

FACULTY OF LAW
University of Belgrade

MASTER in European Intergration



Judicial System of the European Union

Course Reader

Edited by:

Prof. Dr. Tanasije Marinković

**Academic year
2019-20**



MASTER EVROPSKIH INTEGRACIJA

Judicial System of the EU

READER

Tanasije Marinkovic, PhD.
Svetislava Bulajic, LL.M.

I Judicial organization and composition

1. History, name and seat
2. Relevant documents: Treaties, Statute, Rules of Procedure
3. The Court of Justice:
 - 3.1. Judges
 - 3.2. Advocates General
4. The General Court
5. The Civil Service Tribunal
6. The Registry and Staff
7. Reports and Citations
8. The Court's Website

Mandatory Reading

Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 142-149.

Koen Lenaerts, Dirk Azar, Ignace Masselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2005 Chapter I (1-1 V).

Tanasije Marinkovic, PhD.
Svetislava Bulajic, LL.M.

CONTENTS

- 1 Introduction
 - 1.1 Preserving the unity of EU law
 - 1.2 Dispute resolution
- 2 The Court of Justice of the European Union
 - 2.1 The Court of Justice
 - 2.2 The General Court
 - 2.3 The European Union Civil Service Tribunal
- 3 Archi-features of the EU Judicial Order
 - 3.1 Preliminary reference procedure and the EU judicial order
 - 3.2 Subjects of the EU judicial order
 - 3.3 Structure of the EU judicial order
- 4 Functions of the Preliminary Reference Procedure
 - 4.1 Development of EU law
 - 4.2 Judicial review of EU institutions
- 5 Management of the EU Judicial Order
 - 5.1 Binding effects of Court of Justice judgments
 - 5.2 Management of the reference period and interim measures
 - 5.3 Managing the circumstances in which national courts refer
- 6 The Docket of the Court of Justice

Further reading

1 INTRODUCTION

This chapter considers the judicial order within the European Union, comprising the Court of Justice and national courts and tribunals, and the institutional relations of this judicial order.

Section 2 considers the Court of Justice of the European Union. The institution comprises three courts: the Court of Justice, the General Court and the European Union Civil Service Tribunal.

A feature of EU law is that there is a joint responsibility between national courts and the Union courts for the interpretation and maintenance of EU law. Section 1 considers the central institutional features of this judicial order, which is governed by Articles 257 and 274 TFEU. The Court of Justice has an exclusive responsibility to declare EU measures invalid and to provide authoritative interpretations of EU law across the Union, whilst national courts have a monopoly over the adjudication of disputes. A further feature of this order is that its only subjects are courts. Institutional relations between them are not governed by a system of appeal by individuals but a reference from a national court to the Court of Justice on a point of EU law. The Court of Justice has sought to expand the subjects of this judicial order by allowing many bodies to refer, which would be considered regulatory or administrative bodies rather than courts under national law. It also allows any body to make a reference irrespective of national precedents or hierarchies. This has created a judicial order, the relationship of which to the administration is often far from clear and which is marked by a lack of hierarchy or specialisation.

Section 4 looks at the roles played by the preliminary reference procedure, the central institutional link between courts in the Union, in securing the EU legal order and judicial order. It argues that the preliminary reference procedure is pivotal, first, to the development of EU law through national courts, which set out the emerging questions to be addressed by the Court of Justice. Secondly, it is the central form of judicial review of EU institutions through individuals challenging implementation of an EU measure before a national court, which then questions the legality of the EU measure in a reference. Thirdly, it is central to preserving the autonomy and unity of EU law. Finally, it facilitates national courts in resolving disputes that involve EU law.

Section 5 looks at how relations between the courts are managed to secure these roles. This has been done, first, through the Court holding that its judgments bind all authorities in the Union, not just the referring court. Secondly, relations between the parties are managed during the reference period through the grant of interim measures by national courts. Whilst this will be used to suspend national law wherever the effectiveness of EU law requires it, the test for suspending EU measures or national measures implementing them is more restrictive: it is only if the application is urgent and the applicant would suffer irreparable damage. Suspension must be weighed against the broader Union interest in keeping the measure in place.

Section 6 looks at how the workload of the Court of Justice has been regulated. Far more cases are referred than the Court can decide each year. The strategy for managing for this is threefold. First, national courts are prevented from referring judgments in only very limited circumstances. Secondly, the central route for managing workload is the use of Chambers by the Court of Justice so that over three-quarters of cases are decided by Chambers of three or five judges. Finally, certain cases are prioritised by the use of two procedures, the accelerated and urgent procedures. Management of relations between national courts and the Court of Justice has been only partially successful.

2 THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Treaties provide for the Union to have its own Court of Justice of the European Union to ensure that the law is observed in the interpretation and application of the Treaties.

Whilst Article 19(1) TEU suggests a general jurisdiction for the Court of Justice over both Treaties, this is subject to three forms of exclusion:

- It has no jurisdiction in the field of the Common Foreign and Security Policy.¹²
- In judicial cooperation in criminal matters and police cooperation, it has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.¹³
- If measures are taken to expel a Member State, the Court of Justice can rule on the procedure but not the substance of the grounds for expulsion.¹⁴

The Court's jurisdiction is further restricted by the rules on *locus standi* which determine the circumstances in which parties can bring actions before it. Matters can come before it in a variety of ways:

- preliminary references from national courts: national courts may, or in some cases must, refer the point of EU law to the Court of Justice which is necessary to enable them to decide the dispute. The Court of Justice will give judgment on the point of EU law, which the national judge will apply to the dispute in hand;¹⁵
- enforcement actions brought by the Commission or Member States against other Member States: the Commission, or in rare cases another Member State, can bring a Member State before the Court of Justice for a declaration that the latter is in breach of EU law;¹⁶
- sanctions for failure to comply with Court judgments:¹⁷ if a Member State fails to comply with a Court of Justice judgment, the Commission can bring it back before the Court in order to have it fined for its behaviour;
- judicial review of EU institutions by other EU institutions and judicial review of the Parliament or Council by Member States;¹⁸
- Opinions on the conclusion of international agreements: the Council, Parliament, Commission or any Member State can ask for an Opinion of the Court as to whether the Union has lawfully concluded a draft treaty. If the Court rules that the international agreement is illegal, it can only enter into force if the treaty is first amended;¹⁹
- appeals from the General Court on points of law;²⁰
- the Council may confer jurisdiction on the Court with regard to disputes concerning the application of European intellectual property rights.²¹

¹² Article 24(1) TEU. Article 275 TFEU. It can, however, rule on the limits relative to other parts of the Treaties. Article 40 TEU.

¹³ Article 276 TFEU.

¹⁴ Article 249 TFEU.

¹⁵ Article 267 TFEU.

¹⁶ Articles 258 and 259 TFEU.

¹⁷ Article 260 TFEU.

¹⁸ Article 263(1) and 265(1) TFEU. Protocol on the Statute of the Court of Justice, Article 51. There are limited exceptions for judicial review against Council exercise of delegated powers, Council measures authorising state aids and Council measures defining the common commercial policy. These go to the General Court.

¹⁹ Article 340(1) TFEU.

²⁰ Article 256(1) TFEU.

²¹ Article 261 TFEU.

These procedures are discussed in far more detail in subsequent chapters. Combined, they make a substantial docket. In 2008, the Court of Justice disposed of 567 cases and gave 333 judgments.²² Despite this considerable output, it struggles to cope with the number of cases that are submitted to it: 757 cases were still pending at the end of 2008.²³

(1) The General Court

The General Court (formerly known as the Court of First Instance) is composed of twenty-seven judges. Unlike the Court of Justice, it is not confined to a single judge from each Member State, but must comprise at least one judge from each Member State.²⁴ The General Court can sit in full Court if it considers the circumstances require or because of the importance of the case.²⁵ It almost always sits in Chambers of three or five judges. One of the judges will act as Advocate General. A single judge can give judgments in actions brought by private parties, but the circumstances to which this can occur are extremely restricted. The case must raise only questions already clarified by established case law and must not cover certain fields, notably state aids, competition, mergers, agriculture and trade with non-EU states.²⁶

The General Court's jurisdiction has expanded over the years and it now has the power to receive the following cases:

- judicial review by individuals of actions or illegal action by EU institutions or action for non-contractual damages against the EU institutions;²⁷
- actions by Member States against the Commission, the European Central Bank and the European Council;²⁸
- matters referred to the Court of Justice under an arbitration clause;²⁹
- appeals from decisions of the Office for Harmonisation in the Internal Market.³⁰ This agency is responsible for the grant of the Community trademark and anybody adversely affected by its decisions can appeal these to the General Court;
- appeals from decisions of the European Civil Service Tribunal.³¹

Jurisdiction over these matters results in the General Court being the central administrative court. It has thus become the key actor in the development of administrative principles of due process. As much competition law and external trade law develops through challenges by private parties adversely affected by EU measures, it is also the central judicial institution in these fields as well as in the field of the Community trade mark, where a similar process takes place with challenges to decisions by the Office for Harmonisation of the Internal Market.

²² Annual Report, above, n. 12, 87–8.

²³ *Id.* 14–5.

²⁴ Article 253(1) TEU.

²⁵ Rules of Procedure of the Court of First Instance, Article 14(1). Available at http://eur-lex.europa.eu/legal-content/en/legislation/pdf/2008-08-25_2008-08-25_14-02-4_40.pdf (accessed 3 August 2009).

²⁶ Article 184(1).

²⁷ Articles 243(1), 245(1), 248 and 249(1) TFEU.

²⁸ Articles 263 and 265 TFEU. Protocol on the Statute of the Court of Justice, Article 51. There is a limited exception for challenges against Commission authorisation of technical cooperation. These go to the Court of Justice.

²⁹ Article 273 TFEU.

³⁰ Regulation 1894/EC on the Community trade mark (2004) OJ L261, Article 67.

³¹ Article 256(1) TFEU.

In 2008, actions against EU institutions accounted for 44.2 per cent of cases and trade mark cases 31.72 per cent.³² The General Court is struggling even more than the Court of Justice to keep up with its docket. At the end of 2008, 1,178 cases were pending and the duration of proceedings was (depending on the type of action) between 20.4 and 39.6 months.³³ These delays are so serious that they have led to decisions being overturned on the grounds that they violated the applicant's fundamental right to have the case heard within a reasonable period of time.³⁴ Notwithstanding this, there is also provision for it to receive preliminary rulings in fields to be specified.³⁵ Although, as yet, no field has been transferred under this heading, the provision is important for what it promises. For it suggests that over the years, the jurisdiction and size of the General Court could be expanded.

There is a right to appeal from the General Court to the Court of Justice within two months of notification of the decision. The appeal must be on points of law,³⁶ but this right to appeal exists not just for parties to the dispute but also for Member States and EU institutions where the decision directly affects them.³⁷ Even if the Court of Justice finds that the General Court has misapplied EU law, it will only uphold an appeal if the mistake of law relates to the operative part of the judgment. Even if EU law is misapplied in the operative part of the judgment, the appeal will not be successful if the operative part is shown to be well-founded for other legal reasons.³⁸ In 2008, the Court of Justice considered seventy-seven appeals and found, for the appellant, fully or partially, in twenty-three of these.³⁹ These statistics tell only part of the story as differences on significant and controversial areas of law have emerged between the two courts.⁴⁰

If the Court of Justice finds the appeal to be well founded, it will quash the decision of the General Court. If this has the discretion to give the final judgment or to refer the matter back to the General Court. If it adopts the latter course of action, the General Court is bound by the Court of Justice's decision on the point of law.⁴¹ The General Court takes the view that it is only bound by the judgments of the Court where its decision has been quashed by the Court of Justice and the matter is referred back, or where the principle of res judicata operates, that is to say, where a dispute involving the same parties, the same subject-matter and the same cause of action had already been decided by the Court of Justice.⁴² Nevertheless, the circumstances in which the General Court will not follow judgments of the Court of Justice will be rare, as this would generate considerable instability.

³² Annual Report, above n. 11, 173, 211.

³³ *Id.* 173.

³⁴ Case C-165/05 *P. Sison/Commission* [1998] ECR I-4419; Case C-245/97 *P. Gysse/Parla* C-237 v Commission, judgment of 16 July 2003.

³⁵ Article 256(1) TFEU.

³⁶ Article 256(1) TFEU.

³⁷ Protocol on the Statute of the Court of Justice, article 58.

³⁸ Case C-30/93 *P. Jarrige v Commission* [1994] ECR I-3755; Case C-224/03 *P. Jarrige v Commission* [2004] ECR I-2143.

³⁹ Annual Report, above n. 11, 188, 211.

⁴⁰ There have been many differences. For example, over the rules on liability of private parties to challenge EU acts, Case T-117/01 *Alpe-Quercy v Commission* [2002] ECR II-4165; Case C-461/03 *P. Commission v. Alpe-Quercy* [2004] ECR I-3163.

⁴¹ Protocol on the Statute of the Court of Justice, article 61.

⁴² Case T-164/04 *ANB France v Commission* [1996] ECR II-427.

(iii) The European Union Civil Service Tribunal

There is provision for work of the General Court to be transferred to specialised courts. The rules on the organisation for each court are likely to be different, as they will be governed by the legislation establishing it. In all cases, members must be independent and fit for judicial office. There must also be the possibility of appeal to the General Court.⁴³ To date, only one has been established, the European Union Civil Service Tribunal, which hears disputes between employees of the EU institutions and the institutions themselves.⁴⁴

3 ARCHITECTURE OF THE EU JUDICIAL ORDER

It is wrong to see the judicial application of EU law as all about the activities of the three courts set out in Article 19 TEU. These are important but, as we have seen in Chapter 1 and will see in much more detail in Chapter 7,⁴⁵ EU law gives individuals the right to invoke EU law provisions before national courts in certain circumstances and imposes a whole host of duties on national courts when this happens. These are more numerous, have greater resources and are more accessible to individual litigants. There is, thus, a shared responsibility between them and the three Union courts for the application and development of EU law. This is a shared responsibility that has been made explicit by the Treaty of Lisbon with its introduction in Article 19(1) TEU of the requirement that Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

(i) Preliminary reference procedure and the EU judicial order

If EU law provides for its administration by a judicial order that comprises not just the three Union courts but all the courts and tribunals in the Member States, there are only two provisions that govern the nature of this judicial order and the duties it imposes on the different courts.

The first is Article 274 TFEU. This grants the Court of Justice exclusive jurisdiction where the Treaties provide for the Union to be a party to the proceedings.

Article 274 TFEU

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

⁴³ Article 257 TFEU.

⁴⁴ Decision 2004/659/EC, REGULATION establishing the European Union Civil Service Tribunal [2004] OJ L215/1. It has similar problems to the other courts which, at the end of 2008, 315 cases pending and a mean waiting time of 15.7 months. Annual Report, above n. 11, 120–2.

⁴⁵ See pp. 268–71.

THE EUROPEAN COURTS

I. NATIONAL COURTS

General. National courts and tribunals are under an obligation to apply Community law in all cases between national authorities and natural or legal persons or between such persons¹ and to safeguard the rights conferred by Community law.² 1-001

Primary role. The primary role played by national courts in applying Community law is connected with the peculiar nature of that law. The Community Treaties created a new legal order, directed at the Member States and their nationals. The relationship between the Community legal order and the national legal systems is characterised by the primacy of Community law and the direct effect of a whole series of provisions of Community law.³ The question arises as to how individuals may assert the rights which they derive from these provisions. 1-002

The system of legal protection formulated in the Treaties does not provide for the creation of "Community courts" in the different Member States. It starts from the premise that the national courts are the bodies to which individuals may turn whenever action or failure to act on the part of national authorities or other individuals infringes rights conferred on them by Community law.⁴ The national court is therefore the normal Community court to hear and determine all cases which do not fall within the jurisdiction of the Court of Justice, the Court of First Instance or a judicial panel. Within the legal system of the individual's Member State, the national courts are the bridgehead of the Community legal order and

¹ See 3-015 and 3-016, *infra*, with regard to whether the national court is under a duty to raise a question of Community law of its own motion.

² ECJ, Case 106/77 *Simmenthal* [1973] E.C.R. 623, para.21; ECJ, Case C-224/97 *Cole* [1999] E.C.R. I-2517, paras 29-34; ECJ, Case C-293/00 *Duchon* [2002] E.C.R. I-3567, para.31.

³ ECJ, Opinion 1/51 *Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] E.C.R. I-6079, para.21. See Lenders and Van Nieuwenhuijze, *Community Law of the European Union* (2nd ed., Sweet & Maxwell, London, 2005), § 17-001-4 17-052, at 660-703.

⁴ ECJ, Case 25/62 *Van Gend & Loos* [1963] E.C.R. I, third para. The second subpara. of Art.1-29 of the Constitution provides: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

secure the enforcement of Community law through dialogue with the Court of Justice.⁵

The Court of Justice has defined the task of national courts in its case-law on the operation of the preliminary ruling procedure⁶ and on the application of the principle of cooperation enshrined in Art.10 of the EC Treaty to national courts.⁷

II. THE COURT OF JUSTICE

- 1-003 General. The institution known as the "Court of Justice" consists at present of three courts, the Court of Justice, the Court of First Instance and the European Union Civil Service Tribunal which, within their respective spheres of jurisdiction, ensure that in the interpretation and application of the Treaties the law is observed.⁸ In the future, new judicial panels may be attached to the Court of First Instance in order to exercise judicial competence in certain specific areas.⁹

A. COMPOSITION

- 1-004 Judges and Advocates General. The Court of Justice consists of one Judge per Member State,¹⁰ assisted by eight Advocates General.¹¹ Should the Court so request, the Council may, acting unanimously, increase the number of Advocates General.¹² Judges and Advocates General are appointed for a term of six years by common accord of the governments of the Member States. They are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence.¹³ Every three years there is a

⁵ Slynn, "What is a European Community Law Judge?" (1993) Cambridge L.J. 234-244; Kapteinau, "Europe's Expectations of its Judges", in Jansen, Knister and Van Zuylen (eds), *European Ambitions of the National Judiciary* (Kluwer Law International, The Hague/London/Boston, 1997), at 181-189.

⁶ Cf. 2, *infra*.

⁷ Cf. 3, *infra*.

⁸ EC Treaty, Art.223, and EABC Treaty, Art.136; Council Decision 2004/752/EC, Euratom of November 2, 2004, establishing the European Union Civil Service Tribunal. (2004) O.J. L333/7.

⁹ EC Treaty, Arts 220 and 225a. At present only one judicial panel has been created, namely the European Union Civil Service Tribunal.

¹⁰ EC Treaty, Art.221, first para.

¹¹ EC Treaty, Art.222, first para.

¹² *Ibid.* For the part played by Advocates General, see Bergsmid, "The Advocate General at the European Court of Justice: A Comparative Study" (1955) E.J.Rev. 105-119 and Tridimas, "The Role of the Advocate General in the Development of Community Law: Some Reflections" (1997) C.M.L.Rev. 1349-1387. See Breakey *versus* Haskins, *Remedies in E.C. Law*, (2nd ed., Sweet and Maxwell, London, 1995) at 23, as regards the "persuasive value" of Opinions of Advocates General for national courts.

¹³ EC Treaty, Art.221, first para.

partial replacement of Judges and Advocates General. Twelve and thirteen Judges are replaced alternately and four Advocates General.¹⁴ Retiring Judges and Advocates General may be reappointed.¹⁵ The Treaty does not require that Judges and Advocates-General must be nationals of Member States.¹⁶

Uneven number of Judges. The Court must always consist of an uneven number of Judges when it takes its decisions,¹⁷ which is why in the past it always had an uneven number of Judges.¹⁸ As far as Advocates General are concerned, there is one for France, Germany, Italy, Spain and the UK; the three remaining Advocates General come alternately from the other Member States.¹⁹ If a Judge's or Advocate General's office falls vacant before the expiry of its term, a successor is appointed for the remainder of the normal term of office.²⁰

¹⁴ EC Treaty, Art.223, second para., and Statute, Art.9.

¹⁵ EC Treaty, Art.223, fourth para.

¹⁶ Cf. the Commission, of which only nationals of Member States may be members (EC Treaty, Art.215(1), third subpara.) and which must include at least one national of each Member State, but may not include more than two members having the nationality of the same State (EC Treaty, Art.215(1), fourth subpara.).

¹⁷ Statute, Art.17, first para.

¹⁸ The need to have an uneven number of Judges stemmed from the rule that in principle the Court of Justice met in plenary session. Accordingly, the accession of new States in 1973 was to have increased the original number of Judges from seven to eleven (Art.17 of the 1972 Act of Accession, [1972] O.J. Spec. Ed. 14), but their number was reduced to nine on account of Norway's decision not to join the Community (Art.4 of the Council Decision of January 1, 1973, [1973] O.J. L37). Following the accession of Greece, the Court had only 12 Judges (Art.16 of the 1975 Act of Accession, [1975] O.J. L31, and Council Decision of December 22, 1975 ([1975] O.J. L363/8), after which the Council raised the number to eleven by Decision of March 30, 1981 ([1981] O.J. L100/26). The number was increased to fifteen Judges by Art.10 of the Council Decision of January 1, 1995 adjusting the instruments concerning the accession of the new Member States to the European Union ([1995] O.J. L31), which amended Art.17 of the 1985 Act of Accession ([1985] O.J. L302). As from May 1, 2004, the Court of Justice consists of 25 Judges.

¹⁹ When new Member States joined the Community in 1973, the original number of Advocates General was increased from two to four (Art.1 of the Decision of January 1, 1973, [1973] O.J. L29), which were to be shared among the four "large" Member States. After the accession of Greece, a fifth was added (Council Decision of March 30, 1981, [1981] O.J. L104/21) for a smaller Member State and, following the accession of Spain and Portugal, a sixth (Art.13 of the 1985 Act of Accession, [1985] O.J. L302). The accession of further Member States has raised the number of Advocates General to eight, and temporarily to nine (Art.11 of the Council Decision of January 1, 1995 amending Art.20 of the 1994 Act of Accession, [1995] O.J. L31); the five "large" Member States each put forward one person for appointment as Advocate General, whilst the other Member States share out in turn the remaining three posts. See the Joint Declaration on Art.31 of the Decision adjusting the instruments concerning the accession of the new Member States to the European Union, [1995] O.J. L322/1. In the case of the 2004 accessions, the number of Advocates General was kept at eight. Consequently, unlike the other large Member States, Poland has no "fixed" Advocate General. The Joint Declaration on the Court of Justice of the European Communities annexed to the Acts of Accession stated that "Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates General" and added "[o]therwise, the new Member States will be integrated into the existing system for their appointment" ([2003] O.J. L255/71).

²⁰ Statute, Arts 7 and 8.

1-006 Oath and immunity. Before taking up their duties, Judges and Advocates General take an oath, in open court, to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.²¹ Judges and Advocates General are immune from legal proceedings. They continue to enjoy immunity after they have ceased to hold office in respect of acts performed by them in their official capacity, including words spoken or written. Their immunity may be waived only by the Court sitting in plenary session. Where immunity has been waived and criminal proceedings are instituted against a Judge or an Advocate General, the member concerned may be tried only by the court competent to judge the members of the highest national judiciary.²²

Judges and Advocates General may not hold any political or administrative office or engage in any occupation unless exemption is granted by the Council. After their term of office, they must act with integrity and discretion as regards the acceptance of certain appointments or benefits.²³ A Judge or Advocate General may be deprived of his or her office or of his or her right to a pension or other benefits in its stead only if, in the unanimous opinion of the other Judges and Advocates General, he or she no longer fulfils the requisite conditions or meets the obligations arising from his or her office.²⁴

007 President. Immediately after their partial replacement, the Judges elect one of their number as President of the Court for a term of three years. He or she may be re-elected.²⁵ The rule that if an office falls vacant before the normal expiry date of its term, a successor is to be elected for the remainder of the term, also applies to the President.²⁶

1-008 Registrar. An election procedure is also used to appoint the Court Registrar for a term of six years.²⁷ He or she may be reappointed.²⁸ If the office of Registrar falls vacant before the normal expiry date, a new Registrar is to be appointed for six years.²⁹ The Registrar takes the same oath before the Court as the Judges and Advocates General.³⁰

B. INTERNAL ORGANISATION

009 Chambers. In principle the Court of Justice sits in Chambers, each consisting of five (the most frequent case) or three Judges, or as the Grand Chamber when a Member State or an institution of the Communities that

²¹ Statute, Art.12. By virtue of Art.15 of the Statute, the provisions of the Statute relating to the status of Judges (Arts 2-7) also apply to Advocates General.

²² Statute, Art.1.

²³ Statute, Art.4.

²⁴ Statute, Art.5.

²⁵ EC Treaty, Art.223, third para.; ECU Rules of Procedure, Art.1(1).

²⁶ ECU Rules of Procedure, Art.1(2).

²⁷ EC Treaty, Art.213, first para.; ECU Rules of Procedure, Art.12.

²⁸ ECU Rules of Procedure, Art.12(4).

²⁹ ECU Rules of Procedure, Art.12(7).

³⁰ Statute, Art.10.

is party to the proceedings so requests³¹ or where the Court considers that a case before it has an important value as a precedent.³² For specific cases listed in the Statute or where the Court considers that a case before it is of exceptional importance, the Court may sit as a Full Court.³³

The Court forms Chambers consisting of three or five Judges.³⁴ The Judges elect the Presidents of Chambers from among their number. The Presidents of the Chambers of five Judges are elected for three years. They may be re-elected once.³⁵

The Grand Chamber consists of thirteen Judges and is presided over by the President of the Court.³⁶ In order to avoid the important cases assigned to that chamber being heard always by the same Judges, its composition varies. Nevertheless, it consists of a fixed core, consisting of the President of the Court of Justice and the three Presidents of the Chambers of five Judges. In addition, the Judge-Rapporteur for the case at issue sits in that Chamber. Other Judges appointed, for each case, in accordance with the order laid down in the Rules of Procedure to make up the thirteen Judges also form part of the Grand Chamber.³⁷

For each case, the Chambers of five Judges and three Judges are composed of the President of the Chamber, the Judge-Rapporteur and the number of Judges required to attain the number of five and three Judges respectively. The lists of Judges assigned to the Chambers of three and five Judges,³⁸ the order used to determine the composition of the Grand Chamber and the Chambers of three and five Judges and the appointments of Presidents of Chambers are published in the *Official Journal of the European Union*.³⁹

Quorum. When the Court sits in Chambers, there is a quorum of three Judges in the case of three- or five-Judge Chambers and of nine Judges in the case of the Grand Chamber. Decisions of the Full Court are valid if fifteen Judges are sitting.⁴⁰

1-010

³¹ EC Treaty, Art.221, second para., and Statute, Art.16, first, second and third paras.

³² See ECU Rules of Procedure, Art.44(3), first subpara., which provides that "The Court shall assign to the Chambers of five and three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber".

³³ EC Treaty, Art.221, third para., and Statute, Art.16, fourth and fifth paras.

³⁴ Statute, Art.16, first para., and ECU Rules of Procedure, Art.11a. At present, the Court has three Chambers of five Judges and three Chambers of three Judges.

³⁵ Statute, Art.16, first para.

³⁶ EC Treaty, Art.221, second para., and Statute, Art.16, second para.

³⁷ ECU Rules of Procedure, Art.11b.

³⁸ At present, eight Judges are assigned to each of the three Chambers of five Judges and seven Judges are assigned to each of the three Chambers of three Judges.

³⁹ ECU Rules of Procedure, Arts 10(1), 11b(2) and (3), and 11c(2).

⁴⁰ Statute, Art.17. It falls within the Court's power of internal organisation to assign the Judges from a Chamber which are to adjudicate a particular case (see ECJ, Case C-7/94 *Goel* [1995] E.C.R. I-3631, para.13, in which the German Government argued that the criteria

1-011 Assignment of a case to a Chamber. At the end of the written procedure, the Court may at an administrative meeting assign any case to a Chamber of five or three Judges or to the Grand Chamber, upon consideration of the Judge-Rapporteur's preliminary report and after the Advocate General has been heard. The Court must comply with a request from a Member State or an institution of the Community that is party to the proceedings for a case to be assigned to the Grand Chamber.⁴ A Member State or an institution which is a party to or an intervenor in proceedings or which has submitted written observations in preliminary ruling proceedings is regarded as being a "party to the proceedings".⁵ The Court meets as the Full Court in very exceptional cases exhaustively listed in the Treaty (dismissal of the European Ombudsman, compulsory retirement of a Member of the Commission in breach of his or her obligations, etc.) and where the Court considers that the case before it is of exceptional importance.⁶ A Chamber may, however, refer a case back to the Court at any stage in the proceedings in order that it may be reassigned to a formation composed of a greater number of Judges.⁴ Parties are not entitled to require that a Judge of a particular nationality sit or not sit. The Court therefore constitutes a genuinely "supranational" court *vis-à-vis* the Member States and specifically national procedural interests.

1-012 Rules of the Judge-Rapporteur and the Advocate General. The primary responsibility for decision-making within the Court lies with the Judge-Rapporteur, who is designated for each case by the President immediately after proceedings have been brought.⁷ At the same time, the First Advocate General⁸ assigns an Advocate General to the case.⁹ The Judge-Rapporteur and the Advocate General follow the procedural progress of the case with particular heed. The Judge-Rapporteur is responsible for

⁴ determining the composition of the Chamber adjudicating a case consisting of five Judges from a Chamber to which six Judges had been appointed had not been published in the Official Journal of the European Union). As far as the Court of First Instance is concerned, Art.12(4) of the CFI Rules of Procedure provides that if in a Chamber of three or five Judges the number of Judges assigned to that Chamber is higher than three or five respectively, the President of the Chamber is to decide which of the Judges will be called upon to take part in the judgment of the case.

⁵ EC Treaty, Art.221, second para; Statute, Art.16, third para; ECI Rules of Procedure, Art.44(3).

⁶ ECI Rules of Procedure, Art.44(3), second subpara.

⁷ Statute, Art.16, fourth and fifth paras. Opinion 1/00 was assigned to the Full Court. The Court held that the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters fell entirely within the Community's exclusive competence; see ECI (February 7, 2006), Opinion 1/05 *New Lugano Convention*, not yet reported.

⁸ ECI Rules of Procedure, Art.44(4).

⁹ ECI Rules of Procedure, Art.19(2).

¹⁰ The First Advocate General is appointed for one year by the Court and has the rank of a President of Chamber. He is *pari passu* with the Advocates General (ECI Rules of Procedure, Art.19(1)).

¹¹ ECI Rules of Procedure, Art.19(2).

drawing up the preliminary report (see 24-068, *infra*) and the report for the hearing (see 24-054, *infra*). Lastly, it falls to the Judge-Rapporteur to draw up the draft judgment and subsequently to revise it so that it reflects the consensus of the Court or the Chamber (or the majority of the bench) (see 24-111 to 24-114, *infra*).

The Advocate General, acting with complete impartiality and independence, makes, in open court, reasoned submissions ("the Advocate General's Opinion") on each case assigned to him or her in order to assist the Court in the performance of its task.¹⁰ Unlike the *Procureur Général* in some national legal systems, the Advocates General are not entrusted with the defence of the general interest and do not form a hierarchy. As members of the institution, the Advocates General take part in the process by which the Court reaches its judgment and in carrying out the judicial function entrusted to it.¹¹

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General.¹²

1- Role of the President. The President directs the judicial business and the administration of the Court¹³; he or she presides at hearings and deliberations of the Grand Chamber and when the Court sits as the Full Court. The President does not sit in the five- and three-Judge Chambers.

1- Staff. In performing its duties the Court has a variety of departments at its disposal. There is an interpreting service, a translation service, a research and documentation department, which also manages the Court's library, and internal administrative machinery (including personnel, finance and technical services departments). The registry staff assist the Registrar in the performance of his or her judicial duties. As far as his or her administrative tasks are concerned, the Registrar can have recourse to the various departments of the Court. The Judges and Advocates General are each served by three law clerks, known as *référéndaires* or legal secretaries, who carry out the preparatory work for the Judges and Advocates General, and three secretarial staff members.

C. BASIC FUNCTION

1- Constitutional and supreme court. The Court of Justice plays the role of the Community's constitutional court, that is to say, as the guardian of the

¹⁰ EC Treaty, Art.221, second para.

¹¹ ECI (first of February 4, 2002), Case C-27/98 *Emmott-Lager* (2002) E.C.R. I-565, para.20 *et seq.*, with a case note by Lawson (2002) C.M.L.Rev. 581-592.

¹² Statute, Art.21, fifth para.

¹³ ECI Rules of Procedure, Art.8.

objectives and rules of law laid down in the Treaties.¹² The Court rules in cases in which constitutional issues come to the fore,¹³ such as the legality of Community secondary legislation, the preservation of institutional equilibrium, the demarcation of Community and national spheres of competence and the development of protection of fundamental rights.¹⁴

Alongside this, the Court plays the role of a supreme court where—on a request from a national court for a preliminary ruling—it ensures the uniform application of Community law. In a certain sense, there is also a constitutional aspect to that function performed by the Court inasmuch as disparate application of Community law in the Member States would run counter to achievement of the objectives laid down in the Treaties.

116 Court of last resort for constitutional issues. It is self-evident that constitutional issues of Community law may also arise in cases brought before national courts or the Court of First Instance. Consequently, the Court of Justice is not the sole guardian of the Community legal order. But national courts may (and, in some cases, must) still bring the constitutional issue before the Court by requesting a preliminary ruling (see Ch.2, *infra*). Likewise, an appeal may be brought or, in exceptional cases, a review procedure initiated against decisions of the Court of First Instance, which means that here again the Court of Justice can have the last word in determining legal questions with constitutional implications¹⁵ (see 1-047 to

¹² Dooner, "The Constitutional Powers of the Court of Justice of the European Communities" (1979) C.M.L.Rev. 127-143, and "The Court of Justice as a Constitutional Court of the Communities", in *Thesen zur Rolle der Gemeinschaften*, (Tjeck Willink, Zwolle, 1986), at 343-351; Due, "A Constitutional Court for the European Communities", in *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice T.F. O'Higgins* (Butterworths (Ireland), Dublin, 1992), 1, at 4-9; Gaudin, "La Cour de justice, juridiction constitutionnelle?" (2000) R.A.E. 269-322; Jacobs, "Is the Court of Justice of the European Communities a Constitutional Court?", in *Constitutional Adjudication in European Community and National Law, Essays for the Hon. Mr Justice T.F. O'Higgins* (Butterworths (Ireland), Dublin, 1992), at 23-32; Kapteyn, "The Role of the Court of Justice in the Development of the Community Legal Order", in *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario* (CEDAM, Milan, 1995), at 157-173; Lenaerts, "Some Thoughts about the Interaction between Judges and Politicians" (1992) Y.E.L. 1-14; Müsch, "Un rôle nouveau pour la Cour de Justice?" (1990) R.M.C. 681-686; Pescatore, "Die Gemeinschaftsverträge als Verfassungsgesetz—ein Kapitel Verfassungsgeschichte in der Perspektive des europäischen Gerichtshofs, systematisch geordnet", in *Festschrift Kersch* (Nomos, Baden-Baden, 1981), at 319-333; Thymann, "The European Union's Judicial System" (2004) C.M.L.Rev. 393-405.

¹³ The constitutional dimension is clearly recognisable in the Court's case-law: see Lenaerts, *Le juge et la constitution des Etats-Unis d'Amérique et dans l'ordre juridique européen* (Duyfons, Brussels, 1983), 817 pp. See also Walker, "The Court of Justice on Trial: Review Essay of Hjalte Rosengren: On Law and Policy in the European Court of Justice" (1987) C.M.L.Rev. 553-588.

¹⁴ Rodríguez Iglesias, "Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht" (1993) EuR. 223-245. For the Court's jurisdiction to rule on the "constitutionality" of national law, see Ruzic, "The Role of the European Court of Justice as a Federal Constitutional Court" (1993) Pub. L. 426-443.

¹⁵ See Part IV, Chs 16 and 17, *infra*.

1-054, *infra*, concerning the distribution of heads of jurisdiction as between the various judicial bodies belonging to the Court of Justice).

III. THE COURT OF FIRST INSTANCE

A. COMPOSITION

Judges. The Court of First Instance consists of at least one Judge per Member State¹⁶ and, in its present composition, has twenty-five Judges.¹⁷ They are appointed for a term of six years by common accord of the governments of the Member States.¹⁸ They are chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. Membership of the Court is partially renewed every three years, although retiring Judges are eligible for reappointment.¹⁹ As in the case of the Court of Justice, there is no nationality requirement, but in practice there is one Judge from each Member State. If a vacancy occurs during the term of office, the new Judge is appointed for the remainder of his or her predecessor's normal term.²⁰

Advocates General. At present, no separate Advocates General are attached to the Court of First Instance, on the ground that cases brought before it normally do not require the assistance of an Advocate General. However, a Judge may be called upon to perform the task of Advocate General in a given case.²¹ In such case, he or she performs the same function as an Advocate General in the Court of Justice and may not take part in the judgment of the case.²² The decision to designate an Advocate General in a particular case is taken at an administrative meeting of the

¹⁶ EC Treaty, Art.224, first para. The number of Judges is laid down in the Statute.

¹⁷ Statute, Art.45.

¹⁸ EC Treaty, Art.224, second para.

¹⁹ *Ibid.*

²⁰ Statute, Art.7, applicable by virtue of Art.47, first para., of the Statute.

²¹ Statute, Art.49. This role is a "compromise" between the view that the Advocate General's role principally consists of assisting the Court of Justice in its task of ensuring uniform interpretation of Community law and that therefore there is no need for an Advocate General in the Court of First Instance, and the view that the Advocate General's role is an essential safeguard for the legal protection of individuals and that therefore it is important for there to be an Advocate General in the first-instance court. See Christensen, "Le Tribunal de première instance et la nouvelle organisation judiciaire des Communautés européennes", in *Le Tribunal de première instance des Communautés européennes* (European Institute for Public Administration, Maastricht, 1993), 17, at 23; Vandersanden, "Une instance désignée: le Tribunal de première instance des Communautés européennes" (1985) J.T. 545, at 546. Art.224, first para., of the EC Treaty provides that the Statute may provide that the Court of First Instance be assisted by Advocates General, which leaves the possibility open to appoint permanent Advocates General and not just Judges *ad hoc* Advocates General.

²² Cf. the second para. of Art.222 of the EC Treaty in conjunction with the second and fourth paragraphs of Art.49 of the Statute.

Court of First Instance at the request of the Chamber dealing with the case or to which the case is assigned.¹¹ When the Court of First Instance sits in plenary session, it is assisted by an Advocate General.¹² In other cases, the Court of First Instance is under no obligation to have itself assisted by an Advocate General.¹³ The Court may decide to appoint an Advocate General when sitting in a Chamber and the Chamber considers that the legal difficulty or the factual complexity of the case requires such appointment. The President of the Court of First Instance then designates the Judge called upon to perform the function of an Advocate General.¹⁴ The consequence is that references to the Advocate General in the Rules of Procedure of the Court of First Instance apply only where a Judge has been designated so to act.¹⁵

- 1-019. Oath and immunity. Before taking up his or her duties, each Judge takes an oath before the Court of Justice (see 1-006, *supra*).¹⁶ Judges of the Court of First Instance have the same status as Judges and Advocates General of the Court of Justice (see 1-006, *supra*)¹⁷ and are subject to the same constraints and obligations as regards taking up political or administrative offices and engaging in other occupations.

A Judge may be removed from his or her office only by the Court of Justice, after seeking the opinion of the Court of First Instance.¹⁸ Before that opinion—which must be reasoned—is given, the Judge concerned may make representations to the Court of First Instance in closed session.¹⁹

- 1-020. President. Immediately after their partial replacement, the Judges elect a President from among their number for a term of three years.²⁰ He or she may be re-elected. If the President gives up his or her office before the expiry of its term, a successor is to be elected only for the outstanding portion of the term.

¹¹ CFI Rules of Procedure, Art.19, first para.; Statute, Art.45, third para., provides that the criteria for selecting such cases, as well as the procedures for designating the Advocates General, are to be laid down in the CFI Rules of Procedure.

¹² CFI Rules of Procedure, Art.17. Where, following the designation of an Advocate General pursuant to Art.17 of the CFI Rules of Procedure, there is an even number of Judges in the Court of First Instance sitting in plenary session, the President is to designate, before the hearing and in accordance with a rota established in advance by the Court and published in the Official Journal of the European Union, the Judge who will not take part in the judgment of the case (CFI Rules of Procedure, Art.31(1), second subpara.).

¹³ CFI Rules of Procedure, Art.18. ECJ (order of July 18, 2002), Case C-116/00, P. *Autosalone Aperta del Friuli v. Ratti v. Commission* [2002] E.C.R. I-5561, para. 17–18.

¹⁴ CFI Rules of Procedure, Art.19, second para.

¹⁵ CFI Rules of Procedure, Art.3(2).

¹⁶ CFI Rules of Procedure, Art.4(1).

¹⁷ EC Treaty, Art.224, sixth para.; see also Statute, Art.47, first para., by virtue of which Arts 2 to 8 of the Statute are applicable to Judges of the Court of First Instance and its members.

¹⁸ Statute, Art.47, first para.; CFI Rules of Procedure, Art.5.

¹⁹ For further particulars, see Art.5 of the CFI Rules of Procedure.

²⁰ EC Treaty, Art.224, third para.

Registrar. The Court appoints its Registrar.²¹ The provisions relating to the status of the Registrar of the Court of Justice apply *mutatis mutandis* to the Registrar of the Court of First Instance.²²

2. INTERNAL ORGANISATION

Chambers. As in the case of the Court of Justice, the Court of First Instance sits as a rule in Chambers of three or five Judges.²³ The Court of First Instance has five Chambers of five Judges and five Chambers of three Judges. Unlike in the case of the Court of Justice, the most common formation is the three-Judge Chamber.

The Court of First Instance may also sit in plenary session,²⁴ as a single Judge²⁵ or as the Grand Chamber.²⁶ The Grand Chamber consists of thirteen Judges.²⁷ Under the second para. of Art.50 of the Statute and

²¹ EC Treaty, Art.224, fourth para.

²² Statute, Art.47, second para.

²³ Statute, Art.50, first para., and CFI Rules of Procedure, Art.10(1), first subpara.

²⁴ Statute, Art.50, second para., and CFI Rules of Procedure, Art.11(1), second subpara.

²⁵ Statute, Art.50, second para., and CFI Rules of Procedure, Art.11(1), third subpara. Under Art.14(2), point 1, of the CFI Rules of Procedure, the Judge-*Rapporteur* of a Chamber of three Judges may hear and determine the sort of cases described in that article as a single Judge (Council Decision 1999/29/ES, ECSC, Euratom [1999] O.J. L14/45) if, having regard to the lack of difficulty of the questions of law or fact raised, to the limited importance of those cases and to the absence of other special circumstances, they are suitable for being so heard and determined and have been delegated under the conditions laid down in Art.51 of the CFI Rules of Procedure. However, as a result of Art.14(2), point 2, of the CFI Rules of Procedure, it is not possible to delegate to a single Judge cases raising issues as to the legality of an act of general application or cases concerning the implementation of the rules on competition and on control of concentrations, relating to aid granted by States, relating to measures to protect trade or relating to the common organisation of the agricultural markets, with the exception of cases that form part of a series of cases in which the same relief is sought and of which one has already been finally decided. Likewise, a single Judge may not sit in proceedings brought against the Office for Harmonisation in the Internal Market (Trade Marks and Designs) or against the Community Plant Variety Office concerning the application of the rules relating to an intellectual property regime. For example, see CFI, Case T-88/95 *Tadpole v. Commission* [2001] E.C.R. II-1443. See also ECJ, Case C-171/00 *P. Distros v. Commission* [2002] S.C.R. 451, paras 25–26, where the judgment of the Court of First Instance sitting as a single Judge was set aside on the ground that the case raised an issue of the legality of an act of general application and therefore could not be decided by a single Judge. See also Héron, "Le système de juge unique pour le règlement d'un problème multiple: l'encadrement de la Cour de justice des Communautés européennes et du Tribunal de première instance" (2001) R.M.U.E. 60–65 and Riney, "L'encadrement du juge unique au Tribunal de première instance des Communautés européennes" (2000) R.A.E. 257–274.

²⁶ Statute, Art.50, third para., and CFI Rules of Procedure, Arts 10(1), first subpara., and 11(1), second subpara. The first judgments of the Court of First Instance sitting in Grand Chamber were given on December 14, 2005 (See CFI, Case T-55/00 *FIAMM and FIAND v. Commission* and *FIAND v. Council and Commission*, not yet reported; CFI, Case T-55/00 *Leopoldine du Bois v. Council and Commission*, not reported; CFI, Case T-321/00 *Groupe Financière et Patrimoine v. Council and Commission*, not reported; CFI, Case T-323/00 *CD Erdemir v. Council and Commission*, not reported; CFI, Case T-323/00 *Beangrow v. European Parliament and Others*, not yet reported; and CFI, Case T-153/01 *Fredon de Fighi and Others v. Council and Commission*, not reported).

²⁷ CFI Rules of Procedure, Art.10(1).

Article 2 of the CFI Rules of Procedure, the Court of First Instance is to lay down criteria by which cases are to be allocated among the Chambers.¹¹ As soon as the application initiating proceedings has been lodged, the President of the Court of First Instance assigns the case to a three-Judge Chamber.¹² Each Chamber has a President of Chamber. The Presidents of the Chambers of five Judges are elected for three years. The President of the Court of First Instance himself or herself presides over a Chamber of five Judges. The Presidents of the Chambers of five Judges, with the exception of the President of the Court of First Instance, are also Presidents of two compositions of a Chamber of three Judges. The Presidents of the Chambers of five Judges may be reappointed once.¹³ The composition of the Chambers and appointments of Presidents of Chambers are published in the *Official Journal of the European Union*.¹⁴

Assignment of a case to a Chamber. A case is immediately assigned to a Chamber of three Judges. Whenever the legal difficulty or the importance of the case or special circumstances so justify, a case may be referred to the Court of First Instance sitting in plenary session, to the Grand Chamber or to a Chamber consisting of a different number of Judges.¹⁵ At any stage of the proceedings, the Chamber hearing the case may, on its own initiative or at the request of the parties, make a proposal to this effect to the Court sitting in plenary session. The Full Court then decides, after hearing the parties and the Advocate General, whether or not to refer the case.¹⁶ Where a Member State or an institution of the European Union which is a party to the proceedings so requests, a case will be decided by a Chamber composed of at least five Judges.¹⁷

Quorum. A bench of the Court of First Instance can decide validly only when an uneven number of Judges is sitting in the deliberations. A quorum consists of three Judges in the case of three- or five-Judge Chambers,¹⁸ nine Judges in the case of the Grand Chamber¹⁹ and fifteen Judges where the Court sits in plenary session.²⁰

¹¹ For the period from October 1, 2005 to September 30, 2006, see the decision of July 7, 2005 (2005) O.J. C205/15.

¹² CFI Rules of Procedure, Art.13(1) and decision of July 7, 2005 (2005) O.J. C205/15; cf. ECJ Rules of Procedure, Art.5(2) (assignment only for preparatory inquiries) and ECJ Rules of Procedure, Art.44(2) and (3) (designation of a Judge-Rapporteur by the President of the Court; the administrative meeting assigns the case to a Chamber, at the proposal of the Judge-Rapporteur).

¹³ Statute, Art.59, first para. The President of the Court of First Instance is not subject to this limitation.

¹⁴ CFI Rules of Procedure, Arts 10(2) and 15, third para. See, for the period from October 1, 2005 to September 30, 2006, decision of July 7, 2005 (2005) O.J. C205/15.

¹⁵ CFI Rules of Procedure, Art.14(1).

¹⁶ CFI Rules of Procedure, Art.51(1), first subpara.

¹⁷ CFI Rules of Procedure, Art.51(1), second subpara.

¹⁸ CFI Rules of Procedure, Art.32(3), first subpara.

¹⁹ CFI Rules of Procedure, Art.32(3), second subpara.

²⁰ Statute, Art.17, fourth para., applicable to the Court of First Instance by virtue of Art.47, first subpara., of the Statute.

Procedure. The procedure before the Court of First Instance largely parallels that before the Court of Justice (see Part V, *infra*). 1-025

President and Registrar. The tasks of the President and the Registrar of the Court of First Instance are, to the extent of their powers, similar to those of their counterparts in the Court of Justice. 1-026

Staff. As far as the personnel of the Court of First Instance is concerned, the Statute of the Court of Justice provides as follows: "The President of the Court of Justice and the President of the Court of First Instance shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the Court of First Instance to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the Court of First Instance under the authority of the President of the Court of First Instance."²¹ 1-027

The last sentence of that passage applies, of course, to the staff of the Registrar and the cabinets of the Judges of the Court of First Instance (Judges are assisted by, among others, three legal secretaries or référendaires, who perform the same duties as the law clerks of the Judges and Advocates General of the Court of Justice, and two secretarial staff members). The aim is to bring the staff of the Court of First Instance who are directly and exclusively concerned with the performance of its judicial function under the President and the Registrar, which constitutes a guarantee of independence from the other court.

C. BASIC FUNCTION

Purpose. The purpose of establishing the Court of First Instance, which was "attached" to the Court of Justice in 1983, was to maintain and improve the quality and effectiveness of judicial protection in the Community legal order. In 1988 a steadily rising tide of cases had caused proceedings before the Court to become unacceptably protracted.²² Furthermore, in cases requiring an appraisal of complex facts,²³ the Court of Justice could no longer provide the high quality of judicial protection which it was called upon to do.²⁴ 1-323

²¹ Statute, Art.52.

²² This term was employed in the pre-Nice version of Art.225(1) of the EC Treaty: "A Court of First Instance shall be attached to the Court of Justice."

²³ The average duration of a direct action increased from 2.5 months in 1973 to 24 months. The average time taken to complete proceedings in a reference for a preliminary ruling was 27.5 months.

²⁴ Principally, competition and anti-trust cases.

²⁵ For commentaries, see Biancamano, "La création du Tribunal de première instance des Communautés européennes: un fait ou une nécessité?" (1998) R.T.D.E. 1-25 and

The transfer in stages to the Court of First Instance of jurisdiction in all cases brought by natural or legal persons against any unlawful act or failure to act of a Community institution helped to allay those shortcomings.¹⁶ At the same time, a two-tier court system was created for such cases, which can only improve the quality of legal protection.

- 1-029 Treaty of Nice. As a result of the Treaty of Nice, which entered into force on February 1, 2003, and the recent amendment on April 26, 2004 of Art. 157 of the Statute,¹⁷ the jurisdiction of the Court of First Instance has been extended to a considerable degree. The Court of First Instance is no longer confined to being an administrative court of the Community. The Court is incrementally becoming the Community Court of general jurisdiction at first instance (see 1-047 to 1-054, *infra*, concerning the distribution of heads of jurisdiction as between the various judicial bodies belonging to the Court of Justice).¹⁸

¹⁶Présentation générale du Tribunal de première instance des Communautés européennes" (1995) R.M.C.U.E. 564-567; Cruz, "Het Gerecht van eerste aanleg" (1996) N.J.B. 477-485; de Cruz Wégle, "The Court of First Instance of the European Communities: A Significant Step towards the Consolidation of the European Community as a Community governed by the Rule of Law" (1996) Y.E.L. 2-56; Jozg, "Das Gericht erster Instanz der Europäischen Gemeinschaften" (1992) EuR. 246-264; Kerschner and Klöpfer, *Das Gericht erster Instanz der Europäischen Gemeinschaften* (Carl Heymanns Verlag KG, Cologne/Berlin/Bonn/Munich, 1998), 315 pp.; Lenaerts, "Het Gerecht van eerste aanleg van de Europese Gemeenschappen" (1990) S.E.W. 527-548; "Le Tribunal de première instance des Communautés européennes: genèse et premiers pas" (1990) J.T. 409-415; "The Development of the Judicial Process in the European Community after the Establishment of the Court of First Instance", in *Collected Courses of the Academy of European Law* (Book 1, European University Institute, Florence/Dordrecht, 1991), Vol. 1, at 53-113; and "Le Tribunal de Première Instance des Communautés européennes: regard sur une éternelle d'actualité et sur l'impact du double degré d'instance au droit communautaire" (2000) C.D.E. 323-411; Mallet, *The Court of First Instance of the European Communities*, Butterworths, London-Edinburgh, 1997, 114 pp.; Nelke Brown, "The First Five Years of the Court of First Instance and Appeals to the Court of Justice: Assessment and Statistics" (1995) C.M.L.Rev. 743-761; Palasio González, *El Sistema Judicial Comunitario* (Universidad de Deusto, Bilbao, 1995), at 57-94; Van der Woude, "Le Tribunal de première instance 'Les trois premières années'" (1992) R.M.U.E. 113-157; Vesterdahl, "The Court of First Instance of the European Communities after Two Full Years of Operation" (1992) C.M.L.Rev. 697-715; Van Ginderachter, "Le Tribunal de première instance des Communautés européennes. Un nouveau préjugé?" (1989) C.D.E. 63-101.

¹⁷See Council Decision 85/391/EEC, EEC, Euratom of October 24, 1985 establishing a Court of First Instance of the European Communities (1986) O.J. L131/1; corrigendum in (1989) O.J. L 261/4, as amended by Council Decision 93/356/Euratom, EEC, EEC of June 8, 1993 (1993) O.J. L144/21; and Council Decision 94/149/EEC, EC of March 1, 1994 (1994) O.J. L66/29. Art. 13 of the Treaty of Nice amended this Decision.

¹⁸Council Decision 2004/407/EC, Euratom of April 26, 2004 amending Arts 1 and 54 of the Protocol on the Statute of the Court of Justice (2004) O.J. L132/9; corrigendum in (2004) O.J. L154/3.

¹⁹For a survey of the various heads of jurisdiction transferred, see Gautron, "Les compétences du Tribunal de première instance" (1995) R.M.C.U.E. 568-575; for the changes brought about by the Treaty of Nice, see Lenaerts and Desomer, "Het Verdrag van Nice en het 'post-Nice'-debat over de toekomst van de Europese Unie" (2001-2002) R.W. 73, para. 21-32. For the effects of the Treaty of Nice on the judicial organisation of the European

IV. JUDICIAL PANELS

General. As from the entry into force of the Treaty of Nice, the Council has been empowered to create judicial panels to be attached to the Court of First Instance which will hear and determine at first instance certain classes of action or proceedings brought in specific areas.¹⁹

Appeal before the Court of First Instance. Decisions given by judicial panels may be subject to a right of appeal before the Court of First Instance on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact.

Judicial panels set up and proposed. Recently, the European Union Civil Service Tribunal was created which has taken over the staff cases previously falling within the jurisdiction of the Court of First Instance. The Commission has proposed that another judicial panel also be set up, namely the Court for the Community Patent. That Court would hear and determine cases which in the absence of the creation of the judicial panel would normally fall within the jurisdiction of the Court of First Instance.

A. EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Creation. Declaration No 16 attached to the Nice Treaty called upon the Court of Justice and the Commission "to prepare as swiftly as possible a draft decision establishing a judicial panel which has jurisdiction to deliver judgments at first instance on disputes between the Community and its

Union, see Andriantimbarovina, "Le modèle juridictionnel de la Cour européenne des droits de l'homme et la réforme de la Cour de justice des Communautés européennes" (2000) R.A.E. 410-415; Ombon, "L'indispensable réforme du Tribunal de première instance des Communautés européennes" (2003) R.A.E. 254-266; Dyrberg, "What should the Court of Justice be doing?" (2001) E.L.Rev. 291-300; Dubas, "Quel avenir pour le Tribunal de première instance après le traité de Nice?" (2000) R.A.E. 426-440; Fierstra, "Een nieuw toekomstperspectief voor het Hof van Justitie: de nuwaastand na het Verdrag van Nice" (2001) N.T.E.R. 35-40; Johnston, "Judicial Reform and the Treaty of Nice" (2001) C.M.L.Rev. 455-525; Kateva, "De rechtstreekse organisatie van de Europese Unie en de Intergevenementale Conferentie 2000" (2001) N.J.B. 1-8; Lenaerts, "La réorganisation de l'architecture juridictionnelle de l'Union européenne: quel angle d'approche adopter?", in Dony and Brébaut (eds.), *L'avenir du système juridictionnel de l'Union européenne* (Éditions de l'Université de Bruxelles, Brussels, 2002), at 49-64; Lenz, "Die Gerichtsbarkeit in der Europäischen Gemeinschaft nach dem Vertrag von Nice" (2001) Eu.G.R.Z. 433-441; Lönig, "La Cour de justice après Nice", in Dony and Brébaut (eds.), *L'avenir du système juridictionnel de l'Union européenne* (Éditions de l'Université de Bruxelles, Brussels, 2002), at 5-17; Ruiz-Jarabo Colomer, "La réforme de la Cour de justice opérée par le traité de Nice et sa mise en œuvre future" (2001) R.T.E. 75-726; Tanioud, "Le système juridictionnel communautaire revu et corrigé par le traité de Nice" (2001) R.M.U.E. 164-170.

¹⁹EC Treaty, Arts 220 and 225a. The Council is to decide unanimously on a proposal of the Commission after consulting the European Parliament and the Court of Justice, or at the request of the Court of Justice after consulting the European Parliament and the Commission.

servants". On November 2, 2004, the Council adopted Decision 2004/752/EC, Euratom establishing the European Union Civil Service Tribunal.¹³⁷ This decision inserts a new Art.62a in the Court's Statute which provides that the provisions relating to the jurisdiction, composition, organisation and procedure of the judicial panels are set out in an annex to the Statute. Council Decision 2004/752 adds a new Annex I to the Statute entitled "The European Union Civil Service Tribunal" (hereinafter "Civil Service Tribunal").

Composition and jurisdiction. The Civil Service Tribunal is attached to the Court of First Instance and has its seat in Luxembourg.¹³⁸ It exercises the jurisdiction previously exercised by the Court of First Instance in staff matters¹³⁹ and is composed of seven Judges appointed for a period of six years by the Council,¹⁴⁰ acting unanimously.¹⁴¹ A selection committee composed of former members of the Court of Justice and the Court of First Instance and lawyers of recognised competence gives an opinion on the candidates' suitability to perform the duties of Judge at the Civil Service Tribunal.¹⁴²

Chambers. The Civil Service Tribunal sits in chambers of three Judges. In certain cases determined by its rules of procedure, it sits in plenary session, as a chamber of five Judges, or as a chamber constituted by a single Judge.¹⁴³

Procedure. Decision 2004/752 further lightens the existing procedure in staff cases with a view to settling disputes rapidly. Annex I to the Statute of the Court of Justice provides in principle for one exchange of written submissions between the parties.¹⁴⁴ When the Civil Service Tribunal deems that a second exchange is necessary, it may, with the agreement of the parties, decide to proceed to judgment without an oral hearing.¹⁴⁵ Furthermore, at all stages of the procedure the judicial panel may examine the

¹³⁷ [2004] O.J. L313/7.

¹³⁸ Council Decision 2004/752, Art.1.

¹³⁹ Statute, Annex I, Art.1.

¹⁴⁰ See Council Decision 2005/577/EC, Euratom, of July 22, 2005 appointing Judges of the European Union Civil Service Tribunal ([2005] O.J. L193/28).

¹⁴¹ EC Treaty, Art.225a and Statute, Annex I, Arts 2 and 3(1). The Council may, acting by a qualified majority, increase the number of Judges. The Council, when appointing Judges, will ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

¹⁴² Statute, Annex I, Art.3(3) and (4).

¹⁴³ *Ibid.*, Art.4(2).

¹⁴⁴ *Ibid.*, Art.3(3).

¹⁴⁵ *Ibid.* At present, in proceedings before the Court of First Instance, a second exchange of written pleadings together with an oral hearing is the rule, with certain exceptions (see CFI Rules of Procedure, Arts 47(1) and 52 (1)).

possibility for an amicable settlement and may try to facilitate such settlement.¹⁴⁶

Appeals. An appeal may be brought before the Court of First Instance against final decisions of the Civil Service Tribunal and decisions of the Civil Service Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility. The appeal is to be lodged within two months of the notification of the decision appealed against by any party which had been unsuccessful, in whole or in part, in its submissions.¹⁴⁷

Whereas Art.225a of the EC Treaty leaves the door open for appeals on points of law and fact, Decision 2004/752 clearly opts for an appeal limited to points of law.¹⁴⁸ If the appeal is well founded, the Court of First Instance will quash the decision of the Civil Service Tribunal and give final judgment in the matter. Only, where the state of the procedure does not permit the Court of First Instance to give final judgment is the case referred back to the Civil Service Tribunal, which will be bound by the decision of the Court of First Instance on points of law.¹⁴⁹

B. THE COMMUNITY PATENT COURT

General. At present, the protection conferred by patents is governed by national law and in the event of a dispute patent rights have to be enforced before national courts. In order to increase the competitiveness of the Union's economy, the Commission put forward, on August 2, 2000, a proposal for a Council Regulation on a Community patent.¹⁵⁰ The holder of such a patent would enjoy protection based on Community law in all Member States of the Union.

Two stages. The establishment of a Community patent court intended to ensure uniform interpretation of Community patent legislation and give rulings enjoying Community-wide effect will take place in two stages. First, the Council will have to adopt a decision based on Art.229a of the EC Treaty conferring jurisdiction on the Court of Justice over disputes relating to the Community patent. Since patent litigation differs from proceedings normally brought before the Community courts in so far as it is between private parties, the relevant Council decision will also have to be adopted by the Member States in accordance with their respective constitutional

¹⁴⁶ Statute, Annex I, Art.3(4).

¹⁴⁷ *Ibid.*, Art.5.

¹⁴⁸ *Ibid.*, Art.21.

¹⁴⁹ *Ibid.*, Art.23.

¹⁵⁰ COM (2000) 412 final.

requirements.¹¹⁰ The Commission has recently submitted to the Council a proposal for a decision conferring jurisdiction on the Court of Justice in disputes relating to the Community patent.¹¹¹

As a second step, a Council decision based on Art.225a will have to be adopted to create a judicial panel and transfer to that panel the jurisdiction at first instance conferred upon the Court of Justice with respect to the Community patent. To that end, the Commission has prepared a proposal for a Council decision establishing the Community Patent Court (hereinafter referred to as the "CPC") and concerning appeals before the Court of First Instance.¹¹²

- 1-040 **Judges.** Under the Commission's proposal, the CPC will consist of seven Judges, appointed for a period of six years.¹¹³ The Judges will be chosen from candidates presented by the Member States having an established high level of legal expertise in patent law. They are to be appointed by the Council on the basis of their expertise, after consultation of an advisory committee which will give an opinion on the adequacy of the candidates' profile.¹¹⁴
- 1-041 **Chambers.** The CPC will sit in chambers of three Judges. In special circumstances provided for in the Rules of Procedure, the CPC could sit in an enlarged composition, for example in cases where fundamental questions of patent law are concerned, or in a reduced composition (single Judge) in simple cases.¹¹⁵
- 1-042 **Assistant Rapporteurs.** The Judges will be assisted by seven technical experts named Assistant Rapporteurs¹¹⁶ who will also be appointed for renewable periods of six years.¹¹⁷ The Assistant Rapporteurs, who will be

¹¹⁰ EC Treaty, Art.225a. Art.11-364 of the Constitution would simplify this procedure. Under that provision a "European law may confer on the Court of Justice of the European Union, to the extent that it shall determine, jurisdiction in disputes relating to the application of acts adopted on the basis of the Constitution which create European intellectual property rights". Such a European law would be adopted pursuant to the ordinary legislative procedure (Constitution, Arts 1-34 and 11-396).

¹¹¹ COM (2003) 828 final. Under this proposal, the Court of Justice would have jurisdiction in disputes relating to the infringement or the validity of a Community patent and a Community supplementary protection certificate, the use of the invention after the publication of the Community patent application, the right based on prior use of the invention, interim and evidence-protection measures in the subject matters conferred damages or compensation in the situations referred to above and the ordering of a penalty payment in case of non-compliance with a decision or order constituting an obligation to act or to abstain from an act (Art.1).

¹¹² COM (2003) 828 final.

¹¹³ COM (2003) 828 final, Art.2: Every three years there is to be a partial replacement of the Judges. Retiring Judges may be reappointed.

¹¹⁴ COM (2003) 828 final: proposed Arts 1 and 3 of Annex II to the Statute of the Court of Justice.

¹¹⁵ COM (2003) 828 final: proposed Art.6 of Annex II to the Statute of the Court of Justice.

¹¹⁶ See Statute, Art.11.

¹¹⁷ COM (2003) 828 final: proposed Art.7 of Annex II to the Statute of the Court of Justice and the legislative financial statement appended to the COM document.

specialised in different technical fields and have the "necessary legal qualifications",¹¹⁸ will actively participate in the preparation, the hearing and the deliberation of cases. They will have the right to put questions to the parties but they will not be entitled to vote on the decision to be taken. Their input would be important in helping the Judges to focus from the start of proceedings on the essential technical questions involved.¹¹⁹

Procedure. The proposed decision would also modify the Statute and add some specific provisions to it in order to take account of the special nature of litigation before the CPC. Accordingly, in contrast to other actions brought before the Community judicature, the competence of the CPC to prescribe any necessary interim measures will not be conditional upon main proceedings having already been instituted before it. Furthermore, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the CPC may, in the event of an actual or imminent infringement of a Community patent, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, of the documents relating thereto. In the event that interim or evidence-protection measures are revoked, it is proposed that the CPC will order the applicant, at the defendant's request, to give the defendant adequate compensation for any injury caused by these measures.¹²⁰

Costs. In contrast to other proceedings before the Community judicature, it is proposed that proceedings before the CPC will not be free of charge. This is because the CPC will hear litigation in which parties seek to enforce their private rights against competitors and hence should adequately contribute to the court costs.¹²¹

Appeals. It is proposed that an appeal against a final decision of the CPC may be brought before the Court of First Instance within two months of notification of the decision appealed against.¹²² In contrast to other appeal procedures,¹²³ an appeal against a decision of the CPC will have suspensory effect.¹²⁴ Furthermore, under the proposal, appeals may be based on points of law and matters of fact.¹²⁵

¹¹⁸ See proposed Art.12 of the Statute of the Court of Justice; according to the Commission, "a thorough experience in patent law would seem necessary since the Assistant Rapporteur must have a good understanding of what technical aspects are relevant for a legally sound decision of the CPC" (COM (2003) 828 final).

¹¹⁹ COM (2003) 828 final: proposed Art.7 of Annex II to the Statute of the Court of Justice.

¹²⁰ COM (2003) 828 final: proposed Art.14 of Annex II to the Statute of the Court of Justice.

¹²¹ COM (2003) 828 final: proposed Art.21 of Annex II to the Statute of the Court of Justice.

¹²² COM (2003) 828 final: proposed Art.25 of Annex II to the Statute of the Court of Justice.

¹²³ Appeals before the Court of Justice in cases for which the CFI has jurisdiction is, first instance, appeals before the CFI against decisions of the Civil Service Tribunal.

¹²⁴ COM (2003) 828 final: proposed Art.22 of Annex II to the Statute of the Court of Justice.

¹²⁵ COM (2003) 828 final: proposed Art.27 of Annex II to the Statute of the Court of Justice.

Appeals against decisions of the CPC would be heard and determined by a specialised patent chamber within the Court of First Instance composed of three Judges and assisted by three technical experts (Assistant Rapporteurs).¹²³ As a result, the number of Judges in the Court of First Instance would be increased to 28.¹²⁴

Under the proposal, if the appeal is well founded, the Court of First Instance will quash the decision of the CPC and give final judgment. The Court of First Instance may refer the case back to the CPC for judgment only in exceptional circumstances and in accordance with the Rules of Procedure. The rationale for this is that it is essential to avoid unnecessary referrals of cases back to the CPC in order to ensure efficient and swift patent proceedings. Where a case is referred back to the CPC, that court will be bound by the decision of the Court of First Instance on points of law.¹²⁵

1-346 Timeframe. It is the intention of the Commission that the CPC will be operational by no later than 2010.

V. DISTRIBUTION OF HEADS OF JURISDICTION AS BETWEEN THE VARIOUS JUDICIAL BODIES BELONGING TO THE COURT OF JUSTICE

A. THE POSITION BEFORE THE TREATY OF NICE

1-347 Court of First Instance. Before the Treaty of Nice, the jurisdiction of the Court of First Instance was limited as follows. The Court had jurisdiction¹²⁶ to hear and determine actions for annulment,¹²⁷ actions for failure to act¹²⁸ and actions for reparation of non-contractual damage¹²⁹ brought by natural or legal persons against institutions and bodies of the Union and disputes between those institutions and bodies and their servants.¹³⁰ The Court of First Instance also had jurisdiction to entertain actions brought by natural and legal persons pursuant to an arbitration clause.¹³¹ Lastly, the Court had jurisdiction in cases brought against the Office for Harmonisation in the

¹²³ COM (2003) 623 final: proposed Art.61a of the Statute of the Court of Justice and the legislative financial statement appended to the COM document.

¹²⁴ COM (2003) 623 final: proposed Art.48 of the Statute of the Court of Justice.

¹²⁵ COM (2003) 623 final: proposed Art.23 of Annex II to the Statute of the Court of Justice.

¹²⁶ See Council Decision 88/591/EEC, EEC, Statute of October 24, 1988 establishing a Court of First Instance of the European Communities [1988] O.J. L330; corrigendum in [1988] O.J. L243(M), as amended by Council Decision 91/300/EEC, EEC of June 3, 1991 [1991] O.J. L144(21), and Council Decision 94/149/EEC, EC of March 7, 1994 [1994] O.J. L66(29).

¹²⁷ EC Treaty, Art.230.

¹²⁸ EC Treaty, Art.232.

¹²⁹ EC Treaty, Arts 235 and 238, second para.

¹³⁰ EC Treaty, Art.235.

¹³¹ EC Treaty, Art.238.

Internal Market relating to Community trademarks¹³² and designs¹³³ as well as cases brought against the Community Plant Variety Office relating to Community plant variety rights.¹³⁴

Court of Justice. The EC Treaty excluded preliminary references from the potential jurisdiction of the Court of First Instance.¹³⁵ They thus came within the reserved jurisdiction of the Court of Justice. That Court also had jurisdiction to decide actions for annulment or for failure to act and actions pursuant to an arbitration clause where those actions were lodged by a Member State, a Community institution, or, under certain circumstances, the European Central Bank. The Court of Justice was also competent to hear actions brought by the Commission or a Member State relating to the infringement of Community law by a Member State (infringement actions)¹³⁶ and actions relating to compensation for non-contractual damage brought by a Member State against the Community.¹³⁷ Lastly, as regards the jurisdiction of the Court of Justice, mention should be made of appeals which may be lodged on points of law only against rulings of the Court of First Instance.¹³⁸

I-043

B. THE NICE TREATY: A FUNDAMENTAL REALLOCATION OF JURISDICTION IN EMBRYO

Role of Court of Justice. The Treaty of Nice contains in embryo a fundamental reallocation of jurisdiction as between the Community courts.¹³⁹ It appears from the Treaty of Nice that the Court of Justice's role should be confined to the examination of questions which are of essential

I-049

¹³² Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trademark [1994] O.J. L31.

¹³³ Council Regulation (EC) No 609/02 of December 12, 2001 on Community designs [2002] O.J. L31.

¹³⁴ Council Regulation (EC) No 1100/94 of July 27, 1994 on Community plant variety rights [1994] O.J. L227(1), as amended by Council Regulation (EC) No 2505/95 of October 25, 1995 [1995] O.J. L233.

¹³⁵ Former Art.225(1) of the EC Treaty.

¹³⁶ EC Treaty, Arts 226-228.

¹³⁷ Such actions are, however, generally lodged by natural and legal persons and not by Member States. For completeness' sake the following actions (falling within the jurisdiction of the Court of Justice) should also be mentioned: actions based on Art.231 of the EC Treaty which concern the fulfilment by Member States of obligations under the Statute of the European Investment Bank (hereinafter "EIB"), the legality of measures adopted by the Board of Governors and of the Board of Directors of the EIB, and the fulfilment by national central banks of obligations within the framework of the monetary union; actions based on Art.239 of the EC Treaty concerning any dispute between Member States which relates to the subject-matter of the Treaty, submitted to the Court under a special agreement between the parties.

¹³⁸ EC Treaty, Art.225(1).

¹³⁹ See in this regard Louis, "La fonction juridictionnelle de Nice à Rome" (2003) J.T.D. 237; Vanderhanden, "Le système juridictionnel communautaire après Nice" (2003) C.D.E. 3; Vaiterdorf, "The Community court system ten years from now and beyond: challenges and possibilities", (2003) E.L.Rev. 303; Thüsing, "La Cour de Justice après Nice: le transfert de compétences au Tribunal de première instance" (2002) R.D.U.E. 665.

importance for the Community legal order. In order to achieve this objective, the Treaty provides that the Court of Justice is to be the competent court for infringement actions,¹⁴⁰ for (the great majority of) preliminary references, for appeals against rulings of the Court of First Instance,¹⁴¹ and, exceptionally, for the review of preliminary rulings of the Court of First Instance or of decisions taken by the Court of First Instance upon appeal in cases for which a judicial panel has jurisdiction at first instance.

- 1-050 **Transfer of jurisdiction to the Court of First Instance.** The Treaty of Nice introduced into the EC Treaty a legal basis for the transfer of jurisdiction to the Court of First Instance with regard to preliminary references in specific areas, which are still to be determined.¹⁴² It is the intention of the Treaty of Nice¹⁴³ that the Court of First Instance, regardless of the status of the applicant, should have jurisdiction to hear at first instance actions for annulment¹⁴⁴ and for failure to act,¹⁴⁵ actions relating to compensation for non-contractual damage,¹⁴⁶ actions pursuant to an arbitration clause¹⁴⁷ and disputes between the Community and its staff.¹⁴⁸ There are two exceptions. First, judicial panels may be created. They are to hear and determine at first instance certain classes of action or proceeding brought in specific areas.¹⁴⁹ Secondly, the Statute of the Court of Justice may reserve certain actions at first and last instance to the Court of Justice.¹⁵⁰ However, the Statute attached to the Nice Treaty confirmed the pre-Nice *status quo* and, as far as the direct actions mentioned above are concerned, maintained—until a later amendment of the Statute¹⁵¹—the pre-Nice division of jurisdic-

¹⁴⁰ Under Art.225(1), first subpara., second sentence, of the EC Treaty, the Statute may provide for the Court of First Instance "to have jurisdiction for other classes of action or proceeding". This means that granting the Court of First Instance jurisdiction in infringement actions (based on Arts 225-228 of the EC Treaty) would not require a Treaty amendment; an amendment of the Statute would suffice.

¹⁴¹ Art.225 of the EC Treaty allows for the introduction of a filter system for appeals in so far as Art.225 (1), second para., of the EC Treaty provides: "Decisions given by the Court of First Instance [...] may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute" (emphasis added).

¹⁴² EC Treaty, Art.225(3).

¹⁴³ EC Treaty, Art.225(1).

¹⁴⁴ EC Treaty, Art.230.

¹⁴⁵ EC Treaty, Art.232.

¹⁴⁶ EC Treaty, Arts 235 and 238, second para.

¹⁴⁷ EC Treaty, Art.238.

¹⁴⁸ EC Treaty, Art.236.

¹⁴⁹ EC Treaty, Art.225(1), first subpara., and Art.225a, first para.

¹⁵⁰ EC Treaty, Art.225(1), first subpara.

¹⁵¹ The Treaty of Nice introduced a simplified procedure for amending the Statute of the Court of Justice. Whereas until the entry into force of the Treaty of Nice the provisions relating to Treaty amendments applied, Art.245 of the EC Treaty now provides: "The Council, acting unanimously at the request of the Court of Justice and after consulting the European Parliament and the Commission, or at the request of the Commission and after consulting the European Parliament and the Court of Justice, may amend the provisions of the Statute, with the exception of Title I".

tion *ratione personae* between the Court of Justice and the Court of First Instance.

C. THE PRESENT ALLOCATION OF JURISDICTION

Present system. Council Decision 2004/407/EC of April 26, 2004, which amended Art.51 of the Protocol on the Statute of the Court of Justice,¹⁵² (partly) implemented the principles of the Treaty of Nice by transferring jurisdiction from the Court of Justice to the Court of First Instance over direct actions, other than actions for infringement. The changes to the Statute, which aimed at leaving the Court of Justice with jurisdiction at first and last instance only in respect of basic legislative activity and in respect of the determination of interinstitutional disputes, may be summarised as follows.

First, actions which already fell within the jurisdiction of the Court of First Instance (see 1-347, *supra*) will continue to be heard and determined by that court.¹⁵³

Secondly, all interinstitutional disputes (including those affecting the European Central Bank) are to be heard and determined at first and last instance by the Court of Justice.

Thirdly, as regards actions brought by Member States, the Statute favours the status of the defendant as the factor determining jurisdiction. The Court of Justice has jurisdiction to hear and determine actions brought by Member States against acts and failures to act of the European Parliament and/or the Council, either in the exercise of the powers vested in each of those institutions or pursuant to the co-decision procedure. In principle, therefore, actions brought by Member States against the Commission and the European Central Bank fall within the jurisdiction of the Court of First Instance, since such cases do not normally involve review of the basic legislative activity of the institutions.

Exceptions. Art.51 of the Statute contains two series of exceptions.¹⁵⁴ The first is based on the fact that the Council sometimes adopts acts which do not concern the basic legislative activity of the Community. Reserving

¹⁵² [2004] O.J. L136/5; corrigendum in [2004] O.J. L194/3.

¹⁵³ This means that it cannot be ruled out that some cases involving basic legislative activity will be heard and determined at first instance by the Court of First Instance.

¹⁵⁴ Art.51 provides: "By way of derogation from the rule laid down in Art.225(1) of the EC Treaty and Art.46(1) of the EAEC Treaty, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Arts 230 and 232 of the EC Treaty and Arts 146 and 148 of the EAEC Treaty when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by both these institutions acting jointly, except for:

- decisions taken by the Council under the third subpara. of Art.36(2) of the EC Treaty;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Art.133 of the EC Treaty;
- acts of the Council by which the Council exercises implementing powers in

actions in relation to such acts to the Court of Justice would not be in conformity with the aim pursued by the changes made to the Statute. Art.51 of the Statute therefore provides that the Court of First Instance is to have jurisdiction to hear and determine at first instance actions brought by a Member State concerning acts or failures to act of the Council in the field of State aid (EC Treaty, Art.88(2), third subpara.), with respect to implementing measures to protect trade (within the meaning of Art.133 of the EC Treaty), as well as with respect to the Council's implementing powers reserved to it in the basic legislative act or which it has regained in the course of a "committee procedure" (EC Treaty, Art.232, third indent).

Conversely, action by the Commission may constitute basic legislative activity. The review of the legality of such acts or of a failure on the part of the Commission to adopt such an act would therefore logically fall within the jurisdiction of the Court of Justice at first and last instance. Accordingly, Art.51 of the Statute provides that the Court of Justice is to have jurisdiction to hear and determine actions brought by Member States against an act of or failure to act by the Commission under Art.11a of the EC Treaty (relating to enhanced cooperation).

1-053 Infringement actions and preliminary references. Since the recent changes to the Statute did not bear on infringement actions or preliminary references, the Court of Justice will continue to hear such actions (at first and last instance).

1-054 Overview. On the basis of the EC Treaty, as amended by the Nice Treaty, and the new Art.51 of the Statute, the current allocation of jurisdiction between the Court of Justice and the Court of First Instance is as follows:

The Court of Justice has jurisdiction in:

- infringement actions (EC Treaty, Arts 225-228);
- preliminary references (EC Treaty, Art.234);
- actions for annulment (EC Treaty, Art.230) lodged by
 - o an institution or the European Central Bank against another institution or the European Central Bank;
 - o a Member State against the European Parliament and/or the Council, with the exception of actions relating to decisions taken by the Council under Art.88(2), third subpara., of the EC Treaty;

accordance with the third indent of Art.207 of the EC Treaty;

- (b) against an act of or failure to act by the Commission under Art.11a of the EC Treaty. Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same articles when they are brought by an institution of the Communities or by the European Central Bank against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Communities against an act of or failure to act by the European Central Bank."

acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Art.133 of the EC Treaty and acts of the Council by which the Council exercises implementing powers in accordance with Art.202, third indent, of the EC Treaty;

- o a Member State against an act by the Commission under Art.11a of the EC Treaty;
- actions for failure to act (EC Treaty, Art.232) lodged by
 - o an institution or the European Central Bank against another institution or the European Central Bank;
 - o a Member State against the European Parliament and/or the Council, with the exception of actions relating to the Council's failure to adopt a decision under Art.88(2), third subpara., of the EC Treaty, to the Council's failure to adopt an act pursuant to a Council regulation concerning measures to protect trade within the meaning of Art.133 of the EC Treaty and to the Council's failure to exercise its implementing powers in accordance with Art.202, third indent, of the EC Treaty;
 - o a Member State against a failure to act by the Commission under Art.11a of the EC Treaty;
- actions based on Art.237 of the EC Treaty which concern the fulfilment by Member States of obligations under the Statute of the European Investment Bank ("EIB"), the legality of measures adopted by the Board of Governors and of the Board of Directors of the EIB, and the fulfilment by national central banks of obligations within the framework of the monetary Union;
- actions based on Art.239 of the EC Treaty concerning any dispute between Member States which relates to the subject-matter of the Treaty, submitted to the Court under a special agreement between the parties;
- appeals against rulings of the Court of First Instance (EC Treaty, Art.225(1));
- review of decisions which the Court of First Instance took on appeal against decisions of judicial panels.¹⁰¹

The Court of First Instance has jurisdiction in:

- actions for annulment (EC Treaty, Art.230) lodged by

¹⁰¹ EC Treaty, Art.225(2), second subpara. Review of preliminary rulings given by the Court of First Instance will also be possible (EC Treaty, Art.225(3), third subpara.). Whilst one judicial panel has already been created (the European Union Civil Service Tribunal), a transfer of jurisdiction to the Court of First Instance over preliminary references is not envisaged for the time being.

THE EUROPEAN COURTS

- o natural or legal persons;
- o a Member State against the Commission (unless the action concerns an act by the Commission under Art.113a of the EC Treaty);
- o a Member State against the Council relating to decisions under Art.88(2), third subpara., of the EC Treaty;
- o a Member State against acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Art.133 of the EC Treaty;
- o a Member State against acts of the Council by which the latter exercises implementing powers in accordance with Art.202, third indent, of the EC Treaty;
- actions for failure to act (Art.232 of the EC Treaty) lodged by
 - o natural or legal persons;
 - o a Member State against the Commission (unless the action concerns a failure to act by the Commission under Art.113a of the EC Treaty);
 - o a Member State against the Council relating to a failure to adopt a decision under Art.88(2), third subpara., of the EC Treaty;
 - o a Member State against the Council relating to a failure to adopt an act pursuant to a Council regulation concerning measures to protect trade within the meaning of Art.133 of the EC Treaty;
 - o a Member State against the Council relating to a failure to exercise its implementing powers in accordance with Art.202, third indent, of the EC Treaty;
- actions relating to compensation for non-contractual damage brought against the Community (EC Treaty, Arts 235 and 288, second para.);
- actions pursuant to an arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law (EC Treaty, Art.238);
- cases brought against the Office for Harmonisation in the Internal Market relating to Community trademarks¹⁴ and designs¹⁵ and cases brought against the Community Plant Variety Office relating to Community plant variety rights¹⁶;
- appeals against decisions of judicial panels (EC Treaty, Art.225(2)).

¹⁴ Council Regulation (EC) No 4354 of December 20, 1997 on the Community trademark [1994] O.J. L31/L.

¹⁵ Council Regulation (EC) No 6092 of December 12, 2001 on Community designs [2002] O.J. L31/L.

¹⁶ Council Regulation (EC) No 2100/94 of July 27, 1994 on Community plant variety rights [1994] O.J. L217/L, as amended by Council Regulation (EC) No 2966/95 of October 25, 1995 [1995] O.J. L238/3.

DISTRIBUTION OF HEADS OF JURISDICTION

The Civil Service Tribunal has jurisdiction in staff cases (EC Treaty, Art.236).¹⁷

Procedural document submitted to the wrong court. In addition, mention should be made of Art.54 of the Statute of the Court of Justice of the EC, which deals with three complications regarding the allocation of jurisdiction as between the Court of Justice and the Court of First Instance.¹⁸ First, there is *formal mistake*: if an application or other procedural document addressed to the Court of First Instance is lodged by mistake with the Registrar of the Court of Justice, or *vice versa*, it is to be transmitted immediately from one Registrar to the other.¹⁹ Secondly, there is *substantive mistake*: if the Court of First Instance finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it is to refer the action to the Court of Justice.²⁰ Likewise, where the Court of Justice finds that an action falls within the jurisdiction of the Court of First Instance, it is to refer it to the Court of First Instance, whereupon that court may not decline jurisdiction.²¹ As will be appreciated, the allocation of jurisdiction as between the Court of Justice and the Court of First Instance is based on objective grounds in so far as the court wrongly seized of a case falling within the jurisdiction of the other court is under an obligation to refer it to that other court. In case of doubt, the Court of Justice has the last word, since after it has referred a case to the Court of First Instance in that way, that court cannot decline jurisdiction. This system does not detract from the right of the Court of First Instance to decline jurisdiction where a case falls outside the sphere of action of the Community judiciary, regarded as a whole.

¹⁸ Where the protocol establishing a Community institution or body provides that the Court of Justice should be the competent court to hear and determine disputes between that institution or body and its servants, the expression "Court of Justice" is to be interpreted as referring to the Community judicature as a whole within the meaning of Art.1 EC and thus as including the Court of First Instance" (CFI, Case T-333/99 *X v. EC* [2001] E.C.R. II-3621, I-4-155, II-921, para.41) as well as the European Union Civil Service Tribunal. If such a provision was interpreted "as precluding actions by certain servants against certain institutions or organs ... from the improved system of legal remedies introduced by Decision 53521 (which) is characterised by a two-tier approach) for the same type of dispute, that departure from the general system of legal remedies, for which there is no objective justification, would be in breach of the principle of equal treatment and therefore of a fundamental principle of Community law." (ibid., para.40).

¹⁹ See Klinker, "Quelques réflexions à propos de la relation entre la Cour de justice et le Tribunal de première instance des Communautés européennes" (2000) *RAE* 219-253.

²⁰ Statute, Art.54, first para.

²¹ Statute, Art.54, second para. See, for example, CFI (order of November 25, 2000), Case T-150/01 *IMM v. Commission*, [2003] E.C.R. II-4973, para.52.

¹⁷ Statute, Art.54, second para. For practical examples, see ECJ (order of May 23, 1990), Case C-72/89 *Asia Motor France v. Commission* [1990] E.C.R. I-2187; ECJ (order of June 4, 1991), Case C-65/90 *PTT v. Commission* [1991] E.C.R. I-2723; ECJ (order of May 3, 1993), Case C-424/92 *Leadbroke Racing v. Commission* [1993] E.C.R. I-2215; ECJ (order of March 21, 1997), Case C-33/97 *Région Wallonne v. Commission* [1997] E.C.R. I-1387; ECJ (order of October 1, 1997), Case C-186/97 *Région Yvelines v. Commission* [1997] E.C.R. I-5245, para. 9-12; ECJ (order of July 14, 2005), Case C-70/04 *Schier Confédération v. Commission*, not reported, para.52.

Identical or similar object of cases pending before different courts. Thirdly, there is the case where the two courts are validly seized of cases in which the object is identical or similar.¹²³ Identity of object will occur where a natural or legal person or a Member State brings an action before the Court of First Instance against a Community institution for annulment of an act or for failure to take a decision, and another Community institution brings an action against the same act or failure to act before the Court of Justice. Similarity of object will occur where a natural or legal person or a Member State brings an action for annulment of an act—e.g. of a Commission decision approving State aid—before the Court of First Instance, whilst a national court makes a reference for a preliminary ruling to the Court of Justice relating to the validity of the same act. Likewise, the same question of interpretation may be raised before both the Court of First Instance and the Court of Justice.

The third and fourth paras of Art.54 of the Statute¹²⁴ resolve the matter as follows:

"Where the Court of Justice and the Court of First Instance are seized of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the Court of First Instance may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment on, where the action is one brought pursuant to Art.220 of the EC Treaty [...], may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the Court of First Instance shall continue.

Where a Member State and an institution of the Communities are challenging the same act, the Court of First Instance is to decline jurisdiction so that the Court of Justice may rule on those applications."

This solution calls for a number of observations. The Court of First Instance is obliged to decline jurisdiction only in one instance, namely where a Member State (before the Court of First Instance) and an institution (before the Court of Justice) contest the same act. For the rest, the Court of First Instance cannot be compelled to decline jurisdiction (*se desister*) or to stay proceedings.¹²⁵ This is a reflection of the judicial

independence of the two courts, expressed by the words "the Court of First Instance may". But if that court decides to make use of that possibility, the Court of Justice can prevent it from doing so by staying proceedings on its part, thus causing the procedure to have to go through the Court of First Instance. In the event that the Court of First Instance has already declined jurisdiction, the Court of Justice can refer the case back to it by staying the parallel proceedings.

D. THE CONSTITUTION

Denomination of different courts. Under Art.125(1) of the Constitution, the Court of Justice of the European Union is to include the Court of Justice, the General Court and specialised courts.¹²⁶ Thus, the Constitution would put an end to the confusion which has existed ever since the creation of the Court of First Instance between the institution and the courts which it comprises. The envisaged change in the names of the courts can be attributed, on the one hand, to the fact that the abolition of the three pillars in the Constitution rendered any reference to the "European Communities" obsolete and, on the other hand, as far as the Court of First Instance is concerned, to the fact that that court could no longer be treated as a court of "first instance". The judicial panels, which constitute in reality fully fledged courts,¹²⁷ are to be called specialised courts.

Selection committee for Judges and Advocates General. As regards the composition, the internal organisation and the jurisdiction of the Court of Justice, the General Court and specialised courts, the Constitution reproduces the corresponding provisions of the EC Treaty. What is new,

¹²³ Joliet and Vogel, "Le Tribunal de première instance des Communautés européennes" (1997) *J.U.L.C.* 423, at 428. For an example, see CFI (order of November 15, 1998), Case T-316/93 *Nederlandse Aankopen v Council* [1998] E.C.R. II-4131, para.7.

¹²⁴ [2004] O.J. L1325; corrigendum in [2004] O.J. L194/3.

¹²⁵ The expression "decline jurisdiction" (*se desister* in the French version) in the third para. of Art.54 of the Statute does not have the same meaning as it has in the second para. of

Art.54 (where the French reads "décliner sa compétence"). Where the Court of First Instance stays proceedings, an appeal will not lie against that decision (ECJ (order of November 26, 2003), Joined Cases C-365/03, C-366/03, C-367/03, C-391/03 and C-394/03 *P. Association Bancaire Italiana and Others v Commission*, not reported). Where the Court of Justice refers a case to the Court of First Instance pursuant to the second para. of Art.54 of the Statute, the Court of First Instance may no longer decline jurisdiction on account of the nature of the action, but it may refrain from deciding the case (*se desister*), for example on jurisdictional grounds, and refer the case back to the Court of Justice. For examples, see ECJ (order of February 25, 2002), Case C-47/01 *Netherlands v Commission*, not reported; CFI (order of June 21, 1991), Case T-42/91 *PJT v Commission* [1991] E.C.R. II-273; CFI (order of February 1, 1995), Case T-23/94 *Société Commerciale des Poteries et de l'Azote and Others v Commission* [1995] E.C.R. II-521 (this case was decided by the Court of Justice; ECJ, Joined Cases C-65/94 and C-30/95 *France and Others v Commission* [1998] E.C.R. I-1375); CFI (order of February 21, 1995), Case T-48/93 *Handelskredit Industrie-Beteiligungen v Commission* [1995] E.C.R. II-469; CFI (order of February 23, 1995), Case T-450/93 *Bronner Vulkan Verband v Commission* [1995] E.C.R. II-477 (these cases, too, were decided by the Court of Justice; ECJ, Joined Cases C-325/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] E.C.R. I-5151); CFI (order of November 15, 1991), Case T-41/91 *Andrian Rice Mills v Council* [1991] E.C.R. II-4117, para.7.

¹²⁶ On this subject, see Barents, "The Court of Justice in the Draft Constitution" (2004) *M.E.C.L.* 121-141.

¹²⁷ They will, however, remain "attached" to the General Court (Constitution, Art.125(1)).

however, is the envisaged creation of a panel which would give an opinion on candidates' suitability to perform the duties of Judge and Advocate General of the Court of Justice and the General Court before the national governments take their decision.¹²⁵

- 1-059 Amendment of Statute. Another important innovation concerns the procedure to be followed for amending the Statute of the Court of Justice of the European Union. The Constitution provides that a European law may amend the provisions of the Statute.¹²⁶ The ordinary legislative procedure would apply with the particularity that either the Court of Justice or the Commission may take the initiative and that the other institution will be consulted.¹²⁷ As a result, amendments to the Statute would no longer require unanimity in the Council¹²⁸; a qualified majority would suffice. Furthermore, whereas at present the European Parliament is only consulted on amendments to the Statute,¹²⁹ the Constitution would make the Parliament a co-legislator also in this area.

¹²⁵ Constitution, Art. III-351. The panel is to comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom is to be proposed by the European Parliament. The Council is to adopt a European decision establishing the panel's operating rules and a European decision appointing its members. It is to act on the initiative of the President of the Court of Justice.

¹²⁶ Constitution, Art. III-361 (with the exception of Title I and Art. 64 of the Statute). The Rules of Procedure of the Court of Justice will require the consent of the Council (Art. II-355, fourth para. of the Constitution). The Rules of Procedure of the General Court and of the specialised courts will be established in agreement with the Court of Justice and will be subject to the consent of the Council (see Constitution, Arts II-356, fifth para. and II-355(5), respectively). The Council is to act by a qualified majority (Constitution, Art. I-23(3)).

¹²⁷ Constitution, Arts I-34, II-381 and II-396.

¹²⁸ EC Treaty, Art. 235.

¹²⁹ *Ibid.*

II Jurisdiction – A General Overview

1. Direct Actions

1.1. Actions against Institutions of the Community 1.2. Actions against Member States

2. Preliminary Rulings

3. Opinions - External Relations

Mandatory Reading

A. Arnulf, *The European Union and its Court of Justice*, Oxford, 2006 Chapter 5 (excluding Judicial Panels).

Keen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 12.

P. Craig, G. De Burca, *EU Law, Text, Cases and Materials*, 4th edition, Oxford University Press, 2008 Chapter 6 (5 (a) (b) (c) (d)).

Tanasije Marinkovic, PhD.
Svetislava Bulajic, LL.M.

The judicial architecture of the Union

The establishment of the Court of First Instance in 1988 marked the first major alteration to the judicial architecture of the Community (that is, the configuration of its judicial system) since the 1957 Convention on Certain Institutions Common to the European Communities. The CFI has in many respects proved to be a resounding success.¹ Only a small proportion of its decisions is challenged before the Court of Justice and the number set aside is low.² Although it has sometimes overreached itself,³ the CFI has made an important contribution to the development of Community law. It has been particularly influential in the competition field, delivering a series of notable judgments on such subjects as collective dominance⁴ and merger control.⁵ It is perhaps in that field that its willingness to scrutinise closely the factual background of cases has been most apparent.⁶ The influence of the CFI has not been confined to the substantive law of the Community. In *Pfizer Animal Health v Council*,⁷ for example, it addressed the application of the precautionary principle as well as the link between democratic

¹ See generally Verdroff, 'The Court of First Instance of the European Communities after two full years in operation' (1992) 29 CML Rev 397; Lenaerts, 'Le Tribunal de première instance des Communautés européennes: regard sur une décennie d'activités et sur l'appartenance double degré d'instance au droit communautaire' (2000) 35 CDE 323.

² See the statistics concerning the judicial activity of the CFI published each year on the website of the Community Courts, <http://ec.europa.eu/law/law/index.htm>.

³ See e.g. joined Cases T-79/89, T-84/89, T-35/89, T-46/89, T-38/89, T-51/89, T-52/89, T-84/89, T-96/89, T-102/89 and T-104/89 *BAZF and Others v Commission* (1992) ECR II-3115, quashed on appeal in Case C-137/92 *P. Commission v BAZF and Others* (1994) ECR I-2553 (see the first edition of this work at 445-6); Case T-177/01 *Jyske-Qulit v Commission* [2002] ECR II-2165, quashed on appeal in Case C-262/01 *P. Commission v Jyske-Qulit* (2004) ECR I-3425. The *Jyske-Qulit* case is discussed in ch 3.

⁴ See e.g. joined Cases T-52/89, T-77/89 and T-78/89 *SIO v Commission* (Plaßon Fat Gaur) (1992) ECR II-1420; joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* (1996) ECR II-1201 (partially upheld on appeal; joined Cases C-395/96 *P* and C-396/96 *P. Compagnie Maritime Belge Transports and Others v Commission* (2000) ECR I-1365).

⁵ See e.g. Case T-102/95 *Conax v Commission* (1995) ECR II-750; Case T-315/01 *Schmidl Ebnitz v Commission* (2002) ECR II-4071; Case T-56/02 *Five Level v Commission* (2002) ECR II-1085 (upheld on appeal; Case C-12/03 *P. Commission v Five Level*, judgment of 15 February 2005).

⁶ See e.g. Case T-242/99 *Affaire v Commission* (2002) ECR II-2535; *Schmidl Ebnitz v Commission*, above; *Five Level v Commission*, above. The CFI's propensity to interfere with the Commission's assessment in competition cases has been criticised by one of the CFI's own members: see Légal, 'Le traitement communautaire de la concurrence: entre contrôle restreint et pleine juridiction' (2005/2) *Concurrences* 1.

⁷ Case T-12/99 (2002) ECR II-3305. See Lenaerts and Conaut, 'Judicial review in a contribution to the development of European constitutionalism' (2003) 22 YEL 1, 24-42; Michélelli, 'Using the precautionary principle to protect human health: *Pfizer v Council*' (2005) 23 ELG 723.

legitimacy and the exercise of political responsibility. In *Ahmed Ali Yagci and Another v Council and Commission*,⁸ it considered (among other things) the effect of the Charter of the United Nations on the obligations of the Community and its Member States under Community law; the relationship between the Community and the Union legal order; the use of the 'flexibility clause' of Article 308 EC in combating terrorism; and the scope of the Community's powers to adopt restrictive measures affecting individuals or organisations under Articles 60 and 301 EC.

While inevitably some of the CFI's decisions have attracted criticism, the overall quality of its output is widely acknowledged. However, it has not had the desired effect of reducing the length of proceedings before the Court of Justice, as Table 5.1 demonstrates.⁹

Table 5.1 Average duration of proceedings before the Court of Justice

Year	Cases brought	Cases completed	Cases pending at year end	Average duration of proceedings (months and tenths of months)		
				References	Direct actions	Appeals
1988	373	385	605	17.5	23.7	n/a
1989	455	420	748	21.4	21	20.3
1990	543	395	896	21.2	23	23
1991	503	525	873	21.6	23.5	19
1992	504	434	943	22.7	23.1	15.3
1993	477	513	937	24.1	24.3	18.1
1994	551	494	974	25.5	24.7	20.7
1995	531	665	840	23.5	20.2	21.3

Sources: (1988) Brown and Karstedt, Brown and Jacobs 'The Court of Justice of the European Communities' (5th edn, 2000) 422-3; (1988-2004) Statistics concerning the judicial activity of the Court of Justice, <http://ec.europa.eu/law/law/statistics/index.htm>.

Moreover, in the mid-1990s, the capacity of the CFI to cope with its own workload began to cause concern. The CFI became particularly alarmed¹⁰ at the prospect of having to deal with large numbers of challenges to decisions of the Boards of Appeal established under the Community trade mark regulation.¹¹ That regulation created a Community trade mark existing alongside national trade marks but having equal effect throughout the Community. Responsibility for implementing the regulation was given to OHIM, the Office for Harmonisation in the Internal Market (Trade Marks and Designs). Appeal against decisions of the examiners and the various

⁸ Case T-336/01, judgment of 21 September 2005. See also Case T-315/01 *Yamir Abdulkhalil Kadi v Council and Commission*, judgment of 21 September 2005.

⁹ The reasons for the improvement recorded in 2004 are considered below.

¹⁰ See its contribution issued for the purposes of the 1995 IGC, published in 'Proceedings of the Court of Justice and Court of First Instance of the European Communities', No 15/95 (12-26 May 1995).

¹¹ Reg 40/94, OJ 1994 L 11/1. See also Reg 2100/94 on Community plant variety rights, OJ 1994 L 227/1.

divisions of OHIM lay to independent Boards of Appeal within CHIM. Decisions of the Boards of Appeal were in turn susceptible to judicial review before the CF.¹⁴ By 2004, cases of this sort represented over 20 per cent of the new cases brought before the CF. The implications of the CF's growing workload were underlined in *Sauvagegrube v. Commission*,¹⁵ a competition case decided in December 1995, where the Court of Justice partly upheld an appeal against a ruling of the CF on the ground that the proceedings before the CF had not been completed within a reasonable time.¹⁶ Moreover, the growth in the total number of actions brought each year before the CF was causing a concomitant rise in the number (if not the rate) of appeals to the Court. Table 5.2 summarizes the caseload of the CF from 1958 to 2004.

Table 5.2 Average duration of proceedings before the CF

Year	Cases brought	Cases completed	Cases pending at year end	Average duration of proceedings (months and tenths of months)		
				Staff cases	Intellectual property	All other actions
1998	232	348	1007	16.7	n/a	20
1999	384	659	732	17	8.6	12.5
2000	398	344	766	15.6	9.1	27.5
2001	345	340	792	18.7	15.4	20.7
2002	411	331	872	17.4	15.5	21
2003	466	335	999	17.9	15.8	21.5
2004	536	361	1174	18.2	17.3	22.6

Source: Statistics concerning the judicial activity of the CF, <http://www.cj.europa.eu/cj/press/presentation/index.htm>.

The advent of the Treaty of Nice

During the 1990s, it became evident that the number of cases brought before the two Community Courts was unlikely to fall. In addition to the trade mark regulation, their workload was expected to be affected by, among other things,

¹⁴ Such challenges are regarded as a form of action for annulment under Art 230 EC; see Reg 40/94, Art 63 and, possibly, recitals 11 and 13; Jaag, 'Proceedings relating to intellectual property rights' in *Wentzer* (ed.), *European Courts Practice and Procedure* (1997) ch 35, 922–3. Cf. Arnold, 'The Community judiciary and the 1995 IGC' (1995) 20 *ELR* 559, 603–4.

¹⁵ Case C-185/95 P (1996) ECR I-4417.

¹⁶ A period of about five and a half years elapsed between the date on which the application was lodged and the date on which the CF gave judgment. The force of the Court's criticism was somewhat blunted by the fact that the Advocate General's Opinion was not given until over two and a half years after the appeal was brought and there was then a further delay of over ten months before the Court gave judgment, a total of more than 41 months. It is possible, however, that the judgment was dictated more at the Council and the Member States than the CF.

enlargement, economic and monetary union and the expansion of the jurisdiction of the Court of Justice effected at Amsterdam. So steps needed to be taken to increase the capacity of the Courts to cope with present and likely future demand.

During the period preceding the IGC which was to culminate in the Treaty of Nice, the Community Courts sought to force the question of reforming the Union's judicial architecture on to the political agenda. In the spring of 1999, they issued a far-reaching and remarkably open-minded discussion paper¹⁷ containing a mixture of concrete proposals and options for reform. At around the same time, the European Commission set up a Working Group on the future of the Court under the chairmanship of Ole Due, a former President of the Court, with the task of reviewing 'the various possible courses which may be taken in order to maintain the quality and consistency of case law in the years to come, bearing in mind the number and present duration of proceedings and foreseeable developments...'. The Working Group's report was published in January 2000¹⁸ and formed the basis of a contribution entitled 'Reform of the Community courts' submitted by the Commission due to the Working March to the IGC which was by then under way.¹⁹ The Courts themselves built on their 1999 discussion paper with a contribution of their own to the IGC containing specific proposals for amendments to the EC Treaty. Within the IGC, the negotiation of reforms to the Union's judicial architecture was entrusted to a group of legal experts from the Member States and the Community institutions known as the 'Friends of the Presidency'. This meant the essentially technical question of judicial reform did not have to compete for the attention of politicians with other matters. When the Heads of State and Government met at Nice in December 2000 at the conclusion of the IGC, the proposals of the 'Friends of the Presidency' were apparently endorsed without change.²⁰ They were later incorporated virtually unamended into the Constitutional Treaty.

The major issue of principle in the pre-Nice era was whether the solution to the burgeoning workload of the Community Courts lay in expanding the jurisdiction of the CF or whether some more fundamental renovation of the Union's judicial architecture was necessary.²¹ The Treaty of Nice envisaged a little of both, but not immediately: the Nice provisions were essentially enabling, leaving the details of any

¹⁷ 'The future of the judicial system of the European Union (proposals and reflections)', sent to the Council on 10 May 1999. The text is reproduced in Durbwood and Johnston (eds), *The Future of the Judicial System of the European Union* (2001) 111–143.

¹⁸ The text is reproduced in Durbwood and Johnston, ibid., 145–204.

¹⁹ For the text of the Commission's contribution, see Durbwood and Johnston, ibid., 205–216.

²⁰ See Durbwood and Johnston, ibid., 16.

²¹ See generally Arnold, 'Modernising the Community Courts' (2000) 3 *CYELS* 33; Craig, 'The jurisdiction of the Community Courts revisited' in de Búrca and Weir (eds), *The European Court of Justice* (2001) ch 6; Dancy and Brindley (eds), *L'avenir de l'ordre juridique de l'Union européenne* (2002); Eckhaus, 'The European Courts after Nice' in Anderson and Usher (eds), *The Treaty of Nice and Beyond* (2001) ch 21; Hoffmann, 'The Community Courts post-Nice: a European court revisited' (2001) 52 *ICLQ* 927; Johnston, 'Judicial reform and the Treaty of Nice' [2001] 36 *CML Rev* 457; Durbwood and Johnston, above n 15; EC Advisory Board of the British Institute of International and Comparative Law, *The Role and Future of the European Court of Justice* (1996).

reform to be worked out later. Some reforms were made easier from a procedural point of view than they had previously been; some which the Treaties had not previously contemplated were now in principle to be permitted.

References for preliminary rulings

References from national courts were originally excluded by the Treaties from the jurisdiction of the CJL.²⁰ However, they often now represent the largest single category of case brought before the Court of Justice in a single year. The total number of references made rose from 141 in 1990 to 249 in 2004. It is especially important that references should be dealt with promptly, because the time they take at the Court has to be added to the time spent in the national forum. Excessive delay in Luxembourg may discourage national courts from using the mechanism. The importance of the preliminary rulings procedure is universally acknowledged,²¹ but it may be thought that some references are not important enough to require detailed consideration by the Court itself. Should the way in which such references are dealt with be changed?

That question was considered in some detail by the Working Group set up by the Commission,²² which suggested that the objective should be to return to the situation in 1983, when references were on average dealt with within one year. That would mean reducing significantly the burden imposed by references on the Court of Justice. The Working Group emphatically rejected three ways of achieving that objective which had been canvassed by the Community Courts in their 1999 discussion paper.

One was limiting the right to refer to national courts of last resort. That was the approach taken by the Member States at Amsterdam in relation to Title IV, Part Three, of the EC Treaty, which is concerned with visas, asylum, immigration and other policies related to free movement of persons. To limit the potential burden on the Court of Justice, the right to refer cases arising under that Title was confined to top national courts.²³ The Working Group was not in favour of extending that approach. It pointed out that the majority of the references sent to the Court of Justice over the years had come from inferior national courts, so depriving them of the right to refer would weaken the spirit of cooperation and dialogue between national judges and the Court of Justice on which the procedure depended. Such a reform might also have the perverse effect of encouraging parties to pursue cases unnecessarily to courts of last resort. The Group ruled out for similar reasons the less radical option of taking the right to refer away from national courts of first instance.

²⁰ See the pre-Nice version of Art 225(1) EC and the corresponding provisions of the other Community Treaties. Strictly speaking it was only references made under the Community Treaties which were reserved to the Court of Justice, not references made under other instruments such as the Protocols on the Interpretation of the Brussels and Rome Conventions (see CJ 1591 C-27/13 and 41 respectively). For all practical purposes, however, the Council could be regarded before Nice as precluded from giving the CJL a preliminary rulings jurisdiction.

²¹ Cf. Edwards, *Reform of Article 234 procedure: the limits of the possible* in O'Keefe and Bennett (eds) *Judicial Review in European Union Law* (2000) 119.

²² See Art 51 EC and ch 4 above.

Also emphatically rejected was the idea of requiring lower national courts to give judgment before making a reference. That would have meant giving a party to national proceedings a right to ask, or perhaps require, the national court to transmit its judgment to the Court of Justice, which would review its conclusions on the points of Community law in issue. The Group thought this would 'debate the entire system of cooperation established by the Treaties between national courts and the Court of Justice—a system that has proved its worth'.²⁴ The objection was presumably that the relationship between the Court of Justice and the national court would become overly hierarchical, with the former sitting in judgment over the latter regardless of its status in the national system. Instead, the Working Group thought that Article 234 EC should be amended to give national courts greater encouragement to apply Community law for themselves. In particular, the Group suggested that the obligation of national courts of last resort to refer should be qualified. That idea was opposed by the CCBE²⁵ and the Commission and no amendments to Article 234 were made at Nice.²⁶

If the object of enabling references to be turned round more quickly was to be achieved, the focus therefore had to be on the way they were handled in Luxembourg. On 1 July 2000, several changes to the Court's Rules of Procedure took effect²⁷ with a view (among other things) to streamlining the process of dealing with references from national courts. Two of the changes are worth mentioning here. First, Article 104(3) of the Rules now permits the Court to give its decision by reasoned order where a question referred is identical to one on which the Court has already ruled, the answer 'may be clearly deduced from existing case-law' or it 'admits of no reasonable doubt'.²⁸ Previously Article 104(3) limited the possibility of responding to a reference in this way to cases where the question referred was 'manifestly identical' to one on which the Court had already ruled. Second, Article 104a enables references of exceptional urgency to be dealt with under an accelerated procedure adapted to the circumstances of the individual case. This might involve derogating from the procedure normally applicable (something which was not previously permitted) and in particular reducing the period within which written observations may be submitted. The Advocate General must be heard, but is not required to deliver an Opinion. This facility is likely to be of particular value in cases concerning individuals held in custody²⁹ or the interests of children.³⁰

²¹ Above n 16 at 153.

²² See CONFER/VAR 3566/00, 18 May 2000.

²³ See ch 4.

²⁴ See CJ 2000 L 122/43.

²⁵ In the later case, the Court is required to inform the national court and hear the views of those entitled to submit observations under Art 23 of the Statute, but it is not bound to comply with their wishes: see Case C-259/02 *Le Mir Technologies Inc v Lohmeier GmbH*, Order of 27 January 2004.

²⁶ For example, under the Treaty provisions on the area of freedom, security and justice see ch 4, CJ Act III-359 of the Constitutional Treaty.

²⁷ For example, under Reg 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, regarding Reg. EC No 1347/2000, CJ 2003 L 23/1.

More radical suggestions about the treatment of references were made by the Working Group. One was that there were certain special situations where the CFI should be given a preliminary rulings jurisdiction. One of the situations envisaged was references made in the course of national proceedings concerning infringements of Community trade marks. The thinking of the Working Group was that, since the CFI was already dealing with direct actions concerning the registration of such marks, jurisdiction to deal with all cases arising out of the Community-trade mark regulation should be consolidated. The Group seems to have assumed that infringement actions in the national courts could never raise questions of Community law concerning matters other than the effect of the trade mark regulation. That assumption may not have been warranted, for it is not inconceivable that such actions might also involve consideration of the Treaty rules on competition and the free movement of goods. Another important category of proceeding in which the Working Group suggested the CFI might be given a preliminary rulings jurisdiction was cases concerning private international law instruments adopted under Title IV, Part Three, of the EC Treaty.³¹ The Group's thinking here was that these cases would be only indirectly connected with Community law in the strict sense and that they would benefit from being dealt with by specialized judges.

At Nice agreement was reached on a new version of Article 225 EC. Paragraph 3 of the revised text took up the Working Group's suggestion that the CFI should be given a preliminary rulings jurisdiction. It provides as follows:

The Court of First Instance shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute.

Where the Court of First Instance considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the Court of First Instance on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Community law being affected.

The difference between a review of the type contemplated by the third subparagraph of Article 225(3) and an appeal against a decision of the CFI in a direct action lies in the extent to which the parties are involved. Unlike an appeal,³² a review may not be initiated by a dissatisfied litigant. Article 62 of the Statute gives the First Advocate General³³ the task of proposing that the Court review a preliminary ruling given by the CFI where the conditions set out in the third subparagraph of Article 225(3) are met. The proposal of the First Advocate General must be made within one month of the CFI's decision. The Court has a further month in which to decide whether to

³¹ E.g. Reg 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12/1) and Reg 2201/2003 (above p 92).

³² See Statute, Art 56.

³³ The office of First Advocate General rotates annually among the Advocates General.

act on the proposal. If the Court decides to proceed with a review, those involved in the proceedings before the CFI are entitled to lodge written observations with the Court by a common decision.³⁴ Unlike appeals,³⁵ there is no exchange of pleadings.³⁶ The Court may reject the oral procedure if it considers this necessary. Unless the Court decides otherwise, the answer given by the CFI to the questions referred to it do not take effect until the periods laid down in Article 62 of the Statute have expired and, if a review procedure is opened, until it has been completed. Any new answers given by the Court are substituted for those of the CFI.³⁷ The Court is required to give its ruling 'by means of an urgent procedure'.³⁸

Although there never seems to have been serious opposition among the Member States to the principle of giving the CFI a preliminary rulings jurisdiction, they were reluctant to do so without providing for oversight by the Court of Justice. Finding an acceptable mechanism for enabling the Court to have the final say on important questions proved difficult and the detailed procedural rules were not agreed by the Council until autumn 2005.³⁹ One possibility might have been to provide for 'referral in the interests of the law' by a body like the Commission, to enable the Court to give an authoritative ruling for the future independently of any specific case. A mechanism of that type forms part of the modified preliminary rulings procedure applicable since Amsterdam under Title IV, Part Three, of the EC Treaty.⁴⁰ However, there were misgivings about employing such a mechanism to secure oversight of the exercise by the CFI of its preliminary rulings jurisdiction. Essentially the worry seems to have been that it might undermine the credibility of the CFI and the authority of its decisions. If such referrals were instead to be made in response to specific decisions of the CFI, the effect might also be to prolong suspension of the national proceedings, thereby lengthening the overall procedure.⁴¹ The solution chosen by the Member States does not entirely meet these objections. If reviews by the Court of preliminary rulings given by the CFI became at all frequent, the confidence of national judges in the CFI, and their willingness to refer questions to it, might be shaken. Moreover, the Statute would effectively suspend the answers given by the CFI until the review procedure had run its course. That would mean a further delay at least until the First Advocate General had decided what to do. The advantage of a mechanism for referral in the interests of the law along the lines of Article 68(3) EC is that it would allow the Court to address a question outside the confines of a particular case.

An alternative would have been to make the transfer of individual cases within the categories in which the CFI had a preliminary rulings jurisdiction subject to the

³⁴ Statute, Art 62a.

³⁵ See Arts 11, 16-17 of the Court's Rules of Procedure.

³⁶ In this respect, the review procedure resembles reference proceedings before the Court of Justice under Art 134 EC; see Statute, Art 23.

³⁷ Statute, Art 62b, second paragraph.

³⁸ Statute, Art 62a.

³⁹ See Council document 15657/05.

⁴⁰ See Art 65(2) EC, discussed in *et seq*.

⁴¹ See the French Government's contribution to the JSC on the Community Courts, CONF 4726/00, 27 March 2000, 12.

assent of the Court of Justice. The Court might be expected to give its assent in most cases, but it would be in a position to withhold it and deal with a case itself if it thought, perhaps on the advice of the First Advocate General, that it required a decision of principle likely to affect the unity or consistency of Community law. A mechanism of broadly that type was suggested by the French Government in a submission to the IGC.⁴¹ Its main drawback is that it would require every reference to be examined in order to establish whether or not the assent of the Court to its transfer to the CFI should be withheld. It will be noted, however, that the second subparagraph of Article 225(3) imposes precisely that burden on the CFI, since it will need to establish a mechanism for identifying as early as possible those references within its jurisdiction which ought to be transferred directly to the Court of Justice.

At the time of writing, these issues are somewhat academic as the Statute has still to be amended to give the CFI a preliminary rulings jurisdiction in specific categories of case. No formal proposals for such an amendment have yet been formulated due to the difficulty of defining appropriate categories.

Direct actions

Since Maastricht the Treaty has permitted the Council to transfer to the CFI direct actions brought by a Member State or a Community institution. In 1998 the Court proposed that a limited category of annulment actions brought by Member States should be so transferred,⁴² but that proposal encountered a certain amount of opposition among the Member States. In a submission to the IGC, the French Government observed:⁴³

It is important to maintain the principle of the clearest and simplest possible distribution of jurisdiction between the two courts. The French Government does not believe this to be the case under the current proposal. The scope of the proposal also seems very modest in practical terms, since it would only involve transferring around twenty cases a year from the Court of Justice to the Court of First Instance, a figure which would be further reduced by an inevitable number of appeals lodged by Member States or EU institutions in some of those cases.

The principle of the clearest and simplest possible distribution of jurisdiction between the two Courts is a good one, but it cuts both ways. The Working Group said that in principle all direct actions should start in the CFI, even where the validity of normative acts was in issue and the applicant was a Member State or a Community institution. Appeals would be permitted only with the permission of the Court of Justice.⁴⁴ However, the Working Group was unwilling to apply that

rule rigorously, suggesting that the Court should continue to deal as a court of first and last resort with actions where a rapid judgment was essential to avoid serious disruption to the proper functioning of the Community institutions.

One of the categories identified by the Group as satisfying that description was infringement actions under Articles 226-8 EC. The Group did, however, advocate changes in the way such actions were handled in order to reduce the burden they impose on the Court, especially where they are not seriously contested by the Member State concerned. The Working Group argued that the best solution would be to follow the model of Article 38 ECSC. That would have meant giving the Commission the power to record the alleged infringement in a binding decision and leaving it to the Member State to challenge that decision before the Court. The idea was that Member States would be unlikely to go to the trouble of challenging such a decision if they did not think they had an arguable case. Although supported by the Greek Government,⁴⁵ the suggestion was opposed by the French Government on the basis that a Commission decision would not have the same moral authority as a judgment of the Court and that in practice such a decision usually would be challenged, thus defeating the object of the reform.

The Working Group proposed that seven other categories of direct action should continue to go straight to the Court of Justice.⁴⁶ One of them—applications for an opinion on the compatibility with the EC Treaty of a proposed international agreement—is admittedly unsuitable for the two-stage procedure which involving the CFI might entail. However, it is not self-evident that the same is true of the other categories mentioned by the Working Group. The proper functioning of the Community institutions is an important consideration, but so too is the proper functioning of the internal market and protecting the rights of businesses and individuals, matters which the Working Group accepted should be dealt with at first instance by the CFI. Where a particular case is urgent, interim measures may be granted and it may be given priority over others. Moreover, the CFI's Rules of Procedure now permit urgent cases to be dealt with under an expedited procedure derogating from the rules normally applicable.⁴⁷ Those possibilities seem adequate to protect the proper functioning of the institutions without departing from the

⁴¹ See CONFER 4739/90, 4.

⁴² Above n 41 at 14.

⁴³ They were: (i) other types of infringement action, namely State aid cases, cases of alleged breaches of their Treaty obligations by national central banks and improper use by the Member States of the powers provided for in Arts 335 and 297 EC; (ii) annulment actions against decisions of the Council taken in cases of excessive deficit in a Member State; (iii) annulment actions against an authorisation granted by the Council to a Member State wishing to establish closer cooperation; (iv) annulment actions against Council decisions under Art 303 EC suspending a Member State's rights; (v) actions for the annulment of acts affecting the Community budget; (vi) disputes between Member States, or between a Member State and the Commission, under Art 35(7) TEU arising out of the application of Title VI of the TEU; and (vii) applications for an opinion on the compatibility with the EC Treaty of a proposed international agreement. The Commission envisaged that a similar category of direct actions should remain the exclusive preserve of the Court of Justice.

⁴⁴ See Art 76b. Similar amendments were made to the Court's Rules of Procedure, see Art 42a.

⁴⁵ See CONFER 4724/90, 11.

⁴⁶ See House of Lords Select Committee on the European Communities, 'Enlarging the jurisdiction of the Court of First Instance' (Session 1996-99, 13th Report, HL Paper 62).

⁴⁷ Above n 41 at 7.

⁴⁸ See below.

general rule—accepted by the Working Group—that the CFI should be the *juge de droit commun* in direct actions.⁵⁰

The question of the extent to which the CFI should have jurisdiction to deal with direct actions brought by Member States and institutions was left unresolved at Nice. The effect of Article 225(1) EC is that the CFI has jurisdiction in direct actions to the extent laid down in the Statute. The relevant provision of the Statute, Article 51, did not initially change the pre-Nice position. However, within two weeks of the entry into force of the Treaty of Nice, the Court submitted to the Council a draft decision amending Article 51 of the Statute to enlarge the jurisdiction of the CFI in direct actions.⁵¹ The draft decision sought 'to reconcile simplicity, which favours the status of the defendant as the determining factor in jurisdiction, with the adjustments necessary to follow as closely as possible the guiding principle that the Court of Justice ought to retain jurisdiction at first and last instance only in connection with the basic legislative activity of the institutions'. The draft was adopted by the Council in April 2004⁵² and resulted in the transfer to the CFI of direct actions brought by the Member States against some acts and omissions of the Council and virtually all acts and omissions of the Commission.⁵³

Judicial panels

General

A further reform introduced at Nice which could reduce significantly the number of direct actions brought before the CFI was the grant to the Council of a power to create judicial panels to hear certain types of case. Under the first paragraph of Article 225a EC:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice or, at the request of the Court of Justice, and after consulting the European Parliament and the Commission, may create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.

