THE MODIFICATION OF THE RULE OF STANDING OF ARTICLE 230(4) 
BY THE EUROPEAN CONSTITUTION

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1. Introduction
When I started reading about gender actions before the European Court of Justice I was looking for a case-law where a woman or an NGO on behalf of a woman had challenged a general measure of Community law using direct action for the annulment of Art.230.4 EC Treaty. The case would have allowed me to frame the debate on the modifications of the rule of standing of Art.230.4 EC Treaty introduced by the European Constitution (hereinafter, the Constitution)1. In general, the debate is important because an appropriate rule of standing is directly linked to the guarantee of the right to effective judicial protection. This right is included in the Charter of Fundamental Rights of the Union2. Regarding gender actions, the modification of the rule of standing is also important for two reasons3; firstly, because the Constitution explicitly includes equality between men and women in both the values and the objectives of the Union4, and secondly, because the Constitution is a source of rights and specifically includes the right to non-discrimination on grounds of sex, and equality between men and women5. These rights enable a person to challenge a discriminatory measure of the Union’s institution or body6. Nevertheless, the effective judicial protection of these rights depends on an appropriate rule of standing. 
Until now, discrimination cases on grounds of sex arrived at the ECJ via a preliminary ruling: A woman could challenge a national measure which infringed an EU Directive (for instance, Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation7). There is no case-law in which a woman
has challenged directly a general Union measure, that is, a regulation through the legality review action of Article 230(4) EC Treaty. Although Union legislation is usually drafted according to the principle of non-discrimination and equality between men and women, one reason explaining why women or NGOs on behalf of women have not used the legality review action against Union legislation is the narrow rule of standing of Article 230 (4) EC Treaty, which does not facilitate access to the Court of First Instance (hereinafter, CFI).

This paper is focused on the changes introduced by the Constitution to the rule of standing of Article 230 (4) EC Treaty. These modifications will enable a woman or a women’s NGO to challenge a self-executing regulation which directly imposes prohibitions upon her, without giving rise to national implementation measures challengeable before national courts.

With that aim, the first section deals with the current rule of standing of Article 230 (4) EC Treaty and explains how it is interpreted by the ECJ. The second section focuses on a recent case-law which has highlighted, as never before in terms of arguments, how the ECJ interpretation of Article 230 (4) may infringe the right to effective judicial protection. The third section deals with the modification introduced by the Constitution on that rule. Finally, the fourth section will explain with an example how the new provision (Article III-365 (4)) will work and what its utility will be for a woman or a women’s NGO when challenging a European regulation.

2. The rule of standing of Article 230(4) EC Treaty

Article 230 EC Treaty allows the CFI to review the legality of the institutions’ acts. According to the second section of this provision, only a Member State, the European Parliament, the Council and the Commission would have standing to challenge the legality of that measure. Nonetheless, individuals and legal persons would have standing to challenge its legality when the measure is a decision addressed to them or
addressed to another person but affects the applicant’s rights negatively. In general
terms, individuals do not have standing to challenge a European regulation, although
they would be able to do so if they could prove that the regulation was, in reality, a
decision which *directly and individually concerned* them, for example, a European
regulation that provoked indirect discrimination towards someone as a consequence of
its pension schemes.

According to the Court of Justice a person is ‘directly concerned’ by a Community
measure when:

The latter [the measure] […] directly affects the legal situation of the individual and leaves no
discretion to the addressees of that measure who are entrusted with the task of implementing it, such
implementation being purely automatic and resulting from Community rules without the application of
other intermediate rules.\(^\text{11}\).

More difficult than the requirement of being ‘of direct concern’ in a decision not
addressed to the applicant is the fulfilment of the requirement of being ‘of individual
concern.’ The following paragraphs explain the difficulties associated with this
concept and its interpretation by the Court of Justice. The leading case is the
Plaumann case\(^\text{12}\). The applicant had a commercial activity affected by the decision of
the Commission of 22 May 1962, which refused to authorise the Federal Republic of
Germany to suspend in part customs duties applicable to mandarins and clementines
freshly imported from third countries. The applicant appealed for annulment of that
decision under Article 173(2) (current Art.230.4 EC Treaty), which reads:

> Any natural or legal person may… institute proceedings against a decision… which, although in the
> form of …a decision addressed to another person, is of direct and individual concern to the former.