Judicial panels (which would be renamed 'specialised courts' by the Constitutional Treaty)⁵⁴ are 'attached' to the CFI⁵⁵ in the same way that the CFI was originally—but is no longer—'attached' to the Court.⁵⁶ They are established by Council decision laying down the extent of their jurisdiction and rules on the way they are to be organized. Like the CFI, judicial panels establish their Rules of Procedure in

agreement with the Court of Justice. These require the approval of the Council acting by qualified majority. The members of judicial panels are appointed by the Council, acting unanimously. They are chosen, according to the fourth paragraph of Article 225a, 'from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office'. That was previously the criterion laid down for appointment to the CFI. Because the status of judicial panels is inferior to that of the CFI, the second paragraph of Article 224 EC now specifies, as we saw in chapter 1, that the members of the CFI must 'possess the ability required for appointment to high judicial office'.⁵⁷ (emphasis added).

According to Article 225a EC, decisions of judicial panels 'may be subject to a right of appeal on points of law only or, when provided for in the decision establishing the panel, a right of appeal also on matters of fact before the CFI. By virtue of Article 225(2) EC, decisions given by the CFI on an appeal from a judicial panel 'may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a risk of the unity or consistency of Community law being affected'. The review procedure operates in this context in broadly the same way as review of preliminary rulings given by the CFI.⁵⁸ The First Advocate General decides within a month of the CFI's decision whether it should be reviewed by the Court. If the First Advocate General proposes that the decision should be reviewed and the Court accepts the proposal, it may either give final judgment in the case or refer it back to the CFI.⁵⁹ The Statute requires the Court to deal with such cases as a matter of urgency.⁶⁰

The creation of judicial panels makes the title of the CFI inappropriate, since it no longer sits exclusively as a first instance tribunal.⁶¹ The Constitutional Treaty⁶² would therefore rebaptise it the General Court, reflecting a not insignificant rise in its status following the entry into force of the Treaty of Nice. Perhaps as a consequence, Article 226 EC was amended to make specific reference to the CFI. The Nice changes seemed to have the effect of reconstituting the CFI as a body distinct from the Court of Justice. The Constitutional Treaty seems to conceive of the Court, the CFI and the judicial panels as three incarnations of a single institution, a sort of 'Holy Trinity'.⁶³

The Civil Service Tribunal

The first judicial panel to be created was the European Union Civil Service Tribunal (CST),⁶⁴ which exercises first instance jurisdiction in disputes between the Communities and their officials. In 2004, these so-called staff cases represented over

⁵⁰ A similar view was expressed by the CCBE, see *supra* n 25 at 4-5. See also Lehoucq, *supra* n 1 at 405.

⁵¹ See 'Interinstitutional File 2001/0635' (CNS), 13 February 2003. For the opinion of the Commission, see COM(2003) 660 final.

⁵² *Speech 1*.

⁵³ See Art 1-29(1).

⁵⁴ See Art 225 EC, second para.

⁵⁵ See the pre-Nice version of Art 225(1) EC.

⁵⁶ See *supra*.

⁵⁷ *Statute*, Art 62a.

⁵⁸ *Article 62a*.

⁵⁹ It has been argued that the name 'Court of First Instance' is in any event a misnomer because the CFI's decisions on questions of fact are final and it hears appeals against the decisions of quasi-judicial bodies; see the Constitution of the CFI for the purposes of the 1956 IGC, May 1955, Section IV, *Sanity* speaking. However, these 'appeals' are currently regarded as a form of action for annulment.

⁶⁰ See Art 2-23(1).

⁶¹ See Art 1-13(1) and 1-29(1).

⁶² See Dec 2004/752, C/ 2004 L 352/2.

27 per cent of the new cases brought before the CFI, so its caseload will fall significantly as a result of the establishment of the CST. Some staff cases will still find their way to the CFI, however, as appeals may be brought before it against decisions of the CST, although only on points of law.⁴⁴

The CST consists of seven judges appointed by the Council. When appointing judges of the CST, the Council is required to 'ensure a balanced composition of the Tribunal on as broad a geographical basis as possible among nationals of the Member States and with respect to the national legal systems represented'.⁴⁵ The Council acts after consulting a committee 'comprising seven persons chosen from among former members of the Court of Justice and the Court of First Instance and lawyers of recognised competence'. The Council determines the committee's membership and operating rules.⁴⁶ The committee is required to draw up a list containing twice as many names as there are vacancies of candidates 'having the most suitable high-level experience'.⁴⁷

In order to fill the seven initial vacancies on the CST, the Council issued a public call for applications,⁴⁸ which was published in the Official Journal.⁴⁹ The operating rules laid down by the Council did not specify the order in which the committee should list the best qualified candidates. It is understood that the list of the best 24 candidates was presented to the Council in order of merit. At the suggestion of the Presidency (one of whose nationals happened to be in first place), the Council decided to appoint the first seven candidates listed.⁵⁰

In drawing up the procedure for appointing judges of the CST, the Council was clearly influenced by Article III-357 of the Constitutional Treaty, which had been signed by the Member States only days previously.⁵¹ As we saw in chapter 1, that article would require the Member States to consult a panel before appointing members of the Community Courts. If it is true that the Council did not depart from the ranking of candidates drawn up by the committee in appointing the first judges of the CST, the process offers support for the view that the panel referred to in Article III-357 should have been given a right to rank alternative candidates for vacancies on the Community Courts. Although appointments to the Community Courts are considerably more sensitive than appointments to the CST, the Member States do not at present compete with each other for vacancies. The experience of the first appointments to the CST suggests that it is not entirely fanciful to suggest that the Member States might normally accept the preference between alternative candidates expressed by the panel. There is another respect in which the process of

appointing the first members of the CST should be welcomed. Article 224 EC makes it possible for additional judges of the CFI to be appointed. It is sometimes said that it would be difficult to make use of that possibility unless every Member State were given the right to nominate a second judge. It is not obvious why some form of rotation system would not be feasible. However, the precedent of the CST, with only seven judges, suggests that the appointment of fewer than 25 additional CFI judges might not be out of the question even if it involved competition between candidates of different nationality.

The proposed Community Patent Court

In December 2003, the Commission proposed the establishment of a further judicial panel.⁵² To be called the Community Patent Court, it would comprise seven judges with experience in the field of patents and would deal with disputes arising out of the proposed Council regulation on the Community patent.⁵³ The Commission's proposal provided for appeals on questions of both law and fact to be heard by a specialized patent chamber of the CFI composed of three additional judges with special expertise in patent law. Under the judicial arrangements proposed by the Commission, the Community Patent Court, the CFI and the Court of Justice would have jurisdiction in disputes between private parties. Since the Union Courts had not previously enjoyed such jurisdiction, a provision was introduced at Nice to enable it to be conferred on them. Article 229a EC provides:

Without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice in disputes relating to the application of acts adopted on the basis of this Treaty which create Community industrial property rights. The Council shall recommend those provisions to the Member States for adoption in accordance with their respective constitutional requirements.

The Commission's proposal for the establishment of the Community Patent Court was accompanied by a proposal for a decision based on Article 229a conferring on the Court of Justice jurisdiction in certain disputes relating to Community patents.⁵⁴ That jurisdiction would be exercised by the Community Patent Court, subject to oversight by the CFI and, exceptionally, the Court of Justice under Article 225(2) EC. The requirement laid down in the last sentence of Article 229a for adoption of the agreed provisions by the Member States reflects the potential novelty of

⁴⁴ *Source*, Annex I, Art 31.

⁴⁵ *Source*, Annex I, Art 31(2).

⁴⁶ *Source*, Annex I, Art 31(3). For the membership of the first such committee as so established, see Dec 2005/151, OJ 2005 L 32/3. For its operating rules, see Dec 2005/49, OJ 2005 L 21/10.

⁴⁷ *Source*, Annex I, Art 31(4).

⁴⁸ See Dec 2005/159, OJ 2005 L 38/7.

⁴⁹ See OJ 2005 C 17 A/1.

⁵⁰ See Dec 2005/571, OJ 2005 L 193/38, where they are named in alphabetical order.

⁵¹ The Constitutional Treaty was signed on 29 October 2004. The Council decision establishing the CST, which added Annex I to the *Statute of the Court*, was adopted on 2 November 2004.

⁵² See COM(2003) 825 final. A declaration made at Nice by Luxembourg raised the possibility that the OHIM Boards of Appeal might also be converted into judicial panels. A similar suggestion had previously been made by the Commission Working Group. See further Forwood, 'The judicial architecture of the European Union—the challenges of change' in Hofman and Robinson (eds), *A Time European* (2003), ch 7, 87–9.

⁵³ See COM(2003) 412 final. For discussion of the background, see House of Lords Select Committee on the European Communities, 'The Community patent and the patent system in Europe' (Session 1997–98, 16th Report, HL Paper 215).

⁵⁴ See COM(2003) 827 final.

the jurisdiction, but is likely to prove burdensome in a Union of 25 Member States or more. The Constitutional Treaty would accordingly dispense with it.¹³

Appeals from the CFI to the Court

Fears of a substantial growth in the number of appeals led the Community Courts to propose, in their 1999 discussion paper, the introduction of a filtering system. This would have involved the submission to the Court of an application for permission on which it would rule, *ex parte*, before an appeal could be brought. The Courts believed that such a procedure might be particularly appropriate in cases where the questions raised had already been considered by an independent tribunal with jurisdiction to decide issues of both fact and law before they were considered by the CFI. Community trade mark proceedings were mentioned as an example, as were staff cases if what has become known as a judicial panel were set up to deal with them.

The Court's proposal was a bold one because, although a system for filtering appeals is familiar to lawyers trained in the common law and Nordic legal traditions, it is less readily accepted in civil law countries, where the right of appeal is traditionally considered a subjective prerogative of the parties.¹⁴ Moreover, restricting the right to appeal against decisions of the CFI would reinforce its central role in the application of Community law by increasing the number of cases in which its judgments would be final, if not *de jure* then *de facto*. Be that as it may, the Courts' idea was taken up by the Working Group,¹⁵ which noted that appeals to the Court were rarely successful and set out a detailed blueprint for the procedure that might be followed. This involved a requirement that the prospective appellant should show that the case had 'major importance either for the development of Community law or for the protection of individual rights'.¹⁶ The request for permission to appeal would be examined by a chamber of three judges, which would issue a reasoned opinion with or without the involvement of an Advocate General. The final decision on whether or not permission should be granted would be taken by the President of the Court, whose decision would be 'briefly reasoned and not open to appeal'.¹⁷

Perhaps encouraged by the report of the Working Group, the Courts made a formal proposal to the IGC for an amendment to the Treaty maintaining a right of appeal in principle while at the same time enabling the Council to determine the classes of case in respect of which a system for filtering appeals could be introduced.¹⁸ The Courts' proposal is reflected in Article 225(1), second subparagraph,

¹³ See Art 124-364.

¹⁴ See House of Lords Select Committee on the European Communities, 'A European court of first instance' (Session 1987-88, 5th Report, HL Paper 22, para 59 and 179).

¹⁵ And subsequently by the French Government, *ibid.* at 15.

¹⁶ *ibid.* at 179.

¹⁷ A related idea, that the Court should be permitted to choose which questions referred to it by national courts needed to be answered (see the Courts' discussion paper, *ibid.* at 15 at 115-7), was rejected by the Working Group on the basis that it would upset the spirit of cooperation and dialogue

which provides: 'Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute' (emphasis added). That provision makes it clear that decisions of the CFI given in direct actions are not automatically subject to appeal but only to the extent permitted by the Statute.¹⁹ No system for filtering appeals in the strict sense has yet been introduced. However, the Court is the master of whether to review decisions of the CFI where the unity or consistency of Community law is at issue in the circumstances considered above.

The future

The judicial statistics for 2004 provide grounds for optimism that the pressure under which the Court of Justice has been working for so long is abating. That year was the most productive in the Court's history, with 563 cases being brought to a close. The number of cases pending before the Court at the end of that year fell to 840, its lowest level for five years.²⁰ This improvement in the Court's productivity is attributable to a number of factors.²¹ One is the ability of the Court since the entry into force of the Treaty of Nice to deal with straightforward cases without an Advocate General's Opinion.²² Another is the arrival of ten new judges following the May 2004 enlargement of the Union. Although the new Member States will in due course generate new cases, it has been pointed out that 'the increase in the number of judges is proportionally greater than the increase in population of the Union'.²³ A long-term gain in productivity may therefore be anticipated. Following the 2004 enlargement, the Court also made a number of managerial changes to the way in which cases are processed.²⁴ The statistics for the CFI are less encouraging, but the situation there will be significantly improved by the establishment of the CST.

The judicial architecture envisaged at Nice has therefore begun to take shape. The CFI seems to be conceived as evolving into a court of general jurisdiction dealing not only with direct actions brought by natural and legal persons but also with some direct actions brought by Member States and institutions and routine preliminary rulings as well as appeals from judicial panels. The work of the Court of Justice seems likely over time to comprise mainly cases of major significance for

on which the preliminary ruling procedure depends: see above at 16 at 171. It was not pursued by either the Community Courts or the Member States.

¹⁹ It is submitted that the word 'right' in the English text of Art 225(1) has no particular significance, the French text simply providing that decisions of the CFI 'peuvent faire l'objet d'un pourvoi devant la Cour de justice'.

²⁰ *ibid.* See Art 20 of the Court's Statute.

²¹ See Jacobs, 'Recent and ongoing measures to improve the efficiency of the European Court of Justice' (2004) 23 *ELR* 523, 524. The number of cases emerging from the new Member States is likely to reflect economic factors such as export patterns. See *ibid.*

²² See Jacobs, *ibid.*

the development and functioning of the Union;³⁷ the most important direct actions brought by Member States and institutions; the most important cases referred by national courts; appeals from decisions of the CFI which the Court of Justice will itself have selected on the basis of criteria which are likely to include the difficulty and importance of the case; applications for review of CFI decisions where the unity or consistency of Union law is in issue; and applications for an opinion on the compatibility with the Treaty of proposed international agreements. Whether this model of the Union's judicial architecture actually materialises will of course depend on the Member States' willingness to exercise the powers conferred on them at Nice (and preserved largely untouched by the Constitutional Treaty).

There seems to be no room in this configuration for an idea canvassed by the Community Courts in their 1999 discussion paper (although only to indicate their disapproval). It would, if implemented, radically recast the existing system. The suggestion is that decentralized courts should be created with responsibility for dealing with cases arising within their area of territorial jurisdiction.³⁸ Several variants of that theme might be envisaged. The jurisdiction of such courts might be confined to preliminary rulings or direct actions or it might extend to both. Such courts might be responsible for groups of Member States or there might be one for each Member State. In the latter case, the body might be either a national or a Community court.

At least two advantages might be claimed for decentralized courts. One is that they might relieve some of the pressure on the existing Community Courts. The other is that they might be said to bring the administration of Community justice closer to the individuals and firms affected. However, their great drawback is that they would pose a major threat to the uniform application of Community law. As the Union Courts pointed out in their discussion paper:³⁹

Any reorganisation of the preliminary rulings procedure on a national or regional basis... involves a serious risk of threatening the unity of Community law, which constitutes one of the cornerstones of the Union and which will become still more vital and undeniable as a result of enlargement of the Union. Jurisdiction to determine the final and binding interpretation of a Community rule, as well as the validity of that rule, should therefore be vested in a single court covering the whole of the Union.

Similar arguments apply, *mutatis mutandis*, to direct actions.

Some mechanism would therefore have to be devised to ensure oversight by the Union Courts of the decisions of decentralized courts, which would add considerably to the system's cost, complexity and potential for delay. Although a limited number of regional courts might pose less of a threat to uniformity than

decentralized courts in each Member State, it would be extremely difficult, perhaps even impossible, to divide the Union into appropriate regions. That difficulty is especially acute in the enlarged Union, since it would be preferable to avoid regions consisting solely of new Member States. This might preclude geographical contiguity and undermine the idea of bringing justice closer to litigants, who might find the logic behind the allocation of jurisdiction hard to understand.⁴⁰ The idea of decentralized courts was not pursued by either the Treaty of Nice or the Constitutional Treaty.⁴¹

³⁷ See the French Government's contribution on the Community Courts to the pre-Nice IGC, above n 41 at 22.

³⁸ Although the proposed Community Tripartite Court would be entitled to hold hearings in Member States other than the one in which it had its seat see COM(2003) 628 final, 29 and 44.

³⁹ COM(1999) 660 final (Commission opinion on changing the division of jurisdiction in direct actions between the Court of Justice and the CFI) 3-4.

⁴⁰ See Jacobs and Weiler, 'On the road to European union—a new judicial architecture: an agenda for the intergovernmental conference' (1990) 17 CML Rev 185, 193-4; Rasmussen, 'Remedying the crumbling EC judicial system' (2002) 37 CML Rev 1071, 1110-11.

⁴¹ Above n 15 at 13.

APPLICATION FOR AN OPINION ON THE COMPATIBILITY WITH THE PROVISIONS OF THE EC TREATY OF AN INTERNATIONAL AGREEMENT TO BE CONCLUDED BY THE COMMUNITY

I. SUBJECT-MATTER

A. GENERAL

402 Objective. The jurisdiction of the Court of Justice to give opinions under Art.300(6) of the EC Treaty is intended to avoid potential complications arising out of legal disputes concerning the compatibility with provisions of the EC Treaty of international agreements concluded by the Community.¹⁴⁹ The Court has described such complications in the following terms: "[A] possible decision of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in the Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries".¹⁵⁰ Consequently, such opinions perform a preventive function.¹⁵¹ The Court of Justice has described the procedure as "a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the Member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute

¹⁴⁹ The Court of Justice also has the power to give opinions under Art.303 of the EEC Treaty (see ECJ, Ruling 1/75 Draft Convention of the International Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transport [1975] E.C.R. 2151).

¹⁵⁰ ECJ, Opinion 1/75 Draft Understanding on a Local Cart Standard drawn up under the auspices of the OECD [1975] E.C.R. 1355, at 1356-1361.

¹⁵¹ For further details see Kavan, "La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux par la Communauté économique européenne", in *Mélanges offerts à P. Reuter* (Pedone, Paris, 1981), at 357-377; Gattisara, "La compétence consultative de la Cour de justice après les arts 150 et 200" (2002) R.O.U.E., 5, 687-741.

SUBJECT-MATTER

concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Art.164 (now Art.220) of the Treaty, that in the interpretation and application of the Treaty the law is observed".¹⁵² The existence of this judicial procedure, however, does not mean that the Court of Justice will not conduct judicial review *ex post* of the act by which a Community institution intended to conclude an international agreement.¹⁵³ In other words, whilst the procedure for obtaining the opinion of the Court of Justice is intended to obviate the adoption of unlawful acts, if it does not succeed in this, the usual channels for judicial review of the acts in question remain open.¹⁵⁴ To date, the Court has given a limited number of opinions.¹⁵⁵

B. THE EXPRESSION "AGREEMENT ENVISAGED"

Agreement. The term "agreement" in Art.300(6) refers to any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.¹⁵⁶ Provided that it is a "standard" [norm], that is, to say a rule of conduct, covering a specific field, determined by precise provisions, which is binding upon the participants", the Court of Justice has jurisdiction to give an opinion on its compatibility with the provisions of the EC Treaty.¹⁵⁷

12-002

¹⁵² ECJ, Opinion 2/94 Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms [1996] E.C.R. I-1759, para.6.

¹⁵³ ECJ, Case C-32/91 France v Commission [1994] E.C.R. I-1641, paras 15-17.

¹⁵⁴ For the action for annulment, see 7-011 and 7-014, *supra*; for the preliminary ruling on validity, see 10-003, *supra*.

¹⁵⁵ See ECJ, Opinion 1/75 Draft Understanding on a Local Cart Standard drawn up under the auspices of the OECD [1975] E.C.R. 1355; ECJ, Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] E.C.R. 741; ECJ, Opinion 1/83 International Agreement on Natural Rubber [1979] E.C.R. 2591; ECJ, Opinion 1/91 Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] E.C.R. I-607; ECJ, Opinion 1/92 Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1992] E.C.R. I-2821; ECJ, Opinion 1/93 Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work [1993] E.C.R. I-1061; ECJ, Opinion 1/94 Agreement establishing the World Trade Organisation [1994] E.C.R. I-5267; ECJ, Opinion 1/92 Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment [1993] E.C.R. I-321; ECJ, Opinion 1/94 GATT-WTO-Framework Agreement on Sanitary [1995] E.C.R. I-4577; ECJ, Opinion 2/94 Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms [1996] E.C.R. I-1759; ECJ, Opinion 2/00 Cartagena Protocol [2001] E.C.R. I-9713; ECJ, Opinion 1/00 Proposed Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area [2002] E.C.R. I-1453; ECJ (February 7, 2006), Opinion 1/06 New Lugano Convention, 201, yet reported.

¹⁵⁶ ECJ, Opinion 1/75 Draft Understanding on a Local Cart Standard drawn up under the auspices of the OECD [1975] E.C.R. 1355, at 1359-1360.

¹⁵⁷ *Ibid.*, at 1360.

- 12-003 Participation of the Community. Since the Court's power to give opinions is provided for in Art.130 of the EC Treaty, which lays down the Community decision-making procedure with regard to the conclusion of international agreements, the power extends only to agreements in which the Community proposes to participate.¹⁰² This relates to the aim of the opinion procedure, which is "to forestall... legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community".¹⁰³ By the same token, the Court of Justice is entitled to give opinions on the compatibility with the Treaty of mixed agreements to which both the Community and some or all Member States are parties.¹⁰⁴

II. IDENTITY OF THE APPLICANTS

- 12-004 Applicants. The European Parliament,¹⁰⁵ the Council, the Commission or a Member State may request the Court of Justice to deliver an opinion.¹⁰⁶
- 12-005 No obligation. It is optional whether a request for an opinion is made. The Community can validly conclude an international agreement without seeking the opinion of the Court.¹⁰⁷

¹⁰² One commentator considers that it can be inferred from the vague wording of Opinion 2/94 that all "agreements", including those concluded by Member States, may be submitted to the Court of Justice for its opinion (see case note by Newald in (1993) C.M.L.Rev. 1185, at 1180-1191). The possibility has to be ruled out. Unlike Art.103 of the EEC Treaty, the EC Treaty affords no textual basis, therefore. What is more, such agreements are not binding on the Community and hence, if they are subsequently found to be incompatible with the Treaty, there will be no likelihood of the Community incurring liability under international law. In contrast, in the case of mixed agreements, the Court of Justice is entitled to test Member States' obligations against the requirements of Art.130 of the EC Treaty, see Kovar, [a.1993, *supra*], at 356.

¹⁰³ ECJ, Opinion 1/75 Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD [1975] E.C.R. 1355, at 1360.

¹⁰⁴ See, for instance, ECJ, Opinion 1/76 Draft Agreement establishing a European lay-up fund for inland waterway vessels [1976] E.C.R. 741.

¹⁰⁵ The European Parliament has had this power since the entry into force of the Treaty of Nice. For the former position of the European Parliament, see Barents, "The Court of Justice and the EEA Agreement: Between Constitutional Values and Political Realities", in Stuyck and Lofgren (eds.), *The European Economic Area EC-EFTA International Aspects and Financial Services* (Kluwer, Dordrecht, 1994), 57, at 58.

¹⁰⁶ To date, all requests for opinions have been made by the Commission with the exception of ECJ, Opinion 2/92 Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment [1992] E.C.R. I-521 (Belgium); ECJ, Opinion 2/94 Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms [1994] E.C.R. I-1755 (see Kovar); ECJ, Opinion 1/94 GATT-WTO Framework Agreement on Services [1994] E.C.R. I-457 (Germany); ECJ (February 7, 2006), Opinion 1/06 New Legnano Convention, not yet reported (the Council).

¹⁰⁷ Cf. Christakos, "La compétence consultative de la Cour de justice à la lumière du traité de l'Union européenne" (1994) R.M.C.L.E. 37, at 55.

III. SPECIAL CHARACTERISTICS

A. EXTENT OF THE JURISDICTION TO GIVE OPINIONS

Scope of review. The Court of Justice has interpreted its jurisdiction to review "whether an agreement envisaged is compatible with the provisions of the [EC] Treaty" in the sense that its judgement may depend not only on provisions of substantive law but also on those concerning the powers, procedure or organisation of the institutions of the Community.¹⁰⁸ This approach is also expressed in Art.107(2) of the ECJ Rules of Procedure.¹⁰⁹

Review limited to the compatibility of the agreement with the Treaty. The Court's review is limited, however, to the envisaged agreement's compatibility with the Treaty. The requirements imposed upon the Community by international law are not covered. Thus, the Court did not inquire into the provisions establishing the International Labour Organisation to see whether the Community was entitled to join that organisation.¹¹⁰ The opinion procedure is also not intended to solve difficulties associated with implementation of an envisaged agreement which falls within shared Community and Member State competence.¹¹¹ In addition, the review as to compatibility covers only the legal aspects of the envisaged agreement. Judicial review does not extend to political expediency. As a result of the broad compass of the Court's review, conflicting powers often form the basis of requests for opinions.

Review may be limited to parts of the agreement. Alongside the question as to what provisions the Court of Justice reviews the compatibility of an envisaged agreement with the Treaty, the question arises as to whether

¹⁰⁸ ECJ, Opinion 1/75 Draft Understanding on a Local Cost Standard drawn up under the auspices of the OECD [1975] E.C.R. 1355; ECJ, Opinion 1/76 Draft Agreement establishing a European lay-up fund for inland waterway vessels [1976] E.C.R. 741; ECJ, Opinion 1/78 International Agreement on Natural Rubber [1978] E.C.R. 2511, para.30; ECJ, Opinion 2/92 Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work [1992] E.C.R. I-1051, para.3; ECJ, Opinion 2/94 Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms [1994] E.C.R. I-1759, para.9; ECJ, Opinion 1/00 Cartagena Protocol [2001] E.C.R. I-9713, para.3, in which the Court of Justice held that its opinion may be obtained in particular on questions concerning the division between the Community and the Member States of competence to conclude a given agreement with non-member countries.

¹⁰⁹ Art.107(2) of the ECJ Rules of Procedure provides as follows: "The Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement." See also in this connection ECJ (February 7, 2006), Opinion 1/06 New Legnano Convention, not yet reported.

¹¹⁰ ECJ, Opinion 2/92 Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work [1992] E.C.R. I-1051, para.4.

¹¹¹ ECJ, Opinion 2/00 Cartagena Protocol [2001] E.C.R. I-9713, para.17.

in the case of a given request the Court must examine the whole agreement or simply part of it. In Opinion 1/91, the Court, at the Commission's request, considered only the provisions of the envisaged EEA Agreement which related to the system of judicial supervision provided for therein.¹²⁹⁰ In Opinion 1/92, the Court confined its review to those provisions of the EEA Agreement which had been amended following Opinion 1/91 finding the Agreement incompatible with the Treaty, despite the request made by the European Parliament in its observations submitted to the Court that it should consider the influence of the EEA Agreement on the role and powers of the Parliament.¹²⁹¹ In Opinion 1/00, the Court assessed the compatibility with the Treaty of the system of judicial supervision established by an agreement on a European Common Aviation Area. In determining the scope of the assessment requested, the Court considered all the language versions in which the request had been made.¹²⁹²

B. TIME-LIMIT

1-039 Preventive nature. Art.300(6) sets no time-limit. Nevertheless, the preventive nature of these judicial proceedings and the extent of the Court's jurisdiction to give opinions place restrictions on the time within which a request may be made to the Court.¹²⁹³

12-010 Subject-matter of the envisaged agreement must be known. First, a request for an opinion may be made to the Court only as from the time when the subject-matter of the envisaged agreement is known.¹²⁹⁴ It is hard to conceive that the Court would be requested to give an opinion at a time when the subject-matter of the envisaged agreement was still uncertain. But as soon as the subject-matter is known, the Court's opinion may be sought, even before the negotiations have started.¹²⁹⁵ From that time, the Court is in a position to adjudge whether the Community is competent to conclude the agreement in question. Indeed, in the event of any conflicts of jurisdiction it is of essential importance for the Community, the Member

¹²⁹⁰ ECJ, Opinion 1/91 *Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] E.C.R. I-5873, para.1.

¹²⁹¹ ECJ, Opinion 1/92 *Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1992] E.C.R. I-2521, para.10.

¹²⁹² ECJ, Opinion 1/00 *Proposed Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2000] E.C.R. I-3493, para.1.

¹²⁹³ See Kizilgözü, "L'expression 'accord envisagé' dans l'Art.228 (now Art.250), 6 du traité CE" [1998] C.D.E. 126-136.

¹²⁹⁴ ECJ, Opinion 1/63 *International Agreement on Natural Rubber* [1975] E.C.R. 2871, paras 11-14.

¹²⁹⁵ ECJ, Opinion 2/54 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1956] E.C.R. I-755, paras 11-12.

States and third countries or international organisations concerned to be certain about the precise powers of the parties at the beginning of the negotiations.

But the Court will not be in a position to give its opinion on the compatibility of an envisaged agreement so long as it does not have sufficient information about the content and institutional machinery of the agreement. Consequently, a request for an opinion raising the question of the compatibility of an envisaged agreement with the Treaty will be admissible only in so far as the Court can have access to such information.¹²⁹⁶

Community must not yet be bound by the agreement. Secondly, a request may be made to the Court only in so far as the Community is not yet bound by the agreement.¹²⁹⁷ Failing this, the opinion would not play its preventive role.¹²⁹⁸ It makes no difference in this connection at what stage in the process of concluding the international agreement the opinion is sought, provided that the Community is not yet bound by it. Accordingly, an opinion may be obtained from the Court before the Commission has made any recommendations to the Council pursuant to Art.300(1) of the EC Treaty with a view to opening negotiations and before the Council has given it the necessary authorisation. The Court's opinion may also be sought after the negotiations have closed, but before the Council concludes the agreement pursuant to Art.300(2) of the EC Treaty.¹²⁹⁹

If, however, the envisaged agreement is concluded after the request for an opinion was submitted but before the Court has given its opinion, the request becomes devoid of purpose. The preventive intent of the procedure provided for in Art.300(6) of the EC Treaty requires the "envisaged" agreement to be still only envisaged at the time when the Court gives its opinion. Moreover, if the Court were to give an adverse opinion on the compatibility with the Treaty of an agreement which had already been concluded, that opinion would not be capable of having the legal effect prescribed by the second sentence of Art.300(6), namely that, if the Court has given an adverse opinion, the agreement may enter into force only after the Treaty has been amended in accordance with the procedure provided for in Art.48 of the EU Treaty (see 12-014, *infra*). In those circumstances the Court will not respond to the request for an opinion.¹³⁰⁰

¹²⁹⁶ *Id.*

¹²⁹⁷ Koxen (n.1063, *supra*), at 352; Christmann (n.1075, *supra*), at 40-41.

¹²⁹⁸ An opinion dealing with the compatibility with the Treaty of an international agreement which has already entered into force may be given where the Community is not yet bound by it, but is considering acceding to it.

¹²⁹⁹ ECJ, Opinion 1/94 *Agreement establishing the World Trade Organisation* [1994] E.C.R. I-5247, para.12. The Commission requested Opinion 2/00 (ECJ, Opinion 2/00 *Certegans Protocol* [2001] E.C.R. I-9112) after the Protocol had been signed by the Council, but before the Commission had submitted a proposal to the Council for the conclusion of the Protocol.

¹³⁰⁰ ECJ, Opinion 2/94 *GATT-WTO-Framework Agreement on Business* [1995] E.C.R. I-4577.

C. PROCEDURE BEFORE THE COURT

11-012 Special procedure. Since a request for an opinion pursuant to Art.300(6) of the EC Treaty does not introduce normal contentious proceedings, the decision is reached in the Court of Justice in accordance with a special procedure held behind closed doors. It is traced out in Arts 107 and 108 of the ECJ Rules of Procedure. The request for an opinion has to be lodged with the registry. If it is lodged by the European Parliament, it has to be served on the Council, the Commission and the Member States. If it is lodged by the Council, it has to be served on the Commission and the European Parliament.¹⁰⁸¹ If the request is lodged by the Commission, it must be served on the Council, the European Parliament and the Member States. If a Member State requests an opinion, the request has to be served on the Council, the Commission, the European Parliament and the other Member States.¹⁰⁸² The President of the Court prescribes a period within which the Member States which have been served with the request may submit written observations.¹⁰⁸³ It is not possible to apply the expedited procedure in the case of a request for an opinion made pursuant to Art.300(6) of the EC Treaty.¹⁰⁸⁴

12-013 Reasoned opinion. The Court, sitting in closed session, delivers its reasoned opinion after hearing all the Advocates General.¹⁰⁸⁵ No provision is made for a hearing, although the Court may hear the institutions and Member States.¹⁰⁸⁶ The opinion is signed by the President, by the Judges who took part in the deliberations and by the Registrar, following which it is served on the Council, the Commission, the European Parliament and the Member States.¹⁰⁸⁷

IV. CONSEQUENCES

12-014 Adverse opinion. An agreement which the Court of Justice has given an adverse opinion may enter into effect only if the conditions set out in Art.48 of the EU Treaty are complied with. This means first that the EC Treaty must be amended in accordance with the applicable procedure (EC

Treaty, Art.300(6)).¹⁰⁸⁸ Naturally, it is also possible for the envisaged agreement to be amended in consultation with the third countries and international organisations concerned in order to meet the objections raised by the Court.¹⁰⁸⁹

Favourable opinion. A favourable opinion leaves the way free for the Community to enter into the agreement, but naturally does not compel it to do so. However, the opinion does not prevent the legality of the act by which the Community concludes the agreement from being raised in some other judicial proceedings, especially where the opinion considered the compatibility of the agreement with the Treaty only from a clearly specified point of view (see also 12-003, *supra*).

V. THE CONSTITUTION

General. Art.III-325, para.11, of the Constitution provides: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Constitution. Where the opinion of the Court of Justice is adverse, the agreement envisaged may not enter into force unless it is amended or the Constitution is revised".

¹⁰⁸¹ The Member States, as "members" of the Council, are always apprised of the fact that a request is to be lodged.

¹⁰⁸² ECJ Rules of Procedure, Art.107(1).

¹⁰⁸³ ECJ Rules of Procedure, Art.107(1), second subpara.

¹⁰⁸⁴ ECJ (order of the President of April 29, 2004), Opinion 1/04, *Proposed Agreement between the European Community and the United States of America on the processing and transfer of Passenger Name Record data*, not reported. For the expedited procedure, see 24-052 to 24-059, *infra*.

¹⁰⁸⁵ ECJ Rules of Procedure, Art.108(2).

¹⁰⁸⁶ Christians (21075, *supra*), at 41.

¹⁰⁸⁷ ECJ Rules of Procedure, Art.108(1).

¹⁰⁸⁸ For further details, see Xeltrui, "La fonction consultative de la Cour de Justice des Communautés européennes" (1997) R.T.D.E. 553, at 576; Gray, "Advisory Opinions and the European Court of Justice" [1995] E.L.Rev. 24, at 35, who argues that there are only procedural differences between an opinion and a declaratory judgment.

¹⁰⁸⁹ See, for example, the EEA Agreement: the proposed system of judicial supervision was amended following Opinion 1/91 of Opinions 1/92 and 1/92 (n.1067, *supra*).

CRAIG P. DE CURCA, "EU LAW, TEXT, CASES
AND MATERIALS", 4th ED, OUP, 2008.

213-223

up 'special relations of integration' with the EC of the kind referred to by the ECJ in paragraph 42 of its ruling in *Portugal v. Council*.

3. THE ROLE OF THE ECJ IN EU INTERNATIONAL RELATIONS

It is clear from the above discussion of the ECJ's approach to the effect of international agreements in the EC legal order, as well as its approach to the nature and breadth of EC competence and the scope of the OGP in the early years, that the Court has played an active and at times critical role in EU external relations. Below, a broader overview of the Court's role in the important and expanding field of international relations will be provided.

(a) PRE-EMPTIVE JURISDICTION: THE ADVISORY OPINION PROCEDURE OF ARTICLE 300(6)

The most distinctive source of ECJ jurisdiction in the field of international relations is the advisory opinion procedure provided for in Article 300(6) EC.¹⁴

The European Parliament, the Council, the Commission or a Member State may request an opinion of the Court of Justice upon whether any agreement envisaged complies with the provisions of the Treaty, where the opinion of the Court is asked in advance of the agreement being signed or in accordance with Article 48 of the Treaty by the European Council.

The fact that a Treaty amendment is required in the case of a negative opinion indicates clearly that the Court's opinions are binding on the institutions. In its first Opinion, the ECJ outlined the rationale for this advisory procedure, and indicated that the scope of the questions which can form the subject of the request is very broad, and includes questions concerning the competence of the EC to enter the agreement.

Opinion 1/75 (Understanding on a Long-List Standard)
[1975] ECR 1255.

Note: IIA remembering: Art. 228 is now Art. 335.

The compatibility of an agreement with the provisions of the Treaty and of the principles of all the rules of the Treaty, that is to say, both those provisions which determine the powers of the institutions of the Community and those which determine the powers of the Member States.

and in more recent years Cases C-93/7 and C-94/7 *Albayrak* (2001) [ECJ I-1256], para. 52-55; Case C-213/01 *Opinion* (2004) [ECJ I-382], para. 57-68; Case C-115/93 *Demirel* (2005) [ECJ I-4759], para. 58-60; Case C-159/93 *Sotgiu* (1996) [ECJ I-151], para. 35.

¹⁴ And Arts. 181-185 of the European Atomic Energy Community Treaty. While there is no formal Opinion provided by an Advocate General, they are nevertheless heard in Council sessions. For instance, in the proceedings on Opinion 1/75, n. 41 above, 3 Advocates General were heard.

It is the purpose of the second subparagraph of Article 238 (1) to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community. In fact, a possible decision of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context, but also in that of international relations, serious difficulties and might give rise to serious consequences for all interested parties, including third countries.

For the purpose of avoiding such complications, the Treaty had recourse to the exceptional procedure of a prior reference to the Court of Justice for the purpose of elucidating, before the conclusion of the agreement, whether the latter is compatible with the Treaty. This procedure must therefore be open for all questions, capable of submission for judicial consideration, either by the Court of Justice or possibly by national courts, in so far as such questions give rise to doubt, either as to the substantive or formal validity of the agreement with regard to the Treaty.

There is no time limit for the submission of a request under Article 300(5). Moreover, as we have seen, earlier in this chapter, the term 'agreement' has been interpreted broadly so as to include 'any undertaking entered into by entities subject to international law which has binding force, whatever its legal designation'.¹⁹⁴ On the other hand, the ECJ indicated in its Opinion 2/94 on accession to the ECER that the purpose of the agreement envisaged must be known before the Court is in a position to give an opinion.¹⁹⁵ The Court ruled that it was not necessary that the Council should already have adopted a decision to open negotiations, but the Court would need sufficient information concerning the specific arrangements envisaged, such as the proposed mechanism for the judicial control under the ECER. Since no such information was provided for the purpose of Opinion 2/94, the Court ruled that it could not give its opinion on that point.

Once an agreement is signed, the Court is precluded from interfering with an Article 300(6) procedure, although it remains an 'envisaged agreement' until the Community's consent is bound by the agreement. It is finally expressed through its conclusion by the Council.¹⁹⁶ In Opinion 1/94, however, the ECJ did not give an opinion even though the agreement had not yet been concluded, because the Court decided that since the preventive function of the procedure could no longer be achieved, there was no point in responding, and the party which had requested an opinion would instead have to seek amendment of the decision to conclude the agreement.¹⁹⁷

Finally, the ECJ has ruled that once the legal basis on which the Community may act has been established, it is beyond the Court's jurisdiction to engage in a more precise delineation of competence, and in particular the Article 300(6) procedure is not intended to resolve the difficulties associated with the implementation of an envisaged agreement when competence is shared.¹⁹⁸

¹⁹⁴ Opinion 1/93, n. 57 above.

¹⁹⁵ Opinion 2/94, n. 13 above.

¹⁹⁶ Eckhout, n. 58 above, 134.

¹⁹⁷ Opinion 3/94 (Banana Framework Agreement) [1995] ECR I-4377.

¹⁹⁸ Opinion 2/92, n. 17 above, para. 17-18.

(b) JURISDICTION OF THE ECJ OVER INTERNATIONAL AGREEMENTS UNDER OTHER EC TREATY PROCEDURES

International agreements entered into by the EC may form the subject-matter of a reference for a preliminary ruling on a point of interpretation or validity under Article 234 EC. In the first example of such a reference, the ECJ ruled in *Harjoen* that the Community's Association Agreement with Greece was, in so far as the Community was concerned, an act of the institutions within the meaning of Article 234 EC.¹⁹⁹ Therefore, the provisions of the Agreement formed an integral part of Community law and the Court had jurisdiction to give preliminary rulings on their interpretation. In addition to agreements concluded by the Community the Court has asserted its jurisdiction to interpret other acts such as decisions of bodies (like the Turkey-EC Association Council) set up under an agreement,²⁰⁰ as well as non-binding recommendations made under an international agreement.²⁰¹

Unsurprisingly, international agreements and other provisions of international law have been held to be amongst the rules of law to be taken into account in assessing the validity of Community measures. This is clear from the *International Fruit Company* case, which has been discussed above in relation to the direct effect of international agreements, but which is an important case on EC external relations more generally.²⁰² Effectively, by treating international agreements in principle in the same way as internal EC acts, the Court was able to broaden its jurisdiction and permit itself to hear actions for annulment and actions for damages brought on the basis of international agreements. Further, the Court has jurisdiction to give a ruling in the event that Member States fail to fulfil their obligations under an international agreement.²⁰³

The grounds for annulment of an agreement alleged to violate the Treaty are the same as for internal acts, in accordance with Article 230 EC, i.e. lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Thus the alleged infringement may arise from the procedure followed for the conclusion of an international agreement,²⁰⁴ or in the substantive provisions of the agreement,²⁰⁵ or the agreement may be *ultra vires* in the sense that the Community lacked competence to conclude it.²⁰⁶

Since international agreements concluded by the Community are binding upon it, a violation of their provisions may, in principle, form the basis for an action in damages under Article 235 EC. Thus far, however, no such action has been successful. Most of the cases brought have been based on the alleged violation of WTO law, and the ECJ has consistently held that the provisions of the WTO agreements do not form part of the rules by which the ECJ and CJF review the legality of acts adopted by the Community institutions. They do not enable individuals to rely on their provisions before the courts, and their infringement will not give rise to non-contractual liability on the Community's part.²⁰⁷

¹⁹⁹ Case 18/87 *Harjoen*, n. 13 above, para. 4-6.

²⁰⁰ Case C-4/93 *Simmenthal*, n. 137 above.

²⁰¹ Case C-4/93 *Simmenthal* [1993] ECR I-367.

²⁰² *International Fruit*, n. 55 above, 135.

²⁰³ Opinion 1/91, n. 45 above, para. 35.

²⁰⁴ See, e.g., Case C-317/91 *Fraser*, *Greenwich*, n. 14 above.

²⁰⁵ Case C-123/91 *Germany v. Council* [1993] ECR I-473.

²⁰⁶ Case C-127 and 128/92 *European Parliament v. Council* (1993), n. 1 above.

²⁰⁷ See, e.g., 17-18.

Finally, as we shall see in Chapter 11, the Commission may initiate an infringement procedure under Article 226 (and other Member States may do so under Article 227) when it considers that one of the States has failed to respect the obligations contained in an international agreement of the Community. This is true also with regard to the WTO agreements, even though, as we saw in *Portugal v. Council*,²⁰ they are not among the rules which Member States may invoke to challenge the legality of the Community acts.

(C) THE ECJ AND MIXED AGREEMENTS

Although the Court's first ruling on the interpretation of international agreements in the *Haeghe* case concerned a mixed agreement, that fact seemed to play no part in the Court's assessment of its jurisdiction in that case.²¹ The mixed nature of the agreement was invoked for the first time in *Demirel*, concerning the EC-Turkey Association Agreement.

Since the agreement in question is an association agreement creating special privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 et seq., of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding the system of movement to which the powers conferred on the Community by Article 238. Thus, the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement involving a commitment which only the Member States could enter into falls within the Court's own powers does not arise.²²

While this passage seems to suggest that the Court's jurisdiction over mixed agreements covers all cases, with the exception of matters which fall within the exclusive competence of the Member States, it has been argued that in fact the judgment does not address the question of the ECJ's jurisdiction in cases where the relevant provisions of an international agreement have been concluded on the basis of the Member States' power.²³

An opportunity for clarification of this point arose in *Haeghe*,²⁴ in which a preliminary reference was made to the ECJ on a question concerning the interpretation of Article 50 of the TRIPS Agreement, concerning the power of judicial authorities to order provisional measures to prevent certain infringements of intellectual property rights.²⁵ One of the objections raised was that the dispute concerned the application of national trade mark law. The Court replied that it did indeed have jurisdiction, since:

Where a provision can apply both in situations falling within the scope of national law and in situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted

²⁰ Case C-144/84 *Portugal v. Council* [1995] ECR I-4277.

²¹ P. Katsouris, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' [2002] *TEJPA* 11.

²² Case 1/78 *Demirel*, 187 above.

²³ A. Dickinson, 'Preliminary Rulings on the Interpretation of Mixed Agreements', in P. O'Keefe and A. Borge, *Legal Aspects of the European Union of Law* (London: Longmans Green, 1992), 111.

²⁴ Case C-35/95 *Haeghe*, 185 above.

uniformly, whatever the circumstances in which it is to apply... In the present case, as has been pointed out in paragraph 38 above, Article 50 of the TRIPS Agreement applies to Community trade marks as well as to national trade marks.

Since the provision applied also to Community trade marks, the Court ruled that it had jurisdiction to provide an interpretation of the Article.

Some of the questions which persisted after *Haeghe* were addressed by the ECJ in its ruling in *Parfums Christian Dior*, in which Article 50 of the TRIPS Agreement was again at issue. Having repeated various aspects of the ruling in *Haeghe* including the paragraph above, the ECJ went on to extend further the scope of its jurisdiction to rule on Article 50:

Cases C-202 and 39/98 *Parfums Christian Dior*
[2000] ECR I-13207

(Note to A remembering: Art. 50 is now Art. 234)

THE ECJ

By its order of 11 July 2000, the President of the Court has referred to the Court for a preliminary ruling two questions referred to it by the Tribunal de Grande Instance de Paris. The first question relates to the interpretation of Article 50 of the TRIPS Agreement, which provides that judicial authorities shall have the authority to order provisional measures in order to prevent certain infringements of intellectual property rights. The second question relates to the interpretation of Article 50 of the TRIPS Agreement, which provides that judicial authorities shall have the authority to order provisional measures in order to prevent certain infringements of intellectual property rights.

This is a strong and broad assertion of the Court's jurisdiction with regard to the TRIPS Agreement, and the implications and shortcomings of the judgment have given rise to comment.

P. Katsouris, *EU International Relations Law*²⁶

The Court's ruling in *Parfums Christian Dior* is a landmark decision in the interpretation of the TRIPS Agreement. It is a strong and broad assertion of the Court's jurisdiction with regard to the TRIPS Agreement, and the implications and shortcomings of the judgment have given rise to comment.

²⁶ *Id.*, 1005, 201.

in contrast to the expansive jurisdiction which the ECJ has construed for itself within the Community Pillar, Article 45 TEU expressly excludes the CFSP from the jurisdiction of the Court. Some of the key reasons for this jurisdictional exclusion are set out in the following extract:

E. Giesse, *The Intergovernmental Pillars of the European Union* 112

The first mission was that EPC, and the CESP instruments are essentially short-term to characterise and potentially soft-wide-ranging and sensitive. Under these, the laws agreed by the Member States are not designed to establish a permanent framework of mutual legal obligations between Contributing Parties but to conditionally offer a temporary to a specific one-year crisis, a catastrophe or a change of regime or to impose collective discipline on a particular individual regardless of their proclivities over time, and in this case the practice before the Member States to especially to help to ignore them.

The second reason concerned the nature and the record of the ECJ. The judges appeared to the Court having, generally, come to their task from a background of public international law, and they have over the years elaborated doctrines—particularly in the sphere of the external relations of the European Communities—which lay much more emphasis on the Kilgus-Boisot purpose of the Treaties and less on presuming a minimum derogation from individual sovereign powers than a tribunal of international lawyers would have done. The UK was particularly sensitive to the fear that the EC might want accessions to its task—[sic] to be—rather than to ensure ECJ doctrines—[sic] representing for example, the exclusive nature of Community external benefits in the commercial pre-existing regional powers—might find their way into the CFSP.

As we saw above, the CFSP was created to include the area of foreign and security policy within its scope. The possibility of conflict with general parts of Community external competence was foreseen. Article 1 TEU actually envisaged this by listing amongst the EU's objectives:

Despite the jurisdictional exclusion, however, the Court has derived a certain limited scope for judicial supervision from Articles 48 and Article 47 TEU.¹¹³ In the *Airport Transit Visa* case the Court defined its role as being to ensure that acts which fall under the TEU do not encroach upon the powers conferred by the EC Treaty on the Community. The Court ruled that it had jurisdiction to review the content of a measure adopted outside the scope of the Community Pillar, in order to ascertain whether it affected the powers of the Community and to annul the measure if it appeared that it should have been based on a provision of the EC Treaty instead.¹¹⁴ The ECJ effectively used this power in a subsequent case concerning the possible enforcement of EC environmental law through criminal penalties.¹¹⁵

There has however been sustained criticism of the lack of judicial control over the law adopted within the CFSP, in particular on account of the likely consequences for individuals¹² in contrast to the scenario envisaged by Dents, above, an increasing number of CFSP and

၁၁၆ [ဇန်နဝါရီလ ၂၀၁၂၊ ၂၁-၂၃]

312 It has also been argued that since the provisions of the EU Treaty are a matter of legal obligation under international law, the Member States cannot, in theory, bring an action against one another before the International Court of Justice as in *Meo-Carbone v. Germany*. The jurisdiction of the European Court of Justice in disputes of the Member States is laid down in Protocol (2004) 55 (2004) 77.

214. Case C-119/93 Commission v. Ireland, 24 March 1994, paras. 16-17. Although the case concerned a measure adopted under the provisions of the Treaty in connection with the Second Pillar of the EU, there is no reason why the interpretation of Article 47 TEU would not be equally applicable to the CDF.

113 Case C-17625, Commission v. Grand [2022] ECHR-3279.

114 P. Jacobson, 'Does Europe's Commission Step to the Hitler's Edge? Law and Policy in the EU's External Relations', (2005) *Hitler and German Legal Culture*.

¹⁰⁰ 500 U.S. 107 (1991) (quoting *United States v. Gaudin*, 11 F.3d 1061, 1064 (9th Cir. 1994)).

13. *Case 2-23103: Cummings v. Fournier*, 452 B.R. 252 (S.D. Cal. 2011).

٢٠١٤-٢٠١٥

Third Pillar measures have a legislative or quasi-legislative character, and the present limitation of judicial review has been described as 'patently insufficient from the perspective of the rule of law'.¹¹⁷ Perhaps in a partial response to such critiques, the ECJ has read its jurisdiction somewhat more broadly than the Treaty text suggests. As we shall see in Chapter 14, the ECJ ruled in the *Segi/Geronzi Pre-Amministrative* case that, despite the text of Article 35(1) EU which does not mention common positions among the acts which can form the object of a preliminary ruling, the right to make a reference to the Court of Justice for a preliminary ruling exists in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties.¹¹⁸ In the cases in question, the contested common positions had been adopted on a dual legal basis, under both the Second and Third Pillars.

10. COHERENCE, CONSISTENCY AND CO-OPERATION IN THE GOVERNANCE OF EU INTERNATIONAL RELATIONS

One of the key aims of the EU's foreign policy is to co-ordinate a variety of different external activities. As we have already noted, some overlap in competences is inevitable, given that the CFSP covers 'all areas of foreign and security policy'. While not the only or even the most important aspect of foreign policy, consistency is nonetheless a significant goal in the external relations of an entity like the EU which is a relative newcomer to the international scene and which still lacks a coherent and recognizable international identity. In order to establish and shape its international role more effectively, the EU needs to ensure co-ordination on a number of different levels. Below, we will consider some of the different dimensions of this task. Co-ordination needs to be pursued first in the international representation of the EU, secondly, across the different activities and pillars of the EU, and, thirdly, between the Member States and the EU. Finally, we will consider the significance of co-ordination in the context of one important new area of EU foreign policy: the neighbourhood policy.

(a) INTERNATIONAL REPRESENTATION AND THE EU

In order to perform their tasks under the Treaties, the Community and the Union have developed extensive diplomatic relations with other subjects of international law. Almost all States have established diplomatic missions to the Communities (which have been renamed Representative Missions to the European Union), and the Communities maintain relations through Commission 'delegations' in more than 150 States and international organizations. They enjoy customary privileges and immunities under international law. Their task is to communicate the views and to represent the interests of the Communities as a whole. However, in formal terms they receive instructions from and report to the Commission alone.¹¹⁹ As far as international organizations are concerned, Article 325 EC provides that it shall be for the Commission to ensure the maintenance of all appropriate relations with the

organs of the United Nations and its specialised agencies, and with 'all international organisations'.¹²⁰

Several provisions of the TEU aim at organizing the representation of the interests of the Union internationally. Article 18 TEU provides that in matters which come within the scope of the Common Foreign and Security Policy, the Union is represented by the Presidency which is also responsible for the implementation of CFSP decisions. When necessary the Presidency expresses the position of the Union in international organizations and in international conferences. In its duties the Presidency is assisted by the Secretary-General of the Council (who also exercises the function of High Representative for the CFSP) and, if necessary, by the next Member State to hold the rotating Presidency. Moreover, the Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues. The Commission is to be fully associated with the tasks of the Presidency.

Article 19 TEU requires Member States to co-ordinate their action in international organizations and at international conferences as well as to uphold EU common positions in such fora. In international negotiations and at international conferences where not all the Member States participate, those which do take part have particular duties: they are required to uphold EU common positions and to keep the others informed of any matter of common interest. The Member States which are also members of the UN Security Council are required to 'conduct their practice and to keep the other Member States fully informed. Those Member States which are permanent members of the Security Council must, in the execution of their functions, ensure the defence of the positions and the interests of the Union.'

Article 21 provides for the co-operation of the diplomatic and consular missions of the Member States and the Commission delegations in third countries and international conferences, and their representations to international organizations, in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented. This co-operation is to take form of an exchange of information, carrying out joint statements and contributing to the implementation of the EU's common positions and joint actions.

(b) THE REQUIREMENT OF COHERENCE ACROSS PILLARS AND POLICIES

The longstanding division in foreign policy between high politics (e.g., matters of war and peace) and low politics (e.g., economic and other more 'technical' matters) is arguably legally reflected in the pillar structure of the EU. Within the context of globalization, however, the reality of political and economic interconnection prevails over this kind of formal delineation. Perhaps it is this mismatch between the constitutional framework and the practical reality of EU international relations that has kept the theme of 'coherence' at the centre of EU attention, such that it has been described as 'the true recurrent theme of European foreign policy'.¹²¹

The need for coherence is expressed in Article 3 TEU which requires the Union to 'ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies'. It is the role of the 'single institutional framework' to ensure the desired consistency and coherence, and it is the Council and the Commission which have particular responsibility in this regard.

¹¹⁷ *ibid.*

¹¹⁸ Case C-355/04 *P Segi and others v. Council*, 23 Feb. 2005, Case C-583/04 *P Geronzi Pre-Amministrative*, Council, 23 Feb. 2005.

¹¹⁹ *Marshall, Herzig, and Sjoberg*, n. 48 above, 218–219.

¹²⁰ To this end, two offices of liaison have been established in Geneva and New York by the General Secretariat of the Council.

¹²¹ P. Grutler, *International Coherence and the External Competences of the European Union* (2004) 10 *EUJ* 15, 15.

REVIEW OF LEGALITY: ACCESS

1. INTRODUCTION

It is readily apparent from the previous chapters that the EC develops policy through regulations, directives, and decisions. Any developed legal system must have a mechanism for testing the legality of such measures. This chapter is, therefore, concerned with access to justice and review of legality by the Community courts.

There are, as will be seen, a number of ways in which Community norms can be challenged, but the principal Treaty provision is Article 230:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission, and of the ECB other than recommendations and opinions, and acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in regard to: brought by a Member State, the European Parliament, the Council or the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in regard to: brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

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

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

It is evident that four broad conditions have to be satisfied before an act can successfully be challenged. The act has to be of a kind which is open to challenge at all; the institution or person making the challenge must have standing to do so; there must be illegality of a type mentioned in Article 230(1); and the challenge must be brought within the time limit indicated in Article 230(1).

2. CENTRAL ISSUES

1. The judicial interpretation of Article 230 has been problematic, particularly the extent to which private individuals have standing to contest the legality of Community acts. It is, as will be seen, extremely difficult for individuals to challenge the legality of Community action directly before the Community courts.
2. It is also possible for the validity of Community action to be challenged indirectly, via Article 234. The later-relationship between direct challenge under Article 230 and indirect challenge is important. The Community Courts have defended their narrow interpretation of standing for direct actions by arguing that the Treaty provides a complete system of legal protection through a combination of Articles 230 and 234. There are, however, as will be seen, real difficulties with this hypothesis.

3. REVIEWABLE ACTS

(a) THE COMMUNITY PILLAR

Article 230(1) allows the Court to review the legality of acts,¹ other than recommendations and opinions, taken by the institutions listed in Article 230(1).² This clearly covers regulations, decisions, and directives, which are listed in Article 249.³ The ECJ has, however, also held that this list is not exhaustive,⁴ and that other acts which are sui generis can also be reviewed, provided that they have binding force or produce legal effects.⁵

Case 22/70 *Commission v. Council*
[1971] ECR 123

(Note that renumbering: Arts. 113 and 115 are now Arts. 230 and 230)

The Member States being brought, the Council adopted a Resolution on 20 March 1970 to coordinate their approach to the negotiations for a European Road Transport Agreement (ERTA/ASTP). The Commission did not follow the procedure established in the Resolution, and sought to challenge the Council's Resolution under Article 173.

¹ The Court may review acts of the Council which are intended to have legal effects irrespective of whether they have been passed pursuant to Treaty provisions. Case C-316/93 *European Parliament v. Council* (Liberal Convention) [1994] ECR I-611. However, decisions adopted by representatives of the Member States acting not as the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not reviewable under Art. 230. Case C-451 and 452/93 *European Parliament v. Council and Commission* [1995] ECR I-3515. It will be for the Court to decide whether a measure really was an act of the Council or whether it was an act of the Member States acting independently. See also Case C-451 and 452/93 *European Parliament v. Council and Commission* [1995] ECR I-3515.

² Prior to the TUE, Art. 173 as it then was only formally applied to the Council and the Commission, but the ECJ held that the acts of the European Parliament were also susceptible to review by the ECJ. Case 154/83 *Amey European Union v. European Parliament* [1984] ECR I-1339.

³ This includes provisions of an EC law which required or authorized Member States to adopt legislation in breach of, e.g., fundamental rights. Case C-54/93 *European Parliament v. Council* (Family Reconciliation) [1994] ECR I-3749 (Family Reconciliation II).

⁴ See also Case C-57/95 *France v. Commission* (Le Pénitencier de la Prison de la Cour de Cassation) [1997] ECR I-1713. Moreover, in *Commission v. Council* which has the power to take reviewable decisions delegates that power to another institution, the Court will not be prevented from reviewing the acts of such a delegate.

THE ECU

48. As regards negotiating, the Council decided, in accordance with the course of action decided upon at its previous meetings, that the negotiations should be carried out and concluded by the six Member States, which would become contracting parties to the Act.¹

49. Throughout the negotiations and at the conclusion of the Agreement, the States would act in common and would constantly coordinate their positions according to the usual procedure in close association with the Community institutions. In delegation of the Presidency, the State currently occupying the Presidency of the Council acted as spokesman.

50. It does not appear from the minutes that the Commission necessarily objected to the definition by the Council of the objective of its proceedings.

51. On the other hand, it does lodge an express reservation regarding the negotiating procedure, declaring that it considered that the position adopted by the Council was not in accordance with the Treaty, and more particularly with Article 228.

52. It follows from the foregoing that the Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States decided to act in concert outside the framework of the common institutions.

53. It thus seems that in so far as they concerned the objective of the Agreement, and defined by the Council, the proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were assigned to set upon a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the text of the regulations.

54. In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of mitigating the existing differences among the procedures laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements.

55. Hence, the proceedings of 20 March 1970 had a definite legal effect on the relations between the Community and the Member States and on the relations between institutions.

Whether a particular act does produce legal effects may sometimes be controversial, as shown by the ESM case:

Case 50/81 International Business Machines Corporation v. Commission
[1981] ECR 2531

(note to A renumbering: Arts. 65 and 173 are now Arts. 82 and 237)

IBM sought the annulment of a Commission decision of 1975 which had been based on the fact that IBM had initiated competitive proceedings against a number of other companies in breach of Article 85. The latter was accompanied by a statement of the Commission that the company had to justify its position. The Commission's decision of 1975, which impugned IBM, was not an act producing legal effects.

8. In order to obtain annulment, it is necessary to show that the act in question is an act producing legal effects. Article 173 is inapplicable to acts which do not have such effects.

case-law of the Court any measure the legal effects of which are binding on, and capable of affecting, the legal interests of, the applicant by bringing about a distinct change to his legal position is an act or decision which may be the subject of an application under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast, in principle, is immaterial as regards the question whether they are open to challenge under that article.

10. As the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.

11. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure designed to permit the Commission to take the Council to task in its decision on the substance of the case.

12. Furthermore, it must be noted that whilst measures of a purely preparatory character do not themselves have a legal effect, an application for annulment of such measures is not a legal decision which may be challenged by an action. Consequently, the acts in question, which the Commission is proposing to annul, are not legal decisions.

The applicant failed.² The letter was merely the initiation of the competitive procedure, a preparatory step leading to the final decision at a later stage. The statement of objections did not, in itself, alter IBM's legal position, although it might indicate, as a matter of fact, that it was in danger of being forced later.³

The general principle is that a reviewable act will have legal effect until it is set aside by the ECJ or the CFJ,⁴ and the challenge must be brought within the time limit specified in Article 230(5). The exception is where acts are tainted by particularly serious illegality and are deemed to be 'non-existent'. Three consequences flow from the description of this which the normal time limits for challenge do not apply, since the act cannot be cloaked with legality by the passage of time; such acts do not have any provisional legal effects; and non-existent acts are not actually susceptible to annulment, because there is no 'act' to annul.

A judicial finding that an act is non-existent will, however, have the same effect in practice as if it had been annulled. Thus in *EASAG* the CFJ found that a Commission decision in competition proceedings against the FWO cartel was non-existent because the Commission could not locate an original copy of the decision duly authenticated in the manner required by the Rules of Procedure; it appeared that the Commissioners had not agreed on the precise text of

¹ See also Cases C-113 and C-118 *Autres Entreprises v. Commission and Council* [1990] ECR I-773; Case C-181/85 *2 Gebroeders Aankomende, Commission* [1992] ECR I-523; Case T-554/83 *Sabena, Council* [1977] ECR II-549; Case T-41/87 *Argenteaux Industrie, Commission* [1991] ECR II-1003; Case C-153/95 *Arruy, Commission v. Commission* [1996] ECR I-719; Case C-182/95 *United Kingdom v. Commission* [1999] ECR I-3385; Case T-377, 378, 310/96, 140, and 171/97 *Polly Media International Inc v. Commission* [2003] ECR II-I; Case C-442/92 *Pontepare, Republic v. Commission* [2004] ECR I-3713; Case C-132/93 *R. J. Agard v. Tribunal Judicial* [2004] ECR I-1755.

² Compare Case 15/15 *AGZO Chemik JV v. Commission* [1974] ECR 1985 and Case C-20/93 *P. Sordani, Principale de l'Equipe Internationale (PSE) v. Commission* [1994] ECR I-2541. See also Cases T-10-13 and 15/92 *In Commission v. Council and others v. Commission* [1992] ECR II-2469; Case C-25/91 *R. Minkler v. European Parliament* [1993] ECR I-471; Case C-410/95 *John Holding SA, Finat SA and Marimor SA v. Commission* [1996] ECR I-2478; Case T-123/96 *Loy Inductor Ltd v. Commission* [1997] ECR II-2571.

³ Case C-113/93 *2 Gebroeders Aankomende, EASAG* [1994] ECR I-2385.

⁴ Cases T-15, 16-18, 22, 51-52, 54, 55, 56, 57, and 104/87 *EASAG v. Commission* [1992] ECR II-312.

the decision and it had been altered after it had been formally adopted. The non-existence of a measure should, said the CFI, be raised by the Court of its own motion at any time during the proceedings. The ECJ took a different view as, despite the defects being so serious as to make the act non-existent, but the decision was limited by sufficient irregularity to be annulled.

(b) THE COMMUNITY PILLAR, THE SECOND PILLAR, AND THE UNITED NATIONS

There have recently been difficult cases concerning the reviewability of acts, where the challenged Community action is designed to implement directly a Security Council resolution. This is exemplified by the *Kadi* case.¹⁰ The applicant challenged a Community regulation, made in furtherance of a measure under the CFSP, which froze the funds of those suspected of supporting Al-Qaida. The regulation was passed pursuant to Security Council Resolutions which established a Sanctions Committee to designate those who should be subject to such freezing orders. The applicant's name was included on the list and his assets in the EU were frozen in accord with a Community regulation. He argued that he was never involved in the provision of financial support for terrorism. The CFI held that the contested regulation could be based on Articles 60, 301, and 308 EC. The case has been considered in relation to fundamental rights¹¹ and supremacy.¹²

So far as to say for the present that the CFI declined to exercise generalized review of the contested Community regulation for compliance with fundamental rights as protected by the Community legal order, since this would entail indirect review of the Security Council Resolutions for compliance with those rights, but the CFI held that it could review the Security Council Resolutions for compliance with *ius cogens*, since this was a body of higher rules of international law binding on all, including the United Nations. This did not however avail the applicant, even though there was no right to be heard before the Sanctions Committee placed a person on the list, and even though there was no judicial remedy available to the applicant. The case highlights the pressing need for administrative law safeguards at the international level.¹³

The CFI however distinguished *Kadi* in the *Medjhedine* case.¹⁴ In the latter case the applicant's funds were frozen pursuant to a Community regulation enacted in furtherance of a UN Security Council Resolution, but there was nothing at UN level that specifically named the applicant organization as one that supported terrorism. This decision was made by the EC pursuant to its own regulation. The CFI held that this served to distinguish the *Medjhedine* case from *Kadi*, and therefore the normal principles of judicial review, such as the obligation to state reasons, the right to effective judicial protection, and the right to a fair hearing, could, in principle, be applied to the instant case.¹⁵

¹⁰ Case C-402/02 *Kadi*, [2005] ECR I-3645.

¹¹ Case T-315/01 *Sanjiv Chandra Kadi v. Council and Commission* [2005] ECR II-3445. See also Case T-340/01 *Abdel Aziz Al-Jarrah v. Council and Commission* [2005] ECR II-3531.

¹² See 285, 290.

¹³ See 344.

¹⁴ J. Kingburg, N. Krück, and T. Stöven, 'The Emergence of Global Administrative Law' [2005] 64 *CFP* 55.

¹⁵ Case T-228/02 *Organisation des Modjahedines de la Paix v. Council*, 11 Dec. 2004.

¹⁶ *Id.*, paras. 38-40; Case T-71/02 *Sumitomo Bank*, 11 July 2007.

(c) THE THIRD PILLAR

The ECJ has, since the T.A., been given limited power under Article 35(5) TEU to review the legality of framework decisions and decisions made pursuant to the re-modelled Third Pillar dealing with Police and Judicial Co-operation in Criminal Matters (PJCCM). Action can be brought by the Commission or a Member State within two months of the publication of the measure.¹⁶ Article 35(5) TEU however prevents the ECJ from reviewing the validity or proportionality of operations by the police or law enforcement agencies, or the exercise of responsibilities of Member States with regard to the maintenance of law and order, and the safeguarding of internal security. It is noteworthy that the *Strejcek* case¹⁷ states that there can be difficulties in ensuring review of agencies established by the Council under the Third Pillar, more especially where the measure sought to be reviewed is not a framework decision or a decision. The ECJ has however been creative in its construction of Article 35, as shown by *Canal*.¹⁸

Case C-154/04 P *Bostoyan Pri Araratian, Diako and Erastov v. Council* 20 February 2007

The case concerns a challenge to a decision of the Council of the European Union, adopted pursuant to the Treaty of Amsterdam, which established the European Agency for the Operational Cooperation in the Field of Railway Safety (ERA). The applicant, a company, claimed that the decision was unlawful because it was adopted in breach of the principle of proportionality. The Council had decided to establish the ERA as an agency, rather than as a body of the European Union. The applicant argued that this was disproportionate because the ERA's tasks could be performed by existing bodies of the European Union. The Council responded that the ERA was necessary to ensure the safety of the railway system in the EU, and that it was the most appropriate way to achieve this. The ECJ was asked to review the Council's decision. The ECJ held that the Council's decision was lawful. It found that the ERA's tasks were of a technical nature, and that it was necessary to have a specialized body to deal with them. The ECJ also found that the Council's decision was proportionate, as it was necessary to achieve the objective of ensuring the safety of the railway system. The applicant's claim was dismissed.

¹⁶ The ECJ can also review acts made under the TEU where it is claimed that they should have been passed under the EC Treaty. Case C-175/95 *Commission v. Council (Airport Trunk Road)* [1998] ECR I-3163; Case C-475/01 *Commission v. Council (Criminal Justice)* [2003] ECR I-3179, para. 39.

¹⁷ Case C-162/03 *Strejcek v. European Council* [2005] ECR I-2377.

¹⁸ See also Case C-155/04 P *Sipr, Enjap and Gelovany v. Council*, 27 Feb. 2007.

Given that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would be contrary to that objective to interpret Article 235 narrowly. The right to make a reference to the Court for a preliminary ruling must therefore extend in respect of all measures adopted by the Council or the Commission: their nature or form, which are intended to have legal effects, is a factor and not a bar.

54. As a result, it has to be possible for the subject-matter to be reviewed by the Court even if the provision which, because of its content, has a scope beyond that assigned by Article 235, results in that kind of act. So, a national court hearing in dispute which it raises a point of doubt with this aim, common position is ready to produce legal effects in relation to the law, and it would be able, subject to the conditions laid by Article 235, to ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the common position is intended to produce legal effects in relation to the law, and to give a preliminary ruling.

55. The Court would thus have jurisdiction to review the legal effects of a common position which has been brought by a Member State to the Court for review on the grounds set out by Article 235.

The broader implications of the limits on review under the Second and Third Pillars for the issue of how far there is a complete system of legal protection will be considered below.¹¹

4. ARTICLE 230(2): STANDING FOR PRIVILEGED APPLICANTS

Article 230(2) states that the action may be brought by a Member State, the European Parliament, the Council, or the Commission. It appears from this that these applicants are always allowed to bring an action, even where the decision is addressed to some other person or body. EC law does not oblige a Member State to bring an action under Article 230 or 232 for the benefit of one of its citizens, although EC law does not preclude national law from containing such an obligation.¹²

The status accorded to the European Parliament in review proceedings altered over time. Prior to the TEU it was not accorded any formal privileged status. In the 'Commonity' case¹³ the ECJ rejected the Parliament's argument that it should have the same unlimited standing as other privileged applicants. The issue was considered again in the 'Chernobyl' case,¹⁴ where the ECJ took a different view and held that the EP could have a quasi-privileged status as to protect its own prerogatives. Article 173(3), as it then was, was re-drafted in the TEU so as to reflect the legal position in the Chernobyl judgment: the Parliament had standing to defend its own prerogatives.¹⁵ The Nice Treaty has now added the European Parliament to the list of

¹¹ See below, 523-527.

¹² Case C-51/90 *McIntosh v. The State*, [1991] ECR II-4773.

¹³ Case 204/77 *European Parliament v. Council*, [1978] ECR 5835.

¹⁴ Case C-42/86 *European Parliament v. Council* (Chernobyl), [1988] ECR I-2441. See also Case C-456/93 *European Parliament v. Commission* (Common Production), [1995] ECR I-1419; Case C-11/93 *European Parliament v. Council* (Shipment of Milk), [1994] ECR I-2155; Case C-162/93 *European Parliament v. Council* (Common Commercial Policy), [1994] ECR I-1195.

¹⁵ For discussion of this phrase, see K. Se, *Brady, Moore and Smith*, *Parliamentary Council Legislation* [1991] 36 *ELRev* 243; L. Walker, *Prize and Prejudice—Parliamentary Council*, [1991] 16 *ELRev* 324; G. Tava, *The Standing of the European Parliament in the Community System of Legal Protection: A Theory of Jurisdictional Development* [1992] 10 *JEL* 171.

privileged applicants. The Court of Auditors and the European Central Bank (ECB) remain covered by Article 230(3), so that they only have standing to defend their own prerogatives.¹⁶

5. ARTICLE 230(4): STANDING FOR NON-PRIVILEGED APPLICANTS

In many of the cases considered below the Court refers to Article 173(1) EC, which was the provision on standing for non-privileged applicants prior to the TEU, or Article 173(4), which was the relevant provision after the TEU. The matter is now governed by Article 230(4), but there has been no change in wording. Article 230(4) allows non-privileged applicants to seek review in three types of case.

The first is straightforward: the addressee of a decision can challenge it before the ECJ or CJL. The second is where there is a decision addressed to another person, and the applicant claims that it is of direct and individual concern to him or her. The third type of case is where there is a decision in the form of a regulation, and the applicant claims that it is of direct and individual concern to him or her. Litigation has, not surprisingly, been primarily concerned with categories two and three.

Article 230 does not on its face allow any challenge by non-privileged applicants to directives. It has nonetheless been held that the mere fact that the measure is a directive will not in itself render the action inadmissible, since the Community institutions cannot, by their choice of legal instrument, deprive the applicant of judicial protection. An applicant will however have an uphill struggle to convince the Community courts that it is individually concerned.¹⁷

(a) DIRECT CONCERN

An applicant must show that the decision was of direct concern if it is to be successful standing. The general principle is that a measure will be of direct concern where it directly affects the legal situation of the applicant and leaves no discretion to the addressee of the measure, who are entrusted with its implementation. This implementation must be automatic and result from Community rules without the application of other intermediate rules.¹⁸ It can be difficult to determine whether there is some autonomous exercise of will interposed between the original decision and its implementation.¹⁹

¹⁶ For discussion of the status of the ECB see A. Craig, 'EMU, the European Central Bank and Judicial Review', in Z. Douglas and N. Walker (eds.), *Legal Framework of the Single European Currency* (1993), 113-132.

¹⁷ Case C-350/85 *Guinness v. Council*, [1991] ECR I-1005; Case T-33/84 *Association Espagnole de Exportation de Cerveaux (AUEC) v. Council*, [1984] ECR II-4713; upheld on appeal, Case C-15/85 P [1985] ECR I-4149; Case T-35/84 *CEAFAH v. Council*, [1988] ECR II-1225, para. 52; Case T-172/10, 115, and 171/88 *Salvador AG v. Parliament and Council*, [2000] ECR II-1417; Case T-34/84 *EEB v. Commission*, [2000] ECR II-4523.

¹⁸ Case C-346/93 *Société Industrielle de Cerveaux v. Commission*, [1994] ECR I-2809; Case T-34/84 *EEB v. Commission* (see footnote 17); Case T-33/84 *Association Espagnole de Exportation de Cerveaux v. Council*, [1984] ECR II-4713; Case T-45/89 *Salvador AG v. Parliament and Council*, [2000] ECR II-1417; Case T-34/84 *EEB v. Commission*, [2000] ECR II-4523; Case T-34/84 *EEB v. Commission*, [2000] ECR II-4523, para. 34; Case C-156/94 *Región Autónoma de Murcia v. Council*, [1994] ECR I-1195.

¹⁹ See, e.g., Case T-12/85 *David Geronzi & Société Générale de Crédit Agricole v. Commission*, [1985] ECR II-1347; Case T-35/81 *Comité Central d'Exportation de la Société Générale des Grands Services v. Commission*, [1981] ECR II-1211; Case T-33/84 *Association Espagnole de Exportation de Cerveaux v. Council*, [1984] ECR II-4713, and 171/88 *Salvador AG v. Council*, [1988] ECR II-1225, para. 52.

Cases 41-44/70 *NV International Fruit Company v. Commission*
[1971] ECR 411

The Community adopted a regulation which limited the import of apples from third countries from 1 April 1970 to 30 June 1970. The regulation provided for a system of import licences, which were granted to the extent to which the Community market allowed. Under this system, a Member State notified the Commission, at the end of each week, of the quantities for which import licences were requested during the preceding week. The Commission then decided on the issue of licences in the light of this information. The challenge was to a regulation applying this scheme to a particular week. The ECJ found individual concern and then considered whether the applicant was directly concerned.

THE ECJ

23. Moreover, it is clear from the system introduced by Regulation No 456/70, and particularly from Article 2(2) thereof, that the decision on the grant of import licences is a matter for the Commission.

24. According to this provision, the Commission alone is competent to assess the economic situation in the light of which the grant of import licences must be justified.

25. Article 1(2) of Regulation No 456/70, by providing that the Member States shall, in accordance with the conditions laid down in Article 2, issue the licence to any interested party applying for it, makes it clear that the national authorities do not enjoy any discretion in the matter of the issue of licences and the conditions on which applications by the parties concerned should be granted.

26. The duty of such authorities is merely to collect the data necessary in order that the Commission may take its decision in accordance with Article 2(2) of that regulation, and subsequently adopt the national measures needed to give effect to that decision.

27. In these circumstances as far as the interested parties are concerned, the issue of or refusal to issue the import licences must be bound up with this decision.

28. The measure whereby the Commission decides on the issue of the import licences thus directly affects the legal position of the parties concerned.

29. The applicants thus fulfil the requirements of the second paragraph of Article 173 of the Treaty and are therefore admissible.

The decision in the *International Fruit case*¹⁴ can be compared with the following judgment by the Court:¹⁵

Case 122/83 *Municipality of Dillender v. Commission*
[1984] ECR 2855

The Commission authorised Luxembourg to grant aid to steel firms, on the condition that they undertake reductions in capacity. The applicant municipality argued that it was directly and individually concerned by this decision, insofar as the ground that the reduction in production capacity and closure of factories would lead to a reduction in local taxes.

¹⁴ See also Case 157/75 *Agropur v. Commission* [1976] ECR 1251, para. 11; Cases 7-10/76 *Freiburg Seifen- und Fettfabrik v. Commission* [1976] ECR II-3661, para. 15-16; Case 7-56/73 *Land Rheinland-Pfalz v. Commission* [1973] ECR II-1075, para. 23.

¹⁵ See also, e.g., Case 87/83 *Alcoa v. Commission* [1979] ECR 365; Case 42/73 *Jack v. Commission* [1971] ECR 157.

THE ECJ

10. In this case the contested measure, which is addressed to the Grand Duchy of Luxembourg, authorises it to grant certain aids to the undertakings named therein provided that they reduce their production capacity by a specified amount. However, it itself indicates the establishments in which the production must be reduced or terminated and the factories which must be closed as a result of the termination of production. In addition, the Decision states that the Commission was to be notified of the closure dates only by 31 January 1984 so that the undertakings affected were free until that date to fix, where necessary with the agreement of the Luxembourg government, the detailed rules for the restructuring necessary to comply with the conditions laid down in the Decision.

11. That conclusion is, moreover, confirmed by Article 3 of the Decision according to which the capacity reductions may also be carried out by other undertakings.

12. It follows that the contested Decision left to the national authorities and undertakings concerned such a margin of discretion with regard to the manner of its implementation and in particular with regard to the choice of factories to be closed, that the Decision cannot be regarded as being of direct and individual concern to the municipalities with which the undertakings affected, by virtue of the location of their factories, are connected.

While applicants must therefore show direct concern, they have encountered greater difficulties in proving individual concern. It is to this issue that we now turn.

3) INDIVIDUAL CONCERN: CHALLENGE TO
DECISIONS ADDRESSED TO ANOTHER PERSON

Case 25/67 *Staubmann & Co. v. Commission*
[1962] ECR 95

In 1957 the German Government requested the Commission to authorise it to succeed the collection of duties on chemicals imported from non-member countries. The Commission refused the request, and addressed its answer to the German Government. The applicant was an importer of chemicals, who contested the legality of the Commission's decision. The ECJ stated that the right of interested parties to bring an action should not be interpreted restrictively. It then set out the following test for individual concern:

THE ECJ

Persons 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 by reason of circumstances in which they find themselves in relation to the persons and by virtue of these facts and circumstances their situation is justiciable in the case of the persons addressed. In the present case the applicant is affected by the contested Decision in an individual capacity, the fact being by reason of a circumstance of fact which may at any time be prejudiced by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

For these reasons the present action for annulment must be declared inadmissible.

The *Plaumann* test is still the leading authority. It is therefore important to dwell on the test, and its application, so as to understand why private applicants have found it so difficult to succeed.

(i) The *Plaumann* Test: Pragmatic and Conceptual Difficulties

The test itself is encompassed in the first sentence in the paragraph. This emphasises that applicants who claim to be individually concerned by a decision addressed to another can do so only if they are in some way differentiated from all other persons, and by reason of these distinguishing features singled out in the same way as the initial addressee. The test nonetheless recognizes that it is possible for there to be more than one applicant who is individually concerned. The application of the test to the facts is contained in the second sentence of the extract: the applicant failed because it practised a commercial activity that could be carried on by any person at any time. This reasoning can be criticised on both pragmatic and conceptual grounds.

In pragmatic terms the application of the test is economically unrealistic. If there are, for example, only a very limited number of firms pursuing a certain trade this is not fortuitous, but is the result of the ordinary principles of supply and demand. Even if there should be a sudden surge of desire for demeritines, the result will normally be that the existing firms will import more of the produce. The argument that the activity of importing demeritines can be undertaken by any person, that the number might alter significantly, and that therefore the applicant is not individually concerned is thus unconvincing. Moreover, even if there were incentives for other traders to enter the relevant industry, this might still take some considerable time, and might well not occur during the period of application of the contested decision.¹⁴

The ECJ's reasoning is also open to criticism in conceptual terms, since it renders it literally impossible for an applicant ever to succeed, except in a very limited category of retrospective cases. The *Plaumann* test has to be applied at some point in time. There are only three choices. The relevant question could be asked when the contested determination was made, when the application for review was lodged, or at some future, undefined date. It has been held that the test for standing must be judged when the application for review was lodged.¹⁵ This is indeed sensible. However it is sound comfort to the applicant in a *Plaumann*-type case to be told that standing will be judged at the time the application is lodged, but then to be told the application fails because the activity of demeritine-importing could be carried out by anyone at any time. On this reasoning no applicant could ever succeed, subject to the caveat considered below, since it could always be argued that others might engage in the trade at some juncture. This serves, in reality, to shift the focus to choice three: some future, ill-defined date. The 'possibility' of becoming individually concerned is like a mirage in the desert, ever receding and never capable of being grasped.

(ii) Open and Closed Categories: Pragmatic and Conceptual Difficulties

The preceding argument might be opposed by contending that the applicant in *Plaumann* was properly rejected, since he was a member of an open rather than closed category of applicants, and hence was not individually concerned. Open categories are regarded as those in which the

membership is ascertained at the time of the decision; a closed category is one in which it is thus fixed. There are however practical and conceptual problems with this reasoning.

In practical terms, the language of open categories is used to rule out standing for any applicant, even if there is only one potential number presently engaged in that trade, on the ground that others might undertake the trade thereafter. If the presence of such potential future traders renders the category open, this ignores the practical economics that determine the number of those who supply a product.

In conceptual terms, to regard any category as open merely because others might notionally undertake the trade leads to bizarre results, since any decision with a future impact would be unchallengeable because the category would be regarded as open. The *Plaumann* test is based on the assumption that some people have attributes which distinguish them from others, and that they possess these attributes when the contested decision is made. The fact that others might acquire these attributes later, by joining that trade, does not mean that they are presently part of that category. The matter can be put quite simply. The fact that I may wish to become striker for England, a great pianist, or a demeritine importer does not mean that I currently have the attributes associated with any of these roles in life.

(iii) The Restrictive Impact of the *Plaumann* Test

The *Plaumann* test has effectively prevented virtually all direct actions brought by private parties to challenge decisions addressed to others,¹⁶ except where the challenged decision had a retrospective impact.¹⁷ The ECJ and CJ have reiterated the *Plaumann* test for individual concern and applied it in the same manner as in *Plaumann* itself. Many of the cases concerned challenges to decisions made under the Common Agricultural Policy. The Community Courts however applied the test in other areas, as exemplified by the *Greenpeace* case.

Case T-545/93 *Siliching Greenpeace Council* (*Greenpeace International*) v. Commission [1995] ECR II-7225¹⁸

The applicant sought the annulment of a Commission decision granting financial assistance from the European Regional Development Fund for the construction of two power stations in the Canary Islands. The applicants were individual fishermen, farmers, and scientists, and also environmental interest groups, concerned by the impact of the development on tourism, agriculture and fisheries. The applicants argued that the ECJ should interpret *Plaumann* liberally. They also argued that standing because of detriment would be suffered from the harmful effects of the development.

¹⁴ Case 1/94 *Chenavari Ribeiro v. Commission* [1994] ECR 413; Case 34/94 *Calvé-Jungert Gesellschaft v. Commission* [1995] ECR 343; Case 1/97 *Finelli-Patrucco v. Commission* [1997] ECR 347; Case 37/95 *Union Democrite Libanais v. Commission* [1997] ECR 1269; Case 24/94 *CFR v. Council* [1994] ECR 6253; Case 19/93 *Co-France Ltd v. Commission* [1994] ECR 772; Case 204/87 *Lafont v. France* [1988] ECR 275; Case T-31/93 *John Schepers v. Commission* [1993] ECR II-479; Case T-45/93 *Arbeitsgemeinschaft Deutscher Jagdschutzvereine und Jagd-Sport-Fachverbände v. Commission* [1994] ECR II-175.

¹⁵ Cases 106 and 107/93 *Alfred Dupuy and Cornil-Frédéric Guichet v. Commission* [1993] ECR 425; Case 21/93 *Jack v. Commission* [1993] ECR 197; Case 1/92 *Finelli-Patrucco*, n. 30 above.

¹⁶ Upheld on appeal: Case C-71/95 *P. Siliching Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR I-1551. See also Case T-137/94 *Associação Agrária da Província de Beira v. Commission* [1995] ECR II-435; Case T-60/95 *Morck & Co. Ltd v. Commission* [1997] ECR II-449; Case T-151/95 *E. Davidson v. Commission* [1995] ECR II-3021.

¹⁴ A point made by the applicant in Case 1/97 *Finelli-Patrucco v. Commission* [1997] ECR 347, although ignored by the ECJ.

¹⁵ Case T-1654 *City of Exeter Ltd v. Commission* [1998] ECR II-757, para. 35.

environmental effects of the Commission's unlawful conduct. The CJ held that the Plaumann test was applicable in respect of the nature, economic or otherwise, of the applicant's interest which was affected. It then continued as follows:

THE CJ

53. Consequently, the criterion which the applicants seek to have applied, restricted merely to the existence of harm suffered or to be suffered, cannot alone suffice to confer locus standi on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be distinguished in advance in a way which distinguishes them individually in the same way as the addressees of a decision, in accordance with the case-law cited above (Plaumann etc.). That conclusion cannot be affected by the fact, put forward by the applicants, that in the practice of national courts in matters relating to environmental protection locus standi may depend merely on their having a 'sufficient interest', since locus standi under the fourth paragraph of Article 173 of the Treaty depends on meeting the conditions relating to the applicants' being directly and individually affected by the contested decision. (The CJ then considered whether the applicants had standing judged by the Plaumann test.)

54. The applicants are 16 private individuals who rely either on their objective status as local residents, 'fishermen' or 'farmers' or on their position as persons concerned by the consequences which the building of the two power stations might have on local tourism, on the health of Canary Island residents and on the environment. They do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision, in so far as it grants financial assistance for the construction of two power stations..., is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned.

(The CJ then considered whether the applicant associations such as Greenpeace could have standing.)

55. It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned... by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually... Furthermore, special circumstances such as the role played by an association in a procedure which led to the adoption of an act within the meaning of Article 173... may justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure....

60. The three applicant associations, Greenpeace, TEA and ECO, claim that they represent the general interest, in the matter of environmental protection, of people residing on Gran Canaria and Tenerife and that their members are affected by the contested decision; they do not, however, adduce any special circumstances to demonstrate the individual interest of their members as opposed to any other person residing in these areas. The possible effect on the legal position of the members of the applicant associations cannot, therefore, be any different from that alleged by the applicants who are private individuals. Consequently, in so far as the applicants... who are private individuals cannot... be considered to be individually concerned... nor can the members of the applicant associations....

The CJ examined whether the associations could come within the exception mentioned in the second part of paragraph 55 and decided on the facts that they could not.

(G) INDIVIDUAL CONCERN: CHALLENGES TO REGULATIONS

The other problem of access is where an individual asserts that, although the challenged measure is in the form of a regulation, it is in reality a decision which is of direct and individual concern to him or her.

(i) The Abstract Terminology Test

There were initially two tests in the case law: the closed category test³⁹ and the abstract terminology test. The latter was stricter than the former, and became the general test applied by the Court. It is exemplified by *Calpak* and many other judgments.⁴⁰

Cases 725 and 732/78 *Calpak SpA and Societ  Emiliane
Laboratori Proffe SpA v. Commission*
[1980] ECR 1345

(Note that renumbering: Arts. 173 and 189 are now Arts. 230 and 243)

The applicants were producers of *William's* brand, and they complained that the calculation of production aid granted to the growers under the terms of an aid arrangement, production aid was to be calculated on the basis of the average production over the previous three years, in order to avoid the risk of overproduction. The applicants alleged that the Commission had abandoned this method of assessing aid, and had based its aid calculation on one marketing year, in which production was abnormally low. The applicants also claimed that they were a closed and definable group, the members of which were known to, or identifiable by, the Commission.

THE ECJ

2. The second paragraph of Article 173 empowers individuals to contest, inter alia, any decision which, although in the form of a regulation, is of direct and individual concern to them. The objective of that provision is in particular to prevent the Community institutions from taking 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.

3. By virtue of the second paragraph of Article 169 of the Treaty the criterion for distinguishing between a regulation and a decision is whether the measure is of general application or not....

³⁹ The ECJ adopted a closed-category approach to cases that dealt with a complaint of producers. *Case 41-6470 International Bank Company NV v. Commission* [1971] ECR 411; *Case 105/74 Soci t  G m SA v. Commission* [1975] ECR 1332; *Case C-254/81 Molkerei Zentrale v. Commission* [1982] ECR I-3487.

⁴⁰ *Cases 103-104/73 Europay v. Council and Commission* [1974] ECR 33; *Case 162/74 Nysse v. Commission* [1975] ECR 565; *Case 45/71 Alexander Molkerei-Export GmbH & Co. Molkerei KG v. Commission* [1972] ECR 1123; *Cases 77, 78, 171, and 215/75 Antonio AE and Smeets v. Commission* [1976] ECR 1335; *Case 162/75 J. P. Molkerei Export v. Commission* [1976] ECR 1335; *Case C-254/81 Molkerei Zentrale SA v. Council* [1982] ECR I-3487.

3. 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 period is by 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 in question by the mere fact that it is possible to determine the number or even identity of the producers to be granted the aid which is denied them by.

The abstract terminology left placed those who challenged an act in the form of a regulation in a difficult position. The purpose of allowing such challenge is, as the ECJ recognised in *Colpak*, to prevent the Community institutions from communicating measures from attack by the form of their justification. Article 130(4) prevented this by permitting a challenge when the regulation was in reality a decision, which was of direct and individual concern to the applicant. This required, as acknowledged in *Colpak*, the Court to look behind the form of the measure in order to determine whether in substance it really was a regulation or not.

The problem with the abstract terminology test was that, rather than looking behind form to substance, it came perilously close to looking behind form to form. A regulation would be accepted as a true regulation if, as stated in *Colpak*, it applied to 'objectively determined situations and produces legal effects with regard to categories of persons described in a generalised and abstract manner'. However, it is always possible to draft norms in this manner, and thus to insulate them from attack, more especially as the Court makes it clear that knowledge of the number or identity of those affected will not prevent the norm from being regarded as a true regulation. It was, moreover, clear that many measures regarded as 'true' regulations, and thus characterised as 'regulative' in nature, were short-lived in terms of time and applied only to a very limited group. They did not differ from many measures which in domestic legal systems would be classified as administrative in nature.

(ii) The Promise of *Codorniu*

If a regulation was found to be a 'true regulation' on the basis of the abstract terminology test then traditionally the case would stop at that point and the Court would simply conclude that the applicant was not individually concerned. It is now clear that the Community Courts are willing in principle to admit that a regulation might be a 'true' regulation as judged by the abstract terminology test, but to accept that nonetheless it might be of individual concern to an applicant.

Case C-309/89 *Codorniu SA v. Council* (1991) ECR II-1853

The applicant challenged a regulation which stipulated that the term 'premium' should be reserved for sparkling wines of exceptional quality from France or Germany.¹⁷ The applicant made sparkling wine in Spain and held a trade mark which contained the words 'Cordon Rojo'. However, other Spanish producers also used the term. The Council argued that the measure was a regulation which the Council could not challenge, as it was not possible to identify the number or identity of those affected by the measure.

THE ECJ

18. As the Court has already held, the general applicability and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less exactly the number or even identity of the persons to whom it applies at any given time, so long as it is established that it applies to them by virtue of objective legal or factual situations defined by the measure in question in relation to its purpose, ...

19. Although it is true that according to the criteria in the second paragraph of Article 173 of the Treaty the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them.

20. Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. ... *Plaumann*, at 1.

21. *Codorniu* registered the graphic trade mark 'Gran Cordon de Codorniu' in Spain in 1924.... By reserving the right to use the term 'Cordon Rojo' to French and Luxembourg producers, the contested provision prevents *Codorniu* from using its graphic trade mark.

22. It follows that *Codorniu* has established the existence of a situation which, from the point of view of the contested provision, differentiates it from all other traders.

(iii) The Limits of *Codorniu*

The willingness to accept that a norm could be a true regulation as judged by the abstract terminology test, and yet that it could be of individual concern, was certainly a liberating move. An applicant however must still show individual concern in accordance with the *Plaumann* test, paragraph 20 of *Codorniu*, and we have already seen the difficulties with this test. The crucial issue was therefore whether the Community Courts would interpret *Plaumann* more liberally than hitherto. Judicial practice in this respect differed.

There were some cases where the ECJ was willing to find individual concern because the applicant possessed a right that had been infringed, as in *Codorniu*,¹⁸ or because the Community measure was held to create a duty owed to the applicant, as in *Annilum Rice*.¹⁹ There were exceptional cases where the ECJ was willing to consider the 'degree of factual injury' in determining whether the applicant was individually concerned, as exemplified by *Ensslin*,²⁰ or where, as in *Las Verts*,²¹ the ECJ sought to reinforce the democratic nature of the Community by allowing standing to a political party to challenge a decision of the EP concerning funding that favoured parties already represented in the EP.

The dominant approach post-*Codorniu* was nonetheless 'pure *Plaumann*'. Applicants were denied standing because the Community Courts applied the *Plaumann* test in the same manner as in *Plaumann* itself. The fact that the applicant operated a trade which could, in the sense considered above, be engaged in by any other person served to deny individual concern. Thus

¹⁷ See also Case T-13/91 *Infante WMA AG v. Commission* [2005] ECR II-3487.

¹⁸ Cases T-483 and T-87/92 *Anilum Rice NV v. Commission* [1994] ECR II-2205, para. 75, 76; Cases T-31 and T-51 *Gemina et al. v. Commission* [2004] ECR II-270.

¹⁹ Case C-110/89 *Ensslin v. Commission* [1991] ECR II-3531, para. 17; Case T-45/94 *Ensslin v. Council* [1995] ECR II-3481.

²⁰ Case C-33/94 *Parti Socialiste des Fêtes v. Parliament* [1994] ECR II-333.

[State Taxation: Art. 25, 26, and 173 are now Arts. 31, 32, and 200]

THE [C] ...

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 65 and 66 that natural or legal persons who are entitled, pursuant to Article 20(1) of Regulation No 17, to request the Commission to find an infringement of Articles 65 and 66 should be able, if their request is not complied with wholly or in part, to institute proceedings in order to protect their legitimate interests.

Similar considerations are apparent in the case law on state aid. The provision of such aid is regulated by Articles 87-89 EC to prevent the conditions of competition from being distorted by a firm receiving assistance from its government, thereby giving it an unfair advantage as against other companies operating in the same area.¹⁴ The Commission decides whether the aid is compatible with the Treaty, and addresses a decision to the State, which can challenge it under Article 230. The Treaty was less clear whether complainants could also do so. There was nothing directly comparable in state aid to the complaints procedure that operated in competition law. Notwithstanding this, the ECJ in *COFAZ*¹⁵ reasoned by analogy from the *Adreus* case in competition law and the *Tunec* case in anti-dumping. The applicants in *COFAZ* had, said the ECJ, played a comparable role in the procedure under what is now Article 24 EC, more especially because Article 83(2) recognised in general terms that the undertakings concerned were entitled to submit their comments to the Commission.

11 5x02

²¹ Case 149181, *Compagnie Française de Pêche*, (1954) 5 A.Y. Commission 17966; ECR 391; Case T-43572, 158 E.Y. Commission (1955); 20 R.U.-1281; Case T-36574, *AGFPA S.A. Commission* (1954), ECR 2-1169; Case T-18701, *Seiera*, 34 Y. Commission (1953) 20 R.U.-1143, para. 55-57.

(c) INDIVIDUAL CONCERN: THE AG,
THE ECL AND THE 524 CASE

Case C-50/50 P Unión de Pequeños Agricultores v. Council
(2001 ECR I-491)

ASSOCIATE GENERAL FACTORS

— under the proposed administrative procedure, if an applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and, thus, to part of access to the Court of Justice; on the other hand, the national court could itself grant the person entitled to declare the general measure in issue.

¹¹ *Carp. 2-3-1983* [Economic Research in S. Y. Chow: 1981] [ECL-1981, Table AG, para. 14-15]

implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions;

- legal certainty: plans in favour of allowing a general measure to be reviewed as soon as possible and not only after implementing measures have been adopted;
- indirect challenges to general measures through references of validity under Article 234 present a number of procedural disadvantages in comparison to direct challenges under Article 230 before the Court of First Instance as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention.

(2) These objections cannot be overcome by granting standing by way of exception to those cases where an applicant has under national law no way of triggering a reference for a preliminary ruling on the validity of the contested measure. Such an approach

- has no basis in the wording of the Treaty;
- would inevitably oblige the Community Courts to interpret and apply rules of national law, a task for which they are neither well prepared nor even competent;
- would lead to inequality between operators from different Member States and could foster the loss of legal certainty.

(3) Nor can these objections be overcome by postulating an obligation for the legal orders of the Member States to ensure that references on the validity of general Community measures are available in their legal systems. Such an approach would

- leave unresolved most of the problems of the current situation such as the absence of remedy as a matter of right, unnecessary delays and costs for the applicant or the award of interim measures;
- be difficult to monitor and enforce; and
- require far-reaching interference with national procedural autonomy.

(4) The only satisfactory solution is therefore to recognise that an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests. That solution has the following advantages:

- it removes all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, claims of possible denial of justice are avoided, and judicial protection is improved in various ways;
- it also removes the anomaly under the current case-law that the greater the number of persons affected the less likely it is that effective judicial review is available;
- the increasingly complex and unpredictable rules on standing are replaced by a much simpler test which would shift the emphasis in cases before the Community Courts from purely formal questions of admissibility to questions of substance;
- such a re-interpretation is in line with the general tendency of the case-law to extend the scope of judicial protection in response to the growth of powers of the Community institutions (ERTA, Les Verts, Chernobyl).

(5) The objections to enlarging standing are unconvincing. In particular:

- the wording of Article 230 does not preclude it;
- to insulate potentially unlawful measures from judicial scrutiny cannot be justified on grounds of administrative or legislative efficiency: protection of the legislative process must be achieved through appropriate substantive standards of review;
- the fears of overloading the Court of First Instance seem exaggerated since the limitation in Article 230(5) and the requirement of direct concern will prevent an inappreciable increase of the case-load; there are procedural means to deal with a more limited increase of cases.

(6) The chief objection may be that the case-law has stood for many years. There are however a number of reasons why the Courts provide for change. In particular:

- the case-law in many borderline cases is not stable, and has been in any event revised in recent years, with the result that decisions on admissibility have become increasingly complex and unpredictable;
- the case-law is increasingly out of line with more liberal developments in the laws of the Member States;
- the establishment of the Court of First Instance, and the progressive transfer to that Court of all actions brought by individuals, makes it increasingly appropriate to enlarge the standing of individuals to challenge general measures;
- the Court's case-law on the principle of effective judicial protection in the national context makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

The hope that standing rules might be liberalised proved short-lived, since the ECJ declined to follow the lead of Advocate General Jacobs.

Case C-58/90 P Unión de Pequeños Agricultores v. Council [2002] ECR I-6677

The case concerned a challenge to a Council regulation which imposed a levy on the production of certain agricultural products. The applicant, a small farmer, claimed that the regulation was unlawful because it was not based on a valid legal basis. The Council argued that the regulation was based on a valid legal basis and that the applicant was not individually concerned by it. The Court of First Instance (CFI) found in favour of the applicant, holding that the regulation was unlawful and that the applicant was individually concerned by it. The Council appealed the CFI's judgment to the Court of Justice (ECJ). The ECJ dismissed the appeal, holding that the regulation was lawful and that the applicant was not individually concerned by it. The ECJ's judgment was based on the fact that the regulation was based on a valid legal basis and that the applicant was not individually concerned by it. The ECJ also found that the applicant was not individually concerned by the regulation because it was not a natural person. The ECJ's judgment was a significant victory for the Council and for the principle of legal certainty. It also confirmed the importance of the legal basis of Community acts and the importance of the individual concern requirement for standing to challenge Community acts.

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.

43. It is not acceptable to adopt an interpretation of the system of remedies ... to the effect that a direct action for annulment before the Community courts will be available. It can be shown, following examination by that Court of the particular national procedural rules, that those rules do not allow one individual to bring proceedings to contest the validity of the Community measure at issue. Such an interpretation would require the Community court, in each individual case, to examine and interpret national procedural law. That would go beyond its jurisdiction when reviewing the legality of Community measures.

44. Finally, it should be added that, according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition 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, without going beyond the jurisdiction conferred by the Treaty on the Community Courts.

45. While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures different from established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.

The ECJ in *Stylo-Quart* followed its reasoning and decision in *UPA*.³⁸ It acknowledged the right to effective judicial protection, but held once again that the Treaty established a complete system of legal protection through the combination of Articles 230 and 234. It was for the Member States to ensure that individuals should be able to challenge Community measures at national level, even where no implementing measures were involved. The criteria for standing under Article 230(4), would not be relaxed even where it was apparent that the national rules did not allow the individual to contest the validity of the measure without having contested it. The right to effective judicial protection could not, said the ECJ, have the effect of setting aside a condition expressly laid down by the Treaty. The ECJ rejected the alternative just proposed by the CJF,³⁹ which the latter had given after the Opinion of Advocate General Jacobs in *UPA* but before the Court's decision.

It is clear nonetheless that although the ECJ regards reform as a matter for Treaty amendment, there is indirect pressure from the European Court of Human Rights, since there were indications, particularly in a concurring opinion, that the restrictive Community law standing rules might be inconsistent with Article 6 ECHR.⁴⁰ It is not therefore far-fetched that this

issue has been raised in a number of Community cases.⁴¹ Thus in the *Osaka* case⁴² the applicant claimed that the EC's restrictive standing rules violated Article 6 ECHR, and the ECJ self-consciously 'checked' whether the applicants would be regarded as victims under the ECHR.

(i) A COMPLETE SYSTEM OF LEGAL PROTECTION?

The premise underlying the ECJ's decisions in *UPA* and *Stylo-Quart* is that the Treaty provided for a complete regime of legal protection in terms of access to court, via Articles 234 and 230. There are however real difficulties with this hypothesis.⁴³

(1) The ECJ largely ignored the Advocate General's analysis of the difficulties faced by individuals who seek to use Article 234. They are in part procedural, proceeding via the national court can have implications for the participation of the institutions that adopted the contested measure, delays, costs, the award of interim measures, and the possibility of third party intervention. They are in part inherent in the very nature of Article 234 in its reference system: the applicant must therefore convince the national court that a reference is required; and may have to fight through more than one national court. The difficulties with Article 234 are also substantive: the national court is precluded from invalidating the measure, and hence the applicant has to proceed to the ECJ; and an individual may not be able to challenge the illegality of the measure in the national court without placing itself in contravention of it.

(2) The ECJ subjected national courts, in accordance with Article 10 EC, to interpret national procedural rules so as to enable applicants to challenge Community norms of general application before the national courts. This strategy is however of limited utility. It cannot resolve the procedural difficulties adverted to above. It cannot overcome, although it may alleviate, the difficulties flowing from the discretionary nature of the Article 234 system. It provides no answer to the critique that it is wrong for an applicant to have to place itself in breach of a Community norm in order to challenge its validity.

(3) The Article 234 mode of indirect challenge has undesirable consequences for the division of competence between the ECJ and the CJF. Preliminary rulings are the preserve of the ECJ.⁴⁴ Challenges to the validity of Community norms via Article 234 therefore go to the ECJ, where the same issues would be heard by the CJF if they were admissible as a direct challenge under Article 230. This increases the ECJ's workload and means that for scarce resources are directed to answering such preliminary rulings, which will often not involve any point of general importance for Community law.

(4) The ECJ's reasoning in *UPA* concerning Article 230 is equally problematic. It held that the boundaries of legitimate Treaty interpretation constrained any modification to the traditional case law on direct challenge. The right to effective judicial protection could influence the application of individual concerns, but could not, said the ECJ, set aside that condition, which could only be done via a Treaty amendment. This is with respect unconvincing. The Treaty has always required proof of individual concern; it is the meaning to be given to that phrase that is the question at issue. The crucial issue is not whether the Treaty imposed limits

³⁸ Case C-283/93 *P. Commission v. Stylo-Quart et Cie SA* (2000) ECR I-3425, para. 34-35. See also Case C-258/93 *P. Jeanne Industri Applique-Servis Virelles v. Gervais* (1995) ECR I-1535; Case T-134/93 *SNF Ind. Commun. (1994)* ECR II-3245; Case T-43/92 *General and ADPC v. Commission* (1994) ECR II-1531; Case T-43/92 *ADPC and JNY v. Council* (2001) ECR II-553, para. 52, reversed in part on appeal. Case C-228/95 *P. Cornu Orlon, on behalf of the ADPC and JNY v. Council* (2001) ECR II-1531. See also Case T-335 and 341/94 *ADM and Fichting Maron on petition of Commission* (2005) ECR II-1743.

³⁹ Case T-177/01 *Stylo-Quart et Cie SA v. Commission* (2001) ECR II-1541, where the CJF held that a person should be regarded as individually concerned by a Community measure of general application if the measure affected his legal position in a manner which was both definite and immediate, by conferring his rights or by imposing obligations.

⁴⁰ App. no. 4504/93 *Perthuis-Pere Scharl v. Union des Travaillants de l'Industrie du Papier* (1994) 42 EHRR 1.

⁴¹ See above, 411-414 for a discussion in the context of fundamental rights.

⁴² Case C-233/95 *P. Osaka*, para. 23-24.

⁴³ The approach in this Section is developed in greater detail in J. Craig, *EU Administrative Law* (Oxford University Press, 2006), 342-346.

⁴⁴ The Nice Treaty qualified this monopoly, but the power to accord the CJF power over preliminary rulings has not been restored since 1992-2001.

on standing, but whether the interpretation of these limits has been overly restrictive. The Plaumann test is, as seen above, open to criticism, even given the language of Article 230(4). The ECJ has often interpreted Treaty Articles and Community legislation teleologically. It is moreover not readily apparent why Advocate General Jacobs' interpretation of individual concern would involve any transgression of the bounds of normal Treaty interpretation, let alone that it would be akin to Treaty amendment through judicial fiat. The ECJ gave no explanation of why it felt that the Advocate General's test would be incompatible with the wording of Article 230. There is in reality no reason why a test framed in terms of substantial adverse impact could not be a legitimate reading of individual concern.

(3) A legal system may have impressive principles of judicial review, but there will be of scant comfort to those who cannot access the system because the standing rules are unduly narrow. It is right and proper in normative terms that those who have suffered some substantial adverse impact should have access to judicial review. This test is no more liberal than that which prevails in most domestic legal orders and is fitting for a legal system based on the rule of law. The idea that the more people are affected by a provision, the less chance there is for any challenge is contrary to principle.

(5) The ECJ in *SP4* said nothing about the practical consequences of a more liberal test under Article 230, but one is left nonetheless with the feeling that it was concerned with possible workload problems. There is however no reason why there should necessarily be any significant increase in the number of challenges. At present, the very fact that Article 230 is so restrictive forces applicants to use Article 234. The ECJ has however little control over the range of applicants that can challenge via Article 234, or the type of norm that can be challenged. The consequence of a more liberal interpretation of Article 230 would be to shift some of these cases back to direct challenge, and give the Community Courts stage for control through the determination of whether there was a substantial adverse impact. Moreover, the implicit assumption seems to be that there would be numerous challenges to a regulation by applicants, each of whom would claim to have suffered substantial adverse impact. This does not square with legal or practical reality. Some cases would be joined in a single action. In any event once the SCJ or CFI pronounced on the legality of the regulation in relation to one action, that would be the end of the matter. The decision would resolve the issue in relation to any other possible claimant, unless he or she could raise some new legal argument that had not been addressed in the earlier case.

(7) There may well be valid reasons why the Community Courts are wary of intervening too far in the complex discretionary choices made by the Community institutions, and many of the standing cases involve such choices made pursuant to the Common Agricultural Policy.⁴² The Community Courts can however influence the number of actions that are brought through the standards of review that are applied.⁴³ This will impact on the number of actions brought, since applicants will calculate their chances of success before embarking on the expense of litigation. It is of course true that a very strict test for standing may be hard demanding on the Court's time. This however comes dangerously close to reductionism, since it says no more than that if a court declines to hear a case it will save more judicial resources than if the case had been heard.

(8) The difficulties with the argument that the Treaty provides a complete system of legal protection are of course compounded in relation to the second and Third Pillars. The ECJ has

indeed admitted that the regime of legal protection is far from perfect.⁴⁴ It is largely excluded from the Second Pillar, and even in relation to the Third Pillar its preliminary ruling jurisdiction is dependent on acceptance by the Member State. Individuals have no direct action to challenge the legality of Third Pillar measures and there is no damages action.

(2) THE CONSTITUTIONAL TREATY AND THE CHARTER OF RIGHTS

The Constitutional Treaty⁴⁵ reformulated Article 230(4). The CT is unlikely to become law, but it is nonetheless worth dwelling on the proposed amendment, which was incorporated in Article 340(4) of the CL.

Any natural or legal person may, under the same conditions, 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 novelty of the provision was that individual concern would not have to be shown for regulatory acts which were of direct concern to a person and which did not entail implementing measures. Such liberalisation would be welcome, and go some way to meet the difficulties in the existing case law. The reform was nonetheless limited. The liberalisation only applied in the case of regulatory acts, which were in effect secondary norms as defined in the hierarchy of norms.⁴⁶ It would not have applied in relation to EU laws, framework laws, decisions, or implementing acts.⁴⁷ There was moreover nothing to suggest any alteration of the Plaumann test on individual concern. Thus if an applicant challenged an act in the form of a decision addressed to a third party, but which the applicant claimed was of individual concern to her, she would still have to satisfy the Plaumann test with all its difficulties. Nor did the reform address the more general difficulties with indirect challenge articulated by Advocate General Jacobs in the *SP4* case.

It is doubtful whether the Community Charter of Fundamental Rights⁴⁸ would impact on this area, even if it were accorded binding legal status. Article 41 enshrines a right to good administration. Article 41(2) sets out certain more specific rights that are included in this right. Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Standing rules are not explicitly mentioned in either Article 41 or Article 47. It would be open to the Community Courts, if they wished to do so, to regard these provisions as the basis for expanding the existing standing rules. They are however unlikely to do so, given their approach to standing *liberté*. This is especially so given that the explanatory memorandum stated in relation to Article 47 that there was no intent for this provision to make any change to the rules on standing other than those embodied in the revised Article

⁴² See 528-532.

⁴³ See Ch. 13.

⁴⁴ Case C-341/94 *P. Gornitzky, Claver and Edwards*, Council, 27 Feb. 1995, para. 52.

⁴⁵ Treaty Establishing a Constitution for Europe (2004) OJ C101/31.

⁴⁶ Art. 1-33(1) CL.

⁴⁷ The only way in which this limitation would have been to read the phrase 'regulatory act' to mean something broader than the term European Reg. within Art. 1-33(1). This might have been possible, but it would have been difficult both legally and historically.

⁴⁸ [2000] OJ C461.

112-385(4) C²¹ There is however an uneasy tension between the Charter right and the standing rules for direct actions. The Charter says to individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by Community law would normally not be able to meet the requirements of individual concern.²² There is something decidedly odd about the infringement of an individual right not constituting as a matter of individual concern.

(h) SUMMARY

- i. The central issue is whether the applicant can show that he or she is individually concerned. This is so whether the challenged measure is a decision addressed to a third party, or a regulation which the applicant claims is in reality a decision, since a regulation can be a true regulation in substance as well as form, as judged by the abstract terminology test, but it can still be of individual concern to a particular applicant.
- ii. *Pfleger* remains the test for individual concern. The applicant must show that she has attributes or characteristics which distinguish her from all other persons and mark her out in the same manner as the addressee. This will normally be interpreted in the same manner as in *Pfleger* itself. The fact that the applicant operates a trade which could be engaged in by any other person will serve to deny individual concern. It is this interpretation of the *Pfleger* test which makes it almost impossible for most applicants to succeed. The existence of particular factual injury to the applicant will not usually be relevant. Interest groups will not, in general, be in any better position than a private individual.
- iii. *Newmann* can, exceptionally, be interpreted more favourably to the applicant. This will be so where it can be shown that the challenged measure either infringes the applicant's right or was in breach of a duty owed to the applicant. It will be rare for the CJ or ECJ to allow a claim merely because of the factual injury suffered by the applicant.
- iv. It is clear from *UFA*, *Pfleger*, and subsequent cases that the Community Courts are not willing to shift to the kind of more liberal test for standing proposed by Advocate General Jacobs. The rationale for adherence to the status quo is that the Treaty provides a complete system of legal protection for individuals through Articles 230 and 234. There are, however, as seen above, real difficulties with this view.

5. ARTICLE 134: INDIRECT CHALLENGE TO THE LEGALITY OF COMMUNITY ACTS

(a) THE RATIONALE FOR USING ARTICLE 134

Article 134(1)(b) EC allows national courts to refer to the ECJ questions concerning the 'validity and interpretation of acts of the institutions of the Community'. This provision assumed increased importance for private applicants because of the Court's narrow construction of the standing criteria under Article 230.²³ Article 134 is often the only mechanism

whereby such parties can contest the legality of Community norms, more especially so after the judgments in *UFA* and *Pfleger* reaffirmed the restrictive approach to direct challenge under Article 230. The limitations and difficulties of indirect challenge have been considered above. The present discussion will focus on the rationale for using Article 134 and the types of Community act that can be challenged in this manner.

An individual will often be affected by Community measures through their application at national level by national agencies.²⁴ Thus the 'standard' scenario²⁵ is a Common Agricultural Policy (CAP) regulation, which cannot be contested under Article 230, either because the applicant lacks standing or because of the time limit. These regulations will normally be applied by a national intervention agency. The regulation may, for example, require the forfeiture of a deposit given by a trader who believes that this forfeiture is illegal because it is disproportionate or discriminatory. If the security is forfeited the trader may seek judicial review in the national court, claiming that the regulation is invalid. It will be for the national court to decide whether to refer the matter to the ECJ under Article 134(1)(b). An alternative scenario is where a regulation demands a levy which the trader believes to be in breach of Community law. The trader's strategy might be to resist payment, be sued by the national agency, and then raise the alleged invalidity of the regulation by way of defence. Once again, it would be for the national court to decide whether to refer the matter to the ECJ.

(b) THE ACTS THAT CAN BE CHALLENGED UNDER ARTICLE 134

Article 134(1)(b) allows a challenge to be made to the validity of acts of the Community institutions. This enables challenges to be made to regulations via the national courts.

The situation with respect to individual decisions is more complex. A person who is not the addressee of an individual decision may, it seems, contest this decision through the national courts in much the same way as with a regulation. Thus, if a decision is addressed to a Member State or tax agency which requires that certain action should be taken, then an individual affected by this can contest the validity of the decision on which the action is based through the national courts.²⁶

This was exemplified by the *Ufemite* *Pflanz* case.²⁷ The Commission issued a decision to all Member States refusing to allow exemption from customs duty for certain scientific equipment imported from the United States.²⁸ The German authorities applied this decision, and the applicant contested this before the national court. The ECJ held that the case could be brought via Article 134. It was influenced by the fact that the Commission decision did not have to be published, and that it did not have to be notified to the person applying for the tax exemption, which would have rendered challenge within the time limit under Article 230 virtually impossible.

The Court pronounced more generally on the point in *Audi*.²⁹ It held that the applicants, who were marginale producers, could contest in the national courts the legality of a scheme

²¹ C. Harding, 'The Impact of Article 137 of the EEC Treaty on the Review of Community Decisions' (1981) 5 *EECL* 33, 34; C. Harding, 'Who Goes to Court to Challenge An Act of Legislation against the European Community?' (1982) 17 *ELRev* 166.

²² See, e.g., Case C-103/84 *J. v. International Board for Agricultural Producers*, at p. 5. D. & F. *Meas* (Super) Ltd (1985) 2 *EECL* 1145; Case C-46/83 *ACC* (1984) 2 *EECL* 1151.

²³ Case C-181/87 *TWE* *Textilwerke Deggendorf GmbH v. Germany* (1988) 2 *EECL* 5-433.

²⁴ Case C-10/82 *Chenit v. Hamburg v. Hauptzollamt Hamburg-Kleinbrook* (1983) 2 *EECL* 271.

²⁵ The national judge that the Commission claimed that equipment of agricultural vehicles was being manufactured in the Community itself.

²⁶ Cases 133-134/85 *Hörsch v. Landratsamt Weiskirchen*, *Landratsamt für Landwirtschaftliche Verwaltung* (1987) 2 *EECL* 1249.

²⁷ Case 447/80, *Comit* 48, 11 Oct. 1980, at 41; COMV 12453, *Updated Explanation Relating to the Text of the Charter of Fundamental Rights*, 9 July 1983, 41.

²⁸ Case C-103/84 *J. v. Meas*, at 58 above, para. 48-51.

²⁹ *IL* *European*, 1987, in Article 133 interpreted against *Prinze* 7 *EECL* 57 (1988) 5 *EECL* 111, 112-127.

deliberately affected by the grant of such aid. The Court rejected its action on the ground that the applicants were not individually concerned by the decision in question. The same applicants brought an action under Article 175, arguing that there had been a failure to act, this being the failure to revoke the decisions in question.

THE ECU

15. This application concerns the annulment of the implied decision of rejection resulting from the silence maintained by the Commission in respect of the request addressed to it by the applicants seeking the annulment or revocation of the three disputed decisions for illegality or otherwise because they are inappropriate.

16. The action provided for in Article 175 is founded on Article 173, which, as it appears from that Article, which refers to a failure to act in conjunction with the Treaty and from Article 178 which refers to a failure to act, is intended to be complementary to the latter.

Without stating upon which provision of Community law the Commission was requested to annul or revoke the said decisions, the applicants have confined themselves to stating that these decisions were adopted in infringement of the Treaty and that the fact some would be sufficient to make the Commission's failure to act subject to the provisions of Article 175.

17. The Treaty provides, however, particularly in Article 173, other methods of recourse by which an allegedly illegal Community measure may be disputed and it is necessary to enquire whether the application of a duly qualified party.

To admit, as the applicants wish to do, that the parties concerned could sue the Commission from which the measure came to revoke them, in the event of the Commission's failure to act, is to refer such failure to the Court as an illegal omission to deal with the matter, which is not also providing them with a method of recourse parallel to that of Article 173, which would not be subject to the conditions laid down by the Treaty.

18. This application does not therefore satisfy the requirements of Article 175 of the Treaty and must thus be held to be inadmissible.

The ECJ's reference to the use of what is now Article 231 to evade limits placed on Article 230, includes, inter alia, the ability to bypass the time limits for contesting an action under Article 230.¹¹

(b) PROCEDURE

Article 232 requires the applicant to call upon the institution to act, since it may not be easy, in the context of an omission, to say when it came into existence and its content. Thus the omission is deemed to have taken place at the end of the two-month period and its content is defined by the terms of the request.

The Treaties do not specify any time limit within which the procedure for failure to act should be initiated. The Court has, however, specified that this procedure must be initiated within a reasonable time.¹² Once the request to act has been made, the institution has a period of two months within which to decide its position. If it has not done this, the applicant has a further two months within which to bring the action under Article 232.¹³

¹¹ See also Cases 21-24/71 *Marinakis* (1972) ECR II, 71.

¹² Case 35/72 *Neonaxioudis v. Commission* (1973) ECR 413.

¹³ The construction of these provisions is consistent. Compare the view of Joz, n. 88 above, 41-42, with those of Harney, n. 45 above, 351-358.

(c) STANDING

Article 231 EC, like Article 134, draws a distinction between privileged and non-privileged applicants. The former are identified in Article 231(1): the Member States and other institutions of the Community. This has been held to cover the European Parliament.¹⁴ The latter are covered by Article 232(3), which allows a natural or legal person to complain of a failure to address an act, other than a recommendation or an opinion, to that person.¹⁵ Some argued that standing might only be accorded for a failure to act where the act would be of its very nature be addressed to the applicant. This view has not prevailed. The ECJ held in the *ENI* case¹⁶ that standing under Article 241 of the European Treaty, the equivalent of Article 231, would be available to an applicant provided that it would be directly and individually concerned; it was not necessary for the applicant to be the actual addressee of the decision.¹⁷ This test, is, however, applied in the same restrictive manner as under Article 231.¹⁸

5. ARTICLE 241: THE FLEA OF ILLEGALITY

Article 241 provides:

Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, or a decision of the Commission or of the ECB is at issue, plead with grounds specified in the second paragraph of Article 230, in order to have the Court annul the regulation or the decision.