In the Plaumann case the Court of Justice interpreted the meaning of ‘individual
concern’ in the following way:

> [A] Person other than those to whom a decision is addressed may only claim to be individually
> concerned if that decision affects them by reason of circumstances which are peculiar to them or
> by reason of circumstances in which they are differentiated from all other persons and by virtue of
> these factors distinguishes them individually just as in the case of the person addressed.\(^\text{13}\).
In this case, as the decision affected the applicant as an importer of clementines, a commercial activity which may be practised by any person, the action for annulment was declared inadmissible\textsuperscript{14}. Since the Plaumann case, the doctrine of the Court of Justice on the concept of individual concern is based on whether or not the applicant was a member of a class that was closed at the time the measure was adopted\textsuperscript{15}. P Craig has defined a closed category as one in which membership is fixed at the time of the adoption of the measure and an open category as one in which membership is not fixed at the time the measure was adopted\textsuperscript{16}. The Court of Justice grants standing to those who belong to a closed category. Therefore, in the Plaumann case the applicant did not have standing because he was a trader who imported fruit (an open category), and the Community measure would have been applicable to anyone who commenced operations after the decision came into effect\textsuperscript{17}.

Under the rule of standing of Article 230(4) EC Treaty a woman or an NGO on behalf of a woman might have difficulties getting \textit{locus standi} when she wants to challenge the validity of a regulation, for instance, on grounds of sex discrimination. The applicant would face two obstacles: firstly, she should prove that the regulation is formally but not substantively a regulation. And, secondly, she should prove that she is directly and individually concerned by the decision in the form of a regulation. Here the leading case is the Calpak case\textsuperscript{18}, where the Court of Justice explained the reason for giving \textit{locus standi} to those who want to challenge the validity of a Community regulation:

To prevent the Community institutions from being in a position, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually; it therefore stipulates that the choice of form cannot change the nature of the measure\textsuperscript{19}.

The criterion used by the Court to distinguish between a regulation and a decision is whether the measure is of general application or not\textsuperscript{20} (Article 249 EC Treaty).
In the Calpak case the applicants were producers of Williams pears. They complained that the calculation of production aid granted to them was void. Under the terms of a previous regulation, production aid was calculated on the basis of the average production for the previous three years, in order to avoid the risk of overproduction. The new method of aid calculation was based on the marketing year in which production was very low. The applicants also claimed they were directly and individually concerned by the regulation because they were ‘not merely a closed and definable group but equally a group, the members of which were either known to, or at least identifiable by the Commission at the time when it adopted the disputed provisions’

Using the criterion established by Article 249 EC Treaty, the Court of Justice held that:

A provision which limits the granting of production aid for all producers in respect of a particular product to a uniform percentage of the quantity produced by them during a uniform preceding period is by its nature a measure of general application within the meaning of Article 189 of the Treaty. In fact the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner. The nature of the measure as a regulation is not called into question by the mere fact that it is possible to determine the number or even the identity of the producers to be granted the aid which is limited thereby.

Therefore, the applications were dismissed in the Calpak case because the applicants had not established the existence of circumstances that justified the changes in the regulations as a decision adopted specifically in relation to them. The regulations were substantive, not just formal, because they applied to objectively determined situations and produced legal effects with regard to categories of persons described in a generalised and abstract manner. The use of the language describing categories of persons in a generalised and abstract manner as a criterion to determine whether there is a substantive regulation was criticised because Community institutions could always use abstract language to protect a provision from annulment actions by
individuals\textsuperscript{23} and because the Rome Treaty does not mention that only individual decisions could be the object of annulment action by private parties\textsuperscript{24}.