(a) THE ACTS THAT CAN BE CHALLENGED

The scope of Article 241 is as follows.¹⁹ An individual may wish in the course of proceedings initiated for a different principal reason to call into question the legality of some other measure. Thus, for example, the applicant may challenge a decision which is of direct and individual concern, in the course of which it wishes to raise the legality of a regulation on which the decision is based. Article 241 does not therefore constitute an independent cause of action.²⁰ Article 241 cannot moreover be used in proceedings before a national court. A declaration of the inapplicability of a regulation pursuant to Article 241 was only contemplated

¹⁴ Case 11/70 *European Parliament v. Council* (1965) ECR 1513.

¹⁵ See, n. 11 above, 43-44.

¹⁶ Case C-107/81 *ENI v. Commission* (1981) ECR I-355; Case T-35/79 *Commission v. Jönsson SA v. Commission* (1981) ECR II-3427, para. 38; Cases T-73/84, 124/87, and 132/79 *Comet SA and Tico SA v. Commission* (1986) ECR II-1173, para. 35; Case T-25/84 *de Gooijer v. Commission* (1985) ECR II-1243, para. 31. See however Case T-27/84, 4/77C, n. 91 above, para. 58.

¹⁷ In order to sue Art. 231(3), to challenge a failure to act where the act in question was not, on its face, the individual would have to show that the act which was omitted, although it might have taken the form of a regulation, would have been of individual concern to him or would have been a decision which directly and individually concerned him. Cases T-38/76 and 39/76, n. 88 above, para. 72-74.

¹⁸ See, e.g., Case T-15/84 *Edin v. Commission* (1985) ECR II-477.

¹⁹ M. Vior, 'L'indirect action préventive en EC Law: The Case of the Flea of Illegality' (2009) 31 *ELRev* 364.

²⁰ Case 33/40 *A. Vio v. Council* (1971) ECR 1145; Case T-35/74 *Comet SA v. Commission* (1985) ECR II-1177; Case C-115/89 *Nickl Europe*, n. 21 above.

in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect.¹⁴⁰

Moreover the applicant must act within the time limit for the principal action. Thus while Article 241 allows the applicant incidentally to raise the illegality of a regulation outside the time limits in Article 230, the applicant must still be within those time limits in relation to the primary challenge to the decision that is of direct and individual concern to it.

Only the legality of regulations can be contested in this way. There must, moreover, be some real connection between the individual decision which is the subject-matter of the action and the general measure the legality of which is being contested.¹⁴¹ However it is the substance of the measure, and not its form, which is decisive. If the Court decides that the measure is in substance in the nature of a regulation Article 241 can be used. This is demonstrated by the *Simmenthal* case.

Case 52/78 Simmenthal SpA v. Commission
[1978] ECR 373

[Note: TCA renumbering Arts. 173 and 184 are now Arts. 230 and 241]

The applicant sought to annul a Commission Decision concerning the minimum selling prices for frozen beef. In support of its claim, the applicant wished to use Article 184 to challenge the legality of certain regulations and notices which formed the legal basis of the contested decision. The ECJ held that the applicant was directly and individually concerned by the primary decision, even though it was actually addressed to the Member State. The Court then considered the arguments concerning Article 184.

THE ECJ

34. While the applicant formally challenges Commission Decision No 78253¹⁴² it has in the same time criticised, in reliance on Article 184 of the EEC Treaty, certain aspects of the 'frozen beef' system in the form in which it has been implemented pursuant to the new Article 14 of Regulation No 805/68, the Regulation No 2300/73 and No 2801/73 and also by the notices of invitations to tender of 13 January 1978.

35. There is no doubt that this provision [Article 184] enables the applicant to challenge incidentally during the proceedings, with a view to obtaining the annulment of the contested decision, the validity of the measures laid down by Regulation which form the legal basis of the latter.

36. On the other hand there are grounds for questioning whether Article 184 applies to the notices of invitations to tender of 13 January 1978 when according to its wording it only provides for the calling in question of 'regulations'.

37. These notices are general acts which determine in advance and objectively the rights and obligations of the traders who wish to participate in the invitations to tender which these notices make public.

¹⁴⁰ Cases 15 and 156/62 *Waldenwerke Steine, Kiese und Sand AG and A. von Lönne GmbH v. Commission* [1962] ECR 501.

¹⁴¹ Cases T-6/83 and T-5/83, *Almond v. SpA and others v. Commission* [1983] ECR II-1531, para. 75-81; A. Burca, 'The Exception of Illegality in Community Law: A Critical Analysis' [1974] 31 *CLJ* 256, 273-274.

38. As the Court in its judgment... in Case 15/57, *Compagnie des Hauts Fourneaux de Chasse...* and in its judgment... in Case 4/58, *Almond...* has already held in connection with Article 18 of the EEC Treaty, Article 184 of the EEC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked. If that party was not entitled under Article 173 of the Treaty to bring a direct action challenging these acts by which it was thus affected without having been in a position to ask that they be declared void.

39. The field of application of the said article must therefore include acts of the institutions which, although they are not in the form of a Regulation, nevertheless produce similar effects and on those grounds may not be challenged under Article 173 by natural or legal persons other than Community institutions and Member States.

40. This wide interpretation of Article 184 derives from the need to provide those persons who are prejudiced by the second paragraph of Article 173 from instituting proceedings directly in respect of general acts with the benefit of judicial review of them at the time when they are affected by implementing decisions which are of direct and individual concern to them.

41. The notices of invitations to tender of 13 January 1978 in respect of which the applicant was unable to institute proceedings are a case in point, seeing that only the decision, taking its consequences from the tender which it had submitted in answer to a specific invitation to tender could be of direct and individual concern to it.

42. There are therefore good grounds for deciding that the applicant's challenge during the proceedings under Article 184, which relates not only to the above-mentioned regulations but also to the notices of invitations to tender of 13 January 1978, is admissible, although the latter are not in the strict sense measures laid down by Regulation.

The ECJ's reasoning in the *Simmenthal* case could also lead to the conclusion that individuals should be able to use Article 241 to challenge individual acts which would not be challengeable under Article 230, because the individuals could not show direct and individual concern. Conversely where it is clear that the individual would be able to bring a direct challenge under Article 230, then an indirect action seeking to use Article 241 may not be possible.¹⁴³

(b) THE PROCEEDINGS IN WHICH
ARTICLE 241 CAN BE RAISED¹⁴⁴

The most common usage of Article 241 is as a collateral, incidental challenge in an enforcement action brought under Article 230, as exemplified by the *Simmenthal* case. It is less clear whether Article 241 can be used as an incident to enforcement proceedings brought under Article 216 against a Member State. This will not be possible where the Member State has not challenged the measure within the time limits allowed for enforcement.¹⁴⁵ To allow the State to rely on Article 241 in such circumstances would mean that it could circumvent the time limits laid down under Article 230.¹⁴⁶

¹⁴³ See above, 328-329. Case C-115/83 *TWD v. TWD*, above Case C-116/83 *P. Commission v. Ariston Ltd*, *Pratt v. AJ* [1989] ECR I-2843, para. 62; Case C-211/02 *McGrath v. Pirelli*, n. 84 above.

¹⁴⁴ Burca, n. 134 above, 275-281.

¹⁴⁵ Case C-31/87 *P. Kref v. Pirelli*, n. 105 above.

¹⁴⁶ Burca, n. 134 above, 278-279.

(c) THE PARTIES WHO CAN USE ARTICLE 241

It is clear that private parties can use Article 241. It is more contentious whether it can be used by privileged applicants, the Community institutions, and the Member States. Bebe is against privileged applicants being able to use Article 241 on the grounds, inter alia, that such applicants can challenge any binding act of Community law under Article 230 within the time limit.¹⁰⁹ However, as Bebe has noted,¹¹⁰ the irregularities in a general act may appear only after the relevant implementation measures have been adopted, and hence the State may not have realized the necessity for challenging the general act until the time limit under Article 230 has passed. Advocate General Roemer suggested that Article 230 should be available to Member States,¹¹¹ both for the reason advanced by Bebe, and because the wording of the Article refers to 'any party'. The ECJ did not deal with the point, deciding the case on other grounds.

9. CONCLUSION

- i. The rules concerning standing are of considerable importance in any legal system. They constitute the main gateway through which individuals gain access to the principles of judicial review in order to render public decision-making accountable. If therefore the standing rules are drawn too narrowly then it will necessarily be difficult for individuals to take advantage of these administrative law principles.
- ii. The standing rules on direct actions under Article 230 have generated significant case law since the very inception of the EC, and continue to do so even after the decisions in *UPA* and *Sys-Quint*. In the great majority of these cases the applicants have failed to secure standing, even though they would have done so in many such cases in national legal systems. The primary reason for this 'failure rate' has been the requirement of individual concern as interpreted in the *Pasquano* case, which renders it exceedingly difficult for non-privileged applicants to succeed, even where they have been significantly affected by the contested measure. There are empirical and conceptual problems with this interpretation of individual concern, and it would be desirable to shift to a test of the kind elaborated by Advocate General Jacobs in the *UPA* case.
- iii. The ECJ's seeks to justify the standing rules by arguing that the Treaty provides a complete system of legal protection, with indirect challenge through Article 234 supplementing direct actions under Article 230. There are however, as we have seen, real difficulties with accepting this hypothesis and the case law since *UPA* points to the problems that applicants continue to have in securing indirect access to the ECJ.

10. FURTHER READING

- Affort Leroux, A., 'The Standing of Private Parties to Challenge Community Measures Has the European Court Measured the Bowl?' (2003) 61 *CLJ* 72.
- Arnold, A., 'Private Applicants and the Action for Annulment under Article 171 of the EC Treaty' (1995) 31 *CMCLR* 7.
- , 'Private Applicants and the Action for Annulment since *Cofemel*' (2001) 39 *CMCLR* 7.
- Craig, P., 'Standing, Rights and the Structure of Legal Argument' (2005) 9 *EPL* 493.
- , *EU Administrative Law* (Oxford University Press, 2006), ch. 10.
- Harlow, C., 'Towards a Theory of Access for the European Court of Justice' (1992) 11 *JESL* 213.
- Yegor, M., 'Judicial Protection in EC Law: The Case of the Plea of Illegality' (2004) 31 *ELRev* 364.
- Ward, A., *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn., Oxford University Press, 2007).
- Wyatt, D., 'The Relationship between Actions for Annulment and References on Validity after *TWD Deegedey*', in J. Lamber and A. Bianchi (eds.), *Remedies for Breach of EC Law* (Wiley, 1996), ch. 4.

¹⁰⁹ G. Bebe, 'Judicial Access of Private Parties against Normative Acts of the European Communities: The Role of the Exception of Illegality' (1994) 4 *ChilJur* 7.

¹¹⁰ *Id.* 104, ibidem, 101.

¹¹¹ Case 321/85 *Italy v. Commission* (1986) ECR 389, 414.

III Preliminary rulings on validity

1. Aim of the procedure
2. Reviewable acts
3. Possibility vs. duty to refer
4. Grounds of review
5. Consequences of illegality and invalidity

Mandatory Reading

Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2016, 145-183.

Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2005 Chapter 10.

Tanasije Marinković, PhD.
Svetislava Bulejčić, LL.M.

In 2008, actions against EU institutions accounted for 44.2 per cent of cases and trade mark cases 31.78 per cent.³² The General Court is struggling even more than the Court of Justice to keep up with its docket. At the end of 2008, 1,178 cases were pending and the duration of proceedings was (depending on the type of action) between 22.4 and 38.6 months.³³ These delays are so serious that they have led to decisions being overturned on the grounds that they violated the applicant's fundamental right to have the case heard within a reasonable period of time.³⁴ Notwithstanding this, there is also provision for it to receive preliminary rulings in fields to be specified.³⁵ Although, as yet, no field has been transferred under this heading, the provision is important for what it promises. For it suggests that over the years, the jurisdiction and size of the General Court could be expanded.

There is a right to appeal from the General Court to the Court of Justice within two months of notification of the decision. The appeal must be on points of law,³⁶ but this right to appeal exists not just for parties to the dispute but also for Member States and EU institutions where the decision directly affects them.³⁷ Even if the Court of Justice finds that the General Court has misapplied EU law, it will only uphold an appeal if the mistake of law relates to the operative part of the judgment. Even if EU law is misapplied in the operative part of the judgment, the appeal will not be successful if the operative part is shown to be well-founded for other legal reasons.³⁸ In 2008, the Court of Justice considered seventy-seven appeals and found for the appellant, fully or partially, in twenty-three of these.³⁹ These statistics tell only part of the story as differences on significant and controversial areas of law have emerged between the two courts.⁴⁰

If the Court of Justice finds the appeal to be well founded, it will quash the decision of the General Court. It then has the discretion to give the final judgment or to refer the matter back to the General Court. If it adopts the latter course of action, the General Court is bound by the Court of Justice's decision on the point of law.⁴¹ The General Court takes the view that it is only bound by the judgments of the Court where its decision has been quashed by the Court of Justice and the matter is referred back, or where the principle of *res judicata* operates, that is to say, where a dispute involving the same parties, the same subject-matter and the same cause of action had already been decided by the Court of Justice.⁴² Nevertheless, the circumstances in which the General Court will not follow judgments of the Court of Justice will be rare, as this would generate considerable instability.

³² Annual Report, above p. 11, 173, 211.

³³ *Id.* 175.

³⁴ Case C-135/05 *P. Sison/Secretary General/Union* (2005) ECR I-3417; Case T-315/07 *P. D'Amico/Parliament* (2007) Commission, Judgment of 16 July 2008.

³⁵ Article 156(1) TFEU.

³⁶ Article 156(2) TFEU.

³⁷ Protocol on the Statute of the Court of Justice, article 56.

³⁸ Case C-159/07 *P. Laitinen v. Commission* (2008) ECR I-3755; Case C-125/05 *P. José Manuel Sison v. Commission* (2006) ECR I-1431.

³⁹ Annual Report, above p. 11, 182, 211.

⁴⁰ There have been strong differences, for example, over the right of some small private parties to challenge EU acts. Case T-177/01 *Agro-Quel v. Commission* (2001) ECR II-2739; Case C-53/01 *P. Commission v. Agro-Quel* (2004) ECR I-3425.

⁴¹ Protocol on the Statute of the Court of Justice, article 61.

⁴² Case T-162/84 *1995 France v. Commission* (1996) ECR II-425.

(13) The European Union Civil Service Tribunal

There is provision for work of the General Court to be transferred to specialised courts. The rules on the organisation for each court are likely to be different, as they will be governed by the legislation establishing it. In all cases, members must be independent and fit for judicial office. There must also be the possibility of appeal to the General Court.⁴³ To date, only one has been established, the European Union Civil Service Tribunal, which hears disputes between employees of the EU institutions and the institutions themselves.⁴⁴

3 ARCHITECTURE OF THE EU JUDICIAL ORDER

It is wrong to see the judicial application of EU law as all about the activities of the three courts set out in Article 19 TEU. These are important but, as we have seen in Chapter 1 and will see in much more detail in Chapter 7,⁴⁵ EU law gives individuals the right to invoke EU law provisions before national courts in certain circumstances and imposes a whole host of duties on national courts when this happens. These are more numerous, have greater resources and are more accessible to individual litigants. There is, thus, a shared responsibility between them and the three Union courts for the application and development of EU law. This is a shared responsibility that has been made explicit by the Treaty of Lisbon with its introduction in Article 19(1) TEU of the requirement that Member States must provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

(1) Preliminary reference procedure and the EU judicial order

If EU law provides for its administration by a judicial order that comprises not just the three Union courts but all the courts and tribunals in the Member States, there are only two provisions that govern the nature of this judicial order and the duties it imposes on the different courts.

The first is Article 274 TFEU. This grants the Court of Justice exclusive jurisdiction where the Treaties provide for the Union to be a party to the proceedings.

Article 274 TFEU

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

⁴³ Article 151 TFEU.

⁴⁴ Decision 2004/753/EC, 2004/754/EC establishing the European Union Civil Service Tribunal (2004) OJ L330/1. It has similar powers to the other courts with, at the end of 2008, 107 cases pending and a mean waiting time of 18.7 months. Annual Report, above p. 11, 220–1.

⁴⁵ See pp. 258–91.

The European Union will be a party to the proceedings where one of the EU institutions is either plaintiff or defendant. It will be a defendant in cases where judicial review or damages are being sought against an act or omission of one of the institutions. The only circumstances where it will be a plaintiff are either where one EU institution is seeking judicial review against another institution(s) or the Commission is bringing enforcement actions or an action for damages against a Member State for non-compliance with EU law.

If Article 274 TFEU sets out the scenarios on which national courts cannot rule, Article 267 TFEU sets out their relationship with the Court of Justice in the contexts where they can adjudicate.

Article 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Two initial features of the procedure are striking. First, subject to Article 274 TFEU, national courts have a monopoly of adjudication over disputes that come before them that involve EU law. Article 267 TFEU sets out circumstances when they may or must refer points of EU law to the Court of Justice and those judgments are binding on them. It is national courts, however, who decide the dispute. They decide not only points of national law that may be pertinent but, even more centrally, they decide the facts to the dispute and, on the basis of this, they decide how to apply EU law to the dispute.⁴⁴ In *WFF*, a challenge was made to the transformation of the military airport in Bolzano, Italy, into one for commercial use because there had been a failure to carry out an environmental impact assessment.⁴⁵ The airport authorities argued that the facts presented by the national court were inaccurate and that the national court, being confined to considering questions of law, had exceeded its jurisdiction by considering these questions of fact. The Court dismissed these arguments. It noted that it was for the national court, not itself, to ascertain the facts and that it was not its role to examine whether the reference had been made in accordance with national laws on court jurisdiction and procedure.

⁴⁴ Case 104/78 *Agip v Nova* [1982] ECR I-745.

⁴⁵ Case C-415/97 *WFF v Autonome Provinz Bozen* [1999] ECR I-5523.

The second feature is that Article 267 TFEU is a court to court procedure, with national courts acting as gate-keepers to the Court.⁴⁶ It grants private parties no direct access to the Court of Justice, nor can they appeal decisions of the national courts to the Court of Justice. The Court has thus characterised the procedure as:

a non-contentious procedure excluding any initiative of the parties who are merely invited to be heard in the course of this procedure.⁴⁷

There are circumstances when the parties can, on paper at least, oblige a national court to refer.⁴⁸ In addition, they may submit written observations and may make oral representations of between 15 and 30 minutes long, depending upon the nature of the proceedings, to the Court.⁴⁹ This limited role reflects, however, their not being the centre of proceedings. Instead, centre stage is taken by the reference from the national court. This will take the form of a question or number of questions about EU law. These must be accompanied by a statement setting out the factual and legal context of the dispute.

Information Note on References from National Courts for a Preliminary Ruling, OJ 2009, C 297/1

32. ...The order for reference must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In particular, the order for reference must:
 - include a brief account of the subject-matter of the dispute and the relevant findings of fact, or, at least, set out the factual situation on which the question referred is based;
 - set out the tenor of any applicable national provisions and identify, where necessary, the relevant national case-law, giving in each case precise references (for example, a page of an official journal or page of a law report, with any Internet reference);
 - identify the European Union law provisions relevant to the case as accurately as possible;
 - explain the reasons which prompted the national court to raise the question of the interpretation or validity of the European Union law provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings;
 - include, if need be, a summary of the main content arguments of the parties to the main proceedings.

This statement frames the dispute. The Court of Justice cannot look behind it and will, indeed, sometimes look to it, rather than the explicit questions set out by the national court, in providing the judgment it gives.⁵⁰

⁴⁶ Private parties not allowed to appear before the national court will not, therefore, be allowed to intervene before the Court of Justice: Case C-111/95 *Boyer v Judicial Directorate* [1996] ECR I-111.

⁴⁷ Case C-164/93 *SAT Fluggesellschaft v Eurocontrol* [1994] ECR I-41.

⁴⁸ See pp. 174–8.

⁴⁹ Protocol on the Statute of the Court of Justice, article 25, 21.

⁵⁰ Case C-165/93 *Decker* [1994] ECR I-7103. T. Tridimas, 'Touching on Member States' Dispute-Resolution, Efficiency and Defence in the Preliminary Reference Procedure' (2007) 40 *OEGL* 8, 23–4.

The wording of Article 267 TFEU is thin. It sets out a procedure but tells us little more about the mutual relations and duties surrounding this procedure. It has been left to the Court of Justice to craft its own vision of an EU judicial order and set out this provision as the spine of that judicial order. It has done this through a three-stage argument. First, it sets out that the European Union is an autonomous legal order. Secondly, an autonomous legal order requires that all courts in the Union interpret EU law in a uniform manner. Thirdly, to enable this, Article 267 TFEU provides a direct relationship between national courts and the Court of Justice. It is to be interpreted and developed in the light of the needs of the Union legal order and its need for a coordinated judicial order in which EU law is given the same effect across the Union.

This reasoning emerged in *Rechenhölzer*, in which the question arose whether national courts were prevented from being able to refer by rulings from superior courts, which would normally bind them. *Rechenhölzer* received a subsidy to export barley outside the Union. When he failed to do this, the German authorities sought to recover the subsidy. The Hesse Finance Court considered that the authorities were entitled to recover the full subsidy, but, on appeal, the Federal Finance Court ruled that the authorities were entitled only to recover part of the subsidy. The matter was referred back to the Hesse court, which considered that the Federal court's ruling was inconsistent with the EU Regulation on the matter. It referred the question as to whether it still had a discretion to refer, unaffected by the ruling of the superior domestic court.

Case 166/73 *Rechenhölzer-Düsseldorf v Einfuhr- und Vorratstelle für Getreide* [1974] ECR 33

1. [Article 267 TFEU] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.

Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise aims to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States.

Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law.

The provisions of [Article 267 TFEU], which enable every national court or tribunal without distinction to refer a case to the court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light.

2. The provisions of [Article 267 TFEU] are absolutely binding on the national judge and, in so far as the second paragraph is concerned, enable him to refer a case to the Court of Justice for a preliminary ruling on interpretation or validity.

This Article gives national courts the power and, where appropriate, imposes on them the obligation, to refer a case for a preliminary ruling, as soon as the judge perceives either of his own motion or at the request of the parties that the litigation depends on a point referred to in the first paragraph of [Article 267 TFEU].

3. It follows that national courts have the widest discretion in referring matters to the Court of Justice if they consider that a case pending before them raises questions involving interpretation, or consideration of the validity, of provisions of Community law, necessitating a decision on their part.

It follows from these factors that a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings.

It would be otherwise if the questions put by the inferior court were substantially the same as questions already put by the superior court.

On the other hand the inferior court must be free, if it considers that the ruling on law made by the superior court could lead it to give a judgment contrary to Community law, to refer to the Court questions which concern it.

If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of the judicial systems of the Member States would be compromised.

The only circumstance in which the Court of Justice will have regard to national hierarchies is where the judgment of the lower court making the reference has been overturned on appeal by a more senior national court.⁵⁴ However, this appeal must relate to a point of national law that does not relate to the reference. For the Court of Justice has held that if the decision to refer has been appealed, the lower court is not bound by that appeal. The autonomous nature of Article 267 TFEU means that it has only to draw inferences from that appeal if it wishes, and it is free to maintain or withdraw the reference in such circumstances, irrespective of the wishes of the higher court.⁵⁵

(ii) Subjects of the EU judicial order

Within the framework of Article 267 TFEU, it is crucial to be a court or tribunal. These and the Court of Justice are the only bodies recognised by the provision. National courts and tribunals become both opportunity structures for those seeking access to the Court of Justice and independent actors in their own right with new powers to ask questions of the Court of Justice and influence the contours of EU law across the Union. This begs the question, however, of what is to be considered a court or tribunal for these purposes. Throughout the Union, a variety of professional, regulatory and arbitral bodies, which are not formally designated as courts under national law, adjudicate upon EU law. It would be problematic, in terms of the uniformity of EU law, if some were entitled to refer, but not others.

In *Broekmeulen*, therefore, the Court of Justice ruled that the uniformity of EU law required that a Union definition be provided for what constituted a court or tribunal for the purposes of Article 267 TFEU.⁵⁶ This should be a broad definition, which should include many bodies that were not formally courts within the national legal system. Thus, the Court held that an appeal committee within the Dutch professional body, regulating entry of doctors to the profession, constituted a court because it determined individual rights under EU law, acted under governmental legal supervision and employed quasi-legal procedures. Over the years, the Court has referred the

⁵⁴ Case 65/81 *Edis v Anderlecht Football Club* [1981] ECR 33; Case C-305/03 *Reddy* [2004] ECR I-2173.

⁵⁵ Case C-412/05 *Comitex*, Judgment of 15 December 2006.

⁵⁶ Case 265/89 *Broekmeulen v Nederlandsche Reguleerder* [1990] ECR 3011.

qualities necessary for a body to be a court. Bodies must be independent, be established by law and have a compulsory jurisdiction, and be taking a decision of a judicial nature.⁵²

The criterion of independence has been held to have an external and internal dimension.⁵³ Externally, the body must be protected against intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. There must also be safeguards protecting its independence. In *Gabalfrisa*, the Court considered the *Tribunales Económico-Administrativos*, which reviewed the decisions of the tax authorities in Spain, to be courts.⁵⁴ Although members of these bodies were appointed and dismissed by the minister, there was considered to be a clear separation of functions between them and the tax authority.⁵⁵ By contrast, in *Syfait*, the Court did not consider the Greek competition authority to be a court even though it was formally independent, as there were insufficient guarantees against dismissal of its members by the Minister for Economic Development.⁵⁶ Internally, the body must be impartial between the parties. It must have no organisational links with any of the parties appearing before it and no interest in the outcome of the proceedings before it.⁵⁷

Secondly, not only must the body be deciding the Union rights of the parties, but it must also have a compulsory jurisdiction over the activities in question. This means that a private body, most notably arbitration panels, cannot be a court for the purposes of Article 267 TFEU, as parties opt into such arrangements.⁵⁸ The last criterion is that the body must be taking decisions of a judicial nature. This leads to bodies having a starting status in which the nature of the proceedings determines whether they will be able to refer. The Court has been unclear about what constitutes a decision of a judicial nature, preferring the opposite strategy of stating that the decision must not be of an administrative nature. Courts allocating the sumo to a child,⁵⁹ or registering a company⁶⁰ have been held not to be in a position to make a reference as these are considered to be administrative decisions. By contrast, if a court hears an appeal against such a decision, its decision will be considered to be of a judicial nature.⁶¹

The consequence of these criteria is that a whole number of public bodies have been found to be courts, notwithstanding that they are not part of the formal judiciaries of their Member States. They include immigration adjudicators,⁶² professional disciplinary bodies,⁶³ bodies established to review public contracts⁶⁴ and tax adjudicators.⁶⁵ Whilst a case can be made for a uniform definition of a

⁵² See Case C-215/96 *Costa*, Judgment of 16 December 1998.

⁵³ Case C-506/04 *Irwin v. Office des marchés de bœufs de Luxembourg* [2006] ECR I-4413.

⁵⁴ Joined Cases C-110/93–C-147/93 *Gabalfrisa* [2000] ECR I-1577.

⁵⁵ In recent years, the Court seems to have toughened up the guarantees necessary. Case C-245/05 *Alip v. IAT* [2007] ECR I-4613.

⁵⁶ Case C-53/03 *Syfait* and *Giffert v. Staatssecretaris ALPE* [2005] ECR I-4669.

⁵⁷ Case C-34/92 *Grifone v. Administración del Contrato* [1993] ECR I-127; Case C-315/99 *Schmidt* [2001] ECR I-4573.

⁵⁸ Case 104/81 *Nordsee Deutsche Hochseefischerei v. Reederei Alfred Heide GmbH* [1982] ECR 1055; Case C-125/94 *Genschel and Carlsberg* [2005] ECR I-973.

⁵⁹ Case C-54/94 *Strandjordens Fiskeriförbund* [2004] ECR I-2561.

⁶⁰ Case C-162/00 *Leh* [2001] ECR I-543.

⁶¹ Case C-510/04 *Costa*, Judgment of 16 December 2004; Case C-140/04 *Rea v. G. B. J. Bosch Boven*, Judgment of 25 June 2005.

⁶² Case C-416/94 *El Yassini v. Secretary of State for the Home Department* [1995] ECR I-2285.

⁶³ Case 245/80 *Arbeitsgemeinschaft v. Minister für Wirtschaft und Verkehr* [1981] ECR 2311.

⁶⁴ Case C-54/94 *Grifone v. Administración del Contrato* [1993] ECR I-127; Case C-93/00 *St v. Stuy Wier* [2000] ECR I-5553.

⁶⁵ Case C-11/00 *De Groot v. College der burgemeester en schepenen van Alphen aan den Rijn* [2002] ECR I-3445.

court in that it leads to an equal possibility of reference from across the Union, the rationale for the criteria used in that definition is not clear and the Court has been attacked on two fronts.

First, a rationale for a wide definition is that it is important that any body that decides EU law rights should be able to refer. If not, individuals will have to challenge the decision before a body that can refer. This adds expense and time to the process of referral and provides a disincentive for parties to seek a referral. Such a view would allow private bodies to refer and would probably not be too worried about whether the decision is of a judicial nature, as all that matters is a denial of rights and not the manner in which this happens.⁶⁶ Such a critique is, however, open to a floodgate argument in that it would allow an extensive number of poorly trained actors to overload the Court of Justice's docket.

The other criticism, made very effectively by Advocate General Colomer, is that the current definition is too wide.⁶⁷ He argues that a strategic decision was taken in Article 267 TFEU to create a conversation between courts which would shape the development of EU law. Administrative and regulatory agencies, independent parts of the executive but nevertheless part of it, should not be part of that conversation. Colomer also notes many practical consequences of a wide definition. It allows bodies with no legal training to formulate references and statements. It has led to restrictions being placed on referrals by courts, notably the uncertain test that they be doing something of a judicial nature. Most crucially, he argues, it allows administrative actors to disrupt stable domestic judicial hierarchies and systems of judicial precedent by making a reference if they do not agree with them.

(iii) Structure of the EU judicial order

The Union court structure is different from national systems of administration of justice. These are characterised by compartmentalisation and decentralisation. There are specialised courts for particular areas, such as tax, intellectual property law, labour law and social security, and distinctions may be made between private law courts and administrative ones. Multitiered systems of appeal result in only a very small proportion of cases reaching the more senior courts. The preliminary reference procedure, by contrast, allows all courts and tribunals within the Union, no matter how high or low, to make a reference to a single court: the Court of Justice. The Union court structure is, therefore, a flat court structure of 'first and then equals', in which all national courts are granted equal possibilities to make a reference to the Court and no national law can disenfranchise any national court of the possibility of making a reference.

⁶⁶ K. Alter, 'The European Court's Political Power' (1956) 19 *West European Politics* 433, 466–7.

⁶⁷ While EC law supremacy posed a threat to the influence and authority of high courts and implied a significant compromise of national sovereignty, lower courts found few costs and numerous benefits in making their own referrals to the ECJ and in applying EC law. Being courts of first instance, lower-court judges were averse to having another court hierarchically above them, and to having their judgments

⁶⁸ T. Biele, 'Multitiered Tribunals and Article 177 of the EEC Treaty' (1985) 21 *OEJL* 489.

⁶⁹ See his Opinion in Case C-17/00 *De Groot v. College der burgemeester en schepenen van Alphen aan den Rijn* [2002] ECR I-3445; Case C-204/04 *Alip v. Europa*, Opinion of AG Colomer of 25 June 2005.

to written by courts above. They also did not have to worry about how their individual actions might upset legal certainty or the smooth functioning of the legal system. Thus, they were more open to sending to the EC broad and provocative legal questions about the reach and effects of European law in the national legal order. There were also many benefits for lower courts in taking advantage of the ECJ and in invoking EC law. It allowed lower courts to disavow the restrictive jurisprudence of higher courts, and to re-open legal debates which had been closed, and thus to try for legal outcomes of their preference for policy or legal reasons. For example, recourse to EC law allowed pro-women industrial tribunals to disavow the Employment Appeals Tribunal and the Conservative government, to get legal outcomes which helped them to promote equal pay for men and women. Having an ECJ decision also magnified the influence of the lower-court decisions in the legal process, as the decision became part of established legal precedent, and it sometimes led to journal articles on decisions which otherwise would not have been publicly reported, but which were able to decisively contribute to the development of national law. Having an ECJ decision behind a lower-court decision also made its reversal by a higher court less likely. Thus, it actually bolstered the legal power and influence of the lower courts. For a lower court, the ECJ was akin to a second parent, where parental approval made off sanction. When a lower court did not like what it thought one parent (a higher national court) would say, or it did not agree with what one parent said, it would ask the other parent (the ECJ). Having the other parent's approval decreases the likelihood of sanctions for challenging legal precedent or government policy. If the lower court, however, did not think that it would like what that other parent might say, it could follow the York case and the ECJ can't set policy and not make a referral.

The different strategic calculations of national courts vis-à-vis the ECJ created a competition-between-courts dynamic of legal integration; this fed the process of legal integration and came to shift the national legal context from under high courts. The limitations on interpretation of national law created by high courts prompted lower courts to make referrals to the ECJ. This enabled lower courts to deviate from established jurisprudence or to obtain preferred new legal outcomes. In so using EC law and the ECJ to achieve outcomes, lower courts created opportunities for the ECJ to expand its jurisdiction and jurisprudence, and, in some cases they actually guided the ECJ to expand the legal authority of EC law even further. In this respect one can say that lower courts were the motors of EC legal integration into the national order, and legal expansion through their referrals to the ECJ.

This structure is also relatively untested. This might seem a bizarre thing to say about a procedure that was in the Treaty of Rome and has given rise to 6,318 references by the end of 2003, including many of the Court of Justice's seminal judgments.²³ Yet prior to the entry into force of the Treaty of Lisbon, restrictions were placed on the references that could be made in the fields of immigration, asylum, civil justice and policing and criminal justice. In the case of policing and criminal justice, Member States could choose whether to let their courts refer and which courts could refer.²⁴ In the case of the other fields, only courts against whose decision there was no judicial remedy could refer. Combined, this restricted the possibilities for reference so that in 2003, only twenty-six references were made in all these fields combined.²⁵

²³ Annual Report, above n. 20, 126.

²⁴ The procedure was in Article 68 EC and Article 35 TFEU respectively.

²⁵ Annual Report, above n. 21, 84.

Article 267 TFEU abolishes this exception and allows any national court or tribunal to refer in these fields in just the same way as in other fields. The abolition of this exception and the exposure of these fields to the full force of EU judicial structures are likely to change the workload and salience of the Court of Justice. Many of the fields traditionally exposed to these procedures, be they environmental, financial services, transport or broadcasting law, are, of course, significant but they are for the most part played out in national tribunals and regulatory agencies rather than by courts. This has led to preliminary references being concentrated in limited fields perceived as technical in nature. A study carried out between 1993 and 2000 thus found that 47 per cent of the cases decided were on agriculture, VAT or the economic freedoms.²⁶ By contrast, the new fields – immigration, asylum and crime – constitute the daily bread-and-butter of national judicial systems in a way that other areas of EU law (with the exception of anti-discrimination law) do not. To give one example, in the United Kingdom, 350 out of 1,847 of all the applications for judicial review (46 per cent) that were considered were on immigration, asylum or crime.²⁷ The number of cases heard in any of these fields dwarfs those in other fields of EU law. They also frequently touch on civil liberty and public order sensitivities, which leads to any decision being potentially highly contentious. It remains to be seen if the procedure will meet this challenge.

4. FUNCTIONS OF THE PRELIMINARY REFERENCE PROCEDURE

The institutional role of the Court of Justice was discussed at length at the signing of the Treaty of Nice. The Court of Justice submitted a discussion paper there to the Intergovernmental Conference. In this paper the Court described the goal of the preliminary reference procedure as being:

to guarantee respect for the distribution of powers between the Community and its Member States and between the Community institutions, the uniformity and consistency of Community law and to contribute to the harmonious development of the law within the Union.²⁸

Extrapolating from this, the preliminary reference procedure can be said to contribute to the development of the EU legal and judicial orders in four ways.

The first is the development of EU law. It enables the Court to develop new interpretations of EU law, resolve uncertainties, correct injustices and enunciate principles. Secondly, in its statement, the Court talks of the maintenance of the institutional balance. By this it means that EU institutions do not trespass on each other's prerogatives and that the same is also true of the relationship between EU institutions and national institutions. EU institutions do not encroach in matters that are reserved to the domestic field and national institutions respect the autonomy and rules of the Union legal system. The preliminary reference procedure secures this through judicial review by private parties. Private parties can use it to challenge national behaviour through a ruling from the Court that exposes illegality by their courts, legislature or administration. Alternatively, a reference can be made which questions the legality of actions or omissions

²⁶ D. Chalmers, 'The Court of Justice and the Constitutional Treaty' (2005) 6 JCMS 424, 466.

²⁷ Ministry of Justice, Judicial and Court Statistics 2007 (London, Statistical Office, 2008) 23.

²⁸ European Court of Justice, *The Future of the Judicial System of the European Union* (Luxembourg, 1993) 21. Available at www.cofr.europa.eu/inf/inf2/inf2about/inf2about.htm

by the EU institutions. Thirdly, the Court talks of the preliminary reference procedure as being necessary for the uniformity and consistency of EU law.¹⁸ This is partly about coordination. Historically, decisions of the national courts of one Member State do not bind those of another. Without the possibility of access to a court whose authority is accepted by all actors, divergent interpretations of EU law would arise in the different national jurisdictions. The reference procedure also has a circulatory power in that it makes all Union courts part of a single judicial order and legal territory. A consequence of the reference procedure is that litigation in one Member State is now equally legally significant for the legal systems of all the other Member States, insofar as the Court of Justice judgment coming out of it will affect all the jurisdictions. Litigation in the Netherlands, therefore, is as important as litigation in the United Kingdom for determining how EU law will govern life in the United Kingdom. Fourthly, the preliminary reference procedure has an administration of justice function. It enables national courts to decide disputes that involve EU law by allowing them to tap into the expertise of the Court of Justice.¹⁹

(i) Development of EU law

The reference procedure is significant quantitatively and qualitatively. Of the 757 cases pending at the end of 2008, 555 (about 51 per cent)²⁰ were preliminary references and almost all the significant rulings concerning EU law, other than those concerning the result of the powers of the EU institutions, have come via the preliminary reference procedure. National courts act, therefore, as the gate-keepers to most of the central legal questions that move the EU legal order forward. However, they do more than this, as they formulate the questions that must be addressed. In this sense, they are agenda-setters, as, whilst the Court chooses how it responds to the question, they decide and frame what the Court can adjudicate upon.

The procedure is important for the development of EU law in another sense. The monopoly of adjudication provided to national courts indicates a division of functions, in which the Court of Justice is to steer the Union legal order, setting out its fundamental principles and limits and determining the legality of Union measures, whilst national courts are responsible for its day-to-day limits. For the functions of the Court of Justice are exceptional in that they will not arise in most disputes involving EU law. In these disputes, it is the national courts and national legal systems that have hegemony over development of EU law: giving it a local reality, interpreting its principles, making sense of the practical relationship between it and national law.

(ii) Judicial review of EU institutions

Article 267 TFEU allows the Court of Justice to rule on the validity of EU legislation and administrative acts of the EU institutions.²¹ Typically, the individual will challenge the national

¹⁸ This was picked up early on in R. Barendse, 'Article 177 of the Rome Treaty as a Preliminary Device' (1966), 23 *Stanford Law Review* 1241. It has also been noted as a number of non-judicial comments made by members of the Court: G. Agha and C. Lippert, 'From CJEU to ECJ: the Constitutional Challenge Facing the Court' (1993) 11 *FEU L* 340; S. Tassier, 'The Effectiveness of Judicial Protection and Co-operation between the National Courts and the Court of Justice' (1993) 13 *FEU L* 1, 17.

¹⁹ Although see Case 166/73 *Pratt v. Director of the Inland Revenue and Revenue for Goods* (1974) ECR 11.

²⁰ Annual Report, at 11 above, 55.

²¹ Joined Cases 112/85–113/85 *Re v. Enderby* (1986) *Official Journal of the European Communities* (1986) ECR 2389.

measure implementing the EU act before a national court. The national court will then refer the question of whether the EU measure, which provides the legal authorisation for the national measure, is lawful or not.

In this way, the national court acts alongside the direct action procedures, which explicitly provide for individuals to challenge the acts of EU institutions.²² Its relationship with these provisions is a complicated one as the Court sees it as part of a system of remedies. In *Jégo-Quéré*, the Commission adopted a Regulation setting a minimum mesh size for nets. *Jégo-Quéré*, a French company, fished for whitefish, a very small fish. The new minimum mesh sizes were now too big to allow it to do so effectively. It could not challenge the measure before a national court, as the Commission Regulation provided for no implementing measures to be taken, with the consequence that there was no national law to challenge. It sought to challenge the Regulation directly before the Court under Article 263(4) TFEU.²³ The Court held that they lacked standing, but that there were corollary duties on national authorities to allow individuals to challenge these acts before national courts, who could then refer the matter to the Union Courts.

Case C-253/02 *P. Commission v. Jégo-Quéré* [2004] ECR I-3425

23. It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been recognised in Articles 8 and 10 of the ECHR...
30. By Articles [263] and [266] TFEU, ... on the one hand, and by Article [267] TFEU, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the Community Courts. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article [263] TFEU, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts, before the Community Courts under Article [266] TFEU or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity...
31. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection...
32. It is that contract, in accordance with the principle of sincere cooperation laid down in Article [4] TFEU, 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...

²² On these see pp. 414–17.

²³ See pp. 424–5.

The Court of Justice thus states that there is a duty on national courts to allow individuals to challenge the legality of EU acts before them with the presumption that these will then in turn refer the question to the Court of Justice.⁴⁴ In this, the Court of Justice sees the preliminary reference procedure as the central instrument for judicial review of EU acts. For private parties are not required to meet any restrictive *locus standi* requirements to do this, whereas if they seek direct access to the Court of Justice under Article 263(4) TFEU, the requirements are highly restrictive. However, subsequently in the judgment, the Court limits the force of this position by indicating that there will be no sanction if national courts fail to do this. In particular, it will not step in to give private parties direct access to the Court under Article 263(4) TFEU.

By contrast, the preliminary reference procedure cannot be used to review an EU measure where a party has *locus standi* to challenge a measure directly before the Court of Justice under Article 263(4) TFEU but failed to bring the action within the necessary time limits. In *TWD*, a German textile company sought to challenge a 1985 Commission Decision declaring a German subsidy to it to be incompatible with the EU law on state aids by asking for a preliminary reference from a German court in 1991.⁴⁵ The applicant was only barred from bringing a direct action as the time limits for such an action, under Article 263(5) TFEU, are within two months of the Decision becoming known to it. The Court refused, stating that once the time limit had expired legal certainty required that the national court be bound by the Commission Decision and could not, therefore, raise the question of its validity.⁴⁶

Two months is a short period and most cases are different from *TWD* as parties will not be clear whether they have standing or not. In *Atzeni*, the Court tempered the limitation, therefore.⁴⁷ It stated that the exclusion would only apply where the applicant was explicitly identified in an EU institution and clearly had standing under Article 263 TFEU. In other circumstances, where parties are not identified or only identified in a general manner, there is no time-bar on challenging an EU act before a court. Whilst the motivations behind this reasoning are clear, it still does not avoid the problem of legal uncertainty and it might be here that national courts could impose their own limitation periods provided these are not too restrictive.

3.3 Preserving the unity of EU law

The unity of the Union legal system rests on the idea that the Union legal system is an autonomous legal system that must be interpreted and applied in a uniform way across the Union.⁴⁸ This has required that the Court of Justice set out the corpus of EU law so which it can give judgments under Article 267 TFEU. If particular provisions of EU law could not be referred, both the uniformity and autonomy of the legal order would be compromised, as, without authoritative guidance, national courts would give divergent interpretations and the sense of being part of the same legal jurisdiction would be compromised.

Although Article 267 TFEU only gives the Court the power to give rulings on the Treaties and acts of the EU institutions, the Court has consequently interpreted its power more broadly

to include anything which forms part of the EU legal order, even if it is neither a provision of the Treaties nor a piece of secondary legislation, be that international agreements to which the Union has succeeded the Member States⁴⁹ or general principles of law and fundamental rights when there was no explicit reference to these in the Treaties.⁵⁰

A feature of international agreements and fundamental rights is that they form part of the EU legal order but they can have an existence outside it. The Court has held that it will still give rulings on such provisions, notwithstanding that they apply to situations governed by both domestic and EU law. In that regard, it will rule on a provision even where it will mostly be invoked as a matter of national law and only occasionally as a matter of EU law. In *Hernández*, the Court considered a provision of the WTO Agreement on Trade Related Intellectual Property Rights which concerned enforcement of intellectual property rights. This largely fell within national competence.⁵¹ The Court nevertheless held that, insofar as the provision could potentially cover situations which fell within the scope of EU law, most notably where intellectual property rights generated by EU law were infringed, the provision required a uniform interpretation.

The Court has been concerned to secure not just uniformity of application of EU law but also an interpretive unity. This has led it to accept references on matters that do not fall within EU legal competences but where there is, nevertheless, a reference to EU law. Whilst it has no general power to give rulings on provisions of national law,⁵² the Court will, thus, give rulings wherever the latter refers to the contents of provisions of EU law or adopts similar solutions to those found in EU law.⁵³

In *Drozd*, a Togolese woman challenged a decision by the Belgian authorities refusing her a residence permit following the death of her Belgian husband, a situation governed exclusively by Belgian law.⁵⁴ The Belgian law stated, however, that the spouses of Belgian nationals should be treated in the same way as spouses of other EU nationals, whose treatment was governed by EU law. In other words, the standard for Belgian law was to be that set in EU law. The Court ruled it to be in the Union legal interest that it give a ruling, on the grounds that every EU provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied, in order to forestall future differences in interpretation.⁵⁵

This concern to secure uniform interpretation has generated its own legal uncertainties. For it raises the question of how explicit the reference to EU law must be for the Court to be able to give a reference. In *Drozd*, there was an explicit reference. This was not the case in *Las Verges du Vieux Nevers*.⁵⁶ The Belgian government had transposed a Directive which restricted the

⁴⁴ Case C-144/83 *Finke Bergbau v Hauptverband der Bergbau-Industrie* [1983] ECR I-1393. See pp. 160–1.

⁴⁵ Case C-125/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-811.

⁴⁶ D. Wyatt, 'The Relationship between Actions for Annulment and References on Validity after *TWD Deggendorf*', in J. L. Lamy and A. E. S. L. (eds.), *Review for the Work of EC Law* (Cheltenham, 2003), 155ff.

⁴⁷ Joined Cases C-248/92 and C-249/92 *Atzeni and Others v Regione autonoma della Sardegna* [1993] ECR I-1873.

⁴⁸ Case C-155/96 *Kannan v CNF* [2007] ECR I-4811.

⁴⁹ Joined Cases C-271/01–C-272/01 *Arbeitsgemeinschaft der Energie-Lieferanten v SEB* [2003] ECR I-801.

⁵⁰ See, e.g., Case C-112/01 *Internationale Handelsgesellschaft v Einfuhr- und Vorratshilfe für Getreide und Futtermittel* [1992] ECR I-1125.

⁵¹ Case C-52/96 *Hernández International v FRT Marketing* [1996] ECR I-2001; Joined Cases C-305/94 and C-306/94 *Peeters Christian Dior v Dior, Christian Dior* [2000] ECR I-1107; Case C-401/95 *Markt Gardiner – Produkte Farmindustria v Markt* [2007] ECR I-1707.

⁵² Case C-151/92 *Maritime v Belgische Staat* [1994] ECR I-371.

⁵³ Case C-247/97 *Schubert v. Hof* [1998] ECR I-4295; Case C-175/03 *Jones v. Jones* [2004] ECR I-1359. For discussion, see S. Lefevre, 'The Interpretation of Community Law by the Court of Justice in Areas of National Competence' [2004] 23 *ELRev* 511.

⁵⁴ Joined Cases C-371/88 and C-372/88 *Drozd v. Dubois* [1990] ECR I-3673.

⁵⁵ Similar wording has been employed to allow the Court to accept references on matters that incorporate items of EU law: Case C-424/91 *Pratt v. Pratt* [1993] ECR I-4135.

⁵⁶ Case C-49/97 *Las Verges du Vieux Nevers*, judgment of 11 December 2002.

haves parent companies had to pay ex dividends made by subsidiaries in other Member States. The Belgian law replicated, in parts, the language of the Directive, but the instance was wider and the Belgian law did not refer to it explicitly. It also applied to relations between Belgian parent companies and their subsidiaries, something that fell outside the Directive. The Court was asked to give an interpretation on the Belgian law in a case that involved only a Belgian parent company and its subsidiary. Notwithstanding the domestic nature of the case and the absence of an explicit reference, the Court considered it sufficient that the Belgian law was intended to transpose the Directive and there was some replication of the language. However, this is a very weak and uncertain nexus. It also loses sight of the initial rationale for intervention in such cases, namely unity of interpretation of EU law. As the Court acknowledged, the Belgian court need have only partial regard to its judgment in interpreting the provision but would also be able to look at the Belgian domestic legal context. There would be no guarantee, therefore, that its interpretation of its law would be the same as interpretations of identically worded provisions in other Member States.

The unity of EU law also has an institutional dimension in that the Court of Justice has understood it as suggesting that there needs to be one court with pre-eminent authority over the interpretation and validity of EU law.¹⁷ This view is not contested by national courts.¹⁸ We have already seen that by virtue of Article 274 TFEU, the power of judicial review over acts of the EU institutions is reserved to the Court of Justice. The Court has stated that national courts cannot declare EU measures invalid but must refer where this question arises.¹⁹ In *Foglia v. Commission* Decision requiring import duties to be paid on vinegars imported from the eastern part of Germany was challenged before a Hamburg court on the grounds it conflicted with the 1957 Protocol on German Internal Trade, which allowed free trade between the two divided parts of Germany. The Hamburg court asked the Court of Justice whether it could declare the Commission Decision invalid.

Case 314/85 *Firma Foglia v Hauptzollamt Lübeck-Ost* [1987] ECR 4159

13. In enabling national courts, against those decisions where there is a judicial remedy under national law, to refer to the Court for a preliminary ruling on questions on interpretation or validity, [Article 267 TFEU] did not settle the question whether those courts themselves may declare that acts of Community institutions are invalid.
14. These courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.
15. On the other hand, these courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasised... in Case 56/62 *International Chemical Corporation v Aerial Refinaria Siciliana* (1981) ECR 1179, the main purpose of the powers accorded to the Court

¹⁷ European Court of Justice, above n. 77, 37.

¹⁸ See pp. 131-3.

¹⁹ G. J. de Waele, 'The Constitutional Review of Community Acts under the EEC Treaty' (1988) 15 *CEML* 647.

by Article [267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

16. The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, for actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out... in Case 294/83 *Parit-Société des Vins v European Parliament* (1984) ECR 1313, 'by Articles [23] and [268], on the one hand, and in Article [267 TFEU], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.
17. Since Article [267 TFEU] gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.
18. It must also be emphasised that the Court of Justice is in the best position to decide on the validity of Community acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.
19. It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question.

The indispensability and strength of the requirement on national courts to challenge the validity of EU measures was illustrated in *Schul*.²⁰ A Dutch court of last resort asked whether it could strike down an EU instrument when an analogous instrument based on identical principles had already been struck down. The case in question concerned a charge levied on Brazilian sugar imported into the Netherlands on the basis of a Commission Regulation. An identical pricing structure was used as in a measure in the poultry sector ruled illegal by the Court of Justice, namely the Council had suggested one pricing structure (the representative price) and the Commission had exceeded its delegated power by using a different one (cfl price). The Court of Justice stated that the uniformity of EU law and its procedural rules, in which all Member States and EU institutions have the right to make observations, entitled that only it could declare Union acts invalid. This was the case even where an analogous measure had already been struck down. Analogies could be misleading in that the factual and legal context surrounding each measure would necessarily be different.

²⁰ Case C-459/02 *Schul v Minister van Landbouw, Natuur en Voedselkwaliteit* (2005) ECR I-10513.

A very slight narrowing of the situation was allowed in *DATA*.¹²¹ *DATA*, the central association representing airlines, challenged Regulation 261/2004/EC, which provided for compensation and assistance to passengers in the event of being denied boarding and of cancellation or long delay to long-haul flights. The English court was sceptical of the challenge and, indeed, the challenge was eventually unsuccessful. It therefore questioned the threshold at which it must refer to the Court of Justice. The latter stated it was not required to refer simply because one party challenged the validity of a measure. It should only refer if it considers an argument as to the invalidity of a measure, brought up either by itself or by one of the parties, to be well founded.

The annual Commission studies on the application of EU law have, however, not suggested any rebellion against *Foglia* by national courts.¹²² This is, in part, because the practical application of the *Foglia* judgment is rather different from its rhetoric. National courts may still suspend acts through the granting of interim relief pending a reference to the Court of Justice.¹²³ A compact is thereby offered, whereby national courts may provisionally suspend the application of an act provided they refer the matter to the Court of Justice for a definitive ruling. They retain their power of review but at the cost of having to make a reference.

(iv) Dispute resolution

The monopoly of adjudication granted to the national court by Article 267 TFEU suggests dispute resolution for it. However, the stipulation in Article 267(2) TFEU that it only refer when the point of EU law is necessary to give a judgment has been interpreted to mean that a reference should only take place and the Court of Justice give a judgment where the latter meaningfully contributes to the resolution of the dispute. The Court of Justice will not give a ruling, therefore, if it considers it will not be used to determine a genuine dispute before the national court. This inevitably means that it will look at the litigation before the national court to verify whether a dispute is taking place. This position was tested for the first time in the *Foglia* saga. *Foglia* had contracted to sell Italian liqueur wine to Novello in France with the proviso that Novello would reimburse any taxes *Foglia* incurred, unless these were levied contrary to Community law. *Foglia* sought to recover the French taxes paid from Novello, equivalent to 149,000 Italian lire, who refused on the grounds that these had been levied contrary to Community law. The matter was brought before an Italian court which was asked to rule on the compatibility of the French taxes with EC law. The case had all the hallmarks of a test case. Both *Foglia* and Novello argued that the taxes were illegal, the amount of tax paid was disputed and *Foglia* indicated that he was participating in this case on behalf of Italian traders of this wine. The Court of Justice refused to give judgment in the initial reference on the grounds that there was no genuine dispute.¹²⁴ The Italian court re-referred the matter, asking what the roles of the national court and Court of Justice were in such matters.

¹²¹ Case C-344/04 *A*, on point *DATA v Department for Transport* [2005] ECR I-2493.

¹²² See e.g. European Commission, 2010 Annual Report on Monitoring the Application of Community Law, COM(2010)577, Annex VI.

¹²³ Case C-483/93 *Atlanta Franchising* [1994] ECR I-4517 and others (No. 2) [1995] ECR I-4517; Case C-32/95 *Adger v Hays* [1995] ECR I-4517.

¹²⁴ Case 104/79 *Foglia v Novello* [1980] ECR 745.

Case 244/80 *Foglia v Novello* (No. 2) [1981] ECR 3045

14. With regard to the first question it should be recalled, as the Court has had occasion to emphasise in very varied contexts, that [Article 267 TFEU] is based on cooperation which entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of Community law throughout all the Member States.
15. With this in view it is for the national court – by reason of the fact that it is seised of the substance of the dispute and that it must bear the responsibility for the decision to be taken – to assess, having regard to the facts of the case, the need to obtain a preliminary ruling to enable it to give judgment.
16. In exercising that power of appraisal the national court, in collaboration with the Court of Justice, fulfils a duty imposed on them both of ensuring that in the interpretation and application of the Treaty the law is observed. Accordingly the problems which may be entailed in the exercise of its power of appraisal by the national court and the relations which it establishes within the framework of [Article 267 TFEU] with the Court of Justice are governed exclusively by the provisions of Community law.
17. In order that the Court of Justice may perform its task in accordance with the Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment.
18. It must in fact be emphasised that the duty assigned to the Court by [Article 267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. A declaration by the Court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the national court but makes it possible to prevent the application of the procedure under [Article 267 TFEU] for purposes other than those appropriate for it.
19. Furthermore, it should be pointed out that, whilst the Court of Justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in a position to make any assessment inherent in the performance of its own duties in particular in order to check, as all courts must, whether it has jurisdiction. Thus, the Court, taking into account the repercussions of its decisions in this matter, must have regard, in exercising the jurisdiction conferred upon it by [Article 267 TFEU], not only to the interests of the parties to the proceedings but also to those of the Community and of the Member States. Accordingly it cannot, without disregarding the duties assigned to it, remain indifferent to the assessments made by the courts of the Member States in the exceptional cases in which such assessments may affect the proper working of the procedure laid down by [Article 267 TFEU] ...
20. On the one hand it must be pointed out that the court before which, in the course of proceedings between individuals, an issue concerning the compatibility with Community law of legislation of another Member State is brought is not necessarily in a position to provide for such individuals effective protection in relation to such legislation.
21. On the other hand, regard being had to the independence generally ensured for the parties by the legal systems of the Member States in the field of contract, the possibility arises that the conduct of the parties may be such as to make it impossible for the State concerned to arrange for an appropriate defence of its interests by causing the question of the validity of its legislation to be decided by a court of another Member State. Accordingly, in such procedural situations it is impossible to exclude the

risk that the procedure under Article 267 TFEU may be diverted by the parties from the purposes for which it was laid down by the Treaty.

30. The foregoing considerations as a whole show that the Court of Justice for its part must display special vigilance when, in the course of proceedings between individuals, a question is referred to it with a view to permitting the national court to decide whether the legislation of another Member State is in accordance with Community law.

Foglia was extremely contentious. The power to refuse a reference established a hierarchical element between the Court of Justice and the national court, as it granted a power to the Court of Justice to review the national court's decision to refer. The enquiry into the existence of a genuine dispute by the Court of Justice would also require it to look behind the national court's reference and examine the factual background to the dispute. There was consequently debate about whether this violated the cooperative spirit of Article 67 TFEU or transgressed unduly on the national court's monopoly over fact-finding.¹⁰⁸ Whatever its merits, there are severe practical difficulties in applying *Foglia*.¹⁰⁹ The finding of an absence of a genuine dispute requires the Court to take an independent view of the facts of the case. Without its own fact-finding power, however, the Court has little capacity to second-guess national courts.

Within this context, the Court has accepted test cases. In *Lesieur Siplec v TFI Publicité*, *Lesieur Siplec* challenged a refusal by TFI, one of the major French television broadcasters, to televise an advertisement which sought to persuade viewers to purchase petrol from the forecourts of Lesieur's chain of supermarkets.¹¹⁰ The reason for the refusal was a French law prohibiting television advertising of the distribution sector. Both parties to the dispute were in agreement about the domestic legal situation and the need for a reference. The Court accepted the reference. It noted that what was being sought was a declaration from the national court that the French law did not comply with EU law. The parties' agreement did not make the need for that declaration any less pressing or the dispute any less real. Whilst resolution of test cases is an important part of the judicial function, it is very difficult to distinguish them from hypothetical cases. In both, there is little conflict between the immediate parties to the dispute.

Since *Foglia*, the Court has also accepted cases where the national law of one Member State is challenged in the courts of another. In *Eau de Cologne*, *Eau de Cologne*, a cosmetics company, agreed to supply cosmetics to an Italian company, *Provide*.¹¹¹ The contract contained a warranty that the cosmetics would comply with Italian law. *Provide* repudiated the contract on the grounds that the cosmetics did not comply with Italian labelling laws. *Eau de Cologne* argued that they complied with the Directive regulating the matter. Under a choice of forum provision in the agreement, the matter was brought before a German court which referred

¹⁰⁸ For differing views see A. Barro, 'Preliminary Questioning? The Judgment of the European Court in *Foglia v Novelli*' (1985) 5 *ELRev* 443, 451–4; K. Roumestan, 'On Law and Policy in the European Court of Justice Decisions: Martin v Mair, 1984' 485–93; D. Wyatt, 'Foglia (No.2): The Court Decides It has Jurisdiction to Give Advisory Opinions' (1982) 7 *ELRev* 185; C. Gray, 'Advisory Opinions and the Court of Justice' (1982) 5 *ELRev* 34.

¹⁰⁹ G. Jelic, 'The Existence of a Genuine Dispute: An Inexplicable Precondition for the Jurisdiction of the Court under Article 177 EC?' (1984) 11 *October* 525, 526.

¹¹⁰ Case C-41/79 *Lesieur Siplec v TFI Publicité SA and TFI Publicité SA* [1980] ECR I-2479, 26. G. Jelic, 'Article 177 and Limits to the Right to Refer: An End to the Confusion?' (1986) 3 *European Public Law* 275.

¹¹¹ Case C-150/84 *Eau de Cologne v Provide* [1985] ECR I-881.

a question on the interpretation of the Directive. The Court accepted the genuineness of the dispute despite a number of factors, notably the seemingly trivial nature of the breach and the choice of forum which allowed a German court to adjudicate upon the compatibility of Italian legislation with EU law.

The *Foglia* line of reasoning survives. Instead of being used by the Court to review the motives of the parties, it is being used to review the contents of the reference and the quality of the national court's communications.¹¹² The Court will refuse to give a reference not merely where the dispute is hypothetical but where the factual and legal context to the dispute has not been properly explained. In *Plato Plastik v Carapack*, *Plato Plastik* produced plastic bags in Austria which it sold to *Carapack*, who sold them at supermarkets. Under the contract, *Plato Plastik*'s statutory obligation to participate in a collection and recovery scheme was transferred to *Carapack*. Following prosecution by the Austrian authorities, *Plato Plastik* asked for confirmation from *Carapack* that it was participating in the scheme. *Carapack* refused, arguing that it could not absolve *Plato Plastik* of its statutory duties. The Austrian court referred the question whether the Austrian scheme for the collection and recovery of waste complied with Directive 94/62/EC on packaging waste. The Commission noted that both parties agreed on the law and were using the case to have the Austrian scheme declared illegal.

Case C-341/01 *Plato Plastik v Carapack* (2004) ECR I-4893

26. It has consistently been held that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling...
27. However, the Court has also held that, in exceptional circumstances, it should examine the conditions in which the case was referred to it by the national court... The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions...
28. The Court has accordingly held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation or assessment of the validity of a Community rule sought by that court bears no relation to the facts or purpose of the main action, where the question is hypothetical or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it...
29. In order that the Court of Justice may perform its task in accordance with the EC Treaty it is essential for national courts to explain, when the reasons do not emerge beyond any doubt from the file, why they consider that a reply to their questions is necessary to enable them to give judgment... Thus the Court has also on various occasions stressed that it is important for the national court to state the

¹¹² T. Keneally, 'First Steps Towards a European Courtroom' (1993) 18 *ELRev* 111; D. Anderson, 'The Admissibility of Preliminary References' (1994) 24 *JEL* 175, 186–8.

positive reasons for which this is doubt as to the interpretation of Community law and which led it to consider it necessary to refer questions to the Court for a preliminary ruling...

30. In the present case, the action before the national court seeks, on an application by Pabo Plastik, an order that Campac must provide the latter with confirmation of its participation in the APA system relating to the plastic bags delivered to it. It is not manifestly apparent from the facts set out in the order for reference that the dispute is in fact fictitious... The fact that the parties to the main proceedings are in agreement as to the interpretation of the Community provisions in question does not affect the reality of the dispute in the main proceedings...
31. Consequently, the argument that the dispute is fictitious cannot succeed.

There is a duty for the national court to explain the factual and legal context and also a duty to provide reasons why it considered it necessary to make a reference. These reasons must explain the national court's doubts but they must also provide some explanation of the reasons for the choice of the EU provisions to be interpreted and of the link between those provisions and the national legislation applicable to the dispute. Whilst this may lead the Court to limit its answers to only some of the questions referred,¹¹⁰ in recent years the review has been extremely light-touch. The Court has therefore stated that it will only refuse to give a reference where it is 'quite obvious' that there is no dispute, the point of law referred bears no relationship to the dispute in question or that it has not been provided with the necessary factual and legal material. The 'quite obvious' test means that if there is the slightest doubt about any of these it will give a ruling. In *Stichting Zuid-Hollandse Milieufederatie*, for example, the Court accepted a question from a Dutch court about the Directive on biocides, notwithstanding that the litigation concerned legislation on another Directive, that on plant protection, on the grounds that the two Directives were closely related and governed by similar principles.¹¹¹ Furthermore, even if the statement of the factual and legal context is thin and ambiguous or the reference is posed in general and hypothetical terms, the Court will give judgment if it thinks it can relate the reference to a particular dispute¹¹² and if it thinks enough of the facts are provided for it to give a sufficiently informed judgment.¹¹³

5. MANAGEMENT OF THE EU JUDICIAL ORDER

We have seen in the last two sections that the Court of Justice has set out an EU judicial order, comprising both EU and national courts, the structure of which is underpinned by Article 267 TFEU. This has led to a division of duties where the Court of Justice has a monopoly over the review of EU institutions and what can be referred to it, whilst national courts have a monopoly of adjudication over other disputes involving EU law that come before them, albeit that a reference to the Court of Justice entitles the Court of Justice to instruct them on how to interpret the point of EU law before them.

¹¹⁰ Case C-322/05 *Comitè Français de l'Alimentaire et de l'Agriculture* [2006] ECR I-439.

¹¹¹ Case C-118/05 *Stichting Zuid-Hollandse Milieufederatie v Milieu van Leefomgeving* [2006] ECR I-8333.

¹¹² Case C-537/07 *Grain Processing v OGC*, Judgment of 26 July 2008.

¹¹³ Joined Cases C-293/04–C-394/04 *Viscosea Werff and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2005] ECR I-4519.

All this still leaves the question of how the procedure is managed to realise these different functions and whether it successfully realises this. There are three points of management. First, there are the effects of the Court of Justice judgments on the referring court and the wider judicial order. Secondly, the reference process has to be managed by the domestic court in the period when it refers and when it gives final judgment. Finally, the circumstances under which a referral is or is not made have to be managed.

(1) Binding effects of Court of Justice judgments

A judgment given by the Court of Justice binds the referring national court.¹¹⁴ However, it is free to refer the question back to the Court of Justice if it is either dissatisfied with the ruling or is unclear about the meaning of the ruling. In such circumstances, in a form of judicial 'ping pong', the Court has tended simply to reiterate or extrapolate on its prior judgment.¹¹⁵ There is also no meaningful sanction that is applied against national courts that do not follow the rulings.¹¹⁶ That said, national compliance is very high. A cross-country study found implementation of the Court's rulings in 85.3 per cent of the cases studied.¹¹⁷ Challenges to the authority of the Court were rarely in the form of direct non-observance but rather in less direct ways. A study of Austrian courts found that a variety of devices were used to evade rulings of the Court of Justice that were unpopular with the local court. These included narrow constructions of EU legal norms, arguing that the norm does not apply to the facts, weak remedies, a contra pro reasoning and application of domestic, rather than EU, legal norms if it would lead to the same result.¹¹⁸ The Court of Justice has tried to circumvent this in some instances by sending back rulings which are so detailed that they leave national courts little room for discretion in how they decide the dispute in hand. By contrast, in other cases, they have sought to defuse conflict by sending back rulings that are sufficiently vague to allow the national court considerable discretion in deciding how to resolve the dispute.¹¹⁹

There is, however, the question of the effects of the Court's judgments on the wider EU judicial community. The doctrines of *stare decisis* and precedent do not formally exist in EU law. Judgments of the Court only declare the pre-existing state of the law.¹²⁰ However, judgments having no broader effects would be highly unsatisfactory for the development of the Union legal order. It was felt to be particularly problematic where the Court declared an EU measure illegal. If the judgment only bound the parties concerned, it would lead to the instrument being invalid for them but binding upon everybody else, albeit open to challenge by everybody else. In ACC, therefore, the Court ruled that a judgment declaring an EU measure illegal bound all

¹¹⁴ Case 5/76 *Beckman v Arnold* [1977] ECR 161.

¹¹⁵ Joined Cases 28/52–36/52 *De Caste* [1958] ECR 37; Case 244/80 *Foglia v Novello* (No. 2) [1981] ECR 3045.

¹¹⁶ Case C-414/01 *Enzy v Austria* [2002] ECR I-10033.

¹¹⁷ S. Miron, 'The Preliminary Reference Process: National Court Implementation, Changing Opportunity Structures and Litigant Behaviour' (2004) 4 ECP 297, 410.

¹¹⁸ B. Reicher, 'The Application of EU Law in Austria', 1978 Working Paper No. 33, Available at www.bur.schul.ac.at.

¹¹⁹ The manner in which the Court has done this has been subject to some criticism. J. Smith, 'European Courts and Constitutional Democracy: A Tale of Two Systems and One Court' (2004) 29 ECLR 174.

¹²⁰ Case 5/76 *Beckman v Arnold* [1977] ECR 3255. T. Koopmans, 'Stare Decisis in European Law' in D. O. Laffin and R. Schermers (eds), *Europe's Law and Jurisdiction* (Dordrecht, Kluwer, 1997); A. Armati, 'Working Up to Preliminary Reference and the Court of Justice' [1993] 30 CMLRev. 247.

courts and authorities in the Union.¹²¹ The binding force of Court judgments interpreting EU law, by contrast, was unclear for some time.¹²²

In *Kühne*, the Court resolved this by holding that the statements of the law in its judgments bound all courts and administrative authorities in the Union. *Kühne* exported chicken legs, with part of the chicken's back still attached, to states outside the European Union. In a judgment involving other parties, the Court of Justice had ruled that these were to be classified as 'chicken legs' for the purposes of customs classification.¹²³ *Kühne* then sought reimbursement from the Dutch authorities who had previously placed its goods in a customs classification on which higher customs duties were levied. The Dutch authorities observed that the matter had previously been decided by a Dutch court, which had decided against *Kühne*, and could not, therefore, be reopened. *Kühne* argued that they were bound to reconsider the matter in the light of the earlier Court of Justice judgment.

Case C-453/00 *Kühne & Heitz v Productieop voor Pluimvee en Eieren* (2004) ECR I-837

21. The interpretation which, in the exercise of the jurisdiction conferred on it by Article (257 TFEU), the Court gives to a rule of Community law clarifies and defines, where necessary, the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force...
22. It follows that a rule of Community law interpreted in this way must be applied by an administrative body within the sphere of its competence even to legal relationships which arose or were formed before the Court gave its ruling on the question of interpretation.
23. The main proceedings raise the question whether the above-mentioned obligation must be complied with notwithstanding that a decision has become final before the application for review of that decision in order to take account of a preliminary ruling by the Court on a question of interpretation has been lodged.
24. Legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of these remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way.
25. However, the national court stated that, under Netherlands law, administrative bodies always have the power to reopen a final administrative decision, provided that the interests of third parties are not adversely affected, and that, in certain circumstances, the existence of such a power may imply an obligation to withdraw such a decision even if Netherlands law does not require that the competent body reopen final decisions as a matter of course in order to comply with judicial decisions given subsequent to the decision. The aim of the national court's question is to ascertain whether, in circumstances such as those of the main case, there is an obligation to reopen a final administrative decision under Community law.

¹²¹ Case 15/80 *Internationale Handelsgesellschaft v. Administrations des Douanes* (1981) ECR I-1131; Case 31/85 *Formica-Polymère Benelux v. Staat der Nederlanden* (1987) ECR I-1551.

¹²² For contrasting views of the Advocate General, see Advocate General Durruti in Case 201/85 *Parfums v. Administration des Douanes* (1986) ECR I-244; Advocate General Van Gerven in Case 143/86 *Payton v. National Council of the B Q* (1986) ECR I-265; Advocate General Lenz in Case 102/88 *Frank v. Bundesanstalt für Wirtschaftsinformationssysteme* (1989) ECR I-1033.

¹²³ Case C-152/93 *Voogd v. Westlandse Coöperatieve* (1994) ECR I-4315.

26. As is clear from the case-file, the circumstances of the main case are the following. First, national law confers on the administrative body competence to reopen the decision in question, which has become final. Second, the administrative decision became final only as a result of a judgment of a national court against whose decisions there is no judicial remedy. Third, that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in Article (257 TFEU). Fourth, the person concerned complained to the administrative body immediately after becoming aware of that judgment of the Court.
27. In such circumstances, the administrative body concerned is, in accordance with the principle of cooperation arising from Article (4 TFEU), under an obligation to review that decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court. The administrative body will have to determine, on the basis of the outcome of that review to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question.

Although *Kühne* only refers to the Court's judgment binding national administrative authorities, this has been interpreted as being binding on all national authorities. They are required to change national law as soon as possible after the judgment, making sure that they give full effect to individual rights under EU law.¹²⁴ These authorities include national judges, and they are, consequently, governed by the duties set out in the judgment.¹²⁵ There has to be had when describing their binding effects. As the judgments are assumed to be declaring pre-existing law, their binding force applies to all relationships governed by the legal instrument since it entered into force. This poses, as the judgment acknowledges, real challenges for legal certainty. In most instances, this will be resolved by national limitation periods which will prevent disputes of a certain vintage being reopened. More challenging is the situation in *Kühne*, where a court or administrative authority has just given a decision which conflicts with a subsequent Court judgment. Legal certainty will prevent it being reopened unless four criteria are met: there is an administrative body that has the power to reopen the decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is based on a misinterpretation of EU law and the court failed to refer the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.¹²⁶ These conditions are cumulative and restrictive. The Court has therefore held that the possibility of appeal would preclude reopening the matter.¹²⁷ It will be rare that they are met and the Court has insisted that there is no general obligation on courts to reopen cases simply because they conflict with subsequent Court judgments.¹²⁸

¹²⁴ Case C-41/05 *MPD v. Azienda* (2006) ECR I-15243.

¹²⁵ Case C-312/04 *Adams v. United Kingdom* (2006) ECR I-4603.

¹²⁶ However, the parties do not have to have raised it themselves before the court. Case C-206 *Kemper* (2006) ECR I-1411.

¹²⁷ Joined Cases C-203/04 and C-412/04 *Adams v. United Kingdom* (2006) ECR I-4389.

¹²⁸ Case C-213/04 *Kayibov v. Schiedt & Schiedt* (2005) ECR I-1541.

(ii) Management of the reference period and interim measures

There is a lengthy period between the time the reference is made by the national court and the adoption of a judgment by the Court of Justice. In 2005, this period was an average of 15.6 months.¹⁰³ In addition, there will be the period following the Court judgment when the matter must wait to go back before the national courts. National courts are required to manage the rights of the parties during this time through the grant of interim relief. This remedy of interim relief operates in different ways depending on whether interim relief is being sought against an autonomous provision of national law whose compatibility with EU law is being contested, or whether it is being sought against a national law implementing an EU law where the validity of the EU measure is being contested.

In the case of the former, the Court has ruled that the national court must do everything to secure the effectiveness of the Court's judgment. In *Federfarma*, a challenge was made by a number of Spanish fishermen to the United Kingdom's Merchant Shipping Act 1938.¹⁰⁴ This Act made it very difficult for non-British boats to fish in British waters by imposing, most notably, a series of residence requirements as a precondition. The national court referred the matter to the Court of Justice. In the meantime, the House of Lords found that the applicants would suffer irreparable damage if interim relief was not granted as many fishermen would go bankrupt before judgment was delivered. As English courts had no jurisdiction to suspend the Act at that time, it referred the question whether national law should be set aside where its application would deprive a party of the enjoyment of rights derived from EU law. The Court of Justice ruled that it should. It ruled that national courts were under a duty to secure the full effectiveness of EU law. This required that they had to ensure the full effectiveness of any Court judgment on those rights. If the national court considers that the effectiveness of the final judgment might be otherwise undermined, it must grant interim relief. This works to the benefit of applicants claiming possible entitlements under EU law. They merely have to show that they would not be able to claim those rights if they were to make a strong case for interim relief.

The conditions for interim relief are much more restrictive where a reference is being sought that, in effect, challenges the validity of an EU measure. In such circumstances, the applicant must show they will suffer serious and irreparable damage and this has then to be weighed against the Union interest in not having the measure disapplied. In *Mertini*, manufacturers in Italy, the Netherlands and the United Kingdom challenged Directive 2002/2/EC on the circulation and marketing of compound feeding stuffs for animals.¹⁰⁵ This required manufacturers to indicate the quantities of feed materials used in the composition of the products with a tolerance of ± 15 per cent of the declared value and, when requested by a customer, to provide the exact percentages by weight of the feed materials making up a feeding stuff product. The Dutch court asked if the national implementing measure could be suspended pending judgment.

¹⁰³ Annual Report, above n. 11, 34.

¹⁰⁴ Case C-413/93 *R v Secretary of State for Transport, ex parte Federfarma* [1995] ECR I-2433.

¹⁰⁵ This judgment constitutes a large number of cases, Joined Cases C-143/98 and C-50/98 *Enckhauser Stahlwerke and Zeching Stahlwerk* [1999] ECR I-415, Case C-465/98 *Adler's Fruchtverarbeitungsgesellschaft* and others (Dec. 9) [1999] ECR I-5075, Case C-49/95 *T. Port* [1996] ECR I-6245.

Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *Martini & Minutero delle Politiche Agricole e Forestali* [2005] ECR I-10423

103. ...references for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed. In the context of actions for annulment, Article 173 TFEU enables applicants to request enforcement of the contested act to be suspended and empowers the Court to order such suspension. The coherence of the system of interim legal protection therefore requires that national courts should also be able to order suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested.
104. The Court has, however, ruled that the uniform application of Community law, which is a fundamental requirement of the Community legal order, means that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and examination of the application, must in all the Member States be subject, at the very least, to conditions which are as strict as those for the granting of such relief is concerned and which it has defined as being the same conditions as those of the application for interim relief brought before the Court...
105. The Court has pointed out in particular that, in order to determine whether the conditions relating to urgency and the risk of serious and irreparable damage have been satisfied, the national court dealing with the application for interim relief must examine the circumstances particular to the case before it and consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreparable damage to the applicant which could not be made good if the Community act were to be declared invalid...
106. As the court responsible for applying, within the framework of its jurisdiction, the provisions of Community law and consequently under an obligation to ensure that Community law is fully effective, the national court, when dealing with an application for interim relief, must take account of the damage which the interim measure may cause to the legal regime established by a Community measure for the Community as a whole. It must consider, on the one hand, the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons and, on the other, those special features of the applicant's situation which distinguish it from the other operators concerned...
107. In particular, if the grant of interim relief may represent a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money or other security...
108. The unavoidable conclusion in this regard is that national administrative authorities may not in a position to adopt interim measures while complying with the conditions for granting such measures as defined by the Court.

These different tests result in applicants whose interests are prejudiced in very similar ways being treated very differently. This disparity results because the Court is giving priority to different systemic concerns: the effectiveness of EU law in one case and the cumulative effect of interim relief and the financial risks for the Union, in the other. We might wonder why these should have such priority, why different elements are emphasised in different cases and why the Court does not think these same arguments should apply analogously to national law.

This seemingly arcane question also strongly influences the type of litigant who goes to Luxembourg, and in not altogether desirable ways. The ready availability of interim relief, together with the presence of long delays in the reference system, serves to benefit litigants who can withstand delay.¹²² The victory for them is simply obtaining the reference, as it will preserve their position for a couple of years. They have only to find their legal costs and hope that the position of their opponent weakens.¹²³ By contrast, in the second scenario, where interim relief is less likely, the applicant's position is greatly prejudiced. She will have to bear all the costs of the Union measure, however onerous, as well as the costs of litigation.

(iii) Managing the circumstances in which national courts refer

The central mechanism for determining when a reference should be made is set out in the distinction between Article 167(2) and 167(3) TFEU. The latter states that courts against whose decisions there is no judicial remedy in national law are obliged to refer, where the point of EU law is necessary to decide the dispute in hand. All other courts fall within Article 167(2) TFEU and enjoy a discretion whether to refer. The obligation to refer extends not just to the highest court in the land but also to any other court, where the party has been denied the possibility to take the matter further because they have been denied leave to appeal to a higher court. In *Lyckeskog*, *Lyckeskog* was prosecuted for importing rice into Sweden without paying customs duties. He appealed to the Swedish Court of Appeal, arguing that the relevant EU Regulation allowed this where the rice was for personal use. The Swedish Court of Appeal, whose decisions could be appealed to the Swedish Supreme Court, referred the question as to whether it fell within Article 167(3) TFEU for it to refuse *Lyckeskog* leave to appeal.

Case C-59/00 *Lyckeskog* [2002] ECR I-4539

14. The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case law that is not in accordance with the rules of Community law from coming into existence in any Member State.
15. That objective is secured when, subject to the limits accepted by the Court of Justice...supreme courts are bound by this obligation to refer...as is any other national court or tribunal against whose decisions there is no judicial remedy under national law...
16. Decisions of a national appeal or court which can be challenged by the parties before a supreme court are not decisions of a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article [167] TFEU. The fact that consideration of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

¹²² On the difficulties and delays with the current preliminary reference procedure see p. 278.

¹²³ R. L. Jennings, 'The Swedish Game: Some Reflections from a Saga' (1987) 11 *Journal of Law and Society* 325.

17. That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol against the judgment of a court, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at least in some cases, by the supreme court.
18. If a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article [167] TFEU, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage.

Lyckeskog secures the universal jurisdiction of the Court of Justice. In principle, in every case, there should be a point at which individuals are able to demand a reference from a national court because there will be a moment where either leave to appeal is refused or the case is decided by the highest court in the land, and that court falls within Article 167(3) TFEU. Notwithstanding these points, there are drawbacks to such an interpretation, as it prevents national courts stopping proceedings becoming too drawn out, or matters not being referred to the Court of Justice because the sums involved are too small or the case is of very limited importance.

The situation is not an imitable one, however. There are circumstances both when a lower court against whose decision there is a judicial remedy must refer and when a court against whose decision there is no judicial remedy must not refer.

The former circumstance has already been addressed. All national courts must refer if they consider that an EU measure may be invalid. This derives from the dictates of the uniformity of EU law, which require that EU measures cannot be declared invalid in one national territory in the Union but remain valid elsewhere. Only the Court of Justice has the power, therefore, to declare a Union measure invalid.¹²⁴

By contrast, national courts against whose decision there is no judicial remedy are not compelled to refer if either the doctrine of *acte décliné* or that of *acte élus* applies. The former allows a court not to refer if a materially identical matter has already been decided by the Court of Justice. The latter states that a question need not be referred if the provision in question is so clear that there is no reasonable doubt about its application.

In *CILFIT*, a group of textile firms challenged levies imposed by the Italian Ministry of Health on wool imported by them from outside the Union. The case centred on whether wool was an animal product as a Regulation prohibited levies imposed on 'animal products'. The dispute went up to the Italian Court of Cassation, the highest civil court in Italy. The Italian Ministry of Health argued that there was no need to make a reference to the Court of Justice as the question of law, namely whether wool is an animal product, was obvious.

¹²⁴ Case C-116/95 *Prodi-Fabrizio's Magnanimo* (Liberal-Cit) [1997] ECR 4199.

Case 263/81 *CLIFT v Ministry of Health* [1982] ECR 341

13. It must be remembered in this connection that... In Joined Cases 24 to 26/81 *De Coster v Nederlandse Administratieve* [1982] ECR 31 the Court ruled that: 'Although the third paragraph of [Article 267 TFEU] expressly requires courts or tribunals of a Member State against whose decision there is no judicial remedy under national law... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under [Article 267 TFEU] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'
14. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 267 TFEU, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.
15. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in paragraph (3) of [Article 267 TFEU], remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.
16. Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if these conditions are satisfied may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.
17. However, the existence of such a possibility must be assessed on the basis of the characteristic feature of Community law and the particular difficulties to which its interpretation gives rise.
18. To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.
19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law as in the law of the various Member States.
20. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

Read literally, the exception is so narrow so as to be almost meaningless.¹²³ There will be few national judges who have the capacity to compare the nuances and context of a provision in all languages of the Union.¹²⁴ Even the Court of Justice, with all the back-up of its

¹²³ H. Rossmann, 'The European Court's Act Clair Strategy in CLIFT' (1982) 3 *ELRev* 343; E. Mirelail and D. Leffing, 'From CLIFT to ECU: The Constitutional Challenge Facing the European Court' (1981) 11 *JHEU* 1, 4. See as authority that the exception should therefore be applied see M. Borchers, 'Act Clair Revisited: Adapting the Doctrine of Act Clair to the Demands of the Times' (2009) 41 *ChicRen* 1341.

¹²⁴ For an attempt to do so see *Constitutional Risk Mapping: Brief for Northern Ireland* (2011) 3 *OCJL* 15.

translating services, has struggled to come to terms with the interpretive difficulties posed by the authenticity of all the different language versions of EU law.¹²⁵ However, to concentrate on the formal limits of CLIFT is to miss its significance. CLIFT encourages national courts to decide seemingly non-controversial or technical matters of EU law themselves. To some, this creates a lacuna in judicial protection by providing circumstances where individuals will not have access to the Court of Justice.¹²⁶ To others, the doctrine of *acte clair* acts as a valve, defusing potential conflict between the higher national courts and the Court of Justice, by allowing the former to decide matters conclusively by themselves without engaging in any overt act of judicial rebellion.¹²⁷

The practice of many senior national courts is irregular. Whilst the Belgian Constitutional Court has made seventy-two references, the Italian and Portuguese Constitutional Courts have made only one reference each, whilst the French Constitutional Council and German Constitutional Court have never made a reference.¹²⁸ However if CLIFT grants national courts some leeway for decision-making, it does so in a highly restricted manner. It requires the highest national court to hide behind *academic grounds* as a reason for non-referral; that is, that the matter has already been decided or that the provision is so clear that it does not require interpretation. It does not permit national courts to put forward the far stronger reasons for non-referral, namely that there are important national constitutional values at stake that they wish to decide, or that to refer might lead to an abuse of the litigation process with one party needlessly drawing out the process.

Matters changed in *Köbler*.¹²⁹ Köbler was an Austrian professor who lost houses, to which he would otherwise have been entitled for his length of service in the university sector, because he had spent some years working outside Austria at a German university.¹³⁰ The Austrian Administrative Court, a court of last resort, wrongly ruled that this did not breach EU law and that it was not, therefore, obliged to refer. The Court ruled that an action for damages against the state would be available where it was manifestly apparent that a court had failed to comply with its obligations under Article 267(3) TFEU. This would be the case where it was evident that neither the doctrine of *acte clair* nor that of *acte décliné* applied. In this instance, the Court ruled it was not obviously apparent, as the Austrian court had mistakenly, but in good faith, thought that the matter was covered by a previous ruling of the Court, which had held that the treatment was lawful. It contemplated, therefore, that it fell within the doctrine of *acte décliné*.

In principle, this adds an incentive for courts to comply with their duties under Article 267 TFEU. National courts failing under Article 267(3) TFEU are as subject to appeal when they fail to apply EU law properly, as when they misapply domestic law. There is financial redress against the state if courts against whose decision there is no judicial remedy fail to refer, where it is obvious that they should. However, the duty might still only be a paper one.¹³¹ The redress

¹²⁵ For difficulties with the different language versions of EU legislation see Case C-71/85 *Accorombenti v P.C. International* (1986) 25 *ELRev* 540.

¹²⁶ A. Arnall, 'Reflections on Judicial Activism at the European Court' [1985] 34 *MLR* 151, 172; A. Arnall, 'The Use and Abuse of Article 177 EEC' [1985] 52 *MLR* 622, 625.

¹²⁷ J. Gubb, 'The Politics of Judicial Discretion: Establishing the Interaction between National Courts and the European Court of Justice' [1989] 18 *MLP* 365, 374-7.

¹²⁸ Annual Report, above n 10, 104-5.

¹²⁹ Case C-224/01 *Köbler v Austria* [2003] ECR I-10239.

¹³⁰ This case is dealt with in more detail in Chapter 7 at pp. 301-11.

¹³¹ J. Kereck, 'Potential Damages in the Community Judicial System: Building Confidence in the Community Legal System' [2005] 42 *ChicRen* 3, 12-18.

either establishing a system of regional courts,¹⁴⁸ which would create a new judicial layer between national courts and the Court of Justice, or developing specialised courts for complex, fact-intensive areas of EU law.¹⁴⁹ Neither of these has found favour.¹⁵⁰ Debate has instead distilled down to two alternatives. One alternative was that national courts decide more cases by themselves.¹⁵¹ A suggestion was made that national courts submit draft answers with their references. If the Court agrees at an early stage that the draft answer is correct, it would simply state that it did not object to the suggested interpretation.¹⁵² The other is that the Court of Justice decides more by engaging in more efficient case-management.¹⁵³ This would involve internal reorganisation of the Court through increased resort to Chambers, an increase in the jurisdiction of the General Court and an expansion of the translation services.¹⁵⁴ It would also be possible to have a mix of these two approaches.¹⁵⁵

This was considered in most depth at the Treaty of Nice. A clear preference emerged for the second approach, namely that the problems were to be addressed by efficient management of its docket and internal distribution of its workload by the Court of Justice. This has involved a fourfold strategy.

First, there is only very limited control of references from national courts by the Court of Justice. As we have seen, the Court will not give a ruling if it is quite obvious there is no legal dispute, the factual and legal context to the dispute has not been provided in sufficient detail for the Court to be able to give an answer to the question, or the question referred is clearly not relevant to the dispute.¹⁵⁶ It will also not give a reference where this will undermine the *locus standi* conditions set out in other provisions of the Treaties.¹⁵⁷ It has also been noted, however, that this has led in recent times to very few references being refused. More significant is the rule in Article 104(1) of the Rules of Procedure that allows the Court to make an order referring

¹⁴⁸ J.-F. Jacquet and J. Weiler, 'On the Road to European Union, a New Judicial Architecture: An Agenda for the Intergovernmental Conference' [1994] 27 *OEJLRev.* 155.

¹⁴⁹ P. Kapteina, 'The Court of Justice of the European Communities after the Year 2000' in B. Davies and T. Twiss (eds.), *National Dynamics of European Integration: Liber Amicorum Sebastianus* (Hartford, Marlow, N.Y., 1994) vol. 2, 125, 141–5.

¹⁵⁰ Court of First Instance, 'Reflections on the Future Development of the Community Judicial System' [1991] 18 *ELRev.* 175.

¹⁵¹ See Advocate General Jacobs in Case C-318/95 *Hoffmann-La Roche and Hoechst* [1997] ECR I-4685.

¹⁵² S. Strauss, 'The Development of a Strategy of Greater Control for the European Court of Justice and the Question of Preliminary References', *Year Market Planning Paper No. 95/3*, http://ec.europa.eu/marketing/marketing/papers/industrial/doc95/3_november_2005.

¹⁵³ Contribution by the Court of Justice and the Court of First Instance to the Intergovernmental Conference, Luxembourg, Office for Official Publications of the European Communities, 2000. See also the earlier more extensive document issued by the European Court of Justice, above n. 77.

¹⁵⁴ British Institute of International and Comparative Law, 'The Role and Future of the Court of Justice', London, 1994, 115–51. This is not representative of the translation work at the Court: there considerable work is done. See, for example, P. Kapteina, 'The Role of the Court of Justice in the Translation of EU Law', in B. Davies and T. Twiss (eds.), *National Dynamics of European Integration: Liber Amicorum Sebastianus* (Hartford, Marlow, N.Y., 1994) vol. 2, 125, 141–5.

¹⁵⁵ Report by the Working Party on the Future of the European Communities' Court System (Brussels, European Commission, 2000) (Date Report). For discussion see A. Dashwood and A. Johnston (eds.), *The Future of the Judicial System of the European Union* (Oxford and Portland, 2001); P. Craig, 'The Jurisdiction of the Community Courts Reconsidered' in G. de Búrca and J. Weiler (eds.), *The European Court of Justice: A Critical Analysis* (Oxford, 2001); H. Baumgarten, 'Reconciling the Crumbling EC Judicial System' [2000] 37 *OEJLRev.* 227; A. Johnston, 'Judicial Reform and the Treaty of Nice' [2001] 31 *OEJLRev.* 453.

¹⁵⁶ See pp. 157–8.

¹⁵⁷ Case C-183/92 *Thyssen Stahl AG v Germany* [1993] ECR I-433.

to its previous case law where the question is identical to one on which it has ruled, may be clearly deduced from existing case law, or where the answer 'admits of no reasonable doubt'. Twenty such orders were given in 2002. They involve only limited time savings, however, as the Court must still hear the Advocate General before making such an order.

Secondly, the central tool for efficient management of the Court is the Chamber system. The Treaty of Nice made provision, as we have seen, for preliminary references to be made to the General Court¹⁵⁸ and also for its possible expansion, as it introduced the provision that it comprise 'at least' one judge from each Member State.¹⁵⁹ There was the possibility of its becoming the central Union court with the Court of Justice only pronouncing on broad principles which affect the unity and consistency of EU law.¹⁶⁰ To date, however, this has not happened. Instead, reliance is placed upon the Chambers system of the Court of Justice. Between 2004 and 2008, 84.4 per cent of cases were heard by Chambers of either three or five judges.¹⁶¹ This is not a new trend.¹⁶² However, it does result in the Court becoming increasingly fragmented with individual judges acquiring special significance in the judgments upon which they rule. This is particularly concerning when important decisions are taken by Chambers of three judges, as only two judges have to agree for a judgment to be reached.¹⁶³

Thirdly, the Court gives priority to ruling on certain types of case, notably where delay will lead to extremely adverse consequences. It does this by two procedures:

- the 'accelerated procedure': this allows a national court to request from the President of the Court that the matter be put to the Court as a matter of exceptional urgency. In such circumstances, the case will be prioritised and the time limits for observations restricted to not less than fifteen days;¹⁶⁴
- the 'urgent procedure': this procedure is implicit in the amendment made by the Treaty of Lisbon, now set out in Article 157(4) TFEU, which provides that when a reference is made with regard to a person in custody, the Court shall act with the minimum of delay. It was anticipated by Decision 2008/79.¹⁶⁵ This procedure can either be requested by the national court or decided by the Court of its own motion. It is even more truncated than the accelerated procedure. No minimum time limits for submissions are set. Both the written procedure and the Opinion of the Advocate General can be dispensed with. To date, Opinions of Advocates General given under this procedure have not been published.

The procedures raise a number of different concerns. One of the challenges with the accelerated procedure is the high threshold of 'extreme urgency'. It is rarely used, with only thirty-four applications between 2004 and 2008, of which only two were successful.¹⁶⁶ The concerns

¹⁵⁸ Article 156(2) TFEU.

¹⁵⁹ Article 151(2) TFEU.

¹⁶⁰ Weiler, above n. 152.

¹⁶¹ Annual Report, above n. 11, 20.

¹⁶² In 1992, for example, 177 out of 255 judgments were given by the Chambers. Statistics of judicial activity of the Court of Justice in 1992, <http://eur-lex.europa.eu/juris/ces/doc/1992/11/Avgust1992>.

¹⁶³ On concerns as to the effects of the presence of the Advocate General on the Chamber system, see the European Council's 'Judicial System' [2004] 41 *OEJLRev.* 230; H. Baumgarten, 'Present and Future European Judicial Problems After Enlargement and the Post-2005 Member State Treaty' [2007] 44 *OEJLRev.* 164.

¹⁶⁴ It is set out in the Court's Rules of Procedure, article 194.

¹⁶⁵ [2008] OJ L24/42. The procedure is now incorporated in the Court's Rules of Procedure, article 194.

¹⁶⁶ Annual Report, above n. 11, 20. E. de la Torre, 'Accelerated and Expedited Procedures before the EC Courts: A Review of the Practice' [2008] 45 *OEJLRev.* 733.

with regard to the urgent procedure are different. Six applications were made in the ten months of its use in 2008, of which three were successful. All the cases were in the fields of asylum, immigration and criminal law, for which there were twenty-six references in 2008.¹²⁸ It may thus apply in about one-quarter of the cases in these fields. These fields are, moreover, likely to take up a significant part of the Court's time following the reforms made by the Lisbon Treaty. There is thus a risk of displacing other important areas of activity. More serious are the procedural short-cuts being taken. What it can be understood that the Court may wish to dispense with written submissions, the desire to dispense with an Advocate General's Opinion leads to concerns about what space there is for reflection here. And, put simply, the decision not to publish it cannot be justified on any basis whatsoever.

The jury is still out on whether these changes will reduce the current delays. In 1993, with fifteen judges, the Court gave 214 judgments. In 2008, with twenty-seven judges, it gave 353 judgments: a lower rate of judgments per judge. Looked at from the point of view of number of cases per judge, they seem to be offering only modest efficiency gains, therefore. If the preliminary references were to increase, either because of more references from the new Member States or because of the increased jurisdiction of the Court, then it is clear that the problem of delay will be exacerbated. If the problem is not one merely of delay, but of a structural imbalance in the type of litigation arriving at the Court, then deciding more cases is likely to exacerbate existing problems. Resolution of more cases involving an ever more eclectic array of issues is likely both to stretch the Court's expertise and to strain its capacity to act as a constitutional court. More generally, there are real concerns about the orderly development of EU law, where there is a single court making out around 400 judgments per year under increasingly tight deadlines. The potential for error and self-contradiction is considerable, and it will be increasingly difficult for national legal systems to keep up with and reflect on that amount of case law.

The refusal to maintenance national courts making fewer references, as the article by Komárek sets out, also suggests a poorly articulated vision of the EU judicial order. It suggests that the Court of Justice should decide on everything that matters, and that virtually everything matters. It also suggests a vision where the preliminary reference procedure does not facilitate dispute resolution, but is the process at the centre of the dispute. Finally, in letting applicants force a reference, it conveys a view of national courts as either incompetent or untrustworthy.

J. Komárek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467, 476

The attempt to attach fundamental status to every provision of EU law is contradicting the premise that EU law has become part of national law. If it has, then EU law can no longer be treated as 'supranational' law having some special force in each instance; rather must the weight of its rules reflect their actual nature.

Preliminary ruling procedure must be seen as a deviation from normal organisation of the judicial process, not as its natural component. This is because it allows obviating the existing hierarchy amongst the courts, which plays an important role in the rationalisation of the judicial process, and delays final

resolution of the dispute, thus potentially bringing an element of injustice. Again, it is a question of how we want to see the EU judicial system: whether it really compares national courts as European courts, or whether we use this label only for highlighting their obligations resulting from EU law. If we see it in the former sense, then we must accept that it means to see the EU judiciary as a judicial system without qualifications. Nice does may only hide some (of course hard) choices we must inevitably make when we perceive national courts as 'Community courts of general jurisdiction'—thus fully competent to decide questions concerning interpretation of EU law. Insisting on all courts' possibility to refer to the Court of Justice questions their competence to give effective protection to individuals without the Court of Justice's assistance. At the same time, it implies that the Court should be involved in an everyday dispute settlement whenever a question of Community law arises, regardless of its importance for the EU legal system as a whole. The result is an unreasonable distribution of the Court of Justice's judicial capacity throughout the Union judicial system.

FURTHER READING

- K. Alter, *The European Court's Political Power* (Oxford, Oxford University Press, 2005)
- D. Azarov and M. Demerouti, *References to the European Court* (London, Sweet & Maxwell, 2004)
- G. de Búrca and J. Weller (eds), *The European Court of Justice* (Oxford, Oxford University Press, 2001)
- D. Chalmers, 'The Court of Justice and the Constitutional Treaty' (2005) 4 *JCMJ* 415
- Z. Chwastek, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge, Cambridge University Press, 2007)
- A. Dashwood and A. Johnston (eds), *The Future of the Judicial System of the European Union* (Oxford and Portland, Hart, 2001)
- J.-F. Jacqué and J. Weller, 'On the Road to European Union, a New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1996) 17 *Common Market Law Review* 115
- J. Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal System' (2005) 42 *Common Market Law Review* 9
- H. Karmarsch, 'Reconciling the Crumbling EC Judicial System' (2006) 33 *Common Market Law Review* 1071
- R. Rawlings, 'The Lawlaw Game: Some Deductions from a Saga' (1990) 10 *Journal of Law and Society* 109
- T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review* 5
- C. Turner and B. Meeus, 'Revisiting the Judicial Architecture of the European Union' (1995–2006) 25 *Yearbook of European Law* 1

¹²⁸ Annual Report, above n. 11, 56 and 84 respectively.

DETERMINATION OF THE VALIDITY OF COMMUNITY ACTS BY REFERENCES FOR PRELIMINARY RULINGS

General. The Treaties confer jurisdiction on the Court of Justice to give preliminary rulings (see Ch.2, *supra*) on the "validity" of Community acts ("acts of the institutions of the Communities and of the ECB [European Central Bank]"; EC Treaty, Art.234, first para., indent (b); EABC Treaty, Art.159, which has the same wording but makes no reference to the ECB). What this involves is a review of the validity of a given Community act as a step in proceedings before a national court in which the validity of that act is in issue, but the national court does not resolve that question itself, referring it instead to the Court of Justice for its assessment. Art.234 of the EC Treaty and Art.159 of the EABC Treaty contain no obligation for national courts and tribunals to make a reference for a preliminary ruling in the case of courts and tribunals against whose decisions there is a "judicial remedy under national law" (see 2-046 and 2-047, *supra*) but, as already mentioned, the Court of Justice has decided that even those courts and tribunals have no jurisdiction themselves to declare that Community acts are invalid (see 2-355, *supra*). Consequently, they too are under an obligation to submit the question of validity to the Court of Justice whenever they regard a Community act as invalid.²⁰

The subject-matter covered by the review of validity will now be considered, followed by its content and consequences.

I. SUBJECT-MATTER OF PRELIMINARY RULING PROCEEDINGS RELATING TO THE VALIDITY OF A COMMUNITY ACT

Acts excluded from review. The Treaties themselves and all other rules of constitutional rank fall outside the ambit of preliminary rulings on the validity of Community acts. Those rules constitute in fact the yardstick against which the validity of such acts is reviewed.

²⁰ ECJ, Case 314/85 *Fox-Phear* [1987] E.C.R. 4139, paras 12-20. For an application in France, see Cassia, "Le juge administratif et la validité des actes communautaires" (1959) R.T.D.E. 429-441.

In addition, the Court of Justice has held that "a preliminary ruling of the Court does not rank among the acts of the Community institutions whose validity is open to review in proceedings under Art.177 [now Art.234]".⁷² Undoubtedly, that ruling must be extended to cover any judgment of the Court of Justice, which, as a result, remains outside the scope of review by way of preliminary rulings on validity. However, the fact that the Court of Justice has already given a preliminary ruling on the interpretation of an act does not preclude the Court from ruling on the validity of the same act in a later judgment.⁷³

10-003 International agreements. A trickier question is whether the validity of international agreements concluded by the Community may be reviewed in preliminary ruling proceedings. Textbook writers have voiced great reservations,⁷⁴ chiefly on the ground that, in the event that it failed to give effect to such agreements, the Community might stand to incur liability at international level. Moreover, it was for that reason that the Treaty introduced a procedure whereby the Court of Justice gives a prior opinion on the compatibility of proposed international agreements with the provisions of the Treaties (which means in practice with Community constitutional law as a whole) (see Ch.12, *infra*). However, it is no simple matter to exclude international agreements concluded by the Community from the scope of the review of validity under the preliminary ruling procedure.

In the first place, this is because the Court of Justice has held that it has jurisdiction to give preliminary rulings on the interpretation of international agreements concluded by the Community (see 5-013, *supra*). Since indent (b) of the first para. of Art.234 of the EC Treaty draws no distinction between preliminary rulings on the validity of acts of the institutions as opposed to preliminary rulings on their interpretation, if the Court of Justice holds that it has jurisdiction to interpret international agreements by preliminary ruling, it creates the impression that it also has jurisdiction to review their validity.

What is more, a dictum of the Court of Justice has further reinforced this impression: "The question whether the conclusion of a given agreement is within the power of the Community and whether, in a given case, such power has been exercised in conformity with the provisions of the Treaty is, in principle, a question which may be submitted to the Court of Justice ... in accordance with the preliminary procedure".⁷⁵ This passage has been understood to mean that the Court of Justice should review the validity of

⁷² ECJ (order of March 5, 1986), Case 85/85 *Mitsubishi v Germany* [1986] E.C.R. 547, para.16.

⁷³ ECJ, Joined Cases C-293/93 and C-294/93 *Hoeft and Others* [1994] E.C.R. I-2815, para.27. Consequently, a judgment giving a preliminary ruling on interpretation does not therefore implicitly rule on the validity of the act interpreted.

⁷⁴ See Jellinek, *Le contentieux*, at 153; *Commentaire Algérien*, at 214-215.

⁷⁵ ECJ, Opinion 1/75 *Opinion on a Local Court Standard drawn up under the auspices of the OECD* [1975] E.C.R. 1355, at 1361.

the act whereby the Community purported to conclude the agreement, but not the validity of the agreement itself.⁷⁶ But that reading of the Court's case-law does not resolve the question of the possible liability of the Community at international level, since if the act by which the Community purported to conclude an international agreement is declared invalid, it will lose all binding force in the Community legal order, just as if the agreement itself was to be declared invalid.⁷⁷

Yet this did not stop the Court of Justice in its 1994 judgment in *France v Commission* from declaring void "the act whereby the Commission of the European Communities sought to conclude the Agreement with the United States of America regarding the application of the competition laws of the European Communities and the United States, which was signed and entered into force on 23 September 1991"⁷⁸ (essentially on the ground that the Commission had disregarded the Council's powers under Art.30J of the EEC Treaty). Although "[i]n the event of non-performance of the Agreement by the Commission ... the Community could incur liability at international level",⁷⁹ the Court of Justice held that the action for annulment of the act whereby the Commission sought to conclude the agreement was admissible, on the ground that, "as is apparent from its actual wording, the Agreement (on which that act was based) was intended to produce legal effects" within the meaning of the *AEIR* case-law.⁸⁰ In addition, it held that "exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review, under Art.175 [now Art.235] of the Treaty, of the legality of the acts adopted".⁸¹

Given that the Court of Justice considers the action for annulment and the preliminary ruling on validity to be two mechanisms in the same system of judicial review at Community level,⁸² it would seem probable that the Court would not assess the legality of an act by which the Community sought to conclude an international agreement any differently if this question were to be raised by a national court in a reference for a preliminary ruling on the validity of that act.

Finally, the validity of a provision of an international agreement can indirectly be called into question in a reference for a preliminary ruling on

⁷⁶ Jellinek, *Le contentieux*, at 59-60 and 195; Boix, *Development of Judicial Control of the European Communities*, (Maurice Niboy, The Hague, 1981), at 489; Van Roo (n.136, *supra*), at 235.

⁷⁷ *Commentaire Algérien*, at 214.

⁷⁸ ECJ, Case C-32/91 *France v Commission* [1994] E.C.R. I-3641. For a critical commentary, see Kaddous, "Quelques France v Commission de 1994 (Accord concurrence) et le contrôle de la légalité des accords externes en vertu de l'Art.175 (now Art.235) CE: la difficile réconciliation des orthodoxies communautaires avec l'orthodoxie internationale" (1995) C.D.E. 611-613.

⁷⁹ *Ibid.*, para.25.

⁸⁰ ECJ, Case C-32/91 *Commission v Council* (the *AEIR* case) [1991] E.C.R. 265, para.14-15.

⁸¹ ECJ, Case C-32/91 *France v Commission* [1994] E.C.R. I-3641, para.16.

⁸² ECJ, Case 112/83 *Société des Produits de l'Inde* [1983] E.C.R. 719, para.17; ECJ, Case 254/83 *Les Pères v European Parliament* [1985] E.C.R. 1539, para.23; ECJ, Case 214/83 *Foto-Franz* [1987] E.C.R. 4199, para.15.

the interpretation of a provision of Community law. Thus, in *Tad's*, a question concerning the interpretation of Art.12 of the EC Treaty was referred to the Court of Justice in the proceedings before a national court relating to the application in the national legal order of a provision of the Berne Convention. It appears—indirectly—from the judgment given by the Court of Justice that the application of the relevant provision of the Berne Convention in the national legal order is invalid under Community law.⁷⁹

10-004 Acts of the institutions. In principle, when it comes to reviewing the validity of "acts of the institutions" in preliminary ruling proceedings, the expression is to be given a broad interpretation in order to ensure that the system of legal protection is as "full" as possible.⁸⁰ Consequently, the validity of acts of the Council, the Commission, the European Parliament and the Court of Auditors, all institutions of the Community within the meaning of Art.7 of the EC Treaty, may unquestionably all be reviewed under the preliminary ruling procedure.⁸¹ It goes without saying that this also applies to acts adopted jointly by the European Parliament and the Council under the co-decision procedure provided for in Art.251 of the EC Treaty. In addition, indent (3) of the first para. of Art.234 also makes acts of the European Central Bank (EC Treaty, Art.8) subject to review of their validity under the preliminary ruling procedure.

10-005 Acts of bodies or agencies. Acts of bodies or agencies set up by Community institutions to which powers of executive decision have been delegated by those institutions also come within the jurisdiction of the Court of Justice to give preliminary rulings on validity.⁸² This is because the Court of Justice has made the compatibility with the Treaty of such a delegation of powers dependent upon its complying with the Treaty provisions to which the exercise of the powers by the delegating institution would have been subject, including the Treaty provisions on judicial supervision, had it exercised the powers itself.⁸³

The question whether acts of a body established by an international agreement concluded by the Community may be subjected to a review of

⁷⁹ See ECJ, Case C-28/94 *Tad's and Tad's France* [2005] E.C.R. I-5781.

⁸⁰ Cf. ECJ, Case 25/82 *Plesner v Commission* [1983] E.C.R. 55, at 108: provisions of the Treaty regarding the right of interested persons to bring an action must not be interpreted restrictively.

⁸¹ As far as the European Parliament is concerned, see Pescatore, "Reconnaissance et contrôle judiciaire des actes du Parlement européen" (1973) R.T.D.E. 581, at 590; for the Court of Auditors, see *Commentaire*, at 212.

⁸² See Lenz, "Auxiliary Organs and Agencies in the EEC" (1975) C.M.L.Rev. 355, at 375-381.

⁸³ ECJ, Case 9/56 *Morrell v High Authority* [1957 and 1958] E.C.R. 133; see also Lenz, "Regulating the Regulatory Process: Delegation of Powers in the European Community" (1993) E.L.Rev. 44-45. See in this respect also Art.136 of the Constitution, which provides that the "Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning [...] (b) the validity and interpretation of acts of the institutions, bodies, offices and agencies of the Union".

their validity under the preliminary ruling procedure is more difficult to answer. Also in the case of such bodies, the Court of Justice emphasises the need for a system of judicial supervision which provides effective legal protection for all individuals,⁸⁴ but so far has left it undecided whether the Court of Justice itself ought to provide the judicial protection in so far as the international agreement in question provides for no (or an insufficient) system of judicial supervision of the bodies which it establishes. Here too, the possibility of the Community incurring liability at international level counsels caution, but even so the requirement for a full system of judicial review is an argument in favour of allowing validity to be tested by references for preliminary rulings, especially since Community institutions contributed, within the framework of the bodies concerned, towards the adoption of the acts in question.⁸⁵

10-006 Binding and non-binding acts. The validity of all acts of Community institutions and bodies may be reviewed in the context of a reference for a preliminary ruling irrespective as to what they are called⁸⁶ and whether or not they have direct effect.⁸⁷ The acts may be non-binding.⁸⁸ Reviewing the validity of non-binding acts in preliminary rulings can be of considerable interest in the Court's words, such acts "cannot ... be regarded as having no legal effect. The national courts are bound to take recommendations⁸⁹ into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".⁹⁰ Sometimes it will be sufficient for the Court to interpret a non-binding act (e.g. a communication), thereby appraising its compatibility with the Community provisions which it is intended to elucidate.⁹¹

10-007 Acts of general application. Since the review of validity effected by means of a reference for a preliminary ruling is a species of review incidental to the main proceedings, some commentators have argued—by analogy with

⁸⁴ ECJ, Opinion 1/76 *Draft Agreement establishing a European lay-up fund for inland waterway vessels* [1977] E.C.R. 741, para.21.

⁸⁵ Cf. ECJ, Case C-192/88 *Sevince* [1990] E.C.R. I-3461, para.3.

⁸⁶ For the indirect review in a preliminary ruling of the validity of a Council resolution, see ECJ, Case 39/75 *Manghera and Others* [1976] E.C.R. 91, paras 19-22.

⁸⁷ The Court has jurisdiction to give preliminary rulings concerning the validity of a directive, regardless of whether it is directly applicable, even though the period for its implementation has not yet expired, provided that the question referred for a preliminary ruling is connected with a real dispute (ECJ, Case C-49/01 *British American Tobacco and Imperial Tobacco* [2002] E.C.R. I-1453, paras 32-34). See also Bion, "Examen en validité au titre de l'Art.17 (now Art.234) du Traité CEE et cohésion juridique de la Communauté" (1975) C.D.E. 375, at 398-399.

⁸⁸ ECJ, Case C-322/85 *Gubaldini* [1986] E.C.R. 4407, para.8, where the Court of Justice compared the wording of Arts 230 and 234, reaching the conclusion that "all acts of the institutions of the Community without exception" are covered by Art.234.

⁸⁹ Recommendations are not binding as a result of Art.249 of the EC Treaty.

⁹⁰ ECJ, Case C-322/88 *Grimaldi* [1989] E.C.R. 4407, para.13.

⁹¹ ECJ, Case C-94/91 *Wegmann* [1992] E.C.R. I-2765, paras 16-17.

the objection of illegality (EC Treaty, Art.241)—that only acts of general application may be so reviewed.¹⁰² The Court of Justice has also given the impression of acceding to that view by referring to the "complete system" of judicial review of acts of the institutions: "Where the Community institutions are responsible for the administrative implementation of ... measures [of general application], natural or legal persons may bring a direct action before the Court against administrative measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."¹⁰³ It is clear, however, that while that passage correctly reproduces the rationale of judicial review of validity by means of the preliminary ruling procedure, it does not necessarily mean that such review may in no circumstances be carried out in respect of an individual act.¹⁰⁴

- 10-008 Individual acts. What is actually behind the question whether it is possible to review by preliminary ruling the validity of an individual act of a Community institution, often seems to arise under a different aspect, namely whether it is still possible for a party to the main proceedings to request the national court to apply to the Court of Justice for a preliminary ruling on the validity of an act where that party could have brought an action for annulment against the act in question within the prescribed time limit (EC Treaty, Art.230, fifth para.), but neglected to do so.¹⁰⁵ The Court

¹⁰² See, for instance, Lagrange, "L'action préjudicielle dans le droit interne des États membres et en droit communautaire" (1974) R.T.D.E. 263, at 331; Mertens de Wilmars, "La procédure suivie par l'Art.173 (now Art.241) CEE" (1965) S.E.W. 477, at 443.

¹⁰³ ECJ, Case 294/83 *Les Verts v European Parliament* (1985) E.C.R. 1339, para.21.

¹⁰⁴ See ECJ, Joined Cases 133-136/85 *Rus and Others* (1987) E.C.R. 2255, point 1 of the operative part: "The possibility of bringing a direct action under the [fourth] paragraph Art.173 (now Art.241) of the [EC] Treaty against a decision adopted by a Community institution does not preclude the possibility of bringing an action in a national court against a measure adopted by a national authority for the implementation of that decision on the ground that the latter decision is unlawful". That case was concerned with a Commission decision addressed to the Federal Republic of Germany within the meaning of the fourth paragraph of Art.159 (now Art.249) of the EC Treaty, consequently an individual act, which a German authority had implemented with respect to the plaintiffs in the main proceedings, whereupon the plaintiffs brought an action for annulment of the Commission decision to the Court of Justice and an action for annulment of the German implementing decision in the national courts. It was in this context that the Court of Justice held that it had jurisdiction to conduct judicial review of an individual act of a Community institution in a preliminary ruling procedure on the basis of the rationale of that jurisdiction set out above. See, to the same effect, ECJ, Case C-20/97 *P. Schöcher v Commission* (1995) E.C.R. I-7163, paras 47-49 (relating to a Commission decision declaring Art.5(1) of the EC Treaty inapplicable to a selective distribution system pursuant to Art.81(3)).

¹⁰⁵ This goes back as far as Tomashak, *Die gerichtliche Vorbeurteilung nach den Verträgen über die Europäischen Gemeinschaften* (Springer-Verlag, Berlin-Heidelberg-New York, 1964), at 89-92.

of Justice has answered this question in the negative¹⁰⁶: a natural or legal person who undoubtedly has the right under Art.230 of the EC Treaty to seek the annulment of a Community act,¹⁰⁷ may not plead the illegality of that act in subsequent proceedings before the national courts. The same

¹⁰⁶ ECJ, Case C-163/92 *TWD Textilwerke Deggendorf* (1994) E.C.R. I-833: in this case, the Court of Justice held that a beneficiary of a scheme of aid in respect of which the Commission had taken a decision could have brought an action for annulment; ECJ, Case C-175/85 *Wijn* (1987) E.C.R. I-555, paras 19-24: in this case the Court held that the validity of a Commission decision set out in a letter addressed to the undertaking concerned could no longer be challenged since the undertaking had failed to bring an action for annulment. The same principle applies where the validity of a regulation imposing a definitive anti-dumping levy is challenged by an undertaking which could not have sought the annulment of the regulation before the Court of First Instance but failed to do so, even where the regulation has been declared null and void in other undertakings which did bring actions for annulment (ECJ, Case C-239/95 *Nicht Europe* (2001) E.C.R. I-1157, paras 23-40). Cf., however, ECJ, Case C-380/98 *Bender* (2001) E.C.R. I-6117, paras 111-113. In two other cases, the Court of Justice held that a party could plead the illegality of a Community act in national proceedings on the ground that it was not obvious that an action for annulment pursuant to the fourth para. of Art.230 of the EC Treaty would have been admissible: ECJ, Case C-241/95 *Accorring Beef* (1995) E.C.R. I-6559, paras 15, where the applicants in the main proceedings alleged that a regulation was invalid, the Court found that, in view of the fact that the contested act was in the nature of a regulation, it was improbable that an action brought by the applicants for its annulment would have been declared admissible. A similar ruling, but relating to a directive, is contained in ECJ, Case C-403/95 *Euronaval and Others* (1997) E.C.R. I-6315, paras 29-34. See also CFI (order of March 10, 2005), *Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-258/00, T-252/00, T-256/00 to T-259/00, T-263/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-275/00, T-281/00 and T-287/00 to T-255/00 Gruppo omegastel del porto di Venezia and Others v Commission*, not yet reported, paras 24 and 30-32. For a critical analysis of the case-law, see Opinion of Advocate General D. Ruiz-Jarabo Colomer of April 28, 2005 in *Joined Cases C-345/03 and C-325/03 Arzeni and Others*, not yet reported, paras 66-93 (these cases concern the validity of a Commission decision declaring a general aid scheme incompatible with the common market).

¹⁰⁷ What comes to mind in the first place is the obvious case where a Community act is addressed to a natural or legal person or where in a specific area of Community law a natural or legal person is manifestly directly and individually concerned within the meaning of the fourth para. of Art.230 of the EC Treaty, such as a recipient of State aid which the Commission has found to be incompatible with the common market in a decision addressed to the Member State in question; ECJ, Case 730/79 *Philly Meats v Commission* (1980) E.C.R. 2572; for those reasons, the President of the Court of First Instance declared admissible an application for interim measures in respect of a Commission decision requiring the recovery of unlawful State aid and rejected the argument of the Commission, which claimed that the application was inadmissible (that application could still be made in the national court to suspend the national measures to recover the aid on the ground of the invalidity of the Commission decision (CFI (order of the President of April 4, 2003), Case T-252/01 *R. Technische Glaswerke Jena v Commission* (2003) E.C.R. I-2153, para.54, upheld in ECJ (order of the President of October 15, 2003), Case C-232/02 *P(R) Commission v Technische Glaswerke Jena* (2003) E.C.R. I-5977, paras 31-33); see also ECJ, Case C-163/92 *TWD Textilwerke Deggendorf* (1994) E.C.R. I-833, paras 14 and 24. See also in this regard Pécot, "Keine Verträge ohne Aufrechnung" (1954) Eu.Z.W. 615-620. Where, in connection with the recovery of unlawful aid, the beneficiary undertaking has brought an action for annulment against the Commission decision obliging the aid to be recovered, Community law does not preclude the suspension by the national court of the

applies with regard to Member States and decisions addressed to them.¹¹⁴ To have decided otherwise would have detracted excessively from the legal certainty which the limitation period prescribed by the fifth para. of Art.230 is intended to secure. The national courts must regard the act in question as valid vis-à-vis the party in question and therefore apply it in any event. As a result, there is no point in making a reference to the Court of Justice for a preliminary ruling or at least not with a view to protecting a party to the main proceedings who is no longer entitled to plead that the act is unlawful. Another party to the main proceedings which was not entitled to challenge the act in question pursuant to Art.230 may persuade the national court to make a reference for a preliminary ruling on the validity of the act. There is nothing to prevent the national court from inquiring into this question or from raising it with the Court of Justice of its own motion. If the Court then finds that the act is invalid, it will be for it to determine what consequences that finding should have for the party to the main proceedings for whom the act has become unappealable because of its failure to bring an action for annulment.¹¹⁵

- 10-009 Failure to act. In proceedings for a preliminary ruling the Court of Justice has no power to rule that a Community institution has failed to act.¹¹⁶ Consequently, an action brought on the basis of Art.232 of the EC Treaty (see Ch.8, *supra*) is the only procedure for challenging an unlawful failure to act on the part of an institution.

II. SUBSTANCE OF THE REVIEW OF VALIDITY OF A COMMUNITY ACT IN PRELIMINARY RULING PROCEEDINGS

- 10-010 Review of legality of Community acts reserved to the Court of Justice. The review of the validity of a Community act by preliminary ruling, in common with the action for annulment, is a form of judicial review of the legality of

national measure exceeding the Commission decision (but see CSI (order of the President of December 3, 2001), Case T-121/01 *R. Neue Erde Landers v. Commission* [2002] E.C.R. II-5081, para.105).