Since the aim of this paper is to point out the flaws in EU judicial protection of individuals (women or NGOs on behalf of women) and the modification introduced by the Constitution, the following section deals with the UPA and Jégo-Quéré cases, where AG Jacobs and the CFI highlighted the deficiencies of the Union’s judicial system in guaranteeing the right to effective judicial protection. It is submitted that these cases provoked the modification of the rule of standing introduced by the European Constitution.

3. The UPA and Jégo-Quéré cases and the flaws in judicial protection in the Union

In the UPA case, an association of farmers (UPA) sought the annulment of Regulation 1638/98, which substantially amended the common organisation of the olive oil market\textsuperscript{25}. UPA appealed to the Court of Justice against a CFI judgment. The CFI had dismissed UPA’s application for the annulment of a Regulation because the members of UPA were not individually concerned in the contested Regulation. According to the CFI, UPA did not fulfil the conditions of Article 230(4) EC. The CFI held that the Regulation concerned UPA members only on the basis of their objective capacity as operators trading in the olive oil market, in the same way as all the other operators who traded in this market\textsuperscript{26}. The novelty of the UPA case is that the applicant focused its action on its right to effective judicial protection, a right that was \textit{de facto} denied by the CFI on dismissing its application. In so far as the provisions of the regulation did not require any national implementing measure, the applicant could not attack the regulation via preliminary ruling (Article 234 EC). Although the Court of Justice mentioned that the Union was a community based on the rule of law, where the institutions' acts should respect fundamental rights, the
Court rejected the applicant’s arguments. Basically, the Court of Justice held that the Treaties established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of the institutions' acts and, according to that system, natural or legal persons cannot directly challenge Community measures of general application if they do not fulfil the standing requirements of Article 230(4) EC Treaty. Regarding the role of national courts, the Court of Justice held that they should interpret national procedural rules in a way that facilitates an indirect challenge by individuals of the Union’s regulation via preliminary ruling. Here again, we can see how the Court of Justice has restricted the autonomy of national judges, who should look for an option in their own systems that guarantees the effectiveness of individual rights and the right to effective judicial protection.

Regarding the Court of Justice’s findings on the complete system of legal remedies and procedures provided for in the Treaties, the Opinion of AG Jacobs in the UPA case highlighted, as never before in terms of arguments, the flaws in the Union’s judicial system in guaranteeing the right to effective judicial protection to private parties. AG Jacobs’ Opinion analysed the legal remedies and procedures established by the Treaties to review the legality of the institutions' acts. Specifically, AG Jacobs began by analysing whether the assumption that the preliminary ruling procedure provided full and effective judicial protection against general Community measures was correct. The answer was negative. According to AG Jacobs, proceedings before national courts are not capable of guaranteeing that individuals seeking to challenge the validity of Community measures are granted fully effective judicial protection; firstly, because national courts are not competent to declare measures of Community law invalid, secondly, because the principle of effective judicial protection requires that applicants have access to a court which is competent to grant remedies capable of protecting them against the effects of unlawful measures, and thirdly, because access
to the Court of Justice via Article 234 EC Treaty (preliminary ruling) is not a remedy available to an individual applicant as a matter of right.29 For instance, national courts may refuse to refer questions to the ECJ or they may reformulate the questions referred, limiting the range of the Union’s measures that an applicant seeks to challenge.

These arguments lead AG Jacobs’ Opinion to the conclusion that proceedings before the CFI under Article 230 EC Treaty are generally more appropriate for determining issues of validity than preliminary rulings30. The arguments in favour of the action of annulment are: firstly, that the institution which adopted the impugned measure is a party to the proceedings from the beginning to the end because direct action involves a full exchange of pleadings; secondly, for reasons of legal certainty the validity of Community acts is required to be brought in as soon as possible after their adoption. Article 230(5) EC Treaty sets a time-limit of two months, whereas Article 234 EC Treaty does not establish a time-limit, so the validity of Union measures could be raised before a national court at any time, depending on national procedural rules. Therefore, if the action of annulment of Article 230 (4) EC Treaty is the most appropriate proceeding for issues of validity of the Union’s measures, the Court of Justice should adopt another concept of ‘individual concern’. The argument of how many operators might be affected by the measure is unacceptable, because the right to an effective judicial review of individuals and the legal certainty of the EU legal system cannot depend on how many individuals are affected by a measure. AG Jacobs’ Opinion proposes the following concept of what constitutes being individually concerned:

A person should be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests31.
Following the arguments of AG Jacobs in the UPA case of March 2002, the CFI, in May 2002, declared admissible the appeal of Jégo-Quéré et Cie SA (a fishing company established in France which operates on a regular basis in waters south of Ireland). Jégo-Quéré et Cie SA appealed for the annulment of some provisions of the Commission Regulation No 1162/2001, which establishes measures for the recovery of the stock of hake and associated conditions for the control of activities of fishing vessels. The CFI’s main concern was to guarantee the right to effective judicial protection taking account of AG Jacobs Opinion in the UPA case. The CFI was aware of the disadvantages of using the prejudicial ruling to challenge the validity of EU legislation by individuals who are not the addressees of the measure. Following AG Jacobs’ Opinion, the CFI held that:

[There were] no compelling reasons to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee […] In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.

Therefore, the CFI dismissed the objection of inadmissibility raised by the Commission and ordered the action to proceed. The Commission appealed against this judgment and, during that period, the UPA judgment was decided by the Court of Justice, finishing without any hope of a case-law revolution on the rule of standing of 230(4) EC Treaty. Following the arguments used in the UPA judgment, the Court of Justice insisted on the responsibility of national courts to provide for a system of legal remedies and procedures which ensure respect for the right to effective judicial protection:

In that context, in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of a Community act of general application, by pleading the invalidity of such an act.
According to the judgment, the Court of Justice cannot extend its jurisdiction to examine and interpret national procedural law in order to see whether or not those rules allow the individual to bring proceedings to contest the validity of the Community measure at issue. Although the Court has recognised that the condition by which ‘a natural or legal person can bring an action challenging a regulation only if he is concerned both directly and individually’ must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually, such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty.

Therefore, the Court of Justice set aside the judgment of the CFI and declared the application for annulment by Jégo-Quéré et Cie SA inadmissible.

These decisions by the Court of Justice can be criticised because they do not appear to be aware of the increasing role of fundamental rights within a Union of citizens. The Court made its decision, sticking to a doctrine developed before the proclamation of the European Charter of Fundamental Rights. Although the Charter was not binding when the UPA case was decided, it does not mean that it could be ignored by the Court.

In others words, it was a missed opportunity to update the Court of Justice’s doctrine according to a legal system that has, for the first time, its own Charter of Fundamental Rights.

What is the rationality of the UPA judgment? To what extent would the Constitution change the previous scenario? Why has the discussion circle decided to introduce changes on the rule of standing of Article 230(4)? The fourth section of this paper tries to answer these questions by focusing on the changes in the rule of standing introduced by the Constitution, their rationality, and their consequences for the judicial protection of individuals (read a woman or an NGO on behalf of a woman) in the EU legal system.
4. Modifications on the rule of standing of private parties introduced by the Constitution

The Convention’s plenary discussions held on the 5th and 6th December 2002 and the 20th and 21st January 2003 revealed that some members of the Convention felt there was a need to look at the implications that certain proposals might have for the operation of the European Court of Justice. In recognition of these concerns, the Praesidium set up a ‘discussion circle’ on the operation of the Courts, where the members of both Courts (the ECJ and the CFI) had the opportunity to express their views on matters that concerned them.

The discussion circle was chaired by Mr. Antonio Vitorino and its purpose was to look at those matters on which the Convention had not yet adopted fixed positions, such as the procedure for appointing Judges and Advocates General to the ECJ and the CFI, and new names to the ECJ and the CFI. The circle also discussed the judicial review of the acts of agencies or bodies, the effectiveness of the system of penalties for non-compliance with a judgment of the Court, the possible modification of the rule of standing of Article 230(4) EC Treaty, and other questions aimed at facilitating the application of Articles 225 A, 229A and 245 EC Treaty. In addition, the circle was open to any other concern that its own members or members of the ECJ or the CFI considered worth examining. In order to address these issues, the discussion circle met four times with an additional meeting on the possible jurisdiction of the ECJ on CFSP matters.