¹¹⁴ ECJ, Case C-241/01 *National Farmers' Union* [2002] E.C.R. I-6019, paras 34-35, in which the Court of Justice held that a Member State which was an addressee of a Commission decision on emergency measures to protect against bovine spongiform encephalopathy and which had not challenged the legality of that decision within the time-limit laid down by the 5th para. of Art.230 of the EC Treaty did not have standing subsequently before a national court to invoke its unlawfulness in order to dispute the merits of an action brought against it. Since a Member State can raise an objection of illegality in respect of a regulation which it failed to challenge within the time-limit prescribed by the 5th para. of Art.230 of the EC Treaty (see 5-008, *supra*), it may be assumed that a Member State may also challenge the legality of a regulation before a national court even if it did not bring an action for the annulment of that regulation.

¹¹⁵ Cf. *Commentaire Adjoint*, at 310.

¹¹⁶ ECJ, Case C-62/95 *T. Port v. Commission* [1995] E.C.R. I-6035, para.51.

acts of Community institutions¹¹⁷; since Art.230 gives the Court of Justice exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court, the power to declare the act invalid must also be reserved to the Court of Justice.¹¹⁸ The Court, moreover, is "in the best position" to decide on the validity of Community acts, since "[u]nder Art.23 of the Protocol on the Statute of the Court of Justice of the [EC], Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question".¹¹⁹

Differences compared with an action for annulment. The most important differences between the action for annulment and the review of validity in preliminary ruling proceedings are that the latter is not subject to any time-limit and cannot be "limited by the grounds on which the validity of [Community] measures may be contested"¹²⁰ and that the initiative for seeking a preliminary ruling on validity comes from the national court and not from interested natural or legal persons. In the main proceedings, the parties may try to move the national court to make a reference to the Court of Justice, but they cannot compel the Court to rule on the validity of a measure if the national court has not put a question to that effect.¹²¹

Grounds on which validity may be contested. The parties to the main proceedings, or Community institutions and Member States submitting observations pursuant to Art.23 of the Statute cannot oblige the Court of Justice to appraise the validity of an act in the light of "submissions" or "grounds" of illegality not raised in the order for reference.¹²² This does not mean, however, that the Court has no latitude at all in the matter.

The national court may request the Court of Justice merely to interpret a Community act, but the Court, having regard to the whole of the content of the order for reference, may consider the reference to be concerned with

¹¹⁷ ECJ, Case 314/85 *Foot-Foot* [1987] E.C.R. 4199, para.15.

¹¹⁸ *Ibid.*, para.17.

¹¹⁹ *Ibid.*, para.18; the wording of this passage of the judgment is more consistent with the procedure in the case of a direct ruling, see Ch.24, *infra*, than with the formally contentious procedure of a reference for a preliminary ruling. The Court of Justice added that, furthermore, under the second para. of Art.24 of the Statute the Court may require the Member States and institutions which are not participating in the proceedings "to supply all information which it considers necessary for the purposes of the case before it. It had done so on one occasion in order to enable the European Parliament, which was formerly not entitled to submit observations to the Court under Art.23, to defend its prerogatives in proceedings for a preliminary ruling on validity: ECJ, Case 24/35 *Rowell* [1985] E.C.R. 2635, at 2816.

¹²⁰ ECJ, Joined Cases 21-24/72 *International Fruit and Others* [1972] E.C.R. 1213, para.5; ECJ, Case C-161/86 *Recke* [1988] E.C.R. I-3535, para.26 (where the Court reviewed the validity of a Community act in the light of customary international law).

¹²¹ ECJ, Case 44/63 *Singer* [1955] E.C.R. 965, at 970.

¹²² ECJ, Joined Cases 30-35/72 *Dona Marine and Others* [1982] E.C.R. 3949, para.13.

the validity of the act with a view to promoting the efficiency of judicial cooperation.¹⁰¹ It is important in such a case that the order for reference may be construed as a request for a ruling on validity even though it is couched as a request for a ruling on interpretation. The reason for this is that only in such case may the parties to the main proceedings, the Commission, the Council and the European Parliament (if one of their acts is in issue) and the Member States correctly assess what the Court's ruling may cover and formulate their views thereon.¹⁰²

Next, the Court of Justice may supplement the "submissions" or "grounds" of illegality of the Community act at issue as set forth in the order for reference in the light of matters which come to light in the course of legal argument before the Court itself.

One situation occurs where the national court raises the question of the validity of an act in general terms only. In such a case, the Court of Justice will answer that question in the light of an assessment of the submissions which are set out by the claimant in the main proceedings in its observations to the Court concerning the validity of the act¹⁰³ or which emerge from the statement of reasons of the order for reference.¹⁰⁴

Secondly, the Court of Justice has held that it is empowered to find of its own motion infringements of essential procedural requirements by which an act is vitiated, thereby, if necessary, supplementing the submissions set out in the order for reference alleging that the act is invalid.¹⁰⁵ The case-law to this effect is related to the rule applicable to actions for annulment that the Court of Justice or the Court of First Instance will find infringements of essential procedural requirements of its own motion.¹⁰⁶ Lack of competence on the part of the institution which adopted the contested act should also perhaps be regarded as a peremptory plea, with the result that, as in the case of an infringement of an essential procedural requirement, it may be raised by the Court of its own motion in conducting judicial review of a contested act in preliminary ruling proceedings.¹⁰⁷

10-013 Finding of facts necessary to assess the legality of a given act. In arriving at its preliminary ruling on the validity of a given act, the Court of Justice may go no deeper into the facts of the main proceedings than it may in the

¹⁰¹ E.C.J., Case 16/65 *Schwarz* [1965] E.C.R. 877, at 885.

¹⁰² Cf. E.C.J., Case 62/76 *Smith* [1977] E.C.R. 211, at 211, where the Court of Justice held of its own motion that a provision of a regulation, of which only the interpretation had been sought, was invalid having regard to a decided case.

¹⁰³ E.C.J., Joined Cases 133 and 143/77 *Royal-Schneider Hoting* [1978] E.C.R. 2017, paras 15 and 17.

¹⁰⁴ E.C.J., Case 41/72 *Getulide-import* [1973] E.C.R. I, para. 2.

¹⁰⁵ E.C.J., Joined Cases 73 and 74/53 *Internationale Crediet- en Handels-vereniging Rotterdam and Others* [1954] E.C.R. I, at 14.

¹⁰⁶ See E.C.J., Case C-19/85 *Intehotel v Commission* [1991] E.C.R. I-2257, para. 14; E.C.J., Case C-504/83 *Olivero v Commission* [1991] E.C.R. I-2243, para. 19. See also 7-222 *supra*.

¹⁰⁷ See, to this effect, the Opinion of Advocate General J. Gans in E.C.J., Case 1/67 *Sauv* [1968] E.C.R. 53, at 108-109, who added that, in his view, the Court would not raise the question of misuse of powers of its own motion and that "there is doubt about the situation where there is a question of a breach of the Treaty or a rule of law".

case of a preliminary ruling on interpretation (see 5-021, *supra*).¹⁰⁸ There is a slight difference, however, in that the Court may make all the findings of fact necessary to assess the legality of the contested act.¹⁰⁹ In this respect, the Court's powers are no different if it reviews the legality of an act under Art. 230 or Art. 234 of the EC Treaty.¹¹⁰ In this connection, it would be perfectly possible for measures of inquiry to be ordered pursuant to Art. 45 of the EC Rules of Procedure.¹¹¹

III. CONSEQUENCES OF THE REVIEW OF THE VALIDITY OF A COMMUNITY ACT IN PRELIMINARY RULING PROCEEDINGS

Ruling of the Court of Justice. Where the Court of Justice comes to the conclusion that the contested measure should not be declared invalid, the answer which it gives to the national court is not that the act is valid but as follows: "Examination of the question raised has revealed no factor of such a kind as to affect the validity of [the act]".¹¹² That answer does not preclude the court to which it is addressed from referring other questions to the Court of Justice which might call in question the validity of the same act.¹¹³

Where, in contrast, the Court of Justice declares the act in question invalid, its answer is binding on the national court to which it is made. It may no longer apply the act. The same applies to "any other national court", where there is "sufficient reason [for it] to regard that act as void for the purposes of a judgment which it has to give".¹¹⁴ The effect *erga omnes* of the preliminary ruling on validity is justified as being the inevitable corollary of "particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of Community law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the Community law applicable".¹¹⁵

¹⁰⁸ *Infra*, *Le contentieux*, at 210.

¹⁰⁹ For an example, see E.C.J., Case C-323/86 *Sorner* [1990] E.C.R. I-3307, paras 21-31.

¹¹⁰ The parallel between the two procedures as adverted to by the Court in E.C.J., Case 324/85 *Fore-Fruit* [1987] E.C.R. 4195 emerges clearly here; for an example, see E.C.J., Case C-15/90 *Möller* [1991] E.C.R. I-563, paras 17, 23 and 24.

¹¹¹ See as long ago as E.C.J., Case 5/67 *Sauv* [1968] E.C.R. 53, at 55.

¹¹² For an example, see E.C.J., Case C-323/86 *Sorner* [1990] E.C.R. I-3307, operative part.

¹¹³ E.C.J., Case 1/76 *Möller* [1976] E.C.R. 171, para. 4-5.

¹¹⁴ E.C.J., Case 54/80 *Internationale Crediet- en Handels-vereniging Rotterdam* [1981] E.C.R. 1191, point 1 of the operative part.

¹¹⁵ *Ibid.*, para. 12, at 1213. For the effects in practice, see Hehr, "Direct and Indirect Judicial Control of Community Acts in Practice: the Relation Between Arts 173 and 177 (now Arts 230 and 234) of the EEC Treaty" (1984) *Möschler Rev.* 1229, at 1239-1243; Harding, "The Impact of Art. 177 (now Art. 234) of the EEC Treaty on the Review of Community Action" (1992) *Y.E.L.* 93, at 101-105.

10-015

Definitive effect of a declaration of invalidity. The declaration that an act is invalid is definitive, as in the case of a declaration of nullity (hence the Court's exclusive jurisdiction to declare an act void results in its also having exclusive jurisdiction to declare an act invalid¹⁰¹).

Nevertheless, the Court of Justice endeavours to reconcile the absolute effect of the declaration that a given act is invalid with the requirements of the preliminary ruling procedure as laid down by Art.234. Consequently, it acknowledges that the declaration of invalidity "does not mean ... that national courts are deprived of the power given to them by Art.234 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution [invalid]"¹⁰². The Court does not mean that the declaration of invalidity may be reversed, but that any national court (including the one which obtained the ruling that the act in question was invalid) may possibly have an interest in referring further questions for a preliminary ruling "if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier."¹⁰³

10-016

Consequences of invalidity in the national legal order. It is for the national court to decide disputes concerning the consequences of the declaration that a Community act is invalid in accordance with its national law in so far as Community law does not provide otherwise. In principle, therefore, national law governs the formal and substantive requirements for the refund of amounts collected on behalf of the Community—on the basis of a regulation subsequently declared invalid—unless a rule of Community law specifically deals with such refunds.¹⁰⁴

On a more general level, all national authorities in the Member States have to draw the necessary conclusions from a declaration that a Community measure is invalid. Action by the national authorities may no longer be based on that measure and any action previously taken on the basis of that measure must be withdrawn (and, where necessary, its consequences rectified).¹⁰⁵ However, the consequences which may be drawn in the national legal systems from such a ruling of invalidity depend directly on Community law as it stands in the light of that ruling.¹⁰⁶

Sometimes the Court of Justice spells out the consequences of the declaration that an act is invalid in the national legal system, either in the judgment ruling that it is invalid or in a subsequent judgment following a request for an interpretation of the consequences of the declaration of invalidity.

¹⁰¹ ECJ, Case 31/455 *Pozo-Fruct* [1987] E.C.R. 4189, para.16.

¹⁰² ECJ, Case 66/80 *International Chemical* [1981] E.C.R. 1191, para.14.

¹⁰³ *Ibid.*

¹⁰⁴ ECJ, Case 198/86 *Reifen* [1986] E.C.R. 1163, para. 12-13.

¹⁰⁵ ECJ, Case 23/75 *Rey Sode* [1975] E.C.R. 1279, para. 50-51.

¹⁰⁶ ECJ, Case C-12/79 *H. & R. Sordy and Rupert Sordy* [1986] E.C.R. 1-1771, para.15.

The first scenario presented itself when an agricultural regulation which denied the benefit of exemption from a levy to a particular group of traders, thereby discriminating against them, was declared invalid. As far as the "scope of the preliminary ruling" was concerned, the Court of Justice inferred from that declaration that the Community legislature had to act upon the judgment by adopting such measures as might be appropriate in order to establish equal treatment for the traders concerned as regards the rules governing exemption from the levy.¹⁰⁷ In so doing, the Court implicitly applied Art.233 of the EC Treaty (governing the consequences of a declaration of nullity) by analogy to a declaration by way of preliminary ruling that an act of a Community institution was invalid. Next, the Court noted that, in the particular circumstances of the case, in which the discrimination did not arise from what the offending provision provided but from what it did not provide, a straightforward declaration that it was invalid would have had the result that, pending the adoption of new provisions, all exemptions would be precluded.¹⁰⁸ In order to avoid such a situation, the Court expressly held that the second para. of Art.231 of the EC Treaty¹⁰⁹ had to be applied "by analogy" for the same reasons of legal certainty which underlay that provision. Specifically, this meant that, pending such new provisions, "the competent authorities must continue to apply the exemption provided for in the provision declared invalid but they must also grant it to the operators affected by the discrimination found to exist."¹¹⁰

Next, there is the case where the national court comes back to the Court of Justice with a new request for a preliminary ruling for guidance on how it should react to the declaration of invalidity in deciding the case before it in the main proceedings. Such a request gives the Court of Justice an opportunity to give a precise indication of the consequences of its declaration of invalidity.¹¹¹

Declaration of invalidity comparable to declaration of nullity. So it is clear that the Court of Justice in fact attaches similar consequences to the declaration of invalidity and the declaration of nullity, especially as far as

10-017

¹⁰⁷ ECJ, Case 300/86 *Van Landuyck* [1988] E.C.R. 3443, para.21.

¹⁰⁸ *Ibid.*, para.25.

¹⁰⁹ "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive."

¹¹⁰ ECJ, Case 300/86 *Van Landuyck* [1988] E.C.R. 3443, para.24; cf. ECJ, Case 264/92 *Tomte v Council and Commission* [1993] E.C.R. 649, para.32.

¹¹¹ ECJ, Case 359/87 *Piava* [1988] E.C.R. 385, at 613-616, where the Court explained the consequences of its declaration that Art.73(2) of Regulation No 1408/71 was invalid for "those authorities [which were obliged] to draw the inferences in their legal system from a declaration of invalidity made in the context of Art.17 (now Art.234) of the Treaty" "so long as the Council has failed, following the judgment of the Court, to lay down new rules". *Ibid.*, para.13; the earlier judgment containing the declaration of invalidity is reported at ECJ, Case 41/84 *Piava* [1986] E.C.R. 1.

the application of the second part of Art.231 and Art.233⁴⁷ of the EC Treaty is concerned. The act which has been declared invalid may no longer be applied by a national court or a national authority, the institution which adopted the offending act must take appropriate steps to cure the illegality and, if necessary, adopt a new measure, and the Court of Justice is prepared in certain circumstances to maintain certain aspects of the act which has been declared void in force until another measure has been adopted.

10-018 **Temporal effects.** As far as temporal effects are concerned, the declaration of invalidity and the declaration of nullity run on parallel lines. The Court of Justice has held that "A judgment of the Court in proceedings for a preliminary ruling declaring a Community act invalid in principle has retroactive effect, like a judgment annulling an act".⁴⁸

However, a problem may arise as a result of the fact that there is no temporal restriction on a national court's requesting the Court of Justice to declare a Community act invalid, in contrast to an action for annulment, which has to be brought within the limitation period laid down. Consequently, the idea that the legal uncertainty resulting from the effect *ex tunc* of a declaration of nullity (i.e. from the date on which the measure declared void took effect) is mitigated by the relatively short period within which an action for annulment must be brought has no relevance to a declaration of invalidity. This may explain why the Court of Justice has inferred from Art.234 the power to modulate the temporal effects of preliminary rulings declaring Community acts invalid, depending on the case.⁴⁹ In order to justify that power, the Court had recourse to the argument that the

declaration of nullity and the declaration of invalidity were "two mechanisms provided for by the Treaty for reviewing the legality of acts of the Community institutions" and that the "necessary consistency" between the two mechanisms warranted interpreting the second part of Art.251 of the EC Treaty as enabling the Court to impose "temporal limits, on the invalidity of a Community regulation, whether under Art.230 or Art.234 ... in the interest of the uniform application of Community law throughout the Community" (in the event of the declaration's having full effect *ex tunc*, it would perhaps be impossible under the procedural law of some Member States to undo all the effects which the act declared invalid had already had, which would be at the expense of the uniform non-application of the act as far as the past was concerned).⁵⁰

Limitation of temporal effects. As far as limiting the temporal effects of its judgments is concerned, the Court of Justice will decide "in each particular case" whether "an exception to that temporal limitation ... may be made in favour of the party who brought the action before the national court or of any other trader which took similar steps before the declaration of invalidity or whether, conversely, a declaration of invalidity applicable only to the future constitutes an adequate remedy".⁵¹ In the latter case, the Court has in fact considered that the parties which took the initiative of challenging in the national courts the act ultimately declared invalid are sufficiently rewarded for their efforts by seeing the act eliminated from the legal system for the future.⁵² That approach has come in for criticism on the ground that it effectively deprives the party who successfully pleaded the invalidity of the Community act of the benefit of his or her success, since that party only shares in the general benefit which anyone may have in an invalid Community act which is detrimental to his or her interests being no longer applied.⁵³ This is patently insufficient to act as a stimulus to setting judicial review in train.

The Court of Justice recognised this when it was faced with this question on a subsequent occasion and had to consider whether "an importer who, like the plaintiff in the main proceedings, has brought an administrative complaint followed by judicial proceedings, challenging a notice to pay MCAs [monetary compensatory amounts] on the ground that the Community regulation on the basis of which the notice was adopted was invalid, is entitled to rely for the purposes of those proceedings on the invalidity of

⁴⁷ CFI, Case T-113/97 *H & R Soryol v Commission* [1999] E.C.R. II-1577, para.45.

⁴⁸ ECJ, Case C-224/96 *Requette Frères* [1998] E.C.R. I-1445, para.17, from which it follows that the national authorities must ensure the repayment of sums wrongly charged on the basis of Community regulations which are subsequently declared invalid by the Court, *ibid.*, para.18; see also ECJ, Case 138/75 *Expanso Dairy-Foods* [1976] E.C.R. 1357, para.14; cf. Pescatore, "Art.177 (now Art.234)", in Constantinesco et al. (eds), *Traité juridique de CEE. Commentaire Art. par Art.* (Economica, Paris, 1982), No 73, at 1230-1231. See also Rylands, "Temporal Limitation of the Effects of Judgments of the Court of Justice—A review of recent case-law" [1995] I.J.E.L. 206-233; Isaac, "La modulation par la Cour de justice des Communautés européennes des effets dans le temps de ses arrêts d'invalidité" (1987) C.D.E. 444-473; Weiss, "Die Einschränkung der zeitlichen Wirkungen von Verwaltungsentscheidungen nach Art.177 EGV" (1995) EuR. 377-397.

⁴⁹ ECJ, Case 112/63 *Société des Produits de Maïs* [1964] E.C.R. 719; for a case in which the Court of Justice refused to restrict the effect *ex tunc* of a declaration of invalidity, see Joined Cases C-363 and C-401-41/91 *Lancry and Others* [1994] E.C.R. I-3957, paras 40-45. See also ECJ, Joined Cases C-177/99 and C-181/99 *Amisance and Sanofi Synthelabo* [2000] E.C.R. I-7013, para.67 (in this case a Member State invoked for the first time the principle of protection of legitimate expectations with a view to limiting the temporal effects of a judgment declaring a decision invalid. The Court of Justice held that this was not possible on the ground that to allow a Member State to do so would jeopardise the possibility for individuals to be protected against conduct of the public authorities based on unlawful rules) and ECJ, Case C-228/99 *Süß v. Magerath/Martini* [2001] E.C.R. I-3601, paras 35-38.

⁵⁰ *Société des Produits de Maïs*, cited in the preceding n., para.17.

⁵¹ *ibid.*, para.18.

⁵² ECJ, Case 4/79 *Providence Agricole de la Champagne* [1980] E.C.R. 2521, paras 42-45; ECJ, Case 103/79 *Moteries de Beauce* [1980] E.C.R. 2583, paras 42-45; ECJ, Case 145/79 *Requette Frères* [1980] E.C.R. 2977, paras 50-53.

⁵³ See, among others, Vanovermaet, case note in (1983) S.E.W. 469; Labeyrie, "La Cour de justice des Communautés et les effets d'une déclaration d'invalidité" (1982) R.T.D.E. 444-510; Waackbrack, "Le principe de la non-rétroactivité en droit communautaire à la lumière des arrêts 'Soglusac'" (1993) R.T.D.E. 565.

a regulation declared by the Court of Justice in the same proceedings" ¹⁴⁰ If the Court were to have held that "a declaration of invalidity applicable only to the future is an adequate remedy even for that party", this would have meant that "the national court would dismiss the action brought against the notice in question, even though the regulation on the basis of which that notice was adopted had been declared invalid by the Court in the same proceedings". ¹⁴¹ The Court found that that outcome would be unacceptable: "An economic agent such as the plaintiff in the main proceedings would thereby be deprived of its right to effective judicial protection in the event of a breach of Community law by the institutions, and the practical effect of Art.234 of the Treaty would thereby be jeopardised". ¹⁴² Consequently, it came to the conclusion that "a trader who before the date of the present judgment has brought an action in a national court challenging a notice to pay MCAs adopted on the basis of a Community regulation declared invalid by the present judgment is entitled to rely on that invalidity in the national proceedings". ¹⁴³ This meant not only the plaintiff in the main proceedings which had resulted in the reference to the Court of Justice, but also anyone who had brought judicial proceedings or "submitted an administrative complaint" before the date of the declaration of invalidity. ¹⁴⁴

Since the Court of Justice reached that decision sitting as the Full Court and it is based on the fundamental "right to effective judicial protection" and on guaranteeing the "practical effect [effet utile] of Art.234 of the Treaty", it seems unlikely that in future the Court will revert to the option, which still exists in theory, of holding that a declaration of invalidity is applicable to parties to the main proceedings and others whose position may be equated with theirs "only for the future".

¹⁴⁰ ECJ, Case C-214/91 *Roquette Frères* [1994] E.C.R. I-5465, para.24.

¹⁴¹ *Ibid.*, paras 25 and 26.

¹⁴² *Ibid.*, para.27.

¹⁴³ *Ibid.*, para.30.

¹⁴⁴ *Ibid.*; see also the earlier case ECJ, Case 41/84 *Piava* [1986] E.C.R. I, paras 29-30.

IV Preliminary rulings on interpretation

1. Aim of the procedure
2. The provisions which can be referred
3. Possibility vs. duty to refer
4. Admissibility of the request
5. Effects of preliminary rulings

Mandatory Reading

Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 *Procedural Law of the European Union* - Chapter 6

Tanasije Marinkovic, PhD.
Svetislava Bulajic, LL.M.

INTERPRETATION OF COMMUNITY LAW BY WAY OF PRELIMINARY RULING

6-001 Topics to be discussed. The request for a preliminary ruling²² on the interpretation of Community law raises three specific questions. The first relates to the subject-matter of the preliminary ruling on interpretation, in other words, to what provisions and principles may be interpreted by the Court of Justice. The second relates to the content of the preliminary ruling on interpretation and the related limits set to the jurisdiction of the Court of Justice. Thirdly, there is the question of the consequences of a preliminary ruling.

These three questions will be considered in turn.

I. SUBJECT-MATTER OF AN INTERPRETATION BY WAY OF PRELIMINARY RULING

6-002 General. According to Art.234 of the EC Treaty, the jurisdiction of the Court of Justice to give preliminary rulings on interpretation extends to "this Treaty" and "acts of the institutions of the Community and of the ECB (European Central Bank)". The wording of Art.153 of the EAEU Treaty is similar.

The upshot is that, as far as the subject-matter of a reference for a preliminary ruling is concerned, the Court has parallel jurisdiction to give preliminary rulings on interpretation under the two Treaties. This covers the Treaties themselves, acts of the Community institutions, including international agreements concluded by the Community and acts of bodies set up by such agreements, and provisions of Community law to which national law refers.

²² For the mechanism of cooperation between national courts and the Court of Justice and the general requirements which requests for preliminary rulings have to satisfy, see Ch.2, supra. Art.234 is the only form of action provided for in the EC Treaty allowing the Community judicature to rule on the interpretation of a Community act. Cf. (order of February 28, 2005), Case T-104/03 *Van Pelt v. Commission*, not yet reported, paras 55-58.

A. THE TREATIES

Notion of Treaty. The Treaties establishing the European Communities (EC and EAEU Treaties) constitute the "basic constitutional charter"²³. They are the written constitution surmounting the hierarchy of Community norms and consequently are the first instruments whose interpretation may form the subject-matter of preliminary rulings by the Court of Justice.

What is meant is the Treaties establishing the Communities and all amendments thereto, the treaties and acts relating to the accession of new Member States, complementary "treaties", such as the former (1957) "Convention on certain institutions common to the European Communities"²⁴ and the former (1965) "Treaty establishing a Single Council and a Single Commission of the European Communities" (the "Merger Treaty"; see Art.33 thereof),²⁵ and all the annexes and protocols annexed to the Treaty, which have the same legal force as the Treaties themselves.²⁶

Not all of the Single European Act (1986) and the Treaty on European Union (1992) relate to the European Communities. Consequently, only those parts of them relating to Community law fall within the Court's jurisdiction to give preliminary rulings on interpretation under Art.234 of the EC Treaty (EU Treaty, Arts 46 to 53; see also Ch.4, supra, and Ch.22, infra).

Treaty status also has to be given to such provisions, adopted by the Council by means of a special procedure, as it "shall recommend" to the Member States for adoption in accordance with their respective constitu-

²³ ECJ, Case 294/85 *Les Verts v. European Parliament* [1986] E.C.R. 1339, para.23.

²⁴ Convention on certain institutions common to the European Communities, in *European Union, Selected Instruments taken from the Treaties* (Book I, Office for Official Publications of the European Communities, Luxembourg, 1995), Vol.1, at 533-554.

²⁵ *Ibid.*, 697-727. This Treaty and the Convention cited in the preceding n. have been repealed by Art.9(1) of the Treaty of Amsterdam [(1997) O.J. C340/76-77]. Most of their provisions had been incorporated to the Community Treaties. As for the remainder, Art.9(1) to (7) of the Treaty of Amsterdam set out to retain their essential elements (*ibid.*).

²⁶ EC Treaty, Art.231; EAEU Treaty, Art.101. The principal protocols are those on the Statute of the European Investment Bank, on the Statute of the Court of Justice, and on the Privileges and Immunities of the European Communities, together with the seventeen protocols appended to the EC Treaty by the EU Treaty. For the text of the protocols, see *European Union, Selected Instruments taken from the Treaties* (Book I, Office for Official Publications of the European Communities, Luxembourg, 1999), Vol.1. See also the further protocols annexed by the Treaty of Amsterdam to the EC Treaty [(1997) O.J. C340/103-110], to the EU Treaty and the EC Treaty (*ibid.*, 93-102) and to the EU Treaty and the three Community Treaties (*ibid.*, 111-114). For a practical example, see ECJ, Case C-141/95 *Swannovius* [1997] E.C.R. I-2057, in which the Court of Justice gave a ruling on the interpretation of the Protocol on Art.14 of the EC Treaty. At the same time, a whole series of declarations of intergovernmental conferences relating to various provisions of the Treaties accompany the Treaties (especially the Single European Act, the EU Treaty, the Treaty of Amsterdam and the Treaty of Nice as well as a series of declarations on various provisions of the Treaties). Although these declarations do not have the status of legislation (and hence certainly not the status of treaties), their content may be taken into account in interpreting the provisions to which they relate (for the text of the declarations, see the references cited above).

tional requirements".²⁰ The provisions decided upon by the Council do not enter into force until they have been adopted by all Member States (by act of parliament or after a referendum, depending on the "constitutional requirements" of each Member State). Once they have been so adopted, they obtain Treaty status in the hierarchy of norms of Community law.²¹

- 6-004 General principles of Community law. The unwritten general principles of Community law, including fundamental rights, may also be the subject of a reference for a preliminary ruling on interpretation. Those principles form part of the "law" which the Court of Justice has to ensure is observed in the interpretation and application of the Treaties (EC Treaty, Art.220; EEC Treaty, Art.156). Examples are the principles of equal treatment, proportionality and *nec sibi in idem* and the rights of the defence prior to the adoption of an individual decision having adverse effect.²² Naturally, a preliminary ruling on the interpretation of those principles may be sought only in connection with the application of substantive Community law, that is to say, in connection with main proceedings relating (at least to some extent) to Community law.²³

B: Acts of Community Institutions

- 6-005 All acts of Community institutions. All acts of Community institutions may be the subject of a request for a preliminary ruling on their interpretation, irrespective of whether the act is specifically mentioned in the Treaties²⁴ or

²⁰ See, *inter alia*, Art.22 of the EC Treaty (adding to rights arising out of citizenship of the Union); Art.193(4) of the EC Treaty (determining a uniform procedure for elections to the European Parliament); see the Act concerning the election of the representatives of the Assembly by direct universal suffrage, annexed to the Council Decision of September 20, 1976, [1976] L 278/1, as amended by Council Decision of February 1, 1991, [1991] O.J. L33/15; Art.223a of the EC Treaty (confering jurisdiction on the Court of Justice in disputes relating to the application of acts creating Community industrial property rights) and Art.269 of the EC Treaty (determining the system of the Community's own resources).

²¹ See Isaart, *Droit communautaire général* (Masson, Paris, 1990), at 281; cf. Jodet, *Le contentieux*, at 150-151.

²² The "interpretation" of the principle concerned is conceptual behind the appraisal of the "validity" of an inferior provision of Community law. See ECI, Joined Cases 41, 121 and 756/72 *Tetra* [1982] E.C.R. 1579, para.21; ECI, Case 245/87 *Schneider* [1989] E.C.R. 2337, paras 20-24; ECI, Case C-331/83 *Feders and Others* [1990] E.C.R. I-4021, paras 12-14.

²³ ECI, Case C-144/93 *Maurice* [1994] E.C.R. I-2929, paras 12-13; ECI, Case C-295/93 *Kromosz* [1997] E.C.R. I-2629, paras 15-16. For further particulars, see Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, §.7-065-§.7-050, at 711-735. See also 6-024, *infra*.

²⁴ In Art.249 of the EC Treaty or elsewhere in the Treaties, such as the Rules of Procedure of the institutions (EC Treaty, Arts 179, 107(1) and 218(2)), the Financial Regulation (EC Treaty, Art.175) or the measures provided for in the third indent of Art.223 of the EC Treaty ("Comitology Decision"; Council Decision 1999/468/EC of June 28, 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] O.J. L184/23).

not,²⁵ whether it is binding or non-binding²⁶ or whether or not it has direct effect.²⁷

Act must be attributable to Community institution(s). The sole criterion is whether the act may be ascribed to a Community institution. The Court of Justice has held that no such act was involved in the case of an agreement concluded between national central insurance bureaux relating to the Green Card Scheme pursuant to Council Directive 72/165 on insurance against civil liability in respect of the use of motor vehicles. The agreement could not be considered an act of a Community institution on the ground that "no Community institution or agency took part in its conclusion", even though the conclusion of the agreement was a precondition for the entry into force of the directive and the length of time for which the directive was applicable was determined by the agreement's duration. It made no difference that the Commission had consistently stated, in a recommendation and in successive decisions, that the agreement complied with the directive's requirements or that it was annexed to a Commission decision and published with it in the *Official Journal*. This did not mean that the agreement itself was the work of a Community institution.²⁸

The test that a Community institution or body must have "taken part" in the conclusion of the act in order for it to be amenable to interpretation by the Court of Justice in Art.234 proceedings is, in all likelihood, open to flexible application. There are many ways in which a Community institution or body might conceivably "take part" in the conclusion of an act. Thus, the test is satisfied in the case of international agreements concluded by the

²⁵ E.g. a Council resolution: ECI, Case 573 *Schlüter* [1973] E.C.R. 1135, para.42.

²⁶ E.g. a recommendation (or opinion) within the meaning of Art.249 of the EC Treaty: ECI, Case 113/73 *Freemant* [1976] E.C.R. 345, paras 3-8; ECI, Case C-322/83 *Gruenwald* [1985] E.C.R. 4467, paras 7-9. As a result of the principle of cooperation in good faith, national courts are bound to take recommendations into consideration in order to decide disputes referred to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

²⁷ E.g. ECI, Case 32/74 *Heipog* [1974] E.C.R. 1261, para.1; ECI, Case 111/75 *Imperial Chemicals* [1976] E.C.R. 537, paras 3-9; ECI, Case 1480 *Von Colson and Krenn* [1984] E.C.R. 1897, para.27; ECI, Case C-25/93 *Putzhard* [1997] E.C.R. I-4025, para.11; ECI, Case C-313/95 *Moro and Others* [1997] E.C.R. I-4037, para.13. Irrespective of whether the Community measure has direct effect, its interpretation will be useful in the national court, which, as a public body, is required under Art.10 of the EC Treaty to apply its domestic legislation in conformity with the requirements of Community law (see also ECI, Case 513/77 *Leones* [1988] E.C.R. 4637, para.15; ECI, Case C-106/93 *Marking* [1994] E.C.R. I-4135, paras 5-9; see the case note by Stuyck and Wuyts [1991] C.M.L.Rev. 255-273).

²⁸ ECI, Case 158/81 *Demoche and Others* [1987] E.C.R. 1833, paras 15-21; see also an earlier case, ECI, Case 116/83 *Franzoni* [1984] E.C.R. 2481, para.11. Cf. ECI, Case C-35/93 *Pfennigsmann* [1999] E.C.R. I-7747, paras 16-20, in which the Court held that an Agreement of February 9, 1954 concluded pursuant to Directive 91/69/EC between the governments of certain Member States on the levying of charges for the use of certain roads by heavy commercial vehicles could not be regarded as Community law. As a result, the Court had no competence to interpret it.

Community and of (binding and non-binding) acts adopted by bodies set up by such agreements (since the Community participates in the operation of such bodies).

New forms of regulatory activity within the Community will make it necessary to take a creative approach to this test. An example may be found in the Title of the EC Treaty concerning social policy. Under Art.139 of the EC Treaty, management and labour may conclude agreements at Community level. The question is whether, in certain circumstances, such agreements may also be the subject of a reference for a preliminary ruling. Such agreements are intended to be an alternative to the Community legislation contemplated by Art.137 of the EC Treaty. In addition, before submitting proposals for legislation to the Council, the Commission has to consult management and labour and, if they express a wish to that effect, must give them the opportunity to conclude an agreement on the content of the proposal (EC Treaty, Art.138). Lastly, "[a]greements concluded at Community level shall be implemented . . . in matters covered by Art.137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission" (adopted by the voting method specified in Art.137) (EC Treaty, Art.139(2)). Although, strictly speaking, Community institutions or bodies do not play any part in drawing up the agreements to be concluded by management and labour at Community level, it may perhaps be accepted, in the light of the contribution they make, that they "take part" to a sufficient extent in the conferral of legal force on the agreements, as a result of the Council decisions implementing them, as to make them qualify for preliminary rulings by the Court of Justice.²⁴ The position will be different, of course, where the agreements are implemented, not by Council decision, but "in accordance with the procedures and practices specific to management and labour and the Member States" (the other alternative set out in Art.139(2) of the EC Treaty). The main reason for taking this view is that it is stated in Declaration No 27 annexed to the Treaty of Amsterdam that "the content of [such] agreements" is to be developed "by collective bargaining according to the rules of each Member State" and that there is therefore "no obligation on the Member States to apply the agreements directly or to work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation". Precisely the opposite situation obtains where the agreements are implemented by Council decision, which means that the aim of the procedure of preliminary rulings on interpretation may be achieved in full in that case.

6-007 Notion of Community institution. The question also arises as to what is the precise meaning of the expression "institutions of the Community" in indent (b) of the first para. of Art.234 of the EC Treaty. The Court of

²⁴ An action for annulment may lie against such a Council decision: see *CFI*, Case T-153/96 *USAPMC v Council* [1998] E.C.R. II-2335.

Justice has interpreted it broadly by referring to a "Community institution or agency", which must have taken part in the conclusion of the relevant act.²⁵ It appears from this that the expression covers any Community body in addition to the "institutions of the Community" referred to in Art.7 of the EC Treaty.

It is self-evident that all measures adopted by the Council, the Commission or the European Parliament and the Council jointly may be the subject of a reference for a preliminary ruling on their interpretation. In the overwhelming majority of cases, Community decision-making results in such an act in one form or another (see EC Treaty, Art.249).

Acts of the European Parliament and the Court of Auditors also come under the jurisdiction of the Court of Justice to give preliminary rulings on interpretation,²⁶ albeit it is rarer for the interpretation of such acts to be relevant to the determination of main proceedings before a national court.²⁷

Judgments of the Court of Justice. Preliminary rulings may also be sought on the interpretation of judgments of the Court of Justice. For instance, an interpretation of a previous judgment may be sought in the event that the national court has difficulty in understanding or applying it.²⁸ The judgment to be interpreted does not have to be a preliminary ruling; it may have been given in any sort of proceedings.²⁹

Commentators have long been divided on this issue. Those arguing that judgments of the Court could be the subject of a reference for a preliminary ruling did so chiefly on the basis of the wording of Art.234 of the EC Treaty: the Court of Justice is an "institution" of the Community and so its "acts" (judgments/orders) may be interpreted by way of preliminary ruling.³⁰ Those taking the opposite view contended that the subject-matter of a reference for a preliminary ruling on the interpretation of an earlier

²⁵ *ECJ*, Case 151/81 *Demouche* [1987] E.C.R. 3333, para.19.

²⁶ For acts of the European Parliament, see Duman, "La Cour de Justice: Questions préjudicielles", in *Les Nouvelles Droits des Communautés européennes* (Larcier, Brussels, 1969), at 341-366; Vandermandes and Barav, *Conventions communautaires* (Brussels, Brussels, 1977), at 295; for acts of the Court of Auditors, see *Commentaire Mérieux*, at 212.

²⁷ *Rideau and Fodé, Code de procédures juridictionnelles*, at 291.

²⁸ *ECJ* (order of March 5, 1986), Case 69/85 *Alzette* [1986] E.C.R. 947, para.15; *ECJ*, Case 14/86 *Prover di Salò v X* [1987] E.C.R. 2545, para.12. For an example, see *ECJ*, joined Cases C-363 and C-407-411/93 *Lemery and Others* [1994] E.C.R. I-3957; *ECJ*, Case C-280/94 *Poulsen-van Dorpe and Dorlik* [1996] E.C.R. I-179, para.13; *ECJ*, Case C-597 *Reifen Nedam Group* [1997] E.C.R. I-7549, para.1; *ECJ*, Case C-215/93 *Arasoulou and Others* [2000] E.C.R. I-5241, paras 13-14; *ECJ*, Case C-234/01 *Xabier* [2003] E.C.R. I-10219.

²⁹ See, for example, *ECJ*, joined Cases 314-316/81 and 31/82 *Waterkeyn* [1982] E.C.R. 4337: interpretation of the scope and legal effects of a judgment given pursuant to Art.225 of the EC Treaty.

³⁰ *Chevallier and Maitland, Guide pratique, Art.177 (now Art.234)* (Office for Official Publications of the European Communities, Luxembourg, 1981), 121-72; *Vandermandes and Barav, Conventions communautaires*, at 296.

judgment was in fact not the judgment as such but the provisions and principles of Community law applied or interpreted therein.³⁰

The distinction is perhaps not as clear-cut as it seems. The Court of Justice allows national courts and tribunals to refer questions to it on the interpretation of its previous judgments, but in answering them, it inevitably falls back on the provisions and principles of Community law underlying those judgments. This is also true where national courts apply to the Court of Justice for an interpretation of a judgment of the Court of First Instance. The possibility of making such a reference is of great practical importance for national courts where they query whether a judgment of the Court of First Instance against which no appeal has been brought before the Court of Justice correctly interprets the principles and provisions of Community law with which it deals.

6-009 Acts of European Central Bank. Alongside acts of "institutions of the Community", since the EU Treaty entered into force, indent (b) of the first para. of Art.134 of the EC Treaty has expressly mentioned acts of the European Central Bank. Consequently, a preliminary ruling may also be sought from the Court of Justice on the interpretation of its acts.

6-010 Acts of Community bodies and agencies. The fact that only the European Central Bank is also mentioned in Art.234 of the EC Treaty does not mean that acts of other Community bodies may not be the subject of a reference for a preliminary ruling.³¹ The correct position is that acts of bodies which have been established by Community institutions in the exercise of their powers and given specific executive tasks (and the associated power to take decisions) may form the subject of a request for a preliminary ruling. As has already been pointed out, the Court of Justice requires Community institutions or bodies to have taken part in the adoption of an act in order for it to be capable of being the subject of an Art.234 reference on its interpretation. That requirement is certainly fulfilled in the case of the

³⁰ Joliet, *Le contentieux*, at 153; Kovar, "Cour de Justice, Recours préjudiciel en interprétation et en appréciation de validité—Examen de la question préjudicielle par la Cour de justice" (1991) *J.C.D.L.* Vol.16:75-2, No. 24, referring to ECJ, Case 131/77 *Borch* (1978) *E.C.R.* 873 and ECJ, Joined Cases 81, 112 and 113/79 *Segura and Others* (1980) *E.C.R.* 1159; see also the Opinion of Advocate General J.-P. Warner in ECJ, Case 3/78 *Midre* (1978) *E.C.R.* 1721, at 1740-1741. Brealey and Rodière, *Remedies in E.C. Law*, at 234, also take the view that judgments of the Court of Justice are not open to review in the context of preliminary ruling proceedings; they refer to ECJ (order of March 5, 1984), Case 89/83 *Wührke* (1985) *E.C.R.* 947, paras 10-15.

³¹ Art.134-369, first para., of the Constitution provides that the Court of Justice of the European Union has jurisdiction to give preliminary rulings concerning the interpretation of the Constitution, as well as the validity and the interpretation of acts of the institutions, bodies, offices and agencies of the Union. Art.134-369 thus incorporates the *acquis communautaire* by formally extending the Court's preliminary jurisdiction to cover acts of bodies, offices and agencies of the Union.

agencies, offices, foundations and other "bodies" established by the Community institutions.³²

Acts of committees. The European Economic and Social Committee and the Committee of the Regions, which assist the Council and the Commission in an advisory capacity (EC Treaty, Art.17), are not institutions or bodies whose acts are amenable to interpretation by the Court of Justice pursuant to Art.234 of the EC Treaty. The Opinions which they deliver form part of the decision-making process carried out between the Commission, the Council and (generally) the European Parliament. They have no independent existence and could, at the most, be used to help interpret acts where they took part in the process of their adoption.³³

Acts of European Council. The European Council is not an institution of the Community³⁴; in principle, its acts fall outside the Court's jurisdiction to give preliminary rulings on interpretation. Nevertheless, some have argued that it should be equated with the Community institutions for the purposes of Art.234 on the ground that it has to provide the Union (and hence the Community) with the necessary impetus for its development; and to define general political guidelines (EU Treaty, Art.4).³⁵ Exceptionally, the European Council itself plays a formal role in the Community's decision-making process³⁶ or serves as the forum for the adoption of a decision of the Heads of State or Government meeting in the European Council.³⁷ As such, those acts do not give rise to references for preliminary rulings from national courts, although they may well have to be interpreted by the Court of Justice in conjunction with the Community acts or Treaty provisions to which they relate in order to determine the precise implications of those acts or provisions.

³² See the list set out in Art.1 of the Decision taken by common agreement between the Representatives of the Governments of the Member States, Meeting at Head of State or Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europe, [1995] *O.J.* C123/1. See also Lenzert, "Regulating the Regulatory Process: 'Delegation of Powers' in the European Community" (1993) *E.L.Rev.* 23, at 45-46.

³³ *Communiqué Média*, at 212-213.

³⁴ The Constitution promotes the European Council to the status of an institution. See Art.1-19. When the Constitution enters into force, the Court will therefore have jurisdiction also to give rulings on preliminary references concerning the interpretation and the validity of acts of the European Council.

³⁵ *Ridda and Fiedt, Code de procédure judiciaire*, at 291.

³⁶ EC Treaty, Art.59—adoption of a conclusion on the broad guidelines of the economic policies of the Member States and the Community, on the basis of which the Council is to adopt a recommendation.

³⁷ See with regard to the position of Denmark in the European Union, (1992) *O.J.* C348; see also Corin and Van Oik, "De offenkende positie van Denemarken in de Europese Unie" (1992) *S.E.W.* 673-682.

C. INTERNATIONAL AGREEMENTS CONCLUDED BY THE COMMUNITY AND ACTS OF INSTITUTIONS ESTABLISHED BY SUCH AGREEMENTS

- 5-013 Agreements concluded by the Community. Not only acts adopted by Community institutions autonomously, but also "contractual" acts, are covered by indent (b) of the first para. of Art. 234. Thus, the Court of Justice has held that it has jurisdiction to give preliminary rulings on the interpretation of international agreements concluded by the Community.³⁴¹
- 5-014 Agreements concluded by the Community and the Member States. The question arises as to whether in the case of a mixed agreement concluded by the Community and the Member States jointly with a third country the jurisdiction of the Court extends to rulings interpreting provisions of the agreement by which the Member States enter into commitments vis-à-vis that country by virtue of their own powers. The Court of Justice first left this question expressly open.³⁴² It was able to do so because it could take the view that the provisions whose interpretation was sought fell partly within the Community's powers to guarantee commitments towards the non-member country concerned. The fact that the Member States had to carry out the commitments was irrelevant because in doing so they were simply fulfilling an obligation in relation to the Community³⁴³ and did not

³⁴¹ ECJ, Case 161/73 *Norgesen* [1974] E.C.R. 449, paras 1-5; for examples, see ECJ, Case 87/75 *Erardani* [1976] E.C.R. 129; ECJ, Case 65/77 *Rassatoumbis* [1977] E.C.R. 2239; ECJ, Case C-189/90 *Kibler* [1991] E.C.R. I-159; ECJ, Case C-43/92 *Archerd and Others* [1994] E.C.R. I-5387; ECJ, Case C-153/97 *Sabotage* [1998] E.C.R. I-181; ECJ, Case C-321/97 *Anderson and Walker-Anderson* [1998] E.C.R. I-3551, paras 23-33. It is clear from this judgment that the Court of Justice has jurisdiction to interpret the EEA Agreement. However, the interpretation is binding only on the Community and not on the EFTA States. The EFTA Court is empowered to give rulings on the interpretation of the EEA Agreement which are applicable in the EFTA States. See also ECJ, Case C-211/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région* [2004] E.C.R. I-7357; ECJ, Case C-265/03 *Simutenkov* [2005] E.C.R. I-2579.

³⁴² ECJ, Case 12/54 *Demirel* [1961] E.C.R. 1715, para 9; ECJ, Case C-35/96 *Harmis International* [1998] E.C.R. I-3603, paras 34-35; see also Boninck, "The TRIPS Agreement and the ECJ: A New Dawn? Some Comments about Joined Cases C-300/98 and C-323/98, *Parfums Dior and Assco Gerbiste*" available from www.janmennenprogram.org/papers; Neframi, "La compétence de la Cour de justice pour interpréter l'Accord TRIPS selon l'arrêt 'Parfums Christian Dior'" (2001) R.D.U.E. 491-513, who emphasises moreover that the Court can rule only on the direct effect of a provision of a mixed agreement in so far as the agreement falls within the substantive sphere of competence of the Community; Kovrakos, "The Interpretation of Mixed Agreements under the Preliminary Reference Procedure" (2002) E.For.Aff. Res. 15-52; Snyder, "The gatekeepers: the European Courts and WTO Law" (2003) C.M.L.Rev. 315-367.

³⁴³ EC Treaty, Art. 16; ECJ, Case 104/81 *Kupferberg* [1982] E.C.R. 3641. See also ECJ, Case C-439/01 *Cipra and Kozmicka* [2003] E.C.R. I-743, paras 23-24 with respect to the AETR Agreement (European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport). The Court held, after having recalled that in ratifying or acceding to that agreement, the Member States had acted in the interest and on behalf of the Community, that it forms part of Community law in so far as it has jurisdiction to interpret it; ECJ, Case C-439/01 *Cipra and Kozmicka* [2003] E.C.R. I-743, paras 23-24.

assume, vis-à-vis the non-member country, the Community's responsibility for the due performance of the agreement.³⁴⁴

In *Parfums Christian Dior*³⁴⁵ the Court held, however, that it had jurisdiction to interpret Art. 50 of TRIPS³⁴⁶ (a procedural provision conferring on the judicial authorities of the Contracting Parties the authority to order prompt and effective provisional measures to prevent a threatened or suspected infringement of any intellectual property right from occurring) both in situations falling within the scope of the national law of the Member States and in those coming under Community law. The Court inferred its interpretative jurisdiction from the finding that Art. 50 of TRIPS constitutes a procedural provision which should be applied in the same way in every situation falling within its scope (both situations covered by national law and situations covered by Community law) and that that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

Lately the Court of Justice seems to consider itself competent to interpret any provision of a mixed agreement if the agreement concerns a field in large measure covered by Community law.³⁴⁷

Pre-existing agreement in an area of Community competence. For the purposes of the Court's jurisdiction to give preliminary rulings on interpretation, international agreements by which the Community is bound by way of substitution for the Member States are treated in the same way as international agreements concluded by the Community. In this way, the Court of Justice has held that it has jurisdiction to give preliminary rulings on the interpretation of the GATT (General Agreement of Tariffs and Trade) of 1947 on the ground that, since the Common Customs Tariff entered into effect, the Community has been substituted for the Member

³⁴⁴ Likewise the Court considers that it has no jurisdiction under Art. 234 of the EC Treaty to interpret a provision of an agreement concluded between a number of Member States, not even if the agreement was concluded pursuant to a Community directive; ECJ (order of November 12, 1998), Case C-162/98 *Harmann* [1998] E.C.R. I-7083, paras 3-10.

³⁴⁵ ECJ, Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior and Others* [2000] E.C.R. I-1337, paras 32-40, with a case note by Holikowski (2002) C.M.L.Rev. 155-176. See also ECJ, Case C-59/99 *Schindler-Nijm and Others* [2001] E.C.R. I-5351, para 30; ECJ, Case C-243/02 *Archeur-Bouch* [2004] E.C.R. I-10929, paras 40-46.

³⁴⁶ On the WTO and the competence of the Community and the Member States for matters falling within the scope of the WTO, see Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, § 20-002-§ 20-014, at § 20-014.

³⁴⁷ In the *Archeur-Bouch* case, the Court deemed itself competent to interpret Art. 15 of TRIPS, a substantive provision concerning the rights conferred on the owner of a registered trademark, after having stressed, however, that the Community is under an obligation to interpret its trademark legislation, as far as possible, in the light of the wording and purpose of TRIPS; ECJ, Case C-243/02 *Archeur-Bouch* [2004] E.C.R. I-10929, paras 40-45. See also as far as customs under Art. 226 of the EC Treaty are concerned, ECJ, Case C-259/01 *Commission v France* [2004] E.C.R. I-9125, paras 22-31.

States as regards fulfilment of the commitments laid down in the GATT, the result being that "the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community".²⁰

It is striking that the Court of Justice assumed jurisdiction to give preliminary rulings simply by referring to the aim of that jurisdiction, namely "to ensure the uniform interpretation of Community law"²¹ (thereby completely ignoring the lack of any actual connection between the GATT of 1947 and any act of a Community institution, whereas such a connection does, of course, exist in the case of international agreements concluded by the Community).

- 6-016 Acts of bodies established by international agreements. That same aim of the Court's jurisdiction to give preliminary rulings on interpretation has prompted it to hold that it may give preliminary rulings on the interpretation of binding and non-binding acts of bodies established by international agreements concluded by the Community. Thus, the Court has held that decisions of an Association Council form an integral part of Community law on account of their direct connection with the agreement itself.²² Since the function of Art 234 of the EC Treaty is to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system and to ensure that their effects do not vary according to the interpretation accorded to them in the various Member States, the Court of Justice must have jurisdiction to give preliminary rulings on the interpretation, not only of the agreement itself, but also of decisions of the body established by the agreement and entrusted with responsibility for its implementation.²³

D. PROVISIONS OF COMMUNITY LAW TO WHICH NATIONAL LAW REFERS

- 6-017 The *Drozd* case-law. In 1990 the Court of Justice considerably extended its jurisdiction to give preliminary rulings on interpretation (after Advocate General M. Darmon had delivered an Opinion proposing that it should not

do so): "It does not appear either from the wording of Art 177 (now Art 234) or from the aim of the procedure introduced by that article that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision in the specific case where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State".²⁴ The Court stated that it was "manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied".²⁵

Drozd remains within the confines of the interpretation of Community law, although it breaks new ground because it accepts that Community law is being applied, not by virtue of its own authority, but by virtue of that of national law, and that this does not prevent the Court ruling on its interpretation.²⁶ The Court of Justice also accepts jurisdiction to give preliminary rulings on interpretation on the same terms where provisions of Community law are applicable for the resolution of a dispute by virtue of a contractual relationship between the parties.²⁷

Limits of *Drozd*. The Court has jurisdiction only to interpret Community law; it cannot "take account of the general scheme of the provisions of domestic law which, while referring to Community law, define the extent of

6-01

²⁰ ECJ, Joined Cases C-297/83 and C-197/89 *Drozd* [1990] E.C.R. I-3763, para.36. See also ECJ, Case C-285/85 *Leur-Bloem* [1987] E.C.R. I-4161, para.27; ECJ, Case C-130/95 *Gilly* [1991] E.C.R. I-4291, para.21; ECJ, Case C-247/87 *Schoonderbode* [1988] E.C.R. I-3095, para.6; ECJ, Case C-297/87 *AP* [1988] E.C.R. I-3597, para.35 (where the Court found that the national legislature had not referred to Community law in order to treat a purely domestic situation in the same way as a situation governed by Community law. Whilst *Leur-Bloem* was referred to as "settled case-law", it did not apply to this case); ECJ (Order of April 26, 1992), Case C-454/90 *Ms Farmaceutici Italiana Scientifica delle Venezie*, not reported, paras 21-24; ECJ, Case C-222/91 *British American Tobacco Manufacturing* [2004] E.C.R. I-4633, paras 40-41.

²¹ *Drozd*, cited in the preceding at para.17; ECJ, Case C-43/03 *Andersen og Jensen* [2003] E.C.R. I-379, para.63. By recognising its interpretative jurisdiction the Court avoids the provisions of Community law in issue taking on a life of their own. If the Court of Justice refused—in a case like *Drozd*—to accede to a request from the national court to provide the correct interpretation of the provisions in question, a national court could, in a future case in which—by contrast to *Drozd*—Community law is applicable in its own right be more easily inclined to come to the (possibly wrong) conclusion that the answer to the question of interpretation is obvious (or already in existence) and that it is therefore under no obligation to seek a preliminary ruling. This would in turn put the uniform interpretation of Community law at risk. For an extensive discussion, see Lenaerts, "Préjudiciel: déglacé van het gezamenlijk recht met het oog op het passeren van nationale rechts", *Makaria, Deventer, Kluwer*, 2002, at 173-186. For a critical analysis, see Barav, "Une anomalie préjudicielle", in *50 ans de droit communautaire—déclatier en hommage de Guy Isaac* (Presses de l'Université des Sciences sociales de Toulouse, Toulouse, 2004), at 773-391; see also Lefevre, "The interpretation of Community law by the Court of Justice in areas of national competence" (2004) *E.L.J.Rev.* 29, at 501-516.

²² For other applications, see ECJ, Case C-231/99 *Gmursky-Richter* [1999] E.C.R. I-4003; ECJ, Case C-384/99 *Tomatis and Falciani* [1999] E.C.R. I-1277.

²³ ECJ, Case C-85/91 *Federconsorzio* [1992] E.C.R. I-4635.

²⁴ ECJ, Joined Cases 297-199/83 *SPF and SAM* [1983] E.C.R. I-3763, paras 14 and 15-19.

²⁵ *Ibid.*, para.15.

²⁶ ECJ, Case 30/83 *Greece v Commission* [1983] E.C.R. 1711, para.13.

²⁷ ECJ, Case C-192/89 *Sevince* [1990] E.C.R. I-3461, paras 9-11; see also ECJ, Case C-217/93 *Kir* [1993] E.C.R. I-6731; ECJ, Case C-185/91 *Deutsche Shell* [1993] E.C.R. I-363 (the latter case was concerned with the interpretation of a non-binding act, which was of interest to the national court because it wanted to apply its national law as consistently as possible with that act on account of the obligation of cooperation in good faith borne by the Member State of which that court was a body); ECJ, Case C-277/94 *Tafan-Mer and Others* [1996] E.C.R. I-345; ECJ, Case C-175/95 *Fack* [1997] E.C.R. I-323; ECJ, Case C-351/93 *Kedimov* [1997] E.C.R. I-2135; ECJ, Case C-364/95 *Eur* [1997] E.C.R. I-2597; ECJ, Case C-285/95 *Kol* [1997] E.C.R. I-3369; ECJ, Case C-365/96 *Ganguly* [1997] E.C.R. I-6143; ECJ, Case C-95/96 *Branda* [1997] E.C.R. I-5177; ECJ, Case C-210/97 *Abman* [1998] E.C.R. I-7519; ECJ, Case C-297/98 *Sinden* [1999] E.C.R. I-7747; ECJ, Case C-129/97 *Egzi* [2000] E.C.R. I-2487; ECJ, Case C-271/01 *Ayar* [2004] E.C.R. I-5365.

that reference". The Court drew the demarcation line between its own jurisdiction and that of the national court in the following terms: "Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member States".²⁴

Indeed the Court has consistently held that it has no jurisdiction to rule on questions of national law which remain unanswered in the order for reference, even if this means that it has to consider different hypotheses in interpreting Community law.²⁵

Moreover, it is on account of the same limitation of its jurisdiction to give preliminary rulings that the Court refuses to rule on the interpretation of provisions of international law (e.g. of an agreement) which are binding on Member States outside the confines of Community law.²⁶

²⁴ *Ducat* (cited in n. 272), para. 42. In *Low-Bloom and Giley* (cited in n. 272), the Court held, however, that in every case where it had held that it had jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law, the application of the provisions of Community law was manifestly not limited by provisions of domestic law or contractual provisions incorporating those Community provisions (*Low-Bloom*, para. 47, and *Giley*, para. 25). See also ECJ, Case C-195/85 *Kyfos Inter* [1986] E.C.R. I-257, paras 15-30; ECJ, Case C-257/89 *Adam* [2001] E.C.R. I-7457, paras 27-31. The position was different in *Kleinwort Benson* (ECJ, Case C-346/92 *Kleinwort Benson* [1995] E.C.R. I-615). In that case, the Court of Appeal made a reference to the Court of Justice pursuant to the Protocol of June 3, 1971 on a provision of the Brussels Convention. The Court of Justice held that it had no jurisdiction to answer the question on the ground that the dispute in the main proceedings was concerned with the interpretation not of the relevant provision of the Brussels Convention as such, but of a provision of domestic law (the Civil Jurisdiction and Judgments Act 1982) modelled on the Convention and partially reproducing its terms. The Court of Justice further found that the Act provided for the national authorities to adopt modifications designed to produce divergence between provisions of the act and corresponding provisions of the Convention. The Court properly inferred from this that the provisions of the Convention could not be regarded as having been rendered applicable as such in cases outside the scope of the Convention by the law of the Contracting State concerned. The Court went on to observe that, in applying the provisions of national law modelled on the Brussels Convention, the national courts were not bound by its case-law but were required only to have regard to it (see also the case note by Beilein (1994) C.M.L. Rev. 137-147, who even argues that the Court lacks jurisdiction to give preliminary rulings on questions such as those referred in the *Ducat* case; a less extreme position is taken by Podrabsky, "Compétence préjudicielle et dispositions nationales inspirées du droit communautaire" (1995) L.J.D.E. 121-125, who mentions some examples from Belgian law in which the legislature took over Community provisions expressly and unconditionally). See with regard to the question as to what extent national courts may request a preliminary ruling from the Court of Justice in applying national competition law—which is largely inspired by the relevant Treaty provisions—Atlaw, "National Competition Law and the Preliminary Ruling Procedure" (2001) E.J.L. Rev. 241-257.

²⁵ See Wils, *Prejudiciele vragen van Belgische rechter en hun gevolgen* (Podrabsky, *Verslag van de vergaderende stude van het recht van België en Nederland*) (Tijdschrift Wink, Zwolle, 1993), at 14-15.

²⁶ ECJ, Case 130/73 *Verzwarecht and Others* [1973] E.C.R. 1223, para. 2; ECJ, Case 44/84 *Hund* [1986] E.C.R. 25, para. 20.

II. CONTENT OF A PRELIMINARY RULING ON INTERPRETATION

Interpretation v. application. The Treaty does not define precisely what is meant by "interpretation" of Community law in the context of the preliminary ruling procedure.²⁷ Initially, the Court of Justice strongly emphasised the distinction between interpretation and application, which was also to demarcate the respective functions of the Court of Justice and the national courts.²⁸ At the same time, however, it referred to "the special field of judicial cooperation under Art. 177 [now Art. 234] which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision".²⁹

Judicial cooperation. Since then, the idea of "judicial cooperation" has got the upper hand over the distinction between interpretation and application,³⁰ the aim being to ensure that the main proceedings are determined in a way which secures the uniform "application" of Community law.

This is why the Court of Justice regularly refers to "the need to afford a helpful interpretation of Community law".³¹ Such an interpretation can be confined very specifically to the facts and points of national law underlying the national proceedings as they emerge from the "documents before the Court".³² The documents in the case from which the Court derives the relevant facts and points of national law include not only the order for reference and the file submitted by the national court, but also the observations of the parties to the main proceedings, the Member States, the Commission and the Council or the European Parliament (where an act of

²⁷ See ECJ, Case 13/61 *Roost and Others* [1961] E.C.R. 45, where the Court of Justice held that "since the question what is meant in Art. 177 [now Art. 234] by 'the interpretation of Community law' may itself be a matter of interpretation, it is permissible for the national court to formulate its request in a simple and direct way".

²⁸ ECJ (order of June 3, 1964), Case 6/64 *Casta v. ENEL* [1964] E.C.R. 614, at 614-615; ECJ, Case 20/64 *Albani* [1965] E.C.R. 29, at 34; ECJ, Case 12/63 *Salgo* [1963] E.C.R. 453, at 459-460.

²⁹ ECJ, Case 15/65 *Schweine* [1965] E.C.R. 377, at 816; ECJ, Joined Cases C-263/80 to C-268/80 *Labourg and Madi-Seymour* [2001] E.C.R. I-10045, para. 25, where the Court stated in connection with a preliminary question concerning a tariff classification in the Combined Nomenclature that "its task is to provide the national court with guidance on the criteria which will enable the latter to classify the products at issue correctly in the [Combined Nomenclature], rather than to effect that classification itself".

³⁰ For a critical approach to the distinction between interpretation and application, see Donner, "Unfugging to Unpassing", in *Miscellaneous W.J. Grooten van der Meer* (Brilliant, Brussels, 1972), Vol. II, at 103 et seq.; see also the Opinion of Advocate-General D. Ruiz-Larrea Colomer in ECJ, Case C-30/92 *Recheis* [1994] E.C.R. I-6551, points 13-35, at 1-6551.

³¹ ECJ, Case 244/73 *Union Linéaire Normande* [1979] E.C.R. 2663, para. 5.

³² ECJ, Case 311/83 *PFR* [1983] E.C.R. 3801, para. 11.

the Council or the Parliament is at issue in the proceedings) submitted pursuant to Art.23 of the Statute of the Court of Justice.

6-021 The Court of Justice does not rule on facts and points of national law. It is essential in this connection that the "matters disclosed by the documents before the Court" are not disputed,²⁴ since the Court is not entitled to find the facts and points of national law in *inter partes* proceedings,²⁵ or to verify whether they are correct.²⁶ Where, however, the facts and points of national law are agreed as between the "parties" (being all the parties participating in the legal debate before the Court under Art.23 of the Statute), there is nothing to prevent the Court from spelling out its understanding of the facts and points of national law as its starting point for its "useful" (i.e. specific) interpretation of the applicable provisions and principles of Community law.²⁴

More specifically, in answering questions on interpretation which in fact are designed to bring to light a possible inconsistency of national law as compared with Community law,²⁷ it is important for the Court to be able to base itself on the undisputed facts and points of national law set out by the "defendant" government in its observations.²⁸

The Court of Justice may also ask the national court or the government concerned to elucidate certain facts and points of national law and, if those explanations are not contested, take account of them in the judgment giving a preliminary ruling.²⁹ A request to the national court will be based on Art.104(5) of the ECI Rules of Procedure. Generally, a request to the national government will be informal in the shape of a letter from the Registrar, but it may if necessary be made in the form of an order of the Court prescribing measures of inquiry within the meaning of Art.45(2) of the ECI Rules of Procedure (request for information and production of documents).³⁰ Other measures of inquiry, such as taking oral testimony,

²⁴ It is for this reason that the Court refers to the fact that the observations submitted are "not disputed", see *ibid.*, paras 13-17. The Court disregards observations of interested parties within the meaning of Art.23 of the Statute which contradict information in the order for reference (ECJ, Case C-153/02 *Van der Vliet* [2003] E.C.R. I-11553, paras 21-26; ECJ, Case C-261/03 *Lundberg* [2004] E.C.R. I-3247, para 41-42).

²⁵ ECJ, Case 17/62 *Fabry & Richart* [1962] E.C.R. 1381, para 10-11.

²⁶ ECJ, Case 194/77 *Schweitzer* [1975] E.C.R. 791, para 4. See also ECJ, Joined Cases C-481/01 and C-491/01 *Oyanoopoulos and Others* [2004] E.C.R. I-3257, para 42: it is not for the Court, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct.

²⁷ See, for a very explicit example, ECJ, Case 311/85 *PPR* [1987] E.C.R. 3501, paras 15-18. This is an accepted feature of the preliminary ruling procedure, see ECJ, Case 16/63 *Van Gend & Loos* [1963] E.C.R. I, at 11-11 and 13.

²⁸ See, for example, Case 33/88 *Abad and Others* [1989] E.C.R. 1591, para 12.

²⁹ ECJ, Case C-343/90 *Leone and Others* [1991] E.C.R. I-4673, para 12; ECJ (order of March 11, 2004), Case C-34/02 *Autosplen*, not reported, para 14.

³⁰ See, for example, ECJ, Case 143/77 *Hansen* [1978] E.C.R. 1757, at 1759, from which it

commissioning an expert's report and inspections of a place or thing, are not formally precluded in proceedings for a preliminary ruling on the interpretation of Community law, but probably go too far in practice because they are intrinsically intended to determine or verify contested facts and points of national law and the Court of Justice has indeed no jurisdiction to do this.³¹

Reformulation of questions. In order to arrive at a "useful" interpretation", the Court of Justice often has to rework the questions to some extent before answering them (see 2-021, *supra*). It will do this where the questions referred are too vague, for instance where they do not refer specifically to any provision or principle of Community law,³² or are deficient in other respects.³³ In such cases, the Court will specify and flesh out the questions in the light of the particulars set out in the order for reference and in the national case-file. Sometimes, too, a great many questions are referred and the Court prunes them back somewhat³⁴ or the questions are put in a very complicated way (divided into propositions and sub-propositions) and the Court has first to identify the core issue raised.³⁵ This exercise often makes it unnecessary to answer some of the questions referred.³⁶

appears that the Court decided "to open the procedure without any preparatory inquiry", but "requested the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission of the European Communities to provide written answers to a certain number of questions before the opening of the oral procedure". Germany had submitted observations to the Court pursuant to Art.23 of the Statute, but France had not, so that the questions were intended to involve that State in the proceedings, which is what happened; see *ibid.*, at 1758-1759.

³¹ This is because, when ruling on the interpretation or validity of Community provisions, the Court of Justice is empowered to do so only on the basis of the facts which the national court puts before it (ECJ, Case C-413/01 *MS Fresh and Others* [2004] E.C.R. I-9039, para 15). See Registrar, "Art.17 (now Art.23)", in *Troub L'Inventaire de CEE-Commentaires article par article* (Economica, Paris, 1992), 1073, No 61, at 1115-1116.

³² ECJ, Case 1271 *Mader* [1971] E.C.R. 723; ECJ, Case 251/53 *Hong-Adrian* [1954] E.C.R. 427, para 5-11.

³³ ECJ, Joined Cases 141-143/51 *Holzkamp* [1951] E.C.R. 1295; ECJ, Case C-27/94 *O'Flynn* [1996] E.C.R. I-2517, para 24-25.

³⁴ See, for example, ECJ, Joined Cases 115 and 116/81 *Aded and Cornuelle* [1982] E.C.R. 1565.

³⁵ See, for example, ECJ, Case 156/85 *SIOT* [1985] E.C.R. 731, para 10-13; ECJ, Joined Cases C-157/88 and C-158/89 *Orsini* [1990] E.C.R. I-3753, para 11: "The questions submitted for a preliminary ruling by the Tribunal de première instance essentially seek to establish whether, and in what circumstances, the Community provisions ...", para 14: "The questions submitted by the Cour d'appel, Brussels, ask the Court to interpret Arts 5 and 6 of Directive 64/221/EEC of February 25, 1954 ...", para 11 to 15 of the judgment contain, under the heading "The object of the questions submitted to the Court", a meticulous analysis of the orders for reference (and the associated case-files) showing which provisions and principles of Community law raise difficulty for the referring courts.

³⁶ See, for example, Case 352/85 *Bond van Advertiser* [1985] E.C.R. 2065, para 40-41.

6-223

No jurisdiction to rule on the compatibility of national rules with Community law. The Court sometimes reworks the wording of the questions referred on account of the limits placed by the Treaty on its jurisdiction to give preliminary rulings. It has to do so because the Treaty "neither expressly nor by implication prescribes a particular form in which a national court must present its request for a preliminary ruling" and it therefore falls to the Court of Justice itself to decide "as that request only in so far as it has jurisdiction to do so, that is to say, only in so far as the decision relates to the interpretation" of Community law.²⁹

This has occurred principally where questions were referred by which the national court sought a ruling on whether or not national provisions were consistent with Community law. Commonly, the national court puts the question of compatibility with Community law directly to the Court of Justice, as indeed is its right, precisely because of the lack of any requirements as to the form in which questions are to be referred. Moreover, formulating questions directly in this way affords the advantage that there is no doubt as to the scope of the request for a preliminary ruling. Consequently, the referring court should not be concerned if the Court of Justice, referring to its settled case-law,³⁰ prefaces its judgment with the words "although in proceedings brought under Art.177 (now Art.234) of the Treaty, it is not for the Court to rule on the compatibility of national rules with provisions of Community law, the Court is competent to give a ruling on the interpretation of Community law in order to enable the national court to assess the compatibility of those rules with the Community provisions".³¹ That caveat which the Court enters as regards the limits placed on its jurisdiction, however, does not lead it to give a somewhat abstract interpretation of the Community law at issue. On the contrary, the Court will reformulate the national court's questions in a particularly concrete manner. As a result, although they are primarily based on the interpretation of provisions or principles of Community law, the answers given will nevertheless at the same time be determinative of the outcome of the question of compatibility.³²

²⁹ ECJ, Case 134/82 *Burch and Others* [1982] E.C.R. 43.

³⁰ For the first of these cases, see ECJ, Case 6/54 *Condom v ENEL* [1954] E.C.R. 515, at 521-522.

³¹ ECJ, Case C-130/93 *Lamorte* [1994] E.C.R. I-3215, para.12; ECJ, Joined Cases C-37/93 and C-28/93 *Southey and Others* [1993] E.C.R. I-2035, para.22; ECJ, Case C-399/98 *Ordre degli Avvocati and Others* [2001] E.C.R. I-3433, para.49.

³² See, as an example, *Lamorte*, para.11: "The national court's question asks essentially whether Arts 9 and 12 (now Arts 23 and 25) of the Treaty preclude national legislation from imposing a compulsory contribution, such as the charge of BFR 2 per 100 kg of potatoes exported [to other Member States], provided for in Art.4(4) of the [Belgian] Royal Decree of May 15, 1936, as amended by the Royal Decree of July 14, 1937, on exports of agricultural products to other Member States". In answering this question, the Court of Justice came to the conclusion that "a compulsory contribution levied in respect of the exportation of potatoes, such as the charge levied for the National Board pursuant to

6-224

The issues raised must fall within scope of Community law. Where the question of interpretation referred by the national court is intended to test the compatibility of a national measure with the Treaty provisions on free movement of persons, goods or capital, the Court ascertains that the issues raised in the main proceedings have points of connection with a situation arising under Community law. This is because if the issues raised in the main proceedings relate to activities which are confined in all respects within a single Member State, the Treaty provisions on free movement are not applicable to the main proceedings and the Court will leave the preliminary question without a substantive answer.³³ For the purposes of assessing whether or not an issue is confined within a single Member State, the facts of the main proceedings are not conclusive, but rather the content and scope of the measure under consideration. Accordingly, the Court held that a tax levied by the municipality of Carrara on the export of marble outside the confines of the city did not relate to an internal situation even though the main proceedings were concerned with a purely local tax imposed by an Italian municipality on an Italian undertaking. The Court held that "the marble tax is imposed on all marble from Carrara that crosses that municipality's territorial boundaries, no distinction being made between marble the final destination of which is in Italy and marble destined for other Member States". As a result, "by its nature and terms, the marble tax therefore impinges on trade between Member States".³⁴

Reference back to the national court. Where the Court of Justice interprets Community law in a case where certain relevant facts or points of national law have not yet been established in the main proceedings, it will indicate very precisely what findings the national court has to make in order to

6-225

Art.4(4) of the Belgian Royal Decree of May 15, 1936, as amended, must be regarded as a charge having equivalent effect to a customs duty on exports and as such prohibited by Arts 9 and 12 (now Arts 23 and 25) of the [EC] Treaty" (para.22). It then gave the same answer, couched in somewhat more neutral terms, in the operative part. Sometimes, the Court does not formulate the operative part positively and refers expressly to the provisions of national law as being compatible or incompatible with Community law. ECJ, Case C-130/93 *OTO* [1994] E.C.R. I-3231. For a critical appraisal, see the Opinion of Advocate General D. Ruiz-Larrea Colmenero in ECJ, Case C-390/92 *Ascheli* [2004] E.C.R. I-5331, points 23-26, at I-5351.

³³ ECJ, Joined Cases C-34/88, C-41/88 and C-145/88 *Nino and Others* [1990] E.C.R. I-3531, para.12-13; ECJ, Joined Cases C-28/94 to C-35/94 *Aubertin and Others* [1995] E.C.R. I-321, para.5; ECJ, Case C-114/95 *USFL No 47 & Others* [1997] E.C.R. I-335, para.19; ECJ (order of October 5, 1995), Case C-328/94 *Vejnar*, not reported, para.12-15.

³⁴ ECJ, Case C-72/93 *Cartonnet Apurcal* [2004] E.C.R. I-877, para.25. See, to the same effect, ECJ, Case 285/81 *Grochek's Ungewerkschaften* [1982] E.C.R. 4315, para.5; ECJ, Joined Cases C-27/91, C-33/91 and C-31/91 *Liger Corni and Others* [1993] E.C.R. I-6621, para.35-37; ECJ, Case C-254/93 *IX-Helmerei* [2000] E.C.R. I-151, para.21-22; ECJ, Case C-445/98 *Guimard* [2000] E.C.R. I-1663, para.21-22. See also the Opinion of Advocate General L.A. Geelhoed in ECJ, Case C-515/99 *Reich* [2002] E.C.R. I-2157, points 7-10, at I-2161.

resolve the case in accordance with its interpretation.³² However, the Court of Justice may not abuse this sort of reference back to the national court by evading its responsibility for making the necessary appraisals in interpreting Community law, especially the fundamental provisions and principles.³³ The Court is under a duty to give the national court an answer which, in principle, will lead directly to the resolution of the case (at least as far as Community law is concerned). Only where, in the concrete context of the main proceedings some specific facts or points of national law require clarification in order to make a "useful interpretation" of Community law, will that clarification have to be made by the national court after the Court of Justice has clearly identified which facts and points of national law must be elucidated.³⁴ Where, by contrast, the Court of Justice is itself apprised of the uncontested facts and points of national law which are necessary in order to reach a decision in the main proceedings, then it has to have regard to those facts and points of law as such in making the "useful interpretation" of Community law expected by the national court.³⁵

6-026 Jurisdiction of the national court. Naturally, it falls in any event to the national court to dispose of the case. In that sense, the judgment giving a ruling on interpretation, no matter to what extent it determines the outcome of the main proceedings, is always "preliminary", that is to say, given before the national court gives final judgment in the main proceedings.³⁶ However, the Court of Justice does not shrink from giving guidance based on the case-file and the written and oral observations which have been submitted to it, with a view to enabling the national court to give judgment on the application of Community law in the specific case with which it is having to deal.³⁷ The Court went a step further in dealing with a request for a preliminary ruling in a factually complex case on State liability

³² For example, see ECJ, *Joined Cases 286/82 and 25/83 Laif and Carbone* [1984] E.C.R. 377, para.36; ECJ, *Case 171/88 Rüger-Kühn* [1989] E.C.R. 2743, paras 14-15; ECJ, *Joined Cases C-134 and C-221/81 Omburg and Van Meenen* [1993] E.C.R. I-1633; ECJ, *Case C-127/92 Enderby* [1993] E.C.R. I-3535, paras 26-29.

³³ See, for instance, the criticism in learned articles of ECJ, *Case C-145/86 Taylor-Borough Council* [1989] E.C.R. 3251, paras 15-17; Gormley (1990) C.M.L.Rev. 141, at 143; Pisalac (1990) S.E.W. 595, at 604.

³⁴ However, the Court may, after hearing the Advocate General, request clarification from the national court (ECJ Rules of Procedure, Art.104(3)). For an illustration, see ECJ (order of March 12, 2004), *Case C-54/03 Austroplan-Atenimittel*, not reported, para.14.

³⁵ See also Lenaerts, "Form and Substance of the Preliminary Rulings Procedure", in Cortin and Hauke's (eds), *International Dynamics of European Integration. Essays in Honour of H.G. Schiemer* (Maastricht: Nijhoff, Dordrecht, 1994), Vol.II, 355, at 364-370.

³⁶ Cf. ECJ, *Case 1/83 Salomon* [1983] E.C.R. 1937, para.5.

³⁷ ECJ, *Case C-325/91 Thomas and Others* [1993] E.C.R. I-1247, para.13; ECJ, *Case C-170/93 Freers and Speckmann* [1995] E.C.R. I-1155, para.24; see also the more cautious terms employed in ECJ, *Joined Cases C-45 and C-48/93 Arrondissements du Péninsule and Factotame (Factotame IV)* [1996] E.C.R. I-1023, para.36; and ECJ, *Case C-338/96 Aronsson* [1998] E.C.R. I-3155, para.29; ECJ, *Case C-381/99 Brinkhofer* [2001] E.C.R. I-4961, para.53.

for an alleged breach of Community law. While recognising that it was in principle for the national courts to verify whether or not the conditions governing State liability for a breach of Community law are fulfilled, the Court held that in the case in question it had all the necessary information to assess the acts of the Member State concerned itself.³⁸

III. CONSEQUENCES OF A PRELIMINARY RULING ON INTERPRETATION

A. AS REGARDS THE NATIONAL COURT DECIDING THE CASE AT ISSUE IN THE MAIN PROCEEDINGS

Binding effect. A judgment given by the Court under Art.234 is binding on the national court hearing the case in which the decision is given.³⁹ This is to be understood as meaning that all courts and tribunals dealing with the case, also at a later stage of the proceedings, on appeal or upon an appeal on a point of law, are obliged to comply with the substance of the judgment giving the preliminary ruling.⁴⁰

The binding effect attaches to the whole of the operative part and main body of the judgment, since the operative part has to be understood in the light of the reasoning on which it is based.⁴¹

Naturally, the fact that the judgment given by way of preliminary ruling is binding does not mean that the national court has invariably to apply the provisions or principles of Community law elucidated thereby in reaching its decision in the main proceedings. It may be that that judgment specifically indicates why those provisions or principles are not applicable.⁴²

New reference possible. The fact that a judgment given by way of a preliminary ruling is binding does not preclude the court to which the judgment is addressed, or another court involved in deciding the case, from making a further reference for a preliminary ruling to the Court of Justice if it considers such a step to be necessary in order to give judgment in the main proceedings.⁴³ Such a request will be justified "when the national court encounters difficulties in understanding or applying the judgment".

³⁸ ECJ, *Case C-152/91 British Telecommunications* [1996] E.C.R. I-1531, para.41; ECJ, *Joined Cases C-253, C-251 and C-252/94 Deminor and Others* [1996] E.C.R. I-3063, para.49. Cf. ECJ, *Case C-520/97 Korte* [1998] E.C.R. I-3099, para.39, and ECJ, *Case C-439/97 Reckberger and Others* [1999] E.C.R. I-3459, paras 72-73. See also Lenaerts, "De feitelijke achtergrond van de prejudiciële vragen in Europese rechtpraak", in *Liber Amicorum H. van Gerven* (Nijmegen, Antwerp, 2000), at 41-61.

³⁹ ECJ, *Case 28/83 Milieu, Fern, and Eimkantor* [1989] E.C.R. 165, para.1; ECJ, *Case C-445/95 Fataleto Pielice* [2000] E.C.R. I-11433, para.49.

⁴⁰ *Presatone* (n.295, *supra*), No 65, at 1113; see also the general wording of ECJ, *Case 52/76 Bonadati* [1977] E.C.R. 153, para.26.

⁴¹ ECJ, *Case 115/77 Borch* [1978] E.C.R. 855, para.4.

⁴² ECJ, *Case 212/78 ICAF* [1979] E.C.R. 1161, para. 1-12.

⁴³ See ECJ, *Case 29/83 Milieu, Fern, and Eimkantor* [1989] E.C.R. 165, para.3.

when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier."¹¹⁷

The validity of the judgment delivered previously cannot be contested by means of a further reference for a preliminary ruling "as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Art.177 (now Art.234) of the Treaty".¹¹⁸

Furthermore, the initiative for making a fresh request for a preliminary ruling lies with the national court dealing with the main proceedings alone. The parties to those proceedings are not entitled to ask the Court of Justice to interpret an earlier preliminary ruling.¹¹⁹ More generally, moreover, the Court has held that "Arts 38 to 41 (now Arts 41 to 44) of the Protocol on the Statute of the Court of Justice list exhaustively the exceptional review procedures available for challenging the authority of the Court's judgments; however, since there are no parties to proceedings in which the Court gives judgment by way of a preliminary ruling, the aforesaid articles do not apply to such a judgment".¹²⁰

- 6-019 Sanction for non-compliance. In the event that the national court fails to comply with its obligation to follow the judgment giving the preliminary ruling, that court, as an institution of its Member State, will be in breach of Community law. This means that proceedings may be brought against that Member State under Arts 226-228 of the EC Treaty.¹²¹ This may also result in domestic remedies being taken with a view to reversing the infringement of Community law or at least its consequences.¹²²

B. AS REGARDS NATIONAL COURTS GENERALLY

- 6-030 Binding on all national courts. The binding effect of a judgment by way of preliminary ruling extends further than to merely what is necessary to determine the main proceedings. It also applies outside the specific dispute in respect of which it was given to all national courts and tribunals, subject, of course, to their right to make a further reference on interpretation to the Court of Justice.¹²³ In the United Kingdom, this has been given effect by section 3(1) of the European Communities Act 1972, under which ques-

¹¹⁷ ECJ, Case 14/86 *Prestore di Sella* [1987] E.C.R. 2545, para.12.

¹¹⁸ ECJ (order of March 5, 1986), Case 69/85 *Wilmarche* [1986] E.C.R. 947, para.15.

¹¹⁹ ECJ (order of May 16, 1966), Case 13/61 *Becker* [1966] E.C.R. 196; ECJ (order of October 13, 1979), Case 42/70 *Sirena* [1979] E.C.R. 3165, at 3170-3171.

¹²⁰ ECJ (order of March 5, 1986), Case 69/85 *Wilmarche* [1986] E.C.R. 947, para.14.

¹²¹ *Peccatore* (n.25), *supra*, No 65, at 1138. See also 3-012, *supra*.

¹²² For example, see *Rédouan and Picot*, *Code de procédures judiciaires*, at 207.

¹²³ For an example, see ECJ, Case 53/74 *Albano* [1975] E.C.R. 165. The Court of First Instance is bound by a preliminary ruling of the Court of Justice, unless it appears that the latter court "based its assessment on inaccurate or incomplete information" (CF, Case T-43/91 *Emesa Sugar v Council* [2001] E.C.R. II-3515, para.73).

tions of Community law shall, if not referred to the Court of Justice, be decided "in accordance with the principles laid down by and any relevant decision" of that Court.¹²⁴

Declaratory nature of the interpretation. There are two arguments in favour of the generalisation of the binding effect of judgments by way of preliminary rulings. First, there is the fact that the interpretation is declaratory; it does not lay down any new rule, but is incorporated into the body of provisions and principles of Community law on which it is based. Consequently, the binding effect of the interpretation coincides with the binding effect of the provisions and principles on which it is based and which all national courts must respect.¹²⁵ It is, moreover, precisely because the interpretation has, by its very nature, such effect *erga omnes* that there are no "parties to proceedings"¹²⁶ but in contrast a system in which, alongside the parties to the main proceedings, the Commission, the Council and the European Parliament (where one of their acts is at issue) and all the Member States are entitled to submit observations pursuant to Art.23 of the Statute of the Court of Justice (and to take part in the oral procedure before the Court). The compass of the legal discussion which takes place before the Court accordingly corresponds with the scope of the judgment to be given.¹²⁷ It would therefore be wrong to seize on the idea that a judgment given in preliminary ruling proceedings has effects only *inter partes* on the ground that it is designed primarily to help the national court reach its decision in the main proceedings in which the question referred for a preliminary ruling arose. The *inter partes* aspect attaches only to the judicial decision in the main proceedings, including the way in which that decision deals with the judgment given by way of preliminary ruling, but it does not extend to that judgment itself.¹²⁸

Uniformity in the application of Community law. Secondly, the purpose for which the preliminary ruling procedure exists, which is to secure uniformity in the application of Community law throughout the Member States, would be defeated if it were to be considered that a ruling under Art.234 had "no binding effect at all except in the case in which it was

¹²⁴ This provision was cited by Advocate General J.-P. Warner in his Opinion in Case 112/75 *Morillon* [1977] E.C.R. 1547, at 1663.

¹²⁵ See to this effect Trabucchi, "L'effet erga omnes des décisions préjudicielles rendues par la CJCE" (1974) R.T.D.E. 36, at 76; Jeantet, "Originalité de la procédure d'interprétation de traité de Rome" (1969) J.C.P. Doctrine No. 1987.

¹²⁶ ECJ (order of March 5, 1986), Case 69/85 *Wilmarche* [1986] E.C.R. 947, para.14.

¹²⁷ It would seem from ECJ, Joined Cases 141-143/71 *Holdijk and Others* [1972] E.C.R. 1239, para.5, that the Court of Justice takes the same view.

¹²⁸ See, for instance, Jelliet, *La jurisprudence*, at 212-213.

given".²² The Court of Justice assumes that, with the exception of any new feature necessitating a refinement or even a reversal of the existing case-law, the preliminary ruling provides all national courts and tribunals with an answer to the question of Community law which gave rise to the interpretation given.²³ This is underscored by Art.104(3) of the ECU Rules of Procedure: "Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to its previous judgment or to the relevant case-law". That provision combines with the practice of many years standing by which the Court informs the national court by letter from the Registrar that an earlier judgment has answered its question, and requests it to let it know whether in the circumstances it still wishes to pursue its request for a preliminary ruling (very often the national court will then withdraw its request).²⁴

C. TEMPORAL EFFECTS

6-033 *Ex tunc effect.* In principle, the interpretation simply expresses what was contained *ab initio* in the provisions and principles of Community law to which it relates. Consequently, its temporal effects are the same as the effects of those provisions and principles, in other words, it is effective as from their entry into force or *ex tunc*.²⁵ This is the starting point for the Court's case-law: "The interpretation which, in the exercise of the jurisdiction conferred upon it by Art.177 (now Art.234), the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions

²² Opinion of Advocate General J.-P. Warner in ECU Case 112/76 *Manzoni* [1977] E.C.R. 1647, at 1662-1663, where he went on to say as follows: "This, it seems to me, is where the doctrine of *stare decisis* must come into play. . . . It means that all Courts throughout the Community, with the exception of the Court itself, are bound by the *ratio decidendi* of a judgment of this Court". He then referred to German legislation and the UK European Communities Act 1972 which confirm this binding effect of the Court's judgments. "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effect" (1984) Y.E.L. 1, at 24.

²³ ECU, Joined Cases 75, 56-58 and 149/57 *Seguro and Others* [1958] E.C.R. 2097, paras 11-14. For an express reversal of the case-law procured by a new reference for a preliminary ruling, see ECU Case C-1289 *ENI-SUCAL* [1990] E.C.R. I-3711, para.28; ECU, Joined Cases C-257 and C-269/91 *Keck and Mithouard* [1993] E.C.R. I-6097; cf. Arnell, "Owning up to Fallibility: Precedent and the Court of Justice" (1993) C.M.L.Rev. 247.

²⁴ See Arnell (preceding n.), at 251.

²⁵ See Pescatore (n.25), *supra*, No 70, at 1120.

enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied".²⁶

The proviso set out in the last sentence of that passage refers to the national procedural rules which continue to govern the conditions in which such a dispute may be brought before the courts (e.g. time limits and other procedural requirements). Admittedly the procedural rules must accord with Community law (see 3-001 to 3-003, *supra*), but their relevance—and hence the fact that they may prevent the dispute from being brought back before the courts—is not necessarily defeated by the effects *ex tunc* of the preliminary ruling on interpretation.²⁷

Limitation of temporal effects. The only exception to the *ex tunc* rule arises out of "the general principle of legal certainty inherent in the Community legal order".²⁸ Pursuant to that principle, the Court may "be induced to restrict for any person concerned the opportunity of relying upon the provision as . . . interpreted with a view to calling into question legal relationships established in good faith. As the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought".²⁹ The national legislature or the domestic courts have no power to restrict the effects *ratione temporis* of a judgment given by way of preliminary ruling if the Court of Justice itself has not done so.³⁰ In practice, the Court of Justice weighs the principle of legal certainty—which is applied to obviate the serious effects which its judgment might have, as regards the past, on legal relationships entered into in good faith—against the principle of the uniform application of Community law.

Where the scales fall in favour of the principle of legal certainty, the Court declares that no reliance may be placed in the provision as interpreted in order to support claims concerning periods prior to the date

²⁶ ECU Case 61/79 *Decker and Fabiani* [1980] E.C.R. 1265, para.16; ECU, Joined Cases 64, 127 and 128/75 *Jahromi* [1976] E.C.R. 1237, para.9; ECU Case C-157/84 *Richardson* [1985] E.C.R. I-2407, para.31.

²⁷ The fact that the Court has given a preliminary ruling interpreting a provision of Community law without limiting the temporal effects of its judgment does not affect the right of a Member State to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced (ECU Case C-63/99 *Requena Fiter* [2000] E.C.R. I-0455, para.36).

²⁸ ECU Case 24/85 *Banque* [1985] E.C.R. 379, para.28; ECU Case C-72/03 *Carbonati Apud* [2004] E.C.R. I-6227, para.37.

²⁹ *Banque*, cited in the preceding n., para.28.

³⁰ ECU Case 369/85 *Sowa* [1986] E.C.R. 351, para.11, at 375: "The Court has consistently held that such a restriction may be allowed only in the judgment ruling upon the interpretation sought. The fundamental need for a general and uniform application of Community law implies that it is for the Court of Justice alone to decide upon the temporal restrictions to be placed on the interpretation which it lays down." See also Alexander, "The Temporal Effects of Preliminary Rulings" (1988) Y.E.L. 1, at 25; Seck, "Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect" (1981) C.M.L.Rev. 475, at 535; Barbaresi and Reive, "Le droit transitoire judiciaire dans la pratique des juridictions européennes" (2002) R.D.J.C.B. 125-152.

of its judgment, except in the case of persons who have before that date initiated legal proceedings or raised an equivalent claim under national law.³²

The preliminary ruling on interpretation will be limited in time only where "Member States and the circles concerned" were reasonably entitled to assume that the relevant provision of Community law did not apply to their situation and it was only the Court's judgment which showed that it in fact did so apply. The Commission's conduct in the period prior to the judgment will have a decisive bearing on the Court's decision in this regard,³³ alongside the Court's earlier case-law³⁴ and any existing measures of other Community institutions³⁵ or other Member States.³⁶ The financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling.³⁷

³² ECI, Case C-105/93 *Defrenne* [1993] E.C.R. I-455, paras 69-75; ECI, Case 14/68 *Blum* [1968] E.C.R. 375, para 35; ECI, Case C-261/85 *Barber* [1993] E.C.R. I-1859, paras 44-45; ECI, Case C-61/93 *Legros and Others* [1993] E.C.R. I-4613, paras 34-35; ECI, *Joined Cases C-455 and C-486/93 Smith* [1995] E.C.R. I-2535, para 34; ECI, Case C-126/94 *Société Casti Sugelli and Others* [1996] E.C.R. I-5647, paras 32-34; ECI, Case C-72/93 *Carbonati Apennin* [2004] E.C.R. I-5677, paras 37-42.

³³ See four of the six cases cited in the preceding *note* *Defrenne*, paras 71-75; *Barber*, paras 32, 35; *Barber*, para 40; *Legros and Others*, para 32. See also ECI, Case C-431/97 *ERT and Wain & Co* [2000] E.C.R. I-1157, para 58.

³⁴ Cited in favour of restricting the temporal effects of the preliminary ruling, ECI, Case 14/68 *Blum* [1968] E.C.R. 375, para 31, and ECI, Case C-261/85 *Barber* [1993] E.C.R. I-1859, paras 106-113, and against ECI, Case 61/79 *Denkavit Italiana* [1981] E.C.R. 1205, paras 19-31.

³⁵ ECI, Case C-261/85 *Barber* [1993] E.C.R. I-1859, para 42. The Court of Justice will limit the effects of its judgment *ratione temporis* where, for example, there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered validly to be in force, or where it appears that both individuals and national authorities have been prompted to adopt practices which do not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed (see, for instance, ECI, Case C-153/93 *Legros and Others* [1993] E.C.R. I-4625, para 32; ECI, *Joined Cases C-157 and C-252/94 Société Bouvise and Société Française Maritime* [1995] E.C.R. I-305, paras 44-56; ECI, Case C-294/97 *Athinaïa Zykopoulos* [2001] E.C.R. I-6797, paras 34-40; ECI, Case C-356/98 *Griener* [2001] E.C.R. I-9333, paras 73-76 (limitation not granted); ECI, Case C-431/99 *Heflinger* [2001] E.C.R. I-5945, para 51; ECI, Case C-54/00 *Environ Pénis* [2002] E.C.R. I-5191, paras 43-47 (limitation not granted). The fact that the interpretative judgment could result in the re-examination of numerous files and give rise to administrative and practical difficulties did not suffice in order to limit the temporal effect of the interpretative judgment: ECI, Case C-172/93 *Cooke* [2000] E.C.R. I-8653, para 43.

³⁶ ECI, Case C-134/99 *Grazleyk* [2001] E.C.R. I-6105, para 55.

³⁷ ECI, Case C-104/98 *Bocher and Others* [2000] E.C.R. I-3515, para 41; ECI, Case C-134/99 *Grazleyk* [2001] E.C.R. I-6105, paras 52-53; ECI, Case C-226/01 *Eda* [2003] E.C.R. I-1119, paras 58-59. However, in his Opinion of March 27, 2003 in ECI, Case C-473/03 *Banco popolare di Cremona* (not yet reported), Advocate General F. G. Jacobs proposed to limit the temporal effects of the Court's ruling since "an unlimited temporal effect might retroactively cast into confusion the system whereby Italian regions are financed" (point 80).

Lastly, it should be noted that the precise scope of the temporal limitation of the effects of a preliminary ruling may be the subject of a further request for an interpretation by way of preliminary ruling (see 6-008, *supra*).³⁸

³⁸ See, for instance, ECI, Case C-106/91 *Ten Cate* [1993] E.C.R. I-4379; ECI, Case C-118/91 *Morrell* [1993] E.C.R. I-4597 (these two judgments interpret the restriction of the temporal effects of the judgment in *Barber* which the Court of Justice associated with its interpretation of Art.141 of the EC Treaty; see also ECI, *Joined Cases C-363 and C-407-451/93 Legros and Others* [1994] E.C.R. I-3557, paras 41-43).

V Action for annulment

1. The function of annulment procedure
2. Reviewable acts
3. Standing
 - 3.1. Privileged applicants
 - 3.2. Non-privileged applicants
 - 3.2.1; Individual concern 3.2.1.1. Direct concern 3.3. Standing in particular cases 3.3.1. Anti-dumping cases
 - 3.3.2. State-aids cases
 - 3.3.3. Competition cases
4. Grounds of annulment

Mandatory Reading

Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 396-428.

Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 1.

Tarasije Marinković, PhD.
Svetislava Bolajić, LL.M.

10

Judicial Review

CONTENTS

- 1 Introduction
- 2 Scope of Judicial Review and Article 263 TFEU
- 3 Grounds of Review
 - (i) Lack of competence
 - (ii) Manifest error of assessment and abuse of power
 - (iii) Rights of process
 - (iv) Infringement of the Treaties or of any rule of law relating to their application
 - (a) Non-discrimination
 - (b) Legal certainty
 - (c) Legitimate expectations
- 4 Standing under Article 263 TFEU
 - (i) Privileged and semi-privileged applicants
 - (ii) Non-privileged applicants
 - (a) Regulatory acts and legislative acts
 - (b) Direct concern
 - (c) Individual concern and the Plaumann formula
 - (d) Standing and interest in the matter
- 5 Article 265 TFEU and the Failure to Act
- 6 The Plea of Illegality
- 7 Non-contractual Liability
 - (i) Nature of the liability
 - (ii) Presence of loss caused by the Union
- 8 Consequences of Annulment
- Further reading

1 INTRODUCTION

This chapter considers judicial review by the European Court of Justice. It is organised as follows.

Section 2 considers the scope of Article 263 TFEU, the central provision governing direct actions for judicial review of Union measures before the General Court and the Court of Justice. It has been amended by the Lisbon Treaty to allow not just the traditional institutions to be reviewed but also the European Council and EU agencies, offices and bodies. The measures susceptible to review include not just formal legal acts but any measure intended to produce

legal effects. This will be any measure which is clear, definitive and produces a change in the applicant's legal situation.

Section 3 considers the grounds for review. A measure will be annulled, first, if the institution does not have the formal competence to adopt it. Review is possible, secondly, if the institution has misused its power. This may be an abuse of power where a power is used for purposes other than that for which it was granted. More common is a manifest error of assessment. This requires Union measures to be substantiated by the evidence provided, and for that evidence to be accurate, reliable, consistent and sufficiently complete. The third heading of review is 'rights of process'. These include the right to know the reasons for a legal measure, the rights to a hearing where one's interests are restricted, protection of one's rights of defence in the case of possible sanction, and, finally, the right to administration of one's affairs with due care by the EU institutions. The final heading of review is infringement of the Treaties or any rule of law relating to its application. This includes breach of any substantive provision of EU law and violation of fundamental rights. It also encompasses EU legal principles developed by the Court of Justice, namely non-discrimination, proportionality, legal certainty and protection of legitimate expectations.

Section 4 considers the standing requirements for bringing an action under Article 263 TFEU. Privileged applicants – the Member States, Parliament, the Commission and Council – have unlimited standing to challenge a measure subject to their observance of the time limits. Semi-privileged applicants – the Court of Auditors, European Central Bank and Committee of the Regions – may bring an action to protect their institutional prerogatives. All other parties have standing to bring an action against a regulatory act if it is of direct concern to them and against other measures if these are of direct and individual concern to them. This distinction between regulatory and other acts is new. The best interpretation is to see regulatory acts as any non-legislative act. Direct concern will be established where the Union measure directly affects a legal entitlement of the applicant without any significant intermediation by another party. Individual concern is governed by the Plaumann formula. This requires the interest affected to belong to a fixed, ascertainable and limited group of interests which is not capable, even hypothetically, of being added to. This is a highly restrictive test and has been criticised for making economically arbitrary distinctions and for favouring private interests over public ones.

Section 5 considers Article 265 TFEU and the failure to act. This complements Article 263 TFEU and allows parties to challenge omissions by EU institutions where there are under a duty to act. The standing requirements are similar in the two provisions. However, an action under Article 265 TFEU can only be commenced against an EU institution if it is under a duty to perform a task. If there is only a discretion, no remedy exists. Secondly, an institution, if called upon to act, avoids any further action if it defines its position within two months. Finally, the institution must be called upon to act by the applicant before any action can be commenced.

Section 6 considers the plea of illegality set out in Article 277 TFEU. This is not an independent action, but is an action against a measure brought under another provision (e.g. Article 263 TFEU). It allows challenge of a parent measure. It is subject to two constraints. It cannot be brought when the measure is being challenged before a court elsewhere by the parties, and it cannot be brought by parties who have already had the opportunity to challenge the measure but did not take up that opportunity.

Section 7 considers the action for non-contractual liability under Article 340(2) TFEU. Parties can sue EU institutions for damages where three conditions are met: first, that the institution

has infringed a rule of law intended to confer rights on individuals; secondly, that the breach is sufficiently serious; and finally, that there is a direct causal link between the breach and the damage sustained by the applicant. In fields where EU institutions enjoy no discretion, a simple breach of EU law or failure to exercise reasonable care will be sufficient to establish liability. In fields where they enjoy some discretion, liability will only exist if they manifestly and gravely disregarded the limits of their discretion.

Section 8 considers the consequences of a finding of annulment. Such a ruling is binding on all institutional actors in the Union. A measure found to be illegal continues to have legal effects until it is withdrawn by the EU institution, albeit the latter is under a duty to withdraw the measure following a Court judgment. However, if the measure is so tainted with illegality, the Court has the power to declare it void and without legal effects.

2 SCOPE OF JUDICIAL REVIEW AND ARTICLE 263 TFEU

There are four sets of issues that must be addressed with judicial review. These are: (i) who may be reviewed; (ii) the range of acts subject to review; (iii) the grounds of review; and (iv) the standing of various parties to seek judicial review. The starting point for consideration of all of these is Article 263 TFEU.

Article 263 TFEU

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction to annul or, by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions referred to in the first and second subparagraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of those bodies, offices or agencies intended to produce legal effects in relation to them.

The new provision widens the range of the bodies and institutions susceptible to judicial review by including not just the long-standing EU institutions but also the European Council and EU agencies as bodies whose acts can be challenged. As stated in Chapter 1, the inclusion of the European Council is potentially significant as the decision to subject the agreements of

twenty-seven Heads of Government to judicial challenge is unprecedented and illustrates the symbolic importance attached to the rule of law in the European Union.¹ In a different way, the clarification as to the accountability of EU agencies is of equal significance. In recent years, agencies have proliferated.² Though their powers vary considerably, most dominate their fields through establishing technical norms or patterns of coordination between national agencies. There has been particular concern over their accountability, most notably in the field of policing and judicial cooperation in criminal matters.³

The wider range of actors subject to review raises new questions about the range of acts subject to review. The European Council cannot adopt legislative measures and very few agencies have the power to adopt legally binding decisions.⁴ If the Court adopts a narrow view in which 'acts' capable of being reviewed must bring about a change in a party's legal position, then most of the activity of these bodies would fall outside the radar. This would be a pity, as European Council guidelines are intended to inform legal changes, while EU institutions invariably not only follow the expert opinions of agencies in setting out legal norms, but are also obliged to do so unless they can find a substitute expert body and provide reasons for following the opinion of the latter.⁵ There are, therefore, strong arguments for the accountability of these activities.

Article 263(1) TFEU uses a formula that was first used in the ERTA judgment⁶ for determining when a measure is subject to review.⁷ A measure will be reviewable not merely when it is a formal legal act but, disregarding its form, when it is intended to produce legal effects. When will this be the case? In *IBM*, the company IBM challenged a Commission Decision indicating that it had initiated proceedings against it to determine whether IBM was in breach of EU competition law. The Commission argued that the Decision to open proceedings was not a formal act in any way and was not therefore reviewable.

Case 50/81 *IBM v Commission* [1981] ECR 2639

8. According to Article 263 TFEU proceedings may be brought for a declaration that acts of the Council and the Commission other than recommendations or opinions are void. That remedy is available, in order to ensure, as required by Article 19(1) TEU, that in the interpretation and application of the Treaty the law is observed, and it would be inconsistent with that objective to interpret restrictively the standstill under which the action is admissible by limiting its scope merely to the categories of measures referred to in Article 263 TFEU.
9. In order to ascertain whether the measures in question are acts within the meaning of Article 263 it is necessary, therefore, to look to their substance ... any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a definite change in its legal position is an act or decision which may be the subject of an action under Article 263 for a declaration that it is void, however the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article.

¹ On the composition of the European Council see pp. 14–15.

² See pp. 65–7.

³ Case C-166/20 *Sydney v European* [2020] ECR II-1279; Case T-411/06 *Sydney v EU* [2006] ECR II-1279.

⁴ Article 18(1) TEU.

⁵ Case T-12/99 *Alfred Achard Wolff v Council* [2000] ECR II-1325.

⁶ Case 22/70 *Commission v Council (ERTA)*, [1971] ECR 263.

10. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an 'internal' procedure, it is clear from the case law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.
11. It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only have all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.
12. Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.

The measure will therefore be reviewable if it brings about a change in the applicant's legal position. However, in 1994, the Court found that the decision to initiate proceedings was just a preparatory measure. It did not compromise IBM's rights of defence which were safeguarded later in the procedure. Central to the Court's reasoning was that the Commission had not yet taken a 'definitive position' (paragraph 12). What does this mean?

First, there will be no 'definitive position' and no reviewable act if the institution does not have the competence to adopt the act. In *Sunstein*, the Commission instructed the Belgian authorities at Antwerp that they should not recognise certificates issued by the Turkish Federated State of Cyprus certifying the fitness of citrus fruit from Northern Cyprus.⁷ Whilst the language of the Commission's letter was mandatory in nature, the Court did not recognise it as producing legal effects. It noted that the national authorities had exclusive responsibility under the Directive to apply protective measures against fruit from third countries. The Commission, in the Court's view, could only have been expressing an opinion. Such opinions were not reviewable.⁸ The challenge with this is that it will often be difficult to know if the institution has some complicity or not, and everything will hang on fine-grained interpretations of whether it has the power to do something or not.⁹

Secondly, the act is likely only to be considered definitive if the language is both reasonably imperative and allows the institution's position. Thus, restating an existing position is not reviewable.¹⁰ Conversely, indicating no more than an intention to follow a particular line of conduct will not be reviewable.¹¹ There must be some stronger reiteration. This is often difficult to predict. In *Commission v Netherlands*, the Court held that the Code of Conduct on Public Access to Documents was not a reviewable act.¹² It considered it to be no more than a voluntary coordination between the Council and the Commission to ensure their approaches did not diverge, which did no more than set out general principles. This was notwithstanding

⁷ Case C-50/93 *Sunstein v Commission* [1993] ECR I-2911.

⁸ More recently Case T-11/06 *Reinhold Dabry Products v Commission*, Judgment of 28 October 2009.

⁹ For different views of the same measure by the General Court and Court of Justice see Case T-105/94 *Genmex v Commission* [1995] ECR II-2795; Case C-295/95 *Protexel v Commission* [1997] ECR I-2023.

¹⁰ Case T-35/92 *Deutsche Bahn v Commission* [1993] ECR II-1041.

¹¹ Case C-105/95 *Italy v Commission* [1996] ECR I-2707.

¹² Case C-54/94 *Netherlands v Council* [1995] ECR I-1169.

that the Code was actually a detailed document which is not much further elaborated in either the Council or Commission Decisions Implementing it.

Thirdly, the Court is more likely to find an act reviewable if it brings to an end or suspends some decision-making procedure. Whilst in *IBM*, therefore, the decision to initiate competition proceedings was not reviewable, the position is different if the Commission decides not to initiate proceedings.¹³ In *Air France*, the Commission issued an oral statement that it had no jurisdiction to consider a takeover of Dan Air by British Airways.¹⁴ There was no text nor was the oral statement addressed to anyone. Furthermore, the statement did not follow any notification of the takeover by British Airways to the Commission, as required by the then Merger Regulation 4054/89/EC. The Court considered the statement to be reviewable, claiming that the measure had legal effects by reaffirming national jurisdiction over the merger and absolving the parties of their duty to notify the takeover under the Merger Regulation.

A similar approach was shown in *Commission v Council (Stability and Growth Pact)*.¹⁵ This case concerned the stability and growth pact which requires those states who have the euro as their currency to maintain fiscal discipline and avoid excessive government deficits. The Commission reported both France and Germany to the Council for running excessive budgetary deficits. The Council did two things. First, it decided not to follow the Commission's recommendations to impose sanctions on France and Germany. Secondly, it stated that the procedure would be held in abeyance. Germany and France had made certain commitments. The Council stated that if these were not met, the procedure could be continued. The Commission sought judicial review of the Council's two measures.

On the first measure, the Court of Justice ruled that there had simply been no decision. In its view, there was not the majority to act on the Commission's recommendations, and therefore nothing had taken place. There was thus nothing to review. It came to a different view on the second measure. It noted that this was not merely confirming the existing position but making it conditional on Germany and France meeting certain commitments. It was altering a default position, and it was intended to change the legal responsibilities of those two states. The measure was therefore reviewable.

Whilst it is possible to rationalise the decisions of the Court, the case law is confusing and arbitrary. The two measures in *Commission v Council* were, in practice, part and parcel of the same thing, and it makes no sense to look at one but not the other. Similarly, the distinction between decisions to start and not to start competition investigations is economic nonsense. This confusion also holds out little prospect that the new rules, the European Council and the agencies, will be held to account.

3 GROUNDS OF REVIEW

Four grounds of review are formally listed in Article 263 TFEU: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or of any rule of law relating to its application; and misuse of power. There have been subject to significant case law and, over time, the grounds have been reconfigured around four headings:

¹³ Case C-295/93 *P. SFE v Commission* [1994] ECR I-2641.

¹⁴ Case T-3/93 *Air France v Commission* [1994] ECR II-121. X. Smeets, 'The Nature and Binding Effect of Decisions under Article 175 EC' [1995] 21 *ELRev.* 3, 9-10.

¹⁵ Case C-27/04 *Commission v Council (Stability and Growth Pact)* [2004] ECR I-5643.

in its review of legality ... the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law. On the other hand, the [General] Court cannot take the place of the Commission on issues where the latter must carry out complex economic and ecological assessments ... In this respect, the Court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers, that the competent authority did not clearly exceed the bounds of its discretion and that the procedural guarantees, which are of particularly fundamental importance in this context, have been fully observed.¹⁴

Rearranging the order of these groupings, they can be categorised in the following way:

- (i) the institution in question must not exceed the power granted to it;
- (ii) it must not abuse the discretion granted to it by a manifest error of assessment or an abuse of power;
- (iii) there must not be a breach of process; this will involve all cases of a failure to give reasons but it will also involve violation of the rights of defence of parties that are subject to administrative proceedings;
- (iv) there must be no breach of the substantive obligations imposed by EU law. This comprises not just explicit provisions of EU law, but also fundamental rights¹⁵ and certain principles on which there has been extensive case law: those of legal certainty, non-discrimination and proportionality.¹⁶

(C) Lack of competence

An EU institution will be found to have acted illegally if it has exceeded the legal powers granted to it. This is relatively rare. The Council has very broad powers, most notably in Article 352 TFEU, the flexibility provision, which allows it to take action necessary to realise the objectives of the Union where no other legislative procedure is available.¹⁷ An EU institution will, therefore, rarely be found to have taken action which is not available in the Union.¹⁸ Instead, there tend to be two circumstances where an EU institution is found to have exceeded its powers: first, if it has taken action that should have been taken by other EU institutions and, secondly, if it has exceeded delegated powers granted to it by a piece of EU legislation.

The first goes to institutional balance, preserving both the institutional checks and balances within the Treaties and protecting the prerogatives of the different institutions. This is addressed in part through the case law on whether legislation has been adopted under the appropriate legal base.¹⁹ In institutional terms, this case law is above all about whether the legislative powers of the different institutions have been respected.

¹⁴ Case T-361/07 *Stichting Natuur en Milieu v Commission*, Judgment of 23 September 2008.

¹⁵ See Chapter 6.

¹⁶ These have traditionally been known as general principles of law. This will not be possible after the Lisbon Treaty as this term is now used for all the case law of the Court on fundamental rights which is inspired by the ECHR and the constitutional traditions of Member States, Article 41(1) TEU.

¹⁷ See pp. 314–15.

¹⁸ The only example is *Opinion 1/54 Re Accession of the Community to the ECSC* [1954] ECR I-1753.

¹⁹ See pp. 35–6.

Occasionally, however, an institution adopts a collateral measure which should have been adopted by another. In *Safe Countries of Origin*,²⁰ under the legal regime at the time, EU legislation on the granting or withdrawal of refugee status had to be based on the ordinary legislative procedure if there were already common rules in force. In 2005, a Directive was adopted setting out principles for the grant and withdrawal of refugee status. Provision was made in it for the idea of safe country of origin. Persons coming from such countries were presumed not to be entitled to refugee status. The Directive stated that the Council would draw up a list of safe countries of origin having consulted the Parliament. The Parliament challenged this procedure. It argued that as EU legislation was now in force, further rules on what was a safe country of origin could only be drawn up through the ordinary legislative procedure. The Council did not have competence to agree them unilaterally. The Court agreed. It held the rules regarding the manner in which EU institutions made decisions were set by the Treaty alone and were not at the disposal of the institutions or Member States. To allow the Council to set new procedures would undermine the institutional balance in the Treaty and the Council did not have the competence to do this.

The second context in which institutions are found to have formally exceeded their power is where the Commission is delegated certain powers and acts outside these powers. *Boyle* concerned the common fisheries policies.²¹ Funding was received from the Union but a number of conditions were attached to it, notably a concern not to increase the overall national fishing capacities. To this end, the Council delegated to the Commission powers to determine when modernisation of fishing vessels was appropriate. This was allowed, above all, for modernisation and safety reasons. The applicants, a group of Irish fishermen, successfully challenged a Commission Decision which introduced new criteria that were not in the parent instrument, namely that the boat be registered, be at least five years old and the works concern a particular part of the boat. It was argued successfully that nothing in the original legislation gave the Commission the power to introduce additional criteria, and these were therefore illegal.

(ii) Manifest error of assessment and abuse of power

More common than a lack of competence is an abuse of discretion. This will happen in two circumstances: where there has been a manifest error of assessment and where there has been an abuse of power.

The central judgment on manifest error of assessment is *Tetra Laval*. The case concerned a conglomerate merger between Tetra Laval, the world leader for carton packaging, and Sidel, a company specialising in PET packaging.²² This was a form of packaging composed of a resin through which oxygen and light can pass. The Commission disallowed the merger on the grounds that Tetra Laval would leverage its dominant position on the market for cartons to persuade its customers to that market switching to PET to use Sidel's goods, thereby eliminating competition in that market. The General Court found that the Commission had committed a manifest error of assessment in that it had used reports which overestimated the possibility for leveraging and the possibility for growth in the PET market. The Commission appealed to the Court of Justice.

²⁰ Case C-110/05 *Parliament v Council Safe countries of origin*, Judgment of 8 May 2006.

²¹ Joined Cases T-114/01–T-144/01 *Boyle v Commission* [2005] ECR II-1491. For another instance see also Case T-461/03 *Grevia v Commission*, Judgment of 23 September 2009.

²² A conglomerate merger is a merger between firms engaged in unrelated business activities: here cartons and PET.

Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-937

39. Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature, not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it...
41. Although the [General Court] stated ... that proof of anti-competitive conglomerate effects of a merger of the kind notified calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument or, as in the present case, of a decision on a merger...
44. The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impairment to effective competition mean that the chains of cause and effect are finely discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important. Since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible...
45. It follows from these various factors that the [General Court] did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements ... of the Regulation are satisfied.
46. With respect to the particular case of judicial review exercised by the [General Court] in the judgment under appeal, it is not apparent from the example given by the Commission, which relates to the growth in the use of PET packaging for sensitive products, that [General Court] recorded the limits applicable to the review of an administrative decision by the Community Courts. Contrary to what the Commission claims, paragraph 211 of the judgment under appeal merely restated, more concisely, in the form of a finding by the [General Court], the admission made by the Commission at the hearing ... that its forecast in the contested decision with regard to the increase in the use of PET for packaging UHT milk was exaggerated. In paragraph 212 of the judgment under appeal, the [General Court] gave the reasons for its finding that the evidence produced by the Commission was unfounded by stating that, of the three independent reports cited by the Commission, only the PC report contained information on the use of PET for milk packaging. It went on, in that paragraph, to show that the evidence produced by the Commission was unconvincing by pointing out that the increase forecast in the PC report was of little significance and that the Commission's forecast was inconsistent with the unreported figures ... contained in the other reports. In paragraph 213 of the judgment under appeal, the [General Court] merely stated that the Commission's analysis was incomplete, which made it impossible to confirm its forecasts, given the differences between those forecasts and the forecasts made in the other reports ...
43. It follows from these examples that the [General Court] carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence.

The Court went on to dismiss the Commission's appeal. The Court was here stating that it will not substitute its assessment for that of the institution but will check that any measure is sufficiently substantiated by the evidence provided, and the evidence deployed must be accurate, reliable, consistent and sufficiently complete. A distinction is therefore drawn between the assessment of the institution (not reviewable) and the grounds for the assessment (reviewable). Yet, the demanding level of evidence that must be presented leads, as Craig suggests, to the distinction being eroded.

P. Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2006) 470

The determination of whether the evidence is factually accurate, reliable and consistent remains evaluation, not simply observation. This is a factored so in relation to issues such as whether the evidence contains all the information that must be taken into account in order to assess a complex situation and whether the evidence is capable of sustaining the conclusions drawn from it. The need for complex assessment is equally present when deciding on the various chains of cause with a view to ascertaining whether or not they are most likely.²⁵ It is, however, precisely in relation to these more complex findings, where the facts are multifaceted and difficult, requiring a greater degree of evaluative judgment, that there can be real differences of view as to the facts and possible consequences flowing from them.

If, as Craig persuasively argues, the Union courts are constraining the discretion of the institutions here, this raises the question of what is really taking place. It is probably overstating the argument to say unconditionally that they intervene to replace the view of the latter with their own view. In *Tetra Laval*, neither Union court, for example, sets out a positive thesis on the anti-competitive effects of conglomerate mergers. Instead, they look at whether the argument of the EU institution is more plausible than that of the applicant. Whilst there may be a presumption that it is, it would appear from *Tetra Laval* that this is fairly easy to rebut. Furthermore, the difficulty with a test of comparative plausibility is its inherent testability. Every applicant will believe its arguments are better than those of the EU institution, and every EU institution will be wary about how Union courts measure this.²⁶

In contrast to the doctrine of manifest error of assessment, that of abuse of power can be mentioned almost as a postscript. It arises if it appears:

on the basis of objective, relevant and consistent indications to have been adopted to achieve purposes other than those for which it was intended.²⁷

However, the principle has rarely brought joy to applicants. First, as the test is essentially a subjective one it has proved difficult for applicants to prove the necessary bad faith on the part of the institution. Secondly, the threshold is further raised by the requirement that the decision

²⁵ Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-937, para 43.

²⁶ An indicator of the challenges can be found in the field of merger. A study of challenges to Commission Decisions between 1995 and 2004 found that they were only fully successful in 6 per cent of cases. There were partially successful in securing a reduction of the fine in 112 cases (51 per cent). The procedure and ground was insufficient evidence justified error of assessment provided by the Commission. The Union courts were, then, finding in these cases that it erred in some of its reasoning but not in all of it – a very woolly scenario. C. Birdling and A. Giblin, 'Why Go to Court in Europe? An Analysis of Court Appeals 1995–2004' [2006] 30 *EU Law* 249, 265–7.

²⁷ Case C-32/92 *Santer v Directeur de Service des Ressources de Structuring* [1993] ECR I-2021.

challenged must have been guided exclusively or predominantly by the motivation to use the power for purposes other than those for which they were conferred.³³ This is difficult to prove and, outside two staff cases,³⁴ the principle has only been successfully invoked once.³⁵

(iii) Rights of process

There are, to be sure, procedures set out throughout the Treaties and also through secondary legislation. These are to secure institutional balance and to enable particular actors to have a voice. Breach of these is a violation of rights of process but is also a breach of substantial provisions of EU law. There are, however, more general rights of process in EU law which exist in the absence of specific guarantees. These include the right to know the reasons for a legal measure, the right to a hearing where one's interests are restricted, and particular rights of defence. It is this latter group that is being considered here. Such rights of process are seen as having a dual function in EU law. Process is seen, first, as important for understanding the basis for the decision and whether this is lawful, and secondly, to enable parties to defend entitlements granted to them.

The rationale for both functions lies in that of securing effective judicial review of the acts of other EU institutions. This was set out most explicitly in *Kadi*. The judgment, addressed in Chapter 5,³⁶ concerned a challenge to an EU Regulation implementing UN sanctions restricting financial and material resources to individuals who were on a list of people suspected of associating with Osama Bin Laden and Al Qaeda. Kadi was on this list, which was contained in Annex I to the Regulation. He challenged the Regulation, claiming that due process had been ignored, in that he had been given no opportunity to make a case as to why he should not be on that list, nor to challenge the grounds for placing him on the list.

Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat (International Foundation v Council)*, Judgment of 8 November 2008

333. According to settled case law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 11 ECHR, this principle having furthermore been reaffirmed by Article 47 EUFR ...
336. In addition, having regard to the Court's case law in other fields ... it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested Regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at

³³ Case C-44/94 P *Windsport Groothuis v Commission* [1994] ECR I-2671; Case C-401/04 P *Dachauer SpA v Commission* [2007] ECR I-413.

³⁴ Joined Cases 24/85 and 25/85 *Deutscher v Commission* [1986] ECR I-271; Case 105/75 *Giuffrida v Council* [1976] ECR I-1353.

³⁵ Joined Cases 251/85 and 262/85 *Fabrigue de Perle Chetani v Commission* [1987] ECR I-3533.

³⁶ See pp. 317–18.

the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

337. Observation of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature ... and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

The Court went on to find a breach of Kadi's rights of defence. According to Kadi, the requirement of judicial control is satisfied, first, through the duty, set out in Article 253(2) TFEU, for all EU legal acts to provide the reasons on which they are based. As we have seen in Chapter 9, this relationship is not unproblematic. As the duty to give reasons is simply about enabling parties to know their rights and courts to know the basis for the measure, the reasons need be no more detailed than required for that purpose.³⁷

It is satisfied, secondly, through parties being able to 'defend their rights in the best possible fashion, with full knowledge of the relevant facts' (paragraph 337). However, if the duty to provide reasons is a general duty in EU law, there is not an equivalent right for all actors to have a hearing in all circumstances. Kadi refers to it being present whenever restrictive measures are taken against the actors in question. The meaning of this is uncertain. The fact that a measure adversely affects a party's interests is insufficient to grant them a hearing.³⁸ However, if a party is named or addressed in a Union measure and their interests are significantly affected, they are entitled to a hearing.³⁹

There is an intermediate category where a party is not named in a measure but nevertheless has standing under Article 263(4) TFEU. In *Al Jubail*, the Court stated that if a measure directly and individually concerned an undertaking, that undertaking would be entitled to a hearing.⁴⁰ By contrast, parties will not necessarily have a right to a hearing where they complain to the Commission about a state aid or anti-competitive practice. In such circumstances, the Court has ruled they are doing no more than provide information, and this is insufficient to justify a hearing.⁴¹ They will have no right to a hearing unless secondary legislation requires it.⁴²

Turning to the substance of the right, the right to be heard encompasses an obligation on the institution to make its case known to the party concerned, and the right of that party to reply.⁴³ There is a right to be heard on all matters of fact and law which form the basis for the

³⁷ Case C-112/00 *Jyske v Commission* [2003] ECR I-7691.

³⁸ Case C-107/92 *SEVIC and AGC v Commission* [1994] ECR II-465.

³⁹ Case C-225/95 P *Commission v Germany and Others* [1996] ECR I-5771. See also recently Case C-14/08 P *Junke v Smilde Toegiften Maatschappij and Hordburg CV v Commission*, Judgment of 1 October 2009.

⁴⁰ Case C-45/04 *Al-Jubail v Council* [2005] ECR I-13107. It may be that this formulation will be changed for regulatory acts following the Lisbon Treaty. As these only have to be of direct concern to individuals (p. 346) they have standing. It would make sense that considerations need only be directly concerned by a measure to have a right to a hearing.

⁴¹ Case C-458/01 *Technische Glaswerke Jena v Commission* [2004] ECR I-3317.

⁴² There is limited provision for due to the case of competition under Regulation 1/2003/EC on the implementation of the rules on competition (2002) OJ L1, article 17(3) and to the case of mergers under Regulation 139/2004/EC on the control of concentrations by undertakings (2004) OJ L24, article 1(4).

⁴³ Joined Cases 55/84 and 56/84 *Deutscher and Gröblich v Commission* [1986] ECR I-259.

measure but not on the final position which the administration intends to adopt.⁴³ The institution is thus not obliged to hear an applicant with regard to a factual assessment which forms part of its final decision.⁴⁴

The rights of defence are distinct from the right to be heard as it applies where EU institutions are to impose some sanction on a party.⁴⁵ The rights of defence include the opportunity for the applicant to make known their views on the truth and relevance of the facts alleged;⁴⁶ a duty to set out to the applicant the presumed facts justifying the investigation;⁴⁷ protection only for criminal or administrative penalties that are clearly and unambiguously defined (nullum crimen, nulla poena sine lege);⁴⁸ the presumption of innocence;⁴⁹ the right not to be tried twice for the same facts (ne bis in idem);⁵⁰ the right to judicial review of any sanction;⁵¹ the right to legal assistance and the right for all lawyer-client communications prepared for the purpose of defence to be privileged;⁵² the right to be heard in one's own defence before any administrative sanction is imposed;⁵³ protection from self-incrimination;⁵⁴ and access to the file setting out the allegations.⁵⁵

These rights of process have in recent years increasingly been subsumed within a new right, which is that of observance of the principle of sound administration.⁵⁶ There is a dual element to this principle. First, as set out by the General Court recently in *Hollard/Melin*,

observance of that principle requires a diligent and impartial investigation by the Commission of the measure at issue. The Commission is therefore under an obligation to obtain all the necessary points of view, in particular by requesting information, in order to make a finding on full knowledge of all the facts relevant at the time of adoption of its decision.⁵⁷

This imposes a duty of care on the institutions, which has both a substantive and procedural element. Substantively, the Commission must act in good faith⁵⁸ and give due consideration and attention both to all the arguments presented⁵⁹ and to the task in hand.⁶⁰ At the very least,

⁴³ Case T-458/04 *Asadi v. DGMM* (2007) ECR II-5357.

⁴⁴ Case T-458/04 *Asadi v. DGMM* (2007) ECR II-5357.

⁴⁵ They cover all proceedings leading up to this sanction, no matter how preliminary. Case 45/87 *Sheela AG v. Commission* (1988) ECR 2441.

⁴⁶ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-212/00 P, C-217/00 P and C-218/00 P *Archer Daniels Midland AG and Others v. Commission* (2004) ECR I-111.

⁴⁷ Joined Cases 45/87 and 237/83 *Sheela AG v. Commission* (1988) ECR 2441; Case T-35/04 *Trochoud v. Commission*, Judgment of 8 July 2004.

⁴⁸ Case C-293/05 *Adreanescu v. State of Romania* (2007) ECR I-3531.

⁴⁹ Case C-204/04 *Enriquez*, Judgment of 16 July 2005.

⁵⁰ Case C-459/03 *Storga* (2005) ECR I-2009.

⁵¹ Case 222/85 *UNECTEF v. Belgium* (1987) ECR 4297.

⁵² Case 155/79 *AM & S Europe Ltd v. Commission* (1982) ECR 1515; Joined Cases T-113/91 and T-252/91 *Alzaco Nickel GmbH and Others v. Commission* (2007) ECR II-3511.

⁵³ Case 11/74 *Transocean Marine Paint v. Commission* (1974) ECR 1067.

⁵⁴ Case 37/87 *Delors v. Commission* (1989) ECR 3041.

⁵⁵ This is not an absolute right. It is subject to the principle that confidential information supplied by third parties be protected. Furthermore, only failure to disclose compulsory information will render a measure automatically illegal. Failure to disclose compulsory information will only render any measure illegal if it affects only the applicant's rights of defence. Case T-26/93 *Sabry SA v. Commission* (1995) ECR II-375.

⁵⁶ On the evolution of this right, see R.-P. Noll, *Principles of Administrative Procedure in EC Law* (Oxford and Portland, ME, 1995) 111–45; R. Craig, *EU Administrative Law* (Oxford University Press, 2005) 371–82.

⁵⁷ Case T-358/04 *Hollard/Melin v. Commission*, Judgment of 3 September 2005, para. 135. See also Case T-192/01 *Tekelade v. Commission* (2004) ECR II-2711.

⁵⁸ For a failure to see Case T-458/04 *Asadi v. Commission* (2007) ECR II-5357.

⁵⁹ Case 21/81 *Don-Schmidt v. Commission* (1982) ECR 3245.

⁶⁰ Case T-16/90 *NGC v. Hauptzollamt Bremerhaven* (1993) ECR II-5161.

It must be able to show the basis for its decision and how this relates to the information provided to it. This extends beyond merely providing reasons for the measure. Those reasons must be coherent, take account of the evidence provided and form the basis for the measure itself.⁶¹ Procedurally, the principle of sound administration requires EU institutions to be proactive in gathering information. There is, in particular, a duty to fill in gaps in information through seeking it from parties who have a right to a hearing.⁶² However, it does not appear to give new rights to new parties, and goes more to the type of information that EU institutions can request of parties who are being offered a hearing.⁶³

The second dimension to the principle of sound administration is that EU institutions must exercise their powers within a reasonable period of time.⁶⁴ The delay must not be such as to compromise the rights of defence.⁶⁵ The reasonableness of the time taken will, however, be assessed in relation to the particular circumstances of each case: its background, complexity, the procedural stages followed and its importance for the various parties involved.⁶⁶ These conditions can be read separately, so the complexity of a case may justify a lengthy investigation.⁶⁷ This has resulted in the Union courts taking a very relaxed view of what is an unreasonable period of time. Whilst, where the case seems uncomplicated, they have ruled that twenty-six months is excessive,⁶⁸ in other cases where the applicant has contributed to the delay or the matter has had to go through the domestic courts, they have not found seven or twelve years unduly long.⁶⁹

(iv) Infringement of the Treaties or of any rule of law relating to their application

The final set of grounds for review relate to infringement of the Treaties or any rule relating to their application. This can be a breach of a substantive piece of EU law, be it a provision of the Treaties or a piece of secondary legislation that binds the institution in question.⁷⁰ It can also be a breach of a number of other types of norms:

- fundamental rights: the substance of these were set out in more detail in Chapter 6;⁷¹
- proportionality: this is also discussed in more detail elsewhere in Chapter 9. Insofar as it governs the behaviour of EU institutions, in fields where these enjoy discretion, measures will only be unlawful if the courts consider these to be manifestly inappropriate with regard to the objective in hand;⁷²

⁶¹ Case T-167/97 *Strobel v. Commission*, Judgment of 21 September 2005.

⁶² Case T-412/05 *Machin v. Commission*, Judgment of 7 October 2006.

⁶³ Case C-55/75 *P. v. Commission* (1975) ECR I-1718.

⁶⁴ Joined Cases C-24/00 P and C-25/00 P *Adel and Aertskens v. Commission* (2000) ECR I-1775; Joined Cases C-245/03 and C-255/03 *Alzaco and Others v. Belgium* (2004) ECR I-1775.

⁶⁵ Joined Cases C-224/93 P, C-244/93 P, C-245/93 P, C-246/93 P, C-250/93 P and C-254/93 P *Wachauf v. Germany* (1997) ECR I-1475.

⁶⁶ Case T-7/95 *Chiron v. Commission* (1997) ECR II-313.

⁶⁷ Joined Cases C-322/01 P, C-323/01 P and C-324/01 P *Praxipol v. Agence Française de Sécurité Alimentaire*, Judgment of 3 September 2003.

⁶⁸ Case T-23/95 *IFT v. Commission* (1997) ECR II-4617.

⁶⁹ Joined Cases T-22/01–T-23/01 and T-46/01–T-49/01 *GlaxoSmithKline v. Commission*, Judgment of 9 September 2003; Case T-347/03 *James v. Commission* (2005) ECR II-3496.

⁷⁰ There is one exception to this. The Court of Justice will not allow judicial review of a Union measure for non-compliance with the WTO agreement on the grounds that the agreement is not such as to generate rights for individuals. Case C-377/02 *Van Parys v. BZB* (2003) ECR I-1465.

⁷¹ See pp. 348–52 in particular.

⁷² Case C-331/88 *J. v. AGF*, or *para. 10* (1990) ECR I-4925.

- non-discrimination;
- legal certainty;
- legitimate expectations.

As the first two of these have been addressed in detail elsewhere, this section will focus on the latter three norms: non-discrimination, legal certainty and legitimate expectations. Readers are asked, however, to refer to the other sections of the book for discussion of fundamental rights and proportionality.

(a) Non-discrimination

EU law protects against certain status harms, where parties are disadvantaged on grounds of their enjoying a particular status, be it gender, ethnicity, race, age, disability, religion, belief or sexual orientation. These are set out in Articles 10 and 19 TFEU, and are discussed in Chapter 10. Beyond these, there is a general principle that like cases be treated alike. The seminal case is *Ruckdeschel*.³ It concerned identical subsidies that were historically granted to starch and quailmehl producers by the EU institutions. The reason was that the two products were seen as economically substitutable. The quailmehl subsidy was withdrawn. *Ruckdeschel*, a producer, challenged this, arguing that there was a discrimination between it and starch producers. The Court of Justice agreed.

Joined Cases 112/76 and 16/77, *Ruckdeschel v Council* [1977] ECR 1753

- The second subparagraph of Article 40(2) TFEU provides that the common organization of agricultural markets shall exclude any discrimination between producers or consumers within the [Union].
While this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.
This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.
- It must therefore be ascertained whether quailmehl and starch are in a comparable situation, in particular in the sense that starch can be substituted for quailmehl in the specific uses to which the latter product is traditionally put.
In this connection it must first be noted that the Community Regulations were, until 1974, based on the assertion that such substitution was possible....
While the Council and the Commission have given detailed information on the manufacture and sale of the products in question, they have produced no new technical or economic data which appreciably change the previous assessment of the position. It has not therefore been established that, so far as the Community system of production refunds is concerned, quailmehl and starch are no longer in comparable situations.
Consequently, these products must be treated in the same manner unless differentiation is objectively justified.

The prohibition on discrimination will prohibit not just like cases being treated differently but also different cases being treated in a like manner.⁴ In practice, however, it is rare that there will be a finding of discrimination. Often, where there is differential treatment the Court will simply state that the cases are not alike. This will always be the case where the EU institution can justify the differential treatment (e.g. there is a different basis for the treatment of each). In *Mefti Bank*, for example, an Iranian bank pleaded discrimination on the grounds that Union sanctions had targeted it but not other British subsidiaries of Iranian banks.⁵ The General Court had little difficulty in finding that there was no discrimination. It noted that the Regulation in question implemented a UN Security Council Resolution which targeted financial institutions engaged in assisting nuclear proliferation. For the Court this rationale provided a basis for the differential treatment.

The Court is thus engaged here in looking at the reasonableness of the Union measure. There is, correspondingly, less intense review where EU institutions enjoy a margin of discretion. Discrimination will only be found if the conduct borders on the 'arbitrary'.⁶ In these circumstances the non-discrimination principle seems to add little to the proportionality principle.⁷

(b) Legal certainty

The principle of legal certainty has been protected within EU law for some time.⁸ In *Heinrich*, it was stated as requiring that:

- Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.⁹

The first dimension to this is a temporal one. There is a prohibition against retroactivity. A measure must not take effect prior to its publication.¹⁰ It will thus not be retroactive if it regulates the future effects of situations which arose prior to publication. It will only be retroactive if it applies to events which have already been concluded.¹¹

The principle is absolute in relation to general measures.¹² The Court has also indicated that it should be observed strictly where the rules are liable to have financial consequences.¹³ Other measures may exceptionally take effect before publication where the purpose to be achieved so demands and where the legitimate concerns of those concerned are respected. In *Fedesa*, following the annulment of a Directive outlawing the use of certain hormones, the subsequent Directive, which was published on 7 March 1986, stipulated that it was to take effect from the beginning of that year.¹⁴ The reason was to prevent the market being manipulated for the period prior to March as a consequence of the annulment of an earlier Directive. The Court

³ Joined Cases T-333/85, T-334/85 and T-335/85 *Marble and Others v Parliament* [2001] ECR II-2023.

⁴ Joined Cases T-244/04 and T-245/04 *Mefti Bank v Council*, Judgment of 3 July 2008.

⁵ Case T-245/11 *Mefti v Commission* [2012] ECR II-45; Case C-479/13 *Frankreich v Italia* (Republic of France) (2014), ECR I-0000.

⁶ M. Hordley, 'The Equation Between the Principles of Equality and Proportionality' [1995] 21 *Oxford J.L.* 812.

⁷ It was thus set out in *Poland Cases* 42/59 and 43/59 *SAGPAT v High Authority* [1961] ECR 109.

⁸ Case C-243/76 *Heinrich*, Judgment of 10 March 1977, para. 44.

⁹ Case 14/71 *Yves-Jean v Administration des Finances de la Seine* [1971] ECR 1401.

¹⁰ Case 1/70 *A v Council* [1971] ECR 1243.

¹¹ Case C-331/83 *Pr. AGAFA*, at para. 19 (1985) ECR I-4023.

¹² Case C-54/83 *Emminger-Schick* [2006] ECR I-0000.

¹³ Case C-331/83 *Pr. AGAFA*, at para. 19 (1985) ECR I-4023.

considered there to be no breach of the principle of the legal certainty in light of the short time-span between the enactment of the first Directive and the publication of the second.

The second dimension to legal certainty is that of clarity: enabling the subjects of EU law to know their rights and obligations. At the very least, this means that the EU law in question must be published. In *Heinrich*, an unpublished Annex to a Regulation which prohibited imports of beetles from being taken on civil air aircraft was found to be void because it had not been published.¹² Alongside this, the Court has repeatedly stated that EU legislation must be clear and its application foreseeable.¹³ This would suggest that if a Union measure is obscure it could be struck down. However, this has yet to happen.

(c) Legitimate expectations

The principle of legitimate expectations is often linked to that of legal certainty. However, its roots lie in the concept of good faith and require that, having induced an operator to take one course of action, the administration should not then renege on that, so that the individual suffers loss.¹⁴

An example of how this might be claimed arose in *Bracco*. Bracco was awarded funding under the European Social Fund for the training of young adults. The training was certified by the Portuguese ministry who sent a request to the Commission for payment. The ministry subsequently found irregularities in the performance of Bracco's duties under the contract. The Commission refused to make the final payment and sought repayment of the funds already granted. Bracco claimed a violation of the principle of legitimate expectations in that the work had been certified by the Portuguese ministry in question. The General Court made the following observations:

Three conditions must be satisfied in order to do in entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, these assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.¹⁵

In *Bracco*, the General Court found that the action failed on the first condition. It noted that the decision to authorise payment was made for the Commission, and not the Portuguese authorities, and it had given no assurances here. Even if assurances are made, they must create an expectation on the part of the applicant. This is not simply a subjective test. The expectation must be legitimate and Court will look to whether an ordinary, prudent trader would have relied on it on the basis of the institution's representation.¹⁶ Finally, the Union measure in question must not be illegal. If it is, it will not generate any protected expectation.¹⁷

Although *Bracco* refers to a precise, unconditional and consistent assurance, this assurance does not have to be individualised in the sense that the applicant must be named. It can be a

¹² Case C-345/84 *Heinrich*, judgment of 18 March 1988. See also Case T-11/84 *Syst. Aviat. v. Council* [1991] ECR II-31.

¹³ Case 123/85 *Islandia v. Commission* [1987] ECR S-411; Case C-30/87 *Netherlands v. Council* [2001] ECR I-3232.

¹⁴ See generally S. Schöberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2006).

¹⁵ Case T-316/00 *Bracco v. Commission* [2005] ECR II-255, para. 160.

¹⁶ Case 245/85 *Van den Rooy v. Council* [1987] ECR II-55. On this see S. Schöberg, 'Legitimate Expectations and Economic Reality' [1990] 15 *ELRev.* 123, 129-15.

¹⁷ Case T-316/00 *Bracco v. Commission* [1999] ECR II-255.

general statement or even a particular course of conduct which encourages certain expectations. In *Mulder*, farmers were paid by the Union to take land out of milk production to reduce milk surpluses. Mulder took his land out of production under the scheme but when he sought to resume milk production without paying a levy, he was refused on the ground that this possibility was only available to those who had produced milk in the preceding year. He argued that he had been encouraged to take his land out of production by the Union offering him premiums. This led him to believe that there would be no penalties for his action. The Court of Justice agreed, ruling that:

where a producer... has been encouraged by a Community measure to suspend marketing for a limited period in the general interest... he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the Community provisions.¹⁸

In *Mulder*, the penalty was simply inconsistent with the existing policy framework. The question does arise, however, as to whether a reversal of policy could violate legitimate expectations.¹⁹ The steady view of the Court is that it will not. Instead, there is a presumption of a freedom to legislate, as the Court considers that prudent traders ought to be able to take into account the possibility that the law might change.²⁰ In only one case has a reversal in policy given rise to a successful claim in legitimate expectations. In *CNTA*, the Commission suddenly stopped granting monetary compensation amounts (MCAs) in the cotton and rape seed sectors.²¹ MCAs are subsidies granted to traders designed to protect them against loss from currency fluctuations. This was a clear reversal of policy, which was unusual in that it was a sudden withdrawal of a subsidy. The financial effects were therefore immediate and unexpected. The Court found that there had been a breach of legitimate expectations in this case. Whilst MCAs could not be considered a guarantee against risks on the exchange rate, nevertheless, they meant, in practice, that a prudent trader might not insure himself against the risk. In the absence of an overriding public interest, the Court considered that the immediate withdrawal of MCAs with no provision for transitional measures breached EU law.

4 STANDING UNDER ARTICLE 263 TFEU

(i) Privileged and semi-privileged applicants

By virtue of Article 263(1) TFEU, the so-called privileged applicants – the Member States, the Commission, the Council and the European Parliament – have a general power to seek judicial review against acts of the EU institutions. This grants them general, unconstrained policing powers against the EU institutions, subject to the observance of the three limits set out in the final paragraph of Article 263 TFEU. The justification for this power to monitor and constrain is that each of these represents an important public interest that must be legally protected: the Member States represent individual national interests, the Council collective national interests,

¹⁸ Case 122/85 *Mulder v. Minister van Landbouw en Visserij* [1986] ECR II-2328.

¹⁹ For an argument that occasionally it should, see F. Gény, 'Subjective Legitimate Expectations in Economic and Community Law' [1995] 33 *CLJ* 383, 395.

²⁰ Case 52/81 *Freder v. Commission* [1982] ECR II-45.

²¹ Case T-474 *CNTA v. Commission* [1975] ECR 523.

the European Parliament a pan-European democratic voice and the Commission a pan-European non-governmental public interest.

The actors in Article 263(1) TFEU – the European Central Bank, the Court of Auditors and the Committee of the Regions – are semi-privileged applicants. The justification for their interest in litigation is different. It is not to police generally but rather to protect their institutional prerogatives. It is a defensive power to ensure that other institutions do not trespass on their legal entitlements.

Infringement of these prerogatives can occur in three ways. First, an institution may fail to observe a procedure at the expense of another institution.³⁰ Secondly, an institution may use one procedure when it should have used another procedure which gives another institution greater entitlements;³¹ so, for example, use of the consultation procedure rather than the ordinary legislative procedure. The final circumstance is when the institutional balance is shifted through the delegation of broad powers to the Commission at the expense of the primary legislative procedure. As this pre-empt other institutions' entitlements, they can challenge the delegation.

(ii) Non-privileged applicants

(a) Regulatory acts and legislative acts

Historically, most debate has centred around the circumstances under which private parties, so-called non-privileged applicants, can seek judicial review of acts of EU institutions. This is set out in Article 263(4) TFEU which introduces two amendments to the prior Treaty Article governing the same.

First, Article 263(4) TFEU provides that any natural or legal person may institute proceedings against an act which is either addressed to them or of direct and individual concern to them. This replaces an unhappy formulation which allowed individuals to challenge decisions addressed to them or decisions, which although in the form of regulation, were of direct and individual concern.³² Over time, the Court focused attention away from the form of the act and more to the test of direct and individual concern. The procedure could therefore be used to challenge not only Decisions but also Regulations and Directives.³³ Yet the amendment represents a welcome and overdue clarification. It may also herald a slightly more expansive approach for, on its face, it allows instruments such as the Conclusions of the European Council, or international agreements to be challenged by individuals, something that has not happened hitherto.

The second amendment concerns the establishment of a distinction between regulatory and other acts. To challenge regulatory acts individuals need only establish direct concern.³⁴ For other acts they must establish direct and individual concern. The distinction is therefore an

automatic one. Unfortunately, whilst a distinction is made between legislative acts and non-legislative acts, with the latter comprising delegated acts and implementing acts,³⁵ no definition is provided of regulatory acts.

Some help can be found in the Future of Europe Convention that preceded the Constitutional Treaty. A Discussion Circle there considered the situation of the Court of Justice. In its Final Report, the focus needed requirements for non-privileged applicants were addressed:

22. A majority of those members who wanted the [provision] to be amended would prefer the option mentioning 'an act of general application'. However, some members felt that it would be more appropriate to choose the words 'a regulatory act', enabling a distinction to be established between legislative acts and regulatory acts, adopting, as the President of the Court had suggested, 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 as regards proceedings against regulatory acts.³⁶

It seems that regulatory acts are intended to be non-legislative acts. Indeed, a strong case can be made for subjecting non-legislative acts to greater judicial scrutiny than legislative acts. The latter involve representative institutions. This is not the case with non-legislative acts taken by non-representative institutions, such as the Commission or agencies. Judicial review can provide an opportunity for popular scrutiny and constraints that is lacking in non-legislative processes.

Yet this begs the question as to what counts as a legislative act. Article 265(1) TFEU defines a legal act as anything adopted by one of the EU legislative procedures. This would leave all delegated and implementing acts as regulatory acts. This definition would make a lot of sense, as it suggests that any not adopted by one of the legislative procedures should be subject to greater scrutiny precisely because it has not come through those procedures with their greater checks and balances and arguably greater legitimacy. However, historically, the Court of Justice has adopted a different definition of a legislative act. It is any measure that is couched in general and abstract terms.³⁷ In this regard, it is the phraseology that is important, as all that matters is the level of abstraction of the text rather than the number of interests affected or the procedure used.³⁸ It would be regrettable if such a test was adopted. It would allow EU institutions to escape judicial review through the formulation of the wording they deploy. More importantly, it would not address the justifications for increased judicial review. This is that processes have been used that do not involve representative institutions, and, in such circumstances, courts have to be particularly vigilant against executive abuse and more willing to consider the arguments of citizens who have not had the chance to press these arguments through their representatives.

(b) Direct concern

Historically, the case law on direct concern has been limited. This is because the greater entitlement to standing for non-privileged applicants has been that of individual concern. This may change following the Lisbon Treaty. As we shall see, going through the case law, a High

³⁰ Case C-41/90 *Parliament v Council* [1992] ECR I-4283.

³¹ Case T-23/88 *European Parliament v Council* (Thameside) [1990] ECR II-2041.

³² Cf. also see R. Corman, 'Legal Standing under Article 173 EEC when Seeking Annulment of Legislation' [1984] 11 *ELRev* 123.

³³ Case C-205/93 *Confronto v Council* [1994] ECR I-2853; Case C-10/95 *P. Ascarelli v Council and Commission* [1995] ECR I-4145; Case T-42/95 *Machine v Commission*, Judgment of 23 October 2005.

³⁴ Prior to the Lisbon Treaty, the Court of Justice had already introduced more relaxed standing requirements in fields characterised by wide Commission regulatory power (eg. competition, state aids and anti-trust). The change is part of a progression, therefore. On the earlier regime see A. Arnold, 'Challenging EC Anti-Competing Regulations: The Problem of Admissibility' [1992] 13 *ELRev* 37.

³⁵ Articles 295-310 TFEU.

³⁶ The European Convention Secretariat, *Final Report of the Discussion Circle on the Court of Justice*, COM(2004) 670.

³⁷ Joined Cases 18/52 and 19/52, *Confédération des Producteurs de Produits de Laitages and Others v Council* [1958] ECR 411.

³⁸ Case C-125/57 *Ascarelli v Council and Commission* [1958] ECR I-4148.

proportion of the measures challenged may now be classified as regulatory acts. If that is so, direct concern will be the sole test for determining standing to challenge these measures. One would therefore expect considerably more litigation on its meaning and remit.

There are two dimensions to direct concern. The first involves causation. There must be a direct link between the act of the EU institution and the damage inflicted on the applicant. The second involves the nature of the interest affected by the Union measure. It must be a legal entitlement rather than any other form of interest.

Turning to the first of these, direct concern means that the measure which the applicant wishes to challenge must affect her legal position directly. It must be the Union measure that caused the change in her position:

The contested measure must directly produce effects on the legal situation of the person concerned and its implementation must be purely automatic and follow solely from the [Union] rules, without the application of other intermediate measures.³⁹

If the measure leaves the national authorities of a Member State a degree of discretion as to its implementation, this may be sufficient to break the chain of causation as it will be argued that it is the national measure not the Union one that inflicts the damage. In determining whether there is discretion, the Court will look, however, not merely to the letterway afforded by the Union measure but whether in practice the national authorities will exercise that discretion.

In *Prinko-Attanas*, some Greek cotton exporters challenged a restriction on exporting to other parts of the Union that was applied to them after Greek accession to the European Union but during the transitional period when some restrictions were allowed.⁴⁰ The background was that the French government applied a pre-existing regime restricting cotton imports from Greece. It came to the Commission, as required by EU law, to ask for an authorisation to continue it. This was granted. When the exporters challenged this authorisation, the Commission argued that as the authorisation did not compel the French authorities to do anything, the applicants were not directly concerned by it. The Court of Justice rejected this argument. It noted the pre-existing French regime, and stated that there was no more than a theoretical possibility that the French would not continue it. The Commission authorisation, therefore, directly concerned the applicants by legislating a national regime.⁴¹

This stance is not uncontroversial, as the issue is about allocation of responsibilities. The test for direct concern is that actions should be brought against the EU institutions only if they have exclusive responsibility for the measure as the national authorities had no discretion over the matter. This is a high threshold, indeed. It could be argued that in many cases where the latter had some discretion, there is a shared responsibility in that national authorities would not have taken the action but for the Union measure. In such circumstances, it would seem more appropriate that if both parties are responsible, any action should be against both of them.

³⁹ Case T-415/02 *ECPA and Others v Commission* [2003] ECR II-411. For an early ruling on this see Case 85/80 *Albani v Commission* [1980] ECR 3165.

⁴⁰ Case T-102/92 *Prinko-Attanas v Commission* [1993] ECR 279.

⁴¹ That said, it will only be in exceptional circumstances that the Court will be willing to make inferences about behaviour by national authorities. It will normally therefore assume that if they have been granted a discretion, they will exercise it. Indeed Cases C-445/02 *P* and C-446/02 *P* *Commission v Italy* go to the Supreme Court of 10 September 2004.

The second dimension to direct concern is that the measure must adversely affect the applicant's legal position. If it affects an interest not recognised by the Court of Justice as being legally protected, the applicant will not be directly concerned. This is neatly illustrated in *Front National*. Most MEPs are members of a political group, for example the Socialist group, or the Green group. A few independent MEPs, including a number of far-right Front National MEPs, belonged to no group, meaning that they suffered some disadvantages in the European Parliament, particularly with regard to secretarial support. Accordingly, they sought to establish a group *entre*, known as the TDI group. Other political groups objected and the European Parliament chose not to grant it group status. The decision was challenged by a number of MEPs individually and by the Front National. The General Court held that both sets of applicants were directly concerned, but that the applicants' substantive arguments were not made out.⁴² The Front National appealed to the Court of Justice who overruled the decision of the General Court and ruled that it was not directly concerned by the European Parliament decision.

Case C-466/01 *P Front National v European Parliament* [2004] ECR I-6289

34. ... the condition that the decision forming the subject-matter of [an applicant's] proceedings must be of 'direct concern' ... requires the Community measure complained of to affect directly 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 ...
35. In this instance there is no question that the contested act – to the extent to which it deprived the Members having declared the formalities of the TDI Group, and in particular the Members from the Front National's list, of the opportunity of forming ... a political group ... – affected those Members directly. As the [General Court] rightly pointed out ... those Members were in fact prevented, solely because of the contested act, from forming themselves into a political group and were therefore deprived of the non-attached Members ... as a result, they were afforded more limited parliamentary rights and lesser material and financial advantages than those they would have enjoyed had they been members of a political group ...
36. Such a conclusion cannot be drawn, however, in relation to a national political party such as the Front National ... [A] though it is natural for a national political party which puts up candidates in the European elections to want its candidates, once elected, to exercise their mandate under the same conditions as the other Members of the Parliament, that aspiration does not confer on it any right for its elected representatives to form their own group or to become members of one of the groups being formed within the Parliament ...
37. ... the [General Court] admittedly found that, since the contested act deprived the Members concerned, particularly those elected from the Front National's list, of the opportunity to organise themselves into a political group, it directly impinged on the promotion of the 'ideas and projects of the party which they represented in the European Parliament and, hence, on the attainment of that political party's stipulated object at European level, the reason why the Front National was directly affected by the act.
40. Such effects, however, cannot be regarded as directly caused by the contested act.

⁴² See joined Cases T-311/99, T-312/99 and T-328/99 *Member and Others v Parliament* [2001] ECR II-1612.

The Front National was held not to be directly concerned because there was, according to the Court, no legal right directly infringed by the measure. This was because the former had no right to form its own grouping or to join another grouping (paragraph 38). The requirement that the measure must directly affect the legal situation of the applicant is, however, a very uncertain test. It has proved difficult to apply, as the presence of a legal entitlement is not always clear. In *Regione Siciliana*, the General Court and the Court of Justice disagreed about when this would be so. The Commission had cancelled regional assistance for the construction of a dam in Sicily. The Region of Sicily, named in the document as the authority to administer the assistance, challenged this. The General Court stated that the measure directly concerned the region by depriving it of assistance it would have otherwise received and requiring it to repay money already received.¹⁴² The sums combined came to over €48 million. The Court of Justice overturned this. It stated that the region had no right in EU law to the assistance as, although it was noted as the administering authority, it was the Italian Republic which had made the application.¹⁴³ As the region had no legal entitlement to the assistance, in the Court of Justice's view, notwithstanding the financial impact, it could not be said to be directly concerned.

(c) Individual concern and the Plaumann formula

The other part of the test is that of individual concern. The seminal ruling is *Plaumann*. The German authorities wished to suspend customs duty, an import tax, on importation of cigarettes. They needed, under EU law, authorisation from the Commission. It refused them this. The applicant, an importer of cigarettes, sought judicial review of the Commission Decision. He had to show individual concern as the Decision had been addressed to the German authorities and not to him. The Court of Justice ruled that the applicant lacked standing.

Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes 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. In the present case the applicant is affected by the disputed Decision as an importer of cigarettes, that is to say, by reason of a commercial activity which may at any time be practised by any person, and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

The test is both restrictive and opaque. It needs dissecting. *Plaumann* states that private parties will be able to seek judicial review of Decisions not expressly addressed to them only if they can distinguish themselves by virtue of certain attributes or circumstances from all other persons. Although not explicitly stated, these attributes/circumstances must be fixed and determinate and distinguish members from the rest of the world. Craig has observed that the test could have chosen three dates for deciding when this was the case. The first is the date of the measure. This would involve simply looking at the number of traders importing cigarettes

into Germany at the date of the Commission Decision. This would be fixed. The simple question would be whether the number was sufficiently limited. The second would be the date of the challenge. This would involve an identical calculation but at the date when the application was made before the Court. The third date is any date in the future. The test becomes therefore whether there is a possibility that the group may cease to be fixed and determinate at some future, undefined date.

Plaumann adopted this last position.¹⁴⁴ The test was whether, even though not many of us are in fact engaged in the business of importing cigarettes, any of us could, in theory become cigarette importers. As a consequence, Plaumann was part of a group that anybody could join and did not have attributes or circumstances that distinguished him from others. Hartley has therefore talked of Plaumann drawing a distinction between open categories and fixed categories.¹⁴⁵ An open category is one where the membership is not fixed and determined when the measure takes into force. A closed one is one where the membership is fixed and determined in such a way that it cannot be added to. Applicants can only claim individual concern if they fall into a closed category.

An example of the difference between the two is provided in *Koninklijke Friesland Campina*. A 1956 Dutch law created a scheme to give tax benefits to Dutch companies providing international financing activities (the BEA scheme). In 2000, *Koninklijke Friesland Campina* (KFC) applied for authorisation to join the scheme. In 2001, the Commission announced it was investigating the scheme to see if it was illegal state aid. Following this, the Dutch government announced it would not admit any more undertakings to the scheme, and would not, therefore, admit KFC to the scheme. In 2003, the Commission declared the scheme illegal but stated that all undertakings who were currently members of the scheme could continue to enjoy its benefits. KFC successfully challenged the Commission Decision before the General Court. The Commission successfully appealed this before the Court of Justice. One of the Commission's arguments, which was unsuccessful, was that KFC was not individually concerned.

Case C-519/07 P *Commission v Koninklijke Friesland Campina*, Judgment of 17 September 2009

52. ... natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons ...
53. An undertaking cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis that undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner ...
54. By contrast, the Court has held that, where a contested measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members

¹⁴² Case T-60/03 *Regione Siciliana v Commission* [2005] ECR II-4123.

¹⁴³ Case C-13/04 P *Regione Siciliana v Commission* [2007] ECR I-3531.

¹⁴⁴ P. Craig, 'Capacity, Standing and Substantive Review in Community Law' [1999] 14 OJLS 507, 525–10.

¹⁴⁵ T. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community* (3rd edn, Oxford, Oxford University Press, 2007), 348.

of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders ...

55. It is not in dispute, first, that the contested decision had the effect that requests for first GFA authorisation, which were pending on the date of notification of the contested decision, were rejected without being examined and, second, that the undertakings concerned were easily identifiable, owing to the very existence of such a request, at the time when that decision was adopted. In that regard, it should be recalled that GFC was part of a group of, at most, 14 applicants for first GFA authorisation, whose requests were pending at the time of the 11 July 2001 decision, that those requests were suspended following that decision, and that the Netherlands authorities announced on 5 December 2001 that they would be ceasing, with immediate effect, to consider any new requests for the application of the GFA scheme.
56. Thus, ... GFC formed part of a closed group of undertakings – and not of an indefinite number of undertakings belonging to the sector concerned – specifically affected by the contested decision.
57. It should be borne in mind that, in order to benefit from the GFA scheme, an undertaking which had made a request for first GFA authorisation must have already taken the necessary measures in order to fulfil the criteria required for that scheme. Furthermore, as the Netherlands authorities did not have any discretion in that regard, they were obliged to grant such an authorisation if those criteria were fulfilled. Thus, the undertakings whose requests for first GFA authorisation were pending must be regarded as being concerned by the contested decision, by reason of attributes which are peculiar to them and by reason of circumstances in which they are differentiated from every other undertaking in that sector which had not lodged a request for first GFA authorisation.
58. It follows that those undertakings have standing to bring an individual action against the contested decision.

A distinction is thus made between an open category and a closed category. The open category is that of companies engaging in international financial activities. In principle, anybody could engage in this category (hence its openness) and it is not enough to sustain individual concern. The closed category is composed of undertakings who have already made an application to join the GFA scheme at the time of the Commission Decision. This is closed in that nobody can join that category of pending applications prior to the Commission Decision, is once the Decision is taken the category closes definitively.

In practice, this means that closed categories comprise parties who are limited in number and have some special pre-existing legal relationship envisaged by the Union measure. In GFC, it was a formal application for tax exemption. Possibly crucial here was the fact that if a trader met the criteria they had an automatic right to join the scheme, so the application carried with it a certain legal entitlement. In other instances, the Court has found traders who had pre-existing contracts which could not be carried out because of a Commission Decision to be individually concerned.¹⁰⁷ It has also found traders to be concerned where they were part of a small group given a tax exemption in a particular year for a limited period by a Member State which was then subsequently withdrawn because of a Commission Decision.¹⁰⁸

The applicant will also be individually concerned if, notwithstanding that they would otherwise be in an open category, they are part of a fixed group granted certain procedural safeguards. In

¹⁰⁷ Case 124/82, *Frédéric-Pollet and Others v Commission* [1983] ECR 2079; Case C-12/78, *Se-Meyer v Commission* [1979] ECR I-2477.

¹⁰⁸ Joined Cases C-182/03 and C-41/03, *Soliman and Azzam* [2005] ECR I-5475.

Vischère, EU legislation provided for the phasing out of certain plant protection products.¹⁰⁹ During a transitional period, manufacturers were limited to certain decisions setting out the qualities of those products. Vischère was one of sixteen who presented dossiers in relation to a product, chlo-methanil. A Directive was duly introduced prohibiting it. The General Court held that as Vischère was provided procedural safeguards by the original legislation it was individually concerned.

How to explain this standing rule? Two justifications are deployed. The first is that allowing too many challenges by private parties will unduly disrupt Union decision-making processes. A reason why this argument might have particular force in the EU setting is that Union decisions necessarily involve a delicate balance between many actors, which involve all the Member States and the central EU institutions. Exposing them to wide-ranging and incessant legal challenges ignores the precarious nature of this process and would make the job of realising this balance even harder.¹¹⁰

The second justification provided for such limited standing requirements is to protect the status of the Court of Justice. It has been argued that restrictive locus standi requirements have been used to channel applicants to challenge Union measures before national courts in the first resort. Those then act as a filter for the Court of Justice.¹¹¹ This view re-emerged in the Discussion Circle on the Court of Justice at the Future of Europe Convention, with one group within the discussion arguing against reform on this basis.

The European Convention Secretariat. Final Report of the Discussion Circle on the Court of Justice, COMV 536/03 (2003)

18. It emerged from the discussion that the circle was clearly divided into two groups. For the first group, the current wording of the provision satisfied the essential requirements of providing effective judicial protection of the rights of citizens, taking account of the fact that, in the present decentralised system based on the subsidiarity principle, it was mainly national courts which were called upon to defend the rights of individuals and which might (or should, if at last instance) refer questions to the Court for a preliminary ruling on the validity of a Union act; it would therefore not be necessary to make any substantive changes to Article 253(4) TFEU. These members felt, on the other hand, that it would be appropriate for the Constitution to mention explicitly 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 left for the Member States to establish a system of legal remedies and procedures which ensure respect for the right of individuals to effective judicial protection as regards rights resulting from Union law ...

¹⁰⁹ Case C-403/05 *Vischère v Commission*, Judgment of 7 October 2006. See also Case T-12/99, *Agro-Aliment Biochim v Council* [2002] ECR II-4325.

¹¹⁰ On this see A. Arndt, 'Private Applicants and the Action for Annulment under Article 263 of the EC Treaty' [1995] 21 *Common L.* 46; C. Harding, 'The Private Interest in Challenging Community Action' [1995] 5 *ELRev* 354. Arndt is very critical of this approach. For confident coverage of the different approaches, see A. Arndt, *The European Union and Its Court of Justice* (Oxford, Oxford University Press, 2006), 91–4.

¹¹¹ This was first deployed by Macneven who argued that it was a strategy to transform the Court of Justice into a European Court of Appeal. H. Macneven, 'Why is Article 170 Interpreted Against Private Plaintiffs?' [1983] 5 *ELRev* 111. For a defence of this argument, see J. Vitor, 'Direct and Indirect Concern: An Effective Remedy or a Conventional Solution?' [2001] 28 *ELRev* 575.

Even on their own terms, both these arguments are highly problematic.

Taking first the argument about not disrupting EU decision-making processes: this may be an argument for restrictive rules of standing but it does not explain the arbitrariness of the current test and the obscure world of the difference between open and closed categories. The Court has ruled that a party is not individually concerned by a Union measure where it is the only party affected by it on the grounds that it belongs to an open category which others could potentially join.¹³² If the rules on standing are concerned solely with restricting applicants, they could look at those actually affected by a measure, and restrict standing to a very limited group and not those affected speculatively.

Turning to the argument about the preliminary reference procedure as the central route for judicial review, this begs the question whether national courts would be effective filters.¹³³ In principle, following the *Forsyth* doctrine, they should refer everything to the Court as they are not allowed to declare a Union measure invalid themselves.¹³⁴ It could therefore become a free-for-all with the only question being whether the applicant has standing domestically. In some instances, this may be very liberal, whereas conversely, there may not even be a domestic measure that can be the subject of a challenge. There is, moreover, an institutional contradiction in this argument, as the procedures send the applicant to different courts. An action under Article 263(4) TFEU is brought before the General Court whilst a reference goes to the Court of Justice.¹³⁵ It would be absurd if the clear Treaty preference for individual administrative challenges to be the main concern of the General Court was undermined in this way. Viewed more broadly, there are further disadvantages to this vision. Legal proceedings would be highly protracted with all the disadvantages for legal certainty and costs.

The bulk of the academic literature has thus been highly critical of the *Pfleger* formula. It is viewed, in the first place, as highly restrictive, preventing applicants adversely affected by Union measures from any effective judicial redress. There is also a sense that it is internally unjustified.¹³⁶ The text of Article 263 TFEU clearly does not require it. Nor does it justify it. There is nothing in the Treaty to imply that the phrase 'direct and individual concern' should be interpreted as narrowly as the Court chose to in *Pfleger*.

The most robust critique of the *Pfleger* formula is that of Advocate General Jacobs in *UPA*. *UPA*, a Spanish trade association representing the interests of Spanish farmers, sought judicial review of a 1993 Council Regulation which abolished many forms of financial aid to olive oil farmers and producers. It was impossible to challenge this Regulation before the Spanish courts. The General Court dismissed the application for the reason that *UPA* lacked standing. *UPA* appealed to the Court of Justice. In his Opinion, Advocate General Jacobs set out a series of reasons why, in his view, the current law was in need of reform. Underlying the Advocate General's analysis was the idea that judicial review must be informed by the 'principle of effective judicial protection':

¹³² Case 231/81 *Spyridon v Commission* [1982] ECR 2555.

¹³³ For a particularly thorough critique of the inadequacy of this route, see the Opinion of Advocate General Jacobs in Case C-540/03 *P. Unión de Pequeños Agricultores v Council* [2005] ECR I-6677, paras 41–5.

¹³⁴ Case 114/85 *Fines Feigandt v Hauptverband der Lohn- und* [1987] ECR I-1159.

¹³⁵ Article 256(1) TFEU.

¹³⁶ A. Burley, 'Direct and Individual Concern: An Absent Inseparable Barrier to the Admissibility of Individual Appeals to the ECJ Court' (1974), 21 *CDL* 19; J. A. Asensio, 'Private Applicants and the Action for Annulment since *Chiodi*' [2001], 38 *Ord. Rev.* 3; E. Lourenço and T. Conzelmann, 'Judicial Review as a Contribution to the Development of European Constitutionalism' [2002], 29 *FEU* 5; P. Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2002) 340–1.

Case C-50/03 *P. Unión de Pequeños Agricultores v Council* [2005] ECR I-6677, Opinion of Advocate General Jacobs

18. As is common ground in the present case, the case law of the Court of Justice acknowledges the principle that an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community law must have access to a remedy against that measure and be able to obtain complete judicial protection.
 19. That principle is, as the Court has repeatedly stated, grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights. Moreover, the Charter of Fundamental Rights of the European Union, while itself not legally binding, states in a generally recognised principle in Article 47 that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal...
- Suggested solution: a new interpretation of the notion of individual concern
59. The key to the problem of judicial protection against unlawful Community acts lies therefore, in my view, in the notion of individual concern laid down in the fourth paragraph of Article [263 TFEU]. There are no compelling reasons to read into that notion 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. On that reading, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article [263 TFEU] will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however in my mind a positive reason for accepting a direct challenge by one or more of those individuals.
 60. In my opinion, it should therefore be accepted that a person is to 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 interests.
 61. A development along those lines of the case law on the interpretation of Article [263 TFEU] would have several very substantial advantages.
 62. First ... it avoids what may in some cases be a total lack of judicial protection – a *denial de justice*.
 63. Second, the suggested interpretation of the notion of individual concern would considerably improve judicial protection. By laying down a more generous test for standing for individual applicants than that adopted by the Court in the existing case law, it would not only ensure that individual applicants who are directly and adversely affected by Community measures are never left without a judicial remedy; it would also allow issues of validity of general measures to be addressed in the context of the procedure which is best suited to resolving them, and in which effective interim relief is available.
 64. Third, it would also have the great advantage of providing clarity to a body of case law which has often, and rightly in my view, been criticised for its complexity and lack of coherence, and which may make it difficult for practitioners to advise in what court to take proceedings, or even lead them to take parallel proceedings in the national courts and the [General Court].
 65. Fourth, by ruling that individual applicants are individually concerned by general measures which affect them adversely, the Court of Justice would encourage the use of direct actions to resolve issues of validity, thus limiting the number of challenges raised via Article [267 TFEU]. That would, as explained above, be beneficial for legal certainty and the uniform application of Community law...

66. A point of equal, or even greater, importance is that the interpretation of Article [253 TFEU] which I propose won't shift the emphasis of judicial review from questions of admissibility to questions of substance. While it may be accepted that the Community legislative process should be protected against casual judicial intervention, such protection can be more properly achieved by the application of substantive standards of judicial review which allow the institutions an appropriate margin of appreciation in the exercise of their powers than by the application of strict rules on admissibility which have the effect of 'flood[ing] excluding applicants without consideration of the merits of the arguments they put forward.

Shortly after this Opinion was handed down, the General Court applied its reasoning in *Alpe Quidry*.¹¹⁷ But when *UFA* was considered by the Court of Justice, it chose not to follow the advice of its Advocate General. The Court insisted on the restrictive force of the Plaumann formula, stating that any reform to the law of standing must come not from the Court, but from the Member States. It has since then insisted resolutely on the Plaumann formula.¹¹⁸ The Opinion of Advocate General Jacobs must be seen, therefore, as a critique of the existing law rather than anything more.

The debate about widening standing rules is complicated and too black and white. It revolves around general statements about having either relaxed rules or restrictive rules. If standing requirements are relaxed they may, of course, address the concerns surrounding restrictive requirements. However, they open the door to other concerns. They involve curbing of the legislative process and government by courts. Significant members of Union measures will go up before the courts, with a danger of the latter substituting their views for those of the legislature. There is also the concern about capture of courts by minority interests. Groups unable to secure agreement for their view elsewhere may simply bombard the courts with actions as a way of undermining the legislative procedure and as a strategy for securing what they could not achieve elsewhere.

The strength of these arguments will vary according to the context. In some instances, the argument for efficient judicial protection might seem strong, whilst in others the case for restrictive standing is apparent. In this regard, the amendments introduced by Lisbon between regulatory and legislative acts in Article 263(4) TFEU are pertinent. In instances where there is EU legislation, there is restricted standing. In the case of administrative acts, individual concern is abolished and there is liberalised standing. This also is reinforced by Article 253(5) TFEU which provides that the acts setting up EU agencies and bodies may lay down specific arrangements allowing acts of these bodies to be challenged. The philosophy is clear. Non-legislative acts are taken by non-representative institutions and therefore there are less strong concerns about democratic process being disrupted by judicial challenge. Furthermore, there are strong reasons why questions of due process and the reach of executive power should be more actively policed. These institutions are not subject to the same levels of public debate and scrutiny as the legislative process, and, therefore, judicial review intervenes to substitute for that.

¹¹⁷ Case T-171/01 *Alpe Quidry v Commission* [2003] ECR II-2035.

¹¹⁸ See e.g. *Infed Case C-372/06 P*, *C-375/06 P* and *C-381/06 P* *Plaumann and Others v Commission* [2008] ECR I-2449; Case C-255/05 *P. Saldanha v Commission*, judgment of 21 April 2006.

(d) Standing and interest groups

A further criticism of Plaumann is that the test of 'individual concern' is easier to meet for those who can point to some individual financial or material interest that has been prejudiced. It thus benefits trading interests over groups representing public interests such as the environment, the regions or the consumers. This is particularly problematic if judicial review is seen as also having a function of allowing different social groups to challenge legislative or administrative abuse. It cannot be right, if this is only available to some interests or bodies and not to others.

Interest groups will be granted standing if they are seen as having been granted certain procedural entitlements. This will be where they have been given certain procedural rights or privileges either by EU law or through the practice of the EU institutions. The argument is that this recognition by the political process confers a parallel entitlement to protection of this before the courts. The position was set out most cogently in *Associazione Nazionale Bieticoltori*. In this instance, *Associazione Nazionale Bieticoltori (ANB)*, a trade association representing Italian sugar beet producers, brought an action against a Regulation that granted aid to their Portuguese counterparts whilst reducing aid for the Italian growers. It was found to lack standing.

Case T-38/98 *Associazione Nazionale Bieticoltori v Council* [1998] ECR II-4191

25. It should be pointed out, second, that an application for annulment lodged by an association may be admissible in three types of situation, namely:
 - (a) where a legislative provision expressly confers a range of procedural powers on trade associations ...
 - (b) where the association represents the interests of undertakings having locus standi to seek the annulment of the provision in question ...
 - (c) where the association is distinguished because its own interests as an association are affected, in particular because its position as a negotiator has been affected by the measure whose annulment is sought ...
26. In those three types of situation the Court of Justice and the [General Court] have also taken into account the participation of the associations in question in the procedure ...
27. As regards the first type of situation, mentioned above, it is sufficient to point out that the regulations on the common organisation of the markets in the sugar sector do not recognise that associations have any right of a procedural nature.
28. As regards the second of the above-mentioned types of situation, it should be observed that the fact that the contested provision will affect sugar beet producers whose interests are represented by the *Associazione Nazionale Bieticoltori* is not such as to differentiate those producers from all other persons, since they are in a situation which is comparable to that of any other operator who may enter the same market ...
29. As regards, last, the third type of situation referred to above, it should be pointed out that, according to a consistent line of decisions, an association formed to promote the collective interests of a category of persons cannot be regarded as individually concerned by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually ... None the less, the existence of particular circumstances, such as the role played by an association in a procedure leading to the adoption of an act which is the meaning of Article [263 TFEU], may justify admitting an action brought by an association whose members are not directly and individually concerned by the act at issue, particularly where its position as negotiator is affected by it ...

Such procedural entitlements will be rare, and they will only be given to 'insider' groups who have good relationships with the EU institutions. There are likely to be the last people who wish to challenge a measure as their privileged position in negotiations or consultations is likely to have already secured some influence for them.

More interesting, therefore, is whether other interest-groups with a strong stake in a measure can challenge it. In *Greenpeace*, three environmental campaigning groups and several individuals resident on the Canary Islands challenged the legality of a series of Commission Decisions granting aid from the European Regional Development Fund (ERDF) to assist with the construction of two power stations, one on Gran Canaria and the other on Tenerife. The General Court ruled that neither the associations nor the individuals had standing.¹¹⁴

Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205

32. The applicants ask the Court to adopt a liberal approach on this issue and recognise that, in the present case, their locus standi can depend not on a purely economic interest but on their interest in the protection of the environment....
33. In the alternative, the applicants submit that the representative environmental organisations should be considered to be individually concerned by reason of the particularly important role they have to play in the process of legal control by representing the general interests shared by a number of individuals in a focused and coordinated manner....
56. Nor can the fact that (certain of the) applicants have submitted a complaint to the Commission constitute a special circumstance distinguishing them individually from all other persons and thereby giving them locus standi to bring an action under Article [263]. No specific procedures are provided for whereby individuals may be associated with the adoption, implementation and monitoring of decisions taken in the field of financial assistance granted by the ERDF. Merely submitting a complaint and subsequently exchanging correspondence with the Commission cannot therefore give a complainant locus standi to bring an action under Article [263]....
59. ... [S]pecial circumstances such as the role played by an association in a procedure which as to the adoption of an act within the meaning of Article [263] may justify bringing a challenge to an action brought by an association whose members are not directly and individually concerned by the contested measure....
60. The three applicant associations ... claim that they represent the general interest, in the matter of environmental protection, of people residing on Gran Canaria and Tenerife and that their members are affected by the contested decision; they do not, however, adduce any special circumstances to demonstrate the individual interest of their members as opposed to any other person residing in those areas. The possible effect on the legal position of the members of the applicant associations cannot, therefore, be any different from that alleged here by the applicants who are private individuals. Consequently, in so far as the applicants in the present case who are private individuals cannot, as the Court has held, be considered to be individually concerned by the contested decision, nor can the members of the applicant associations, as local residents of Gran Canaria and Tenerife....
62. In the present case ... the Commission did not, prior to the adoption of the contested decision, initiate any procedure in which Greenpeace participated; nor was Greenpeace in any way the interlocutor of the Commission with regard to the adoption of the ... decision. Greenpeace cannot, therefore, claim to have any specific interest distinct from that of its members to justify its locus standi.

¹¹⁴ The judgment was affirmed on appeal. Case C-233/95 *Greenpeace and Others v Commission* [1996] ECR I-1651.

Public interest associations will therefore only be able to seek judicial review of measures not addressed to them if they are granted specific procedural privileges or safeguards; their members are individually concerned; or in negotiations they are recognised by the EU institutions as the central interlocutor of particular interests. It will be rare that any of these conditions will be met. Since *Greenpeace*, the Court has consistently refused to relax standing requirements for public interest litigation.¹¹⁵ EU law has therefore been criticised as resulting in diffuse public interests being less well protected than private interests.¹¹⁶

Whilst apparently attractive, this argument must be treated cautiously. There are dangers in undermining judicial review for political accountability. Take the *Greenpeace* case, for example: why should it be characterised as being a legal concern to decide whether European funds should be allocated to the environmentally controversial construction of a new power station? Is this not precisely the sort of question which is best resolved politically?

C. Harlow, 'Public Law and Popular Justice' [2002] 65 *Modern Law Review* 1, 13

In public interest litigation, campaigning groups can be treated as experts provided their hidden agenda is openly recognised. Alternatively, they can be treated as single issue political parties, in which case their presence as advocates in the legal process needs a different justification. Otherwise ... the triumph of pressure groups or factions or special interests will mark a corruption of the legal process. To put this important point differently, too close a relationship between courts and campaigning groups may result in a dilution of the neutrality and objectivity of law.

Harlow suggests, therefore, that a middle way might be to give public interest groups wider rights of intervention in proceedings. As she makes clear, this has not yet happened.

C. Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992)

12 *Yearbook of European Law* 213, 247-8

The most economical way to increase interest representation without overloading the Court is, however, undoubtedly through intervention procedure. Many modern courts feel able to allow intervention freely and interventions by interest groups are particularly a feature of constitutional courts. In the Court of Justice, in sharp contrast, group interventions are rare and Articles 17 and 20¹¹⁷ of the Statute are largely the preserve of the privileged applicants.

¹¹⁵ Case T-461/93 *Asi v Secretary of State* [1994] ECR II-2731; Case T-219/95 *St. Beatus and Others v Commission* [1996] ECR II-2081.

¹¹⁶ M. Filer et al., 'Access to Justice: Legal Standing for Environmental Associations in the European Union' in D. Robinson and A. Cradock (eds.), *Public Interest Perspectives in Environmental Law* (Chichester, Chancery, 1995); L. Kretzmer, 'Public Interest Litigation in Environmental Matters before European Courts' [1996] 1 *JEL* 1; H. Greco, 'Access to Justice in Environmental Matters: A Case of Double Standards?' [1996] 1 *JEL* 119.

¹¹⁷ The right to intervene is now set out in article 40 of the current Statute of the Court of Justice which gives that right to all Member States and EU institutions. Others may intervene if they can show an interest and the dispute is not between Member States. EU institutions or Member States and an EU institution.

The Court's distinctive injunctive procedures could be used to design an appropriate intervention procedure without adding to burdens on applicants in the shape of greater expense or delay. Strict time-limits can already be imposed for interventions with limited rights of contradiction and oral observations already require the Court's permission. Submissions could be limited as to length, increased use could be made of the judge rapporteur's oral observations if thought necessary. Alternatively, they could be collected and evaluated by the Advocate General, forming part of his Opinion.

5 ARTICLE 265 TFEU AND THE FAILURE TO ACT

In certain circumstances positive duties are placed by EU law upon the EU institutions to act. They are under a duty to realise some Treaty objectives¹²¹ and secondary legislation often places duties upon the institutions.¹²² The conditions for bringing an action if an institution fails to act in such circumstances are set out in Article 265 TFEU.

Article 265 TFEU

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act, if, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

There is a similar distinction between privileged and non-privileged applicants as in Article 263 TFEU, with the former laid out in Article 265(1) TFEU and the latter in 265(2). Privileged applicants comprise a wider group under Article 265 TFEU than under Article 263 TFEU, as all EU institutions and Member States are granted that status, whilst under the latter provision it is available just to Member States, the Commission, the Parliament and the Council. The European Council, the European Central Bank and (hypothetically) the Court of Justice all have a wider standing, therefore, under Article 265 TFEU.¹²³

¹²¹ On the common transport policy, see Case 15/81 *Parliament v Council* [1985] ECR I-532.

¹²² For example, the Commission is required to examine the financial and legal position of any member state a branch of EU composition, law which is made by a person with a legitimate interest. Case T-14/90 *Autoserv v Commission* (Autoserv II) [1992] ECR II-2323.

¹²³ The list of institutions is set out in Article 13 TFEU.

Quirks are also added to the provision by the Lisbon Treaty. Prior to the Treaty, only the Parliament, Council and Commission were institutions against whom an action could be brought. Two further institutions have been added to this: the European Council and the European Central Bank. The second paragraph, however, refers to an action only being available if the 'institution, body or agency' has been called upon to act. This suggests that, in principle, the action should be available against EU agencies, bodies and offices as well, in the same way as Article 263 TFEU is available against acts taken by these. This is the preferable interpretation. It not only secures consistency between the provisions but also ensures that there is no lacuna in the rule whereby an EU body or agency can escape judicial scrutiny by simply doing nothing.¹²⁴

Articles 263 and 265 TFEU were described in an early judgment as prescribing 'one and the same method of recourse'.¹²⁵ This means, as one author put it, that:

the system of remedies ... would be incomplete if Community institutions were subject to judicial control only in respect of their positive actions while they could evade the obligations imposed upon them by simply failing to act.¹²⁶

It also means that the provisions should be interpreted in a parallel manner. There is thus a similar distinction between privileged and non-privileged applicants. Non-privileged applicants can only invoke Article 265 TFEU if they would be directly concerned by the regulatory act or directly and individually concerned by the non-regulatory act which has not been adopted.¹²⁷

However, there are some lacunae in this coverage.

First, an action under Article 265 TFEU can only be commenced against an EU institution if it is under a duty to perform a task. If there is only a discretion, no remedy exists. The decision of the Court to rule in some circumstances that the matter is one of discretion rather than obligation has been controversial as it creates a gap in protection. We saw in Chapter 3 how the decision to hold that the Commission had complete discretion whether to launch enforcement proceedings against a Member State under Article 258 TFEU for infringement of EU law has led to private parties being largely excluded from this important process.¹²⁸

Secondly, an institution, if called upon to act,¹²⁹ avoids any further action if it defines its position within two months. The principle of complementarity would require that this position be an act capable of being reviewed under Article 263 TFEU. However, an institution can define its position without adopting an act that is reviewable under that provision.¹³⁰ It can also act in a different way from that in which it was called upon to act.¹³¹

Finally, the institution must be called upon to act by the applicant. If this does not happen, there will be no action.¹³² Whilst the Article sets no time limit within which an action must

¹²⁴ Case T-41/96 *Sagadeu v SAE* [2000] ECR II-2771.

¹²⁵ Case 15/76 *Clarendon v Commission* [1976] ECR 919.

¹²⁶ A. Tiedt, *The Law in A.S. State as the Appeal for Failure to Act* [1975] 3 L.J. 65.

¹²⁷ Case T-39/96 *Autoserv v Commission* [2000] ECR II-1343; Case T-187/06 *Autoserv v Commission* [2007] ECR II-1375.

¹²⁸ Case 247/87 *Inter Fruit v Commission* [1988] ECR II-281. See pp. 341–3.

¹²⁹ Joined Cases T-20/91–T-24/91 and T-45/92 *Dyckerhoff & Widmann v Commission*, Judgment of 9 September 2003.

¹³⁰ Case 377/97 *Parliament v Council* [1998] ECR I-6111; Case 303/02 *European Parliament v Council* [2004] ECR I-561; Case T-115/04 *García Arredondo v Commission* [2005] ECR II-1953.

¹³¹ Case C-25/91 *Asociación Española de Ganaderos v Commission* [1992] ECR I-1113; Case T-12/05 *Wachow v Commission*, Judgment of 7 October 2005.

¹³² Joined Cases T-2/02–T-32/02 and T-45/02–T-48/02 *Dyckerhoff & Widmann v Commission*, Judgment of 9 September 2003.

THE ACTION FOR ANNULMENT

I. SUBJECT-MATTER

General. The action for annulment (i.e. for a declaration that an act is void), which is provided for in Art.230 of the EC Treaty and Art.146 of the EAEC Treaty, enables Community institutions, Member States and natural and legal persons to protect themselves against unlawful binding acts of Community institutions, provided that specific conditions as to admissibility are fulfilled.¹ By this procedure, the Court of Justice or the Court of First Instance reviews the contested act in the light of superior—written and unwritten—Community law. In the event that an infringement of that superior law is found, the action will result in the annulment of the contested act.²

7-001

A. THE TERM "ACT"

1. The requirement for there to be a contested act

Existing act. An application for annulment is admissible only if it is directed against an existing act.³ A non-existent act may not be declared void.

7-002

¹ Art.35(6) of the EU Treaty provides for a comparable, yet not identical, procedure in the context of the civil pillar (see Ch.22, *infra*; see also ECJ (judgment of September 12, 2005), Case C-175/05 *Commission v Council*, not yet reported). It is for the applicant to choose the legal basis of its action and not for the Community judicature itself to choose the most appropriate legal basis. So, if an action is brought under Art.230 of the EC Treaty, the Court will not examine whether it would be admissible under Art.35 of the EU Treaty even if the contested act concerns the provisions of the EU Treaty relating to police and judicial cooperation in criminal matters (see ECJ, Case C-160/03 *Spain v Eurojust* [2005] E.C.R. I-2677, paras 35 and 38).

² An application for a declaratory judgment that the Commission has no power to adopt certain measures, without seeking annulment of a specific act, will be inadmissible (ECJ (order of December 5, 2000), Case C-224/03 *Italy v Commission* [2003] E.C.R. I-14751, para 30-32).

³ ECJ (order of October 7, 1957), Case 248/56 *Endersmeier v ESC* [1957] E.C.R. 395; CFI, Case T-64/89 *Automec v Commission* [1990] E.C.R. II-167, para.42; CFI, Case T-16/91 *Rovito v Commission* [1992] E.C.R. II-2417, para.39; ECJ, Case C-27/04 *Commission v Council* [2004] E.C.R. I-2649, para.34 (failure by the Council to adopt acts that are recommended by the Commission cannot be regarded as giving rise to acts open to challenge for the purposes of Art.230 of the EC Treaty). The Court of Justice (under Art.22(7) of the ECJ Rules of Procedure) and the Court of First Instance (under Art.123 of the CFI Rules of Procedure) may declare of its own motion that an act is non-existent.

- 7-003 Identification of the act. Consequently, the applicant must identify precisely the act which it is seeking to have annulled. If it fails to do so, the application will be inadmissible on the ground that its subject-matter is unknown.¹ However, it may be that an application for annulment which is formally directed against a particular act is in fact directed against other acts which are linked with the contested act in such a way that they constitute a single whole.²
- 7-004 Act no longer in force. An application for annulment of an act which is no longer in force is not necessarily devoid of purpose. If the applicant has an interest in the annulment of an act which is no longer in force and it is within the time-limit prescribed by the fifth para. of Art.230 of the EC Treaty, the application will be admissible (at least from this point of view).³

¹ ECJ, Case 34/65 *Lesclapart v. Commission* [1970] E.C.R. 301, paras 20-27; ECJ, Case 247/87 *Sofit v. Commission* [1989] E.C.R. 291, para.9.

² ECJ, Joined Cases 15 and 26/65 *SIAT and FERAM v. High Authority* [1967] E.C.R. 31, at 43-44. See also ECJ, Case 3477 *Osilab v. Commission* [1978] E.C.R. 1099, paras 5 and 6, where an application for annulment which was not expressly directed against a specific Commission decision was nevertheless regarded as being directed against that decision in view of the arguments put forward in one of the applicant's pleas raised against other decisions related to the first decision which were expressly mentioned as being the subject-matter of the application for annulment.

³ For an example of a case where the applicant had an interest, see ECJ, Case 207/86 *APESCO v. Commission* [1988] E.C.R. 2151, paras 15-16 (the interest which the Court of Justice considered sufficient was in preventing a repetition of the alleged illegality in similar future acts); for examples of cases in which the applicant was held not to have an interest, see ECJ, Joined Cases 284/86 and 287/86 *Technische v. Commission and Council* [1988] E.C.R. 607, paras 11-14 (the application for annulment of a regulation imposing a provisional anti-dumping duty became devoid of purpose where, in the course of the proceedings, it was replaced by a definitive regulation, against which a new action for annulment had been brought); ECJ, Joined Cases C-105/84 and C-160/84 *Neotype Technisch v. Commission and Council* [1990] E.C.R. I-2943, paras 14-15; CFI, Case T-235/94 *ESLA v. Commission* [1997] E.C.R. II-1835, paras 34-35 (an action brought against a Commission decision authorizing the grant of aid by a Member State pursuant to Art.55 of the ECSC Treaty which was withdrawn in the course of the procedure was held to be devoid of purpose because the contested decision had become "inapplicable"); CFI (order of July 31, 2000), Case T-31/00 *BSE-Fischhington v. Commission*, not reported, para.12 (application to no purpose following the withdrawal of the contested act); CFI (order of March 10, 2005), Case T-154/01 *Idis Health v. Commission*, not yet reported, paras 34-39 (the Court of First Instance held that there was no need to give a decision in this case since no legal effect of the contested decision remained following its withdrawal). An action brought against a Commission decision implementing a "basic decision" of that institution will have no subject-matter if the decision which it implements has been declared void. Cf. pursuant to the judgment: annulling the basic decision, the Commission adopts a new basic decision incorporating the original implementing decision, the applicant will lose any interest in continuing an action to obtain annulment of the original implementing decision. This is because the annulment of the original basic decision causes the implementing decision to lose its raison d'être with the result that the new decision cannot be regarded as a confirmatory act but as an "autonomous act creating or altering legal rights" which takes the place of the original implementing act (CFI (order of January 27, 2005), Case T-235/99 *TAT European Airlines v. Commission* [2005] E.C.R. II-31).

This also applies where the contested act has already been implemented at the time when the action is brought.⁴

Act replacing a withdrawn act. In the interests of the due administration of justice and the requirements of procedural economy, an action for annulment of an act which is withdrawn in the course of the proceedings may be directed against a new, closely related act which replaces or simply revokes the contested act.⁵ In such case, the new act is regarded as a new matter which has arisen in the course of the proceedings and the applicant may put forward new pleas in law.⁶ Naturally, it is also possible to bring a new action for annulment. The new act is regarded as being of the same kind as the act which was withdrawn.⁷

Non-existent act. The requirement that the contested measure must exist is applied in the special case of the doctrine of the non-existent act. Such a measure exhibits such particularly serious and manifest defects that it must be regarded as non-existent. If a measure is found to be non-existent, it loses the benefit of the normal presumption that an act is valid in so far as it has not been annulled or the institution which adopted it has not properly repealed or withdrawn it.⁸ Moreover, the non-existent act cannot produce any legal effects at all. Consequently, an application for annulment of a non-existent act will invariably be declared inadmissible.⁹ Furthermore, an act may be declared non-existent after the period prescribed for bringing an action for annulment has run out. The case-law, which shows every sign of

⁴ ECJ, Case 33/63 *AKZO Chemie v. Commission* [1965] E.C.R. 1965, para.21; CFI, Case T-22/97 *Kass v. Commission* [1999] E.C.R. II-1775, para.55.

⁵ ECJ, Case 14/81 *Alpha Steel v. Commission* [1981] E.C.R. 749 (the withdrawal of an unlawful measure is permissible, provided that the withdrawal occurs within a reasonable time and that the Commission has had sufficient regard to how the applicant might have been led to rely on the lawfulness of the measure); CFI, Joined Cases T-45/98 and T-111/98 *CCRE v. Commission* [2000] E.C.R. II-161, para.33. See also CFI (judgment of September 23, 2005), Case T-36/01 *Yusuf and Al Barakat International Foundation v. Council and Commission*, not yet reported, paras 71-77.

⁶ ECJ Rules of Procedure, Art.41(2); CFI Rules of Procedure, Art.43(2).

⁷ Schermers and Waelbroeck, *Judicial Protection*, § 712, at 351.

⁸ Joined Cases 7/56 and 3-7/57 *Algeria and Others v. Common Assembly* [1957 and 1958] E.C.R. 35, at 50-51; ECJ, Case 1583 *Concordia Cooperative d'Abruzzo v. Commission* [1987] E.C.R. 1005, para.13. The purpose of this exception to the principle that acts are presumed to be lawful is to "maintain a balance between two fundamental, but sometimes conflicting requirements with which a legal order must comply, namely stability of legal relations and respect for legality". See also ECJ, Case C-109/92 *P. Hill v. Commission* [1993] E.C.R. I-4267, para.85; ECJ, Case C-100/92 *P. Hill v. Commission* [1993] E.C.R. I-4359, para.30; ECJ, Case C-135/92 *P. Monicelli v. Commission* [1993] E.C.R. I-4339, para.37; ECJ, Case C-475/01 *Commission v. Greece* [2004] E.C.R. I-5723, para.16.

⁹ In view of the non-existence of the contested measure, the Court of Justice and the Court of First Instance may make an order for costs against the defendant in favour of the applicant while declaring that the application is inadmissible (ECJ Rules of Procedure, Art.59(3), second subpara.; CFI Rules of Procedure, Art.87(3), second subpara.).

reluctance,¹¹ affords only two instances in which a measure was actually declared non-existent (one of them being a case heard by the Court of First Instance, the judgment ultimately being set aside by the Court of Justice).¹²

2. The requirement for a binding act

Definition. It follows from Art.230 of the EC Treaty, which precludes the annulment of opinions and recommendations, that acts whose annulment is sought must be binding.¹³ Binding acts are the outcome of "the exercise, upon the conclusion of an internal procedure laid down by law, of a power provided for by law which is intended to produce legal effects of such a nature as to affect adversely the interests of the applicant by modifying its legal position".¹⁴ They must therefore have a legitimate legal basis, reflect the definitive position of a Community institution or body and be intended to have legal effects.

Silence on the part of an institution. When a party makes a request to a Community institution, mere silence on the part of that institution cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of Community law.¹⁵ So, where in a legislative procedure, the Council does not act upon measures proposed by the Commission, that failure cannot be regarded as giving rise to a challengeable act within the meaning of Art.230 of the EC Treaty.¹⁶

¹¹ ECJ, *Joined Cases 7/56 and 3-7/57 Algeria and Others v. Common Assembly* (1957) and 1958) E.C.R. 29, at 63-64; ECJ, *Joined Cases 15-33, 57-58, 57-106, 116-117, 121, 123 and 133-137/63 Schöck (née Kottner) and Others v. Council and Others* (1964) E.C.R. 171, para.33; ECJ, *Case 15/83 Consorzio Cooperative d'Albrizio v. Commission* (1987) E.C.R. 1003, para.10; ECJ, *Case 226/87 Commission v. Greece* (1988) E.C.R. 3521, para.16.

¹² ECJ, *Joined Cases 1 and 14/57 Société des Usines à Tabac de la Sarre v. High Authority* (1957 and 1958) E.C.R. 105, at 112-113. It must be noted, however, that that judgment was not so much concerned with the non-existence of the measure in question, but in fact with its nature (*Matijssen, "Nullité et inexécution des actes des institutions européennes", in Mélanges W.J. Ganshof van der Meersch* (Brussels, Bruylant, 1972), Vol. II, at 272-275); CFI, *Joined Cases T-79, T-84-85, T-89, T-91-92, T-94, T-95, T-98, T-101 and T-104/89 BASF and Others v. Commission* (1992) E.C.R. II-315, set aside by ECJ, *Case C-137/92 P Commission v. BASF and Others* (1994) E.C.R. I-2555 (case note by Le Mire (1994) A.J.D.A. 724).

¹³ *Société des Usines à Tabac de la Sarre v. High Authority*, cited in the preceding n., at 114; ECJ, *Case 113/75 Suinier v. Commission* (1980) E.C.R. 3295, paras 12-19. For examples of acts which have been held open to review, see Brevier and Huet, *Remedies in E.C. Law*, at 271 et seq. A report drawn up by OLAF pursuant to Art.9 of Regulation No 1073/1999 contains only recommendations and is therefore not a challengeable act within the meaning of Art.230 of the EC Treaty (CFI, *order of July 13, 2004*, *Case T-23/03 Comunidad Autónoma de Andalucía v. Commission*, not yet reported, paras 13-40).

¹⁴ ECJ, *Case 182/83 Guffey v. Commission* (1982) E.C.R. 799, para.18: "In Community law there is no general obligation on the administrative or judicial authorities to inform the addressees of measures of the judicial remedies available or of the conditions for bringing themselves thereon (ECJ, *order of March 5, 1999*, *Case C-154/98 P Guérin Automobiles v. Commission* (1999) E.C.R. I-1451, para.15) and hence a Community institution is not obliged to indicate whether one of its acts is binding."

¹⁵ ECJ, *Case C-123/83 P Commission v. Greenpeace* (2004) E.C.R. I-11643, para.45.

¹⁶ ECJ, *Case C-270/04 Commission v. Council* (2004) E.C.R. I-6643, para.24. In the event of an unlawful failure to act, an action for failure to act may be brought under Art.232 of the EC Treaty (see Chd, *infra*).

The position would be different if, under Community law, the Council were deemed, after the expiry of a specific period of time, to have taken an implied decision whose content is determined by Community law.¹⁷

Contract. Mere contractual acts of an institution cannot be regarded as acts exercising prerogatives of public authority and, as a result, such acts cannot be the subject of an action for annulment.¹⁸ An application for the annulment of a letter by which the Commission demanded a party to a contract with it to repay certain sums on account of improper performance of the contract will therefore be inadmissible.¹⁹ In the absence of an arbitration clause within the meaning of Art.238 of the EC Treaty,²⁰ the national courts have jurisdiction.

a. Content and not form determines whether the act is binding

Content. The binding nature of an act is inferred only from its content.²¹ The form in which an act is cast cannot alter its nature.²² Consequently, an act which does not satisfy the relevant requirements as to form does not cease to be binding as a result.²³ Thus, the Court of Justice held that it did not follow from non-compliance with the formal requirements prescribed by the High Authority "as a matter of obligation" for decisions within the

¹⁷ ECJ, *Case C-270/04 Commission v. Council* (2004) E.C.R. I-6649, para.22. See in this connection, ECJ, *C-75/01 P Eurochem and Others v. Council* (2003) E.C.R. I-10001, paras 54-65.

¹⁸ CFI, *order of October 3, 1997*, *Case T-186/96 Mutual Aid Administration Services v. Commission* (1997) E.C.R. II-1633, paras 50 and 51; CFI, *order of January 9, 2001*, *Case T-149/00 Isonova v. Commission* (2001) E.C.R. II-1, para.22; CFI, *order of November 25, 2003*, *Case T-35/01 LADA Consulting v. Commission* (2003) E.C.R. II-4573, paras 51-53; CFI, *order of May 10, 2004*, *Joined Cases T-314/03 and T-378/03 Murde-Gebin v. Commission* (2004) E.C.R. II-1421, paras 30-35.

¹⁹ CFI, *order of May 13, 2004*, *Joined Cases T-314/03 and T-378/03 Murde-Gebin v. Commission* (2004) E.C.R. II-1421.

²⁰ See Chd, *infra*.

²¹ For applications, see ECJ, *Case C-57/85 France v. Commission* (1997) E.C.R. I-3627, para.5; CFI, *Joined Cases T-25/97 and T-127/97 Cora-Cola v. Commission* (2000) E.C.R. II-1733; CFI, *Joined Cases T-22/99, T-32/99 and T-323/99 Martinez and Others v. European Parliament* (2001) E.C.R. II-2323, para.26; CFI, *Case T-113/00 Dupont Teige Fibre Luxembourg and Others v. Commission* (2002) E.C.R. II-3681, para.45; CFI, *order of July 9, 2003*, *Case T-216/01 Retirebank v. Commission*, not reported, para.45.

²² ECJ, *Case 190/74 Koninklijke Schuiten Hovig v. Council and Commission* (1977) E.C.R. 797, para.7; CFI, *order of April 28, 1994*, *Joined Cases T-452 and T-453/93 Pemas and Imperas v. Commission* (1994) E.C.R. II-429, para.29.

²³ ECJ, *Joined Cases 51 and 54/53 Lemmerz-Werke and Others v. High Authority* (1959) E.C.R. 239. Once the Court has established that a measure contained in a letter satisfies the substantive requirements of a binding act, the application cannot be declared inadmissible on that count; ECJ, *Joined Cases 75 and 29/59 Société Métallurgique de Knutange v. High Authority* (1960) E.C.R. I, at 7; ECJ, *Joined Cases 8-11/56 Clementier CBR Cementfabriek and Others v. Commission* (1957) E.C.R. 73, at 93-94; ECJ, *Case C-135/91 Finkbein v. Commission* (1994) E.C.R. I-2583, para. 21-26 (Commission letter to Sweden containing a binding act); ECJ, *Case C-249/01 Portugal v. Commission* (2004) E.C.R. I-10717, paras 35-45 (letter from a Commission official to the Portuguese authorities containing a binding act).

meaning of Art.14 of the ECSC Treaty that a measure should not be considered a decision if it did not comply with those formal requirements, provided that it satisfied the substantive requirements which decisions had to fulfil under the Treaty.²⁴ In addition, the Court of First Instance has held that an action will lie against an act made simply orally—by means of a statement by the spokesman for the Commissioner responsible for competition matters, also reported by the press agency *Agence Europe*—on the ground that its contents were not contested by the parties and had subsequently been confirmed by the Commission itself, and that hence the Court of First Instance was in a position to investigate whether it had produced legal effects.²⁵ However, an action for annulment will not lie against a "practice" of the Commission.²⁶ Silence on the part of an institution cannot produce legal effects unless this is expressly provided for in a provision of Community law.²⁷

- 7-011 Form. In the legal sphere of the EC Treaty, the class of measures against which an action for annulment will lie is not confined to the binding acts mentioned in Art.249 of that Treaty. The Court of Justice has held that to confine that class of measures in that way would conflict with the obligation under Art.220 of the EC Treaty to ensure observance of the law in the interpretation and application of the Treaty, and that an action for annulment, as a means of fulfilling that obligation, "must therefore be

²⁴ ECI, Joined Cases 23-24 and 52/63 *United Brands and Others v High Authority* [1963] E.C.R. 417, at 221, where the Court of Justice held, however, that these "fundamental conditions" were not met, namely "a decision must appear as a measure taken by the High Authority, acting as a body, intended to produce legal effects and constituting the culmination of a procedure within the High Authority, whereby the High Authority gives its final ruling in a form from which its nature can be identified", *ibid.*, at 224.

²⁵ CFI, Case T-393 *Al France v Commission* [1994] E.C.R. I-121, paras 55-60. In a staff case, the Court of Justice likewise accepted that a binding act could be communicated orally. (ECJ, Joined Cases 315/82 and 40/83 *Köhler v Court of Auditors* [1984] E.C.R. 641, paras 8-13). See also ECI (Judgment of July 7, 2003), Case C-28/03 *Le Pen v European Parliament*, not yet reported, para.47. But see CFI (order of July 9, 2003), Case T-178/02 *FOUUC and Others v Commission*, not reported, para.7, in which the Court of First Instance held that statements made by a Member of the Commission, Ms Loyola de Palacio, at a press conference did not have legal effects and therefore did not constitute an act which could be challenged before the Court.

²⁶ ECI, Case C-155/96 *Portugal v Commission* [1998] E.C.R. I-7319, paras 23-24 (in this case, Portugal brought an action for annulment of the "practice" of exceptional flexibility allegedly followed by the Commission in the administration of quantitative limits on the importation into the Community of textile products originating in various non-member countries. The Court of Justice held that the application was inadmissible in so far as it was brought against this practice).

²⁷ CFI, Joined Cases T-187/95, T-395/96 and T-121/96 *SG4 v Commission* [1999] E.C.R. II-2581, paras 28-29; CFI, Joined Cases T-190/95 and T-455/96 *Scania v Commission* [1999] E.C.R. I-3617, paras 31-35. Cf., however, ECI, Case C-19/93 *P Rendo and Others v Commission* [1995] E.C.R. I-3219, para.29, where the Court of Justice held that where the Commission gives a ruling on only a part of a complaint, that act may be regarded as a partial, implicit dismissal of the part of the complaint to which it has not responded. Silence on the part of an institution which is obliged to act may constitute the subject-matter of an action for failure to act (see Ch.6, *infra*).

available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".²⁸

In the judgment in the *AETR* case, the Court of Justice found that the Council's decision establishing a common negotiating position on the part of the Member States with a view to the conclusion of an international agreement fell within the competence of the Community and therefore laid down a course of action binding on the institutions as well as on the Member States. Accordingly, the Court held that the decision constituted a binding act and hence one against which an action would lie, even though it could not be brought within one of the classes of binding acts listed in Art.249 of the EC Treaty.²⁹

Council conclusions holding the excessive deficit procedure brought against France and Germany in abeyance have been held to be challengeable because they have legal effects, even though such conclusions are not provided for as a instrument in the EC Treaty.³⁰

In contrast, the Court of Justice did not find that a decision of the representatives of the Governments of the Member States meeting in the Council, made at the Commission's proposal, to grant special aid to Bangladesh was a binding act of the Council. The Court did not come to that view because of the name of the act in question,³¹ but based its assessment on the precise content of the act and the context in which it was adopted.³²

Refusal. An act of an institution amounting to a rejection must be appraised in the light of the nature of the request to which it constitutes a reply. The refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Art.230 of the EC Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision.³³ Accordingly, the fact that a letter is sent by a Community institution to its

²⁸ ECI, Case 22/70 *Commission v Council* (the *AETR* case) [1971] E.C.R. 253, para.42. See also ECI, Case 60/81 *IBM v Commission* [1981] E.C.R. 2639, para.8; ECI, Case C-25/94 *Commission v Council* [1995] E.C.R. I-2439, para.29; ECI, Case C-27/04 *Commission v Council* [2004] E.C.R. I-6549, para.44.

²⁹ An action will even lie against an act by which the Commission concludes an international agreement on behalf of the Community. ECI, Case C-37/91 *France v Commission* [1994] E.C.R. I-3541, paras 14-17.

³⁰ ECI, Case C-27/94 *Commission v Council* [2004] E.C.R. I-6549, para. 44-51.

³¹ Press release entitled "Aid for Bangladesh—Council conclusions" (reference 600451, Press 604).

³² ECI, Joined Cases C-31 and C-248/51 *European Parliament v Council and Commission* [1953] E.C.R. I-3385.

³³ ECI, Case 42/71 *Norwegian v Commission* [1972] E.C.R. 105, para.5; CFI (order of April 23, 2002), Case T-238/00 *IPSO and UFF v ECH* [2002] E.C.R. I-2257, para.45; CFI (order of July 13, 2004), Case T-29/03 *Comunidad Autónoma de Andalucía v Commission*, not yet reported, para.30. See also CFI, Case T-154/94 *CSF and CSME v Commission* [1996] E.C.R. I-1577, para.37 *et seq.* (the binding nature of a letter from the Commission was considered in the light of a letter from the applicants to which the Commission's letter replied).

addressee in response to a request from the addressee is not sufficient to make that letter a challengeable act within the meaning of Art. 230 of the EC Treaty.¹⁴

A Commission decision to shelve a complaint from an individual in the course of a procedure brought pursuant to Art. 225 of the EC Treaty does not have any legal effects as regards the complainant. This is because the act sought by the complainant, a decision to commence proceedings before the Court of Justice, is not *per se* a challengeable act.¹⁵ In any event, the complainant has no entitlement to a Commission decision, since that institution has a discretion whether or not to bring proceedings for failure to fulfil obligations.¹⁶

Legitimate legal basis. Lastly, an institution may adopt a binding act only in so far as it has a legitimate legal basis which empowers the institution to adopt a binding act.¹⁷ No such power may be presumed to exist in the absence of a specific Community provision.¹⁸ As a result of that requirement, the Court of Justice and the Court of First Instance often take the view that they have to consider whether the application for annulment is admissible together with the substance.¹⁹

¹⁴ CFI (order of April 9, 2003), Case T-250/02 *Pfizer and Others v Commission* [2003] E.C.R. II-1621, para.23; CFI (order of November 5, 2003), Case T-120/02 *Kromoply v Commission* [2003] E.C.R. II-4351, para.42; CFI (order of July 13, 2004), Case T-28/03 *Comunidad Autónoma de Andalucía v Commission*, not yet reported, para.29.

¹⁵ See ECI, Case C-19/93 *Commission v Germany* [1995] E.C.R. I-3449, para.47; see also CFI, Joined Cases T-377/00, T-379/00, T-383/00, T-363/01 and T-372/01 *Philip Morris International and Others v Commission* [2003] E.C.R. II-1, para.79: a Commission decision to bring legal proceedings—in the particular case before a US court—cannot be considered *per se* to be a decision which is open to challenge. See also 3-325, *supra*.

¹⁶ CFI (order of September 29, 1997), Case T-83/97 *Sotsha v Commission* [1997] E.C.R. II-1573, paras 32-40; CFI, Case T-248/00 *Parshelink Union of Cotton Growers and Exporters v Commission* [2003] E.C.R. II-4415, para.66; CFI (order of September 29, 2005), T-247/04 *Aleprofor and Edifo v Commission*, not yet reported, paras 43-61. Moreover, the complainant has no procedural rights on the basis of which it can require the Commission to inform it and give it a hearing.

¹⁷ CFI, Case T-113/89 *Nefarma v Commission* [1990] E.C.R. II-797, para.65 *et seq.* (see 7-127, *infra*).

¹⁸ ECI (order of September 30, 1987), Case 229/86 *Brother Industries v Commission* [1987] E.C.R. 3757; *Nefarma v Commission*, cited in the preceding *note*, para.69.

¹⁹ See ECI, Case C-231/02 *France v Commission* [2004] E.C.R. I-4755, para.25, where the Court of Justice did not rule on the admissibility of an action for annulment of the decision by which the Commission concluded an agreement with the United States of America on Guidelines on Regulatory Cooperation and Transparency since the "form of order sought by the French Republic must in any event be dismissed on the substance". The question whether the contested act has a legitimate legal basis coincides with the question whether the institution was empowered to adopt it: ECI, Joined Cases 338/85 and 317/86 *France v European Parliament* [1988] E.C.R. 4321, paras 13-15; ECI, Case C-266/83 *France v Commission* [1989] E.C.R. I-3571; ECI, Case C-333/86 *France v Commission* [1991] E.C.R. I-5115, with a case note by Van der Woude (1993) S.E.W. 522-527; ECI, Case C-325/91 *France v Commission* [1993] E.C.R. I-3283, paras 6-11.

b. The act is intended to produce legal effects

Legal effects. Acts of a Community institution are binding in so far as they produce legal effects.²⁰ This means that they must be "capable of affecting the interests of the applicant by bringing about a distinct change in his legal position"²¹ or adversely affect his legal position by restricting his rights.²² If this is not the case, such acts are not binding and an action will not lie against them.²³ A proposal will therefore, in principle, not constitute a challengeable act.²⁴

²⁰ ECI, Joined Cases 8-11/56 *Ciemenzeries CBR, Commendatarios and Others v Commission* [1956] E.C.R. 73, at 91; ECI, Case 21/73 *Commission v Council* (the AETR case) [1971] E.C.R. 263, para.39; ECI, Case C-312/92 *Spain v Commission* [1992] E.C.R. I-4177, paras 13-26, and ECI, Case C-327/91 *France v Commission* [1994] E.C.R. I-3641, paras 14-15 (the application for annulment of an act by which the Commission purported to conclude an international agreement "between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws" was declared inadmissible on the ground that, "as is apparent from its actual wording, the Agreement is intended to produce legal effects"); CFI, Case T-154/94 *CSF and CSAG v Commission* [1996] E.C.R. II-1377, para.37 *et seq.* (the binding nature of a letter from the Commission was considered in the light of a letter from the applicants to which the Commission's letter answered).

²¹ ECI, Case 60/81 *IBM v Commission* [1981] E.C.R. 2639, para.9; ECI, Case 33/85 *AKZO Chemie v Commission* [1985] E.C.R. 1965, para.16; CFI, Case T-112/89 *Alfa and Others v Commission* [2001] E.C.R. I-2439, paras 40-41, where the Commission decision to grant clearance for a period shorter than that of the whole agreement was held to be a challengeable act. See also ECI, Case C-242/00 *Germany v Commission* [2002] E.C.R. I-5693, paras 39-46: the decision by which the Commission approved a new definition of areas eligible for aid under the Community action programme "schemes for improving regional economic structures" in Germany did not constitute a challengeable act. The Court of Justice held that it followed, both from the content of the contested decision and from the context of its adoption, that that decision had neither the purpose nor the effect of rejecting implicitly a request by Germany concerning an additional list of regions.

²² For cases in which this was held not to be the case, see CFI, Case T-541/93 *Connaghan and Others v Council* [1997] E.C.R. II-563 and CFI, Case T-554/93 *Saint and Murray v Council and Commission* [1997] E.C.R. II-563.

²³ ECI (order of May 17, 1989), Case 157/88 *Italy v Commission* [1989] E.C.R. 1255, paras 22-23; ECI (order of October 4, 1991), Case C-117/91 *Barman v Commission* [1991] E.C.R. I-4837, para.14; ECI, Case C-476/93 *P. Alstom v Commission* [1995] E.C.R. I-4125, paras 30-31; ECI, Case C-53/94 *Netherlands v Council* [1995] E.C.R. I-2169, para.27; ECI, Case C-130/96 *United Kingdom v Commission* [1998] E.C.R. I-2265, para.29; CFI, Case T-113/89 *Nefarma v Commission* [1990] E.C.R. II-797, paras 66-99; CFI, Joined Cases T-10-12 and T-15/92 *Ciemenzeries CBR and Others v Commission* [1992] E.C.R. II-2667, para.28; CFI, Case T-277/94 *ATTEC v Commission* [1996] E.C.R. II-351, paras 49-56; CFI, Case T-271/94 *France v Commission* [1996] E.C.R. II-749, para.32; CFI (order of September 15, 1993), Case T-54/96 *Olafici Italiani and Fratelli Rubino Industrie Ceramiche v Commission* [1996] E.C.R. II-3377, paras 50-51: it appeared from the wording of a letter from the Commission to a Member State and from its legal context that it did not alter the applicants' legal position; CFI, Joined Cases T-377/00, T-379/00, T-383/00, T-363/01 and T-372/01 *Philip Morris International and Others v Commission* [2003] E.C.R. II-1, para.79: a Commission decision to bring proceedings—in that case before a US court—did not constitute a challengeable act.

²⁴ ECI (judgment of December 1, 2005), Case C-301/03 *Italy v Commission*, not yet reported, paras 21-24.

- 7-015 Operative part and recitals. Whether an act is capable of having adverse effect must be determined in the first place from its operative part.⁴¹ But the explanations and recitals contained in the act in support of the operative part⁴² as well as the context in which the act is adopted⁴³ may also mean that the act has adverse effect and is amenable to review. Where a measure against which an action for annulment has been brought comprises essentially distinct parts, only those parts of that measure which produce binding legal effects capable of bringing about a significant change in the applicant's legal situation can be challenged.⁴⁴

(1) *Confirmatory acts*

- 7-016 Act inadmissible in the absence of new legal effects. An application for annulment of an act which merely confirms an irrevocable act which was previously adopted is inadmissible.⁴⁵ The confirmatory measure does not

produce any new legal effects. If the Court of Justice or the Court of First Instance were to hold that an application for annulment of a confirmatory act was admissible despite the fact that the time-limit for bringing an action against the original act had run out, this would make it possible to circumvent that time-limit. An applicant who was out of time would then be able to reactivate the possibility of bringing proceedings by providing the adoption of a confirmatory act, thereby jeopardising legal certainty.⁴⁶ So long as the time-limit for bringing an action against the original act has not expired, an action for annulment may be brought against the original act, the confirmatory act or both concurrently.⁴⁷

An action against a confirmatory measure will be inadmissible only in so far as it is a genuinely confirmatory act.⁴⁸ Thus, from the point of view of procedural law, a measure will be regarded as confirmatory of an earlier measure only if the latter is or was amenable to appeal.⁴⁹ Furthermore, a new act which is of such a character as to alter the essential circumstances and conditions which governed the adoption of the original act causes the new act no longer to be confirmatory even though it has the same content as the original act. An action brought against such an ostensibly confirmatory act will be admissible.⁵⁰ On those grounds, an act (decision) by which an institution refuses to amend an earlier decision—in spite of the new facts presented by the applicant—may be the subject of an action for annulment.⁵¹

⁴¹ CFI, Case T-133/83 *NSV and NVB v. Commission* [1992] E.C.R. I-2181, para.31; CFI, Joined Cases T-125/97 and T-127/97 *Coca-Cola v. Commission* [2000] E.C.R. II-1725, paras 77-72.

⁴² This is because the operative part of an act is inextricably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption: ECJ, Case C-355/95 *P. TWD Teerwerke Deggendorf v. Commission* [1997] E.C.R. I-2549, para.21; CFI, Joined Cases T-213/95 and T-18/96 *SCK and FNK v. Commission* [1997] E.C.R. II-1739, para.104, and the case-law cited therein. Whether the operative part has adverse effect consequently extends to the recitals, which constitute the necessary support for the operative part. The assessments made in the recitals to an act can be subject to judicial review by the Community judicature to the extent that, as grounds of an act adversely affecting a person's interests, they constitute the essential basis for the operative part of that act: CFI, Case T-16/91 *Rendo and Others v. Commission* [1992] E.C.R. II-2417, paras 40-41 and 53; ECJ (order of January 28, 2004), Case C-184/02 *Netherlands v. Commission* [2004] E.C.R. I-1177, para.21.

⁴³ ECJ (judgment of December 1, 2005), Case C-391/03 *Italy v. Commission*, not yet reported, paras 23-24.

⁴⁴ CFI, Case T-154/97 *BP Chemicals v. Commission* [2000] E.C.R. I-3145, para.54. In this case, BP Chemicals contested a Commission decision whereby aid was approved for two groups of bio-fuels which differed in point of their composition, use and the market for which they were of interest. The applicant had shown that it had lower funds only in so far as it was a producer of synthetic ethyl alcohol, a product which competes with bio-ethanol, but not with regard to the measures for the other sector. The Court of First Instance therefore held that the applicants had not suffered a significant change in their legal situation as a result of the decision approving aid for cereals and declared the application inadmissible in that regard. See also CFI (judgment of July 4, 2004), Case T-56/00 *Delphine v. Commission*, not yet reported, paras 134-135.

⁴⁵ ECJ, Case 56/72 *Cosch v. Commission* [1975] E.C.R. 181, para.15; ECJ, Case 175 *Wack v. Commission* [1976] E.C.R. 1017, para.7; ECJ, Case 24/78 *Mérea v. Commission* [1977] E.C.R. 1375, para.4; ECJ, Joined Cases 155 and 245/85 *Irish Council v. Commission* [1985] E.C.R. 5473, paras 1-15; ECJ (order of November 11, 1990), Case C-125/90 *Infortec v. Commission* [1990] E.C.R. I-4255, para.10; ECJ, Case C-159/92 *Foyer Guiliard du Sart Tilman v. Commission* [1993] E.C.R. I-2657, paras 20-24; ECJ, Case C-482/93 *P. Zúñiga Solís and Others v. Commission* [1996] E.C.R. I-1, para.14; CFI, Case T-514/93 *Cebrecor and Others v. Commission* [1995] E.C.R. I-621, para.44; CFI, Case T-275/94 *Groupement des Commerces Bancaires "CB" v. Commission* [1995] E.C.R. II-2169, para.27; CFI (order of March 16, 1996), Case T-235/95 *Geldstein v. Commission* [1996] E.C.R. II-523, paras 36-48; CFI

(order of June 15, 1993), Case T-116/93 *Cemenar v. Commission* [1993] E.C.R. II-3261, paras 19-25; CFI, Case T-135/95 *Wasserleiding Maatschappij "Noord-West Brabant" v. Commission* [1998] E.C.R. II-3713, paras 85-141 (a complaint made against State aid which the Commission had already declared to be compatible with the common market does not, where the decision has become definitive, cause time to start running afresh in order to bring an action for annulment of the decision by which the Commission rejects the complaint while confirming its earlier decision); CFI (order of July 9, 2002), Case T-127/01 *Ripe & Meaux v. European Parliament* [2002] E.C.R. II-3005; CFI (order of February 23, 2005), Case T-475/04 *Campanile v. Commission*, not reported, paras 21-22.

⁴⁶ ECJ, Joined Cases 165 and 220/76 *Irish Council v. Commission* [1988] E.C.R. 6473, para.16; ECJ, Case C-195/92 *Foyer Guiliard du Sart Tilman v. Commission* [1993] E.C.R. I-2657, paras 23-24; CFI, Joined Cases T-221/96 and T-152/96 *Manuel Aid Administration Services v. Commission* [1997] E.C.R. II-1355, para.50.

⁴⁷ ECJ, Joined Cases 153 and 194/87 *Mauritzen and European Public Service Union v. Court of Auditors* [1989] E.C.R. 1045, para.16.

⁴⁸ ECJ, Case 5/81 *Wittman v. Court of Auditors* [1982] E.C.R. 3301, para.15; CFI, Case T-321/01 *Internationale Hefbräner v. Commission* [2003] E.C.R. II-3225, para.31.

⁴⁹ ECJ, Joined Cases 175 & 294/87 *Mauritzen and European Public Service Union v. Court of Auditors* [1989] E.C.R. 1045, para.23.

⁵⁰ ECJ, Joined Cases 42 and 45/59 *SNUPAT v. High Authority* [1961] E.C.R. 53, at 75-76; CFI, Case T-311/94 *IPA v. Commission* [1997] E.C.R. II-1655, para.36; CFI, Case T-365/00 *AUCS v. European Parliament* [2002] E.C.R. II-2713, paras 38-40.

⁵¹ ECJ, Case C-514/99 *France v. Commission* [2000] E.C.R. I-4705, para.45, in which the Court of Justice declared an action brought by France inadmissible on the ground that the Commission had not taken any decision on the application to amend a former decision. France argued that the Commission had refused to amend or withdraw an earlier decision. The Court of Justice suggested that the applicant could have brought an action for failure to

(2) Resolutions

- 7-017 Act inadmissible if a mere declaration of intent. Resolutions often express a political declaration of intent which embodies no binding commitments and therefore produces no legal effects. Accordingly, an action will not lie against a resolution,⁵⁵ unless it appears from its content that it affects the legal position of a Member State or a person.⁵⁶

(3) Internal instructions and guidelines

- 7-018 No legal effects vis-à-vis third parties. Internal instructions are usually simply guidelines for the adoption of acts of institutions. Generally, they do not produce legal effects.⁵⁷ Consequently, an internal instruction of the Commission indicating the manner in which it intended to exercise its provisional power to compile a list of candidates for service contracts concluded within the framework of the Lemé Convention was not an act producing legal effects. It was not the line of conduct set out in the internal instruction which produced legal effects and reflected the Commission's definitive position, but the drawing up of the list itself.⁵⁸

see. See also CFI, Case T-285/98 *Inpesco v Commission* [2001] E.C.R. II-157, paras 45-51, and CFI (order of April 29, 2004), Case T-334/02 *SOL Cordon v Commission* [2004] E.C.R. II-1263, paras 51-52, in which the Court of First Instance emphasised that the confirmatory nature of a decision cannot be assessed solely in the light of its content as compared with the previous decision which it purportedly confirms. The confirmatory nature of the decision must also be assessed having regard to the application to which the decision constitutes an answer. If the application in question is based on significant new facts of which neither the applicant nor the administration was aware when the earlier decision was taken and which are liable to bring about a significant change in the applicant's position which was the starting point for the original—now definitive—decision, the new decision can in that respect not be regarded as merely confirmatory, since it makes a determination on the new facts and so contains a new factor as compared with the earlier decision. See also ECJ (judgment of November 14, 2003), *Joined Cases C-254/03, C-254/03 and C-431/03 Italy v Commission*, not yet reported, paras 34-37; ECJ (judgment of December 1, 2005), *Case C-46/03 United Kingdom v Commission*, not yet reported, paras 21-25.

⁵⁵ ECJ, *Joined Cases 93 and 94/83 Commission v Luxembourg and Belgium* [1984] E.C.R. 625, at 631. On that judgment, given pursuant to Art.226 of the EC Treaty, the Court of Justice held that a Council resolution was not a binding measure; ECJ, Case 9/73 *Schäfer* [1973] E.C.R. 1135, para.40 (in that judgment, given in response to a request for a preliminary ruling, the Court of Justice held that the resolution in question was "primarily an expression of the policy favoured by the Council" and Government Representatives of the Member States" and could not, "by reason of its content, create legal consequences of which parties might avail themselves in court").

⁵⁶ ECJ, Case 108/83 *Luxembourg v European Parliament* [1984] E.C.R. 1545, paras 19-23; ECJ, *Joined Cases C-114/83 and C-39/89 Luxembourg v European Parliament* [1991] E.C.R. I-5443.

⁵⁷ See, e.g., ECJ, Case C-233/02 *France v Commission* [2004] E.C.R. I-2558.

⁵⁸ ECJ, Case 114/85 *United Kingdom v Commission* [1986] E.C.R. 2859; ECJ, Case C-443/97 *Spain v Commission* [2000] E.C.R. I-2415, para.34.

Even where internal instructions do have legal effects, they must create rights or obligations outside the institution concerned before third parties may bring an admissible application for their annulment.⁵⁹

- 7-019 Binding on the institution concerned. Where the Commission notifies guidelines for the exercise of its discretion (e.g. for the assessment of State aid under Art.87(3) of the EC Treaty or the determination of a fine on account of infringement of Art.81 and/or Art.82 of the EC Treaty), this entails a self-imposed limitation of that discretion in so far as it must comply with the indicative rules which it has itself laid down.⁶⁰ Such guidelines may be relied upon as against the Commission. In an action for annulment (brought, for instance, against a decision relating to State aid or a decision based on Art.81 and/or Art.82 of the EC Treaty), parties may therefore argue before the Community Court that the Commission has wrongly failed to apply the guidelines.⁶¹

(4) Preparatory acts and measures laying down a definitive position

- 7-020 Definitive statement of position. An action will lie against an act only if it definitively lays down the position of the institution which adopted it.⁶²

- 7-021 Measure concluding an internal procedure. Some acts of institutions are adopted by means of a procedure comprising different stages. Only the measure which concludes the procedure expresses the definitive position of the institution. Measures paving the way for the final measure do not

⁵⁹ For examples of cases in which the internal instruction produced only internal effects, see ECJ, Case 10/58 *Pharmia-Rhône v High Authority* [1955] E.C.R. 75; ECJ, Case 190/84 *Les Verts v European Parliament* [1983] E.C.R. 1017. For a case in which the internal instruction had effects outside the institution and could therefore be challenged before the Court of Justice, see Case C-359/83 *France v Commission* [1990] E.C.R. I-3571.

⁶⁰ For guidelines in connection with State aid, see CFI, Case T-382/94 *AUFESS and AUF v Commission* [1995] E.C.R. II-2159, para.57; CFI, Case T-214/95 *Vianini Grewat v Commission* [1995] E.C.R. II-717, para.59; CFI (judgment of December 1, 2004), Case T-27/02 *Kronfrance v Commission*, not yet reported, para.75. For guidelines with regard to the amount of fines which may be imposed on account of infringement of Arts 51 and 82 of the EC Treaty, see CFI (judgment of July 8, 2004), Case T-44/00 *Mannemanneschwermetalle v Commission*, not yet reported, paras 212 and 232.

⁶¹ ECJ, Case T-35/93 *Keller and Keller Meccanica v Commission* [2002] E.C.R. II-261, para.77; CFI (judgment of December 1, 2004), Case T-27/02 *Kronfrance v Commission*, not yet reported, para.79.

⁶² ECJ, *Joined Cases 23-24 and 25/53 Unies Emile Heurys and Others v High Authority* [1953] E.C.R. 117, at 225-224; ECJ, Case 40/81 *IBM v Commission* [1981] E.C.R. 2635, para.10. For an instance in which the contested act did not definitively lay down a position and therefore had no legal effects, see ECJ (order of June 22, 1993), Case C-64/93 *Denschel and Others v Commission* [1993] E.C.R. I-3595, paras 13-14. It was possible to infer from additional questions put by the Commission with regard to a request for access to documents that the contested act was not a definitive decision and therefore produced no legal effects; CFI, Case T-123/99 *JTY Corporation v Commission* [2000] E.C.R. II-3265, para.25. See also CFI (order of June 2, 2004), Case T-123/01 *Pfizer v Commission* [2004] E.C.R. II-2631, paras 25-27.

determine a definitive position. Consequently, preparatory acts may not be the subject of an action for annulment.⁶⁶ This is because an action brought against such a measure would make it necessary for the Court of Justice or the Court of First Instance to "arrive at a decision on questions on which the [institution] has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial."⁶⁷

- 7-021 Irregularities in preparatory acts. Where an action for annulment is brought against the measure concluding the procedure, any irregularities in the preparatory acts may be raised in challenging the final act.⁶⁸

B. THE CONCEPT OF A REVIEWABLE ACT: SOME FIELDS OF APPLICATION

1. Enforcement of Arts 81 and 82 of the EC Treaty

- 7-022 Regulatory framework. The processing of complaints relating to, inquiries into and the prosecution of infringements of Arts 81 and 82 of the EC Treaty are governed by Regulation No. 1/2003⁶⁹ and Regulation No. 773/2004,⁷⁰ which determine an administrative procedure in which the Commission and/or the national competition authorities adopt various acts. The acts adopted by the national authorities may be challenged only before the courts of the Member State concerned, which may—and in some cases must—refer a question for a preliminary ruling to the Court of Justice. Acts adopted by the Commission on the basis of Regulations Nos 1/2003 and 773/2004 can be challenged before the Court of First Instance,⁷¹ provided that they produce binding legal effects.

⁶⁶ See, for instance, ECJ, Case 344/83 *Boussac v Commission* [1989] E.C.R. I-303, para.23; ECJ, Case C-147/95 *Netherlands v Commission* [2000] E.C.R. I-4721, para.35; CFI, Case T-54/89 *Adams v Commission* [1990] E.C.R. II-367, para.42; CFI, Joined Cases T-17/90, T-25/91 and T-17/92 *Comara Alupia and Others v Commission* [1993] E.C.R. II-541, para.35; CFI, Case T-25/95 *Satellimages TVS v Commission* [2002] E.C.R. II-1425, para.32-42; CFI, Case T-47/01 *Co-Frutos v Commission* [2003] E.C.R. II-4441, para.28-33 (in connection with access to documents).

⁶⁷ ECJ, Case 63/81 *ESM v Commission* [1981] E.C.R. 2635, para.26.

⁶⁸ ECJ, Joined Cases 12 and 29/68 *Loi v Commission* [1968] E.C.R. 107, para.118; CFI, Joined Cases T-10-02 and T-15/02 *Cominterco CBR and Others v Commission* [1997] E.C.R. II-2667; CFI (order of June 2, 2004), Case T-121/03 *Pfizer v Commission* [2004] E.C.R. II-1613, para.24. The unlawful act in the preparatory phase may even affect an institution other than the one against which the action for annulment is brought (ECJ, Case C-445/00 *Alumina v Council* [2003] E.C.R. I-3749, para.31-35; in an action for annulment of a Council regulation, it was argued that the Commission proposal was unlawful).

⁶⁹ Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) O.J. L1/1.

⁷⁰ Commission Regulation (EC) No 773/2004 of April 7, 2004 relating to the conduct of proceedings by the Commission pursuant to Arts 81 and 82 of the EC Treaty (2004) O.J. L123/18.

⁷¹ In the unlikely event that a Community institution would challenge such act, proceedings would have to be brought before the Court of Justice (see 1-054, *supra*).

Until April 30, 2004, Regulation No 17⁷² and Regulation No 2842/93⁷³ were in force. It may be assumed that the case-law which has been built up with regard to acts adopted by the Commission on the basis of those regulations will apply *mutatis mutandis* to similar acts adopted on the basis of the new Regulations Nos 1/2003 and 773/2004.

Requests for information. Whenever the Commission becomes aware that an infringement of Art.81 and/or Art.82 of the EC Treaty may have been committed, it may decide to address a request for information to the undertakings or associations of undertakings concerned in order to obtain "all necessary information".⁷⁴ A distinction has to be drawn between "simple requests" for information on the basis of Art.18(2) of Regulation No 1/2003 and requests "by decision" on the basis of Art.18(3) of that regulation. The addressees of a simple request are free to reply or not to reply to the questions put to them. Such requests for information do not bring about a distinct change in the legal position of the undertakings and associations concerned and cannot be challenged before the Court of First Instance.⁷⁵ By contrast, the addressees of a Commission decision based on Art.18(3) of Regulation No 1/2003 requiring them to supply information are obliged, on pain of penalties, to comply with such a request.⁷⁶ Such a decision is a reviewable act.⁷⁷ If the party to which such a decision is addressed wishes to challenge its legality, it will have to bring its action within the two-month time-limit imposed by the fifth para. of Art.230 of the EC Treaty. Indeed, an undertaking or association concerned which has not sought the annulment of such a decision within this two-month time-limit will be foreclosed from pleading the illegality of the decision requiring information in an action for annulment brought against the Commission decision finding an infringement.⁷⁸

⁷² Regulation No 17: First Regulation implementing Arts 85 and 86 (now Arts 81 and 82) of the Treaty, (1959-1961) O.J. English Spec. Ed. I, 8.

⁷³ Commission Regulation (EC) No 2842/93 of December 22, 1993 on the hearing of parties in certain proceedings under Arts 85 and 86 (now Arts 81 and 82) of the EC Treaty (1996) O.J. L254/19. That regulation replaced the earlier Regulation No 39/83 ((1983-1984) O.J. English Spec. Ed. I, 47).

⁷⁴ Regulation No 1/2003, Art.18(2).

⁷⁵ Regulation No 1/2003, Arts 18(1) and 23(1)(a). A penalty may only be imposed where, having agreed to reply, the undertaking or association concerned provides inaccurate information.

⁷⁶ Regulation No 1/2003, Arts 18(3) and 23(1)(b). The Commission may not, however, compel an undertaking or an association to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove (ECJ, Case 374/87 *Orkem v Commission* [1988] E.C.R. I-3253, para.35; CFI, Case T-34/93 *Société Générale v Commission* [1995] E.C.R. II-545, para.74; CFI, Case T-12/95 *Mannesmannröhren-Werke v Commission* [2001] E.C.R. II-725, para.67).

⁷⁷ Under Art.18(3) of Regulation No. 1/2003 the Commission is even obliged to indicate in a request by decision the right of the parties concerned to have the decision reviewed by the Community Courts. See also ECJ, Case 374/87 *Orkem v Commission* [1988] E.C.R. 3253.

⁷⁸ CFI, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-315/94, T-316/94, T-317/94, T-318/94, T-319/94 and T-320/94 *Limburgse Veei. Maatschappij and Others v Commission* [1995] E.C.R. II-571, para.441 and 442.

The decision by which, in a first stage, the Commission, acting on the basis of Art.24(1) of Regulation No 1/2003,³² fixes a deadline by which an undertaking which has provided what the Commission considers to be an incomplete response to a decision requesting information³³ is required to give a full response and at the same time imposes a penalty payment is, however, not a challengeable act as regards the imposition of the penalty payment. This is because such a decision does not produce binding legal effects in so far as it only fixes a periodical penalty in terms of a specific amount for each day by which the deadline is exceeded. It is not enforceable because it does not fix the total amount of the penalty payable. The total amount is fixed in a second stage by a new decision when it is found that the undertaking has not provided the information in good time.³⁴

Inspections. Art.20 of Regulation No 1/2003 draws a distinction between two forms of inspections, namely inspections carried out upon production of an authorisation in writing³⁵ ("inspections under authorisation") and inspections formally ordered by a decision of the Commission.³⁶ The former type of inspection may be carried out only on the premises, land and means of transport of the undertakings and associations concerned and only if the undertakings and associations concerned are prepared to cooperate. No fine may be imposed where an undertaking or association of undertakings refuses to submit to an inspection under authorisation. Where the Commission wishes to search other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations concerned or where it expects the parties concerned not to adopt a cooperative attitude, it will order an inspection by a formal decision.³⁷ It should be stressed that the Commission may carry out such an inspection without first attempting an inspection by authorisation.³⁸ There is a legal obligation to submit to an inspection ordered by a decision.

Given its binding character, a decision ordering an inspection can be the subject of an action for annulment brought under Art.230 of the EC Treaty.³⁹ However, all persons subject to Community law are under an

³² Formerly Art.16(1) of Regulation No 17.

³³ Regulation No 1/2003, Art.18(3).

³⁴ Cf. (order of June 24, 1993), Case T-595/97 *Dabigne v Commission* [1993] E.C.R. II-2381, para. 23-24.

³⁵ Regulation No 1/2003, Art.20(1).

³⁶ Regulation No 1/2003, Arts 22(4) and 21(1).

³⁷ *Ibid.*

³⁸ ECJ, Case 134/73 *National Panasonic v Commission* [1973] E.C.R. 2023, para. 10-11.

³⁹ Art.20(4) of Regulation No 1/2003 requires the Commission to specify in such a decision that the right exists to have it reviewed by the Court of Justice/Court of First Instance. It should be noted, however, that reports drawn up by the Commission's officials during an investigation into an undertaking and containing a summary of what was said by that undertaking's representatives in the course of the investigation, are not actionable measures: CFI (order of June 9, 1997), Case T-597/97 *Arcochem v Commission* [1997] E.C.R. II-533, para. 15-23.

obligation to acknowledge that measures adopted by the institutions are fully effective as long as they have not been declared invalid by the Court of Justice or the Court of First Instance and to recognise their enforceability unless one of those courts has decided to suspend the legal effects of the said measures.⁴⁰ Practically speaking, this means that an undertaking or association of undertakings will not be in a position to prevent an inspection ordered by a decision of the Commission from taking place. The party concerned will be able only to seek judicial redress before the Court of First Instance after the event by lodging an action for annulment against the decision ordering an inspection.⁴¹ If such action were to be lodged within the two-month time limit laid down by the fifth para. of Art.230 of the EC Treaty and the Court of First Instance were to find that the inspection had been unlawful, the evidence obtained in the course of such inspection would also be unlawful. The Commission could then no longer find an infringement on the basis of that evidence.⁴²

An addressee of a decision ordering an inspection who does not seek the annulment of that decision within the two-month time-limit laid down by the fifth para. of Art.230 of the EC Treaty will be foreclosed from pleading the illegality of the decision (as well as of the evidence obtained in the course of such inspection) in any subsequent action for annulment of the Commission decision finding an infringement of Art.31(1) and/or Art.82 of the EC Treaty.⁴³ Where, however, the applicant does not contest the legality of the decision ordering an inspection but only criticises the way in which that decision was implemented, such arguments may still be raised in the action for annulment brought against the final decision of the Commission finding the infringement.⁴⁴

Before an inspection takes place, a national judicial authority will generally be asked to carry out a limited review of the Commission decision

⁴⁰ ECJ, Joined Cases 46/87 and 127/83 *Hoechst v Commission* [1988] E.C.R. I-2839, para.64.

⁴¹ There remains the theoretical possibility of bringing an application for interim relief. However, it would be hard to prove irreparable damage as a result of an inspection. See CFI (order of the President of October 30, 2003), Joined Cases T-125/03 *R and T-353/03 R Alcan Nobel Chemical and Others v Commission* [2003] E.C.R. II-4771.

⁴² Opinion of Advocate General J.-P. Warner in Case 134/73 *National Panasonic v Commission* [1973] E.C.R. 2023, at 2025: "[The fact that the remedy can only be invoked] after the investigation has taken place, [...] does not make it an ineffective remedy. The Court may [...] if it holds the decision to have been unlawful, order the Commission to return to the undertaking any copies of documents obtained as a result of the investigation and to refrain from using any information so obtained". See also ECJ, Case 45/87 *R Hoechst v Commission* [1987] E.C.R. 4367, para.17.

⁴³ CFI, Joined Cases T-305/94, T-306/94, T-307/94, T-311/94, T-312/94, T-313/94, T-314/94, T-315/94 and T-316/94 *Limburgse Vrij Maatschappij and Others v Commission* [1999] E.C.R. II-931, paras 428-432.

⁴⁴ ECJ, Case 85/87 *Dow Benelux v Commission* [1989] E.C.R. I-1137, para. 49; CFI, Joined Cases T-205/94, T-206/94, T-207/94, T-211/94, T-212/94, T-213/94, T-214/94, T-215/94 and T-216/94 *Limburgse Vrij Maatschappij and Others v Commission* [1998] E.C.R. II-531, para. 413.

ordering the inspection.⁷¹ This will be the case where the Commission requests the assistance of the police in order to compel the undertaking or association concerned to submit to an inspection or where the Commission seeks to conduct an inspection in the homes of members of staff of the undertaking or association concerned. The national judicial authority will check whether the Commission decision is authentic. It will see to it that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection. In reviewing the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular of the grounds the Commission has for suspecting an infringement of Arts 81 and 82 of the EC Treaty, as well as of the seriousness of the suspected infringement and the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection or demand that it be provided with the information in the Commission's file. Only the Court of First Instance and the Court of Justice can review the legality of the Commission's decision.⁷²

7-226 Initiation of infringement proceedings and statement of objections. If the Commission considers, on the basis of the information obtained during its investigation, that certain undertakings and/or associations of undertakings have infringed the EC competition rules, it may open a formal procedure against the parties concerned pursuant to Art.2 of Regulation No 773/2004. Shortly after the initiation of proceedings, it will send a statement of objections to these parties pursuant to Art.10 of Regulation No 773/2004. The initiation of an administrative procedure⁷³ and the communication of a statement of objections⁷⁴ are not acts against which an application for annulment may be brought. This is because they are preparatory acts. Any irregularities in such acts may be raised in an action brought against the decision concluding the procedure.

Accordingly, in *Woodpulp*, the Court of Justice annulled a number of paragraphs of the operative part of the Commission's final decision after finding that the infringements found in those paragraphs had not been

⁷¹ Regulation No 1/2003, Art.20(7) and (8) and Art.21(3).

⁷² *Ibid.* See in particular ECJ, Case C-94/00 *Requejo Feltre* [2002] E.C.R. I-9011.

⁷³ Regulation No 773/2004, Art.2. The initiation of the administrative procedure requires "an authoritative act of the Commission, evidencing its intention of taking a decision [on the matter]" (ECJ, Case 43/72 *Fraserie de Rœux* [1973] E.C.R. 77, para.15). The undertaking addressed is aware of the fact that an administrative procedure is under way against it and knows its procedural position. Such notification does not constitute a definitive adoption of a position.