The Working Group II (on Incorporation of the Charter/Accession to the ECHR) had discussed the question of liberalising conditions for direct action before the CFI, and the proposal to introduce a constitutional appeal which would enable any individual to challenge directly any Community act, even those of legislative nature, for violation of his or her fundamental rights. Concerning the modification of the rule of standing of Article 230(4) EC Treaty, there was no common position. However, on the proposal to introduce a constitutional appeal for violation of fundamental rights, most members of the Group observed that ‘a new form of legal action based on the violation of fundamental rights would be difficult to distinguish from other legal actions, since these rights may be adduced in nearly every
dispute. The proposal was rejected due to the problems it might cause over the distribution of competences between the ECJ and the Constitutional Courts of Member States.

When the discussion circle entered into the matter of the rule of standing, the members were divided into two groups. For one group, the current wording of Article 230(4) EC Treaty satisfied the essential requirements to provide effective judicial protection of the rights of litigants. This group had in mind the present decentralised system based on the subsidiarity principle, in which the defence of the rights of individuals corresponds to national courts, and which might (or should, if in the last instance) refer questions to the Court for a preliminary ruling on the validity of a Union act. Therefore, this first group thought it was not necessary to make any substantive change in the fourth paragraph of Article 230. However, its members were in favour of mentioning explicitly in the Constitution that:

In accordance with the principle of loyal cooperation as interpreted by the Court of Justice, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. It is in fact for the Member States to establish a system of legal remedies and procedures which ensures respect for the right of individuals to effective judicial protection as regards rights resulting from Union Law.

This seems to be at the root of Article I-29(1), 2nd paragraph, of the Constitution which reads: ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. This provision imposes on Member States a more important and specific obligation than the loyal cooperation of Art.10 EC Treaty. This mandate is not only addressed to judicial organs but also to the national legislator and, in future, it could be the legal basis for an action of damages similar to that of the Francovich case.

The second group in the discussion circle considered too restrictive the conditions of admissibility established in the fourth paragraph of Article 230 for proceedings by
individuals against measures of general application. The solutions proposed aimed at substituting the formula ‘of direct and individual concern’ for one of the following options: a) separating the two conditions (direct or individual concern), b) replacing ‘and individual’ by ‘and affecting his legal situation’, c) maintaining the current wording and adding ‘or against a measure of general application which is of direct concern to him without entailing any implementing measure’, d) leaving the current wording for legislative acts and allowing referral to the Court of Justice for regulatory acts when the applicant is directly or individually concerned, and e) leaving the current wording but giving individuals the right to appeal against legislative acts of the Union which do not entail any implementing measure, when the applicant is directly or individually concerned.

Finally, the current wording of the fourth paragraph, Article 230 EC Treaty, was changed as follows:

Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.

The first remark on the amendments introduced by the Constitution in Article 230(4) EC Treaty relates to the replacement of the word ‘decision’ by ‘act’. It was a request in accordance with the case-law of the Court of Justice, which held that measures were acts, within the meaning of Article 230(4) EC Treaty, depending on their substance and not their form. Any measure with binding legal effects and capable of affecting the interest of the applicant is an act or a decision which may be subject to an action under Article 230. Therefore, the general rule under the Constitution is, as it was previously, that an individual (read a woman or an NGO on behalf of a woman) who challenges an act not addressed to her must show that she is directly and individually concerned by it. The same conditions are applicable when the challenged act is a European law or framework law.
The second remark regards the most important amendment introduced to Article 230(4) EC Treaty by the Constitution: ‘Any natural or legal person may [...] institute proceedings against [...] a regulatory act which is of direct concern to him or her and does not entail implementing measures.’ The aim of this provision is to give standing to individuals negatively concerned by the Union’s self-executing regulations. This means regulations which impose prohibitions upon individuals without giving rise to national implementation measures challengeable before national courts (recently, the UPA and Jégo-Quéré cases). This provision puts an end to those problematic cases in which the individual is directly concerned by a regulation but does not fulfil the condition of individual concern according to the Court of Justice’s case-law. These are cases in which the individual concerned must infringe the general measure in order to get access to a national judge, because he or she does not have standing before the Court of Justice in an annulment action. Under the Constitution, the applicant will obtain standing by proving he or she is directly concerned just by a regulatory act, which does not entail national implementing measures\(^49\). On the meaning of ‘direct concern’ the Court said that:

For a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules\(^50\).

A final remark on Article III-365(4) regards the wording of ‘a regulatory act’, which was chosen instead of ‘an act of general application’. Both options were analysed by the discussion circle. The first one was preferred because it made a clear distinction between legislative and regulatory acts. By doing so, the constitutional provision reflects a restrictive approach to proceedings by private individuals against legislative acts, where the condition ‘of direct and individual concern’ still applies, and a more open approach concerning proceedings against regulatory acts\(^51\).
One problem with the terminology used in that provision might be the conceptual delimitation of a regulatory act. Article I-33(1)(4) of the Constitution establishes a negative definition of a regulatory act as ‘a non-legislative act of general application for the implementation of legislative acts and of certain specific provisions of the Constitution.’ It is clear from the report by the discussion circle that the concept of regulatory acts within the meaning of Article III-365(4) is to be understood as not just covering regulations but also decisions of general application. Furthermore, a regulatory act within the meaning of Article III-365 (4) might be a delegated regulation or an implementing act. To further complicate the delimitation of a regulatory act within the meaning of Article III-365(4) the provision contained in Article I-35(3) adds that ‘The Council of Ministers and the Commission, in particular in the cases referred to in Articles I-36 and I-37, and the European Central Bank in the specific cases provided for in the Constitution, shall adopt European regulations and decisions.’ It is submitted that this provision contains an open clause on the meaning of delegated regulations which extends the meaning of the term ‘a regulatory act’ within the Article III-365 (4) of the Constitution.

What is the rationale of these changes in the wording of Article 230(4) EC Treaty? What is behind the wording of Article III-365(4) of the Constitution? Two causes for tension can be seen in this provision, on the one hand, the need to draft the provision according to the second part of the Constitution which contains the Charter of Fundamental Rights, specifically the right to effective judicial protection, and, on the other hand, the idea of preserving primary legislation from challenges by individuals. Currently, regulations and directives are the primary legislation of the Union, and the Court of Justice has interpreted the rule of standing of Article 230(4) EC Treaty while aware that Member States do not allow individuals to challenge the validity of primary legislation. The Constitution establishes a hierarchy of norms that will help to
clarify which norms are primary legislation that should be preserved from challenges by individuals. According to the Constitution, individuals could have standing to challenge a ‘regulation’ which does not need a national implementing measure if they are directly concerned by the regulation. However, they could not challenge a European law or European framework law even if they are directly concerned by that law. Individuals would need to be directly and individually concerned by a European law in order to get the standing required for its challenge.

5. A practical example

This section shows how the modification introduced by the Constitution on the rule of standing might be useful for a woman or a women’s NGO when challenging a Union regulation.

One example comes from the right to data protection. According to the regulation on the protection of individuals with regard to the processing of personal data by Community institutions and bodies, the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, health and sexual orientation is prohibited. Nonetheless, there are some exceptions to these prohibitions such as when the processing 'relates to data which are manifestly made public by the data subject [...]' .

These prohibitions and their exceptions established by the regulation do not need any implementing measure by national authorities (second requirement of Article III-365 (4) of the Constitution). A woman might be directly concerned by these provisions in the case of a Union institution deciding to process data on her sex life, even though she has made it public (first requirement of Article III-365 (4) of the Constitution). Therefore, under the Constitution, the woman or a NGO on her behalf might obtain locus standi to request a review of the regulation's legality by the Court of Justice. However, under the current EC Treaty, the woman or the NGO acting on her behalf...
would have to demonstrate that she is not only directly, but also individually concerned by the regulation in order to get *locus standi*. Under the current Treaty, taking into account the Court’s case-law on the concept of ‘individually concerned’, the woman in our example would not get standing to challenge the regulation.

6. Conclusions

The case-law of the Court of Justice shows the minimal options that a woman or an NGO on behalf of women currently have to obtain *locus standi* for challenging the validity of Union legislation. The modifications introduced by the Constitution represent a small variation in the current scenario. However, the elimination of the condition of being 'individually concerned' in order to challenge a European regulation which does not imply implementing measures to the Member States is a step forward in the protection of women's rights and the principle of gender equality. Nevertheless, the Constitution maintains the conditions of being directly and individually concerned by an act of the Union when the woman is not the addressee of that act. The conditions of being directly and individually concerned are also required when the applicant challenges a European law or framework law. By doing so, the Constitution follows the common tradition of Member States who protect primary law from individual challenges.

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2 Article II-107 of the Constitution.
3 Article III-356 (4) of the Constitution.
5 Articles II-81 and II-83 of the Constitution.
6 Bell M, n.4.
9 For instance, see Arnull, A. (1999), The European Union and its Court of Justice, Oxford University Press, pp. 459- 511, on equal treatment for men and women.
10 According to the provision of Article III-365 (4) of the Constitution, ‘a regulatory act which is of direct concern to him or her and does not entail implementing measures’.
13 Ibid, para.1 in fine.
15 A Arnull, n.9, p. 42.
19 Ibid, para. 7.
20 Ibid, para.8.
21 Ibid, para.5.
22 Ibid, para.9.
23 P Craig, n.16, p. 515.
24 P Cassia wrote: ‘Manifestement, la Cour réécrit ici le traité de Rome, où il n’est nulle part fait mention du fait que seules les décisions individuelles pourraient faire l’objet d’un recours en annulation de la part des particuliers ! […] Il faut insister sur le fait que l’assimilation des décisions à portée générale aux règlements ne découle pas de la lettre du traité: au contraire, on peut même estimer que celui-ci envisage les règlements comme une catégorie juridique spécifique, qui ne comprend pas les décisions à portée générale’ , (2002), L’accès des personnes physiques ou morales au juge de la légalité des actes communautaires, Paris, Dalloz, p. 339.
26 Ibid, para. 10.
27 Ibid, para. 38-42.
29 Opinion of AG Jacobs of 21 March 2002, case C-50/00, n.25, para. 38-44.
31 Ibid, para.60.
32 Case T-177/01, n. 11.
33 Ibid, para.49 and 51.
34 The Judgment of the CFI on the admissibility of Jégo-Quéré application was in May of 2002 and the Judgment of UPA case was in July of the same year.
35 See the beginning of this section.
37 Ibid, para. 33.
38 Ibid, para.36.
The four meetings of discussion circle took place on the 17th and 24th of February and on the 3rd and 17th March 2003. An additional meeting was held on the 4th April 2003. During those meeting the circle heard Mr. Rodriguez Iglesias, President of the Court of Justice, Mr. Vesterdorf, President of the CFI, and a delegation from the Council of the Bars and Law Societies of the European Union. CONV 636/03, n.39, p.1.

CONV 116/02, pp. 15-17.

Ibid, p. 16.

CONV 636/03, n.39, para.18, p. 6.


See, CONV 636/03, n.39, para.19, p.7.

Article III-365(4) of the Constitution.


Article III-365(4) of the Constitution. Regarding the meaning of direct concern, see above section two of this Chapter.


CONV 636/03, n.39, para.22, p.8.

CONV 636/03, n.39, para.22, p.8.

Article I-33 of the Constitution.


Regulation (EC) No 45/2001 of the European Parliament and of the Council, of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on free movement of such data. OJ L 8, 12.1.2001.

Article 10(1).

Article 10(2) (d).

Upon the concept of direct concern see section two of this Chapter.