⁷⁴ Regulation No 773/2004, Art.10. See in this connection ECJ, Case 84/83 *IBM v Commission* [1983] E.C.R. 1637, para.21. The Commission is obliged to apprise the undertaking charged with an infringement of Art.81 or Art.82 of the EC Treaty of the facts and arguments underlying its charges. That statement secures the right of the undertaking concerned to a fair hearing.

clearly set out in the statement of objections. The parties concerned had therefore not been given an opportunity to defend themselves effectively during the administrative procedure against the objections raised against them.⁷⁵

Notice pursuant to Art.27(4) of Regulation No 1/2003. It may be assumed that a Commission notice pursuant to Art.27(4) of Regulation No 1/2003 in which the Commission informs interested third parties either of its intention to adopt a decision making the commitments offered by the undertakings concerned binding on them or of its intention to adopt a decision finding the inapplicability of Art.81 of the EC Treaty to an agreement, a decision of an association of undertakings or a concerted practice, and invites third parties to submit their observations within a fixed time-limit, does not constitute a challengeable act.⁷⁶ The reason is that such notice is a preparatory act in a procedure which will normally result in the adoption of a challengeable act based on Art.9 or Art.10 of Regulation No 1/2003.

Commission's refusal to give access to its file to the parties under investigation. In the course of the administrative procedure the Commission has to give the parties under investigation access to its file. The Commission's obligation extends to its entire file, except for its internal

⁷⁵ ECJ, Joined Cases C-55/85, C-104/85, C-114/85, C-115/85, C-117/85 and C-125/85, *C-129/85 Akzochem and Others v Commission* [1991] E.C.R. I-1389, paras 52 and 54; see also CFI, Joined Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires "CB" and Europay International v Commission* [1994] E.C.R. II-45, para. 49-51.

⁷⁶ See, by analogy, CFI, Case T-44/91 *Ladbroke Racing v Commission* [1995] E.C.R. II-115, para.72, with regard to the notice given by the Commission pursuant to Art.15(3) of Regulation No 17 (notice indicating that the Commission intended to adopt a favourable position with regard to a notified agreement under Regulation No 1/2003 agreements can no longer be notified to the Commission with a view to obtaining an exemption under Art.81(2) of the EC Treaty). By contrast, a communication pursuant to Art.15(6) of Regulation No 17 by which the Commission withdrew exemption from a fine from an undertaking which had notified an agreement was held to be an act against which an annulment action could be brought. The Commission took that decision where, after conducting a preliminary examination, it considered that the agreement notified was prohibited by Art.81 of the EC Treaty and that a declaration under Art.81(3) that the first para. of that article was inapplicable was unjustified. The Court of Justice ruled that if such a "preliminary measure" were excluded from all (direct) judicial review, there would be no alternative for the undertakings concerned than to "take the risk of a serious threat of a fine or to terminate against their own interests an agreement which, if proceedings had been instituted, might have had a chance of escaping the prohibition" (ECJ, Joined Cases 8-11/86 *Consten and CIA v Commission* and *Grain v Commission* [1967] E.C.R. 75 at 92-93; CFI, Case T-1991 *Vioxy v Commission* [1992] E.C.R. II-415, para.9; CFI, Joined Cases T-213/95 and T-16/96 *SKF and FNK v Commission* [1997] E.C.R. I-1759, para.66). That dilemma for the undertakings concerned generally led to the termination of the notified agreement, with the result that the Commission often did not have to take a final decision in order to impose its views on the merits. If no action had been possible against a communication pursuant to Art.15(6) of Regulation No 17, the Commission could have effectively avoided any judicial review of its action.

documents and documents containing business secrets or other confidential information.¹² A refusal on the part of the Commission to accede to a request of a party under investigation to disclose some documents in its file does not constitute a challengeable act.¹³ The possible illegality of such refusal may be raised in an application brought against the final decision of the Commission finding an infringement (and possibly imposing fines).

If a party demonstrates in the context of an action for annulment brought against the final Commission decision that it was not in a position to express its views with regard to one or more incriminatory documents in the course of the administrative procedure, the Court of First Instance will find that there has been a violation of the rights of the defence. The incriminatory documents will be excluded as evidence. Far from leading inevitably to the annulment of the decision in its entirety, the exclusion of such documents will lead to the annulment in whole or in part of the decision only in so far as the corresponding objection raised by the Commission can only be proved by reference to them.¹⁴ In other words, if the Court of First Instance considers that the infringement has been sufficiently made out on the basis of other incriminatory documents which were made available to the applicant in the course of the administrative procedure and in respect of which the applicant was able to express its views, the violation of the rights of the defence will not affect the legality of the decision.¹⁵

¹² This rule was first developed in the case-law. CFI, Case T-739 *Horreuter Chemicals v Commission* [1991] E.C.R. II-1711, para.54; CFI, Case T-6589 *BPE Refractor and Bredel Gyro v Commission* [1993] E.C.R. II-339, para.25; CFI, *Joined Cases T-15/95, T-25/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-40/95, T-41/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-47/95, T-48/95, T-49/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-66/95, T-67/95, T-68/95, T-69/95, T-70/95, T-71/95, T-72/95, T-73/95, T-74/95, T-75/95, T-76/95, T-77/95, T-78/95, T-79/95, T-80/95, T-81/95, T-82/95, T-83/95, T-84/95, T-85/95, T-86/95, T-87/95, T-88/95, T-89/95, T-90/95, T-91/95, T-92/95, T-93/95, T-94/95, T-95/95, T-96/95, T-97/95, T-98/95, T-99/95, T-100/95, T-101/95, T-102/95, T-103/95, T-104/95, T-105/95, T-106/95, T-107/95, T-108/95, T-109/95, T-110/95, T-111/95, T-112/95, T-113/95, T-114/95, T-115/95, T-116/95, T-117/95, T-118/95, T-119/95, T-120/95, T-121/95, T-122/95, T-123/95, T-124/95, T-125/95, T-126/95, T-127/95, T-128/95, T-129/95, T-130/95, T-131/95, T-132/95, T-133/95, T-134/95, T-135/95, T-136/95, T-137/95, T-138/95, T-139/95, T-140/95, T-141/95, T-142/95, T-143/95, T-144/95, T-145/95, T-146/95, T-147/95, T-148/95, T-149/95, T-150/95, T-151/95, T-152/95, T-153/95, T-154/95, T-155/95, T-156/95, T-157/95, T-158/95, T-159/95, T-160/95, T-161/95, T-162/95, T-163/95, T-164/95, T-165/95, T-166/95, T-167/95, T-168/95, T-169/95, T-170/95, T-171/95, T-172/95, T-173/95, T-174/95, T-175/95, T-176/95, T-177/95, T-178/95, T-179/95, T-180/95, T-181/95, T-182/95, T-183/95, T-184/95, T-185/95, T-186/95, T-187/95, T-188/95, T-189/95, T-190/95, T-191/95, T-192/95, T-193/95, T-194/95, T-195/95, T-196/95, T-197/95, T-198/95, T-199/95, T-200/95, T-201/95, T-202/95, T-203/95, T-204/95, T-205/95, T-206/95, T-207/95, T-208/95, T-209/95, T-210/95, T-211/95, T-212/95, T-213/95, T-214/95, T-215/95, T-216/95, T-217/95, T-218/95, T-219/95, T-220/95, T-221/95, T-222/95, T-223/95, T-224/95, T-225/95, T-226/95, T-227/95, T-228/95, T-229/95, T-230/95, T-231/95, T-232/95, T-233/95, T-234/95, T-235/95, T-236/95, T-237/95, T-238/95, T-239/95, T-240/95, T-241/95, T-242/95, T-243/95, T-244/95, T-245/95, T-246/95, T-247/95, T-248/95, T-249/95, T-250/95, T-251/95, T-252/95, T-253/95, T-254/95, T-255/95, T-256/95, T-257/95, T-258/95, T-259/95, T-260/95, T-261/95, T-262/95, T-263/95, T-264/95, T-265/95, T-266/95, T-267/95, T-268/95, T-269/95, T-270/95, T-271/95, T-272/95, T-273/95, T-274/95, T-275/95, T-276/95, T-277/95, T-278/95, T-279/95, T-280/95, T-281/95, T-282/95, T-283/95, T-284/95, T-285/95, T-286/95, T-287/95, T-288/95, T-289/95, T-290/95, T-291/95, T-292/95, T-293/95, T-294/95, T-295/95, T-296/95, T-297/95, T-298/95, T-299/95, T-300/95, T-301/95, T-302/95, T-303/95, T-304/95, T-305/95, T-306/95, T-307/95, T-308/95, T-309/95, T-310/95, T-311/95, T-312/95, T-313/95, T-314/95, T-315/95, T-316/95, T-317/95, T-318/95, T-319/95, T-320/95, T-321/95, T-322/95, T-323/95, T-324/95, T-325/95, T-326/95, T-327/95, T-328/95, T-329/95, T-330/95, T-331/95, T-332/95, T-333/95, T-334/95, T-335/95, T-336/95, T-337/95, T-338/95, T-339/95, T-340/95, T-341/95, T-342/95, T-343/95, T-344/95, T-345/95, T-346/95, T-347/95, T-348/95, T-349/95, T-350/95, T-351/95, T-352/95, T-353/95, T-354/95, T-355/95, T-356/95, T-357/95, T-358/95, T-359/95, T-360/95, T-361/95, T-362/95, T-363/95, T-364/95, T-365/95, T-366/95, T-367/95, T-368/95, T-369/95, T-370/95, T-371/95, T-372/95, T-373/95, T-374/95, T-375/95, T-376/95, T-377/95, T-378/95, T-379/95, T-380/95, T-381/95, T-382/95, T-383/95, T-384/95, T-385/95, T-386/95, T-387/95, T-388/95, T-389/95, T-390/95, T-391/95, T-392/95, T-393/95, T-394/95, T-395/95, T-396/95, T-397/95, T-398/95, T-399/95, T-400/95, T-401/95, T-402/95, T-403/95, T-404/95, T-405/95, T-406/95, T-407/95, T-408/95, T-409/95, T-410/95, T-411/95, T-412/95, T-413/95, T-414/95, T-415/95, T-416/95, T-417/95, T-418/95, T-419/95, T-420/95, T-421/95, T-422/95, T-423/95, T-424/95, T-425/95, T-426/95, T-427/95, T-428/95, T-429/95, T-430/95, T-431/95, T-432/95, T-433/95, T-434/95, T-435/95, T-436/95, T-437/95, T-438/95, T-439/95, T-440/95, T-441/95, T-442/95, T-443/95, T-444/95, T-445/95, T-446/95, T-447/95, T-448/95, T-449/95, T-450/95, T-451/95, T-452/95, T-453/95, T-454/95, T-455/95, T-456/95, T-457/95, T-458/95, T-459/95, T-460/95, T-461/95, T-462/95, T-463/95, T-464/95, T-465/95, T-466/95, T-467/95, T-468/95, T-469/95, T-470/95, T-471/95, T-472/95, T-473/95, T-474/95, T-475/95, T-476/95, T-477/95, T-478/95, T-479/95, T-480/95, T-481/95, T-482/95, T-483/95, T-484/95, T-485/95, T-486/95, T-487/95, T-488/95, T-489/95, T-490/95, T-491/95, T-492/95, T-493/95, T-494/95, T-495/95, T-496/95, T-497/95, T-498/95, T-499/95, T-500/95, T-501/95, T-502/95, T-503/95, T-504/95, T-505/95, T-506/95, T-507/95, T-508/95, T-509/95, T-510/95, T-511/95, T-512/95, T-513/95, T-514/95, T-515/95, T-516/95, T-517/95, T-518/95, T-519/95, T-520/95, T-521/95, T-522/95, T-523/95, T-524/95, T-525/95, T-526/95, T-527/95, T-528/95, T-529/95, T-530/95, T-531/95, T-532/95, T-533/95, T-534/95, T-535/95, T-536/95, T-537/95, T-538/95, T-539/95, T-540/95, T-541/95, T-542/95, T-543/95, T-544/95, T-545/95, T-546/95, T-547/95, T-548/95, T-549/95, T-550/95, T-551/95, T-552/95, T-553/95, T-554/95, T-555/95, T-556/95, T-557/95, T-558/95, T-559/95, T-560/95, T-561/95, T-562/95, T-563/95, T-564/95, T-565/95, T-566/95, T-567/95, T-568/95, T-569/95, T-570/95, T-571/95, T-572/95, T-573/95, T-574/95, T-575/95, T-576/95, T-577/95, T-578/95, T-579/95, T-580/95, T-581/95, T-582/95, T-583/95, T-584/95, T-585/95, T-586/95, T-587/95, T-588/95, T-589/95, T-590/95, T-591/95, T-592/95, T-593/95, T-594/95, T-595/95, T-596/95, T-597/95, T-598/95, T-599/95, T-600/95, T-601/95, T-602/95, T-603/95, T-604/95, T-605/95, T-606/95, T-607/95, T-608/95, T-609/95, T-610/95, T-611/95, T-612/95, T-613/95, T-614/95, T-615/95, T-616/95, T-617/95, T-618/95, T-619/95, T-620/95, T-621/95, T-622/95, T-623/95, T-624/95, T-625/95, T-626/95, T-627/95, T-628/95, T-629/95, T-630/95, T-631/95, T-632/95, T-633/95, T-634/95, T-635/95, T-636/95, T-637/95, T-638/95, T-639/95, T-640/95, T-641/95, T-642/95, T-643/95, T-644/95, T-645/95, T-646/95, T-647/95, T-648/95, T-649/95, T-650/95, T-651/95, T-652/95, T-653/95, T-654/95, T-655/95, T-656/95, T-657/95, T-658/95, T-659/95, T-660/95, T-661/95, T-662/95, T-663/95, T-664/95, T-665/95, T-666/95, T-667/95, T-668/95, T-669/95, T-670/95, T-671/95, T-672/95, T-673/95, T-674/95, T-675/95, T-676/95, T-677/95, T-678/95, T-679/95, T-680/95, T-681/95, T-682/95, T-683/95, T-684/95, T-685/95, T-686/95, T-687/95, T-688/95, T-689/95, T-690/95, T-691/95, T-692/95, T-693/95, T-694/95, T-695/95, T-696/95, T-697/95, T-698/95, T-699/95, T-700/95, T-701/95, T-702/95, T-703/95, T-704/95, T-705/95, T-706/95, T-707/95, T-708/95, T-709/95, T-710/95, T-711/95, T-712/95, T-713/95, T-714/95, T-715/95, T-716/95, T-717/95, T-718/95, T-719/95, T-720/95, T-721/95, T-722/95, T-723/95, T-724/95, T-725/95, T-726/95, T-727/95, T-728/95, T-729/95, T-730/95, T-731/95, T-732/95, T-733/95, T-734/95, T-735/95, T-736/95, T-737/95, T-738/95, T-739/95, T-740/95, T-741/95, T-742/95, T-743/95, T-744/95, T-745/95, T-746/95, T-747/95, T-748/95, T-749/95, T-750/95, T-751/95, T-752/95, T-753/95, T-754/95, T-755/95, T-756/95, T-757/95, T-758/95, T-759/95, T-760/95, T-761/95, T-762/95, T-763/95, T-764/95, T-765/95, T-766/95, T-767/95, T-768/95, T-769/95, T-770/95, T-771/95, T-772/95, T-773/95, T-774/95, T-775/95, T-776/95, T-777/95, T-778/95, T-779/95, T-780/95, T-781/95, T-782/95, T-783/95, T-784/95, T-785/95, T-786/95, T-787/95, T-788/95, T-789/95, T-790/95, T-791/95, T-792/95, T-793/95, T-794/95, T-795/95, T-796/95, T-797/95, T-798/95, T-799/95, T-800/95, T-801/95, T-802/95, T-803/95, T-804/95, T-805/95, T-806/95, T-807/95, T-808/95, T-809/95, T-810/95, T-811/95, T-812/95, T-813/95, T-814/95, T-815/95, T-816/95, T-817/95, T-818/95, T-819/95, T-820/95, T-821/95, T-822/95, T-823/95, T-824/95, T-825/95, T-826/95, T-827/95, T-828/95, T-829/95, T-830/95, T-831/95, T-832/95, T-833/95, T-834/95, T-835/95, T-836/95, T-837/95, T-838/95, T-839/95, T-840/95, T-841/95, T-842/95, T-843/95, T-844/95, T-845/95, T-846/95, T-847/95, T-848/95, T-849/95, T-850/95, T-851/95, T-852/95, T-853/95, T-854/95, T-855/95, T-856/95, T-857/95, T-858/95, T-859/95, T-860/95, T-861/95, T-862/95, T-863/95, T-864/95, T-865/95, T-866/95, T-867/95, T-868/95, T-869/95, T-870/95, T-871/95, T-872/95, T-873/95, T-874/95, T-875/95, T-876/95, T-877/95, T-878/95, T-879/95, T-880/95, T-881/95, T-882/95, T-883/95, T-884/95, T-885/95, T-886/95, T-887/95, T-888/95, T-889/95, T-890/95, T-891/95, T-892/95, T-893/95, T-894/95, T-895/95, T-896/95, T-897/95, T-898/95, T-899/95, T-900/95, T-901/95, T-902/95, T-903/95, T-904/95, T-905/95, T-906/95, T-907/95, T-908/95, T-909/95, T-910/95, T-911/95, T-912/95, T-913/95, T-914/95, T-915/95, T-916/95, T-917/95, T-918/95, T-919/95, T-920/95, T-921/95, T-922/95, T-923/95, T-924/95, T-925/95, T-926/95, T-927/95, T-928/95, T-929/95, T-930/95, T-931/95, T-932/95, T-933/95, T-934/95, T-935/95, T-936/95, T-937/95, T-938/95, T-939/95, T-940/95, T-941/95, T-942/95, T-943/95, T-944/95, T-945/95, T-946/95, T-947/95, T-948/95, T-949/95, T-950/95, T-951/95, T-952/95, T-953/95, T-954/95, T-955/95, T-956/95, T-957/95, T-958/95, T-959/95, T-960/95, T-961/95, T-962/95, T-963/95, T-964/95, T-965/95, T-966/95, T-967/95, T-968/95, T-969/95, T-970/95, T-971/95, T-972/95, T-973/95, T-974/95, T-975/95, T-976/95, T-977/95, T-978/95, T-979/95, T-980/95, T-981/95, T-982/95, T-983/95, T-984/95, T-985/95, T-986/95, T-987/95, T-988/95, T-989/95, T-990/95, T-991/95, T-992/95, T-993/95, T-994/95, T-995/95, T-996/95, T-997/95, T-998/95, T-999/95, T-1000/95, T-1001/95, T-1002/95, T-1003/95, T-1004/95, T-1005/95, T-1006/95, T-1007/95, T-1008/95, T-1009/95, T-1010/95, T-1011/95, T-1012/95, T-1013/95, T-1014/95, T-1015/95, T-1016/95, T-1017/95, T-1018/95, T-1019/95, T-1020/95, T-1021/95, T-1022/95, T-1023/95, T-1024/95, T-1025/95, T-1026/95, T-1027/95, T-1028/95, T-1029/95, T-1030/95, T-1031/95, T-1032/95, T-1033/95, T-1034/95, T-1035/95, T-1036/95, T-1037/95, T-1038/95, T-1039/95, T-1040/95, T-1041/95, T-1042/95, T-1043/95, T-1044/95, T-1045/95, T-1046/95, T-1047/95, T-1048/95, T-1049/95, T-1050/95, T-1051/95, T-1052/95, T-1053/95, T-1054/95, T-1055/95, T-1056/95, T-1057/95, T-1058/95, T-1059/95, T-1060/95, T-1061/95, T-1062/95, T-1063/95, T-1064/95, T-1065/95, T-1066/95, T-1067/95, T-1068/95, T-1069/95, T-1070/95, T-1071/95, T-1072/95, T-1073/95, T-1074/95, T-1075/95, T-1076/95, T-1077/95, T-1078/95, T-1079/95, T-1080/95, T-1081/95, T-1082/95, T-1083/95, T-1084/95, T-1085/95, T-1086/95, T-1087/95, T-1088/95, T-1089/95, T-1090/95, T-1091/95, T-1092/95, T-1093/95, T-1094/95, T-1095/95, T-1096/95, T-1097/95, T-1098/95, T-1099/95, T-1100/95, T-1101/95, T-1102/95, T-1103/95, T-1104/95, T-1105/95, T-1106/95, T-1107/95, T-1108/95, T-1109/95, T-1110/95, T-1111/95, T-1112/95, T-1113/95, T-1114/95, T-1115/95, T-1116/95, T-1117/95, T-1118/95, T-1119/95, T-1120/95, T-1121/95, T-1122/95, T-1123/95, T-1124/95, T-1125/95, T-1126/95, T-1127/95, T-1128/95, T-1129/95, T-1130/95, T-1131/95, T-1132/95, T-1133/95, T-1134/95, T-1135/95, T-1136/95, T-1137/95, T-1138/95, T-1139/95, T-1140/95, T-1141/95, T-1142/95, T-1143/95, T-1144/95, T-1145/95, T-1146/95, T-1147/95, T-1148/95, T-1149/95, T-1150/95, T-1151/95, T-1152/95, T-1153/95, T-1154/95, T-1155/95, T-1156/95, T-1157/95, T-1158/95, T-1159/95, T-1160/95, T-1161/95, T-1162/95, T-1163/95, T-1164/95, T-1165/95, T-1166/95, T-1167/95, T-1168/95, T-1169/95, T-1170/95, T-1171/95, T-1172/95, T-1173/95, T-1174/95, T-1175/95, T-1176/95, T-1177/95, T-1178/95, T-1179/95, T-1180/95, T-1181/95, T-1182/95, T-1183/95, T-1184/95, T-1185/95, T-1186/95, T-1187/95, T-1188/95, T-1189/95, T-1190/95, T-1191/95, T-1192/95, T-1193/95, T-1194/95, T-1195/95, T-1196/95, T-1197/95, T-1198/95, T-1199/95, T-1200/95, T-1201/95, T-1202/95, T-1203/95, T-1204/95, T-1205/95, T-1206/95, T-1207/95, T-1208/95, T-1209/95, T-1210/95, T-1211/95, T-1212/95, T-1213/95, T-1214/95, T-1215/95, T-1216/95, T-1217/95, T-1218/95, T-1219/95, T-1220/95, T-1221/95, T-1222/95, T-1223/95, T-1224/95, T-1225/95, T-1226/95, T-1227/95, T-1228/95, T-1229/95, T-1230/95, T-1231/95, T-1232/95, T-1233/95, T-1234/95, T-1235/95, T-1236/95, T-1237/95, T-1238/95, T-1239/95, T-1240/95, T-1241/95, T-1242/95, T-1243/95, T-1244/95, T-1245/95, T-1246/95, T-1247/95, T-1248/95, T-1249/95, T-1250/95, T-1251/95, T-1252/95, T-1253/95, T-1254/95, T-1255/95, T-1256/95, T-1257/95, T-1258/95, T-1259/95, T-1260/95, T-1261/95, T-1262/95, T-1263/95, T-1264/95, T-1265/95, T-1266/95, T-1267/95, T-1268/95, T-1269/95, T-1270/95, T-1271/95, T-1272/95, T-1273/95, T-1274/95, T-1275/95, T-1276/95, T-1277/95, T-1278/95, T-1279/95, T-1280/95, T-1281/95, T-1282/95, T-1283/95, T-1284/95, T-1285/95, T-1286/95, T-1287/95, T-1288/95, T-1289/95, T-1290/95, T-1291/95, T-1292/95, T-1293/95, T-1294/95, T-1295/95, T-1296/95, T-1297/95, T-1298/95, T-1299/95, T-1300/95, T-1301/95, T-1302/95, T-1303/95, T-1304/95, T-1305/95, T-1306/95, T-1307/95, T-1308/95, T-1309/95, T-1310/95, T-1311/95, T-1312/95, T-1313/95, T-13*

Such a decision is independent of the final decision bringing the administrative procedure to an end. Moreover, the possibility of bringing an action for annulment of the final decision does not afford adequate protection. On the one hand, the administrative procedure does not always culminate in a final decision, which, at the same time, rules out any chance of bringing an action and would hence enable the right to confidential treatment of documents to be breached without any judicial sanction; on the other hand, an action against the final decision affords no guarantee of being able to prevent the disclosure of confidential documents from having irreparable consequences.

interim measures. The Commission has the power to impose interim measures¹⁷ in the course of the administrative procedure in order to avoid serious and irreparable damage to competition which could not be remedied by its final decision. The decision imposing interim measures must be "made in such a form that an action may be brought upon them . . . by any party who considers it has been injured".¹⁸ However, it will have to be assessed whether an applicant still retains an interest in having the decision imposing interim measures annulled where the Commission has adopted a final decision withdrawing the decision imposing interim measures.¹⁹

Commitments. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.¹⁰ It may be assumed that such a decision is a challengeable act within the meaning of Art. 230 of the EC Treaty.¹¹

Finding of infringement and imposition of fines. The decision by which the Commission finds an infringement of Art.81 and/or Art.82 of the EC Treaty

Partipakaze v Commission (2001) E.C.R. I-3551, paras 49-52; *CFI* (order of the President of December 14, 2001), Case T-245/01 R *Bank für Sozial und Wirtschaft v Commission* (2001) E.C.R. I-3553, paras 43-45.

¹²⁰ The Commission will adopt interim measures only on its own initiative and not at the request of a party. Indeed, Article(1) of Regulation No 17003 provides: "In cases of urgency due to the risk of serious and irreparable damage in competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures."

¹²⁰ See, e.g., *Case 75277 R. Camera Case v. Commission* [1982] E.C.R. II, para. 29; ECJ, *Joined Cases 228 and 231-82 Ford v. Commission* [1984] E.C.R. II, para. 20.

¹² CFI (order of March 12, 2005), Case T-134/03 *Int'l Health v. Commission*, not yet reported, paras 34-45.

¹¹⁶ Regulation No 1203, Art.9(2)

¹¹¹ See, by analogy, ECL, Related Cases C-87, C-104, C-114, C-116-217 and C-125-129/MJ *Abderson and Others v Commission* [1993] E.C.R. I-1517, para.157.

and, possibly, imposing a fine produces obligatory legal effects and is a challengeable act. However, an action will not lie against the Commission's refusal to accede to a request from one of the addressees of the decision to agree to their paying the fine in a particular way.¹³² This is because such an act must be regarded as confirming the initial decision. The obligatory legal effects therefore arise out of the initial decision and not out of the refusal.¹³³

7-333 Position of complainant Acts adopted by the Commission during the administrative procedure *vis-à-vis* persons who have lodged complaints¹³⁴ alleging breaches of Art.81 and/or Art.82 of the EC Treaty are not all capable of forming the subject-matter of an action for annulment.

Accordingly, an action will not lie against the notification to be served on the complainants under Art.7 of Regulation No 773/2004¹³⁵ informing them that the Commission is not going to take up the complaint and fixes a time-limit for them to submit any further comments, following which it will take its final decision.¹³⁶ The notification must make it clear that the complainant is entitled to submit comments on the proposed rejection of its complaint. If the letter addressed to the complainant does not contain such an invitation to submit comments, the rejection of the complaint is final and, according to established case-law,¹³⁷ may be the subject of judicial proceedings.¹³⁸

¹³² CFI (order of April 29, 2004), Case T-324/02 *SGL Carbon v Commission* [2004] E.C.R. II-1363.

¹³³ There is a possibility of securing the suspension of the decision finding the infringement and imposing a fine provided that the conditions for the grant of interim measures are satisfied (see Ch.11, *supra*).

¹³⁴ On the basis of Art.7(2) of Regulation No 1/2003 (formerly Art.1(3) of Regulation No 17), formerly Arts.6 of Regulation No 99/63 and Art.6 of Regulation No 2842/91.

¹³⁵ ECJ, Case C-232/03 *F. Guérin Automobiles v Commission* [1997] E.C.R. I-1503, para.34; CFI, Case T-64/03 *Automec v Commission* [1999] E.C.R. II-357, para.46.

¹³⁶ ECJ, Case 210/81 *Demo-Studio Schmidt v Commission* [1983] E.C.R. 3345; ECJ, Case 298/83 *CICCS v Commission* [1985] E.C.R. 1113; ECJ, joined Cases 842 and 156/84 *Smith American Tobacco and R.J. Reynolds Industries v Commission* [1987] E.C.R. 4487.

¹³⁷ See ECJ, Case C-359/95 *P. EFEL and Others v Commission* [1994] E.C.R. I-2681, paras 24-33, in which the Court of Justice set aside the order of the Court of First Instance in Case T-355/92 *EFEL and Others v Commission* [1992] E.C.R. II-2479. The judgment gives on appeal by the Court of Justice links up with the analysis carried out by the Court of First Instance in Case T-64/03 *Automec v Commission* [1999] E.C.R. II-357 of the procedure to be applied where the Commission deals with a complaint alleging infringement of the Treaty competition rules. The Court of First Instance distinguished between three stages (ibid., paras 45-47). During the first of these stages, the Commission collects the information needed to decide what action to take on the complaint. That stage may include an informal exchange of views and information between the Commission and the complainant in the view of the Court of First Instance, preliminary observations made by Commission officials in the context of those informal contacts cannot be regarded as measures open to challenge. In the second stage, the Commission either informs the complainant, in accordance with Art.7(3) of Regulation No 773/2004, that it does not intend to take up the complaint and sets a time-limit within which the complainant is to submit its observations, or serves on the undertaking allegedly in breach of the competition

rules a statement of objections if it considers that the infringement raised in the complaint should be pursued. As already mentioned, neither of those acts may be challenged because they do not amount to a 'definitive' position on the part of the Commission. If the Commission intends to reject the complaint, the Commission takes cognisance of the complainant's comments in the third stage. That stage may end with a final decision by which the Commission rejects the complaint (Regulation No 773/2004, Art.7(2)). The complainant may bring an action to annul that decision. In its order in *EFEL and Others v Commission*, the Court of First Instance took the view that the contested act formed part of the first stage of the investigation and was therefore not amenable to an action for annulment. On appeal, however, the Court of Justice held that the act constituted a final decision definitively rejecting the complaint, and set aside the order of the Court of First Instance. That judgment does not detract from the analysis of the Court of First Instance in *Automec* (para.46)—that the breakdown of the processing of a complaint into three stages for analytical purposes does not mean that an action will lie against the rejection of a complaint only if all three stages of the procedure have been completed (see, however, *Spidea*, case note in *Automec v Commission* [1991] C.M.L.Rev. 493, at 461; see also CFI, Case T-37/02 *BEUC and NGC v Commission* [1994] E.C.R. II-285, paras 21-26 and CFI, Case T-341/97 *Stolk Amsterdam v Commission* [2000] E.C.R. I-305, paras 49-68).

¹³⁸ Regulation No 773/2004, Art.1.

¹³⁹ CFI, Case T-16/92 *Sando and Others v Commission* [1992] E.C.R. I-2437, paras 52-55 (those paras are not affected by the fact that the Court of Justice partially set aside that judgment in ECJ, Case C-35/93 *P. Sando and Others v Commission* [1995] E.C.R. I-3315).

If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission is to reject the complaint by decision. An action will lie against that act. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint is deemed to have been withdrawn.¹³⁹

An action will also lie against a decision of the Commission suspending an administrative procedure under Regulation No 1/2003 pending delivery of judgment in proceedings pursuant to Art.226 of the EC Treaty. This is because such a decision affects the procedural rights of persons who have submitted a complaint pursuant to Art.7(2) of Regulation No 1/2003, in particular the right to be informed beforehand of the Commission's intention not to uphold their complaint and to submit observations in that connection and the right to bring an action for annulment against the rejection of the complaint. In the case of proceedings under Art.226 of the EC Treaty, persons who have lodged a complaint do not have those rights. If some of the questions raised in the complaint pursuant to Regulation No 1/2003 are going to form the subject of infringement proceedings and the Commission therefore suspends judgement on the complaint as far as those questions are concerned, this deprives the complainant of its procedural rights. An action may consequently be brought against the decision suspending the administrative procedure.¹⁴⁰

As far as access to the file is concerned, the principle that there must be full disclosure applies only to undertakings and associations on which a penalty may be imposed by a Commission decision finding an infringement

of Art.81(1) or Art.82 of the EC Treaty.¹²¹ Thus, complainants cannot claim to have a right of access to the file on the same basis as the parties under investigation.¹²² In any event, the Commission's refusal to grant (partial) access to its file to a complainant cannot be held to be a challengeable act. However, when the Commission rejects the complaint, the complainant may challenge the Commission's final decision on the ground that it had insufficient access to the Commission's file during the administrative procedure. In this connection it must be borne in mind that Art.8(2) of Regulation No 773/2004 provides that the complainant may request access to the documents on which the Commission bases its provisional assessment that the complaint should be rejected.¹²³

- 7-034 Complaint relating to a breach of Art.85 of the EC Treaty. Art.86(3) of the EC Treaty requires the Commission to ensure that the Member States comply with the obligations imposed on them in regard to the undertakings mentioned in Art.85(1), and expressly confers on it the power to take action for that purpose by way of directives and decisions. The Commission is empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the Member State to which a decision is addressed must adopt in order to comply with its obligations under Community law.¹²⁴

If an undertaking requests the Commission to find that a Member State has infringed the combined provisions of Arts 82 and 86(1) of the EC Treaty, an action will not lie against the Commission's rejection of that request. The Court of Justice considers that a letter to that effect cannot be regarded as producing binding legal effects.¹²⁵ As a result, complaints based on Arts 82 and 86(1) of the EC Treaty are treated in the same way as complaints that a Member State has infringed other provisions of Community law.¹²⁶

2. Merger control

- 7-035 Regulatory framework. Until May 1, 2004, the Commission's supervisory competence with regard to mergers (or concentrations) and the administrative procedure which it had to follow in that area was laid down in Council

Regulation No 4064/89¹²⁷ and Commission Regulation No 447/93.¹²⁸ The applicable regulations now in force are Council Regulation No 139/2004¹²⁹ and Commission Regulation No 802/2004.¹³⁰

Final decisions on notification. An action will lie against a decision by which the Commission declares a merger compatible or incompatible with the common market.¹³¹ An action will also lie against a Commission decision finding that a joint venture does not constitute a concentration within the meaning of Regulation No 139/2004 and therefore does not fall within the scope of that regulation.¹³²

Ancillary restrictions. The assessment made by the Commission which is contained in the grounds of a concentration decision on whether ancillary restrictions mentioned by the notifying undertakings are permitted or not permitted is likewise a challengeable act.¹³³ This is because a decision declaring a concentration compatible with the common market is to be deemed to cover restrictions directly related and necessary to the implementation of the concentration.¹³⁴

Finding of a dominant position. The mere finding in a concentration decision that an undertaking occupies a dominant position cannot be challenged. The reason for this is that such a finding does not produce binding legal effects.¹³⁵

Referral to national authorities. An action will lie against the referral of a merger falling within the scope of Regulation No 139/2004 to the competition authorities of a Member State pursuant to Art.9 of that regulation.¹³⁶

¹²⁷ Council Regulation (EEC) No 4064/89 of December 21, 1989 on the control of concentrations between undertakings ([1989] O.J. L257/13) as amended by Council Regulation (EC) No 1510/91 of June 24, 1991 ([1991] O.J. L185/1).

¹²⁸ Commission Regulation (EC) No 447/93 of March 1, 1993 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ([1993] O.J. L52/5; corrigendum in [1993] L56/25).

¹²⁹ Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings ([2004] O.J. L24/1).

¹³⁰ Commission Regulation (EC) No 802/2004 of April 7, 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ([2004] O.J. L103/1; corrigendum in [2004] O.J. L 172/9).

¹³¹ Regulation No 139/2004, Art.8(1)-(3).

¹³² CFI, Case T-67/96 *Aspirazioni Generali and Unirelco v Commission* [1995] E.C.R. II-263, paras 17-44.

¹³³ CFI, Case T-25/70 *Legambiente and Canal+ v Commission* [2002] E.C.R. I-4815, para 61-118.

¹³⁴ Regulation No 139/2004, Art.8(1) and (2).

¹³⁵ CFI, Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] E.C.R. II-1733, para 52.

¹³⁶ CFI, Case T-115/02 *Royal Philips Electronics v Commission* [2003] E.C.R. II-1433, paras 167-200; CFI, Joined Cases T-146/02 and T-247/02 *Comcast and Others v Commission* [2003] E.C.R. I-4255, paras 47-52. A decision taken by such national authorities may be

¹²¹ CFI, Case T-65/96 *Kühn Glass v Commission* [2000] E.C.R. II-5885, para 34; Case T-17/93 *Moira Hachette v Commission* [1994] E.C.R. II-595, para 34.

¹²² *Ibid.*

¹²³ Access to the Commission's file cannot only be achieved through Regulations Nos 1/2003 and 773/2004. It can also be secured under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents ([2001] O.J. L145/43). See 7-035, *supra*.

¹²⁴ ECJ, Case C-107/55 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] E.C.R. I-347, para 23.

¹²⁵ ECJ, Case C-14/02 P *Commission v T-Mobile Austria* [2005] E.C.R. I-1251, para 70, setting aside CFI, Case T-54/99 *max.mobil Telekommunikation Service v Commission* [2002] E.C.R. II-313, in which the Court of First Instance had categorised the Commission's rejection of such a complaint as a formal decision addressed to the complainant.

¹²⁶ See 7-012, *supra*.

- 7-043 Commitments. Commitments submitted by the undertakings concerned in the administrative procedure are as such not challengeable acts.¹³⁷ However, the conditions which the Commission imposes in its decision with a view to ensuring that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission produce binding legal effects and may be reviewed by the Community courts.¹³⁸

3. State aid cases

- 7-041 Regulatory framework. The Commission's supervisory competence and the administrative procedure which it must comply with in relation to State aid are laid down in Arts 87 and 88 of the EC Treaty and in Regulations Nos 659/1999¹³⁹ and 794/2004.¹⁴⁰ This legal framework makes provision for separate procedures depending on whether the aid concerned is existing aid or new aid.

- 7-042 Existing aid. As far as existing aid¹⁴¹ is concerned, Art.88(1) of the EC Treaty and Arts 17 to 19 of Regulation No 659/99 empower the Commission, in cooperation with the Member States, to keep aid under constant review. Where the Commission considers that existing aid is not, or is no longer, compatible with the common market, it informs the Member State concerned of its preliminary view and gives the Member State concerned the opportunity to submit its comments. Where the Commission, in the light of the information submitted by the Member State, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it will propose to the Member State concerned any appropriate measures required by the progressive development or by the functioning of the common market. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it will initiate the procedure provided for in Art.88(2) of the EC Treaty.

contested only before the national courts, although they may refer a question to the Court of Justice for a preliminary ruling on the interpretation of Regulation No 135/2004. A complaint made to the Commission about the handling of the case after referral is a complaint under Art.225 of the EC Treaty and the rejection of such a complaint is not a challengeable act (CFI (order of May 25, 2005, Case T-43/03 *Reiser and Others v Commission*, not yet reported, paras 34-46).

¹³⁷ See Regulation No 135/2004, Arts 6(2) and 8(2); Regulation No 800/2004, Art.22.

¹³⁸ See in this regard CFI, Joined Cases T-125/99 and T-127/99 *Coca-Cola v Commission* [2000] E.C.R. II-1733, paras 54-104.

¹³⁹ Council Regulation (EC) No 659/1999 of March 21, 1999 laying down detailed rules for the application of Art.93 (now Art.88) of the EC Treaty [1999] O.J. L83/1.

¹⁴⁰ Commission Regulation (EC) No 794/2004 of April 21, 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Art.93 (now Art.88) of the EC Treaty [2004] O.J. L140/1; corrigendum in [2005] O.J. L25/54.

¹⁴¹ For this concept, see Regulation No 659/1999, Art.1(3).

As far as existing aid is concerned, therefore, the initiative lies with the Commission.¹⁴² If the Commission considers that there is existing aid whose compatibility with the common market it wishes to re-examine, it cannot require the Member State concerned to suspend that aid before it has taken a final decision holding it incompatible with the common market. For its part, the Member State is not under any obligation to suspend existing aid before such final decision.¹⁴³

New aid. As far as new aid is concerned,¹⁴⁴ Art.88(3) of the EC Treaty provides that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Commission then proceeds to an initial examination of the planned aid. If, at the end of that examination, it considers that doubts are raised as to the compatibility with the common market of the measure concerned, it is to initiate the procedure provided for in Art.88(2).¹⁴⁵ In that event, the last sentence of Art.88(3) prohibits the Member State concerned from putting the proposed measures into effect until the procedure has resulted in a final decision.¹⁴⁶ New aid is therefore subject to preventive review by the Commission and in principle cannot be put into effect as long as that institution has not declared it compatible with the Treaty.¹⁴⁷

Final decisions. Irrespective of whether existing aid or new aid is involved, Commission decisions by which national measures are held to be aid and compatible or incompatible with the common market produce binding legal effects and constitute challengeable acts.¹⁴⁸ The same is true of decisions by

¹⁴² ECI, Case C-44/93 *Namur-Les Assurances du Crédit* [1994] E.C.R. I-3323, para.11.

¹⁴³ ECI, Case C-400/98 *Italy v Commission* [2001] E.C.R. I-7533, para.48.

¹⁴⁴ ECI, Case C-35/97 *Piaggio* [1999] E.C.R. I-3733, paras 47-48: the answer to the question whether aid is new cannot depend on a subjective assessment by the Commission. According to Art.1(c) of Regulation No 659/1999, new aid is aid which is not existing aid. Art.1(b) of Regulation No 659/1999 provides a list of all aid which must be regarded as existing aid.

¹⁴⁵ See Art.4(4) of Regulation No 659/1999. Proceedings must also be initiated where the Commission has doubts whether the measure should be categorised as aid unless, in the course of the initial examination, the Commission is able to satisfy itself that the measure at issue is in any event compatible with the common market, even if it is aid (CFI, Case T-1155/97 *Chemical v Commission* [1999] E.C.R. II-3235, para.156; CFI, Case T-44/97 *SIC v Commission* [2000] E.C.R. II-25, para.72). This case-law was confirmed by ECI, Case C-400/98 *Italy v Commission* [2001] E.C.R. I-3657, para.47. The fact that the time spent on an initial examination under Art.88(3) of the EC Treaty considerably exceeds the time usually taken may, in addition to other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Art.88(2) of the EC Treaty (CFI, Case T-45/97 *SIC v Commission* [2000] E.C.R. II-1125, para.102).

¹⁴⁶ See also Regulation No 659/1999, Art.3.

¹⁴⁷ ECI, Case C-44/93 *Namur-Les Assurances du Crédit* [1994] E.C.R. I-3323, para.12.

¹⁴⁸ A decision of the Council pursuant to Art.88(2), third subpara. of the EC Treaty by which aid is considered to be compatible with the common market by way of derogation from the provisions of Art.87 or from the regulations provided for in Art.88 is also a challengeable act (see CFI, Case C-118/92 *Commission v Council* [1994] E.C.R. I-6333).

which the Commission determines that a measure of a Member State does not constitute aid within the meaning of Art.87(1) of the EC Treaty.¹⁴³

- 7-045 Initiation of the procedure. Another question is whether the initiation of the formal investigation procedure provided for in Art.88(2) of the EC Treaty constitutes a challengeable act in itself. Under that provision, the Commission has to give notice to the "parties concerned" to submit their comments before it decides whether aid is compatible with the common market.

It is settled case-law that the initiation of that procedure produces no legal effects and therefore cannot be challenged before the Community Court where it relates to existing aid¹⁴⁴ since the Member State concerned may maintain the aid at that stage of the procedure.¹⁴⁵

Where, in contrast, the procedure initiated relates to new aid the Member State concerned must not put its proposed measures into effect until the inter partes procedure has resulted in a final decision (EC Treaty, Art.88(3)). The obligation to suspend putting the aid into effect which arises out of the initiation of the procedure has autonomous legal effects which cannot be eradicated.¹⁴⁶ This is because the delay in putting the aid into effect caused by the suspensory effect of initiating the procedure is not offset by a decision by which the Commission declares the aid to be compatible with the common market or by a successful action for annulment of the Commission's finding that the proposed aid is incompatible with the common market. Any implementation of the new aid from the initiation of the procedure until the date of the final decision remains in any event unlawful. For those reasons, initiating a procedure under Art.88(2) of the EC Treaty cannot be regarded as a mere preparatory act.¹⁴⁷

¹⁴³ ECJ, Case C-361/55 P *Commission v. Spross and Brink's France* (1958) E.C.R. I-1715, paras 45-48. An action will not lie against a letter from the Commission informing the complainant about its decision addressed to a Member State with regard to State aid (CFI, Case T-52/96 *AP&P and Others v. Commission* [1999] E.C.R. II-1859, para.25). As a result, the complainant should challenge the decision addressed to the Member State. The action will be admissible only if the decision is of direct and individual concern to the complainant within the meaning of the fourth para. of Art.230 of the EC Treaty.

¹⁴⁴ ECJ (order of the President of June 25, 2003), joined Cases C-162/03 R and C-217/03 R *Belgium and Forum 187 v. Commission* [2003] E.C.R. I-6337, para.119; CFI (order of June 2, 2003), Case T-276/02 *Forum 187 v. Commission* [2003] E.C.R. II-2375. For a list of all measures to be regarded as being existing aid, see Art.1(b) of Regulation No 659/1999 [1999] O.J. L83/1.

¹⁴⁵ As far as existing aid is concerned, the Commission's proposal of appropriate measures under Art.88(1) of the EC Treaty is also not a reviewable act. See CFI, Case T-332/94 *Sah Union v. Commission* [1996] E.C.R. II-1476.

¹⁴⁶ ECJ, Case C-312/93 *Spain v. Commission* [1994] E.C.R. I-4117, paras 14-25; ECJ, Case C-4751 *Italy v. Commission* [1997] E.C.R. I-4145, para. 22-26; ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7510, para.53. As a result, an action to annul the decision to initiate the formal procedure does not become devoid of purpose where the Commission adopts a final decision and that decision is not contested by the party which challenged the decision initiating the procedure (see ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7517, para. 15-16).

¹⁴⁷ ECJ, Case C-312/93 *Spain v. Commission* [1994] E.C.R. I-4117, paras 21-24; ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7510, paras 62 and 69.

A decision to initiate a formal investigation procedure therefore has autonomous legal consequences, in particular with regard to the suspension of the measure under investigation, not only when the measure has already been put into effect by the authorities of the Member State concerned as existing aid, but also where the Member State considers that the measure to which the decision initiating the procedure relates does not fall within the scope of Art.87(1) of the EC Treaty.¹⁴⁸ In both cases, an action will lie against the decision.¹⁴⁹ A decision to initiate a formal investigation procedure in relation to a measure in the course of implementation which the Commission has classified as new aid necessarily alters the legal position of the measure under consideration and that of the undertakings which are its beneficiaries, particularly as regards the pursuit of its implementation. Until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the measure is being lawfully carried out as a general measure which does not fall within the scope of Art.87(1) of the EC Treaty or as an existing aid. In contrast, after the adoption of such a decision there is at the very least a significant element of doubt as to the legality of that measure which, without prejudice to the possibility of seeking interim relief from the court with the power to grant it, must lead the Member State to suspend payment, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision holding the measure compatible with the common market which would enable it to be lawfully pursued. Such a decision might also be invoked before a national court called upon to draw all the consequences arising from the infringement of the last sentence of Art.88(3) of the EC Treaty. Finally, it is capable of leading the undertakings which are beneficiaries of the measure to refuse new payments in any event, or to hold the necessary sums as provision for possible subsequent repayments. Businesses will also take account, in their relations with those beneficiaries, of the fragile legal and financial situation of the latter.¹⁵⁰

¹⁴⁸ ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7510, paras 59, 60 and 69; CFI, joined Cases T-259/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v. Commission* [2002] E.C.R. II-4217, para.37.

¹⁴⁹ ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7510, not yet reported, para.35: "In view of the legal consequences of a decision to initiate the procedure provided for in Art.88(2) EC, classifying the measure concerned as new aid even though the Member State concerned is unlikely to subscribe to that classification (...), the Commission must first broach the subject of the measures in question with the Member State concerned so that the latter has an opportunity, if appropriate, to inform the Commission that, in its view, those measures do not constitute aid or else constitute existing aid."

¹⁵⁰ ECJ, Case C-403/99 *Italy v. Commission* [2001] E.C.R. I-7510, para.55; CFI, joined Cases T-259/99 and T-271/99 *Diputación Foral de Guipúzcoa v. Commission* [2002] E.C.R. II-2509, para.45; CFI, joined Cases T-265/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v. Commission* [2002] E.C.R. II-4217, para.38; CFI, Case T-500/99 *Regione Siciliana v. Commission* [2003] E.C.R. I-5015 para. 42-53 (the right to contest a decision to initiate the procedure provided for in Art.88(2) of the EC Treaty does not affect the procedural rights of interested parties to challenge the final decision).

- 7-046 Suspension and recovery injunctions. An action will also lie against an injunction to suspend or recover aid that the Commission may address to a Member State by separate decision (before taking a final decision with regard to the compatibility of the aid with the common market) under Art.1(1) and (2) of Regulation No 659/1999.¹³⁷
- 7-047 Information injunction. In the course of the administrative procedure, the Commission may address a request for information to the Member State concerned.¹³⁸ Where, despite a reminder, the Member State does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission may by decision require the information to be provided. It remains an open question whether such an "information injunction" is a reviewable act.¹³⁹ In the event of non-compliance with an information injunction, the Commission will decide on the basis of the information available.¹⁴⁰
- 7-048 Right to file a complaint. As regards the position of complainants,¹⁴¹ Art.20(2) of Regulation No. 659/1999 provides that "[a]ny interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid."¹⁴² It follows from Art.20(1) and (2) of Regulation No 659/1999 that the interested parties entitled to file a complaint are those which may submit comments following a Commission decision to initiate the formal investigation procedure. They include "[...] the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations [...]"¹⁴³

¹³⁷ The Commission's power to issue such injunctions was already recognized by case-law: ECJ, Case C-361/87 *France v Commission* [1988] E.C.R. I-337, paras 19 and 24; ECJ, C-39/94 *SFEI and Others* [1996] E.C.R. I-3547, para.24. See also ECJ, Case C-400/99 *Ay v Commission* [2001] E.C.R. I-7301, para.51.

¹³⁸ Regulation No 659/1999, Art.10(2). See Siliadin and Bilezik, "Judicial review of State aid decisions" (2004) E.C.M.L.Rev. 133, at 137, who consider that an information injunction constitutes a measure of a preparatory character which is not subject to judicial review.

¹³⁹ In the context of an action for annulment under Art.230 of the Treaty, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the complete assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (ECJ, Case C-228/95 *Germany v Commission* [2000] E.C.R. I-3727, para.24; ECJ, Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1995] E.C.R. II-3405, para.21; CFI, Case T-121/97 *Salomon v Commission* [1999] E.C.R. II-2925, para.42; CFI, Case T-256/97 *Alliada v Commission* [2000] E.C.R. II-3871, para.85).

¹⁴⁰ On this issue, see Slot and Stauder, "The position of the complainant in EC State aid cases, in *Mélanges en l'honneur de Michel Wasbriek* (Brussels, 1999), Vol. II, 1457-1476. See also Winter "The rights of complainants in State aid cases: judicial review of Commission decisions adopted under Art.28 (ex 91) EC" (1999) C.M.L.Rev. 321-358.

¹⁴¹ For the form to be used for filing a complaint, see [2003] O.J. C1165.

¹⁴² See, e.g. ECJ, Case C-28/97 *Pomigil v Commission* [2001] E.C.R. I-3173, para.51.

Decisions pursuant to a complaint. "In so far as the Commission has exclusive jurisdiction to assess the compatibility of a grant of State aid with the common market, it is required, in the interests of the sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of complaints reporting the grant of aid which is incompatible with the common market [...]"¹⁴⁴ After examining the complaint, the Commission takes in principle¹⁴⁵ one of the following decisions, all of which will be addressed to the Member State concerned¹⁴⁶: (a) a decision by which the Commission finds that no aid within the meaning of Art.87(1) of the EC Treaty is being granted; (b) a decision by which the Commission finds that the aid is compatible with the common market; or (c) if it has doubts as to the compatibility with the common market of an aid measure, a decision to initiate proceedings pursuant to Art.88(2) of the EC Treaty, in which case all parties concerned, in particular the complainant and the Member States may submit comments.¹⁴⁷ The first two decisions, which are to be addressed to the Member State concerned,¹⁴⁸ may be contested by the complainant if it demonstrates that they are of direct and individual concern to it within the meaning of the fourth para. of Art.230 of the EC Treaty.¹⁴⁹ In our view, the complainant will have no interest in challenging the initiation of proceedings under Art.88(2) of the EC Treaty. This is because the complaint normally will aim at having the aid declared incompatible with the common market and this can only happen after the Commission has gone through the procedure prescribed by Art.88(2) of the EC Treaty.¹⁵⁰

¹⁴⁴ CFI, Case T-1756/97 *v Commission* [1999] E.C.R. II-1037, para.73. See also Art.10(1) of Regulation No 659/1999, which obliges the Commission to examine: "[...] information from whatever source regarding alleged unlawful aid". Diligent and impartial examination of the complaint may make it necessary for the Commission to examine matters not expressly raised by the complainant. The Commission may therefore be obliged to extend its investigation beyond a mere examination of the facts and the points of law brought to its notice by the complainant (see ECJ, Case C-357/95 *P Commission v Syreval and Brick's France* [1998] E.C.R. I-1719, para.62).

¹⁴⁵ However, where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it has to inform the complainant thereof (Regulation No 659/1999, Art.10(2)). It is unclear whether such a decision will be susceptible of judicial review. It follows from Art.10(1) of Regulation No 659/1999, according to which the Commission has to examine any possible unlawful aid, read in conjunction with Art.11(1), according to which "the examination of possible unlawful aid shall result in a decision pursuant to Art.4(2), (3) or (4)" [i.e. a decision finding that the measure does not constitute aid, a decision finding that no doubts are raised as to the compatibility with the common market, or a decision initiating proceedings pursuant to Art.88(2)] that the Commission has not much scope for responding to a complainant that there are no grounds for taking a view on the case.

¹⁴⁶ Regulation No 659/1999, Art.25. See also ECJ, Case C-367/95 *P Commission v Syreval and Brick's France* [1998] E.C.R. I-1719, para.45.

¹⁴⁷ Regulation No 659/1999, Art.4. See also CFI, Case T-1756/97 *v Commission* [1999] E.C.R. II-1037, para.78.

¹⁴⁸ Regulation No 659/1999, Art.25.

¹⁴⁹ See T-253 to T-105, *infra*.

¹⁵⁰ The formal investigation procedure does not lead to an inter partes debate involving the

7-050 Correspondence with complainants. Any letters which the Commission may address to complainants are not acts amenable to judicial review. Only the formal decision addressed to the Member State concerned can be challenged.¹⁷¹ Thus, an action for annulment lodged by a complainant against a letter from the Commission informing the complainant that a specific aid measure is covered by an approved general aid scheme will be inadmissible.¹⁷² By contrast, a similar action brought against a decision addressed to a Member State in which the Commission raises no objections to an aid measure on the ground that it falls within the scope of an approved aid scheme will be admissible insofar as the complainant demonstrates that the contested act is of direct and individual concern to it within the meaning of the fourth para. of Art. 230 of the EC Treaty.¹⁷³

7-051 Refusal to take appropriate measures. Lastly, as regards existing aid, an action will not lie against the Commission's refusal to take appropriate measures within the meaning of Art. 58(1) of the EC Treaty.¹⁷⁴ It should be borne in mind that when the Court is considering whether an action for the annulment of a negative decision of an institution is admissible, the decision must be appraised in the light of the nature of the request to which it constitutes a reply. Since, according to the wording of Art. 58(1) of the EC Treaty, appropriate measures are merely proposals, which the State concerned is not bound to respect,¹⁷⁵ the Commission's refusal to take such measures does not constitute an act producing binding legal effects.

4. Anti-dumping cases

7-052 General. The final decision in an anti-dumping procedure normally lies with the Council. It imposes definitive anti-dumping duties or decides to terminate the anti-dumping procedure without imposing such duties. It also decides on the definitive imposition of provisional anti-dumping duties.

complaint or even the receipt of the act. The complaint received in the course of the formal investigation will only be submitted to the Member State concerned (Regulation No 659/1999, Art. 8(2)). See also CFI, Case T-513/97 *Uet and Others v Commission* [2000] E.C.R. II-4035, paras 53-57; CFI (judgment of July 5, 2004), Case T-156/01 *Technische Glaswerke America v Commission*, not yet reported, paras 153-158.

¹⁷¹ See ECJ, Case C-167/95 *P Commission v Syreval and Sirex France* [1998] E.C.R. I-1719, para. 43; CFI (order of February 14, 2005), Case T-41/04 *Bouygues and Bouygues Télécom v Commission*, not reported, para. 23.

¹⁷² CFI, Case T-154/54 *CSF and CSME v Commission* [1956] E.C.R. II-1377; but see ECJ, Case C-312/93 *CIAFS and Others v Commission* [1993] E.C.R. I-1125.

¹⁷³ ECJ, Case C-321/99 *ARAP and Others v Commission* [2002] E.C.R. I-4257, paras 60 and 61.

¹⁷⁴ CFI, Case T-110/94 *Sell Union v Commission* [1996] E.C.R. II-1475.

¹⁷⁵ ECJ (order of the President of June 15, 2003), Joined Cases C-182/03 R and C-41/03 R *Belgium and Forum 187 v Commission* [2003] E.C.R. I-6857, para. 119. However, where the Member State concerned accepts the proposed measures and informs the Commission thereof, it will be bound by its acceptance to implement the appropriate measures.

Such regulations and decisions produce legal effects and constitute challengeable acts.¹⁷⁶

7-053 Preparatory measures. Regulation (EC) No 384/96¹⁷⁷ confers extensive duties on the Commission in connection with the investigation of dumping and the provisional control thereof. It receives complaints, directly or indirectly, initiates investigations and decides whether or not protective measures are needed. Various acts adopted by the Commission pursuant to that regulation are preparatory and hence cannot be the subject of an application for annulment, the reason being that sufficient protection is afforded by bringing an action against the final decision. Examples of acts against which an action will not lie are: a decision to initiate an anti-dumping procedure¹⁷⁸; a proposal submitted by the Commission to the Council, following an objection raised in the Advisory Committee, to terminate the procedure without imposing protective measures¹⁷⁹; a decision of the Commission rejecting an undertaking offered by the company concerned in return for the termination of the anti-dumping investigation¹⁸⁰; a Commission decision terminating an undertaking breached by an exporter.¹⁸¹

7-054 Definitive measures. Nevertheless, it should be noted that other acts adopted by the Commission in anti-dumping procedures have definitive legal effects and may be attacked by means of an action for annulment. Examples of such acts include: a Commission decision to terminate the anti-dumping procedure without imposing anti-dumping duties¹⁸² and a Commission regulation imposing provisional anti-dumping duties.

As far as Commission regulations imposing provisional anti-dumping duties are concerned, an action for the annulment of such a regulation will become devoid of purpose when the Council takes a decision with regard to the imposition of definitive anti-dumping duties.¹⁸³ This does not prevent

¹⁷⁶ ECJ, Case C-112/85 *Spitzenhöfen Maschinenbau-Montagenbau und Others v Council* [1985] E.C.R. 3329; ECJ, Case C-76/91 *Evaxion and Others v Council* [2003] E.C.R. I-10051, para. 71.

¹⁷⁷ Council Regulation (EC) No 384/96 of December 22, 1995 on protection against dumped imports from countries not members of the European Community [1996] O.J. L592.

¹⁷⁸ CFI (order of March 14, 1996), Case T-234/95 *Duran Magnetics and Review Magnetics v Commission* [1996] E.C.R. II-151, para. 23, and CFI (order of December 16, 1996), Case T-75/96 *Stelias v Commission* [1996] E.C.R. II-1535, paras 25-43.

¹⁷⁹ CFI, Case T-112/95 *Officinas v Commission* [1997] E.C.R. II-1161, para. 45-54.

¹⁸⁰ ECJ, Joined Cases C-133 and C-153/87 *Nashua and Others v Commission and Council* [1990] E.C.R. I-719, paras 8-11; ECJ, Case C-154/87 *Gentener Holdings v Council and Commission* [1990] E.C.R. I-751, para. 1.

¹⁸¹ CFI (order of July 13, 1995), Case T-234/95 *Mison v Commission* [1996] E.C.R. II-635, para. 31.

¹⁸² Note that an action will also lie against a decision of the Commission denying a third party access to the non-confidential file. ECJ, Case C-172/89 *BEUC v Commission* [1991] E.C.R. I-3729, para. 11.

¹⁸³ ECJ, Case C-315/93 *Günke and Others v Commission* [1994] E.C.R. I-5539; ECJ, Case C-75/91 *Evaxion and Others v Council* [1993] E.C.R. I-10051, para. 72.

¹⁸⁴ ECJ, Case 256/85 *Brother Industries v Commission* [1993] E.C.R. 3635; ECJ, Joined Cases 256/85 and 75/87 *Technische Glaswerke v Commission and Council* [1993] E.C.R. 6977, paras 10-14.

irregularities committed by the Commission in the course of the procedure leading to the imposition of provisional anti-dumping duties from being raised in order to claim that the Council regulation imposing definitive anti-dumping duties should be annulled, provided that the Council regulation takes the place of the Commission regulation. If, however, the defects are remedied in the course of the procedure resulting in the imposition of definitive anti-dumping duties, the unlawfulness of the Commission regulation will no longer affect the legality of the Council regulation.¹⁴⁵

Not only the Council regulation imposing definitive anti-dumping duties may be contested in judicial proceedings. The tacit rejection by the Council (on account of failure to achieve the requisite majority in the Council) of the Commission's proposal for a regulation imposing definitive anti-dumping duties also constitutes a reviewable act.¹⁴⁶

5. Access to documents pursuant to Regulation No 1049/2001

Institutions' rejection of a confirmatory application is a reviewable act. Regulation No 1049/2001¹⁴⁷ defines the principles, conditions and limits governing the right of access by the public to European Parliament, Council and Commission documents so as to enable citizens to participate more closely in the decision-making process, guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and strengthens the principles of democracy and respect for fundamental rights. A two-stage administrative procedure applies. If an initial application for access to documents is refused, the person concerned may make a confirmatory application asking the institution to reconsider its position. Only the institution's decision to reject a confirmatory application is a reviewable act.¹⁴⁸

¹⁴⁵ CFI, joined Cases T-159/94 and T-160/94 *Alcominco and Murelweil v Council* (1997) E.C.R. II-2461, para. 27, upheld by ECJ, joined Cases C-245/95 F and C-279/95 P *Alcominco and Murelweil v Council* (2001) E.C.R. I-3123, paras 63-72.

¹⁴⁶ ECJ, Case C-75/91 P *Sweden and Others v Council* [1993] E.C.R. I-14051, paras 54-65 (see also CFI judgment of March 13, 2003, Case T-177/00 *Koninklijke Philips Electronics v Council*, not reported, paras 28-33). In a subsequent judgment, given in relation to an excessive-deficit procedure, the Court of Justice held that the Council's failure to adopt acts recommended by the Commission could not be regarded as giving rise to acts open to challenge for the purposes of Art. 233 of the EC Treaty. The Court stressed, however, that in an excessive-deficit procedure—unlike in the case of an anti-dumping procedure—there is no provision of Community law prescribing a period on the expiry of which the Council is no longer empowered to adopt the measure proposed by the Commission (ECJ, Case C-27/04 *Commission v Council* [2004] E.C.R. I-6649, paras 32-36).

¹⁴⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents [2001] O.J. L145/43.

¹⁴⁸ CFI judgment of April 11, 2003, Case T-273 *Verenigd Koninkrijk v. Documenten-informatie v Commission*, not yet reported.

II. IDENTITY OF THE PARTIES

A. DEFENDANTS AGAINST WHICH INSTITUTIONS CAN AN ACTION FOR ANNULMENT BE BROUGHT?

1. Institutions

Acts of institutions. The first para. of Art. 233 of the EC Treaty enables actions for annulment to be brought against acts adopted jointly by the European Parliament and the Council and acts of the Council,¹⁴⁹ the Commission and the European Central Bank. Acts of the European Parliament may also be reviewed if they are intended to produce legal effects vis-à-vis third parties.¹⁵⁰ This confirms the case-law on the EEC Treaty with regard to the admissibility of applications for annulment of acts of the European Parliament.¹⁵¹

7-555

¹⁴⁹ An application to annul an act of the European Council will be inadmissible since such acts do not fall within the jurisdiction of the Court of Justice or the Court of First Instance to conduct judicial review. CFI (order of July 14, 1994), Case T-179/94 *Bonnafant v Council*, not reported, para. 13; CFI (order of July 14, 1994), Case T-554/93 *Rozdovsky v Council* [1994] E.C.R. II-335, para. 12.

¹⁵⁰ A decision by which the European Parliament deprived some of its Members of the possibility of forming a political group affects the conditions under which the parliamentary mandate of the Members concerned are exercised, and thus produces legal effects in their regard and goes beyond an act confined to the internal organisation of the work of the Parliament (CFI, joined Cases T-222/99, T-317/99 and T-318/99 *Moritz and Others v European Parliament* (2001) E.C.R. II-2821, paras 55-61). A framework agreement concluded by the Parliament with the Commission which applied a code of conduct governing relations between the two institutions is not an act affecting the legal position of individual Members of Parliament. In particular the right to put questions to the Commission under Art. 193 of the EC Treaty. Consequently, an action brought by a number of Members of Parliament against that framework agreement was dismissed as inadmissible (CFI (order of January 17, 2003), Case T-235/00 *Stauer and Others v European Parliament and Commission* [2003] E.C.R. I-133, para. 12). A decision of the European Parliament laying down the conditions in which OLAF can conduct an investigation in the Parliament goes beyond, in both its object and its effects, the internal organisation of the work of the Parliament and may therefore be the subject of an action for annulment (CFI, Case T-1700 *Bathley and Others v European Parliament* [2002] E.C.R. II-519, paras 56-61, upheld on appeal by ECJ, Case C-167/02 P *Bathley and Others v European Parliament* [2004] E.C.R. I-3149).

¹⁵¹ The first para. of the former Art. 173 of the EEC Treaty confined actions for annulment to acts of the Council or the Commission. That limitation stemmed from the original institutional structure of the Community, in which only the Council and the Commission were empowered to adopt binding acts. The gradual expansion of the European Parliament's competence which enabled it to adopt binding acts prompted the Court of Justice to give a broad interpretation to the first para. of the former Art. 173 of the EEC Treaty in order to avoid acts of the Parliament not being subject to judicial review with regard to their compatibility with the Treaty (ECJ, Case 254/62 *Les Verts v European Parliament* [1969] E.C.R. 1139, confirmed by ECJ, Case 34/66 *Council v European Parliament* [1966] E.C.R. 1155, para. 5).

2. Community bodies entrusted with the preparation or implementation of Community law

7-057 Bodies, offices and agencies. Community institutions may set up bodies (legal persons governed by private or public law) and delegate powers to them. Following on from the judgment in *Les Verts*, which made any binding act of any Community "institution" amenable to judicial review by the Court of Justice and the Court of First Instance, the question arises as to whether the Court of Justice and the Court of First Instance have jurisdiction under Art.230 of the EC Treaty to declare acts of such bodies void. As far as actions for damages are concerned, the Court of Justice has already held that "a Community body established by the Treaty and authorised to act in [the Community's] name and on its behalf" may be an "institution" of the Community for the purposes of the second para. of Art.238 of the EC Treaty¹¹¹ (see 11-011, *supra*). The same approach would not seem to be precluded in the case of actions for annulment.¹¹² It must nevertheless be emphasised that the legal procedure provided for in Art.230 of the EC Treaty cannot be used against bodies established on the basis of provisions of the EU Treaty¹¹³ or of the EEA Agreement.¹¹⁴

¹¹¹ ECI, Case C-370/85 *JOEEM and EIB* (1992) E.C.R. I-611, para 13-14.

¹¹² But naturally only as far as the Community act establishing the body in question does not provide for an effective procedure guaranteeing supervision of the legality of acts of that body (see, e.g. CFI (order of June 8, 1995), Case T-145/91 *Keeling v OHIM* (1995) E.C.R. II-2417, para 30-34; see also Lenaerts, "Regulating the Regulatory Process: Delegation of Power in the European Community" (1993) E.L.Rev. 25-49. For a survey of such bodies, see Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, 110-169-170-176, at 472-475 and 414-462, at 619-626. It has become clear from ECI, Case C-257/94 *Commission v Council* (1995) E.C.R. I-1469, paras 21-23, that Coreper is not an institution, but an auxiliary body of the Council, in that it carries out preparatory work and tasks assigned to it by the Council (EC Treaty, Art.207(1)). Coreper's function of carrying out tasks assigned to it by the Council does not give it the power to take decisions which belong, under the Treaty, to the Council. Acts adopted by Coreper in this context therefore cannot be regarded as binding acts of the Council. In an order of November 26, 1993, the Court of First Instance held that Art.230(6) of the EC Treaty did not afford a legal basis for individuals to bring an action for annulment of decisions of the Board of Directors of the European Investment Bank. The Court took this view because the European Investment Bank, unlike the European Parliament, had not increased its original powers and increase acts of the EIB did not have legal effects vis-à-vis third parties. Consequently, there was no need to give a broad interpretation to Art.230 as the Court of Justice had done in the judgment in *Les Verts* in order to enable actions to be brought against acts of the European Parliament. CFI (order of November 26, 1993), Case T-462/93 *The and Others v EIB* (1993) E.C.R. II-1257. An action for annulment of a decision of the Management Committee of the European Investment Bank brought by the Commission under Art.230(6) of the EC Treaty has been declared admissible (and well founded) by the Court of Justice. ECI, Case C-15/96 *Commission v EIB* (2003) E.C.R. I-7281.

¹¹³ See ECI, Case C-166/93, *Spain v European* (1995) E.C.R. I-2977, paras 33-40. Art.35 of the EU Treaty relates to the jurisdiction of the Court of Justice with regard to the provisions of Title VI of the EU Treaty.

¹¹⁴ CFI (order of July 12, 1995), Case T-316/94 *Polysulfone Producers Group v Council and Commission*, not yet reported, para.31.

3. What acts may be imputed to an institution?

Outcome of the institution's decision-making power. An action for annulment will lie only against acts which may be imputed to a Community institution.¹¹⁵ It is not enough that an institution was involved in bringing the act about in order for it to be imputed to that institution. The act must be the outcome of the institution's decision-making power.

The classic example is a decision to award a tender in a public tendering procedure for works to the ACP States which are financed by the Community. The decision to award the tender is a sovereign decision of the ACP State concerned.¹¹⁶ The Commission's involvement, which is governed by legislation, in preparing the decision does not mean that that decision may be imputed to it.¹¹⁷

Act of a Member or staff member of an institution. An act of a Member or of a staff member of an institution is not necessarily to be imputed to the institution.¹¹⁸ It will be so imputable only if the person who adopts the act makes it clear that he or she does so pursuant to his or her power to act in the name of the institution.¹¹⁹ Furthermore, it must transpire from the content of the act that the person in question intended to express the position or the decision of the institution.¹²⁰

Treaty amendments. Treaty amendments and Acts relating to the accession of new Member States (adopted pursuant to Art.49 of the EU Treaty, formerly Art.237 of the EEC Treaty) are not acts of Community institu-

¹¹⁵ ECI, Case C-202/89 *Le Pen and Front National* (1990) E.C.R. I-1153, para.14: acts of a political group of the European Parliament cannot be imputed to the Parliament *quo actu*. ECI, Case C-9/94 *Orlando Barilli v Commission* (1997) E.C.R. I-6313, para 9-10; ECI, joined Cases C-131 and C-148/91 *European Parliament v Council and Commission* (1993) E.C.R. I-1525: acts adopted by representatives of the Member States' governments meeting in the Council cannot be imputed to the Council, a Community institution.

¹¹⁶ See, e.g. the former *Le Pen* Convention (1991) O.J. L256.

¹¹⁷ ECI, Case 115/83 *STS v Commission* (1984) E.C.R. 2769; ECI, Case 118/83 *CWC v Commission* (1985) E.C.R. 2125; ECI, Case C-251/90 *DeBater v Commission* (1991) E.C.R. I-9. For an application of this principle to the agricultural sector, see CFI, Case T-91/93 *Lago v Commission* (1996) E.C.R. II-135, paras 33-42; CFI, Case T-54/95 *Lundqvist v Commission* (1996) E.C.R. II-113, para 33-42 (in which the Court of First Instance held that the claim for annulment was essentially directed against the act of a national authority and not against an act of a Community institution). But see ECI, Case C-395/95 *P Geometric v Commission* (1997) E.C.R. I-2771.

¹¹⁸ ECI, joined Cases 41 and 49/83 *SAZPAT v High Authority* (1984) E.C.R. 53, at 72.

¹¹⁹ ECI, Case 34/85 *Council v European Parliament* (1985) E.C.R. 2155, para 7-8. A report commissioned by an institution from a private consultancy firm cannot be imputed to the institution. This is because such a report does not contain any act adopted by the institution itself (ECI (order of March 16, 1987), Case 5/87 *Bauer v Commission* (1987) E.C.R. 1231).

¹²⁰ CFI, Case T-213/85 *Nefarma v Commission* (1990) E.C.R. II-797, para.31 (a letter from the Member of the Commission responsible for competition to the Netherlands Government appeared to have been written in his own name and in the context of an exchange of views between politicians, and could therefore not be regarded as an act of the Commission).

tions.²²¹ They are provisions of primary law which are not subject to the system of judicial review provided for in the Treaty. Even if modifications of acts of the institutions ensue out of those provisions, they still do not constitute acts of the institutions and are therefore not amenable to judicial review.²²²

B. APPLICANTS: WHO CAN BRING AN ACTION FOR ANNULMENT?

1. The European Parliament, the Council, the Commission and the Member States.

7-061 Privileged applicants. The European Parliament, the Council, the Commission and the Member States derive from the second para. of Art. 233 of the EC Treaty the right to bring actions for annulment. They are privileged applicants. They may, without proving that they have an interest in bringing proceedings,²²³ bring an action for annulment against any binding act of a Community institution, whether general or individual, and may also rely on any plea in law permitted under Art. 230 of the EC Treaty.²²⁴ The right to bring an action for annulment is not dependent upon the position which they took up when the act at issue was adopted. Thus, the fact that an act was voted for in the Council by the representative of a Member State does not disqualify that Member State from bringing an application for its annulment.²²⁵ Any Member State has a right to bring an action for annulment and that right is not dependent upon other Member States, the Council or the Commission participating in the proceedings before the Court of Justice.²²⁶

²²¹ ECJ, Case C-93/88 *Commission v Spain* [1991] E.C.R. I-3221, para. 10.

²²² ECJ, Joined Cases 31 and 35/85 *LAKE and Others v Council* [1988] E.C.R. 2245, paras 1-15 (with a case note by Vanderlinden [1988] C.M.L.Rev. 351-351).

²²³ ECJ, Case 45/83 *Commission v Council* [1987] E.C.R. 1493, para. 5. For the first case brought by the European Parliament as a privileged applicant, see ECJ, Case C-54/93 *European Parliament v Council* (pending case).

²²⁴ ECJ, Case C-83/83 *Italy v Commission* [1985] E.C.R. 871, para. 30. One of the questions raised in that case was whether Italy could bring an action for annulment against a Commission decision finding that British Telecommunications, at that time a nationalised undertaking having a statutory monopoly in the UK over the running of telecommunications services, had infringed Art. 82 of the EC Treaty. Italy argued, amongst other things, that the Commission had disregarded Art. 84(2) of the EC Treaty and that undertakings entrusted with the operation of services of general economic interest were subject to Community competition law only in so far as its application did not impede the performance of their particular tasks. The Court of Justice allowed Italy to raise that plea despite the fact that what was involved was a balancing of interests—described by the Commission as difficult—which affected only the UK.

²²⁵ ECJ, Case 196/79 *Italy v Council* [1979] E.C.R. 2515, para. 5-6.

²²⁶ ECJ, Case 219/81 *Luxembourg v European Parliament* [1981] E.C.R. 255, paras 22-26 (interpretation of Art. 233, first para., of the ECSC Treaty, which also held good for Art. 233, second para., of the EC Treaty). Community law does not impose any obligation on a Member State to bring an action for annulment for the benefit of one of its citizens. As to the question whether national law may impose such an obligation, the Court of Justice

Local authorities. Local authorities (municipalities, federated States, etc.) are not equated to a Member State and are therefore not privileged applicants. If they have legal personality under national law, they may be regarded as legal persons within the meaning of the fourth para. of Art. 230 of the EC Treaty and bring an action, provided that the admissibility requirements laid down in that provision of the Treaty are satisfied.²²⁷

3. The Court of Auditors and the European Central Bank

Semi-privileged applicants. In the judgment in the *Chernobyl* case, the Court of Justice granted the European Parliament a right not conferred by the former Art. 173 of the EEC Treaty (now Art. 230 of the EC Treaty) to bring an action for annulment against acts of the Council or the Commission "provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement".²²⁸ The

note that such obligation would, in principle, not infringe Community law but added that a Member State could, however, breach the obligation of sincere cooperation laid down in Art. 17 of the EC Treaty if it did not retain a degree of discretion as to the appropriateness of bringing an action, thereby giving rise to a risk that the Community Courts might be inundated with actions, some of which would be patently unfounded, thus jeopardising the proper functioning of the Court of Justice (ECJ judgment of October 22, 2005). Case C-511/03 *Van Kester Holding Almereveen and Others*, not yet reported, paras 30-31).

²²⁷ ECJ, Case 224/83 *Identicity of Differend and Others v Commission* [1984] E.C.R. 2889, para. 9; see also the Opinion of Advocate General C.O. Lenz in ECJ, Joined Cases 82 and 128/77 *Regional Farmers and Glaxo v Commission* [1988] E.C.R. 1573, at 1532; ECJ, Case C-295/89 *Gibraltar v Council* [1993] E.C.R. I-3605, para. 14; ECJ (order of March 21, 1997), Case C-65/97 *Region Wallonie v Commission* [1997] E.C.R. I-1757, para. 4, and ECJ (order of October 1, 1997), Case C-182/97 *Regions Tardieu v Commission* [1997] E.C.R. I-5245, paras 6-8; CF, Case T-214/95 *Moore Sewer v Commission* [1997] E.C.R. II-2717, para. 25; CF (order of June 15, 1993), Case T-238/97 *Comunidad Autónoma de Canarias v Council* [1998] E.C.R. II-2274; CF, Case T-288/97 *Regione Autonoma Friuli Venezia Giulia v Commission* [1998] E.C.R. I-1871, paras 25 et seq., in particular paras 46-48, in which the Court of First Instance held that the fact that a Member State is responsible in an action for failure to fulfil obligations for the acts of devolved bodies and cannot rely in its defence on the division of powers in effect nationally does not mean that the devolved body cannot bring an action for annulment where a decision addressed to a Member State is of direct and individual concern to it. This is because the two actions (action for failure to fulfil obligations and action for annulment) are autonomous procedures and, as a result, the admissibility of an action brought under Art. 230 of the EC Treaty must be decided only in the light of "the objectives specific to that provision and of the principle of judicial protection according to which it must be open to every natural or legal person to apply to the courts on his own initiative, that is to say in the exercise of his own judgment, in order to obtain review of an act which adversely affects that person". CF, Case T-689/97 *Regione Puglia v Commission and Spain* [1998] E.C.R. I-4351, para. 17; CF, Joined Cases T-153/01 and T-217/01 *Gibraltar v Commission* [2002] E.C.R. II-2109, paras 32-33. For an extended discussion, see P. Van Nuffel, "What's in a Member State? Central and Decentralised Authorities before the Community Courts" (2002) C.M.L.Rev. 871-891.

²²⁸ ECJ, Case C-70/83 *European Parliament v Council* [1983] E.C.R. I-2841, para. 27. In the judgment on the substance of the case, moreover, the Court of Justice declared the European Parliament's second and third pleas inadmissible in that they did not allege any infringement of its prerogatives; ECJ, Case C-70/83 *European Parliament v Council* [1983]

primary intention of the Court in its ruling was to maintain the balance between the institutions laid down by the Treaties.²⁴ The Treaty of Nice has now raised the European Parliament to the status of a privileged applicant. The third para of Art.230 of the EC Treaty confers a limited right of action on the Court of Auditors and the European Central Bank within the meaning of the *Chernobyl* judgment. Accordingly, the Court of Auditors and the European Central Bank must clearly show which of their prerogatives should have been respected and in what way the prerogative in question has been infringed.²⁵

3. Individual applicants

- 7-064 Conditions Under the fourth para of Art.230 of the EC Treaty, any natural or legal person has the right to institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.²⁶

a. Requirements as to admissibility relating to the person

- 7-065 Which persons? Any natural or legal person may bring an action for annulment.²⁷ The applicant's nationality is irrelevant as far as the admissibility of the application is concerned. Moreover, the fourth para. of

E.C.R. I-4529, paras 19-21. That condition for admissibility has been confirmed in, for example, ECI, Case C-295/90 *European Parliament v Council* [1992] E.C.R. I-4193, paras 8-10; ECI, Case C-216/91 *European Parliament v Council* [1994] E.C.R. I-625, para.15; ECI, Case C-157/91 *European Parliament v Council* [1994] E.C.R. I-2657, paras 14-15; ECI, Case C-182/91 *European Parliament v Council* [1995] E.C.R. I-4741, paras 11-17.

²⁴ Cf. Bradley, "The Variable Evolution of the Standing of the European Parliament in Proceedings before the Court of Justice" (1988) Y.E.L. 27-57; Darnett, "Le statut contentieux du Parlement européen", in *L'Europe et le Droit—Mélanges en l'honneur de J. Boulois* (Ed. Dalloz, Paris, 1991), at 75-96.

²⁵ The earlier case-law with regard to the European Parliament provides indications which will also apply to the Court of Auditors and the European Central Bank in assessing the admissibility of actions for annulment brought by those bodies: ECI, Case C-316/91 *European Parliament v Council* [1994] E.C.R. I-625, para.15; ECI, Case C-216/91 *European Parliament v Council* [1994] E.C.R. I-625, para.15; ECI, Case C-157/91 *European Parliament v Council* [1994] E.C.R. I-2657, para.14; ECI, Case C-182/91 *European Parliament v Council* [1995] E.C.R. I-4741, para.11 (infringement of the requirement laid down in Art.233 of the EC Treaty to state the reasons on which acts are based cannot be relied upon by the European Parliament on the ground that it is not clear how that breaches its prerogatives); ECI, Case C-360/95 *European Parliament v Council* [1996] E.C.R. I-1155, para.16 (an action contesting the legal basis on which the action attacked is founded has a bearing on the protection of the Parliament's prerogatives); ECI, Case C-392/95 *European Parliament v Council* [1997] E.C.R. I-3313, paras 14-15; ECI, Case C-259/95 *European Parliament v Council* [1997] E.C.R. I-5523.

²⁶ The admissibility requirements for individuals must not be interpreted restrictively. See CFI, Case T-283/97 *Regione Autonoma Friuli Venezia Giulia v Commission* [1999] E.C.R. II-3871, para.40. For a recent analysis of the case-law, see Arnulf, "Private Applicants and the Action for Annulment: *Case Codonan*" (2002) C.M.L.Rev. 7-32.

²⁷ In all probability this includes third countries, cf. ECI (order of February 13, 1963), *Joined Cases 51 and 202/62 Christian International Foodstuffs Commission* [1963] E.C.R. 417, in which

Art.230 of the EC Treaty does not require the applicant to belong to a particular sector of the economy.

Notion of legal personality. In principle, national law determines whether the applicant has legal personality.²⁸ Sometimes lack of legal personality precludes access to the Court of Justice or the Court of First Instance.²⁹ Often, however, entities without legal personality may nevertheless be admitted to bring an action for annulment. In order for them to bring an action, they must be entitled and in a position to act as a responsible body in legal matters.³⁰ As a result, the expression "legal persons" has been given an independent, Community meaning which is not necessarily the same one it has in national law. The fact that the applicant was recognised by the defendant as a negotiating partner before the proceedings arose³¹ and the fact that an *ad hoc* association was allowed to take part in a tendering procedure organised by the Commission³² have helped applicants to be recognised as legal persons within the meaning of the fourth para of Art.230 of the EC Treaty.

b. Requirements as to admissibility based on the type of act

(1) The requirement that the contested act should be a decision

Decision. The only Community acts which can, in principle, be challenged by natural or legal persons in an action for annulment are decisions addressed to them, decisions addressed to another person or decisions adopted in the form of a regulation.³³ In the last two cases, an action for

the Court of Justice gave a third country leave to intervene in the proceedings on the ground that it was an interested "person" within the meaning of the second para. of Art.40 of the Statute of the Court of Justice.

²⁸ ECI, Case 185/77 *Yield v High Authority* [1978] E.C.R. 41, at 43-45; ECI, Case 50/84 *Benider v Commission* [1984] E.C.R. 3991, para.7; CFI, Case T-174/93 *Svenska Sjöfartsförbundet v Council* [1998] E.C.R. II-2339, para.43; cf. ECI, Case 254/83 *Les Verts v European Parliament* [1986] E.C.R. 1339, paras 13-18, in regard to merging associations and the assignment of a pending legal action to the new association.

²⁹ ECI, Case 50/84 *Benider v Commission* [1984] E.C.R. 3991, para.9; CFI (order of February 15, 2005), Case T-225/02 *PAOK and Others v Council*, not yet reported, para.36.

³⁰ ECI, Case 175/73 *Union Syndicale and Others v Council* [1974] E.C.R. 913, paras 7-17, at 324-915; ECI, Case 157/74 *Syndicat Général du Personnel des Organismes Européens v Commission* [1974] E.C.R. 333, paras 3-11.

³¹ *Union Syndicale and Others v Council*, para.12; *Syndicat Général du Personnel des Organismes Européens v Commission*, para.9, both cases cited in the preceding n.; CFI, Case T-261/94 *Sinochem Hongkong v Council* [1996] E.C.R. II-685, para.34; CFI, Case T-106/94 *Shanghai Shipyard v Council* [1997] E.C.R. II-1351, para.26.

³² ECI, Case 33/81 *Groupeement des Agences de Voyages v Commission* [1982] E.C.R. 3795, paras 10-11.

³³ Some applicants have argued that the term "decision" used in the fourth para. of Art.230 of EC Treaty (then Art.173, second para., of the EEC Treaty) had a wider meaning than it does in Art.265 of the EC Treaty and covers any binding act. That argument has been

7-655

This requires a substantive analysis of the contested measure. "If a measure lays down generally applicable principles, applies to objectively defined situations and produces legal effects for categories of persons determined in an abstract manner, the measure will be regarded as a regulation." A measure does not lose its general character because "it may be possible to ascertain with a greater or lesser degree of accuracy the

11. ECR, Case 25/62 Pöschmann v Commission [1963] E.C.R. 55, at 158-162.

See, e.g., CH (Judgment of September 21, 2005), Case T-365/01, *Yunus and Al Barakat International Foundation v Council and Commission*, not yet reported, para. 126, 163.

■ *See, Case 19/75 Koninklijke Scholten Honig v Council and Commission* (1977) E.C.R. 797, para.12.

20 E.C. Joined Cases 785 and 790/79 *Ciampi v Commission* [1980] E.C.R. 1549, para.7: "the choice of form cannot change the nature of the measure". For a Commission decision which was held to be a "measure of general application", see *CFI, Case 431/82 Sydkor v Commission* (1983) E.C.R. 1359, para.8, and *CFI Joined Cases T-483/93 and T-483/95 Austria Rice Mills and Others v Commission* [1995] E.C.R. II-2325, para.85; *CFI, Joined Cases T-282/95, T-71/95, T-74/95, T-74/95 and T-925/95 Commission and Dele Mærsk Fruit Europe v Commission* [2001] E.C.R. I-674.

¹⁰ ECI, Joined Cases 36-38 and 43-43/88 *INATEC and Others v. Fifth Authority* [1989] E.C.R. I-166; ECI, Case 147/83 *Birden v. Commission* [1985] E.C.R. 237, paras 11-15; ECI, Case C-244/85 *União Cooperativa de Desidrefacção do Zêze and Others v. Commission* [1989] E.C.R. 3511, para.13; ECI, Case C-225/85 *Cargill and Others v. Commission* [1990] E.C.R. I-1103, paras 13-15; CFI (order of January 12, 1995), Case T-116/94 *Caixa Nacional de Previdência e Assistência a favor dos Associados e Previdenciários* [1995] E.C.R. II-1, paras 21-25; CFI (order of June 15, 1995), Case T-100/94 *RK v. Council and Commission* [1995] E.C.R. I-1711, para.35; CFI, Case T-47/95 *Tétre Rouger and Others v. Commission* [1997] E.C.R. II-481, paras 67-61.

7-068

In the first place, some provisions of acts which, *per se*, are to be regarded as regulations may be decisions against which a natural or legal person can

ECJ, Case 6/52 Zuckerfabrik Wietzenried v Commission [1965] E.C.R. 409, at 423, See also ECJ, Case 64/69 Compagnie Française Commercialis and Financiers v Commission [1970] E.C.R. 211, para.12; ECJ, Joined Cases 785 and 787/73 Celsovk v Commission [1980] E.C.R. 1945, para.9; ECJ, Case 24/81, Requette Frères v Council [1982] E.C.R. 3223, para.7; ECJ, Case 33/81 Abentini v Council and Commission [1982] E.C.R. 3453, para.11; ECJ, Case 23/82 Späcker v Commission [1983] E.C.R. 2159, para.10; ECJ, Case 16/86 Deuts and Gridermann v Council [1987] E.C.R. 941, para.2; ECJ, Joined Cases C-15, and C-106/85, Suez and Others v Commission [1992] E.C.R. I-5851, para.25; ECJ, Cases C-213/91 Abentini v Commission [1993] E.C.R. I-3177, para.17; ECJ, Case C-264/91 Abentini v Council [1993] E.C.R. I-3265, para.19; CFI [order of October 28, 1993], Case T-476/91 FRSEA and FRSEA v Council [1993] E.C.R. II-1157, para.15; CFI, Case T-435/93 Unifruit Mellus v Commission [1994] E.C.R. II-1261; CFI [order of October 4, 1996], Case T-127/95 Sverige, Svedische and Haverford v Commission [1996] E.C.R. II-1263, para.23; CFI [judgment of February 3, 2005], Case T-119/01 Comapica and Others v Commission, not yet reported, para.1X. Cf. ECJ, Joined Cases 41-44/70 International Fruit and Others v Commission [1971] E.C.R. 411, in which the contested "regulations" applied to a number of applications for import licenses which was known at the time when the "regulation" was adopted and no new application could be added. The Court of Justice regarded the act as a conglomerate of individual decisions which, albeit adopted in the guise of a regulation, affected the legal position of each of the applicants for a license. This indicates that the condition of admissibility in the effect that the contested act must be a decision is particularly closely linked with the condition of admissibility requiring a contested act not addressed to the applicant to be of direct and individual concern to him. See also ECJ, Case C-354/87 Weidel v Commission [1990] E.C.R. I-3547, paras 16-23; CFI, Case T-70/94 Comapica and Dele Fresh Fruit Europe v Commission [1996] E.C.R. II-741, para 40-41; see also no appeal in ECJ, Case C-73/97 P France v Comapica and Others [1999] E.C.R. I-185.

²⁰ ECF (order of March 28, 1988), Case C-204/95 P *Bel v Council and Commission*, [1996] E.C.R. I-1587, para.13.

¹² E.C., Case 18/57, *Mollet v. High Authority* (1958) E.C.R. 47, at 59; E.C., Case 45/51, *Meinert v. Commission* (1952) E.C.R. 1129, para.18.

CE Neufville, "Art.1175 (now Art.230) para 4 E.C. Past, Present and Possible Future" (1996) EL Rev. 7, at 23; Wachnagel and Verheyden, "Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires" (1995) C.D.E. 399-414; Cefi (order of April 29, 1999), Case T-126/98 Alice v Commission [1999] E.C.R. II-1331, para 12.

being an action for annulment.²² However, it will be possible to separate out provisions of a regulation only in so far as they do not constitute an indissoluble whole together with the remaining provisions of the regulation.²³ This will be so only where the intended aim of the regulation can be equally well attained after the provisions alleged to be decisions have been severed.²⁴

Secondly, sometimes the dual nature of the contested act as a whole or of some of its provisions will nevertheless be recognised. Then, the act or some of its provisions will operate as a "decision" vis-à-vis some natural or legal persons, whilst remaining for others a regulation.²⁵ The reason for this is that it appears from the case-law that the fact that an act is of a legislative nature does not prevent it in certain circumstances from affecting some of the market participants concerned individually.²⁶ The requirement is that the market participants in question must be affected by the Community act by reason of attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons as if it was a decision addressed to them (see 7-378, *infra*). In such a case, the determination of the nature of the act coincides with the review as to whether the requirement is met for the act, albeit not addressed to the

²² ECI, Joined Cases 15 and 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes et Others v Council* [1962] E.C.R. 471, 473, last para.

²³ It will be hard to separate out transitional provisions from the legislative measure without this causing adverse effects as far as achievement of the intended objective is concerned. Generally, therefore, they will have the same nature as the contested measure: see, for example, ECI, Case 54/80 *Giuffrida and Campogrande v Council* [1981] E.C.R. 693, paras 4-7.

²⁴ For some cases in which any severing of provisions appeared impossible, see Case 45/81 *Mokni v Commission* [1981] E.C.R. 1129, paras 16-19; and ECI, Case 176/82 *Roumbecker-Jahres "De beste bier"* [1983] E.C.R. 3321, paras 12-17.

²⁵ ECI, Case 264/73 *Tinck v Council and Commission* [1973] E.C.R. 549, paras 8-17; CFI, Joined Cases T-431 and T-454/95 *Exporteurs in Levende Varkens and Others v Commission* [1995] E.C.R. II-1941, para 50. See, e.g. CFI (Judgment of February 3, 2001), Case T-139/01 *Comitologie and Others v Commission*, not yet reported, para 137: "It should be noted that a measure of general application such as a regulation may, in certain circumstances, be of individual concern to certain natural or legal persons and thus in the nature of a decision as to their regard".

²⁶ ECI, Case C-352/84 *Softimport v Commission* [1990] E.C.R. I-2471, paras 8-13; ECI, Case C-305/89 *Codorniu v Council* [1994] E.C.R. I-1853, paras 14-23; ECI (order of November 26, 1995), Case C-10/95 *P. Arcorome v Council* [1995] E.C.R. I-4165, para 43; ECI (order of April 24, 1996), Case C-87/95 *P. Casio Nazionale dei Produttori di Abbigliamento a favore degli Assocati e Procuratori v Council* [1996] E.C.R. I-2003, para 26; ECI, Case C-451/99 *P. Antilian Rice Mills v Council* [2001] E.C.R. I-8946, para 46; CFI, Joined Cases T-456 and T-453/93 *Antilian Rice Mills and Others v Commission* [1995] E.C.R. II-1301, para 65; CFI (order of October 4, 1995), Case T-197/95 *Strawie Betendler and Herderon v Commission* [1995] E.C.R. II-1283, para 31; CFI, Case T-295/94 *Roguesse Friet v Council* [1996] E.C.R. I-2331, para 37; CFI (order of December 10, 1995), Case T-13/95 *Africa and Aden-nationale Fruchtimport-Gesellschaft Weichen v Commission* [1996] E.C.R. II-1669, para 47; CFI (order of May 6, 2003) Case T-45/02 *DOF AgroScience and Others v European Parliament and Council* [2003] E.C.R. II-1973, para 34; CFI (order of July 1, 2004), Case T-133/03 *Eridania Sodem and Others v Commission*, not reported, para 32. See also Nibbel, "La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale" (1994) R.T.D.E. 173-174.

traders in question, nevertheless to be of individual concern to them.²⁷ Only those traders who are individually concerned may bring an action for annulment against the contested "decision". For others, the regulation preserves its general legislative character and will not be amenable to an action for annulment. Anti-dumping cases afford striking illustrations. Undertakings which can prove that their identity is apparent from the contested regulation or that the investigation which resulted in the imposition of anti-dumping duties related to them may bring an action for annulment of the regulation or of the provisions of the regulation which imposed anti-dumping duties on them.²⁸

Examination whether a measure is of general application may be superfluous. Ascertaining whether the act is of individual concern closely resembles the criteria that are employed in order to determine whether the contested act is essentially a decision. Both questions—what is to say, whether a given act is a decision or whether an act, albeit not addressed to the applicant, is of individual concern to it—are directed towards the legal effects produced by the act in question and imply a similar investigation of the content of the act. For those reasons, there is increasingly often no express determination of the nature of the contested act. In such cases, the Community Court considers only whether the contested act is of direct and individual concern to the applicant, after observing that the fact that a

²⁷ ECI, Case 123/77 *UNICOM v Council* [1978] E.C.R. 845, para 7, and ECI, Case 54/83 *Compagnie Française Commerciale and Franchère v Commission* [1978] E.C.R. 221, para 3 *et seq.*; ECI, Case C-264/91 *Aghani v Council* [1993] E.C.R. I-5245, para 18; see also CFI, Case T-458/91 *Unifruit Helor v Commission* [1994] E.C.R. I-2201, para 11; for a wide-ranging discussion, see Schermers and Waelbroeck, *Judicial Protection*, § 861-§ 865, at 424-428; Harding, "The Review of EEC Regulations and Decisions" (1982) C.M.L.Rev. 311-312. See also Blockmans, "Der Klagebehauptung für die Individualklage vor dem Europäischen Gerichtshof", in: *Festschrift für C.F. Meijer-Schön*, des vorwiegend juristischen Rechtschreibers (Carl Heymanns Verlag KG, Cologne/Berlin/Bonn/Münster, 1985), 573, at 583; Parkinson, "Admissibility of Direct Actions by Natural or Legal Persons in the European Court of Justice: Judicial Distinctions Between Decisions and Regulations" (1988) *Trans. L.S.*, 433, at 445-449.

²⁸ ECI, Case 113/77 *ATF Toys Bearing v Council* [1979] E.C.R. 1185, paras 10-11; ECI, Case 113/77 *ATF Toys Bearing v Council* [1979] E.C.R. 1275, paras 17-19; ECI, Case 113/77 *Nippon Seiko v Council and Commission* [1979] E.C.R. 1339, paras 12-15; ECI, Case 221/79 *Nishi Fukusaki v Council* [1979] E.C.R. 1351, paras 7-15; ECI, Joined Cases 259 and 273/81 *Alfred Corporation v Commission* [1984] E.C.R. 1003, paras 7-16; ECI, Case 2383 *Alfred Corporation v Council* [1985] E.C.R. 1511, paras 2-5; ECI, Case 240/84 *MTV Toys Bearing v Council* [1985] E.C.R. 1509, paras 4-7; ECI, Joined Cases C-131 and C-150/85 *Nishina and Osho v Commission and Council* [1986] E.C.R. I-719, paras 12-15; ECI, Joined Cases C-303/86 and C-163/87 *Nestlé Technoport v Commission and Council* [1990] E.C.R. I-2943, para 15; ECI, Case C-353/88 *Extramit Industrie v Council* [1991] E.C.R. I-2501, para 13-14. See also Greaves, "Lexis Standi under Art.173(now Art.239) EEC when Seeking Annulment of a Regulation" (1986) E.L.Rev. 115, at 131; Nibbel, "La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale" (1994) R.T.D.E. 173-174. For a critical note, see Von Heydebrand and der Laan, "Die Nichtigkeitsklage von Unternehmen aus Drittländern vor dem EGH gegen 'Verordnungen' im Bereich des Antidumpingrechts" (1993) N.J.W. 1257, at 1259.

measure is of general application does not mean that it cannot be of direct and individual concern to certain economic operators.²⁷

Accordingly, the Court of Justice has declared admissible an application brought by a legal person for annulment of an intrinsically legislative regulation laying down general rules for the description and presentation of sparkling wines. The Court of Justice treated the regulation as far as the applicant was concerned as a decision of individual concern to it on the ground that the regulation prohibited use of a graphic trade mark which the applicant had officially registered before the regulation entered into force.²⁸ As a result, the contested regulation adversely affected "specific rights" of the applicant, which, as the Court held, the latter must be able to challenge by means of an action for annulment.²⁹

(2) The requirement that, if the contested act is not addressed to the applicant, it should be of direct and individual concern to him

Avoiding the risk of an *actio popularis*. Under the fourth para. of Art.230 of the EC Treaty, an application brought by natural or legal persons against decisions adopted in the form of a regulation or addressed to another person will be admissible only in so far as they are of direct and individual concern to them. The justification for the restriction lies in the far-reaching consequences of the annulment of a Community act. Annulment applies *erga omnes* and is retroactive. To make the action for annulment generally available might mean permanent litigation on Community regulations and open the way to an *actio popularis*.³⁰

²⁷ ECJ, Case C-306/89 *Codorniu v Council* [1994] E.C.R. I-3553, para.15; ECJ, Case C-142/83 *P Commission v Netherlands Anheuser* [1983] E.C.R. I-3453, para.4; ECJ, Case C-263/82 *P Commission v Rigo-Quiré* [1984] E.C.R. I-3425.

²⁸ ECJ, Case C-308/89 *Codorniu v Council* [1994] E.C.R. I-3551, para.14-23.

²⁹ See the interpretation of the judgment in *Codorniu* in this effect in ECJ (order of November 23, 1995), Case C-12/95 *P Anheuser v Council* [1995] E.C.R. I-4149, para.43 (from which it also appears that the Court considers this to be an absolutely exceptional situation). See also CFI (order of September 5, 1993), Case T-263/91 *Attardo Agricola Tre e Manno and Benazech v Commission* [1993] E.C.R. II-3105, paras 12-17; CFI (order of September 15, 1993), Case T-100/94 *Michailidis and Others v Commission* [1998] E.C.R. II-3115, paras 37-39; CFI (order of September 15, 1993), Case T-109/91 *Molkerei Graubünden and Sene Hühnerzucht v Commission* [1999] E.C.R. II-3133, paras 57-75; CFI, Case T-7/96 *IFI v Commission* [1998] E.C.R. II-1757, para.30.

³⁰ Opinion of Advocate General A. Durieux-Lat de Lamoignon in ECJ, joined Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et Cérise and Others v Commission* [1972] E.C.R. 391, at 411; Opinion of Advocate General H. Mayras in ECJ, Case 43/71 *Markus Auerhahn v Commission* [1973] E.C.R. 1055, at 1079. See, to the same effect, Harding, "The Private Interest in Challenging Community Action" [1992] E.L.Rev. 354, at 358. For an example where a measure was held not to be of direct concern to the applicants, see CFI, Case T-56/92 *CCF de la Société Générale des Grands Sources and Others v Commission* [1995] E.C.R. II-2113, para.45.

(i) Direct concern

Definition. The requirement that a decision not addressed to the applicant must be of direct concern to it expresses the rule that an applicant may bring an action for annulment only against acts of Community institutions which, as such, have legal effects on it.³¹ By contrast, Community acts which are to be implemented by national authorities and in respect of which the latter have a discretion do not obtain their precise scope until they have been implemented. Interested individuals are entitled to challenge the implementing measures before the national courts when they have been adopted. If it is argued that the implementing measures are unlawful on the ground that the Community act purporting to be implemented is invalid, the national court may (or must) make a reference to the Court of Justice for a preliminary ruling (see Ch.13, *infra*). In this way, the structure of legal protection reflects the structure of Community law-making.

Measure affecting the applicant's legal position. In order for it to be found that an act is of direct concern to the applicant, the question whether the contested measure confers a discretion on the national authorities or on its addressee³² with regard to its implementation, must be answered in the negative.³³ The Court of Justice has further specified that the requirement that the measure must be of direct concern will be satisfied only if the contested act is capable of directly producing effects on the applicant's legal position.³⁴ The Court therefore held that an interpretative note, adopted in

³¹ ECJ, Case 294/83 *Les Verts v European Parliament* [1986] E.C.R. 1339, para.35: the contested measures are of direct concern to the applicant because they "constitute a complete set of rules which are sufficient in themselves and ... require no implementing provisions". See also the Opinion of Advocate General K. Roemer in ECJ, Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95, at 114-115.

³² The fact that the Commission declares a concentration notified to it pursuant to Regulation No 4064/89 compatible with the common market on condition that the notifying parties implement "commitments" set forth in the notification does not prevent a third undertaking, which is affected by the implementation of those commitments, from being directly concerned by the Commission's decision. This is because there is no doubt that parties to the concentration have undertaken to implement those commitments, given that the Commission declared it compatible with the common market in return for compliance with those commitments and the Commission may always revoke its decision under Art.3(5)(b) of the regulation if the undertakings concerned commit a breach of an obligation attached thereto (ECJ, joined Cases C-68/94 and C-33/95 *France and Others and EMC v Commission* [1998] E.C.R. I-3373, para.51).

³³ For examples, see ECJ, joined Cases 42-44/70 *Internationale Fruite and Others v Commission* [1971] E.C.R. 411, paras 23-25; ECJ, joined Cases 83 and 131/77, 2283, 5 and 1084 *Selma and Others v Commission* [1985] E.C.R. 2525, paras 31-32; ECJ, Case 20/75 *APESCO v Commission* [1976] E.C.R. 2151, para.12.

³⁴ ECJ, Case C-486/01 *F. From National v European Parliament* [2004] E.C.R. I-5639, paras 34-43. See in this connection also CFI, Case T-96/92 *CCF de la Société Générale des Grands Sources and Others v Commission* [1995] E.C.R. II-2113, para.26; CFI (order of February 15, 1998), Case T-139/97 *Compagnie d'Approvisionnement de la Société française de production and Others v Commission* [1998] E.C.R. I-315, para.48.

plenary session on September 13, 1999, to Rule 25(1) of the Rules of Procedure of the European Parliament¹⁴⁵ which no longer permitted a political group to be formed where the group openly rejected any political character and all political affiliation between its Members did not directly affect the *Front National* as a political party. As a result, the "*Groupe technique des députés indépendants*", to which the Members of the *Front National* belonged, could no longer function as a political group. Since, in accordance with the wording of Rule 29 of the Rules of Procedure, only Members of the European Parliament could form political groups, the *Front National* as a political party was affected only indirectly with the result that the application brought by that party for annulment of the interpretative note was declared inadmissible.¹⁴⁶ By contrast, a regulation relating to the funding of European political parties¹⁴⁷ was of direct concern only to the political parties in question and not to individual Members of the European Parliament.¹⁴⁸

- 7-074 Discretion with regard to implementation. The contested act will not be of direct concern to the applicant where, in implementing the act, the authorities entrusted with the task of implementation, have a genuine discretion.¹⁴⁹ Where implementation is "purely automatic", no discretion on the part of the national authorities (or other authorities entrusted with the task of implementation) is involved and the Community act to be implemented is of direct concern to the applicant, provided, of course, that the act is capable of actually affecting the applicant's legal position.¹⁵⁰ Accord-

¹⁴⁵ [1999] O.J. L270/1.

¹⁴⁶ ECJ, Case C-456/01 *P Front National v European Parliament* [2004] E.C.R. I-5269, paras 34-43 and 47. In contrast, the interpretative note 66 has a direct effect on Members of the European Parliament; see CFJ, *Joined Cases T-22/99, T-32/99 and T-329/99 Mariner and Others v European Parliament* [2001] E.C.R. II-2523, para.45, upheld on appeal by ECJ (order of November 11, 2003), Case C-483/01 *P Mariner v European Parliament* [2003] E.C.R. I-3355.

¹⁴⁷ Regulation (EC) No 2004/2003 of the European Parliament and of the Council, of November 4, 2003 on the regulations governing political parties at European level and the rules regarding their funding ([2003] O.J. L257/1).

¹⁴⁸ CFJ (order of July 21, 2003), Case T-42/04 *Bordino and Others v European Parliament and Council*, not yet reported, paras 33-35.

¹⁴⁹ For examples, see ECJ, Case 123/77 *GNICME v Council* [1978] E.C.R. 845, para.11; ECJ, Case 55/85 *ARPGSOG v Council* [1986] E.C.R. 13, paras 11-12; CFJ (order of October 11, 1993), *Joined Cases T-492/93 and T-492/93 R.Naval v Commission* [1993] E.C.R. II-0223, paras 16-19; CFJ, Case T-3456 *Ciampi Italiani and Fratelli Rubino Industrie, Oberte v Commission* [1993] E.C.R. II-3377, para.16; CFJ (order of March 15, 2004), Case T-129/02 *Industrie N. Angeripoulou and Others v Commission* [2004] E.C.R. II-575, paras 52-70.

¹⁵⁰ ECJ, Case 13/77 *NTN Toyo Bearing v Council* [1979] E.C.R. 1185, para.11; ECJ, Case 124/77 *ISO v Council* [1979] E.C.R. 1277, para.26; ECJ, Case 159/77 *Nippon Seiko v Council and Commission* [1978] E.C.R. 1303, para.14; ECJ, Case 120/77 *Koyo Seiko v Council and Commission* [1979] E.C.R. 1337, para.25; ECJ, Case 121/77 *Nachi Fujikoshi v Council* [1978] E.C.R. 1133, para.11; ECJ, Case C-386/93 *P Dreyfus v Commission* [1995] E.C.R. I-2509, para.43; CFJ, Case T-355/94 *Cimmar Paper v Council* [1995] E.C.R. II-575, para.153; CFJ, Case T-100/94 *Shanghai Bicycle v Council* [1997] E.C.R. II-1381, para.41; CFJ, *Joined Cases T-196/93, T-171/94, T-230/91, T-174/93 and T-225/93 Cornillon and Sole Fresh Fruit Europe v Commission* [2001] E.C.R. II-1915, para.95; ECJ, Case C-486/01 *P Front National v European Parliament* [2004] E.C.R. I-5265, paras 34-43.

ingly, an undertaking was found to be directly concerned by a Commission decision on State aid where there was no doubt as to the national authorities' intention to put the aid measure into effect.¹⁵¹ An interested third party will also be directly affected by a Commission decision referring the examination of a concentration to the authorities of a Member State pursuant to Art.5 of Regulation No 4064/89 (now Regulation No 139/2004). This is because the effect of the contested decision is to deprive the applicant of a review of the concentration by the Commission on the basis of Regulation No 4064/89, of the procedural rights provided therein for third parties and of the judicial protection provided for by the Treaty. That effect is direct because the contested decision requires no additional implementing measure in order to render the referral effective.¹⁵²

Directives. In principle, an application brought by a natural or legal person for annulment of a directive is inadmissible because a directive cannot be of direct concern to such persons. This is because, in transposing the directive, the Member States remain free to choose the form and method of implementing it in national law and achieving the result to be attained. In that context, a directive cannot in itself impose obligations on individuals. For those reasons, a directive is not capable in itself, independently of the adoption of implementing measures, of affecting the legal position of market participants.¹⁵³

Authorisation by the Commission of an act of a Member State. A decision by which the Commission authorises Member States in some areas of Community law to diverge from the applicable general provisions may be of

¹⁵¹ CFJ, Case T-432/93 *ASFEC and Others v Commission* [1995] E.C.R. I-1261, para.62; CFJ, Case T-17/95 *TFI v Commission* [1997] E.C.R. II-1757, para.52.

¹⁵² CFJ, *Joined Cases T-346/01 and T-347/01 Cabimex and Others v Commission* [2003] E.C.R. I-4251, paras 14-16.

¹⁵³ CFJ (order of September 18, 2002), Case T-212/01 *Japan Tobacco and JT International v European Parliament and Council* [2002] E.C.R. I-3255, paras 45-50; CFJ, *Joined Cases T-172/98 and T-173/98 to T-175/98 Salamander and Others v European Parliament and Council* [2000] E.C.R. II-2487, para.54; CFJ (order of May 5, 2003) Case T-45/02 *DOW AgroScience and Others v European Parliament and Council* [2003] E.C.R. II-1579, paras 15-41. See also ECJ (order of December 7, 1988), Case 138/85 *Finow v Council* [1988] E.C.R. 593, paras 13-15; ECJ (order of December 7, 1988), Case 160/84 *Fédération Européenne de la Santé Animale and Others v Council* [1988] E.C.R. 6359, paras 12-14; ECJ, Case C-296/89 *Göbeler v Council* [1991] E.C.R. I-1665, para. 14-24; CFJ (order of October 29, 1997), Case T-461/93 *GEVA v Council* [1993] E.C.R. II-1204, para.13; CFJ (order of October 28, 1994), Case T-55/94 *Avoncare v Council* [1994] E.C.R. II-571, paras 17-19; ECJ (order of November 21, 1955), Case C-10/55 *P. Ausimex v Council* [1955] E.C.R. I-4145, paras 35-36. Cf. CFJ, Case T-135/86 *WEAPME v Council* [1988] E.C.R. II-2335, para.53, from which it appears that, exceptionally, it is possible that an applicant may be directly and individually concerned by a directive if it can prove that it has a right which the Community institutions should have taken into account when they adopted the directive. This is because the mere existence of such a right means that its holder should be afforded legal protection. Cf. Schneider, "Effektiver Rechtsschutz Privater gegen EG-Richtlinien nach dem Maastricht-Urteil des Bundesverfassungsgerichts", (1994) *Archiv des öffentlichen Rechts* 374.

direct concern to individuals, depending on the circumstances. This will be so where, before they were given authorisation, the national authorities limited their discretion themselves. The Court of Justice has therefore held that where the Member State concerned makes it known beforehand that it will implement an authorising decision, that decision will be of direct concern to individuals.¹²⁴ The Member State's position does not have to be express, it may be inferred from all relevant factors.¹²⁵ If a Member State does not make its position known beforehand with regard to an authorising decision, it reserves its power of discretion and the decision is not of direct concern to individuals.¹²⁶

If an application from a Member State for authorisation is refused and this adversely affects an individual's interests, the requirement that the contested act must be of direct concern to the applicant is assessed just as if the authorisation had been granted.¹²⁷ Authorisation from the Commission of a protective measure already adopted by a Member State is of direct concern to individuals.¹²⁸

377 Aid programmes financed by the Commission. In the context of aid programmes financed by the Community or the grant of Community loans to non-member countries, one and the same division of powers is generally instituted between the authorities of the beneficiary State and the Community institutions. The authorities of the beneficiary State have the power to select a contractual partner to carry out a particular project, to negotiate the contractual conditions and to conclude the agreement. The Commission is given the task only of examining whether the conditions for Community financing are met. Undertakings competing for the grant of a particular project are in a legal relationship only with the authorities of the beneficiary State. For its part, the Commission has legal relations only with the authorities of the beneficiary State. This pattern of legal relations means that the decision by which the Commission approves the financing of

¹²⁴ ECI, Case 52/70 *Beck v Commission* [1971] E.C.R. 557, para 6-8; *contra*: ECI, *Joined Cases 10 and 12/53 "Eridania" Zuccherificio Nazionale and Others v Commission* [1954] E.C.R. 439. A decision by which the Commission declares, pursuant to Directive 85/552/EEC (television-without-frontiers directive), that an autonomous decision by a Member State to impose reception of a television broadcaster established in a Member State on the ground that it is likely to impair the development of cinema is compatible with Community law is not of direct concern to the broadcaster. The reason for this is that the Commission decision does not replace the national measure and cannot be regarded as a prior authorisation, with the result that the national measure does not implement the Commission decision (CFI, Case T-69/95 *DSTV v Commission* [2000] E.C.R. II-4033).

¹²⁵ ECI, Case 11/82 *Alcibi-Franzini v Commission* [1983] E.C.R. 229, para 7-10.

¹²⁶ Cf. ECI, Case 123/77 *UNICME v Council* [1978] E.C.R. 841 (where derogating rules were provided for a Member State in a Council regulation).

¹²⁷ ECI, Case 89/88 *Alcan v Commission* [1979] E.C.R. 285, para 15: "The decision rejecting the request does not ... concern the applicants in any other way than would the positive decision which they wish to obtain".

¹²⁸ ECI, *Joined Cases 106 and 107/53 Joerges and Gebhardt-Joerges v Commission* [1955] E.C.R. 451, at 411.

a contract concluded by the beneficiary State is not of direct concern to undertakings to which the contract is not granted.¹²⁹ This is because the Commission's decision to finance the project does not take the place of the decision of the beneficiary State granting the contract in question.¹³⁰ However, it is possible for the undertaking to which the beneficiary State awarded a contract to be directly concerned by the Commission decision refusing financing. This depends on the circumstances in which the Commission decision was adopted.¹³¹ If it appears that the Commission decision refusing Community financing deprived the applicant of any real possibility of performing the transaction entered into with the beneficiary State or of obtaining payment of the goods supplied on the agreed terms, the applicant's "legal situation" will be directly concerned. This will be the case where the contract with the beneficiary State was concluded on account of the commitments which the Commission would enter into in its capacity as "financing authority" once it found that the contract was in conformity with the Community rules.¹³²

(ii) Individual concern

Definition. An act not addressed to natural or legal persons will be of individual concern to them if it "affects them by reason of certain attributes 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

¹²⁹ ECI, Case 125/83 *STS v Commission* [1984] E.C.R. 2763, para 15; ECI, Case 112/83 *OMC v Commission* [1985] E.C.R. 3325, para 21.

¹³⁰ But a Commission act which, by reason of its context, may be isolated from the procedure for the conclusion of a contract between the beneficiary State and an undertaking inasmuch as the Commission adopted it in the exercise of its own powers and specifically directed it to an individual undertaking, which loses any chance of actually being awarded the contract simply because that act is adopted, does give rise to binding legal effects as regards the undertaking in question and may therefore be regarded as an act adversely affecting it. Again, which the undertaking concerned may bring an action for annulment: ECI, Case C-355/85 *P. Georgiadis v Commission* [1997] E.C.R. I-2271, para 12-15.

¹³¹ The assessment is not always easy to make. See, e.g. two cases with similar factual settings but which led to different results: CFI (order of July 8, 2004), Case T-341/02 *Regions Siciliennes v Commission*, not yet reported (no direct concern); *under appeal*: ECI, Case C-417/04 *P. Regione Siciliana v Commission* and CFI (order of October 13, 2005), Case T-640/02 *Regions Siciliennes v Commission*, not yet reported (direct concern).

¹³² ECI, Case C-385/85 *P. Dröppa v Commission* [1988] E.C.R. I-2309, para 40-56; ECI, Case C-431/85 *P. Compagnie Continentale v Commission* [1988] E.C.R. I-2377, para 38-54; ECI, Case C-403/86 *P. Glencore Grain v Commission* [1988] E.C.R. I-2403, para 43-55; ECI, Case C-494/85 *P. Glencore Grain v Commission* [1988] E.C.R. I-2415, para 38-54; the Court of Justice set aside the judgments given by the Court of First Instance in these cases in which the latter court held that the applicants were not directly concerned. In comparison with the approach taken by the Court of Justice, the Court of First Instance made a formal juridical analysis of the question whether the applicants' "legal situation" was affected, whereas the Court of Justice based its reasoning more on the "objective economic" finding that the third country could not conclude the contracts concluded with the applicant for the supply of grain in the absence of Community aid.

(by the act).¹³³ This means that the applicant must prove that the contested act, which, in terms of form, is not addressed to him, affects him substantively as if the act was a decision addressed to him.¹³⁴ This is a particularly strict requirement and it extensively curtails natural or legal persons' ability to bring actions for annulment.¹³⁵

7-079 Contested act constitutes a decision. Where the contested measure is a "decision",¹³⁶ it is sufficient for the applicant to show that, at the time when that decision was adopted, he or she was part of a closed class of persons concerned by that act.¹³⁷ It makes no difference whether the class is large or small or whether its members are known by name. Various sets of circumstances may bring about a closed class.

Accordingly, a closed class is involved where the contested decision affects only persons who satisfied certain conditions before it was adopted. This is a situation in which the decision has completely reactive effect. Because the number of persons who satisfied the conditions laid down for the application of the decision in the past can no longer change, the act is applicable to a closed class. Accordingly, a Commission decision approving a national decision refusing to grant import licences concerns the closed class of importers who were refused an import licence before the Commission decision was taken. That group was known (or at least ascertainable) when the decision was adopted.¹³⁸ The contested decision may be intended

¹³³ ECJ, Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95, at 137.

¹³⁴ ECJ (order of December 12, 2003), Case C-255/02 *P. Baumbach Industrie-Service v Commission* [2003] E.C.R. I-15105, paras 34, 36 and 50; the time for assessing whether the individual was individually concerned is the date of adoption of the contested act. Cf. Case T-1125/77 *Monroville v Commission* [1995] E.C.R. II-1277, paras 48-50: a parent company is individually concerned by a decision addressed to its wholly-owned subsidiary.

¹³⁵ In recent years, commentators have been pressing for a broad interpretation to be placed on the admissibility requirements to be satisfied by applicants who are individuals: see, for instance, *Molinho de Almeida*, "Le recours en annulation des particuliers" (Art. 173, deuxième alinéa/now Art. 259, fourth para.), *du traité CE*: *Commentaires théoriques sur l'expression 'la contestation ... individuellement'*, in *Festschrift für Ulrich Everling* (Nomos, Baden-Baden, 1995), at 845-874. An attempt by Greenpeace to have this requirement less strictly interpreted in environmental cases was rejected by both the Court of First Instance and the Court of Justice (sitting as the Full Court): CFJ (order of August 9, 1995), Case T-585/93 *Greenpeace v Commission* [1995] E.C.R. II-2265 and ECJ, Case C-211/93 *P. Greenpeace Council and Others v Commission* [1995] E.C.R. I-1651. For a critical case note, see Wegener, "Keine Klagebefugnis für Greenpeace und 18 andere: Anmerkungen zu EuGH, Rs C-321/93 *P. Greenpeace*" [1994] Z.U.R. 131-133. Some years ago, the Court of First Instance attempted to make the admissibility requirements more flexible, but this attempt was rejected by the Court of Justice (see CFJ, Case T-47/91 *Agro-Quil v Commission* [2002] E.C.R. I-2365 & ECJ, Case C-50/96 *P. Unión de Pequeños Agricultores v Council* [2002] E.C.R. I-6577, not following the Opinion of Advocate General F.G. Jacobs).

¹³⁶ That is to say, an act, irrespective of its name or form, which is not of general application; see 7-067 and 7-068, *supra*.

¹³⁷ ECJ, Case 57/65 *Deutsches Lebensmittelwerke v Commission* [1967] E.C.R. 2265, para. 11. The Court of Justice uses the expression "closed circle". See also ECJ (order of May 24, 1993), Case C-131/92 *Arnold and Others v Council* [1993] E.C.R. I-2573, para. 8, where the applicant used the expression "closed class".

¹³⁸ ECJ, Joined Cases 106 and 107/93 *Zeepfer and Garde-Import v Commission* [1995] E.C.R. 435, at 411-412.

to cover both events in the past and events to come about in the future. If provisions can be found in the contested decision which are applicable solely to events in the past, those provisions concern a closed class of persons.¹³⁹

Contested act is a measure of general application. Where, in contrast, the contested act is a measure of general application, it is not enough for the applicant to show that it belongs to a closed class in order to show that it is individually concerned by it.¹⁴⁰

The fact that the persons to whom a regulation is applicable are identifiable is not determinative in itself.¹⁴¹ Also the fact that an act of general application is applicable only to a small number of individuals,¹⁴² that certain market participants are affected more harshly in economic terms than their competitors¹⁴³ or that different specific consequences may ensue for the various persons to whom the contested measure applies¹⁴⁴ is

¹³⁹ ECJ, Case 52/70 *Beck v Commission* [1971] E.C.R. 597, paras 2-3.

¹⁴⁰ CFJ, Case T-462/93 *Weyer v Commission* [1995] E.C.R. II-603, para. 45.

¹⁴¹ ECJ, Case 566 *Zuckerfabrik Waischedel v Council* [1963] E.C.R. 409; ECJ, Case 61/59 *Compagnie Française Commerciale et Financière v Commission* [1970] E.C.R. 121, para. 14; ECJ, Case 125/77 *UNICOM v Council* [1974] E.C.R. 845, para. 18; ECJ, Case 242/51 *Roquette Frères v Council* [1982] E.C.R. 3213, para. 7; ECJ, Case 258/6 *Deutscher und Goldmann v Council* [1987] E.C.R. 341, para. 6; ECJ, Joined Cases 97, 193, 95 and 215/65 *Arteris v Commission* [1966] E.C.R. 215, para. 15; ECJ (order of the President of July 13, 1988), Case 154/83 *R. Fédération Européenne de la Santé Animale and Others v Council* [1986] E.C.R. 412, para. 29; ECJ, Joined Cases C-15 and C-108/91 *Suebi and Others v Commission* [1992] E.C.R. I-6841, para. 25; ECJ (order of May 24, 1993), Case C-132/92 *Arnold v Council* [1993] E.C.R. I-2573, paras 12-13; ECJ, Case C-211/93 *Abertal v Commission* [1993] E.C.R. I-1117, paras 17-24; ECJ (order of June 21, 1993), Case C-255/93 *Pacific Fruit Company and Others v Council and Commission*, not reported; Case C-154/93 *Van Parijs and Others v Council and Commission* [1993] E.C.R. I-3335; Case C-275/93 *Chiquito Banana and Others v Council* [1993] E.C.R. I-3345; Case C-252/93 *Comercial and Others v Council and Commission*, not reported; and Case C-283/93 *CO.MA.CO v Council*, not reported; ECJ, Case C-293/93 *Günzler v Council* [1993] E.C.R. I-3635, para. 17. For the possibility that the contested act is also applicable to situations in the future, see ECJ, Case 231/82 *Späcker v Commission* [1983] E.C.R. 2553, paras 8-11; CFJ (order of May 11, 2001), Case T-755/96 *Eridania and Others v Council*, not reported; para. 33. For the possibility that the regulation is also applicable to individuals established in another Member State, see ECJ, Case 1/64 *Glaxo v Commission* [1964] E.C.R. 413, at 417. Also the fact that the applicant is the largest undertaking in the sector in question does not individually place its position sufficiently: CFJ (order of April 25, 1999), Case T-222/98 *Alex v Commission* [1999] E.C.R. I-1555.

¹⁴² ECJ, Case C-255/93 *P. Commission v Agro-Quil* [2004] E.C.R. I-3421, para. 46.

¹⁴³ ECJ, Case C-512/93 *P. Commission v Camer and Tica* [2002] E.C.R. I-2255, paras 65-68; the chief importer of bananas was not individually concerned by the Commission's refusal to adjust the tariff quota for such bananas; CFJ (order of September 15, 1999), Case T-1199 *Van Parijs and Others v Commission* [1999] E.C.R. II-2653, para. 50; CFJ (order of July 6, 2004), Case T-338/03 *Eridania Sodem and Others v Commission*, not reported, para. 15.

¹⁴⁴ ECJ (order of December 15, 1999), Case C-405/96 *P. Schweizer Eidgenössische Eidgenössische and Henschel v Commission* [1999] E.C.R. I-7531, para. 37; CFJ (order of the President of February 13, 2003), Case T-100 *R. Y&S and Others v Commission* [2003] E.C.R. I-251, para. 21; CFJ (order of July 6, 2004), Case T-338/03 *Algeria-Cameroon-Work and Others v Commission*, not yet reported, para. 52.

not sufficient to show that the persons in question are individually concerned by the measure.²⁰¹

If the situation to be regulated is such that, in order to attain its aim, the regulation must be held to be applicable without distinction to facts which existed at the time when it entered into effect and to similar facts which arose thereafter, an applicant cannot rely on its partial retroactive effect in order to claim that it is individually concerned by the act in question.²⁰²

Exceptional circumstances in which the applicant is individually concerned by a measure of general application. An applicant can show in only limited ways that it is individually concerned by a legislative act.

In the first place, an applicant will be individually concerned where the act adversely affected specific rights of the applicant or its members.²⁰³ This is exceptional and there is only one instance to be found in the case-law. In *Codorniu*²⁰⁴ the Court of Justice held that a provision of a Council regulation which reserved the use of the term "cremant" to sparkling wine produced in France and Luxembourg prevented the Spanish undertaking concerned from continuing to sell its wine under the trade mark "Gran Cremant de Codorniu". It had registered this trade mark in Spain as long ago as 1924. It was therefore in a position which differentiated it, from the point of view of the said provision, from all other market participants.

Secondly, the applicant may argue that, in adopting the legislative act, the Community institution was under a duty to take account of its specific circumstances. Such specific protection distinguishes it sufficiently from other market participants to which the act applies. In addition, there is the

²⁰¹ ECJ, Case 38/84 *Gendie Import v Commission* [1985] E.C.R. 203, at 205. In that case, the contested act was a decision addressed to all Member States valid for one day and laying down the basis for an import levy. The applicant was the only individual who had applied for an import certificate.

²⁰² ECJ, Case C-244/88 *Unives Coopératives de Distillation du Vain and Others v Commission* [1989] E.C.R. 3513, paras 11-14; ECJ, Case C-218/88 *Cornil and Others v Commission* [1989] E.C.R. I-2301, paras 13-18.

²⁰³ ECJ, Case C-309/89 *Codorniu v Council* [1994] E.C.R. I-1553; ECJ [order of November 23, 1995], Case C-10/95 *P. Arcoy v Council* [1995] E.C.R. I-4349, para 45 (no specific right infringed); CFI [order of March 26, 1995], Case T-124/95 *Confédération des TECH and Simulacris Confédération LOR v Commission* [1995] E.C.R. II-923, para 33 (no specific right infringed); CFI [order of July 5, 2004], Case T-371/01 *Alpeyrou-Commanche-Werk and Others v Commission*, not yet reported, paras 65-66 (no specific right infringed; an application for annulment brought by manufacturers of Feta cheese established in Denmark against a regulation that made it impossible for them to go on making cheese under that denomination was declared inadmissible); CFI [order of September 6, 2004], Case T-113/02 *SAF v Commission*, not yet reported, paras 55-57; CFI [order of December 10, 2004], Case T-156/03 *European Federation for Cosmetic Ingredients v European Parliament and Council*, not yet reported, paras 58-62 (no specific right infringed despite the fact that the applicant complained that its intellectual property rights had been impaired by the contested general measure).

²⁰⁴ ECJ, Case C-309/88 *Codorniu v Council* [1994] E.C.R. I-1553.

fact that such a market participant must be able to assert that specific protection and therefore to bring an action.²⁰⁵

The fact that a person intervenes in some way in the procedure leading to the adoption of a Community act can only cause that person to be individualised with regard to that act within the meaning of the fourth para. of Art. 230 of the EC Treaty if the applicable Community rules confer on that person specific procedural guarantees,²⁰⁶ such as the right to be heard.²⁰⁷

Thirdly, an applicant will be individually concerned when the contested act mentions it by name (although it is not the addressee of the act) and a situation specific to it is directly governed by the act.²⁰⁸ What is involved, therefore, is a situation in which the legislator adopts an act with the aim of

²⁰⁵ ECJ, Case 11/82 *Paradijs-Panama v Commission* [1985] E.C.R. 207, paras 17-22; ECJ, Case C-10/95 *P. Arcoy and Others v Council* [1995] E.C.R. I-4349, paras 30-35; ECJ, Case C-152/83 *Schepers v Commission* [1990] E.C.R. I-2477, paras 8-13; ECJ, Case C-390/95 *P. Arcoy v Council* [1999] E.C.R. I-2765, paras 25-30; ECJ, Case C-167/01 *P. Arcoy and Others v European Parliament* [2004] E.C.R. I-3143, paras 32-34. Cf. however, ECJ, Case C-451/93 *Arcoy v Council* [2001] E.C.R. I-5349, paras 55-68, and ECJ, Case C-452/93 *Nederlandsche Anilien v Council* [2001] E.C.R. I-6773, paras 54-71, in which the Court of Justice stated in relatively strong terms that the responsibility for the Council to take account of the effects of an intended safeguard measure based on the OCT Decision (Decision on the association of the overseas countries and territories) on the OCTs concerned was not sufficient to individualise the OCT in question. Cf. CFI, Joined Cases T-12/95 and T-41/95 *Nederlandsche Anilien v Commission* [2000] E.C.R. II-231, in which the Court of First Instance declared an action brought by the Netherlands Anilien for annulment of a safeguard measure relating to the import of sugar from OCTs inadmissible and well founded. The Court of First Instance considered that the Commission was required to take account of the adverse effects for the Netherlands Anilien of a safeguard measure adopted pursuant to Art. 169(2) of the OCT Decision. However, that judgment was set aside by the Court of Justice on the ground that the factual situation of the Netherlands Anilien did not differentiate them from all other OCTs. Other OCTs, too, suffered the effects of the safeguard measure. Consequently, the Netherlands Anilien were not individually concerned by the safeguard measure and the Court of First Instance should have declared the claim inadmissible (ECJ, Case C-142/00 *P. Commission v Nederlandsche Anilien* [2000] E.C.R. I-3433). See also CFI, Joined Cases T-46/93 and T-43/93 *Arcoy and Others v Commission* [1995] E.C.R. II-2305, paras 67-78 (with a case note by Weirbroeck and Foulard [1995] C.M.L.Rev. 311-329); CFI, Case T-47/00 *Rico Foods v Commission* [2002] E.C.R. II-113, para 41. But see CFI, Joined Cases T-36/99 *La Souda-Société Agricole des Ardois and Others v Commission* [2001] E.C.R. II-585, paras 48-51; CFI, Case T-43/98 *Emara Sugar v Council* [2001] E.C.R. II-3519, paras 54-56.

²⁰⁶ CFI, Joined Cases T-36/99 *Société Agricole des Ardois v Commission* [2001] E.C.R. II-585, para 48; CFI, Case T-47/00 *Rico Foods v Commission* [2002] E.C.R. II-113, para 35; CFI, Case T-73/99 *Alpharma v Council* [1999] E.C.R. II-3453, paras 73-95; CFI, Case T-136/99 *Pier Animal Health v Council* [2002] E.C.R. II-3803, para 31-35; CFI [order of May 25, 2004], Case T-264/02 *Schmidt and Others v Commission* [2004] E.C.R. I-1515, para 100; CFI [order of July 6, 2004], Case T-370/02 *Alpeyrou-Commanche-Werk and Others v Commission*, not yet reported, paras 67-68.

²⁰⁷ ECJ, Case C-255/02 *P. Commission v République* [2004] E.C.R. I-3415, para 47.

²⁰⁸ ECJ, Case 124/79 *Roquette Frères v Council* [1980] E.C.R. 1133, paras 13-16; ECJ, Case 125/78 *Matenc v Council* [1980] E.C.R. 1353, para 13-16; ECJ, Joined Cases 239 and 237/82 *Alfred Corporation v Commission* [1984] E.C.R. 1023, paras 4 and 12.

obtaining a specific result in favour of³² or to the disadvantage³³ of specific persons.

- 7-081 Refusal of an institution. An action for annulment may be brought by a natural or legal person against an institution's refusal to adopt an act only if an application brought against the act refused would have been admissible.³⁴
- 7-083 Judgment in *Ler Verts*. In exceptional circumstances, the requirement that the contested act must be of individual concern to the applicant discriminates against persons who find themselves in a similar position. In such a case, the Court of Justice, applying the principle of equal treatment—part of superior Community law—will, if necessary, lower the hurdle of admissibility. The judgment in *Ler Verts v European Parliament*³⁵ provides an illustration. The decision of the Bureau of the European Parliament determining the allocation of financial assistance to political parties with a view to preparing for the European elections applied both to political parties which were represented in the Parliament at the time when the decision was adopted, which were therefore identifiable, and to parties which were not so represented at that time and therefore were not identifiable, but which would be taking part in the elections. According to the wording of the judgment, there was no doubt that parties represented in the Parliament, which were identifiable, were individually concerned.³⁶ The question arose whether this was also true of parties not represented in the Parliament, who were therefore not identifiable. The Court of Justice held that the fact that the decision applied to all parties taking part in the elections placed the second class of parties in a similar position to the first, with the result that both classes had to be regarded as individually concerned by the decision in the same way.³⁷
- 7-084 Associations. The question whether trade associations are individually concerned is arising increasingly frequently. It appears from the case-law that trade associations may be deemed to be sufficiently individually

concerned in three types of situation.³⁸ First, a trade association may be individually concerned if it can show that a provision of Community law expressly grants it a series of procedural rights.³⁹ Secondly, this may be so where the association represents the interests of natural or legal persons who would be entitled to bring proceedings in their own right.⁴⁰ Thirdly, a trade association will be sufficiently individually concerned where it is differentiated because its own interests as an association are affected by the contested measure, especially where its position as negotiator of the act in question is affected.⁴¹ In those three situations, the Court of Justice and the Court of First Instance also take account of the participation of the association in question in the decision-making procedure.

Effective judicial protection. The Court of Justice is not prepared to relax the criteria developed in its case-law for individual concern depending on the legal protection enjoyed by individuals before their national courts.⁴² The Court has pointed out that, in the complete system of legal remedies and procedures established by the EC Treaty with a view to ensuring

7-085

³² For a clear survey of the case-law, see CFI (order of September 30, 1997), Case T-225/96 *Federatia v Commission* [1997] E.C.R. II-1559, para. 53 et seq.; CFI (order of November 23, 1999), Case T-175/98 *União de Pequenos Agricultores v Council* [1999] E.C.R. I-3357, para. 52; CFI, Case T-257/01 *Genulke Europharm and v Commission* [2004] E.C.R. I-917, paras 40–42; CFI (order of May 10, 2004), Case T-391/02 *Bundesverband der Nahrungsmittel- und Speiserestverwertung und Koch v European Parliament* [2004] E.C.R. II-1447, para. 44–55; CFI (order of December 19, 2004), Case T-196/03 *European Federation for Cosmetic Ingredients v European Parliament and Council*, not yet reported, paras 41–42.

³³ ECJ, Case 151/82 *Fediel v Commission* [1983] E.C.R. 1913; CFI, Case T-129/93 *CCF de Vitel and Others v Commission* [1995] E.C.R. I-1247.

³⁴ CFI, Joined Cases T-447, T-448 and T-449/93 *ATEC and Others v Commission* [1995] E.C.R. I-1971; CFI, Case T-350/94 *AlUFAS and AET v Commission* [1996] E.C.R. I-2569, para. 58; CFI (order of February 13, 2005), Case T-225/03 *P&K and K&K v Council*, not yet reported, para. 45.

³⁵ See, for instance, ECJ, Joined Cases 67/85, 69/85 and 70/85 *Von der Kooij and Others v Commission* [1988] E.C.R. 219; CFI (order of January 14, 2002), Case T-84/01 *ACHE v European Parliament and Council* [2002] E.C.R. II-35, para. 25. The test is that the position as negotiator is clearly defined and must be related to the subject-matter of the contested act and that that position must have been affected by the adoption of the contested act (CFI (order of May 10, 2004), Case T-351/02 *Bundesverband der Nahrungsmittel- und Speiserestverwertung und Koch v European Parliament* [2004] E.C.R. II-1447, para. 42; CFI (order of May 25, 2004), Case T-254/03 *Schmidt and Others v Commission* [2004] E.C.R. I-1515, paras 131–143). The fact that an association has communicated information to the Community institutions or has tried to influence the position adopted by the national authorities in the Community legislative procedure does not suffice in itself to show that the act adopted at the end of that procedure affects the association in its position as negotiator (CFI (order of May 10, 2004), Case T-351/02 *Bundesverband der Nahrungsmittel- und Speiserestverwertung und Koch v European Parliament* [2004] E.C.R. II-1447, para. 43–56; see also CFI (order of May 25, 2004), Case T-254/03 *Schmidt and Others v Commission* [2004] E.C.R. I-1515, paras 137–143); CFI (order of July 12, 2005), Case T-40/04 *Senio and Others v European Parliament and Council*, not yet reported, para. 72.

³⁶ ECJ, Case C-37/95 *Greenpeace Council and Others v Commission* [1995] E.C.R. I-2651, paras 33–34; see also CFI (order of March 12, 1998), Case T-27/97 *Bertini v Council* [1998] E.C.R. I-529, para. 25; CFI (order of September 15, 1999), Case T-12/98 *Von Parry and Others v Commission* [1999] E.C.R. II-2551, para. 54.

³⁷ CFI (judgment of February 3, 2005), Case T-139/01 *Comoffice and Dole Fresh Fruit Europe v Commission*, not yet reported, para. 118.

³⁸ ECJ, Case 180/74 *CAG v Commission* [1975] E.C.R. 1393, para. 16.

³⁹ ECJ, Case 42/73 *Norddeutsche v Commission* [1972] E.C.R. 105, para. 5; ECJ, Joined Cases 57, 58, 59 and 215/86 *Antoni and Others v Commission* [1988] E.C.R. 2151, paras 17–18; ECJ, Case C-37/85 *SOMITIS and Others v Commission* [1987] E.C.R. I-1931, para. 8; ECJ, Joined Cases C-15 and C-108/91 *Exed and Others v Commission* [1992] E.C.R. I-6061, para. 22; CFI, Case T-35/92 *Zurich Holding and Others v Commission* [1993] E.C.R. I-1667, para. 31; CFI (order of March 15, 2004), Case T-139/01 *Industria N. Agriropoulos and Others v Commission* [2004] E.C.R. II-671, paras 56–57; CFI (order of July 12, 2004), Case T-29/03 *Comunidad Autónoma de Andalucía v Commission*, not yet reported, para. 30.

⁴⁰ ECJ, Case 354/83 *Ler Verts v European Parliament* [1986] E.C.R. 1335.

⁴¹ Commentation point to the specific character of the contested measure (*Kovax* [1957] C.D.E. 306–332; cf. *Jacque* [1956] R.T.D.E. 386–511).

⁴² See, however, CFI (order of January 10, 2005), Case T-357/03 *Gouldrich and Others v European Parliament*, not yet reported, paras 69–70; CFI (order of July 11, 2005), Case T-304/04 *Ennio and Others v European Parliament and Council*, not yet reported, paras 73–74.

judicial review of the legality of acts of the institutions, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth para. of that article, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community judicature under Art. 241 of the EC Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling.³⁴

Acts which do not entail implementing measures. There are cases, however, in which an individual has no remedy for contesting a provision of Community law before a national court.³⁵ This may occur in particular where a regulation does not require Member States to adopt any implementing measures. The question arises as to whether the Community Court will take a more flexible approach to the admissibility requirements laid down in the fourth para. of Art. 230 of the EC Treaty in such circumstances. In its judgment of May 3, 2002 in *Rego-Quêiro*,³⁶ the Court of First Instance recalled that the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of acts of the institutions.³⁷

The right to an effective remedy before a court of competent jurisdiction is based on the constitutional traditions common to the Member States, Arts 6 and 13 of the ECHR and Art. 47 of the Charter of Fundamental

³⁴ ECJ, Case C-491/01 *British American Tobacco and Imperial Tobacco* [2002] E.C.R. I-11453, paras 39-40; ECJ, Case C-155/02 *P. Pouflet and Others v European Parliament* [2004] E.C.R. I-3145, para. 46.

³⁵ CFJ, Case T-138/93 *ACAV and Others v Council* [2000] E.C.R. II-3431. The Court of First Instance held that the lack of a legal remedy at national level, or the fact that such remedies are in any event ineffective do not enable an action for annulment to be declared admissible where it does not satisfy the conditions laid down in the fourth para. of Art. 230 of the EC Treaty. To declare such an application admissible would result in a wrongful amendment by judicial interpretation of the system of remedies and procedures laid down in the Treaty; CFJ, Joined Cases T-372/98 and T-175/98 in *T-175/98 Salomons and Others v European Parliament and Council* [2000] E.C.R. II-2487, para. 75; CFJ (order of April 25, 2002), Case T-339/00 *Becton v Commission* [2002] E.C.R. II-2287, para. 34; the Court of First Instance held that the possible absence of remedies cannot justify an amendment by way of judicial interpretation of the system of remedies and procedures laid down in the Treaty (upheld on appeal in ECJ (order of December 12, 2003), Case C-155/02 *P. Pouflet and Others v European Parliament* [2004] E.C.R. I-15105, paras 57-60); CFJ (order of June 28, 2003), Case T-336/04 *Erdemir Sadam and Others v Commission*, not yet reported, paras 42-43; CFJ (order of July 11, 2003), Case T-400/04 *Pouflet and Others v European Parliament and Council*, not yet reported, para. 77. See also Lecaer, "The Legal Protection of Private Parties under the EC Treaty: a Coherent and Complete System of Judicial Review", in *Storia in Europa di Giuseppe Federico Mancini* (Giuffrè editore, Milan, 1968), Vol. II, at 551-571.

³⁶ CFJ, Case T-17/01 *Rego-Quêiro v Commission* [2002] E.C.R. II-2365, para. 41; set aside on appeal by ECJ, Case C-262/02 *P. Commission v Rego-Quêiro* [2004] E.C.R. I-3423.

³⁷ *Ibid.*, para. 41; ECJ, Case 294/83 *Les Verts v European Parliament* [1986] E.C.R. 1339, para. 23.

Rights of the European Union proclaimed at Nice on December 7, 2000.³⁸ The Court of First Instance therefore considered that the strict interpretation of the notion of a person individually concerned according to the fourth para. of Art. 230 of the EC Treaty had to be reconsidered in order to ensure effective judicial protection for individuals.³⁹ It took the view in the *Rego-Quêiro* case that "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".⁴⁰

Less than three months later, the Court of Justice made it very clear in its judgment in the *Unión de Pequeños Agricultores* case⁴¹ that it would not follow the approach of the Court of First Instance.⁴² Referring to the *Plaumann* case,⁴³ the Court of Justice declared that natural or legal persons may be individually concerned by a measure where "the measure in question affects [them] by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee".⁴⁴ The Court considered that no other interpretation of this condition for admissibility was possible "without going beyond the jurisdiction conferred by the Treaty on the Community Courts".⁴⁵ As a result, only

³⁸ *Ibid.*, paras 41 and 42; ECJ, Case 224/84 *Johnston* [1985] E.C.R. 1451, para. 15; CFJ (judgment of September 21, 2003), Case T-326/01 *Yusuf and Al Barakat International Foundation v Council and Commission*, not yet reported, paras 250-252 and 312-347 (as regards the question whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which it falls to the Court of First Instance to carry out with regard to a Community regulation putting into effect a decision of the UN Security Council).

³⁹ *Ibid.*, paras 50 and 51.

⁴⁰ *Ibid.*, para. 51.

⁴¹ ECJ, Case C-500/00 *Unión de Pequeños Agricultores v Council* [2002] E.C.R. I-6577.

⁴² The Opinion of Advocate General F.G. Jacobs in *Case C-500/00 Unión de Pequeños Agricultores v Council* [2002] E.C.R. I-6581 was closer to the view taken by the Court of First Instance in *Rego-Quêiro*.

⁴³ ECJ, Case 25/62 *Plaumann v Commission* [1963] E.C.R. 95, at 107.

⁴⁴ ECJ, Case C-500/00 *Unión de Pequeños Agricultores v Council* [2002] E.C.R. I-6577, para. 36.

⁴⁵ *Ibid.*, para. 44; ECJ, Case C-161/01 *P. Pouflet and Others v European Parliament* [2004] E.C.R. I-3149, para. 43; ECJ, Case C-161/01 *P. Commission v Rego-Quêiro* [2004] E.C.R. I-3423, para. 36; CFJ (order of April 2, 2004), Case T-231/02 *Gonnelli and AIFO v Commission* [2004] E.C.R. I-1851, paras 53-54; CFJ (order of May 25, 2004), Case T-264/01 *Schmidt and Others v Commission* [2004] E.C.R. I-1515, paras 151-159. In ECJ, Case C-212/00 *P. Commission v Camar and Tico* [2002] E.C.R. I-1235, para. 75, the Court of Justice declared that "the condition that natural or legal persons may bring an action challenging a regulation only if they are concerned 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". See in this connection Lecaer and Corbett, "Judicial Review as a contribution to the development of European constitutionalism" [2003/2004] Y.L.L. 1-43, point 39: a measure of flexibility in the actual assessment whether the *Plaumann* test is satisfied may make a great difference. Nevertheless,

an amendment to the Treaty could make the admissibility requirements set out in the fourth para. of Art.230 of the EC Treaty more flexible.³⁰² At the same time, the Court of Justice called on national courts "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"³⁰³ (see also 3-007 and 3-008, *supra*).

c. The concept of individual concern: some fields of application

(1) Application of Arts 81 and 82 of the EC Treaty

- 7-087 Decisions finding an infringement or rejecting a complaint. Where the Commission finds that certain undertakings or associations of undertakings have infringed Art.81 and/or Art.82 of the EC Treaty and possibly imposes fines on them, the undertakings or associations of undertakings concerned may bring an action for the annulment of the decision in question. As addressees of the decision, they derive that right from the fourth para. of Art.230 of the EC Treaty. Similarly, when a natural or legal person showing a legitimate interest lodges a complaint with the Commission on account of

it, it is not clear whether the Court of Justice sought to treat an opening by that person in the same way: see, e.g. ECJ, Case C-262/92 P *Commission v. Njogu-Quéré* [2004] E.C.R. I-1425, paras 43-48.

- ³⁰² ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] E.C.R. I-6677, para.45. See in this connection Berowski, "Die Nichtrechtsklage gem. Art.232 Abs. 4 EGV" (2004) Eu.R. 679-680; Brown and Marjo, "Case C-50/00 P, *Njogu-Quéré v. Council*" (2004) C.M.L.Rev. 1635-1639; Corthaut, "Case CFI May 3, 2002, *Njogu-Quéré v. Commission* T-117/02 and C-50/00P ECJ July 25, 2004, *Unión de Pequeños Agricultores v. Council*" (2002) Col.J.E.L. 141-165; Gilliam, "L'accès Unions de Petites Agricultures: entre subsidiarité institutionnelle et efficacité" (2003) C.D.E. 171-222; Günter, "Access to Justice in the European Court of Justice in Luxembourg" (2002) E.J.L.R. 361-445; Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Njogu-Quéré et al. v. Council and Unions de Petites Agricultures v. Council*" (2003) Mod.L.Rev. 124-135; Groussot, "The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?" (2003) L.J.E.L. 221-248; Han, "Tinkering with the 'pouvoir constituant' in Times of Constitutional Reform: The European Court of Justice on Private Applicants' Access to Justice" (2003) 13 M.J.E.C.L. 3, 265-290; Kötter, "Die Ambivalente Situation Rechtsbeschwerde-Einstreiter gegen EG-Verordnungen" (2003) Z.N.V. 113-132; Martin, "Un accès à la justice—Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads" (2004) M.J.E.C.L. 3, 333-363; Mehdi, "La recevabilité des recours formés par les personnes physiques et morales à l'encontre d'un acte de portée générale: l'aggravation d'un acte de Dieu" (2003) R.T.D.E. 21-52; Schwarz, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) E.P.L. 135-333; Under, "Direct and individual concern—an effective remedy or a conventional solution?" (2003) E.L.Rev. 575-600.

- ³⁰³ ECJ, Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] E.C.R. I-6677, para.42; ECJ, Case C-262/92 P *Commission v. Njogu-Quéré* [2004] E.C.R. I-1425, para.42.

an alleged infringement of Art.81 and/or Art.82 of the EC Treaty,³⁰⁴ such persons will be entitled—as addressees of the Commission decision—to bring an action for the annulment against the full or partial rejection of their complaint.³⁰⁵

Decisions making commitments binding and decisions finding Art.81 and/or Art.82 of the EC Treaty inapplicable. Under the rules of Regulation No 17, under which the Commission had exclusive competence to declare that Art.81(1) of the EC Treaty was inapplicable, persons who submitted objections in writing to the Commission during the investigation in regard to a proposed declaration that Art.81(1) of the EC Treaty was not applicable to the practices of a competitor or supplier, or persons who participated in the hearing organised by the Commission, were individually concerned by such declaration.³⁰⁶ The Court of Justice and the Court of First Instance considered that those classes of person had been sufficiently involved in the procedure whereby the contested decision was adopted in order to constitute a closed class in the light of the act.³⁰⁷ This case-law will

³⁰⁴ Regulation No 17/63, Art.7, and Regulation No 773/2004, Art.5.

³⁰⁵ ECJ, Case 26/75 *Mérea v. Commission* [1977] E.C.R. 1875; ECJ, Case 216/81 *Demo-Studio Schmidt v. Commission* [1983] E.C.R. 3045, paras 10-16; CFI, Case T-3752 *SEUC and AGC v. Commission* [1994] E.C.R. II-235, para.36; CFI, Case T-11452 *SEMIK v. Commission* [1999] E.C.R. I-147, para.27; CFI, Judgment of January 26, 2005, Case T-153/02 *Plex v. Commission*, not yet reported, para.35.

³⁰⁶ ECJ, Case 75/84 *Mérea v. Commission* [1986] E.C.R. 3621, paras 15-21; CFI, Case T-15/92 *Lectre v. Commission* [1990] E.C.R. II-1851, paras 55-63 and Case T-63/92 *Lectre v. Commission* [1995] E.C.R. II-1591, paras 49-51. In these judgments, the Court of First Instance, based its finding that the applicant—a cooperative society—was individually concerned also on the fact that it had taken part in the administrative procedure as a representative of its members, who, as potential competitors of the traders belonging to the selective distribution system in which Art.81(1) of the EC Treaty had been declared inapplicable, could have taken part in the administrative procedure, and been individually concerned thereby, as "interested third parties" under Art.15(3) of Regulation No 17.

³⁰⁷ Sometimes the case-law went even further: see CFI, Joined Cases T-523, T-542, T-543 and T-545/93 *Mitsubishi Television and Others v. Commission* [1996] E.C.R. II-645, where the Court of First Instance held that it is sufficient for the applicant to be able to be regarded as an interested third party within the meaning of the first sentence of Art.15(3) of Regulation No 17 which was entitled to be associated by the Commission with the administrative procedure for the adoption of the decision in order for it to be individually concerned thereby within the meaning of the fourth para. of Art.230 of the EC Treaty. The Court considered it irrelevant that the applicant had not availed itself of its procedural rights under Art.15(3) of Regulation No 17. It considered that to make the capacity to bring proceedings of such interested third parties subject to their actually taking part in the administrative procedure would be tantamount to introducing an additional condition of admissibility in the form of a compulsory pre-litigation procedure not provided for in Art.230. Cf., however, CFI, Case T-52/92 *Kruidier v. Commission* [1995] E.C.R. II-1531, paras 61-67. The Court of Justice upheld the judgment of the Court of First Instance in *Kruidier*, holding that the fact that a trade organisation participated in the administrative procedure before the Commission cannot relieve their members of the need to establish a link between their individual situation and the action of the organisation. In other words, the organisation's participation was not sufficient to individualise one of its members which had not participated in the administrative procedure: ECJ, Case C-10/97 P *Kruidier v.*

likely to be relevant for the purpose of assessing the admissibility of actions for annulment brought by third parties against decisions making commitments binding on undertakings or finding that there are no longer grounds for action by the Commission (Regulation No 1/2003, Art.9(1)) and against decisions in which the Commission finds that Art.81 and/or Art.82 of the EC Treaty are inapplicable to a certain practice or agreement (Regulation No 1/2003, Art.10).

(2) Merger control

389 Addressees. Where the Commission finds that a concentration is incompatible with the common market, the addressees of the relevant decision have standing, pursuant to the fourth para. of Art.230 of the EC Treaty, to bring an action for annulment of that decision.

390 Competitors. A competitor of undertakings involved in the concentration which has actively participated in the administrative procedure (by submitting observations and criticisms, clarifying, among other things, the effects of the concentration on its competitive position) will be individually concerned by a Commission decision declaring the concentration compatible with the common market.³⁸ It would appear to be sufficient that the applicant is a potential competitor on most of the markets affected.³⁹

391 Referral to national authorities. An undertaking is individually concerned by a decision to refer the matter to the national competition authorities pursuant to Art.9 of Regulation No 139/2004 if the undertaking would have

Commission [1992] E.C.R. I-7153, para.25. An undertaking which participated in the administrative procedure before the Commission and which started proceedings in the national courts for compensation for having had obligations contrary to Art.31 of the EC Treaty imposed on it under an agreement to which Art.81(1) was declared inapplicable was held to be individually concerned by the decision exempting the agreement (CFI, Case T-31/99 *Shaw and Fells v Commission* [2002] E.C.R. II-1623, paras 25-27).

38 CFI, Case T-293 *Air France v Commission* [1994] E.C.R. II-325, paras 43-48 (the Court of First Instance also took account in this case of the fact that the Commission had judged the competitive position of the market in question above all in the light of the applicant's competitive position and that some months before the concentration came about, the applicant undertaking had given up its interest in one of the undertakings concerned pursuant to an agreement concluded with the Commission); ECJ, Joined Cases C-63/94 and C-32/95 *France and Others and EMC v Commission* [1995] E.C.R. I-1375, paras 34-38 (the Court of Justice also took account in this case of the fact that the conditions attached to the declaration by which the concentration was stated to be compatible with the common market primarily touched the applicant's interests); CFI, Case T-314/02 *Boydell v Commission* [2003] E.C.R. I-1273, paras 81-117. Cf. *Klingebühler, "Zur Klagebefugnis Dritter in der europäischen Wettbewerbspolitik"* (1991) EuZW, 336-339. For a thorough analysis of admissibility problems in the case of actions against Commission decisions pursuant to Regulation No 4054/89, see Langebein, "Judicial Review in the Field of Merger Control" (1992) J.B.L. 121, at 121-131.

39 Ibid., paras 58-120.

been individually concerned by the Commission's final decision had the Commission not referred the case to the national authorities.⁴⁰

Representatives of employees. The Court of First Instance has held in connection with Regulation No 4054/89 that recognised employees' representatives of an undertaking involved in a concentration were individually concerned by a Commission decision adopted pursuant to that regulation on the ground that Regulation No 4054/89 mentioned them expressly and specifically among the third persons showing a "sufficient interest" to submit observations to the Commission during the administrative investigation of the concentration's compatibility with the common market.⁴¹ The Court of First Instance regarded it as irrelevant whether the employees' representatives of the undertaking had actually taken part in the administrative procedure.⁴²

(3) State aid cases

Decisions addressed to Member States. State aid decisions are addressed to the Member State concerned.⁴³ It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if the decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and if, by virtue of those factors, it distinguishes them individually in the same way as the person addressed.⁴⁴

(i) Position of beneficiaries of State aid and their competitors

General. As regards the position of beneficiaries of State aid and their competitors, a distinction has to be drawn between decisions relating to general aid regimes and decisions relating to individual aid measures.

40 CFI, Case T-119/72 *Royal Philips Electronics v Commission* [2003] E.C.R. II-1435, paras 291-292; CFI, Joined Cases T-344/01 and T-347/02 *Cableuropa and Others v Commission* [2003] E.C.R. II-4251, paras 78-79.

41 Representatives of employees and representatives of management enjoy the same right under Art.15(4) of Regulation No 139/2004.

42 CFI, Case T-95/92 *CCF de la Société Générale des Grands Sources and Others v Commission* [1995] E.C.R. I-1213, para.37; CFI, Case T-1293 *CCF de la Société Générale des Grands Sources and Others v Commission* [1995] E.C.R. II-1247, para.43. In those cases, the Court of First Instance subsequently held that the applicants were directly affected by the contested decision only in so far as their procedural rights during the administrative procedure had been affected. Consequently, it considered only the plea alleging that those rights had been breached. For a critical note on that limited admissibility, see Arnulf [1996] C.M.L.Rev. 315-335.

43 Regulation No 659/1999, Art.25.

44 ECJ, Case T-5/92 *Plumera v Commission* [1993] E.C.R. 197; ECJ Case C-321/95 *P Greenpeace Council and Others v Commission* [1996] E.C.R. I-1457, paras 7 and 23; ECJ, Joined Cases C-15/93 and C-103/93 *Italy and Sardegna Lines v Commission* [2003] E.C.R. I-6537, para.32.

* Decisions relating to general aid regimes

7-095 Measures of general application. Commission decisions which declare general aid regimes compatible or incompatible with the common market are considered to be measures of general application. By and large, actions brought by undertakings against such decisions will be inadmissible since they will generally fail to satisfy the "individually concerned" condition laid down in the fourth para. of Art.230 of the EC Treaty. In this respect it seems to be immaterial whether the decision was taken on the basis of the preliminary procedure laid down by Art.88(2) of the EC Treaty³³ or upon completion of the procedure provided for in Art.88(2) of the EC Treaty.³⁴ Similarly, a Commission decision to initiate the procedure laid down in Art.88(2) of the EC Treaty relating to general aid regimes should be deemed to be of general application.

7-096 Competitors of beneficiaries of the aid. An undertaking which is a competitor of a potential beneficiary of aid authorised under a general aid scheme does not have *locus standi* to challenge a Commission decision authorising that scheme.³⁵ This is because the contested decision affects such an undertaking only by virtue of its objective capacity in the same manner as any other undertaking which is, or might be in the future, in the same situation.³⁶ The fact that the applicant made a complaint to the Commission (and in that connection corresponded and even had meetings with the Commission) does not constitute sufficient circumstances peculiar to the applicant by which it can be distinguished individually from all other persons, thus conferring on it standing to bring proceedings against a decision of the Commission relating to a general aid scheme.³⁷

7-097 Beneficiaries of the aid. Similarly, potential beneficiaries of a general aid scheme are not individually concerned by a Commission decision relating to that scheme. The Court has therefore consistently held that an undertaking

³³ CFI, Case T-358/94 *Kohn Schiepsart v Commission* [1995] E.C.R. II-471; CFI, Case T-49/94 *Hamburger Hafen- und Lagerhaus und Others v Commission* [2001] E.C.R. II-237. But see CFI, Case T-188/93, *Waterleiding Maatschappij "Noord-Wit Brebon" v Commission* [1994] E.C.R. I-3713, para. 35-36, and CFI, Case T-114/90 *Abbinergemeinschaft Recht und Eigentum v Commission* [1992] E.C.R. I-5121, para. 41-46, in which the Court of First Instance held that the applicants were individually concerned by the contested decision on the sole ground that they were (or represented) "parties concerned" within the meaning of Art.230(2) of the EC Treaty. The latter judgment was annulled on appeal (ECJ (judgment of December 10, 2003), Case C-18/03 *F. Commission v Abbinergemeinschaft Recht und Eigentum*, not yet reported).

³⁴ ECJ, Cases 67-68 and 70/73 *Van der Kooy v Commission* [1973] E.C.R. 215, paras. 13-14; ECJ, Cases C-15/88 and C-105/89 *Italy and Sardegna Liners v Commission* [1989] E.C.R. I-3655, para. 33; ECJ, Case C-298/90 *P. Italy v Commission* [1994] E.C.R. I-4387, para. 37; CFI, Case T-455/86 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen v Commission* [1988] E.C.R. II-173, paras. 43-44; CFI, Case T-9/93 *Mitteldeutsche Erdöl-Refinerie v Commission* [1993] E.C.R. II-3367, para. 71.

³⁵ CFI, Case T-188/94 *Kohn Schiepsart v Commission* [1995] E.C.R. II-471.

³⁶ *Ibid.*, para. 61.

³⁷ *Ibid.*, para. 62.

cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. With a view to the undertaking should it seek to contest the decision, such a decision is a measure of general application covering situations which are determined objectively, and entails legal effects for a class of persons envisaged in a general and abstract manner.³⁸

Where, however, the applicant undertaking is concerned by the contested decision not only by virtue of its being potential beneficiary of the aid scheme in question, but also by virtue of its being an actual recipient of individual aid granted under that scheme, the recovery of which has been ordered by the Commission, the Court will find that the *Plaumann* test³⁹ is satisfied. Thus, an actual beneficiary of individual aid granted under a general scheme is individually concerned by the Commission decision declaring the aid incompatible with the common market in the case of a decision ordering the recovery of the aid.⁴⁰ It should be recalled that as a result of the *TWD Terwilke Deggendorf* case a person who undoubtedly has the right under Art.230 of the EC Treaty to seek the annulment of a Community act may not plead the illegality of that act in subsequent proceedings before the national courts.⁴¹ That case-law, however, only applies where there is absolutely no doubt that the recovery order applies to the undertaking concerned.⁴²

³⁸ ECJ, Cases 57/85, 58/85 and 73/85 *Van der Kooy and Others v Commission* [1983] E.C.R. 219, para. 15; ECJ, Case C-69/91 *Federmeisen and Others v Commission* [1993] E.C.R. I-5357, para. 14; ECJ, Joined Cases C-15/88 and C-105/89 *Italy and Sardegna Liners v Commission* [1989] E.C.R. I-3655, para. 33; CFI (order of March 10, 2003), Case T-273/00 *Unione degli industriali delle provincie di Venezia v Commission*, not reported, para. 25.

³⁹ See 7-078, *supra*.

⁴⁰ ECJ, Joined Cases C-15/88 and C-105/89 *Italy and Sardegna Liners v Commission* [1989] E.C.R. I-3655, para. 34; ECJ, Case C-18/03 *P. Italy v Commission* [2004] E.C.R. I-4857, paras. 37-38; CFI, Case T-55/99 *CEIM v Commission* [2001] E.C.R. I-3207. See, with respect to existing aid, ECJ, Joined Cases C-152/88 R and C-217/88 R (order of the President of June 26, 2003) *Belgium and Forum 187 v Commission* [2003] E.C.R. I-6681, paras. 104-107; CFI (order of March 10, 2003), Case T-266/00 *Confederazione Venezia and Others v Commission*, not yet reported, paras. 13-16.

⁴¹ ECJ, Case C-182/93 *TWD Terwilke Deggendorf* [1994] E.C.R. I-533, paras. 24-26; ECJ, Case C-241/93 *Accorington Egg* [1995] E.C.R. I-6689, paras. 15-16. See also 10-002, *infra*.

⁴² Where the national authorities consider that the recovery order does not apply to the undertaking having brought an action for annulment before the Court of First Instance, that court will declare the action inadmissible and the *TWD Terwilke Deggendorf* case-law will not apply: see CFI (order of March 10, 2003), Joined Cases T-225/00, T-229/00, T-242/00, T-243/00, T-245/00, T-246/00, T-252/00, T-253/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00, T-275/00, and T-277/00 to T-286/00 *Gruppo armatori del porto di Venezia and Others v Commission*, not yet reported, paras. 24 and 30-32; CFI (order of March 10, 2003), Case T-265/00 *Confederazione Venezia and Others v Commission*, not yet reported, paras. 21-23; CFI (order of March 10, 2003), Case T-273/00 *Unione degli industriali delle provincie di Venezia v Commission*, not reported, paras. 21-23. See also the Opinion of Advocate General D. Ruiz-Jarabo Colomer of April 23, 2003 in Joined Cases C-244/01 and C-252/03 *Atzeni and Others*, not yet reported, paras. 56-57 and 58.

• Decisions relating to individual aid measures

198 Decisions taken on the basis of the preliminary procedure provided for in Art.88(3) of the EC Treaty. As far as new aid¹⁹⁸ is concerned, the Commission is empowered to take decisions at two stages of its investigation into its compatibility with the common market.¹⁹⁹

First, there is the preliminary stage for reviewing aid pursuant to Art.88(3) of the EC Treaty. Where, at the conclusion of its investigation, the Commission decides to initiate the procedure under Art.88(2) of the EC Treaty, that decision is of individual concern to undertakings which are the envisaged beneficiaries of the proposed aid.²⁰⁰ Where, in contrast, the Commission considers at the end of the preliminary stage that the proposed aid is compatible with the common market and therefore decides not to initiate a procedure pursuant to Art.88(2), that decision is of individual concern to all the parties concerned which could have submitted observations in the course of that procedure.²⁰¹ Indeed, judicial review is the only means whereby those parties concerned can enforce their procedural rights.²⁰² "Parties concerned" within the meaning of Art.88(2) do not

¹⁹⁸ For a definition, see 1144, *supra*.

¹⁹⁹ For an extensive discussion, see Coulon and Cris, "Contrôle de la légalité dans le domaine des aides d'Etat: les récentes évolutions dans l'application des articles 173 et 175 du traité CE" (1999) C.D.E. 90-129.

²⁰⁰ The Member State concerned may not put the measure into effect before the procedure has resulted in a final decision.

²⁰¹ ECJ, Case C-253/95 *Cook v Commission* [1995] E.C.R. I-2457, para 13-24; ECJ, Case C-253/95 *Mora v Commission* [1995] E.C.R. I-2463, para 15-20. The same applies where the Commission considers that there is no question of State aid with the result that competing undertakings which have submitted complaints about it are deprived in any event of their procedural rights under Art.88(2) of the EC Treaty. They are directly and individually concerned by such a Commission decision and may enforce their procedural rights before the Community Courts. ECJ, Case C-367/93 *P. Commission v Syreval and Brink's France* [1994] E.C.R. I-2719, para 47; CFI, Case T-155/93 *Chemical v Commission* [1994] E.C.R. I-3134, para 164-165.

²⁰² See, e.g., CFI, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 65. In its application, an applicant must not confine itself to pleading a breach of the procedural rights provided for in Art.88(2) of the EC Treaty. It may invoke all the grounds of illegality mentioned in the second para of Art.230 of the EC Treaty. CFI, Case T-157/01 *Danke Baumgärtner v Commission* [2004] E.C.R. II-917, para 39-42. However, where an applicant does not seek the annulment of a decision taken on the basis of the preliminary procedure laid down by Art.88(3) of the EC Treaty on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Art.88(2) or on the ground that the procedural safeguards provided for by Art.88(2) were infringed, the mere fact that the applicant may be considered to be a party concerned within the meaning of Art.88(2) does not render it individually concerned for the purposes of the fourth para of Art.230 of the EC Treaty. In such a case, the action will be admissible only if the applicant is affected by the contested decision by reason of other circumstances distinguishing it individually in the manner in which the person addressed, in accordance with the Plaumann test (CFI, Case T-356/94 *Stahlfabrikation and Others v Commission* [1999] E.C.R. II-1395, para 45; CFI, Case T-183/95 *Waterscheidt Meatscheppen "Noord-West Brabant" v Commission* [1998] E.C.R. II-3713, para 50; see also ECJ (Judgment of December 11, 2005), Case C-38/01 *P. Commission v Adlonsgernecht Rech* and *Elgenm*, not yet reported).

comprise only the undertaking or undertakings in receipt of aid (which in this event naturally have no interest in bringing an action for annulment), but also such persons, undertakings or associations whose interests might be affected by the grant of the aid, for instance, competing undertakings and trade associations.²⁰⁴

Decision taken upon completion of the procedure provided for in Art.88(2) of the EC Treaty. In addition, the Commission may also take a decision after the *inter partes* procedure provided for in Art.88(2) of the EC Treaty has been completed. Such a decision is likewise addressed to the Member State concerned. If the Commission declares the aid incompatible with the common market, the undertaking for which the aid was intended will be individually concerned.²⁰⁵ Furthermore, a recipient of aid will likewise be individually concerned by a Commission decision declaring aid compatible with the common market subject to the express condition that the recipient of the aid fulfils a number of obligations. It will also have an interest in the annulment of such a decision.²⁰⁶ In contrast, it will have no interest such as

7-599

²⁰⁴ ECJ, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 66; CFI, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 69. It is not enough for the competing position of an undertaking to have been affected by the aid measure approved only potentially and incidentally in order for it to be regarded as a "party concerned" within the meaning of Art.88(2) of the EC Treaty. See also CFI, Case T-353/94 *Klein Scheppe v Commission* [1996] E.C.R. II-471, para 47-48; CFI, Case T-158/95 *Waterscheidt Meatscheppen Noord-West Brabant v Commission* [1998] E.C.R. II-3713, para 50-51; CFI, Case T-63/95 *Herburger Hafen- und Lagerhaus und Others v Commission* [1997] E.C.R. II-1917, para 42, and CFI (order of June 25, 2003), Case T-41/01 *Pérez Escobar v Commission* [2003] E.C.R. II-2157, para 34-47. A taxpayer person is not a party concerned within the meaning of Art.88(2) of the EC Treaty. This is because if this were admitted to be the case it would deprive the notion of a person individually concerned within the meaning of the fourth para of Art.230 of the EC Treaty of any legal meaning in the context of actions for annulment brought against decisions taken on the basis of Art.88(3) of the EC Treaty by making that remedy into a species of *actio popularis*. The fact that a person has submitted a complaint to the Commission is not sufficient in itself for that person to be regarded as a party concerned within the meaning of Art. 88(2) of the EC Treaty. A complainant has to show that it has a legitimate interest, consisting, for instance, in the protection of its competitive position on the market vis-à-vis the measures complained of (CFI (order of June 25, 2003), Case T-41/01 *Pérez Escobar v Commission* [2003] E.C.R. II-2157, para 36-40).

²⁰⁵ ECJ, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 66; ECJ, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 69; ECJ, Case T-153/99 *Thermohel Steier Franz and Others v Commission* [2004] E.C.R. II-1, para 69. Works councils and trade unions of undertakings in receipt of aid were, however, not held to be individually concerned by a Commission decision declaring the aid incompatible with the common market. Such works councils and trade unions are parties concerned within the meaning of Art.88(2), but that is not sufficient to render them individually concerned, even if they submitted comments during the administrative procedure. CFI (order of February 12, 1993), Case T-139/91 *Comité d'entreprise de la Société française de production and Others v Commission* [1993] E.C.R. II-335, para 42-44, upheld by ECJ, Case C-105/93 *P. Comité d'entreprise de la Société française de production and Others v Commission* [1993] E.C.R. I-3553.

²⁰⁶ CFI, Case T-156/97 *Alitalia v Commission* [1999] E.C.R. II-3871.

to entitle it to claim annulment of a decision which simply declares a specific aid measure compatible with the common market. Accordingly, it cannot contest the classification of a measure as aid where the aid is declared unconditionally compatible with the common market.³²

As regards an undertaking which is not the beneficiary of the aid measure, the Court has consistently held that a decision closing a procedure under Art.88(2) of the EC Treaty is of individual concern to those competitors of the beneficiary which have played a significant role in the investigation procedure, provided that their position on the market is significantly affected by the aid which is the subject of the decision at issue.³³ However, that does not preclude the possibility that an undertaking may be in a position to demonstrate by other means—by reference to specific circumstances distinguishing it individually as in the case of the person addressed—that it is individually concerned.³⁴

Nevertheless, an undertaking which is not a recipient of aid will have difficulty in showing that it is individually concerned by a Commission decision approving the aid after completion of the procedure provided for in Art.88(2) of the EC Treaty where it did not take part or played only a negligible role in that procedure.³⁵ Unlike in the case of an action for annulment of a decision taken after the preliminary investigation pursuant to Art.88(3) of the EC Treaty, an undertaking cannot simply rely on its status as a competitor of the recipient of aid in order to demonstrate that it is individually concerned by the Commission's decision.³⁶ Where the undertaking has not exercised its right to submit comments in the course of the procedure provided for in Art.88(2) of the EC Treaty, it must prove

³² CFI (Judgment of April 14, 2005), Case T-141/03 *Snicec v Commission*, not yet reported, paras 20–41.

³³ This will be the case, for instance, where the applicant undertaking was at the origin of the complaint which led to the initiation of the Art.88(2) procedure and where the views of that undertaking were heard during that procedure and largely determined the content of that procedure. See in this respect ECJ, Case 169/84 *Cofar v Commission* [1985] E.C.R. 391, paras 21–23 (for critical comments, see Gyselen, "La transparence en matière d'aides d'Etat: Les droits des tiers" (1993) C.D.E. 4, 7, at 433–434); see also CFI, Joined Cases T-47/93, T-445/93 and T-449/93 *Altec and Others v Commission* [1995] E.C.R. II-1971, paras 33–41 and 75–80; CFI, Case T-145/95 *Ducor v Commission* [1997] E.C.R. II-2831, paras 30–43; CFI (Judgment of October 11, 2004), Case T-26/99 *Leasing v Commission*, not yet reported, para.50: the fact that the position on the market of the person concerned is substantially affected does not necessarily mean that its productivity falls; that its market share is reduced or that operating losses are incurred. The question in that connection is whether the person concerned would be in a more favourable situation in the absence of the decision which it seeks to have annulled. That may validly cover the situation in which the applicant loses the opportunity to make a profit because the public authorities confer an advantage on one of its competitors.

³⁴ CFI, Case T-435/93 *ASPSC and Others v Commission* [1995] E.C.R. II-1281, para.64; CFI, Case T-11/95 *BP Chemicals v Commission* [1996] E.C.R. II-3235, para.72.

³⁵ CFI (Judgment of April 14, 2005), Case T-141/03 *Snicec v Commission*, not yet reported, para.59.

³⁶ ECJ, Case C-106/95 *P. Condit d'entreprise de la Société française de production and Others v Commission* [2003] E.C.R. I-3655, para.41; CFI (Judgment of April 14, 2005), Case T-141/03 *Snicec v Commission*, not yet reported, para.73.

that it is in a distinct competitive position which differentiates it, as regards the State aid in question, from any other trader.³⁷ Accordingly, the Court of First Instance has accepted that undertakings which had not taken part in the formal investigation pursuant to Art.88(2) of the EC Treaty could nevertheless be directly and individually concerned on the ground that the market in which the aid was granted was characterised by a limited number of producers (the applicants had a market share of 95 per cent) and by the significant increase in production capacity involved in the investments planned by the company in receipt of the aid in question. That special situation distinguished them from every other market participant as far as the aid in issue was concerned.³⁸

(ii) Position of regions and devolved authorities

Not privileged applicants under the second para. of Art.230 of the EC Treaty. As regards the position of regions, the term Member State employed in the second para. of Art.230 refers, for the purposes of the institutional provisions and, in particular, those relating to judicial proceedings, only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have.³⁹ Regions and other devolved bodies are therefore not entitled to bring proceedings pursuant to the second para. of Art.230 of the EC Treaty. By contrast, where devolved bodies have legal personality under national law they must, on that basis, be treated as legal persons within the meaning of the fourth para. of Art.230 of the EC Treaty.⁴⁰

Individually concerned if the authority concerned is the author of the aid measure. A region or other devolved body will be deemed to be individually concerned by a Commission decision declaring a general aid scheme⁴¹

³⁷ CFI, Case T-435/93 *ASPSC and Others v Commission* [1995] E.C.R. II-1281, para.70; CFI, Case T-265/94 *Skövdevarföreningen and Others v Commission* [1995] E.C.R. II-1389, para.47; CFI, Case T-11/95 *BP Chemicals v Commission* [1996] E.C.R. II-3235, para.77; CFI (order of May 17, 2004), Case T-356/02 *Deutsche Post and DHL v Commission* [2004] E.C.R. II-1365, para.36.

³⁸ CFI, Case T-435/93 *ASPSC and Others v Commission* [1995] E.C.R. II-1281, para.10.

³⁹ ECJ (order of March 21, 1997), Case C-35/97 *Région Wallonne v Commission* [1997] E.C.R. I-1787, para.5; ECJ (order of October 1, 1997), C-180/97 *Régione Toscana v Commission* [1997] E.C.R. I-5245, para.6; CFI, Case T-214/55 *Vlaams Gewest v Commission* [1991] E.C.R. II-717, para.22.

⁴⁰ ECJ (order of March 21, 1997), Case C-35/97 *Région Wallonne v Commission* [1997] E.C.R. I-1787, para.11; ECJ (order of October 1, 1997), C-180/97 *Régione Toscana v Commission* [1997] E.C.R. I-5245, para.11; CFI, Case T-214/95 *Vlaams Gewest v Commission* [1993] E.C.R. II-717, para.23; CFI (Judgment of October 5, 2005), Joined Cases T-356/03 and T-235/04 *Land Österreich and Austria v Commission*, not yet reported, paras 25–30 (with respect to a decision taken under Art.88(3) of the EC Treaty).

⁴¹ CFI, Case T-255/97 *Regione Autonoma Friuli-Venezia Giulia v Commission* [1999] E.C.R. II-1371, para.11; CFI, Joined Cases T-255/95, T-271/95 and T-272/95 *Eigenschafts Forst de Gipsgraben and Others v Commission* [2002] E.C.R. II-4217, para.41.

or an individual aid measure¹⁰⁷ adopted by the region or body concerned incompatible with the common market. Indeed under such circumstances, the contested decision directly prevents the authority concerned from exercising its own powers as it sees fit.¹⁰⁸ However, where the applicant is not the author of the aid scheme, reliance by a regional or other devolved authority of a Member State on the fact that the application or implementation of the contested Community measure is capable generally of affecting socio-economic conditions within its territorial jurisdiction is not sufficient to render an action brought by that authority admissible.¹⁰⁹

(iii) Position of associations

7-102 General. An action for annulment brought by an association of undertakings against a Community decision relating to State aid will be admissible in two sets of circumstances. The first is where the association has a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled. The second is where the association, by bringing its action, has substituted itself for one or more of the members whom it represents, on condition that those members were themselves in a position to bring an admissible action.

7-103 Association representing the interests of undertakings which are directly and individually concerned. The defence of common interests is not enough to establish the admissibility of an action for annulment brought by an association. An association will, however, be able to bring an action where it defends the individual interests of certain of its members before the Court of First Instance in accordance with the powers conferred on it by its statutes if it can be demonstrated that those members are directly and individually concerned by the decision concerned. Such collective action brought by the association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decision, whilst avoiding any risk of Art. 230 of the EC Treaty being circumvented by means of such a collective action.¹¹⁰

¹⁰⁷ CFI, Case T-214/95 *Meunier General v Commission* [1998] E.C.R. II-717, para. 25; CFI, Joined Cases T-152/96 and T-143/96 *Frederix Sachlen and Others v Commission* [1998] E.C.R. I-3651, para. 24.

¹⁰⁸ CFI, Case T-214/95 *Meunier General v Commission* [1998] E.C.R. II-717, para. 25; CFI, Joined Cases T-132/95 and T-143/95 *Frederix Sachlen and Others v Commission* [1998] E.C.R. II-3563, para. 84; CFI, Case T-333/97 *Regione Autonoma Friuli-Venezia Giulia v Commission* [1999] E.C.R. I-1871, para. 31; CFI, Joined Cases T-261/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v Commission* [2000] E.C.R. I-1217, para. 41.

¹⁰⁹ CFI, Case T-132/97 *Comunidad Autónoma de Cataluña v Council* [1998] E.C.R. II-271, para. 50.

¹¹⁰ ECJ, Case 282/85 *DEF v Commission* [1986] E.C.R. 1463, para. 16; ECJ, Case C-692/94 *Federinter and Others v Commission* [1995] E.C.R. I-4337, para. 17; CFI, Joined Cases T-447/93, T-448/93 and T-449/93 *ATEC and Others v Commission* [1995] E.C.R. I-1971, paras 53 and 61; CFI, Case T-35/99 *CEIM v Commission* [2000] E.C.R. I-3225, para. 23.

The association's position as negotiator is affected. An association will be considered to be individually concerned by a Commission decision relating to State aid if it is capable of demonstrating that its position as a negotiator is affected by that decision.¹¹¹

A trade organisation which was closely involved in the development of the Commission's policy on aid in a particular sector will be individually concerned by a Commission decision which is allegedly at odds with the policy outlined. This is because such a decision affects the trade organisation in its capacity as a negotiator of the policy.¹¹²

Thus, in the *CRFS* case, the Court of Justice held that the *Comité International de la Rayonne et des Fibres Synthétiques* (International Rayon and Synthetic Fibres Committee) was individually concerned by a Commission decision which allegedly violated the Commission's "discipline" with respect to aid to the synthetic fibre industry, after noting that the association concerned had been the Commission's interlocutor with regard to the adoption of this "discipline" and to its later extension and adaptation and had actively pursued negotiations with the Commission during the pre-litigation procedure, in particular by submitting written observations to it and by keeping in close contact with the responsible departments.¹¹³

Similarly in the *Van der Kooy* case, the *Landbouwerschap* (a body established under public law of the Netherlands to protect the common interests of agricultural undertakings) had negotiated with a public undertaking a preferential gas tariff which was considered by the Commission to constitute State aid. It was also one of the signatories of the agreement establishing that tariff. The Court of Justice held that the *Landbouwerschap* was individually concerned by the Commission decision declaring the preferential gas tariff incompatible with the common market. The Court stressed that the association's position as negotiator of gas tariffs in the interests of the growers concerned was affected by the contested decision and that in that capacity the association had taken an active part in the procedure under Art. 88 (2) of the EC Treaty by submitting written comments to the Commission and by keeping in close contact with the responsible officials throughout the procedure.¹¹⁴ Accordingly, the *Van der Kooy* and *CRFS* cases concerned particular situations in which the applicants occupied a clearly organised position as negotiators which

¹¹¹ ECJ, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1986] E.C.R. 219, paras 19-21; ECJ, Case C-112/90 *CRFS and Others v Commission* [1992] E.C.R. I-1115, paras 25 and 39; CFI, Case T-380/94 *AUFASS and AUF v Commission* [1999] E.C.R. II-2159, para. 50; CFI, Case T-51/99 *CEIM v Commission* [2000] E.C.R. II-3227, para. 21.

¹¹² ECJ, Case C-311/90 *CRFS and Others v Commission* [1992] E.C.R. I-1125, paras 28-30; CFI, Case T-224/94 *AUFASS and AUF v Commission* [1996] E.C.R. I-2159, para. 51.

¹¹³ ECJ, Case C-311/90 *CRFS and Others v Commission* [1992] E.C.R. I-1115, para. 24-25.

¹¹⁴ ECJ, Joined Cases 67-68 and 70/85 *Van der Kooy v Commission* [1986] E.C.R. 219, paras 22-24. The position of the association as a negotiator at both national and Community level is taken into account.

was closely linked to the actual subject-matter of the Commission decision, thus placing them in a factual situation which distinguished them from all other persons.¹³⁵

- 7-106 Trade unions. A trade union will not normally be individually concerned by a decision of the Commission declaring an aid measure incompatible with the common market. The status of negotiator with regard to the social aspects constitutes only a tenuous link with the actual subject-matter of the decision. Whereas, when determining whether or not State aid is compatible with the common market, social aspects are liable to be taken into account by the Commission, but this will be done only as part of an overall assessment which includes a large number of considerations of various kinds, linked in particular to the protection of competition, regional development, the promotion of culture or again to the protection of the environment.¹³⁶

(4) Anti-dumping cases

- 7-105 Measures of general application. Provisional and definitive anti-dumping duties are imposed by regulation pursuant to Art.14(1) of Regulation No 384/96.¹³⁷ What is involved is essentially a provision of general application, which applies to all economic entities concerned. Nevertheless, some parts of such a "regulation" or the extension of existing anti-dumping duties to like products or parts thereof are of individual concern to some persons¹³⁸ (see 7-069, *supra*).
- 7-107 Producers and exporters. Producers or exporters established outside the Community of products on which anti-dumping duties are imposed, are individually concerned where information about their trading activities is used with a view to determining the duties. Generally speaking, this will be the case where manufacturing and exporting undertakings can establish that they were identified in measures adopted by the Commission or the

Council or concerned by the preliminary investigation.¹³⁹ Such a factor should have in some way prompted the intervention of the institutions or to have formed part of the *raison d'être* of the regulation itself.¹⁴⁰ An action for annulment is often the only legal remedy available to them against the imposition of such duties.¹⁴¹ This argument provides support for the Community Court in finding that such an action is admissible.¹⁴²

Manufacturing and exporting undertakings, however, are not individually concerned by an anti-dumping duty which is imposed on other undertakings by the same regulation. They are therefore not entitled to challenge such a duty.¹⁴³

Complainants. Natural or legal persons or associations without legal personality acting on behalf of the Community industry which lodge a complaint leading to a preliminary administrative procedure¹⁴⁴ are entitled to bring an action for annulment against a refusal by the Commission to initiate the actual anti-dumping procedure on the grounds that there is insufficient evidence.¹⁴⁵ Their particular legal position founded upon the procedural guarantees conferred by Regulation No 384/96¹⁴⁶ must be protected by the Community Court. A decision refusing to initiate a procedure may not undermine those procedural safeguards.¹⁴⁷

¹³⁵ ECJ, Joined Cases 139 and 275/81 *Allied Corporation v Commission* [1984] E.C.R. I-1005, para.12. See, however, CFI, Case T-152/94 *Sinochem Heilongjiang v Council* [1995] E.C.R. II-995, paras 45-48, where the Court of First Instance held that the preliminary investigation had concerned the applicant undertaking, even though the Commission had decided not to make use of the information which it had provided: CFI, Case T-153/94 *Climax Paper v Council* [1995] E.C.R. II-373, para.44-51; CFI, Case T-118/94 *Jianghai Nitric v Council* [1997] E.C.R. II-1553, para.39; CFI, Case T-147/97 *Champion Stationery and Others v Council* [1999] E.C.R. II-4117, paras 30-35; CFI, Case T-57/97 *Eurovin v Council* [2000] E.C.R. II-2419, para.45; CFI, Case T-393/97 *ETC Footwear Supplies and Others v Council* [2000] E.C.R. II-1155, para.45; ECJ, Case C-43/95 *Nacht Europe* [2001] E.C.R. I-1197, para.11. For an extensive discussion, see Coppieters, "Recente ontwikkelingen in de rechtpraak inzake het anti-dumpingbeleid van de EG ten aanzien van de Volksrepubliek China" (1997) *J.E.W.* 272-285.

¹³⁶ ECJ, Case C-15/92 *Gas Yax v Council* [1994] E.C.R. I-3164, paras 26-32; CFI, Case T-57/97 *Eurovin v Council* [2000] E.C.R. II-2419, para.45.

¹³⁷ ECJ, Joined Cases 139 and 275/81 *Allied Corporation v Commission* [1984] E.C.R. I-1005, para.13.

¹³⁸ But see 7-086, *supra*.

¹³⁹ ECJ, Case 24/84 *Tyco v Council* [1987] E.C.R. I-589, para.4-7; ECJ, Case 25/84 *Nippon Ink v Council* [1987] E.C.R. I-723, para.7; ECJ, Case C-154/87 *Gensior Holdings v Council and Commission* [1990] E.C.R. I-4781, para.12; ECJ, Case C-174/87 *Ritch v Council* [1992] E.C.R. I-3355, para.6-8.

¹⁴⁰ The "investigation" provided for by Art.5 of Regulation No 384/96.

¹⁴¹ ECJ, Case 15/82 *Fedol v Commission* [1983] E.C.R. 2913, paras 15-31. See also Bellis, "Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations after Fedol: The Emergence of a New Admissibility Test" (1984) *CM.L.Rev.* 533, at 545, who suggests that there should be generalized access to the Court of Justice (now the Court of First Instance) for any natural or legal person who participated in the administrative investigation into the dumping in question.

¹⁴² The procedural guarantees conferred by the regulation are the right to lodge a complaint, the associated right that the complaint should be investigated with due care in accordance with the procedure laid down by the Commission and the right, upon written request, to inspect all information made available by any party to an investigation which is not confidential (Art.5(7)).

¹³⁵ ECJ, Case C-105/88 *P. Comité d'entreprises de la Société française de production and Others v Commission* [2000] E.C.R. I-3559, para.45. See also CFI, Case T-49/94 *Hamburger Hafen- und Lagerhaus and Others v Commission* [2001] E.C.R. II-1027, para.50.

¹³⁶ ECJ, Case C-105/88 *P. Comité d'entreprises de la Société française de production and Others v Commission* [2000] E.C.R. I-3559, paras 52-53. See also n.355, *supra*.

¹³⁷ Council Regulation (EC) No 384/96 of December 22, 1995 on protection against dumped imports from countries not members of the European Community [1996] O.J. L368.

¹³⁸ For a survey, see Rams and Uarrow, "Direct Actions before the EC Court of Justice: The Case of EEC Anti-dumping Law", in Fetermann and Janssens (eds), *Adjudication of International Trade Disputes in International and National Economic Law* (University Press, Freiburg, 1992), at 159-260. See also, CFI, Joined Cases T-74/97 and T-15/97 *Süßel v Council and Commission* [2000] E.C.R. I-3657.

An action brought against the regulation imposing a definitive anti-dumping duty is available only to a complainant whose involvement in the adoption of the regulation extends further than simply lodging the complaint which initiated the anti-dumping procedure. Only where the complainant's observations were determinative of the course of the investigation or where its specific position on the market was taken into account, will the complainant be individually concerned by the regulation imposing a definitive anti-dumping duty.¹²⁹ The fact that the complaint was lodged by a trade association of which the applicant is a member does not detract from the undertaking's right to bring an action.¹³⁰ If the aforementioned conditions are fulfilled by both the trade association and the undertaking, both of them can bring an action for annulment.

129 Importers. Importers associated with an importer are individually concerned by a regulation imposing an anti-dumping duty where their resale prices, and not the export prices, of the products in question are considered in order to determine whether dumping is taking place¹³¹ or the level of the anti-dumping duty.¹³² Where an importer brings an action for annulment against a regulation which, following circumvention, was extended to cover like products or parts thereof, an "importer" which is affected by the extension of the anti-dumping duty will be individually concerned only if the Commission took account of the undertaking's commercial activities in its investigation carried out following circumvention of the original anti-dumping duty or if the undertaking concerned participated in good time in the investigation.¹³³

Generally speaking, importers not associated with an exporter are not individually concerned by a regulation imposing an anti-dumping duty.¹³⁴ The reason for this is that the imposition of the duty affects them in their

¹²⁹ ECJ, Case 264/82 *Toner v Council and Commission* [1983] E.C.R. 349, paras 8-17.

¹³⁰ *Ibid.*

¹³¹ ECJ, Case 116/77 *MS v Council* [1978] E.C.R. 1277; ECJ, Joined Cases 239 and 215/82 *Allied Corporation v Commission* [1984] E.C.R. 1005, paras 15; ECJ, Case C-238/99 *Neck Europe* [2001] E.C.R. I-1157, para 21.

¹³² ECJ, Joined Cases C-334/85 and C-168/87 *Neotype Technisystem v Commission and Council* [1990] E.C.R. I-2945, paras 20-21.

¹³³ CFI, Joined Cases T-74/97 and T-15/97 *Böckel v Council and Commission* [2000] E.C.R. II-3057, paras 50-68.

¹³⁴ ECJ, Case 307/81 *Abnatie v Council and Commission* [1982] E.C.R. 3453; ECJ (order of July 8, 1987), Case 273/85 *Semur v Commission* [1987] E.C.R. 3119; ECJ (order of July 3, 1987), Case 330/85 *Frimodt Pedersen v Commission* [1987] E.C.R. 3123. A regulation which is confined to accepting price undertakings offered by an exporter in an anti-dumping investigation in relation to products imported by the applicant is of individual concern only to the exporter in question. The importer—even if he is the sole importer—is necessarily not party to the undertakings given. ECJ (order of July 3, 1987), Case 295/86 *Gardie v Commission* [1987] E.C.R. 3117, para 14; CFI, Case T-563/97 *S&C Footwear Supplies and Sales v Council* [2002] E.C.R. II-1155, paras 49-51. For a critical discussion, see Van Ginderachter, "Recouvrabilité des recours en annulation" (1987) C.D.E. 535-656; see also ECJ (order of November 11, 1993), Case 235/90 *Alrosa Green v Commission* [1993] E.C.R. 4423, para 14.

objective capacity as importers of the product subjected to an anti-dumping duty. Consequently, the regulation remains a regulation, even if independent importers were involved in the procedure which led to its adoption¹³⁵ or if their identity emerges from the regulation.¹³⁶ The existence of dumping is not normally determined by reference to importers' resale prices, but by reference to the actual prices paid or payable on export.¹³⁷

The restrictive scope of the case-law relating to independent importers is mitigated by the fact that they can challenge the imposition of an anti-dumping duty in the national courts, which, in turn, may (or must) make a reference to the Court of Justice for a preliminary ruling on the validity of the regulation (see C-110, *infra*).

In exceptional circumstances, the Court of Justice has recognised the particular economic situation of an independent importer as a specific circumstance causing the importer to be individually concerned by a regulation imposing an anti-dumping duty.¹³⁸ The Court pointed out that the applicant was the largest importer of the product and that its business activities depended to a very large extent on imports, given that there was only one Community producer of the product, which, moreover, was its direct competitor and had strengthened its position considerably vis-à-vis the applicant as a result of the restriction of imports. It made no difference that its resale price was not taken into account in adopting the regulation.¹³⁹

Original equipment manufacturers. An original equipment manufacturer (OEM)—an undertaking selling goods produced by other manufacturers under its own brand name¹⁴⁰—will be individually concerned by a regulation imposing an anti-dumping duty where, in calculating the dumping margin, account was taken of the particular features of its business dealings with the manufacturers in respect of which anti-dumping duties are imposed by the regulation. An application by an OEM will be admissible only in so far as it seeks annulment of the specific anti-dumping duty imposed by the regu-

7-110

¹³⁵ *Abnatie v Council and Commission*, cited in the preceding n., para 23.

¹³⁶ ECJ (order of July 3, 1987), Case 301/85 *Frimodt Pedersen v Commission* [1987] E.C.R. 3123, para 1.

¹³⁷ *Ibid.*, para 17.

¹³⁸ ECJ, Case C-158/93 *Schrammer Industrie v Council* [1994] E.C.R. I-2531. See also CFI, Case T-597/97 *Euromit v Council* [2000] E.C.R. II-1415, paras 45 and 49-50. For an extensive commentary, see Brasseur and Carlin, "Quel rôle pour les dans les procédures anti-dumping après Schrammer" (1991) D.P.C.L. 243-267. For a critical note, see Arnault, "Challenging EC Anti-dumping Regulations: The Problem of Admissibility" (1992) E.C.M.P.L. Rev. 73, at 79.

¹³⁹ This case-law seems to be confined to anti-dumping. It appears from the *Böckel* case (ECJ, Joined Cases C-15 and 138/91 *Böckel and Others v Commission* [1992] E.C.R. I-5661) that the Court of Justice is limiting this "economic" approach to being individually concerned by a measure. See also CFI (order of September 6, 2004), Case T-213/02 *S&F v Commission*, not yet reported, paras 75-77.

¹⁴⁰ Consequently, an OEM falls somewhere between a producer/exporter, on the one hand, and an importer, on the other.

lation on the producer from which the OEM obtains the goods which it sells.²⁹⁷

(5) Access to documents pursuant to Regulation No 1049/2001

- 7-111 Decision addressed to another person. A legal person seeking the annulment of a decision addressed to another person refusing that person access to documents does not have standing before the Community Court. In such a case, the applicant cannot be considered to have an interest in seeking the annulment of such a decision, since it does not affect its own rights.²⁹⁸

(5) Public contracts

- 7-112 Competitors in a public tender procedure. Natural or legal persons who participate in a public tender procedure organised by the Community belong to a closed class. Each of them is individually concerned by a decision awarding the contract to one of their number.²⁹⁹ The withdrawal or modification of a definitive decision awarding the contract is also of individual concern to the persons who participated in the public tender procedure.³⁰⁰

d. The requirement that there should be an interest in the annulment of the contested act

- 7-113 Concept. Natural or legal persons may bring an action for annulment only in so far as they can establish that they have an interest.³⁰¹ This means that

²⁹⁷ ECJ, Joined Cases C-233 and C-156/87 *Nichel and Others v Commission and Council* [1993] E.C.R. I-719, paras 16-21; ECJ, Case C-358/87 *Gezeiner Holdings v Council and Commission* [1990] E.C.R. I-731, paras 15-16.

²⁹⁸ CFI, Case T-41/90 *British American Tobacco International v Commission* [2001] E.C.R. II-1331.

²⁹⁹ ECJ, Case 135/81 *Groupement des Agences de Voyages v Commission* [1982] E.C.R. 3755; ECJ, Case C-496/93 *P. Commission v CAS Succhi di Frutta* [2004] E.C.R. I-3531, paras 52-55.

³⁰⁰ ECJ, Case 132/81 *Agricola Commerciale Olie and Others v Commission* [1984] E.C.R. 3681; ECJ, Case C-496/93 *P. Commission v CAS Succhi di Frutta* [2004] E.C.R. I-3531, paras 52-55.

³⁰¹ CFI, Case T-141/97 *Mitchell and Others v Commission* [2000] E.C.R. II-287, in which the lack of locus standi did not result in the application being declared inadmissible but in the finding that there was no need to adjudicate further on the case. Cf. CFI, Joined Cases T-284/97 and T-276/97 *SPAC v Commission* [2000] E.C.R. II-2361, paras 133-138, in which the Court of First Instance held that an action for annulment of a Commission decision in a State aid investigation calling on the Member State to suspend the aid pending the outcome of the investigation was to no purpose given that the Commission had reached a definitive decision in the course of the investigation, thereby depriving the provisional decision of any legal basis. As a result, the applicant had no interest in proceeding against the provisional decision. See also CFI, Case T-325/99 *Fern Simioli v Commission* [2000] E.C.R. II-2983, paras 66-100, in which the Court of First Instance held that a specialist of

they must benefit from the annulment of the contested act.³⁰² That benefit consists in the elimination of the adverse repercussions on their legal position.³⁰³

As far as State aid is concerned, the conduct of the Member State to which the Commission decision is addressed does not have any bearing on the applicant's interest in the annulment of the Commission decision declaring the aid granted to the applicant unlawful and requiring the Member State to recover the aid, even though the Member State has fully complied with the contested decision and does not intend to reintroduce the aid scheme in question if the decision is annulled. The rationale is that the applicant may be able to put forward certain claims before the national authorities if the contested decision is found to be unlawful.³⁰⁴

As far as merger control is concerned, the fact that the addressees have complied with the Commission decision does not affect their interest in bringing proceedings. Where the Commission declares a concentration incompatible with the common market and orders it to be reversed, the undertakings involved in the concentration do not lose their interest in the annulment of the decision if they have complied with it, and thereby brought the concentration irreversibly to an end.³⁰⁵ Where a concentration has not been effectuated before the Commission takes its decision declaring it to be incompatible with the common market, an undertaking party to the intended concentration retains an interest in the annulment of the Commis-

sionnaire's worldwide reputation in a particular line had no locus standi to claim that a Commission decision granting a licence for the marketing of a medicinal product should be annulled on the ground that the product was ineffective for treating that illness. See, in general, Canadian, "L'absence d'agréation ne procure un avantage ou de préjudice commercial" [1993] R.T.D.E. 451-512.

³⁰² It suffices if the applicant has an interest in the annulment of the part of the act which is unfavourable to it (CFI, Case T-55/00 *Europe Chem-Con v Council* [2001] E.C.R. II-3455, para 35). The legal sphere of an association of beneficiaries of a public provision association was held not to have been affected by a decision to close the file on its complaint. This was because it could derive no benefit from the annulment of the contested act (CFI, Case T-244/94 *ATM v Commission* [1997] E.C.R. II-2523, paras 62-63, upheld on appeal in ECJ (order of May 5, 1999), Case C-51/98 *P. ATM v Commission*; not reported, para 42).

³⁰³ Opinion of Advocate General G.F. Marchal in ECJ, Joined Cases 142 and 156/84 *British American Tobacco and R.J. Reynolds Industries v Commission* [1987] E.C.R. 4457. See also CFI, Case T-232/95 *Stanolinger v Commission* [2001] E.C.R. II-1719: an undertaking which had lodged a complaint against dumping prices of products imported into the Community was held to have an interest in the annulment of a decision by which the Commission terminated a review procedure carried out at the time when existing anti-dumping measures were in force, without introducing new measures. This was because in the event of the annulment of that decision, the existing anti-dumping measures would have remained in force until such time as the Commission had taken a new decision completing the review procedure. Moreover, in the event of annulment, the Commission is obliged under Art.235 of the EC Treaty to take the necessary measures to comply with the judgment.

³⁰⁴ CFI, Case T-39/91 *Mecklenische Erdöl-Refinerie v Commission* [2001] E.C.R. II-3587, paras 32-38.

³⁰⁵ CFI, Case T-225/97 *Reis v Commission* [1999] E.C.R. II-3775, paras 55-61.

sion decision also where the concentration can no longer take place, even in the event that the judgment of the Court of First Instance is in the applicant's favour, as a result of the disappearance of its contractual basis. The Court of First Instance takes account in particular of the existing and future legal consequences of annulment of such a decision by virtue of Art. 233 of the EC Treaty and of the requirements of judicial review of the legality of Commission acts under the concentration regulation.³²⁴

On the same lines, in litigation concerning access to documents of Community institutions, the Court of First Instance has held that it was irrelevant that the documents to which access had been refused were already in the public domain. A person who is refused access to a document has a sufficient interest in the annulment of the decision refusing such access.³²⁵

Where necessary, the Court of Justice and the Court of First Instance will consider of their own motion whether the requirement to have an interest in bringing proceedings is satisfied.³²⁶ They may have regard to the effect of the national law of a Member State when they consider the applicant's legal position in assessing its *locus standi*.³²⁷

- 114 No interest in challenging act the adoption of which was sought by applicant. Where a natural or legal person receives from the Commission an act which that person sought, the person in question has no interest in applying for the annulment of that act (or of certain grounds of that act) even if the grounds of the act contain a number of unfavourable passages. Accordingly, an undertaking which has notified a concentration has no interest in having the decision declaring it compatible with the common market annulled even if the decision finds that the undertaking concerned has a dominant position on a particular market.³²⁸ Likewise, a Member

³²⁴ CFI, Case T-101/96 *Gencor v Commission* [1999] E.C.R. II-1553, paras 41-45. The same applies where the parties concerned withdraw from the merger before the Commission takes its decision, but the Commission nonetheless adopts a decision: CFI (Judgment of September 28, 2004), Case T-312/00 *McC v Commission*, not yet reported, paras 49-51.

³²⁵ CFI, Case T-45/92 *Scottish Scottish Association v Commission* [1994] E.C.R. II-1039, paras 23-14; CFI, Case T-174/95 *Journalisten-Verband v Council* [1995] E.C.R. II-2285, paras 56-59.

³²⁶ ECJ, Case 132/86 *D.M. v Council* [1993] E.C.R. 2913, para.10; CFI (order of March 10, 2005), Case T-273/00 *Unione degli industriali della provincia di Venezia v Commission*, not reported, para.15; CFI (order of March 10, 2005), Case T-159/00 *Exploit Hotels and Sagar v Commission*, not reported, para.16.

³²⁷ ECJ (order of May 3, 1999), Case C-519/97 *ATM v Commission*, not reported, para.26.

³²⁸ CFI, joined Cases T-25/97 and T-127/97 *Coca-Cola v Commission* [2000] E.C.R. II-1713, paras 77-92. See also in this connection CFI, Case T-35/99 *NBB and NBB v Commission* [1999] E.C.R. II-2151, paras 31-34: undertakings which obtained of their request a declaration from the Commission pursuant to Art. 2 of the former Regulation No 17 that their agreement was not in breach of Art. 81(1) of the EC Treaty, had no interest in having that declaration annulled, even though they considered that the decision contained considerations capable of damaging their interests. Since the undertakings had ended up in the legal position which they had requested of the Commission, they had no interest in having the decision annulled.

State or the recipient of aid have no interest in obtaining the annulment of a decision declaring aid notified by that State compatible with the common market.³²⁹

Personal interest. The interest must be personal to the applicant itself.³³⁰ An applicant to which the contested act is not applicable cannot claim that it has a personal interest.³³¹

Accordingly, an undertaking was held to have no legal interest in bringing proceedings for the annulment of a regulation which did not concern the product which it manufactured.³³²

As far as federated States are concerned, they will often have autonomous policy-making powers which are not subject to the control of the federal State. Consequently, such a federated State has an interest of its own, distinct from the interest of the federal or central authorities, in challenging a Community act which restricts its policy-making powers.³³³

Vested and present interest. The interest must be vested and present.³³⁴ A hypothetical interest is therefore insufficient to ground an action for annulment.³³⁵ However, an applicant may have an interest in the annulment of an act which is no longer in force.³³⁶ The annulment of such a measure

³²⁹ ECJ (order of January 24, 2004), Case C-164/02 *Netherlands v Commission* [2004] E.C.R. I-1177, paras 15-25; CFI (Judgment of April 14, 2005), Case T-141/03 *Solace v Commission*, not yet reported, paras 20-41.

³³⁰ ECJ, Case 252/85 *DEFF v Commission* [1986] E.C.R. 2463, para.18; ECJ, Case 204/85 *Steguhl v Court of Auditors* [1987] E.C.R. 389, para.3; CFI, Case T-258/97 *BSUC v Commission* [1999] E.C.R. II-101, para.31.

³³¹ ECJ, Case 38/76 *Société pour l'Exportation des Sucres v Commission* [1977] E.C.R. 739, paras 15-16; CFI (order of April 30, 2001), Case T-41/00 *British American Tobacco International v Commission* [2001] E.C.R. II-1301, para.19.

³³² CFI, Case T-117/95 *Corbin v Commission* [1997] E.C.R. II-95, paras 82-84. A Commission regulation protecting a geographical denomination of origin which the applicant did not use was held not to affect its legal sphere with the result that it had no legal interest in obtaining its annulment: CFI (order of April 29, 1999), Case T-78/98 *Unione provinciale degli agricoltori di Firenze and Others v Commission* [1999] E.C.R. II-1377, paras 30-34.

³³³ CFI, Case T-214/95 *Madax v Commission* [1998] E.C.R. II-217, para.33; CFI (order of April 29, 1999), Case T-75/98 *Unione provinciale degli agricoltori di Firenze and Others v Commission* [1999] E.C.R. II-1377, para.35; CFI, Case T-233/97 *Regione Autonoma Friuli Venezia Giulia v Commission* [1999] E.C.R. II-1671, para.34; CFI, joined Cases T-132/96 and T-143/96 *Freiburger Seiferei and Others v Commission* [1999] E.C.R. II-1563, para.32.

³³⁴ CFI (Judgment of April 14, 2005), Case T-141/03 *Solace v Commission*, not yet reported, para.15; CFI (order of February 10, 2000), Case T-569 *Andrius v Commission and CEDEFOP* [2000] E.C.R. I-215, para.36: the Court of First Instance held that since the applicant had already achieved the result which he was pursuing, he had no legal interest in bringing proceedings.

³³⁵ ECJ, Case 204/85 *Steguhl v Court of Auditors* [1987] E.C.R. 389, para.11; CFI (order of April 30, 2001), Case T-167/01 *Schmitz-Gotha Fahrzeugwerke v Commission* [2001] E.C.R. II-1773, para.13.

³³⁶ ECJ, Case 336/85 *APZO Chemie v Commission* [1986] E.C.R. 1955, para.21; ECJ, Case 207/84 *APESCO v Commission* [1985] E.C.R. 2151; CFI, joined Cases T-291/86 and T-164/87 *CAS Succhi di Frutta v Commission* [1989] E.C.R. II-3151, paras 62-63 (3-004, *supra*).

has the effect of preventing its author from adopting a similar act in the future.⁴¹ The applicant may also have an interest in bringing an action against a measure which has been implemented in full, the intention being for the defendant institution to do justice to the applicant, possibly by way of the payment of damages,⁴² or for it to make the necessary amendments for the future to the legal system in the context of which the act was adopted.⁴³ Lastly, an applicant may have an interest in the annulment of a decision which has been repealed. The reason for this is that the repeal of a decision cannot invariably be equated with annulment by the Court since, by definition, it does not amount to recognition of the decision's illegality. Moreover, repeal generally takes effect *ex nunc*, whereas annulment within the meaning of Art.233 of the EC Treaty takes effect *ex tunc*. Accordingly, the judgment annulling a decision which has been withdrawn may put the originator of the act under an obligation to remove the effects of the illegal conduct found in the judgment by taking adequate steps to restore the applicant to its original position or to avoid the adoption of an identical measure.⁴⁴

7-117 Interest may disappear. In order to obtain judgment on the substance, it is not enough that the applicant had an interest at the time when it brought its action.⁴⁵ The interest may disappear in the course of the

⁴¹ If, however, the Court of First Instance finds that annulment of the act could not give rise to measures to comply with the judgment declaring the act void within the meaning of Art.233 of the EC Treaty, the applicant will have no interest in obtaining its annulment (see CFI (order of June 11, 1997), Case T-1356 *TEAM and Rajpreet v Commission* [1997] E.C.R. II-383, para.25).

⁴² ECJ, Case C-455/93 *P Commission v CAS Succhi di Frutta* [2004] E.C.R. I-5351, para.35.
⁴³ ECJ, Case 52/54 *Stemmerling v Commission* [1959] E.C.R. 777, para.18; CFI, Joined Cases T-456 and T-452/93 *Arifian Rice Mills v Commission* [1995] E.C.R. II-2105, para.52; CFI (order of February 1, 1999), Case T-256/97 *REUC v Commission* [1999] E.C.R. II-169, para.13.

⁴⁴ CFI, Joined Cases T-451 and T-454/93 *Expansive in Lervide Vireux and Others v Commission* [1995] E.C.R. II-2941, paras 45-48; CFI, Case T-211/93 *Fidelis Signet v Commission* [2001] E.C.R. II-1781, paras 45-49. However, the withdrawal of the contested decision may take effect *ex tunc* and also have the same consequences as a declaration of nullity. In such case, the Court of Justice or the Court of First Instance, as the case may be, may decide in an order that the action for annulment is devoid of purpose and that there is no need to proceed to judgment (ECJ (order of March 4, 1997), Case C-455/96 *Germany v Commission* [1997] E.C.R. I-1155; CFI (order of September 13, 1996), Case T-20/96 *Langdon v Commission* [1996] E.C.R. II-1009; CFI (order of March 16, 1997), Case T-2556 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag Lloyd v Commission* [1997] E.C.R. II-363).

⁴⁵ Note, however, that the Court of First Instance has stressed that the applicant's interest in bringing proceedings must be determined "at the time when the application was lodged" and not assessed on the basis of a "future, hypothetical event" (CFI, Case T-16/95 *Cayser Express v Commission* [1995] E.C.R. II-757, para.32). In that same case, the Court of First Instance found that the matters on which the Commission had relied in order to argue that the competition of the undertaking in receipt of the aid had no interest in bringing proceedings were purely speculative and hence could not affect the applicant's *locus standi*. See also CFI, Case T-506/93 *Glencore Grain v Commission* [2000] E.C.R. I-3697, para.29;

proceedings.⁴⁶ For instance, an undertaking which was declared bankrupt after bringing an application for annulment against a Commission decision authorising national aid to a competitor ceased to have any interest in bringing the proceedings since the competitive situation no longer existed as a result of the applicant's having been declared bankrupt; and that situation could not have been affected by the aid since the applicant had been declared bankrupt before the aid was paid.⁴⁷ If the interest for bringing an action disappears in the course of the proceedings (for example, if the defendant institution revokes the contested act in all its aspects), it is for the applicant to discontinue the proceedings. If it fails to do so, it may be ordered to pay the costs.⁴⁸

In a judgment given on appeal, the Court of Justice held that the Commission and a party which had intervened in the proceedings before the Court of First Instance still had an "interest" in bringing a cross-appeal against the judgment of the Court of First Instance declaring part of a Commission decision void even though that part of the decision would no longer have been applicable if the Court of First Instance had not annulled it. That Court had annulled the provision of the Commission decision by which the addressee of the decision was prohibited from concluding

CFI (judgment of April 14, 2003), Case T-14/03 *Immer v Commission*, not yet reported, para.25; CFI (order of September 10, 2003), Case T-256/99 *Mobro Cash & Carry Nederland v Commission*, not reported, para.35. The Court of Justice has also held that the admissibility of an application must be assessed by reference to the situation prevailing at the time when it was lodged (CFI, Joined Cases C-31/96, C-152/97, C-45/98, C-27/99, C-61/00 and C-12/01 *Spain v Council* [2002] E.C.R. I-3455, para.23). A party which brings an application for annulment against a Commission decision declaring a concentration incompatible with the common market and consequently prohibiting it pursuant to Art.8(3) of Regulation No 4064/86 maintains an interest in having that decision addressed to it annulled, even if the agreement concluded by the applicant as the basis for the proposed merger was rendered obligatory by the expiry of the contractual deadline by which the Commission had to approve the merger (CFI, Case T-162/94 *Genstar v Commission* [1999] E.C.R. II-153, paras 45-49). See also CFI, Case T-12/97 *Kauko v Commission* [1999] E.C.R. II-3775, paras 55-65, and CFI (judgment of September 23, 2004), Case T-312/00 *MC v Commission*, not yet reported, paras 44-46, where it was held that an undertaking had an interest in challenging a Commission decision declaring a concentration incompatible with the common market even though it had withdrawn from the proposed merger. See also CFI, Case T-135/99 *Stow and Felle v Commission* [2002] E.C.R. II-2023, paras 32-36, where the Court of First Instance held that an undertaking which had brought an action for annulment against a Commission decision declaring Art.8(1) of the EC Treaty inapplicable to a lease concluded by that undertaking had an interest in obtaining the annulment of the contested decision even after the lease had been terminated.

⁴⁶ CFI (order of October 17, 2003), Case T-224/03 *First Data and Others v Commission*, not yet reported, para. 34-35. It should be noted that it is only the action for annulment which becomes to no purpose if the applicant's interest disappears in the course of the proceedings. This does not mean, however, that an action for damages cannot subsequently be brought against the defendant institution which was late in giving satisfaction to the applicant (ECJ, Case 56/75 *CFDT v Council* [1977] E.C.R. 305, para. 9-10).

⁴⁷ CFI, Case T-44/93 *Canis Grani v Commission* [1995] E.C.R. II-1371.

⁴⁸ ECJ, Case 243/75 *Stemmerling v Commission* [1958] E.C.R. 553, para.9 (where the Court of Justice dismissed the application); ECJ, Case 179/83 *Requette Frères v Commission* [1983] E.C.R. 3613, paras 3-12 (where the Court of Justice declared that there was no need to proceed to judgment).

exclusive purchasing agreements up until December 31, 1957. Since the Court of Justice had not adjudicated on the cross-appeal by that date, the addressee of the decision, who had appealed, claimed that there was no need to adjudicate on the cross-appeal on the ground that it was to no purpose. The Court of Justice held, however, that the fact that the end-date for the prohibition had expired did "not make it any less desirable to settle definitively the dispute as to the legality and scope of [the relevant provision] of the contested decision with a view to determining its legal effects in the period up to the abovementioned date".⁴² It would seem to us that the same reasoning would hold good in the case of an application for annulment of an act whose validity has expired. Thus, a Member State retains an interest in seeking the annulment of a decision to initiate the formal procedure under Art. 158(2) of the EC Treaty at the time when the Commission has already adopted a final decision declaring the aid incompatible with the common market.⁴³

- 115 Flexible attitude taken by the Community Court. Moreover, by and large the Court of Justice and the Court of First Instance are flexible about the requirement to establish an interest. Even if the contested decision finding an infringement of Art. 81 and/or Art. 82 of the EC Treaty does not impose a fine on the applicant, it nevertheless has an interest in having its legality reviewed.⁴⁴ In this event, then, owing to the fact that bringing an action for annulment does not have suspensory effect, the applicant follows its conduct to comply with the contested measure, that will not destroy its interest.⁴⁵ Neither does it have any effect on the applicant's interest that, in the event of annulment of the contested act, it will be impossible for the defendant institution to take all the measures necessary to comply with the judgment of the Court of Justice or the Court of First Instance.⁴⁶ The declaration of nullity can always constitute the basis for a damages claim.⁴⁷

- 115 Pleas solely in the interest of the law. The applicant may adduce only pleas in law against the contested act which raise breaches of the law adversely affecting it—no matter how indirectly. Pleas solely raised in the interests of

⁴² ECJ, Case C-239/53 *P. Les grains d'or v. Commission* [1958] E.C.R. I-5895, para. 71.

⁴³ ECJ, Case C-400/59 *Italy v. Commission* [1965] E.C.R. I-3437, paras. 15-18. The Member State concerned had not attacked the final decision.

⁴⁴ ECJ, Case T-77/77 *EP v. Commission* [1978] E.C.R. II-1313, para. 11.

⁴⁵ ECJ, Joined Cases 173 and 224/53 *Hogewegs Group v. Commission* [1955] E.C.R. 2811, paras. 13-15.

⁴⁶ ECJ, Case T-57/79 *Kiencke v. Commission* [1980] E.C.R. II-445, paras. 5-8.

⁴⁷ ECJ, Joined Cases C-48/54 and C-54/55 *France and Others v. Commission* [1958] E.C.R. I-1315, para. 74; CFI, Case T-321/01 *Internationale Rijffonds v. Commission* [2003] E.C.R. I-3223, paras. 15-17.

the law or of the institutions are inadmissible.⁴⁸ However, this does not prevent a party from raising a plea in an application for annulment which was not raised in any administrative proceedings prior to the adoption of the contested act.⁴⁹

Different applicants. Where more than one applicants have brought one and the same action, a finding of admissibility in relation to one applicant means that there is no need to consider whether the other applicants are entitled to bring proceedings.⁵⁰ 7-120

II. SPECIAL CHARACTERISTICS

A. GROUNDS FOR ANNULMENT

Pleas which may be raised by the applicant. Under Art. 230 of the EC Treaty or Art. 146 of the EASC Treaty, an act of a Community institution may be annulled on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Consequently, the review exercised under those articles must be limited to the legality of the disputed measure and the Court of Justice and the Court of First Instance will not consider its expediency⁵¹ or substitute their own reasoning for that of the author of the contested act.⁵² 7-121

⁴⁸ ECJ, Case 55/62 *Schölk v. Council* [1963] E.C.R. 1205, paras. 13-14. This will arise only in extremely rare cases. Thus, even where an individual citizen, as applicant, a breach of the division of powers or between the institutions or as between the Community and the Member States, or a breach of any procedural requirement in the course of the adoption of the contested act, he or she will never do so exclusively in the interests of the law or of the institutions, since all the superior rules of law in that connection are intended, *inter alia*, generally to protect individuals affected by acts of the institutions. See ECJ, Case 113/73 *Requena Frias v. Council* [1974] E.C.R. 3333, para. 2; ECJ, Case 139/73 *Meirens v. Council* [1974] E.C.R. 3391, para. 2. A likely example of an inadmissible plea is where the applicant argues that the contested measure is discriminatory, while admitting that the discrimination operates only in his or her favor. Something somewhat similar arose moreover in *Schölk*: the applicant relied on the fact that the vacancy for the post for which his candidature had been rejected (which he was contesting) had not been brought to the notice of staff of Community institutions other than his own. Although that constituted a breach of the Staff Regulations, this had operated in the event only to the applicant's advantage, since there had been less competition for the post as a result.

⁴⁹ CFI, Case T-31/97 *Fogor de Clusberg v. Commission* [1999] E.C.R. II-539, para. 94.

⁵⁰ ECJ, Case C-311/90 *GRIF and Others v. Commission* [1991] E.C.R. I-1225, para. 31; CFI, Case T-265/94 *Stichting voor de Erfrechten en Others v. Commission* [1996] E.C.R. I-1359, para. 51; CFI Judgment of December 14, 2000, Case T-176/02 *FICF and Others v. Commission*, not yet reported, para. 43.

⁵¹ ECJ, Case C-54/94 *United Kingdom v. Council* [1995] E.C.R. I-5755, para. 21.

⁵² ECJ, Case C-34/58 *P. DLR International Film and Others v. Commission* [1958] E.C.R. I-447, para. 38. Where the Community Court reviews the legality of a complicated economic assessment made by the Commission or another institution and the institution concerned

7-121 Pleas which may be raised by the Court. It appears from the case-law that the first three grounds for annulment may be subsumed under the heading of breach of superior law, since the rules on competence and essential procedural requirements form part of the Treaties or of general rules adopted pursuant thereto. This blurs the distinction between the different grounds for annulment. Yet the distinction is not without importance.⁶⁰ The Court of Justice and the Court of First Instance are bound to raise of their own motion⁶¹ pleas alleging lack of competence⁶² and infringement of an essential procedural requirement⁶³ in relation to the adoption of the

has a broad discretion, the review will be confined to whether the procedural requirements were complied with, whether the statement of reasons is sufficient, whether the facts are correctly reproduced and whether there was a manifestly wrong assessment or a misuse of power: ECJ, Joined Cases 142 and 156/84 *British American Tobacco and R.J. Reynolds Industries v Commission* [1987] E.C.R. 4437; ECJ, Joined Cases C-204/90 P, C-265/90 P, C-111/90 P, C-211/90 P, C-217/90 P and C-219/90 P *Asberg Portland and Others v Commission* [2004] E.C.R. I-123, para.245; CFI, Case T-231/95 *Agnew v Commission* [2000] E.C.R. II-2035, para.35. An analysis of the review of the legality of discretionary acts of the institutions may be found in Rüfeng, "Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires" (1995) A.J.D.A. 645-667.

⁶⁰ Opinion of Advocate General M. Lagrange in ECJ, Case 56/53 *Netherlands v High Authority* [1954] E.C.R. 533, at 553-554.

⁶¹ ECJ, Case C-165/95 *P Commission v De'fr* [1997] E.C.R. I-953, para.24; ECJ, Case C-367/95 *P Commission v Syreval and Brink's France* [1998] E.C.R. I-1713, para.67; ECJ, Case C-255/95 *P Commission v SCI* [2000] E.C.R. I-2341, para.55; ECJ, Case C-210/98 *P Saigüer v Commission* [2000] E.C.R. I-5843, para.56. For further details, see Lecaeris, "Rechter en partijen in de rechtspleging voor Hof en Gerecht" (2002) S.B.W. 251-257.

⁶² ECJ, Case C-455 *Société des Fonderies de Font-S-Moulin v High Authority* [1955] E.C.R. 215, at 229; CFI, Case T-152/94 *Mare Erer and Del Amo Maritima v European Parliament* [1996] E.C.R. SC D-1-97, para.44 (English abstract at I-A-411); CFI, Joined Cases T-1259 and T-6359 *UK Coal v Commission* [2001] E.C.R. II-2153, para.159; CFI, Case T-147/00 *Laboratoire Servier v Commission* [2003] E.C.R. II-35, para.45-46; CFI (judgment of September 27, 2003), Joined Cases T-134/03 and T-135/03 *Common Market Fisheries v Commission*, not yet reported, para.52.

⁶³ ECJ, Case 154 *France v High Authority* [1954 to 1955] E.C.R. I, at 15; ECJ, Case 654 *Netherlands v High Authority* [1954 to 1956] E.C.R. 103, at 12; ECJ, Case 1957 *Noid v High Authority* [1955] E.C.R. 41, at 51-52; ECJ, Case C-291/89 *Interhotel v Commission* [1991] E.C.R. I-2257, para.14; ECJ, Case 354/89 *Oliver v Commission* [1991] E.C.R. I-2252, para.18; ECJ, Case C-245/97 *P VBA v Florinca and Others* [2000] E.C.R. I-2361, para.14; CFI, Case T-32/91 *Soley v Commission* [1993] E.C.R. II-1825, para.43; CFI, Case T-164/93 *FFM and Others v Commission* [1997] E.C.R. II-229, para.62; CFI, Case T-166/93 *Métropole Télévision v Commission* [2001] E.C.R. II-1059, para.43; CFI, Case T-231/99 *Agnew v Commission* [2002] E.C.R. II-2035, para.161; CFI (judgment of July 5, 2004), Case T-46/03 *Mennekenwärdren-Flake v Commission*, not yet reported, para.125 and 213 (under appeal: Case C-41/04 P) (defective statement of reasons). The Court of First Instance may inquire of its own motion into whether essential procedural requirements, especially procedural safeguards conferred by Community law, have been infringed (CFI, Case T-154/96 *Ain Ador France and Others v Commission* [2000] E.C.R. II-3452, para.46). The Court of First Instance may also consider of its own motion whether rights of the defence have been infringed during the administrative procedure (CFI, Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-212/97, T-213/97, T-215/97 to T-218/97, T-275/97, T-280/97, T-253/99 and T-147/99 *Kaufing and Others v Commission* [2001] E.C.R. II-3357, para.134. But see CFI (judgment of July 8, 2004), Joined Cases T-67/00, T-63/00, T-71/00 and T-78/00 *IFE Engineering and Others v Commission*, not yet reported, para.423, in which the Court of First Instance held that a breach of the rights of the defence, which

act (*la légalité externe*) in the light of the facts adduced.⁶⁴ Pleas alleging infringement of the Treaties or of any rules of law relating to their application, or misuse of powers, which relate to the content of the contested act (*la légalité interne*),⁶⁵ may only be considered by the Court of Justice or the Court of First Instance if they are raised by the applicant.⁶⁶ It is not necessary to that end for the grounds to be specified, it being "sufficient for the grounds for instituting the proceedings to be expressed in terms of their substance rather than the legal classification provided, however, that it is sufficiently clear from the application which of the grounds referred to in the Treaty is being invoked".⁶⁷

7-122 Timeframe. The legality of an act is reviewed in the light of the facts and the state of the law at the time when it was adopted.⁶⁸ The content of the act being reviewed is determined as at that time also. Addenda and improvements effected by the institution subsequently are not capable of regularising the act and will not be taken into account.⁶⁹ Acts adopted after the adoption of the contested decision cannot affect the validity of that decision.⁷⁰

by its nature is subjective, does not fall within the scope of an infringement of essential procedural requirements and therefore does not have to be raised by the Court of its own motion (under appeal: Joined Cases C-430/04 P and C-405/04 P).

⁶⁴ ECJ, Case C-125/92 *Montecchini v Commission* [1993] E.C.R. I-4539, para.101. It should, however, be stressed that the Court cannot raise a plea of its own motion if the application, in the absence of such plea, is inadmissible (ECJ (judgment of December 13, 2005), Case C-700/3 *P Commission v Aktionsgemeinschaft Recht und Eigentum*, not yet reported).

⁶⁵ Van der Laan and Baray, *Contentieux communautaire*, at 157.

⁶⁶ ECJ, Case C-357/95 *P Commission v Syreval and Brink's France* [1998] E.C.R. I-1713, para.67; ECJ, Case C-255/97 *P VBA v Florinca and Others* [2000] E.C.R. I-2361, para.14; ECJ (judgment of June 15, 2005), Case T-345/03 *Corrigan Ferries France v Commission*, not yet reported, para.52.

⁶⁷ ECJ, Joined Cases 18 and 21/63, 5 and 6/51 *Société Finet Lille Coll and Others v High Authority* [1956] E.C.R. 251, at 255.

⁶⁸ ECJ, Joined Cases 9 and 10/71 *Compagnie d'Approvisionnement de Transport et de Cridis and Others v Commission* [1972] E.C.R. 351, para.39; ECJ, Case 46/72 *Schneider* [1975] E.C.R. 125, para.14; ECJ, Joined Cases 15 and 16/75 *France v Commission* [1979] E.C.R. 521, para.6; ECJ, Case C-44/88 *P IECC v Commission* [2001] E.C.R. I-3275, para.57; ECJ, Case C-277/93 *Germany v Commission* [2004] E.C.R. I-3525, para.29; CFI, Joined Cases T-75 and T-90/93 *SNCF and British Railways v Commission* [1995] E.C.R. II-1451, para.45; CFI, Case T-77/95 *IFFI and Others v Commission* [1997] E.C.R. II-1, para.14; CFI, Case T-125/94 *Opel Austria v Council* [1997] E.C.R. II-35, para.67; CFI, Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1998] E.C.R. II-2405, para.61; CFI, Case T-63/95 *Transoceanische and Others v Commission* [2000] E.C.R. II-135, para.35; CFI, Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] E.C.R. II-373, para.252; CFI, Joined Cases T-27/99, T-29/99 and T-148/99, *Diputación Foral de Guipúzcoa and Others v Commission* [2002] E.C.R. I-275, para.212.

⁶⁹ ECJ, Case 155/80 *Micheli v European Parliament* [1981] E.C.R. 2851, para.22 (it stems from para.27 that addenda or improvements effected by the defendant institution before the period prescribed for bringing proceedings has expired may indeed regularise the act); ECJ, Case C-343/87 *Cuba v Commission* [1990] E.C.R. I-215, para.15; CFI, Case T-431/94 *SPK-München v Commission* [2000] E.C.R. II-779, para.51.

⁷⁰ CFI, Case T-31/95 *ABB Arena Brown Boveri v Commission* [2002] E.C.R. II-1381, para.103.

7-124 Competition cases. In competition cases, too, the Court only inquires into the legality of the contested act.⁴¹ The Court of First Instance will therefore consider whether the evidence adduced by the Commission in its decision, together with other factors, is sufficient to prove the existence of the alleged infringement.⁴² The evidence must be convincing.⁴³ In the proceedings before the Court of First Instance, the Commission may not adduce new inculpatory evidence in support of the contested decision which is not contained in that decision.⁴⁴ Where there is doubt, the Court of First Instance must give the benefit of that doubt to the applicants. As a result, the Court of First Instance may not conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point. This is because given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence (resulting in particular from Art.6(2) of the ECHR and Art.48 of the Charter of Fundamental Rights of the European Union) applies to competition procedures.⁴⁵

1. Lack of competence

7-125 Different aspects. As a ground for annulment, lack of competence on the part of the defendant institution has several aspects, namely substantive, territorial and personal aspects.

⁴¹ As far as State aid is concerned, see CFI, Case T-259/97 *Alitalia v Commission* [2000] E.C.R. II-3371, para.55. See also CFI (Judgment of October 21, 2004), Case T-259/99 *Leasing v Commission*, not yet reported, paras 127-132 (the Commission's assessment was wrong in that it held that the measure could not be regarded as being aid because it satisfied the private investor test). The legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (ECJ, Case 254/34 *Belgium v Commission* [1955] E.C.R. 2253, para.16; ECJ, Case C-241/94 *France v Commission* [1995] E.C.R. I-4151, para.33; ECJ, Case C-276/92 *Spain v Commission* [2004] E.C.R. I-8251, para.31).

⁴² CFI, Joined Cases T-335/94, T-355/94, T-367/94, T-313/94 to T-316/94, T-312/94, T-325/94, T-332/94, T-329/94 and T-333/94 *Lombardie Vinif Meunierchappi and Others v Commission* [1999] E.C.R. II-931, para.351; CFI (Judgment of July 3, 2004), Joined Cases T-27/02, T-63/02, T-110/02 and T-13/03 *IFE Engineering and Others v Commission*, not yet reported, paras 174-175.

⁴³ ECJ (Judgment of February 15, 1985), Case C-12/83 *P Commission v Fata Lavel*, not yet reported, paras 37-51.

⁴⁴ In so far as the applicants seek to establish, on the basis of "new documents" produced to the Court of First Instance, that the Commission's position is based on inaccurate facts, the Commission is entitled to respond to their arguments by referring to the documents in question (CFI (Judgment of July 3, 2004), Joined Cases T-57/02, T-58/02, T-71/02 and T-75/02 *IFE Engineering and Others v Commission*, not yet reported, paras 177-178).

⁴⁵ CFI (Judgment of July 3, 2004), Joined Cases T-57/02, T-58/02, T-71/02 and T-75/02 *IFE Engineering and Others v Commission*, not yet reported, paras 177-178.

a. Substantive competence

Concept The Community is empowered only to act in policy areas assigned to it by the Treaties. A Community act which falls outside those areas may be annulled.⁴⁶ That "external" lack of competence results, in some commentators' view, in the act's being non-existent, and consequently not within the compass of the grounds for annulment under discussion in this section.⁴⁷

Division of powers. The next question to be considered is the division of powers in the context of Community decision-making. An example may be found in the case-law on the seat of the European Parliament: the scope of the Parliament's powers of internal organisation had to be delimited as against the powers of the national governments under Art.77 of the ECSC Treaty, Art.289 of the EC Treaty and Art.189 of the EASC Treaty to determine the seats of the institutions.⁴⁸

Where an application for annulment is based on an alleged "lack of competence" of a Community institution which has acted, the case will generally consist of a dispute about the legal basis of the contested act.⁴⁹ If the provision of superior law which is stated as being the legal basis for the act is substantively insufficient to support its content, at the same time the mode of decision-making laid down in that provision (including the powers provided for therein for the various Community institutions), together with the permitted legislative instruments (regulations, directives, decisions or any other—albeit unspecified—instruments), will clearly have been used unlawfully. In that sense, the institution which adopted the contested measure will have exceeded its powers (even if it could have adopted the

⁴⁶ Cf. ECJ, Case 294/83 *Les Verts v European Parliament* [1986] E.C.R. 1339, paras 51-55.

⁴⁷ *Collet, Le contentieux*, at 95; Vandersanden and Barav, *Contentieux communautaire*, at 212. See also Sgarbi, *Contentieux communautaire* (3rd ed., Presses Universitaires de France, Paris, 1998), §204, at 226.

⁴⁸ ECJ, Case 230/71 *Luxembourg v European Parliament* [1973] E.C.R. 255, at 263-267; ECJ, Case 105/83 *Luxembourg v European Parliament* [1984] E.C.R. 1545, at 1559-1560; ECJ, Joined Cases 158/85 and 158/86 *France v European Parliament* [1988] E.C.R. 4821, at 4832-4837. For a different example, see ECJ, Joined Cases 251, 253-255 and 257/25 *Germany and Others v Commission* [1997] E.C.R. 3203, paras 25-32; ECJ, Case C-57/95 *France v Commission* [1997] E.C.R. I-1527, para.24.

⁴⁹ ECJ, Case C-375/98 *Germany v European Parliament and Council* [2000] E.C.R. I-8419, paras 76-116; ECJ, Case C-411/01 *Commission v Council* [2003] E.C.R. I-4913, paras 33-53; CFI (Judgment of September 28, 2004), Case T-320/00 *ACI v Commission*, not yet reported, para.167 (lack of power of the Commission to declare a merger incompatible with the common market when the notifying parties had formally withdrawn their notification and informed the Commission of the abandonment of the merger in the form envisaged in the notification); CFI (Judgment of September 21, 2005), Case T-356/01 *Yusuf and Al Barakat International Foundation v Council and Commission* not yet reported, paras 107-171 (alleged lack of power of the Council to adopt regulations imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban).

same measure on the basis of some other provision of superior law).⁴¹ So it would seem that in such cases the ground for nullity of lack of competence fuses almost entirely with the ground of infringement of the Treaty or of any rules of law relating to their application. From the procedural viewpoint, however, it is more a question of the correct application of the rules invoked as the legal basis for adopting a given act than a question purely of competence (or lack of it).⁴²

b. Territorial competence

- 7-128 Scope. A Community act may apply to natural or legal persons established in areas outside the territorial scope of the Treaty.⁴³ It must, however, be applied in conformity with international law.⁴⁴ As far as competition law is concerned, it is enough that agreements concluded outside the Community are implemented in the territory of the Community.⁴⁵

c. Delegation of powers

- 7-129 Delegation of implementing powers. In the Community legal order, an institution may, subject to certain conditions, delegate implementing powers⁴⁶ to itself or to other institutions,⁴⁷ to Member States,⁴⁸ to international organisations⁴⁹ or to agencies governed by public or private law not mentioned in the Treaty.⁵⁰

⁴¹ In this way, the Court of Justice held in ECJ, Case C-11/67 *Commission v Council* (1964) E.C.R. I-6333, paras 28-31, that where the Commission has declared in a decision that State aid is incompatible with the common market, the Council may no longer decide that that aid must be regarded as being compatible with the common market under the third para. of Art.85(3), of the EC Treaty. By adopting a decision to that effect, the Council exceeded its powers.

⁴² For an analysis of the concept of legal basis and its function in Community constitutional law, see Lenaerts and Van Nuffel, *Constitutional Law of the European Union*, § 5-063-§ 5-077, at 68-100.

⁴³ See EC Treaty, Art.235.

⁴⁴ ECJ, Case C-286/90 *Poulsen and Dine Norgaard and Others* (1992) E.C.R. I-6019, paras 21-29.

⁴⁵ ECJ, Joined Cases 65, 104, 114, 116-117 and 125-125/85 *Albion and Others v Commission* (1986) E.C.R. 3193, paras 11-13. As far as merger control is concerned, see CF, Case 7-102/95 *Gencor v Commission* (1995) E.C.R. I-193.

⁴⁶ For a definition of "delegation" in the Community legal order and an extended discussion of this phenomenon, see Lenaerts (n.193, *supra*), at 23-43.

⁴⁷ ECJ, Case 25/70 *Köster* (1970) E.C.R. 1161, para.3.

⁴⁸ As a result of the first para. of Art.10 of the EC Treaty, it is implicit in every Community act that the Member States are under a duty to implement it, although the extent of the obligation and the detailed rules relating to it may also be expressly defined in the act itself (see ECJ, Case 5/77 *Tedemühl* (1977) E.C.R. 1555; ECJ, Joined Cases 213-213/81 *Norddeutscher Vieh- und Fleischverkehr and Others* (1981) E.C.R. 3583).

⁴⁹ ECJ, Opinion 1/76 *Draft Agreement establishing a European lay-up fund for inland waterway vessels* (1977) E.C.R. 741, para.5.

⁵⁰ ECJ, Case 3156 *Merani v High Authority* (1957 and 1958) E.C.R. 133, at 131.

Implementation. The term "implementation" has to be given a broad interpretation.⁵¹ It is sufficient for the institution charged with a legislative task to determine the "general objectives" of the policy in compliance with the applicable mode of decision-making.⁵² The execution of those general objectives may be delegated to the institution itself (using a simplified manner of decision-making), to another institution or to the Member States, even if a measure of discretion is involved. The delegating institution, however, must always be able to supervise and, if necessary, correct the exercise of the discretion.

On those terms, the Council has the right to delegate (important) implementing powers to the Commission under the third indent of Art.202 and the last indent of Art.211 of the EC Treaty.⁵³ The delegation is often subject to the requirement that specific committees must be involved.⁵⁴ In implementing acts of the Council, the Commission must remain within the limits of the implementing powers conferred upon it. If it does not respect those limits, its decisions may be annulled for want of competence.⁵⁵

In specific cases, the Council may exercise certain implementing powers itself (delegation to itself pursuant to the third indent of Art.202 of the EC Treaty). When it decides to do so, it must state in detail the grounds for its decision.⁵⁶

Delegation to international bodies. The Community is also empowered to assign "powers of decision" to an international body.⁵⁷ Such a delegation of powers, however, may not detract from the requirement for the objectives of the Community to be attained by common action on the part of the institutions, each one acting within the limits of the powers conferred on it. If they did otherwise, it would constitute a surrender of the independence of Community action in its external relations and a change in the internal constitution of the Community as regards both the prerogatives of the institutions and the position of the Member States vis-à-vis one another.⁵⁸ Consequently, the possibility of delegating "powers of decision" is confined to implementing powers.

⁵¹ ECJ, Case 23/75 *Rey Sode* (1975) E.C.R. 1279, para.10.

⁵² *Ibid.*, para.14.

⁵³ ECJ, Case C-243/90 *Germany v Commission* (1992) E.C.R. I-3285, paras 30-43.

⁵⁴ Council Decision 1959/463/EC of June 21, 1959 laying down the procedure for the exercise of implementing powers conferred on the Commission (1959) O.J. L184/23.

⁵⁵ Cf. ECJ, Case 22/88 *Kreysenfeld and Others* (1989) E.C.R. 2349; Cf. Judgment of September 21, 2005, Case T-366/03 *Yusuf and Al Barakat International Foundation v Council and Commission*, not yet reported, paras 172-176.

⁵⁶ ECJ, Case 15/88 *Commission v Council* (1989) E.C.R. 3437, para.10; ECJ, Case C-257/01 *Commission v Council* (2002) E.C.R. I-345, paras 49-61.

⁵⁷ ECJ, Opinion 1/76 *Draft Agreement establishing a European lay-up fund for inland waterway vessels* (1977) E.C.R. 741, para.5.

⁵⁸ *Ibid.*, para.12.

7-132 Delegation to agencies. Lastly, agencies governed by public or private law may exceptionally be set up to carry out support tasks.⁴¹ Such agencies must help to attain the objectives underlying the substantive Community competence pursuant to which they are set up.⁴² In addition, the delegation of powers to such agencies may not detract from the balance of powers as between the institutions, which constitutes a safeguard against institutions exceeding their powers.⁴³ Consequently, no discretionary power may be delegated. Moreover, an institution may not delegate powers broader than those which it itself derives from the Treaties.⁴⁴

In exercising their powers, such agencies are subject to the same conditions as the delegating institution (in particular, as regards the duty to state reasons and judicial supervision of their acts). They carry out mainly preparatory or strictly executive work.⁴⁵

7-133 Delegation to a Member of the Commission. The Commission may—provided that it does not detract from the principle of collective responsibility⁴⁶—empower one or more of its Members to take, on its behalf and under its responsibility, clearly defined management or administrative measures.⁴⁷ Measures adopted pursuant to such a delegation of authority are still ascribed to the Commission, which, as a collegiate body, has the last word.⁴⁸ Members of the Commission who voluntarily resign retain their full powers until they are replaced.⁴⁹

7-134 Delegation to members of staff. In so far as it is compatible with the intention behind the provision conferring a power on the Commission,⁵⁰ that institution may also delegate powers to its officials. In exceptional

⁴¹ ECJ, Case 5/55 *Adorno v High Authority* (1957 and 1958) E.C.R. 131.

⁴² *Ibid.*, at 151.

⁴³ *Ibid.*, at 152.

⁴⁴ *Ibid.*, at 153.

⁴⁵ For a survey of these agencies, see Lemaerts and Van Nieuwenhove, *Constitutional Law of the European Union*, § 25-269-310-136, at 472-475 and § 14-452-314-456, at 515-524.

⁴⁶ EC Treaty, Art. 179: "The Commission shall act by a majority of the number of Members provided for in Art. 213. A meeting of the Commission shall be valid only if the number of Members laid down in its Rules of Procedure is present."

⁴⁷ Art. 11 of the Rules of Procedure of the Commission of November 29, 1950 (1200) O.J. L36/26.

⁴⁸ ECJ, Case 5/55 *AKZO Chemie v Commission* (1955) E.C.R. 2535, para. 28-43; ECJ, Joined Cases 57-59/57 *Dow Chemicals and Others v Commission* (1957) E.C.R. 3155, paras. 52-53.

⁴⁹ This is also the case when all the Members of the Commission voluntarily resign. The Commission retains its full powers until the new Members take office (CFI, Case T-219/99 *British Airways v Commission* (2003) E.C.R. II-3913, para. 48-58).

⁵⁰ ECJ, Case 35/61 *Van Eick v Commission* (1965) E.C.R. 329, at 344-345. In that case, the point at issue was whether the appointing authority was entitled to delegate to an official its duty under the third para. of Art. 7 of Annex IX to the Staff Regulations to hear an official concerned by disciplinary proceedings before taking a decision in those proceedings. The Court of Justice held that the article in question constituted a peremptory legal requirement which did not authorize any delegation of powers. See also ECJ, Case C-249/02 *Portugal v Commission* (2004) E.C.R. I-36717, paras. 44-47.

cases, a delegation of powers properly so called is involved where officials take decisions in the name of the Commission⁵¹; usually, however, what is involved is a delegation of signature, which, as a matter of the internal organisation of the institution, authorises an official to notify a decision taken by the Commission⁵²; sometimes both aspects arise in the same case.⁵³ Where a delegation of powers properly so called is involved, the limits imposed on the Commission's ability to delegate powers to its Members apply *a fortiori* (see 7-133, *supra*).

2. Infringement of essential procedural requirements

Concept. An essential procedural requirement is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may influence the content of the measure⁵⁴; essential procedural requirements enable the legality of an act to be reviewed or may express a fundamental institutional rule. The fact that such a rule has been breached in the preparation or adoption of a measure will constitute a ground for its annulment only if the Court of Justice or the Court of First Instance finds that in the absence of the irregularity in question the contested measure might have been substantively different⁵⁵; that the irregularity makes judicial review impossible⁵⁶ or that, on account of the irregularity which it contains, the act in question breaches a fundamental institutional rule.⁵⁷ If a procedural provision is infringed but this does not prevent the aims of the provision from being achieved, no "substantial procedural defect" will be involved.⁵⁸ An express obligation to comply with

⁵¹ ECJ, Case 44/70 *Bonardi v European Parliament* (1971) E.C.R. 175, paras. 30-36. This arises in all institutions as far as decisions in staff matters are concerned.

⁵² ECJ, Case 43/69 *ICI v Commission* (1971) E.C.R. 619, paras. 11-15; ECJ, Case 8/72 *Vereniging van Geneesmiddelen v Commission* (1972) E.C.R. 971, paras. 10-14; ECJ, Joined Cases 41 and 53/82 *VBVB and VBBB v Commission* (1984) E.C.R. 19, para. 14; ECJ, Case C-22/89 *FNVOC v Commission* (1990) E.C.R. I-3659, para. 14; CFI, Case T-450/93 *Liberal v Commission* (1994) E.C.R. II-1277, para. 34.

⁵³ ECJ, Case C-303/89 *FNVOC v Commission* (1990) E.C.R. I-3659, paras. 13-14.

⁵⁴ ECJ, Case 6/54 *Netherlands v High Authority* (1954 to 1956) E.C.R. 103, at 111-112.

⁵⁵ ECJ, Joined Cases 269-275 and 213/75 *Van Landuyck v Commission* (1980) E.C.R. 3125, para. 47; ECJ, Case 150/84 *Bonardi v European Parliament* (1986) E.C.R. 1273, para. 25. See also the Opinion of Advocate General G. Rüschli in Joined Cases 275/82 and 24/81 *Krupp v Commission* (1987) E.C.R. 2459, at 2524.

⁵⁶ This is why the duty to give a statement of reasons is strictly enforced (7-145 to 7-148, *infra*). See also ECJ, Case C-137/92 *P. Commission v BASF and Others* (1994) E.C.R. I-2555, paras. 75-76, in which the Court of Justice held that authentication of a Commission decision is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages in which it is binding. Thus, in the event of a dispute, it can be verified that the texts notified or published correspond precisely to the text adopted by the college and so with the intention of the author. On these grounds, the Court held that authentication was an essential procedural requirement because failure to comply therewith makes judicial review impossible.

⁵⁷ ECJ, Case 138/79 *Requette Frères v Council* (1980) E.C.R. 3333, para. 33; ECJ, Case 133/79 *Meireis v Council* (1980) E.C.R. 3353, para. 34.

⁵⁸ ECJ, Case 252/91 *Requette v Commission* (1993) E.C.R. 1245, para. 22; ECJ, Case 207/81 *Dierckx v Commission* (1983) E.C.R. 1359, para. 19.

certain procedural requirements when carrying out a particular act may not be extended to other acts by way of interpretation.⁴¹ As has already been mentioned, the Court of Justice or the Court of First Instance will raise the issue of an infringement of an essential procedural requirement of its own motion (see 7-122, *supra*).⁴²

a. Requirement to consult:

- 7-136 **Duty to seek an opinion.** In the Community decision-making process, the body or institution adopting or implementing an act is sometimes under a duty (imposed by superior Community law) to seek the opinion of a body or institution before acting.⁴³ The requirement to consult constitutes an essential procedural requirement.⁴⁴ This is because consultation may affect the substance of the measure adopted.⁴⁵

Furthermore, the Court of Justice has held that the consultation of the European Parliament required by the Treaty in certain cases constitutes a fundamental rule designed to guarantee the institutional balance intended by the Treaty, which reflects the fundamental democratic principle that the peoples should take part in the exercise of power through a representative assembly.⁴⁶

- 7-137 **Timeframe and scope.** It is not sufficient merely to ask the body having to be consulted for its opinion; that body must have made its views known

⁴¹ ECJ, Case 2184 *Mercatores Delmer & Fighl v High Authority* (1965) E.C.R. 175, at 150-151; ECJ, Case 2270 *Commission v Council* (the AETR case) (1972) E.C.R. 263, para.98.

⁴² ECJ, Case 254 *France v High Authority* (1954 to 1956) E.C.R. I, at 15; ECJ, Case 254 *Italy v High Authority* (1954 to 1956) E.C.R. 37, at 52; ECJ, Case 1857 *Nold v High Authority* (1958) E.C.R. 47, at 51-52; ECJ, Joined Cases 73 and 74/55 *Internationale Orban en Handelvereniging Rotterdam and Others* (1954) E.C.R. I, at 13-14; ECJ, Case 165/55 *Unger v Commission* (1955) E.C.R. 2679, para.19; ECJ, Case C-154/93 *P Commission v Duffin* (1997) E.C.R. I-583, para.24.

⁴³ In the case, for instance, of legislative action, the bodies or institutions concerned are the European Parliament, the European Economic and Social Committee and the Committee of the Regions under the EC Treaty; in the case of implementing action, they are the Advisory Committee on Restrictive Practices and Monopolies (Regulation No 2620/59, Art.14(1)) and the committees involved in the various procedures prescribed by Council Decision 1995/465/EC of June 25, 1995 laying down the procedures for the exercise of implementing powers conferred on the Commission. (1997) O.J. L184/23.

⁴⁴ ECJ, Case 154 *France v High Authority* (1954 to 1955) E.C.R. I, at 15; ECJ, Case 254 *Italy v High Authority* (1954 to 1956) E.C.R. 37, at 52.

⁴⁵ ECJ, Case 165/57 *Commission v Council* (1958) E.C.R. 5545, para.28; see also Bradley, "Maintaining the Balance: the Role of the Court of Justice in Defining the Institutional Position of the European Parliament" (1987) C.M.L.Rev. 4, at 37.

⁴⁶ ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, para.33; ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, para.34; ECJ, Case 125/75 *Samstag v Commission* (1975) E.C.R. 337, para.17; ECJ, Case C-41/93 *European Parliament v Council* (1993) E.C.R. I-1115, para.9; ECJ, Case C-21/94 *European Parliament v Council* (1995) E.C.R. I-1827, para.17.

before the act was adopted,⁴⁷ unless a derogating provision provides otherwise⁴⁸ or the body requesting the advice exhausted all possibilities of obtaining a preliminary opinion.⁴⁹ In addition, the draft instrument submitted to the consultative body must basically correspond to the instrument ultimately adopted, unless the amendments made to the draft are specifically intended to comply with the wishes expressed by the consultative body in its opinion.⁵⁰

It is sufficient, however, that the opinion be delivered before the act is adopted. The institution seeking the opinion is not obliged to allow a certain period of time to elapse between receipt of the opinion and adoption of the act in order to be able better to consider the opinion. Consequently, a regulation which is adopted only a matter of days after the European Parliament delivered its opinion will be validly adopted.⁵¹

b. Requirement to hear the addressee

The right to be heard. Before an act adversely affecting a person is adopted, the addressee of the act or interested third parties must be heard by the institution concerned.⁵² That obligation is prescribed either by the Treaty⁵³ or by secondary Community law⁵⁴ or arises out of the general legal principle that "a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make

⁴⁷ *Roquette Frères v Council*, para.34; *Mörsen v Council*, para.25, both cases cited in the preceding n.

⁴⁸ ECJ, Case 115/86 *Spain v Commission* (1987) E.C.R. 4171, paras 22-24.

⁴⁹ ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, para.36; ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, para.37.

⁵⁰ ECJ, Case 41/65 *ACP Charities v Commission* (1973) E.C.R. 651, paras 68-69; ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, paras 14-24; ECJ, Case 134/79 *Roquette Frères v Council* (1980) E.C.R. 3333, paras 15-25; ECJ, Case C-61/93 *European Parliament v Council* (1993) E.C.R. I-555, whereby the Court of Justice annulled a Council regulation on the ground that the Council had not reconsidered the European Parliament whereas the regulation ultimately adopted by the Council departed substantially from the text on which the Parliament had originally been consulted; ECJ, Joined Cases C-13-15/92 *Driessens and Others* (1992) E.C.R. I-4751, para.13; ECJ, Case C-334/91 *European Parliament v Council* (1994) E.C.R. I-2077, para.19; ECJ, Case C-280/93 *Germany v Council* (1994) E.C.R. I-4573, para.35.

⁵¹ ECJ, Case 114/81 *Tourel Refinerie v Council* (1982) E.C.R. 3139, para.18.

⁵² ECJ, Case 17/74 *Transocean Marine Paint Association v Commission* (1974) E.C.R. 1063, para.15; ECJ, Joined Cases 209-215 and 220/78 *Van Landuyck v Commission* (1980) E.C.R. 3125, para.17. But see ECJ, Case C-11/52 *P European Parliament v Reynolds* (2004) E.C.R. I-5475, paras 57-61. For a discussion of the duty to hear parties in competition cases, see Kott, "Procedures in EC Competition Cases: The Oral Hearing" (1994) E.C.M.L.Rev. 40-43; Jénot, *Le contentieux*, at 56-58.

⁵³ See, for example, EC Treaty, Art.184(2).

⁵⁴ See, for example, Art.27 of Regulation No 1/2003, Art.6(7) of Regulation No 18496 (anti-dumping) and Art.16 of Regulation No 139/2004 (control of concentrations).

his point of view known".⁴³ This obligation is an essential procedural requirement.⁴⁴

The person concerned must be informed in time,⁴⁵ effectively⁴⁶ and personally⁴⁷ of all the information in the file which might be useful for his or her defence⁴⁸ and of the grounds of the proposed act so that he or she is in a position to challenge it with full knowledge of the facts.⁴⁹

- 139 Infringement of the rights of the defence. The rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it.⁵⁰ An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error.⁵¹

- 140 Application of Arts 81 and 82 of the EC Treaty. The question whether the Commission has infringed the rights of the defence is competition proceedings through the non-disclosure of certain items in the file compiled during

⁴³ ECJ, Case 1/74 *Donat Cattin - Marine Products Association v Commission* [1974] E.C.R. 1063, para.11. See to the same effect ECJ, Case 85/76 *Hoffmann-La Roche v Commission* [1976] E.C.R. 461, para.3; ECJ, Case C-462/93 *P Mediocredito v Commission* [2000] E.C.R. I-7115, para.35; CFI, Case T-50/95 *Prima Producers Import-Export and Others v Commission* [1995] E.C.R. II-3773, para.59. However, the right of the person concerned to make his point of view known, is unrelated to the exercise of discretion by the authority which is the author of the act at issue. Where the institutions have no discretion as to whether it is appropriate to adopt a certain act (e.g. where they are obliged to put into effect resolutions adopted by the UN Security Council), the institutions are not under an obligation to hear the person(s) concerned (see CFI, Judgment of September 21, 2005, Case T-385/01 *Yund and Al Barakat International Foundation v Council and Commission*, not yet reported, paras 327-331).

⁴⁴ ECJ, Case 31/69 *Commission v Italy* [1970] E.C.R. 25, para.13 (proceedings brought pursuant to Art.225 of the EC Treaty); CFI, Joined Cases T-134/97, T-157/97, T-158/97 to T-191/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-278/97, T-330/97, T-293/97, and T-145/99 *Kaufing and Others v Commission* [2001] E.C.R. II-1507, para.134.

⁴⁵ ECJ, Case 55/69 *Castello v Commission* [1970] E.C.R. 187, paras 13-15 (2 day notice of the hearing did not comport the defence).

⁴⁶ ECJ, Joined Cases 56 and 58/64 *Consten and Grondy v Commission* [1964] E.C.R. 269, at 338; CFI, Case T-7/95 *Hercules Chemicals v Commission* [1994] E.C.R. II-1711, paras 51-54; CFI, Joined Cases T-10-12 and T-13/92 *Consten and Grondy v Commission* [1992] E.C.R. II-3667, para.35; CFI, Case T-65/93 *BFB Indumit and British Gypsum v Commission* [1993] E.C.R. II-389, paras 29-30.

⁴⁷ ECJ, Case C-174/99 *P ARBED v Commission* [2000] E.C.R. I-10667, paras 19-25 (a decision addressed to the parent company finding that it had committed an infringement of the competition rules of the ECSC Treaty was annulled on the ground that the statement of objections was addressed only to a subsidiary).

⁴⁸ CFI, Case T-345/01 *ICI v Commission* [1995] E.C.R. II-1547, paras 59-70; CFI, Case T-375/01 *ICI v Commission* [1995] E.C.R. II-1501, paras 49-53.

⁴⁹ ECJ, Case 121/76 *Mell v Commission* [1977] E.C.R. 1971, paras 19-20; ECJ, Case 15/77 *Adeler v Commission* [1978] E.C.R. 257, paras 16-21.

⁵⁰ ECJ, Case 32/73 *Donat Cattin v Commission* [1974] E.C.R. 223, para.26; ECJ, Case C-154/95 *P Thyssen Stahl v Commission* [2003] E.C.R. I-10521, para.21.

⁵¹ ECJ, Case C-515/02 *P Hercules Chemicals v Commission* [1995] E.C.R. I-4235, para.31; ECJ, Case C-154/95 *P Thyssen Stahl v Commission* [2003] E.C.R. I-10521, para.31.

the administrative investigation has to be considered in the light of the specific circumstance of each particular case, since such an infringement depends chiefly on the objections raised by the Commission in order to determine the breach of competition law alleged against the undertaking concerned. The Commission infringes the rights of the defence if it appears that certain documents to which the undertaking concerned had no access could have been used in its defence having regard to the alleged breach of competition law.⁵²

State aid cases. As far as State aid is concerned, the formal investigation procedure is initiated in respect of the Member State responsible for granting the aid in the light of its Community obligations.⁵³ Although all interested parties are invited to submit observations in the course of the formal investigation procedure, this procedure does not lead to an *inter partes* debate with the complainant or even with the recipient of the aid. Indeed, the comments received in the course of the formal investigation will be submitted only to the Member State concerned.⁵⁴ Only the Member State concerned can successfully raise a plea relating to a violation of its rights of defence in an annulment procedure before the Community courts.⁵⁵

d. Duty of confidentiality

Concept and scope. Art.297 of the EC Treaty imposes an obligation not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business rela-

⁵² CFI, Joined Cases T-2555, T-2595, T-3065, T-3195, T-3295, T-3495, T-3595, T-3695, T-3795, T-3895, T-3995, T-4095, T-4195, T-4295, T-4395, T-4495, T-4595, T-4695, T-4795, T-4895, T-4995, T-5095, T-5195, T-5295, T-5395, T-5495, T-5595, T-5695, T-5795, T-5895, T-5995, T-6095, T-6195, T-6295, T-6395, T-6495, T-6595, T-6695, T-6795, T-6895, T-6995, T-7095, T-7195, T-7295, T-7395, T-7495, T-7595, T-7695, T-7795, T-7895, T-7995, T-8095, T-8195, T-8295, T-8395, T-8495, T-8595, T-8695, T-8795, T-8895, T-8995, T-9095, T-9195, T-9295, T-9395, T-9495, T-9595, T-9695, T-9795, T-9895, T-9995, T-10095, T-10195, T-10295, T-10395, T-10495, T-10595, T-10695, T-10795, T-10895, T-10995, T-11095, T-11195, T-11295, T-11395, T-11495, T-11595, T-11695, T-11795, T-11895, T-11995, T-12095, T-12195, T-12295, T-12395, T-12495, T-12595, T-12695, T-12795, T-12895, T-12995, T-13095, T-13195, T-13295, T-13395, T-13495, T-13595, T-13695, T-13795, T-13895, T-13995, T-14095, T-14195, T-14295, T-14395, T-14495, T-14595, T-14695, T-14795, T-14895, T-14995, T-15095, T-15195, T-15295, T-15395, T-15495, T-15595, T-15695, T-15795, T-15895, T-15995, T-16095, T-16195, T-16295, T-16395, T-16495, T-16595, T-16695, T-16795, T-16895, T-16995, T-17095, T-17195, T-17295, T-17395, T-17495, T-17595, T-17695, T-17795, T-17895, T-17995, T-18095, T-18195, T-18295, T-18395, T-18495, T-18595, T-18695, T-18795, T-18895, T-18995, T-19095, T-19195, T-19295, T-19395, T-19495, T-19595, T-19695, T-19795, T-19895, T-19995, T-20095, T-20195, T-20295, T-20395, T-20495, T-20595, T-20695, T-20795, T-20895, T-20995, T-21095, T-21195, T-21295, T-21395, T-21495, T-21595, T-21695, T-21795, T-21895, T-21995, T-22095, T-22195, T-22295, T-22395, T-22495, T-22595, T-22695, T-22795, T-22895, T-22995, T-23095, T-23195, T-23295, T-23395, T-23495, T-23595, T-23695, T-23795, T-23895, T-23995, T-24095, T-24195, T-24295, T-24395, T-24495, T-24595, T-24695, T-24795, T-24895, T-24995, T-25095, T-25195, T-25295, T-25395, T-25495, T-25595, T-25695, T-25795, T-25895, T-25995, T-26095, T-26195, T-26295, T-26395, T-26495, T-26595, T-26695, T-26795, T-26895, T-26995, T-27095, T-27195, T-27295, T-27395, T-27495, T-27595, T-27695, T-27795, T-27895, T-27995, T-28095, T-28195, T-28295, T-28395, T-28495, T-28595, T-28695, T-28795, T-28895, T-28995, T-29095, T-29195, T-29295, T-29395, T-29495, T-29595, T-29695, T-29795, T-29895, T-29995, T-30095, T-30195, T-30295, T-30395, T-30495, T-30595, T-30695, T-30795, T-30895, T-30995, T-31095, T-31195, T-31295, T-31395, T-31495, T-31595, T-31695, T-31795, T-31895, T-31995, T-32095, T-32195, T-32295, T-32395, T-32495, T-32595, T-32695, T-32795, T-32895, T-32995, T-33095, T-33195, T-33295, T-33395, T-33495, T-33595, T-33695, T-33795, T-33895, T-33995, T-34095, T-34195, T-34295, T-34395, T-34495, T-34595, T-34695, T-34795, T-34895, T-34995, T-35095, T-35195, T-35295, T-35395, T-35495, T-35595, T-35695, T-35795, T-35895, T-35995, T-36095, T-36195, T-36295, T-36395, T-36495, T-36595, T-36695, T-36795, T-36895, T-36995, T-37095, T-37195, T-37295, T-37395, T-37495, T-37595, T-37695, T-37795, T-37895, T-37995, T-38095, T-38195, T-38295, T-38395, T-38495, T-38595, T-38695, T-38795, T-38895, T-38995, T-39095, T-39195, T-39295, T-39395, T-39495, T-39595, T-39695, T-39795, T-39895, T-39995, T-40095, T-40195, T-40295, T-40395, T-40495, T-40595, T-40695, T-40795, T-40895, T-40995, T-41095, T-41195, T-41295, T-41395, T-41495, T-41595, T-41695, T-41795, T-41895, T-41995, T-42095, T-42195, T-42295, T-42395, T-42495, T-42595, T-42695, T-42795, T-42895, T-42995, T-43095, T-43195, T-43295, T-43395, T-43495, T-43595, T-43695, T-43795, T-43895, T-43995, T-44095, T-44195, T-44295, T-44395, T-44495, T-44595, T-44695, T-44795, T-44895, T-44995, T-45095, T-45195, T-45295, T-45395, T-45495, T-45595, T-45695, T-45795, T-45895, T-45995, T-46095, T-46195, T-46295, T-46395, T-46495, T-46595, T-46695, T-46795, T-46895, T-46995, T-47095, T-47195, T-47295, T-47395, T-47495, T-47595, T-47695, T-47795, T-47895, T-47995, T-48095, T-48195, T-48295, T-48395, T-48495, T-48595, T-48695, T-48795, T-48895, T-48995, T-49095, T-49195, T-49295, T-49395, T-49495, T-49595, T-49695, T-49795, T-49895, T-49995, T-50095, T-50195, T-50295, T-50395, T-50495, T-50595, T-50695, T-50795, T-50895, T-50995, T-51095, T-51195, T-51295, T-51395, T-51495, T-51595, T-51695, T-51795, T-51895, T-51995, T-52095, T-52195, T-52295, T-52395, T-52495, T-52595, T-52695, T-52795, T-52895, T-52995, T-53095, T-53195, T-53295, T-53395, T-53495, T-53595, T-53695, T-53795, T-53895, T-53995, T-54095, T-54195, T-54295, T-54395, T-54495, T-54595, T-54695, T-54795, T-54895, T-54995, T-55095, T-55195, T-55295, T-55395, T-55495, T-55595, T-55695, T-55795, T-55895, T-55995, T-56095, T-56195, T-56295, T-56395, T-56495, T-56595, T-56695, T-56795, T-56895, T-56995, T-57095, T-57195, T-57295, T-57395, T-57495, T-57595, T-57695, T-57795, T-57895, T-57995, T-58095, T-58195, T-58295, T-58395, T-58495, T-58595, T-58695, T-58795, T-58895, T-58995, T-59095, T-59195, T-59295, T-59395, T-59495, T-59595, T-59695, T-59795, T-59895, T-59995, T-60095, T-60195, T-60295, T-60395, T-60495, T-60595, T-60695, T-60795, T-60895, T-60995, T-61095, T-61195, T-61295, T-61395, T-61495, T-61595, T-61695, T-61795, T-61895, T-61995, T-62095, T-62195, T-62295, T-62395, T-62495, T-62595, T-62695, T-62795, T-62895, T-62995, T-63095, T-63195, T-63295, T-63395, T-63495, T-63595, T-63695, T-63795, T-63895, T-63995, T-64095, T-64195, T-64295, T-64395, T-64495, T-64595, T-64695, T-64795, T-64895, T-64995, T-65095, T-65195, T-65295, T-65395, T-65495, T-65595, T-65695, T-65795, T-65895, T-65995, T-66095, T-66195, T-66295, T-66395, T-66495, T-66595, T-66695, T-66795, T-66895, T-66995, T-67095, T-67195, T-67295, T-67395, T-67495, T-67595, T-67695, T-67795, T-67895, T-67995, T-68095, T-68195, T-68295, T-68395, T-68495, T-68595, T-68695, T-68795, T-68895, T-68995, T-69095, T-69195, T-69295, T-69395, T-69495, T-69595, T-69695, T-69795, T-69895, T-69995, T-70095, T-70195, T-70295, T-70395, T-70495, T-70595, T-70695, T-70795, T-70895, T-70995, T-71095, T-71195, T-71295, T-71395, T-71495, T-71595, T-71695, T-71795, T-71895, T-71995, T-72095, T-72195, T-72295, T-72395, T-72495, T-72595, T-72695, T-72795, T-72895, T-72995, T-73095, T-73195, T-73295, T-73395, T-73495, T-73595, T-73695, T-73795, T-73895, T-73995, T-74095, T-74195, T-74295, T-74395, T-74495, T-74595, T-74695, T-74795, T-74895, T-74995, T-75095, T-75195, T-75295, T-75395, T-75495, T-75595, T-75695, T-75795, T-75895, T-75995, T-76095, T-76195, T-76295, T-76395, T-76495, T-76595, T-76695, T-76795, T-76895, T-76995, T-77095, T-77195, T-77295, T-77395, T-77495, T-77595, T-77695, T-77795, T-77895, T-77995, T-78095, T-78195, T-78295, T-78395, T-78495, T-78595, T-78695, T-78795, T-78895, T-78995, T-79095, T-79195, T-79295, T-79395, T-79495, T-79595, T-79695, T-79795, T-79895, T-79995, T-80095, T-80195, T-80295, T-80395, T-80495, T-80595, T-80695, T-80795, T-80895, T-80995, T-81095, T-81195, T-81295, T-81395, T-81495, T-81595, T-81695, T-81795, T-81895, T-81995, T-82095, T-82195, T-82295, T-82395, T-82495, T-82595, T-82695, T-82795, T-82895, T-82995, T-83095, T-83195, T-83295, T-83395, T-83495, T-83595, T-83695, T-83795, T-83895, T-83995, T-84095, T-84195, T-84295, T-84395, T-84495, T-84595, T-84695, T-84795, T-84895, T-84995, T-85095, T-85195, T-85295, T-85395, T-85495, T-85595, T-85695, T-85795, T-85895, T-85995, T-86095, T-86195, T-86295, T-86395, T-86495, T-86595, T-86695, T-86795, T-86895, T-86995, T-87095, T-87195, T-87295, T-87395, T-87495, T-87595, T-87695, T-87795, T-87895, T-87995, T-88095, T-88195, T-88295, T-88395, T-88495, T-88595, T-88695, T-88795, T-88895, T-88995, T-89095, T-89195, T-89295, T-89395, T-89495, T-89595, T-89695, T-89795, T-89895, T-89995, T-90095, T-90195, T-90295, T-90395, T-90495, T-90595, T-90695, T-90795, T-90895, T-90995, T-91095, T-91195, T-91295, T-91395, T-91495, T-91595, T-91695, T-91795, T-91895, T-91995, T-92095, T-92195, T-92295, T-92395, T-92495, T-92595, T-92695, T-92795, T-92895, T-92995, T-93095, T-93195, T-93295, T-93395, T-93495, T-93595, T-93695, T-93795, T-93895, T-93995, T-94095, T-94195, T-94295, T-94395, T-94495, T-94595, T-94695, T-94795, T-94895, T-94995, T-95095, T-95195, T-95295, T-95395, T-95495, T-95595, T-95695, T-95795, T-95895, T-95995, T-96095, T-96195, T-96295, T-96395, T-96495, T-96595, T-96695, T-96795, T-96895, T-96995, T-97095, T-97195, T-97295, T-97395, T-97495, T-97595, T-97695, T-97795, T-97895, T-97995, T-98095, T-98195, T-98295, T-98395, T-98495, T-98595, T-98695, T-98795, T-98895, T-98995, T-99095, T-99195, T-99295, T-99395, T-99495, T-99595, T-99695, T-99795, T-99895, T-99995, T-100095, T-100195, T-100295, T-100395, T-100495, T-100595, T-100695, T-100795, T-100895, T-100995, T-101095, T-101195, T-101295, T-101395, T-101495, T-101595, T-101695, T-101795, T-101895, T-101995, T-102095, T-102195, T-102295, T-102395, T-102495, T-102595, T-102695, T-102795, T-102895, T-102995, T-103095, T-103195, T-103295, T-103395, T-103495, T-103595, T-103695, T-103795, T-103895, T-103995, T-104095, T-104195, T-104295, T-104395, T-104495, T-104595, T-104695, T-104795, T-104895, T-104995, T-105095, T-105195, T-105295, T-105395, T-105495, T-105595, T-105695, T-105795, T-105895, T-105995, T-106095, T-106195, T-106295, T-106395, T-106495, T-106595, T-106695, T-106795, T-106895, T-106995, T-107095, T-107195, T-107295, T-107395, T-107495, T-107595, T-107695, T-107795, T-107895, T-107995, T-108095, T-108195, T-108295, T-108395, T-108495, T-108595, T-108695, T-108795, T-108895, T-108995, T-109095, T-109195, T-109295, T-109395, T-109495, T-109595, T-109695, T-109795, T-109895, T-109995, T-110095, T-110195, T-110295, T-110395, T-110495, T-110595, T-110695, T-110795, T-110895, T-110995, T-111095, T-111195, T-111295, T-111395, T-111495, T-111595, T-111695, T-111795, T-111895, T-111995, T-112095, T-112195, T-112295, T-112395, T-112495, T-112595, T-112695, T-112795, T-112895, T-112995, T-113095, T-113195, T-113295, T-113395, T-113495, T-113595, T-113695, T-113795, T-113895, T-113995, T-114095, T-114195, T-114295, T-114395, T-114495, T-114595, T-114695, T-114795, T-114895, T-114995, T-115095, T-115195, T-115295, T-115395, T-115495, T-115595, T-115695, T-115795, T-115895, T-115995, T-116095, T-116195, T-116295, T-116395, T-116495, T-116595, T-116695, T-116795, T-116895, T-116995, T-117095, T-117195, T-117295, T-117395, T-117495, T-117595, T-117695, T-117795, T-117895, T-117995, T-118095, T-118195, T-118295, T-118395, T-118495, T-118595, T-118695, T-118795, T-118895, T-118995, T-119095, T-119195, T-119295, T-119395, T-119495, T-119595, T-119695, T-119795, T-119895, T-119995, T-120095, T-120195, T-120295, T-120395, T-120495, T-120595, T-120695, T-120795, T-120895, T-120995, T-121095, T-121195, T-121295, T-121395, T-121495, T-121595, T-121695, T-121795, T-121895, T-121995, T-122095, T-122195, T-122295, T-122395, T-122495, T-122595, T-122695, T-122795, T-122895

tions or their cost components.³³ The question often arises in the Commission's administrative procedure for investigating infringements of competition law³⁴ or for determining dumping practices.³⁵ It is the institution in which the purportedly confidential information is made available itself which has to judge whether or not the duty of confidentiality is applicable after giving the party concerned the opportunity to state its views. In addition, before implementing its decision, the institution must give that party the opportunity of bringing an action before the Community Court with a view to having its assessments reviewed and to preventing disclosure.³⁶ Unlawful disclosure of confidential information in the course of the administrative procedure which led to the adoption of a decision finding an infringement of Art.81 and/or Art.82 of the EC Treaty will be regarded as an infringement of an essential procedural requirement only if it is shown that in the absence of such irregularity the contested decision might have been different. Consequently, it does not inevitably result in the act's being declared void.³⁷

d. Internal procedural rules

- 7-143 Concept and scope. The institutions adopt internal procedural rules in their rules of procedure³⁸ and thereafter are obliged to comply with them.³⁹ Such rules may be categorised as essential procedural requirements. For instance, in one case the Court of Justice annulled a Council directive which was adopted in breach of Art.6 of the Council's Rules of Procedure.⁴⁰ The directive was adopted by the so-called 'written procedure,

³³ There are specific applications of this duty of confidentiality in regulations and directives: see, for example, Art.6(2) of Council Regulation No. 283/52 on common rules for imports ((1952) O.J. L357).

³⁴ See Art.23(2) of Regulation No. 17 in connection with the specific duty of confidentiality in competition cases, replaced by Arts. 27 and 28 of Council Regulation (EC) No. 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) O.J. L1/1. For an extensive discussion of the difficulty of reconciling the duty of confidentiality with the right to a fair hearing, see Justice, "Balancing the Public Interests: Confidentiality, Trade Secret and Disclosure of Evidence in EC Competition Procedures" (1994) E.Omp. Rev. 88-89.

³⁵ See Art.15(5) of Regulation No. 149/56 in relation to the duty of confidentiality in the investigation procedure for determining dumping practices (1956) O.J. L36/1; ECJ, Case C-36/92 P SEP v Commission (1994) E.C.R. I-1311, paras 35-38.

³⁶ ECJ, Case 51/83 AEZG Chemie v Commission (1986) E.C.R. 1585, para.29. See also I-625, *supra*.

³⁷ Cf. ECJ, Joined Cases 269-275 and 277/78 Van Landuyck v Commission (1980) E.C.R. 3125, para.47. Naturally, this does not preclude the person who has been disadvantaged by disclosure from bringing an action for damages against the institution responsible: ECJ, Case 145/83 Adent v Commission (1985) E.C.R. 3335, paras 34-44.

³⁸ See EC Treaty, Art.195 (European Parliament), Art.237(3) (Council) and Art.215(2) (Commission).

³⁹ Sometimes internal procedural rules are adopted in a different context, e.g. in regard to staff matters: see ECJ, Case 282/81 Rogus v Commission (1983) E.C.R. 1245, para.11.

⁴⁰ [1978] O.J. L265, now replaced by Council Decision 2002/582/EC, Euratom of July 22, 2002 adopting the Council's Rules of Procedure (2002) O.J. L209/7.

even though two Member States had expressed objections to its use. Art.6 provides that recourse to a written vote on an urgent matter may be had only if all members of the Council agree.⁴¹

Protection for individuals. Natural or legal persons may plead infringement of internal procedural rules which confer rights on them and guarantee legal certainty.⁴² This qualifies the view that internal procedural rules are intended to guarantee the sound functioning of internal decision-making while respecting the prerogatives of each of the Members of the institution, and that they are therefore not intended to ensure protection for individuals.⁴³

e. Requirement to provide a statement of reasons

Concept and scope. The statement of reasons required by Art.253 of the EC Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its supervisory jurisdiction.⁴⁴ The reasoning must be logically compatible with the content of the measure.⁴⁵ A minimal, merely

⁴¹ ECJ, Case 68/56 United Kingdom v Council (1958) E.C.R. 855, paras 40-42. For a case in which the Rules of Procedure of the Economic and Social Committee were invoked, yet no infringement was found, see ECJ, Case 30/75 Gavarin v EEC and Council (1977) E.C.R. 7415. For a case in which a Commission decision was annulled because a prior opinion was adopted in breach of the Rules of Procedure of the Standing Committee on Construction which assists the Commission in implementing a regulation in that a draft document was not sent to two addressees within the time-limit laid down and the vote was not postponed despite the request made to that effect by a Member State, see ECJ, Case C-263/55 Germany v Commission (1996) E.C.R. I-441, para.32. The Court of Justice declared void a Commission decision which was adopted without being authenticated as provided for in its Rules of Procedure (instruments adopted by the Commission in the course of a meeting have to be attached, in the authentic language or languages, in such a way that they cannot be separated, to the minutes of the meeting at which they were adopted and are to be authenticated by the signatures of the President and the Secretary-General on the final page of the minutes): ECJ, Case C-307/95 Italy v Commission (2000) E.C.R. I-1091, paras 47-48.

⁴² ECJ, Case C-157/92 P BASF and Others v Commission (1994) E.C.R. I-2555, paras 72-78, in which the Court of Justice annulled a Commission decision on the ground that it infringed Art.12 of the Commission's Rules of Procedure; cf. CFI, Case T-3251 Solway v Commission (1995) E.C.R. II-1825, para. 45-54; see also ECJ, Case C-280/93 Germany v Council (1994) E.C.R. I-4973, para.15, from which it appears that in adopting acts which directly affect individuals, the procedural requirements applicable to such acts must be strictly complied with.

⁴³ ECJ, Case C-65/89 Nakajima v Council (1991) E.C.R. I-2059, paras 43-51.

⁴⁴ ECJ, Case C-350/85 Delors and Others v Commission (1993) E.C.R. I-395, para.15; CFI (Judgment of January 12, 2005), Case T-93/02 Confédération Nationale du Crédit Mutuel v Commission, not yet reported, para.61 (see also the case-law cited in those judgments); Cf. ECJ, Case 125/77 Held v High Authority (1979) E.C.R. 41, at 51-52; ECJ, Case 24/62 Germany v Commission (1955) E.C.R. 61, at 68-69; ECJ, Case 254/51 Conoci Dato v Commission (1955) E.C.R. 515, para.14.

⁴⁵ ECJ, Case 256 Gilling v High Authority (1957) E.C.R. 3, at 15.

formal statement of reasons is not enough, because it does not effectively enable interested parties¹¹⁶ and the Court to verify the legality of the act.¹¹⁷ However, the Community authority is not under a duty to go into all the arguments raised by interested parties during the administrative procedure which led to the adoption of the act.¹¹⁸ It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision so as to enable its reasoning to be clearly understood.¹¹⁹ It is therefore unnecessary to have a specific statement of reasons for each technical choice made.¹²⁰

In any case, it is essential for the legal basis of the contested measure to be clearly indicated¹²¹ or to be capable of being determined with certainty from other parts of the measure.¹²²

In principle, the various relevant factual and legal aspects should be set out in the statement of reasons. There is a consistent line of cases, however, to the effect that this is not always necessary on the ground that, in considering whether the statement of reasons of an act satisfies the requirements of Art.253 of the EC Treaty, regard must be had not only to

its wording but also to its context and to all the legal rules governing the matter in question.¹²³

The nature of the contested measure is one aspect of its context which goes to determine the extent of the obligation to provide a statement of reasons.¹²⁴ In the case of an act of general application, such as a regulation, it is enough for the circumstances which led to its adoption, together with its general objectives, to be mentioned.¹²⁵ If the need for the act is obvious from its content, additional reasoning is unnecessary.¹²⁶

The degree of precision of the statement of reasons of an individual measure depends on the practical realities and the time and technical facilities available for drawing it up.¹²⁷ Furthermore, an individual measure which fits into a well-established line of decisions may be reasoned in a summary manner, for instance, by reference to the practice in question. If, in contrast, the measure deviates from previous practice, for example, by going appreciably further than previous decisions, the Community authority which adopted the measure must expressly explain why this is so.¹²⁸

Lastly, the degree to which the addressee was involved in the process by which an act was drawn up has a bearing on the extent of the duty to provide a statement of reasons.¹²⁹ In addition, persons concerned by a

¹¹⁶ Interested parties comprise not only the addressee of an act, but also persons to whom the act is of direct and individual concern. The latter's interest in obtaining an explanation of the act should therefore be taken into account in determining the extent of the obligation to provide a statement of reasons: ECJ, Case 41/83 *Italy v Commission* (1983) E.C.R. 871, para.46; ECJ, Case C-357/95 *P Commission v Syntex*, and *Brick's France* (1995) E.C.R. I-1715, para.62; CFJ, Case T-16/91 *SV Rendu and Others v Commission* (1996) E.C.R. II-1327, para.43; CFJ (judgment of January 12, 2005), Case T-33/02 *Confédération Nationale du Crédit Mutuel v Commission*, not yet reported, para.51.

¹¹⁷ ECJ, Case C-269/90 *Technische Universität München* (1991) E.C.R. I-5465, para. 25-27; cf., however, the case of a decision ordering the repayment of unlawfully paid State aid: ECJ, Case C-73/97 *Belgium v Commission* (1999) E.C.R. I-3671, para.51.

¹¹⁸ ECJ, Case 55/69 *Cottelle v Commission* (1972) E.C.R. 337, para.22; ECJ, Case 56/69 *Moorhuis v Commission* (1974) E.C.R. 527; ECJ, Joined Cases 229-235 and 23/78 *Ver Landweyck v Commission* (1982) E.C.R. 3125, para.65; ECJ, Joined Cases 43 and 53/82 *VBVB and VBVB v Commission* (1984) E.C.R. 15, para.19; ECJ, Case 42/84 *Rémis v Commission* (1985) E.C.R. 2545, para.25; ECJ, Joined Cases 243-242, 241, 262, 263 and 269/82 *Stichting Sigarenindustrie v Commission* (1985) E.C.R. 3621, para.82; ECJ, Case C-41/91 *France v Commission* (1994) E.C.R. I-1829, para.36; CFJ, Case T-3/88 *Hilt v Commission* (1992) E.C.R. II-439, para.332.

¹¹⁹ CFJ, Case T-44/90 *Le Cinq v Commission* (1992) E.C.R. II-1, paras 43-44; CFJ, Case T-192 *Alia Adair France and Others v Commission* (1993) E.C.R. II-568, para.34; cf. ECJ, Case 24/92 *Germany v Commission* (1993) E.C.R. 61, at 53.

¹²⁰ ECJ, Case C-168/93 *Luxembourg v European Parliament and Council* (2000) E.C.R. I-9131, para.52; ECJ, Case C-100/93 *Italy v Council and Commission* (2001) E.C.R. I-3217, para. 43-44; ECJ, Joined Cases C-37/03 and C-125/03 *Omega Air and Others* (2003) E.C.R. I-2559, para.47; ECJ, Case C-342/93 *Italy v Council* (2002) E.C.R. I-2663, para.35.

¹²¹ ECJ, Case 123/85 *Spain v Council* (1985) E.C.R. 4543, para.57. Failure to indicate the legal basis also infringes the principle of legal certainty: ECJ, Case C-325/91 *France v Commission* (1993) E.C.R. I-1283, para.30.

¹²² ECJ, Case 45/86 *Commission v Council* (1987) E.C.R. 1433, para.3.

¹²³ ECJ, Case C-352/83 *Pelore and Others v Commission* (1990) E.C.R. I-395, para.16, and the case-law cited in that judgment; see also ECJ, Case 25/88 *Scherzer v European Parliament* (1977) E.C.R. 1729, para.39; ECJ, Case 35/80 *Denkavit Nederland* (1981) E.C.R. 45, para.33; ECJ, Case C-120/99 *Italy v Council* (2001) E.C.R. I-7397, paras 23-25; ECJ, Case C-310/99 *Italy v Commission* (2002) E.C.R. I-2113, para.48.

¹²⁴ CFJ, Case T-26/90 *Flünder v Commission* (1992) E.C.R. II-1755, para.70. In the case of a decision requiring a Community financial aid for a project not carried out as specified, the statement of the reasons for such a measure must include an indication of the reasons for which the alterations taken into account have been judged to be unacceptable (CFJ, Case T-241/00 *Le Centre v Commission* (2002) E.C.R. II-1551, para.15; CFJ, Case T-182/00 *Ampère v Commission* (2002) E.C.R. I-3585, para.129).

¹²⁵ ECJ, Case 5/67 *Beur* (1968) E.C.R. 35, at 55; ECJ, Case 24/81 *Möckner-Winkel v Commission* (1993) E.C.R. 1457, para.31.

¹²⁶ ECJ, Case 5/72 *Weninger* (1973) E.C.R. 321, para.12.

¹²⁷ Settled case-law ever since ECJ, Case 15/65 *Schwarze* (1965) E.C.R. 577, at 583. For examples of the influence of "practical realities" on the obligation to provide a statement of reasons, see ECJ, Case 8/79 *Bour v Council* (1980) E.C.R. 553, para.6; ECJ, Case 54/92 *Treder v Commission* (1994) E.C.R. 1359, para.21.

¹²⁸ ECJ, Case 21/74 *Groupement des Fabricants de Papier Peint de Belgique and Others v Commission* (1975) E.C.R. 1491, para.31. A substantial change as compared with a previously adopted position of the institution concerned must be justified in the statement of reasons of the new decision containing the change (CFJ, Case T-236/99 *Mitropoli Television v Commission* (2001) E.C.R. II-1057, para.53). The same stricter requirement to state reasons applies where an act derogates from a more general rule (ECJ, Case C-120/99 *Italy v Council* (2001) E.C.R. I-7397, para.53).

¹²⁹ ECJ, Case 13/72 *Netherlands v Commission* (1973) E.C.R. 27, para. 11-12; ECJ, Case 519/79 *Germany v Commission* (1981) E.C.R. 21, paras 13-21; ECJ, Case 125/79 *Italy v Commission* (1981) E.C.R. 235, para. 20-21; ECJ, Case 34/76 *United Kingdom v Commission* (1981) E.C.R. 1749, para.50; ECJ, Case 14/83 *Italy v Commission* (1989) E.C.R. 3573, para.11. For decisions clearing EAGGF accounts, see ECJ, Case C-272/93 *Netherlands v Commission* (2001) E.C.R. I-5211, para.19. In staff cases, previous memoranda and

decision may be expected to make a certain effort to interpret the reasons if the meaning of the text is not immediately clear. The duty to give a statement of reasons is not infringed if it is possible to resolve ambiguities in the statement of reasons by means of such interpretation.³²

7-146 **Material inaccuracy.** A shortcoming in the material accuracy of the statement of reasons, such as a factual inaccuracy or a wrong legal categorisation, is considered an infringement of the Treaty or of a rule relating to its application.³³

7-147 **Timeframe.** A sufficient statement of reasons should be notified at the same time as the person concerned has notice of the act.³⁴ The absence of such a statement of reasons cannot be regularised after proceedings have been brought.³⁵

staff notices influence the duty to provide a statement of reasons in the same way. ECJ, Case 6176 *Gedat v Commission* [1977] E.C.R. 1419, paras 11-14; ECJ, Case 86/77 *Director v Commission* [1978] E.C.R. 1355, paras 34-42; ECJ, Joined Cases 36, 37 and 218/82 *Sison v Commission* [1983] E.C.R. 1769, paras 47-49; CFI, Case T-10/92 *Turner v Commission* [1993] E.C.R. II-1455, paras 62-63. The fact that an official was involved in the reorganisation of his department may justify a decision adversely affecting him or her having a summary statement of reasons; ECJ, Case 125/88 *Arning v Commission* [1991] E.C.R. 2539, para 14.

³² CFI, Case T-16/91 *RY Rendo and Others v Commission* [1996] E.C.R. II-1817, para 45. Cf. CFI, Case T-31/94 *IPX-München v Commission* [2001] E.C.R. II-775, para 52.

³³ ECJ, Case 1/65 *Acciaierie e Ferriere Pugliesi v High Authority* [1958] E.C.R. 1, at 7-8; CFI, Case T-17/91 *Mouton-Hachette v Commission* [1994] E.C.R. II-355, para 57; cf. ECJ, Case 119/86 *Spain v Council and Commission* [1987] E.C.R. 4121, para 51. It is not always easy to draw a clear distinction in this connection, as can be seen from ECJ, Case C-350/92 *Publisher Association v Commission* [1995] E.C.R. I-21, paras 35-48; ECJ, Joined Cases C-328/93, C-329/93 and C-330/93 *Germany and Others v Commission* [1996] E.C.R. I-5151, paras 23-55; ECJ, Case C-367/95 *P. Commission v Spain and Brink's France* [1998] E.C.R. I-1719, paras 65-78; ECJ, Case C-172/01 *P. International Power and Others v Commission* [2003] E.C.R. I-1421, paras 134-139.

³⁴ ECJ, Case 155/83 *Michel v European Parliament* [1981] E.C.R. 2851, para 22; ECJ, Case C-353/01 *P. Marita v Council and Commission* [2004] E.C.R. I-1073, para 32.

³⁵ ECJ, Case C-343/87 *Galia v Commission* [1990] E.C.R. I-225, para 15 (staff case); ECJ, Case C-353/01 *P. Marita v Council and Commission* [2004] E.C.R. I-1073, para 32 (access to documents); CFI, Case T-32/98 *Volger v European Parliament* [1999] E.C.R. II-121, paras 40-42, upheld by ECJ, Case C-115/99 *P. European Parliament v Volger* [1999] E.C.R. I-6549, para 23; CFI (judgment of January 15, 2003), Case T-35/03 *Confédération Nationale du Crédit Mutuel v Commission*, not yet reported, paras 123-125 (State aid). At most, in staff cases the Court allows a concise statement of reasons to be completed in the course of the proceedings; ECJ, Case 111/81 *Nicolas v European Parliament* [1984] E.C.R. 1323, para 22; ECJ, Joined Cases 64, 71-73 and 78/85 *Sergio v Commission* [1985] E.C.R. 1055, para 52; CFI, Case T-37/85 *Hanning v European Parliament* [1990] E.C.R. I-461, para 42; CFI, Joined Cases T-260 and T-165/89 *Kalveras v Court of Justice* [1990] E.C.R. II-371, para 72; CFI, Case T-25/90 *Pérez-Maqueo Camacho v Commission* [1992] E.C.R. II-143, para 67; CFI, Case T-156/89 *Valverde Morán v Court of Justice* [1991] E.C.R. II-470, paras 139-133; CFI, Case T-15/91 *Vela Palacios v ESC* [1993] E.C.R. II-201, para 16; ECJ, Case C-150/02 *Hector v European Parliament* [2004] E.C.R. I-5691, para 38.

Pleas raised by the Court. The Court of Justice or the Court of First Instance must raise of its own motion³⁶ the question as to whether the requirement for a statement of reasons has been fulfilled (see 7-122, *supra*).³⁷

1. Publication and notification of the act

Irregularities in publication or notification. Irregularities in the publication or notification of an act are not classed as infringements of an essential procedural requirement because they do not affect the act itself. Such irregularities may at most prevent time from beginning to run for the purposes of bringing proceedings.³⁸

3. Infringement of the Treaty or of any rule of law relating to its application

Scope. This ground for annulment encompasses any infringement of any provision of superior Community law.³⁹

Treaty. By "Treaty" is meant the Treaties establishing the Communities (as amended), the Protocols annexed thereto⁴⁰ and the Accession Treaties and Acts.⁴¹ The pleas raised by the applicant do not necessarily have to be confined to infringements of the Treaty on the basis of which the action is brought. An action for annulment based on the EC Treaty may embody admissible pleas referring to infringements of provisions of the EAEC Treaty.⁴²

Rule of law relating to the application of the Treaty. "Any rule of law relating to the application of the Treaty" covers all other binding provisions of the Community legal order. These include in the first place

³⁶ ECJ, Case C-165/95 *P. Commission v Daffar* [1997] E.C.R. I-983, para 24; ECJ, Case C-357/95 *P. Commission v Spain and Brink's France* [1998] E.C.R. I-1715, para 57.

³⁷ ECJ, Case 11/57 *Moët v High Authority* [1958] E.C.R. 41; ECJ, Case 134/85 *Union v Commission* [1986] E.C.R. 2379, para 19; CFI, Case T-55/89 *Hanning v European Parliament* [1991] E.C.R. II-463, para 58; CFI, Case T-515/89 *González Holguera v European Parliament* [1993] E.C.R. II-851, para 37; CFI, Case T-62/89 *Danck-Pedersen v Commission* [1992] E.C.R. II-5531, para 125; CFI, Case T-514/93 *Gryberg v Commission* [1994] E.C.R. SC II-595, para 59 (English abstract at [1994] E.C.R. SC I-A-175); CFI, Case T-105/85 *Pfaff and Others v Commission* [1987] E.C.R. II-223, para 62; ECJ, Case T-456/83 *v Court of Justice* [1997] E.C.R. II-1131, para 51; CFI (judgment of July 3, 2004), T-44/00 *Messageries-Compagnie v Commission*, not yet reported, paras 126 and 210 (under appeal: C-411/04 P).

³⁸ ECJ, Case 48/79 *ICI v Commission* [1972] E.C.R. 619, para 46; ECJ, Case 181/75 *Kling* [1974] E.C.R. 607, para 6.

³⁹ See, by way of example, ECJ, Case 52/78 *Simmenthal v Commission* [1975] E.C.R. 177, para 125. See also Bouleux, *Damen and Huglo, Centenaire Communautaire* (2nd ed., Dalloz, Paris, 2001), 1455-1465, at 209-212.

⁴⁰ EC Treaty, Art. 311; EAEC Treaty, Art. 237.

⁴¹ ECJ, Case C-51/83 *Spain v Council* [1983] E.C.R. I-2261, paras 23-31.

⁴² ECJ, Case C-67/83 *Greece v Council* [1984] E.C.R. I-1527, para 8.

provisions of international law, in particular provisions originating in treaties concluded by Member States before the EC Treaty was concluded,¹⁴ agreements concluded by the Community itself¹⁵ and customary international law.¹⁶ Secondly, there is the group made up of the general principles of Community law,¹⁷ such as the principle of proportionality,¹⁸ the principle *ne bis in idem*¹⁹ and the principle of reasonable time in administrative procedures.²⁰ Lastly, there are all valid, binding acts of Community institutions or bodies.²¹

¹⁴ ECJ, Joined Cases 21-24/72 *International Fruit and Others* (1972) E.C.R. 1219, para. 6-7.

¹⁵ EC Treaty, Art. 300(7); ECJ, Case 181/73 *Hogeman* (1974) E.C.R. 449, para. 5. For an example arising in connection with an action for annulment, see ECJ, Case 3338 *Greece v Commission* (1993) E.C.R. 3311. The Court of Justice will review the legality of a Community measure in the light of the WTO rules only where the Community intended by means of that measure to implement a particular obligation assumed in the context of the WTO or where the measure refers expressly to the specific provisions of the WTO agreements (ECJ, Case C-245/96 *Portugal v Council* (1998) E.C.R. I-8573, para. 47-49).

¹⁶ ECJ, Joined Cases 89, 124, 126, 127-128 and 129-130/82 *Admission and Others v Commission* (1983) E.C.R. 5133; CFI, Case T-115/94 *Opal Austria v Council* (1995) E.C.R. II-35, para. 87-95; CFI (Judgment of September 21, 2005), Case T-356/03 *Yang and Al Barakaat International Foundation v Council and Commission* not yet reported, paras. 281 and 282.

¹⁷ ECJ, Case 493 *Mold v Commission* (1974) E.C.R. 491, para. 13; ECJ, Case 114/75 *Bela Mihail* (1977) E.C.R. 1211, para. 5-7; ECJ, Case 224/82 *Mitsubishi-Kasei G.K. v Commission* (1983) E.C.R. 2539, para. 11; ECJ, Case C-125/91 *France v Commission* (1993) E.C.R. I-3281, para. 20; CFI, Case T-85/93 *Van den Bergh Foods v Commission* (2003) E.C.R. I-4633, para. 197-198 (appeal based on infringement of the principles of subsidiarity, loyal cooperation and legal certainty dismissed).

¹⁸ CFI, Case T-305/00 *Conserve Halie v Commission* (2003) E.C.R. II-5735, para. 127-151 (annulment of a Commission decision for infringing the principle of proportionality).

¹⁹ ECJ (Order of March 11, 2004), Case C-455/02 P *Syrovets Medicines*, not reported, para. 43-45.

²⁰ Observation of a reasonable time in conducting administrative procedures in the sphere of competition policy is a general principle of Community law which the Community Court ensures is respected (ECJ, Case C-332/85 P *Guerra Automobiles v Commission* (1997) E.C.R. I-1553, para. 35-37; ECJ, Joined Cases C-232/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P and C-254/99 P *Lombardie Vinyl Monochloride and Others v Commission* (2002) E.C.R. I-3375, para. 167 and 171). It is set out, as part of the right to good administration, in Art. 41(1) of the Charter of Fundamental Rights of the European Union promulgated at Nice on December 7, 2000 (2000) O.J. C164/2; CFI, Case T-67/01 *JCB Service v Commission* (2004) E.C.R. II-49, para. 36: An infringement of the reasonable time principle justifies the annulment of a decision adopted at the end of the administrative procedure only when it also entails an infringement of the right of defence of the undertaking concerned. In the event that it is not proved that the undertaking could defend itself less effectively as a result of the excessively long period of time taken, the Commission's failure to respect the principle of reasonable time will have no effect on the validity of the administrative procedure in a competition case (CFI, Case T-67/01 *JCB Service v Commission* (2004) E.C.R. II-49, para. 43, and the case-law cited therein); see also CFI, Case T-327/01 *Franspex v Commission* (2004) E.C.R. II-1655, para. 34, in which the plea-raised in a staff case—was declared well founded and the administrative procedure was held to be unlawful; CFI (Judgment of July 13, 2005), Case T-242/03 *Sundair v OHIM*, not yet reported, paras. 51-55, in which the plea—raised in a trademark case—was rejected. As far as State aid cases are concerned, the Community Court may consider whether, in adopting the contested decision, the Commission complied with the rules which it laid down itself in guidelines and notices (see CFI, Case T-35/99 *Keller and Keller Maschinen v Commission* (2002) E.C.R. II-251, para. 74 and 75; CFI (Judgment of November 18, 2004),

Infringement. The "infringement" of Community law for which annulment is imposed under this head may consist equally of a misapplication of the law (including an erroneous legal categorisation of the facts in question or a misinterpretation of the applicable rule) or of an error in determining the factual basis on which the application of Community law is founded.²²

Margin of discretion. It is only in areas in which the institutions have a broad discretion that the Court of Justice and the Court of First Instance show reluctance in reviewing the assessment of economic facts and circumstances which played a determinative role in the adoption of the contested act.²³ In such a case, there will have to be a manifestly wrong

Case T-175/01 *Forster Nord v Commission*, not yet reported, para. 134. This is because the compatibility with the common market of planned aid has to be assessed in accordance with the provisions of Art. 87 of the EC Treaty and by reference to the Community guidelines which the Commission has previously adopted for the purposes of such an examination. The Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (ECJ, Case C-352/98 *Spain v Commission* (2002) E.C.R. I-4011, para. 53; CFI (Judgment of November 18, 2004), Case T-175/01 *Forster Nord v Commission*, not yet reported, para. 134).

²² ECJ, Case 185/82 *Boege v High Authority* (1983) E.C.R. 259, at 259-261. For an analytical breakdown of these two aspects, see CFI, Case T-169 *Adams-Poulenc v Commission* (1999) E.C.R. II-567, para. 31-123; CFI, Case T-439 *DAF v Commission* (1994) E.C.R. II-1523, para. 54-253; CFI, Case T-339 *Polly v Commission* (1992) E.C.R. II-499, para. 93-328. It also transpires from these judgments that the Court of First Instance thoroughly reviews the findings of fact which the Commission regards as constituting an infringement of Art. 81(1) or Art. 82 of the EC Treaty. See also CFI, Joined Cases T-68, T-77 and T-78/83 *SPY and Others v Commission* (1992) E.C.R. II-1430, para. 172-369. The Court effects its review by inquiring into the correctness of the factual claims set out in the Commission decision by testing it against the admissible evidence from the parties in the proceedings.

²³ In agricultural cases: ECJ, Case 133/79 *Regione Friuli v Council* (1980) E.C.R. 3333, para. 25, and ECJ, Case C-301/97 *Niederlande v Council* (2001) E.C.R. I-8633, para. 105 (reluctance shown even with regard to determining the facts); in competition cases: ECJ, Case 42/84 *Ramire v Commission* (1985) E.C.R. 2545, para. 34; ECJ, Joined Cases 142 and 156/84 *British American Tobacco and R.J. Reynolds Industries v Commission* (1987) E.C.R. 4487, para. 62; ECJ, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Alborg Portland and Others v Commission* (2004) E.C.R. I-2085, para. 279; CFI, Case T-44/90 *Lo Qing v Commission* (1992) E.C.R. II-1, para. 85; CFI, Case T-791 *Atis Motor France and Others v Commission* (1993) E.C.R. II-469, para. 31; CFI, Joined Cases T-39 and T-40/92 *Groupeement des Carres Benelux "CB" and Europe v Commission* (1994) E.C.R. I-49, para. 109; CFI, Case T-17/93 *Memo Hachette v Commission* (1994) E.C.R. II-395, para. 104; in anti-dumping cases: ECJ, Case 240/84 *Tayo v Council* (1985) E.C.R. 1295, para. 19; ECJ, Case 157/85 *Fedol v Commission* (1986) E.C.R. 4153, para. 5; ECJ, Case C-358/87 *Gesteira Holdings v Council* (1992) E.C.R. I-3335, para. 65; CFI, Case T-116/86 *Thai Bicycle v Council* (1995) E.C.R. II-2691, para. 51; CFI (Judgment of October 23, 2004), Case T-35/01 *Shanghai Toroko Electronic v Council*, not yet reported, paras. 48-49 (reluctance shown also to take account of "factual situations of a legal and political nature in the [rebut] contrary concerned"); in transport cases: ECJ, Case C-354/89 *Schödecker v Commission* (1991) E.C.R. I-1775, para. 14; in State aid cases: ECJ, Case C-225/01 *Meca v Commission* (1993) E.C.R. I-3202, para. 24-25; but see, as regards classifying a measure as aid, CFI, Case T-295/91 *Alitalia v Commission* (2000) E.C.R. II-3871, para. 95; CFI (Judgment of October 21, 2004), Case T-35/99 *Larney v Commission*,

assessment of a misuse of power if the act is to be annulled (apart, of course, from any misapplication of Community law in some other respect).¹⁵¹

If, however, the institutions lay down guidelines with a view to specifying the criteria which they intend to apply in accordance with the Treaty in exercising their broad discretion, this will entail a self-imposed limitation on the exercise of the discretion in that they commit themselves to comply with their self-imposed guidelines.¹⁵² In this context, it is for the Court of First Instance to consider whether the institutions have complied with those rules.¹⁵³

4. Misuse of powers

7-155 Concept. An institution is said to misuse its powers when it uses them for a purpose other than that for which they were conferred (*détournement de pouvoir*).¹⁵⁴ An act may be annulled on that ground. The Court of Justice

has not yet reported, paras 127-162 (Commission's assessment held to be wrong in that it held that the measure could not be regarded as being aid because it satisfied the private investor test); CFI (Judgment of June 15, 2005), Case T-343/03 *Comité Inter France v Commission*, not yet reported, paras 137-138; in concentration cases: the review carried out by the Court of First Instance is broader: see, e.g., CFI, Case T-347/03 *Tetra Laval v Commission* [2007] E.C.R. II-4361. The Commission claimed on appeal that the Court of First Instance had not confined itself to a review of legality but also placed itself in the Commission's position. The appeal was rejected; ECJ, Case C-403/03 P *Commission v Tetra Laval* [2005] E.C.R. I-537, paras 37-51.

¹⁵¹ ECJ, Case 197/77 *Roquette Frères* [1977] E.C.R. 1315, paras 19-22. In its Opinion of February 17, 2005 in Case C-403/03 P *Rice Foods v Commission* (not yet reported, paras 45 to 53, Advocate General P. Léger draws a distinction between discretion of a political nature (which corresponds to the political responsibilities which a Community provision confers on an institution) and discretion of a technical nature (discretion of an administrative authority justified by the technical, economic and legal complexity of the situation which it has to consider). The intensity of judicial review will be stronger where the act is the outcome of the exercise of discretion of a technical nature (e.g. in competition cases), than if it is where the act is the result of the exercise of political discretion (e.g. in agricultural cases).

¹⁵² Guidelines in connection with the assessment of State aid: see CFI, Case T-10/94 *Autofass and ACF v Commission* [1995] E.C.R. II-2165, para 37; CFI, Case T-214/93 *Widma GmbH v Commission* [1995] E.C.R. II-717, para 29; CFI (Judgment of December 1, 2004), Case T-276/02 *Kronofrance v Commission*, not yet reported, para 79. For guidelines regarding the fines which may be imposed for infringement of Arts 11 and 32 of the EC Treaty, see CFI (Judgment of July 5, 2004), Case T-44/00 *Mecanumann-Werke v Commission*, not yet reported, paras 212 and 212.

¹⁵³ CFI, Case T-35/93 *Keller and Keller Meccanica v Commission* [1994] E.C.R. II-261, para 77; CFI (Judgment of December 1, 2004), Case T-276/02 *Kronofrance v Commission*, not yet reported, para 79.

¹⁵⁴ ECJ, Case 355 *Fédération Charbonnière de Belgique v High Authority* [1954 to 1956] E.C.R. 292, at 183; ECJ, Case 15/57 *Compagnie des Hauts Fourneaux de Chaux v High Authority* [1957 and 1958] E.C.R. 211, at 135; ECJ, Case 92/76 *Chemical v Commission* [1979] E.C.R. 777, para 105; ECJ, Case 317/79 *Boyl v Commission* para 15; ECJ, Case C-20/99 *Italy v Commission* [2005] E.C.R. I-3657, para 38; CFI, Case T-35/93 *Keller v Commission* [1994] E.C.R. II-43, para 22; CFI, Case T-105/89 *Schweyer v Commission* [1990]

has evolved from a subjective approach to an objective approach, principally in the context of the ECSC Treaty, of the concept of misuse of powers.¹⁵⁵ It is not always necessary to know the actual grounds which motivated the institution (subjective approach). When the outcome of the contested act diverges from the objectives for which the power was conferred, this can afford a sufficient basis for annulling the contested act for misuse of powers (objective approach).¹⁵⁶ Thus, the Court of Justice has equated with "disregard for the lawful aim" pursuing "objectively", through a serious lack of care or attention in the exercise of a power, purposes other than those for which the power was conferred.¹⁵⁷ An unlawful choice of a decision-making procedure in order to evade other procedures which would normally be applicable also constitutes a misuse of powers.¹⁵⁸

Act pursuing authorised and unauthorised aims. An act which pursues both authorised and unauthorised aims may be annulled only if this detracts from the main aim for which the power was conferred¹⁵⁹ or if the unauthorised aim constitutes the main reason for exercising the power.¹⁶⁰

Proof. The Court subjects claims alleging misuse of powers to strict requirements as to proof. Only if the applicant proves, on the basis of objective, relevant and consistent facts, that the act was adopted for unauthorised purposes, will the Court of Justice or the Court of First

ECJ, Case 411, para 43; CFI, Case T-46/99 *Pirena v Commission* [1999] E.C.R. II-577, para 70. For an extensive discussion, see Schöckewitz, "La notion de détournement de pouvoir en droit communautaire" [1992] A.J.D.A. 435.

¹⁵⁵ See Schöckewitz (preceding n.), at 439-440.

¹⁵⁶ ECJ, Joined Cases 351 and 352/57 *Fabrique de Fer de Charleroi v Commission* [1957] E.C.R. 3439, paras 15 and 16; ECJ, Joined Cases 52, 52 and 57/57 *ISA v Commission* [1955] E.C.R. 3255, para 15; ECJ, Joined Cases 33, 44, 110, 225 and 233/55 *Stahlwerke Peine-Seliger and Others v Commission* [1955] E.C.R. 4309, paras 17-18.

¹⁵⁷ ECJ, Case 355 *Fédération Charbonnière de Belgique v High Authority* [1954 to 1956] E.C.R. 292, at 573; ECJ, Case 15/57 *Compagnie des Hauts Fourneaux de Chaux v High Authority* [1957 and 1958] E.C.R. 211, at 131.

¹⁵⁸ ECJ, Case 23/77 *Compagnie des Hauts Fourneaux de Chaux v High Authority* [1957 and 1958] E.C.R. 195, at 207; ECJ, Joined Cases 143, 146, 221 and 225/82 *Westfälische Vereinigung und Phosphen v Commission* [1984] E.C.R. 931, para 27 et seq.; ECJ, Joined Cases 33, 44, 110, 225 and 233/55 *Stahlwerke Peine-Seliger and Others v Commission* [1955] E.C.R. 4309, para 27-28.

¹⁵⁹ ECJ, Case 134 *France v High Authority* [1954 to 1956] E.C.R. I, at 16; ECJ, Case 355 *Fédération Charbonnière de Belgique v High Authority* [1954 to 1956] E.C.R. 292, at 301.

¹⁶⁰ ECJ, Case 25/77 *Compagnie des Hauts Fourneaux de Chaux v High Authority* [1957 and 1958] E.C.R. 195, at 231.

Instance entertain a claim of misuse of powers.³⁵ A misuse of powers cannot be presumed.³⁶

- 7-153 Importance. In spite of the prominent role which this ground of nullity played in the ECSC Treaty, it is only seldom that the Court of Justice and the Court of First Instance declare an act void for misuse of powers.³⁷

B. CONDUCT DURING THE ADMINISTRATIVE PROCEDURE AND ADMISSIBILITY OF PLEAS IN JUDICIAL PROCEEDINGS

- 7-159 Acknowledgement of the facts in proceedings under Arts 81 and 82. An undertaking involved in an alleged infringement of Arts 81 and 82 of the EC Treaty may raise in its application for annulment mentioned in Art.230 of the EC Treaty. Where the undertaking does not expressly acknowledge the facts, the Commission must prove the facts in its decision and the undertaking is free to put forward in the proceedings before the Court any plea in its defence which it deems appropriate. However, where the undertaking explicitly admits during the administrative procedure the substantive truth of the Commission's allegations made against it in the statement of objections, those facts must thereafter be regarded as established and the undertaking will be in principle estopped from disputing them during the proceedings before the Court.³⁸

³⁵ ECJ, Joined Cases 18 and 35/55 *Guimard v Commission* [1955] E.C.R. 103, at 117; ECJ, Case 65/63 *Luz v Court of Auditors* [1964] E.C.R. 1447, para.53; ECJ, Case 52/86 *Reimer v European Parliament* [1987] E.C.R. 975, para.6; ECJ, Joined Cases 351 and 362/81 *Canalis-Pech and De la Fuente Pech v European Parliament* [1987] E.C.R. 1473, para.23; ECJ, Case C-321/88 *Sernier* [1990] E.C.R. I-3027, para.33; ECJ, Case C-331/93 *Federa and Others* [1995] E.C.R. I-4027, para.24; ECJ, Case C-400/99 *Italy v Commission* [2005] E.C.R. I-3557, para.35; CFI, Case T-453/99 *Pineau v Commission* [1999] E.C.R. II-577, para.71; CFI, Case T-23/91 *Mauritzen v Court of Auditors* [1992] E.C.R. II-2577, para.38; CFI, Case T-80/91 *Turner v Commission* [1993] E.C.R. II-1455, para.70; CFI, Case T-109/92 *Leone Barolo v Court of Justice* [1994] E.C.R.-SC II-133, para.71 (English abstract at [1994] E.C.R.-SC I-A-31); CFI, Case T-46/93 *Michael-Chien v Commission* [1994] E.C.R.-SC II-925, para.35 (English abstract at [1994] E.C.R.-SC I-A-257); CFI, Case T-143/93 *Fertine Mont v Commission* [1995] E.C.R. II-517, para.53; CFI, Joined Cases T-531/93, T-231, T-232, T-233 and T-234/94 *Industria Puente de Campor and Others v Commission* [1996] E.C.R. II-247, para.153.

³⁶ ECJ, Case 24/76 *Pedergnani and Others v Commission* [1976] E.C.R. 1337, para.30, and the Opinion of Advocate General H. Mayers, at 1329-1330; CFI, Case T-146/87 *Williams v Court of Auditors* [1991] E.C.R. II-1253, para.63.

³⁷ ECJ, Joined Cases 15 and 35/65 *Guimard v Commission* [1955] E.C.R. 103, at 117; ECJ, Case 105/73 *Gluffrida v Council* [1976] E.C.R. 1395, para.25; ECJ, Case 92/75 *Schmidt v Commission* [1979] E.C.R. 777, para.105, at 812; ECJ, Joined Cases 59 and 125/83 *Tomer v Commission* [1981] E.C.R. 1383, para.7, at 1523; ECJ, Joined Cases 33, 44, 110, 225 and 285/86 *Stahlecke, Pohl-Schulze and Others v Commission* [1988] E.C.R. 4369, para.28; CFI, Case T-106/92 *Frederixen v European Parliament* [1993] E.C.R.-SC II-93, para.45-60 (English abstract at [1993] E.C.R.-SC I-A-23).

³⁸ ECJ, Case C-297/95 *P. SCA Holding v Commission* [2000] E.C.R. I-10101, para.17; CFI, Case T-214/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*

State aid proceedings. A recipient of State aid or any other party concerned may submit a plea against the final Commission decision which was not submitted during the administrative procedure.³⁹ It should nevertheless be stressed that the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made.⁴⁰ It follows that an applicant which took part in the investigation procedure provided for in Art.88(2) of the EC Treaty cannot rely on factual arguments which were not known to the Commission and which it did not notify to the Commission during the investigation procedure.⁴¹

Nemo audire. In proceedings before the Court of First Instance, a party cannot rely on its own wrongful conduct in the administrative procedure.⁴² Similarly, a party cannot rely on the unlawful conduct of a person authorised to act on its behalf in order to evade its own liability as a result of actions performed by that person.⁴³

C. LIMITATION PERIODS

Time-limit. Under Art.230 of the EC Treaty, annulment proceedings "shall be instituted within two months of the publication of the measure, or its notification to the plaintiff, or, in the absence thereof, of the day on which

tion [2003] E.C.R. II-1597, para.327 (under appeal: Case C-357/03 F). CFI, Joined Cases T-226/01, T-229/01, T-244/01, T-244/01, T-251/01 and T-252/01 *Tokai Carbon and Others v Commission* [2004] E.C.R. II-513, para.108. However, inferences made by the Commission on the basis of declarations made during the administrative procedure may still be challenged before the Court of First Instance (*Tokai Carbon*, para.109).

³⁹ CFI, Case T-159/96 *Clifford Express v Commission* [1998] E.C.R. II-557, para.59; CFI, Case T-125/97 *Solomon v Commission* [1999] E.C.R. II-2525, para.55; CFI (Judgment of May 11, 2005), Joined Cases T-111/01 and T-113/01 *Servicio Edelmetal and ZEMAG v Commission*, not yet reported, para.58.

⁴⁰ CFI, Joined Cases T-371/94 and T-394/94 *British Airways and Others v Commission* [1999] E.C.R. II-2405, para.31; CFI, Case T-110/97 *Krohn Discheste v Commission* [1999] E.C.R. II-2387, para.47; CFI (Judgment of May 11, 2005), Joined Cases T-111/01 and T-113/01 *Servicio Edelmetal and ZEMAG v Commission*, not yet reported, para.57.

⁴¹ CFI (Judgment of May 11, 2005), Joined Cases T-111/01 and T-113/01 *Servicio Edelmetal and ZEMAG v Commission*, not yet reported, para.66.

⁴² CFI (Judgment of January 15, 2005), Case T-141/01 *Enron v Commission*, not yet reported, para.121; see, by analogy, ECJ, Case 39/72 *Commission v Italy* [1973] E.C.R. 101, para.10, and the Opinion of Advocate General J. Michas in Case C-455/99 *Courage and Crehan* [2001] E.C.R. I-5297, I-6300, para.25).

⁴³ CFI (Judgment of January 15, 2005), Case T-141/01 *Enron v Commission*, not yet reported, para.122. In that case, a letter from the Commission intended to ensure the recipient its right to be heard was sent to the wrong address. The Court of First Instance dismissed a plea alleging infringement of the rights of the defence on the ground that the management of the undertaking concerned deliberately misled the Commission as to its correct address.

it came to the knowledge of the latter, as the case may be".¹²² It is settled case-law that the time-limit prescribed for bringing actions under Art.230 of the EC Treaty is a matter of public policy and not subject to the discretion of the parties or the Court, since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice.¹²³ The Community Courts will therefore consider of their own motion whether the time-limit for bringing an action has been respected.¹²⁴

1. Publication

- 7-153 Effects of publication. Under Art.254(2) of the EC Treaty, regulations and directives addressed to all the Member States must be published in the *Official Journal of the European Union*.¹²⁵ Time for bringing proceedings against such acts starts to run from the fifteenth day after their publication in the *Official Journal*.¹²⁶ There is a rebuttable presumption that the date of publication is the date borne by the issue of the *Official Journal* containing the contested act.¹²⁷ Since publication is necessary in order for such acts to enter into effect,¹²⁸ time for bringing proceedings cannot start to run until they have been published in the *Official Journal*.¹²⁹ It makes no difference if the applicant became aware of the content of a regulation also in some other way. The same is true of acts which do not have to be published in order to enter into force where there is a consistent practice of publishing them. In those circumstances, the applicant is entitled to see the decision published in the *Official Journal* and the starting point of the period for

¹²² For the method for calculating time-limits in general, which is also applicable to limitation periods, see 24-176 to 24-183, *infra*. This section deals only with factors determining the onset of the period for bringing an action for annulment. Examples of applications lodged out of time may be found in ECJ (order of January 11, 2006), Case C-295/05 *Italy v Commission* [2006] E.C.R. I-111 and CFI (order of May 27, 2006), Case T-485/04 *CEAS v Commission*, not reported.

¹²³ ECJ, Case 152/85 *Adorn v Council* [1987] E.C.R. II-3, para.11; ECJ, Case C-246/95 *Con* [1997] E.C.R. I-438, para.21; CFI, Joined Cases T-12/95 and T-151/95 *Mahul Aid Administration Services v Commission* [1997] E.C.R. II-1155, para.36 and 38.

¹²⁴ See, e.g., CFI, Joined Cases T-142/01 and T-281/01 *OPTUC v Commission* [2004] E.C.R. II-329; see also 7-173, *infra*.

¹²⁵ The same applies to regulations, directives and decisions adopted in accordance with Art.151 (co-decision as between the Council and the European Parliament) by virtue of Art.254(1) of the EC Treaty.

¹²⁶ ECJ Rules of Procedure, Art.41(1); CFI Rules of Procedure, Art.102(1). This rule applies to all acts of Community institutions published in the *Official Journal* of the European Union and not only to those which enter into effect only after publication thereof (see CFI (order of May 25, 2004), Case T-254/03 *Schneider and Others v Commission* [2004] E.C.R. II-1513, para.51-62).

¹²⁷ ECJ, Case 96/78 *Recke* [1979] E.C.R. 69, para.15-17; CFI, Case T-113/94 *Opel Austria v Council* [1997] E.C.R. II-39, para.117.

¹²⁸ ECJ, Case 185/73 *Alsig* [1974] E.C.R. 437, para.6.

¹²⁹ Cf. Opinion of Advocate General X. Roemer in ECJ, Joined Cases 12 and 13/88 *Endicott v Zuccarelli National and Others v Commission* [1988] E.C.R. 459, at 459-460.

instituting proceedings is the date of publication, regardless of whether the applicant had earlier notice by some other means of the existence and content of the act in question.¹³⁰

Summary publication and Internet link. The fact that the Commission gave third parties full access to the text of a decision on its Internet site, combined with the publication of a succinct notice in the *Official Journal* of the European Union which enabled interested parties to identify the decision in question and brought their attention to the possibility of accessing it over the Internet must be regarded as constituting publication within the meaning of the fifth para. of Art.230 of the EC Treaty.¹³¹ Such publication constitutes the starting point of the period for instituting proceedings.

2. Notification to the applicant

Effects of notification. Under Art.254(3) of the EC Treaty, all other directives and decisions take effect upon notification to the addressee. The period of time for commencing proceedings against such a measure runs from the day following the receipt by the person concerned of due notification,¹³² where any delay in notification is not attributable to that person.¹³³ The person to whom the act is addressed cannot prevent time

¹³⁰ ECJ, Case C-122/95 *Germany v Council* [1996] E.C.R. I-573, para.14-39, in which the Court of Justice held that there was a consistent practice for Council decisions embodying the conclusion of international agreements binding on the European Community to be published in the *Official Journal* (compare ECJ, Case C-305/93 *Commission v Council* [1995] E.C.R. I-635 for acts which are not published). See also CFI, Case T-110/97 *Antidumping v Commission* [1999] E.C.R. II-2231, para.43-44; CFI, Case T-123/97 *Salomon v Commission* [1999] E.C.R. II-2925, para.43-45, in which the Court of First Instance held that the Commission has committed itself to publishing the complete text of decisions granting conditional authorisation for State aid taken at the end of the procedure provided for in Art.88(2) of the EC Treaty and that, for an undertaking to which the relevant decision was not notified, the period for commencing proceedings began to run from the day on which it was published in the *Official Journal*. See also CFI, Case T-256/97 *Aditalia v Commission* [2000] E.C.R. II-1371, para.39-41. In recent case-law it is not even considered whether there is an established practice of publication. Time for beginning proceedings begins to run on notification or on the day of publication in the *Official Journal*. The subsidiary criterion of having notice of the act is relevant only where the act is neither notified nor published in the *Official Journal* (CFI (order of May 25, 2004), Case T-264/03 *Schneider and Others v Commission* [2004] E.C.R. II-1515, para.51-61).

¹³¹ CFI (quotation of June 15, 2005), Case T-110/01 *Glen v Commission*, not yet reported, para.80; CFI (order of September 25, 2005), Case T-32/04 *Air Bourdon v Commission*, not yet reported, para.34 and 37.

¹³² However, a purely formal error in the notification (e.g. a mistake in the name of the addressee) does not prevent the time-limits laid down in the Treaty from applying, provided that the act in question actually reached the addressee and the latter realized that he or she actually was the addressee: ECJ (order of July 4, 1984), Case 82/84 *Metalgesellschaft v Commission* [1984] E.C.R. 2553, at 2556; CFI (order of February 11, 1993), Case T-255/97 *Guérin Automobiles v Commission* [1998] E.C.R. II-253, para.14; CFI (order of February 13, 1993), Case T-276/97 *Guérin Automobiles v Commission* [1998] E.C.R. II-261, para.18.

¹³³ ECJ, Case 376 *Idem v Commission* [1978] E.C.R. 1067, para.8. ECJ Rules of Procedure, Art.87(1)(a); CFI Rules of Procedure, Art.102(1)(a). This rule is applicable to all acts of Community institutions which enter into force upon notification.

from starting to run by refusing to take cognisance of a properly notified act.¹²¹

Publication in the *Official Journal* of an act which takes effect upon notification to the addressee or the fact that the addressee has knowledge of its existence before notification has no effect on when time starts running.¹²²

7-165

Due notification. Due notification requires that the act be communicated to the person to whom it is addressed¹²³ and should put that person in a position to take cognisance of its content and of the grounds on which it is based.¹²⁴ Registered mail with an acknowledgement slip is accepted as an appropriate means of notification, provided that the rules applicable to the delivery of mail are complied with,¹²⁵ since it enables the Court to determine with certainty when time started to run.¹²⁶ In such case, only unforeseen circumstances, force majeure or excusable error which prevented the applicant from actually taking cognisance of the act notified may justify exceeding the time-limit for instituting proceedings.¹²⁷

¹²¹ ECJ, Case 8/72 *Europemballage and Continental Can v Commission* [1972] E.C.R. 215, para.18.

¹²² ECJ, Case 31/75 *Helvola (de Manoeuvre) v European Parliament* [1977] E.C.R. 245, para.13.

¹²³ The notification to the Member State concerned of a decision declaring aid granted by a region incompatible with the common market has no effect on the period within which the region concerned has to bring an action for annulment (CFI, Case T-150/00 *Regions 35/00 v Commission* [2003] E.C.R. I-5015, paras 29-35). Moreover, notification causes time to run within the meaning of the fifth part of Art.233 of the EC Treaty only where the act is notified to the person to whom the decision is addressed. If the Commission sends a copy of a State aid decision (addressed to the Member State) by e-mail to the undertaking which had lodged a complaint relating to the aid concerned, that communication does not start time running, but rather the subsequent publication of that act (see CFI judgment of June 15, 2005, Case T-10/02 *Ober v Commission*, act not reported, para 72-87).

¹²⁴ ECJ, Case 8/72 *Europemballage and Continental Can v Commission* [1972] E.C.R. 215, para.18; CFI, Case T-192/95 *H v Commission* [1997] E.C.R. II-4401, para.32 (English abstract at I-A-133). Consequently, to send only a brief summary of the contents of the act is not sufficient and will not start time running for the purposes of bringing proceedings (ECJ, Case C-143/95 *P Commission v Socarte and Others* [1997] E.C.R. I-1, para.32).

¹²⁵ CFI, Joined Cases T-374/94, T-375/94, T-384/94 and T-385/94 *European Night Services and Others v Commission* [1998] E.C.R. II-3141, paras 75-79. In that case, the Court of First Instance found that the first notification had been made in a proper act authorised to take delivery of mail under the French postal rules and so this did not cause time to start running.

¹²⁶ ECJ, Joined Cases 21 and 23/53 *SYNPAF v High Authority* [1959] E.C.R. 127, at 136; ECJ, Case 224/53 *Forster v Victoria v Commission* [1954] E.C.R. 2365, para.9.

¹²⁷ ECJ, Joined Cases 220 and 221/73 *ALA and ALFER v Commission* [1979] E.C.R. 1573, para.9; ECJ (order of April 27, 1986), Case 352/85 *Franco and Romet v Commission* [1986] E.C.R. 2221, para.7; ECJ (order of February 5, 1992), Case C-59/91 *France v Commission* [1992] E.C.R. I-525, para.8. An excusable error can occur "when the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party, acting in good faith and exercising all the diligence required of a normally well-informed person" (ECJ, Case C-193/01 *P. Parthenis v Council* [2003] E.C.R. I-4507, para.26).

Notification to an undertaking. If the act is addressed to a company, notification to the registered office suffices. Companies have no right to require the Commission to give notice at a place other than the registered office or to a particular person.¹²⁸ In the case of companies, the rule is that measures addressed to the parent company may not be validly notified to subsidiaries.¹²⁹

7-167

Burden of proof. The party alleging that the time-limit for bringing proceedings has run out has to prove the date on which time started running.¹³⁰ When the time-limit for instituting proceedings is exceeded, the applicant will bear the burden of proving the existence of force majeure or excusable error. However, in order for legal certainty not to suffer too much, these exceptions are strictly interpreted.¹³¹

7-169

3. Date on which the applicant had notice of the act

Subsidiary criterion. The criterion of the day on which a measure came to the knowledge of an applicant is subsidiary to the criteria of publication or notification of the measure.¹³² This means that an individual who already has knowledge of the content of an act before it is published in the *Official Journal* is not obliged to bring proceedings within two months of the date when it came to his or her knowledge, but may wait until it is published.¹³³ The same applies where an act comes to the addressee's knowledge before it is officially notified to it.¹³⁴

7-169

¹²⁸ ECJ, Case 42/95 *Cockfield-Somerville v Commission* [1995] E.C.R. 3749, paras 10-11.

¹²⁹ ECJ, Case 43/95 *ICI v Commission* [1972] E.C.R. 519, paras 34-35. In that case, however, the parent company had had full knowledge of the contested act and exercised the right to bring proceedings within the prescribed period. Consequently, the finding that notification might not have been properly effected had no bearing on the case (ibid., paras 39-44).

¹³⁰ CFI, Joined Cases T-70 and T-71/92 *Flormex and VGE v Commission* [1997] E.C.R. II-693, para.74 (order of April 11, 2000), Case T-263/97 *GAL Persepolis Sorbonne v Commission* [2000] E.C.R. I-2941, para.48.

¹³¹ ECJ, Case 254/82 *Buenari v Commission* [1984] E.C.R. 357, paras 11-12; ECJ, Case 224/81 *Forster v Victoria v Commission* [1954] E.C.R. 2343, para.13; ECJ, Case 209/83 *Volcanaria v Commission* [1984] E.C.R. 3059, paras 21-22; CFI, Case T-12/90 *Soyer v Commission* [1991] E.C.R. II-112; CFI, Joined Cases T-33 and T-74/93 *Siobon v European Parliament* [1993] E.C.R. II-249, paras 32-36; CFI, Case T-314/93 *Caltef and Others v Commission* [1995] E.C.R. I-621, para.40.

¹³² CFI, Case T-256/97 *Alitalia v Commission* [2000] E.C.R. I-3971, para.8.

¹³³ CFI, Case T-140/95 *Ryanair v Commission* [1998] E.C.R. II-3277, para.25; CFI, Case T-11/95 *A.P. v Commission* [1998] E.C.R. II-3235, paras 47-48; CFI, Case T-106/95 *Wirtschaftsuniversität Wien v Commission* [1999] E.C.R. II-2155, paras 28-31; CFI, Case T-83/95 *British Steel v Commission* [1998] E.C.R. I-2083, paras 33-36; CFI, Case T-146/95 *Ad v Commission* [1995] E.C.R. II-129, paras 33-37. For an extensive analysis of this case-law with reference to State aid, see Conlon and O'Grá, "Contentious de la législation dans le domaine des aides d'État: les récentes évolutions dans l'application des articles 133 et 175 du traité CE" (1999) C.D.E. 66-69.

¹³⁴ Ibid.

The period for commencing proceedings in the case of interested third parties seeking annulment of an act addressed to another person begins—except in the case of publication in the *Official Journal*—on the day on which that person acquired knowledge of the existence and the precise contents of the measure and of the reasons on which it is based in such a way as to enable him or her profitably to exercise his or her right of action.⁶¹ If the act is published in the *Official Journal*⁶² or in an official publication of a Member State⁶³ or if it is brought to the notice of interested third parties, this will constitute sufficient notice, with the result that time will start running.⁶⁴ However, whether an action for annulment brought by an interested third party against an act directed to another person is admissible does not depend on the fact of publication or notification. An application lodged before publication or notification will be admissible.⁶⁵

A third party who acquires precise knowledge of the content of an act (not published in the *Official Journal*) must bring proceedings within two months of the moment at which it acquired that precise knowledge.⁶⁶ The expression "precise knowledge of the content of an act" does not mean knowledge of every aspect of the decision but of its essential contents.⁶⁷ It has been held that where the applicant had knowledge of the contested act from a letter of which the date of receipt could not be definitely established, the period for commencing proceedings began on the date on which the applicant itself referred to the act in a letter.⁶⁸

⁶¹ ECI, Case 336/84 *Dürringer Hüttenwerke v Commission* [1985] E.C.R. 3751, para.14; ECI, Case 378/87 *Top AG Holzertrieb v Commission* [1989] E.C.R. 1259, para.13.

⁶² ECI, Case 75/79 *Körschke v Commission* [1980] E.C.R. 563, para.7; CFI, Case T-350/94 *ARUFFAZZI and ASIT v Commission* [1996] E.C.R. II-2189, para.42.

⁶³ ECI, Joined Cases 11 and 33/81 *Rühmann and Others v Commission* [1982] E.C.R. 501, at 502.

⁶⁴ Time will start running irrespective as to whether or not the applicant had actual knowledge of the act which is published in the *Official Journal*. See CFI (order of July 27, 2004), Case T-235/04 *Ramb and Others v European Parliament and Council*, not reported, para.9-12.

⁶⁵ ECI, Joined Cases 172 and 226/83 *Hoogovens Group v Commission* [1985] E.C.R. 1531, para.8; CFI (judgment of June 15, 2005), Case T-37/02 *Olsen v Commission*, not yet reported, para.20.

⁶⁶ ECI, Case C-305/93 *Commission v Council* [1995] E.C.R. I-655, paras 18-22. It could be inferred from the wording of this judgment that interested third parties invariably have to comply with this time-limit, irrespective as to whether or not the contested act has entered into force. But the objection to this interpretation is that if the act does not enter into force within two months of the time at which the third party acquired knowledge of it, the action would have to be brought against an act which does not yet produce any legal effects.

⁶⁷ CFI, Joined cases T-485/93, T-491/93, T-494/93 and T-515/93 *Dreyfus and Others v Commission* [2000] E.C.R. II-3659, para.45.

⁶⁸ CFI (order of April 25, 1994), Joined Cases T-452 and T-455/93 *Peters and Lopez v Commission* [1994] E.C.R. II-215, paras 33-34.

However, a third party may not remain idle indefinitely until it acquires precise knowledge of the content of an act. Indeed, if interested parties are put on notice of the existence of an act, they are under an obligation to request the complete text of the act within a reasonable period.⁶⁹ So, where the applicant fails to ask for the full text of the act after it had had knowledge of its existence, its application will be held to be inadmissible if, at the time when it had cognizance of the content of the act, the reasonable time had expired.⁷⁰

D. EXAMINATION *EX OFFICIO* OF THE CONDITIONS GOVERNING THE ADMISSIBILITY OF AN ACTION

Ex officio examination. The conditions governing the admissibility of an action are a matter of public policy. The Community Courts therefore examine of their own motion absolute bars to proceedings, which include bars relating to the time-limit for bringing an action,⁷¹ to whether the contested measure is of a challengeable nature,⁷² to the interest of the applicant in obtaining the annulment of the contested measure⁷³ and to

⁶⁹ ECI, Case 15/84 *Test Testet v Commission* [1986] E.C.R. 387, paras 9-11 (period of 14 months held to be reasonable); ECI, Case C-180/83 *Wittekampverzekering Eiben- and Stedindustrie v Commission* [1985] E.C.R. I-4413, para.22 (two years held to be unreasonable); ECI (order of March 3, 1993), Case C-102/92 *Ferrero Acciaierie Sarda v Commission* [1993] E.C.R. I-561, paras 13-15 (two months held to be unreasonable); CFI (order of February 19, 1994), Case T-458/93 *Früh v Commission* [1994] E.C.R. II-33, paras 33-34 (one year and 10 months held to be unreasonable); CFI, Case T-465/93 *Societate Gruppo di Azione Locale "Adria Mediterranea" v Commission* [1994] E.C.R. I-361 (7.5 months held to be reasonable); CFI, Joined Cases T-412, T-413 and T-434/93 *Socarte and Others v Commission* [1995] E.C.R. II-503, para.49; CFI, Case T-102/94 *Grundpark Großhauzen v Commission* [1995] E.C.R. II-3007, paras 24-25 (7 months held to be unreasonable); CFI (order of September 16, 1997), Case T-151/95 *INEF v Commission* [1997] E.C.R. II-1541, para.46 (13 months held to be unreasonable); CFI (order of July 15, 1998), Case T-155/95 *LPV and GEOTA v Commission* [1998] E.C.R. I-2751, para.44 (6 months held to be unreasonable); CFI (order of May 27, 2005), Case T-485/04 *COBE v Commission*, not reported (4.5 months held to be unreasonable).

⁷¹ CFI, Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta v Commission* [1998] E.C.R. II-3151, paras 93-103; CFI (order of May 27, 2005), Case T-485/04 *COBE v Commission*, not reported.

⁷² ECI, Case 4/67 *Coltign v Commission* [1967] E.C.R. 365, at p. 372; ECI, Case 103/79 *Belfore v Commission* [1980] E.C.R. 1769, para.3; ECI, Case 227/83 *Mouton v Commission* [1984] E.C.R. 3113, para.12; CFI, Case T-28/85 *Moritz v Commission* [1997] E.C.R. II-781, para.13; CFI, Joined Cases T-142/01 and T-285/01 *OPTUC v Commission* [2004] E.C.R. II-329, para.30.

⁷³ CFI (order of April 25, 2004), Case T-305/02 *SGL Carbon v Commission* [2004] E.C.R. II-1351; CFI (order of July 11, 2004), Case T-29/03 *Comunidad Autónoma de Andalucía v Commission*, not yet reported.

⁷⁴ See CFI judgment of September 28, 2004, Case T-316/00 *MCI v Commission*, not yet reported, paras 44-45.

standing to bring proceedings.⁶⁰ The *lis pendens* objection will also be raised by the Community courts of their own motion.⁶¹

- 7-171 **Timeframe.** The admissibility of an action is judged by reference to the situation prevailing when the application was lodged.⁶²

IV. CONSEQUENCES

A. RESULT OF AN APPLICATION FOR ANNULMENT

- 7-172 **Power of the Court limited to annulment.** If the action is well founded, the Court of Justice or the Court of First Instance will declare the contested act void.⁶³ If the application is not well founded, it will be dismissed.

The Court of Justice and the Court of First Instance may also declare part of the contested act void, either by annulling some of its provisions or by confining the declaration of nullity to some substantive or personal aspect.⁶⁴ The applicant may have sought partial annulment⁶⁵ or the Court of Justice or the Court of First Instance may itself take the view that only

⁶⁰ ECJ, Case C-295/00 *P. Italy v Commission* [2004] E.C.R. I-4837, para.35; CFI, Case T-238/94 *ESA v Commission* [1997] E.C.R. II-1335, para.27; CFI (Judgment of July 1, 2004), Joined Cases T-105/01 and T-75/01 *Société de Mines de Sédoum-Lombrès v Commission*, not yet reported, paras 52-53; CFI (Judgment of December 1, 2004), Case T-274/01 *Kranzfranz v Commission*, not yet reported, para.34. See, however, with respect to a possible disappearance of an interest in bringing proceedings, T-117, *supra*.

⁶¹ ECJ, Joined Cases 45 and 49/70 *Bade v Commission* [1971] E.C.R. 465, para.11; ECJ, Case T-257/72 *Perinella v Council* [1973] E.C.R. 511, para.5; CFI (order of March 10, 2005), Case T-223/00 *Gardens Hotels and Others v Commission*, not yet reported, para.30; CFI (order of July 14, 2005), Case T-75/03 *Günther v Commission*, not yet reported, para.7. This objection will be raised when more than one action is brought between the same parties seeking the annulment of the same act on the basis of the same submission (see ECJ, Joined Cases 172 and 226/83 *Hoogovens Group v Commission* [1985] E.C.R. 2431, para.9; ECJ, Joined Cases 358/83 and 54/86 *France v European Parliament* [1985] E.C.R. 4821, para.12; CFI (order of March 10, 2005), Joined Cases T-223/00, T-229/00, T-242/00, T-245/00 to T-243/00, T-250/00, T-252/00, T-255/00 to T-259/00, T-265/00, T-268/00, T-271/00, T-274/00 to T-278/00, T-281/00, T-287/00 to T-295/00 *Gruppo emersioni del porto di Venezia and Others v Commission*, not yet reported, para.40; CFI (order of July 14, 2005), Case T-79/05 *Günther v Commission*, not yet reported, para.11.

⁶² ECJ, Case 34/84 *Brundage and Others v Commission* [1984] E.C.R. 3591, para.3; CFI (order of February 15, 2005), Case T-228/02 *PKK and Others v Council*, not yet reported, para.30.

⁶³ EC Treaty, Art.231, first para.; EASC Treaty, Art.147, first para. In an action for annulment, the applicant can claim only the annulment of the contested act (see CFI (order of February 26, 2005), Case T-103/01 *Von Pöschel v Commission*, not yet reported, paras 55-58).

⁶⁴ See, by way of example, ECJ, Joined Cases 35, 44, 110, 226 and 228/83 *Stahlwerke Pöschel-Schlagter and Others v Commission* [1985] E.C.R. 4309, point 1 of the operative part; CFI, Case T-265/90 *Fraser v Commission* [1992] E.C.R. II-1789, para.52-57.

⁶⁵ If the applicant seeks only partial annulment of an act and the Court of Justice or the Court of First Instance considers that only annulment of the complete act is possible, it may not rule *ultra petita* (ECJ, Case 33/71 *Faust v Commission* [1973] E.C.R. 483, para.12), but would have to declare the application inadmissible (see *Joëlle Le comte*, at 133).

some provisions of the contested act must be annulled.⁶⁶ However, partial annulment of a Community act is possible only if the elements to be annulled may be severed from the remainder of the act.⁶⁷ The requirement of severability is not satisfied where partial annulment of an act would have the effect of altering its substance.⁶⁸ This is because the Court of Justice and the Court of Justice cannot "revise" the contested act in annulment proceedings.

Ex tunc effect. The annulment of an act causes it to disappear from the Community legal order from the date on which it came into force (*ex tunc*), so that the parties to the proceedings are restored to the situation which they were in before it entered into force.⁶⁹

The retroactive force of a declaration of nullity may be attenuated, pursuant to the second para. of Art.231 of the EC Treaty, in the light of the aim behind the action or on grounds of legal certainty.⁷⁰ Thus, the Court of Justice and the Court of First Instance may preserve the effects of the annulled act⁷¹ or even declare that it is to remain in force until the

⁶⁶ ECJ, Case 27/76 *United Brands v Commission* [1976] E.C.R. 207, para.261.

⁶⁷ ECJ, Case 1/74 *Thomson-Marcel Poin Association v Commission* [1974] E.C.R. 1563, para.24; ECJ, Joined Cases C-63/94 and C-30/95 *France and Others v Commission* [1995] E.C.R. I-1515, paras 251-259; ECJ, Case C-25/99 *Commission v Council* [2002] E.C.R. I-1121, paras 45 and 48; ECJ, Case C-376/00 *Commission v European Parliament and Council* [2003] E.C.R. I-437, para.53; ECJ, Case C-255/01 *Germany v Commission* [2003] E.C.R. I-1033, para.31; ECJ, Case C-244/03 *France v European Parliament and Council* [2005] E.C.R. I-4021, para.11.

⁶⁸ ECJ, Case 34/85 *Council v European Parliament* [1985] E.C.R. 2155, para.40-42; ECJ, Joined Cases C-63/94 and C-30/95 *France and Others v Commission* [1995] E.C.R. I-1515, para.257; ECJ, Case C-376/95 *Germany v European Parliament and Council* [2000] E.C.R. I-8419, para.117; ECJ, Case C-29/99 *Commission v Council* [2002] E.C.R. I-1121, para.46; ECJ, Case C-225/01 *Germany v Commission* [2003] E.C.R. I-1033, para.34; ECJ, Case C-244/03 *France v European Parliament and Council* [2004] E.C.R. I-4021, para.13. See also CFI, Joined Cases T-65, T-67 and T-75/99 *SIF and Others v Commission* [1999] E.C.R. I-1403, paras 313-339.

⁶⁹ ECJ, Case 22/70 *Commission v Council (the AETR case)* [1971] E.C.R. 263, paras 59-60; ECJ, Joined Cases 97, 98, 99 and 234/66 *Assiret and Others v Commission* [1968] E.C.R. 2381, para.30.

⁷⁰ The power of the Court of Justice to state which effects of the annulled regulation are to be considered as definitive has also been exercised with regard to other types of act: see ECJ, Case 32/73 *Simmenthal v Commission* [1973] E.C.R. 771, para.107—annulment of a decision; ECJ, Case 34/85 *Council v European Parliament* [1985] E.C.R. 2155, para.43—annulment of the act by which the President of the European Parliament declares the budget finally adopted; ECJ, Case C-295/90 *European Parliament v Council* [1992] E.C.R. I-4193, paras 21-22—annulment of a directive; ECJ, Case C-325/95 *United Kingdom v Commission* [1997] E.C.R. I-2729, paras 39-42—annulment of a decision pursuant to which contracts had been concluded under a Community action programme; ECJ, Case C-211/01 *Commission v Council* [2003] E.C.R. I-8513, para. 54-57—annulment of a Council decision concluding an international agreement between the EC and Bulgaria.

⁷¹ ECJ, Case 45/86 *Commission v Council* [1987] E.C.R. 1453, para.23; ECJ, Case 51/87 *Commission v Council* [1988] E.C.R. 5493, para.22; ECJ, Case C-350/93 *European Parliament v Council* [1995] E.C.R. I-1195, paras 32-36; ECJ, Case C-271/94 *European Parliament v Council* [1995] E.C.R. I-1639, para.40; ECJ, Case C-22/96 *European Parliament v Council* [1998] E.C.R. I-3211, para.42.

competent institution has taken the necessary measures to give effect to the judgment annulling the act.⁶¹

B. AUTHORITY OF THE JUDGMENT

1. Declaration of nullity

7-174 *Erga omnes* effect. The declaration of nullity applies *erga omnes*. Consequently, an action for annulment of a measure which has already been declared void is to no purpose.⁶² This is because the annulled act can no longer compromise the applicant's rights or interests.⁶³ In exceptional cases, the Court of Justice or the Court of First Instance may be prompted to surtail the general effect of the declaration of nullity on grounds of legal certainty.⁶⁴

7-175 Obligations for the institutions concerned. The institution whose act has been declared void is required by the first para. of Art.233 of the EC Treaty to take the necessary measures to comply with the judgment.⁶⁵ The Court of Justice and the Court of First Instance have no power to indicate what measures should be taken.⁶⁶ The extent of the obligation to comply with the judgment is determined both by the operative part and by the grounds underlying the operative part.⁶⁷ The institution must comply with the

⁶¹ ECJ, Case 1/71 *Commission v Council* [1973] E.C.R. 575, para.15; ECJ, Case 254/82 *Turner v Council and Commission* [1985] E.C.R. 849, para.32; ECJ, Case 235/87 *Commission v Council* [1988] E.C.R. 259, at 261; ECJ, Case C-295/90 *European Parliament v Council* [1992] E.C.R. I-4153, para. 21-27; ECJ, Case C-65/90 *European Parliament v Council* [1992] E.C.R. I-4593, para. 22-24; ECJ, Joined Cases C-154/97 and C-165/97 *European Parliament v Council* [1999] E.C.R. I-1139, para. 22-24; ECJ, Case C-211/01 *Commission v Council* [2003] E.C.R. I-8923, para. 54-57.

⁶² ECJ, Case C-372/93 *Italy v Commission* [2004] E.C.R. I-3679, para. 33-38 (where the Court of First Instance has annulled a decision and an appeal against its judgment is dismissed, an action brought before the Court of Justice for the annulment of the same decision will be held to be to no purpose).

⁶³ ECJ, Case 3/54 *ASSIDER v High Authority* [1954] E.C.R. 63, at 70.

⁶⁴ ECJ, Case 32/78 *Sinnemühl v Commission* [1979] E.C.R. 771, para.127. See Bribosia and Borive, "Le droit transactionnel jurisprudentiel dans la pratique des juridictions européennes" (2002) R.D.U.L.B. 115-152.

⁶⁵ Art.233 of the EC Treaty is not an autonomous remedy. As a result, a claim cannot be founded on that article. See CFI (order of April 21, 2005), Case T-1903 *Holcim v Commission*, not yet reported, para. 27-40.

⁶⁶ ECJ, Case 33/51 *AKZO Chemie v Commission* [1956] E.C.R. 1965, para.23; ECJ, Case C-195/91 *Foyer Culturel du Sav-Taman v Commission* [1993] E.C.R. I-2667, para.7; CFI, Case T-3789 *Hanning v European Parliament* [1990] E.C.R. II-413, para.75; CFI, Case T-1550 *Snider v Commission* [1992] E.C.R. II-1789, para.65; CFI, Case T-75/95 *Gönder Aluminium v Commission* [1996] E.C.R. II-457, para.18; CFI (order of January 14, 2004), Case T-201/02 *Makazianko Metro and Melchani v Commission* [2004] E.C.R. II-181, para.12.

⁶⁷ ECJ, Joined Cases 57, 58, 59 and 215/86 *Attard and Others v Commission* [1988] E.C.R. 2181, para.27; ECJ (order of July 13, 2000), Case C-499 *F. Gómez de Enterría y Sánchez v European Parliament* [2000] E.C.R. I-6331, para. 19-20; ECJ, Case C-438/93 *P Industrie der Poudres Spéculaires v Council* [2000] E.C.R. I-3147, para.21; CFI, Case T-224/93 *Tremblay and Others v Commission* [1997] E.C.R. II-2315, para.72; CFI, Case T-154/95 *Aria Motor France and Others v Commission* [2000] E.C.R. II-3453, para.101.

judgment in good faith and may not take any measures liable to circumvent correct implementation of the judgment.⁶⁸

However, the institution concerned is not required to consider whether, in the light of the reasoning of the judgment annulling the contested act, it needs to take measures in relation to periods for whom the party annulled act remains in place.⁶⁹

In addition, an institution which wishes to replace an annulled act may take up the decision-making procedure at the precise point where the illegality arose. This is because the annulment of the final decision does not necessarily affect the validity of the preparatory acts.⁷⁰ The grounds of the judgment annulling the act set out precisely what the reasons are for the annulment pronounced in the operative part and the institution concerned must take account of them in replacing the annulled act.⁷¹

7-176 Compensation. The institution whose act is annulled may in addition be obliged, in complying with the judgment, to pay compensation for the damage originating in the illegality of the act annulled, provided that the all requirements for liability set out in the second para. of Art.238 of the EC Treaty are satisfied.⁷²

7-177 Time-limit. The institution has a reasonable time in which to comply with the judgment.⁷³ What constitutes a reasonable time depends on the nature of the measures having to be taken in order to carry out the judgment declaring the contested act void and on the attendant circumstances.⁷⁴ In the event that there are special difficulties in giving effect to the judgment annulling the contested act, the institution may comply with its obligation to give effect to the judgment by adopting any measure which fairly compensates for the disadvantage suffered by the applicant as a result of the unlawful conduct found.⁷⁵ Failure to comply with the judgment

⁶⁸ See in a staff case: ECJ, Case C-153/95 *P Commission v Giannini* [2000] E.C.R. I-1392.

⁶⁹ ECJ, Case C-31/87 *P Commission v Audi-Daimler Kraft-Produkte and Others* [1995] E.C.R. I-5153, para. 33-71, with a case note by Moloney [2000] C.M.L.Rev. 971-981; CFI, Case T-372/00 *Campaliga v Commission* [2002] E.C.R. SC I-A-49, II-223, para.109 (as regards the duty to give effect to a judgment accepting an act which had already been carried out). See also ECJ, Case C-235/99 *Nachi Europe* [2001] E.C.R. I-1197, para. 24-25.

⁷⁰ ECJ, Case C-415/96 *Spain v Commission* [1998] E.C.R. I-6553, para. 30-32; CFI, Joined Cases T-325/94, T-335/94, T-357/94, T-314/94, T-312/94, T-325/94, T-322/94, T-325/94 and T-335/94 *Lomburpe Vogt, Masouchayev and Others v Commission* [1999] E.C.R. II-551, para. 183-193.

⁷¹ CFI, Case T-206/97 *H & R Eroyed v Commission* [1999] E.C.R. II-1677, para. 56.

⁷² ECJ, Case 266/82 *Turner v Commission* [1984] E.C.R. I, para.5; CFI, Case T-124/89 *Stahlwerke Peine-Salzgitter v Commission* [1991] E.C.R. II-279, para.65; CFI, Case T-5/96 *Apostolides and Others v Commission* [1997] E.C.R. SC II-607, para.37 (English abstract at I-A-237).

⁷³ CFI, Case T-75/93 *Orléans v Commission* [1997] E.C.R. II-351, para.41.

⁷⁴ CFI, Case T-31/95 *De Nijland Impex v Council* [1995] E.C.R. SC II-939, para.34 (English abstract at I-A-327).

constitutes an infringement of Art.233 of the EC Treaty, which may cause the Community to incur liability.⁴⁵

7-273 Reimbursement of fines. If the Court of Justice or the Court of First Instance annuls a decision finding an infringement of Art.81 and/or Art.82 of the EC Treaty and the undertakings concerned have already paid the fines imposed by the decision, the Commission is obliged, pursuant to Art.233 of the EC Treaty, to repay the fines plus interest to the undertakings which successfully brought the action for annulment.⁴⁶ If the Commission does not comply with this obligation, the undertaking concerned has the choice to either introduce an action for failure to act under Art.232 of the EC Treaty or an action for damages under Art.235 of the EC Treaty.⁴⁷ An explicit refusal on the part of the Commission to pay interest on the principal sum is itself a challengeable act.⁴⁸ The undertaking concerned may decide not to introduce an action for annulment of the Commission's refusal to pay interest, but bring a damages claim instead.⁴⁹

Where, in contrast, the undertakings concerned have not paid the fine but furnished a bank guarantee, they are not entitled to claim the costs of that guarantee from the Commission. This is owing to the absence of any causal link between those costs and the unlawful act.⁵⁰

Where the Court of Justice or the Court of First Instance annuls a decision finding an infringement of Art.81 and/or Art.82 of the EC Treaty, the Commission is not obliged to repay fines imposed by that decision to undertakings which did not bring an action for annulment. In the *Ando* case, a number of Swedish woodpulp producers which had not brought an action for annulment of a Commission decision finding an infringement of Art.81(2) of the EC Treaty on account of concerted practices and imposing fines brought an action for annulment of a Commission decision rejecting their claim for repayment of the fines. The undertakings concerned had lodged a request for repayment with the Commission after the Court of Justice had annulled the original decision finding an infringement of Art.81(2) as far as the undertakings which had brought an action against

⁴⁵ CFI, Case T-1150 *Hoeft v. EIB* [2000] E.C.R. II-4719, para.45. Art.233 of the EC Treaty does not, however, constitute an autonomous remedy. See CFI (judgment of April 21, 2005), Case T-234/03 *Hoeft v. Commission*, not yet reported, para.77-82.

⁴⁶ CFI, Case T-101/99 *Conseil v. Commission* [2001] E.C.R. I-2957, para.54-58.

⁴⁷ CFI (order of May 4, 2005), Case T-36/03 *Hoeft v. Commission*, not yet reported, para.33-34.

⁴⁸ ECJ, Case C-123/03 P *Commission v. Greenore* [2004] E.C.R. I-13647, para.41; CFI (order of May 4, 2005), Case T-36/03 *Hoeft v. Commission*, not yet reported, para.44. The mere fact that the fine has been repaid without interest cannot be regarded as a refusal to pay as far as the interest is concerned. Accordingly, the Commission's express refusal to pay interest in subsequent correspondence cannot be regarded as a confirmatory act against which an action for annulment will not lie (ibid., para.47).

⁴⁹ CFI (order of May 4, 2005), Case T-36/03 *Hoeft v. Commission*, not yet reported.

⁵⁰ CFI (order of April 21, 2005), Case T-25/03 *Hoeft v. Commission*, not yet reported, paras 118-122.

it were concerned. The Court of First Instance had held that it would be inconsistent with the principle of legality for the Commission not to have a duty to examine its initial position in relation to undertakings which had not brought an action for annulment of the original decision after the Court of Justice had held that the alleged concerted practice was not proved.⁵¹ On appeal, however, the Court of Justice did not follow the lower court but relied on the principle that where the contested act is not challenged by its addressees within the time-limit prescribed by Art.230 of the EC Treaty, it becomes definitive *vis-à-vis* those addressees. Moreover, it held that the authority of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever.⁵²

2. Dismissal of an application for annulment

Res judicata. After a judgment has been given dismissing an application for annulment, the applicant may not raise the same pleas in another action brought against the same act.⁵³ An action for annulment which is brought after a judgment dismissing an action brought between the same parties, has the same purpose and is based on the same submissions as the application which led to the first judgment will be inadmissible on the ground that the first judgment has the authority of *res judicata*.⁵⁴ But the principle of *res judicata* extends only to matters of fact and law actually or necessarily settled in the judicial decision in question.⁵⁵

⁵¹ CFI, Case T-127/95 *Ando* *Kraft Products and Others v. Commission* [1997] E.C.R. II-1335, para.72.

⁵² ECJ, Case C-341/97 P *Commission v. Ando* *Kraft Products and Others* [1999] E.C.R. I-3361, paras 53-57, with a case note by Maloney [2000] C.M.L.Rev. 571-581.

⁵³ ECJ, Case 50/82 *Italy v. Commission* [1983] E.C.R. 537, paras 17-18. It seems that any person is barred from raising the same pleas in another action for annulment or action for damages relating to the same act (CFI judgment of October 29, 2005), Case T-415/03 *Cofradía de productores de "San Pedro" and Others v. Council*, not yet reported, paras 66-67.

⁵⁴ ECJ (order of April 1, 1987), joined Cases 159 and 257/84, 12 and 254/83, *Alinworth v. Commission* [1987] E.C.R. 1573, para.1; CFI, joined Cases T-216/01 and T-118/01 P & O *European Ferries and Others v. Commission* [2001] E.C.R. II-2557, paras 75-82, in which the Court of First Instance held that *res judicata* could not be pleaded in respect of an earlier judgment pronouncing annulment in new proceedings seeking to annul the decision taken to comply with that judgment. The reason was that the proceedings did not have the same subject-matter.

⁵⁵ ECJ (order of November 13, 1995), Case C-277/93 P *Levy v. Commission* [1996] E.C.R. I-6169, para.50. CFI, Case T-212/01 *Meyer v. Commission* [2003] E.C.R. II-117, paras 22-23: *res judicata* does not mean that a first judgment in which the application was held inadmissible caused a second application between the same parties and having the same subject-matter to be inadmissible. This was because, in the first judgment, the Court of First Instance decided on point of fact or law by which it could be bound in the second proceedings.

V. THE CONSTITUTION

- 7-180 General. The changes which the Constitution is intended to introduce as regards annulment actions cover (i) the enlargement of the category of defendants against which annulment proceedings may be instituted; (ii) the inclusion of the Committee of the Regions in the category of "semi-privileged" applicants and (iii) the improvement of judicial protection for individuals.

A. ENLARGEMENT OF THE CATEGORY OF DEFENDANTS AGAINST WHICH AN ANNULMENT ACTION MAY BE BROUGHT

- 7-181 Defendants. Under the first para. of Art. 230 of the EC Treaty, acts of the European Parliament, the Council, the Commission and the European Central Bank can, subject to certain conditions, be the subject of an action for annulment. Art. II-365(1) of the Constitution now provides that the Court can also review the legality of acts of the European Council and of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties. Since, under the provisions of the Constitution, the European Council is one of the institutions⁴⁴ of the Union which adopts acts intended to produce legal effects,⁴⁵ it was only logical to include its acts amongst those against which an action for annulment will lie insofar as they are intended to produce legal effects *vis-à-vis* third parties. As regards the acts of bodies, offices or agencies of the Union, their inclusion amongst the acts that may be challenged in an action for annulment does not constitute the mere incorporation of the existing *acquis* into the Constitution given that the question of the admissibility of annulment actions brought against acts of bodies, offices or agencies of the Community has not yet been settled by the Court of Justice.⁴⁶

B. INCLUSION OF THE COMMITTEE OF THE REGIONS IN THE CATEGORY OF "SEMI-PRIVILEGED" APPLICANTS

- 7-182 Committee of the Regions. The EC Treaty already includes a category of "semi-privileged" applicants⁴⁷ which are entitled to challenge a Community act where the action is brought for the purpose of protecting their prerogatives. This category, which under the third para. of Art. 230 of the EC Treaty is made up of the Court of Auditors and the European Central Bank, is extended by Art. II-365(3) of the Constitution to cover the

⁴⁴ Constitution, Art. I-19.

⁴⁵ See, for example, Art. I-23(2), second subpara, Art. I-24(3), and Art. I-45(6) of the Constitution.

⁴⁶ See 7-457, *supra*.

⁴⁷ See 7-351, *supra*.

Committee of the Regions. The former case-law developed when the European Parliament was still only a semi-privileged applicant will have a bearing on the assessment of the admissibility of future actions brought by the Committee of the Regions (as well as by the Court of Auditors and the European Central Bank).⁴⁸

Violation of the principle of subsidiarity. In one specific situation, namely where the Committee of the Regions considers that a legislative act infringes the principle of subsidiarity, it will be entitled to bring an action for annulment even if the action is not brought for the purpose of protecting the Committee's prerogatives. Under the Protocol on the application of the principles of subsidiarity and proportionality,⁴⁹ the Court of Justice is to have jurisdiction in actions brought by the Committee of the Regions on grounds of infringement of the principle of subsidiarity by a European legislative act for the adoption of which the Constitution provides that it be consulted.⁵⁰ The action will be admissible regardless whether the Committee was actually consulted.⁵¹

C. IMPROVEMENT OF JUDICIAL PROTECTION FOR INDIVIDUALS

Acts of general application. As indicated above, the fourth para. of Art. 230 of the EC Treaty seems totally to preclude individuals from bringing an action for annulment against measures of general application. The reason is that, in accordance with a literal reading of this provision, an individual may bring an action for annulment only against "genuine" decisions and "disguised" decisions; that is to say, decisions adopted in the form of regulations.⁵² However, the case-law has evolved so that the only question to be determined in relation to the admissibility of proceedings brought by an individual against an act which is not addressed to that person is whether the act is of direct and individual concern to that person.⁵³ If this is the case, the action will be admissible even if the annulment of a measure of general application is sought.⁵⁴

⁴⁸ *Ibid.*

⁴⁹ Art. 6.

⁵⁰ If, in the context of one and the same action, the Committee of the Regions raises a plea relating to the infringement of the principle of subsidiarity as well as other pleas, it may be argued that the latter plea will be admissible only if it can be shown that they are raised for the purpose of protecting the Committee's prerogatives.

⁵¹ An action on the same grounds may also be brought by a Member State on behalf of their national Parliament or a chamber of it (Protocol on the application of the principles of subsidiarity and proportionality, Art. 5).

⁵² ECJ, Case 103/76 *Krohn/Schöten-Hontig* [1977] E.C.R. 797, at 805.

⁵³ ECJ, Case C-309/89 *Costanzo v. Comune* [1991] E.C.R. I-1853, para. 19; ECJ, Case C-452/88 *Niederlande/Arten v. Council* [1991] E.C.R. I-5775, para. 55.

⁵⁴ See 7-876, *supra*; ECJ, Case C-326/89 *Costanzo v. Council* [1994] E.C.R. I-1853; CFI, Case T-243/91 *Sony Computer Entertainment Europe v. Commission* [2005] E.C.R. II-4189, paras 55-75.

Art.III-365(4) of the Constitution codifies this development in the case-law by providing that "[a]ny natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her".⁴¹

Even if the general nature of the challenged act does not as such preclude the admissibility of the action for annulment, an individual will normally not be successful in demonstrating that he or she is individually concerned by such an act. Indeed, according to settled case-law, persons are individually concerned by an act only if that act affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed.⁴²

The rationale of this case-law lies in the fact that the possibility, or even the obligation,⁴³ for national courts to make a reference for a preliminary ruling to the Court of Justice is deemed to afford effective protection for the rights which individuals derive from Community law. This is because Community measures of general application are frequently implemented in the various Member States by national measures which can be challenged before national courts and those courts may—or must—refer a question to the Court of Justice on the validity of the Community act on which the national measure is based.

Problem of effective judicial protection. In some cases, it happens that an individual has no remedy in order to challenge the legality of a provision of Community law in a national court. This can occur in particular where a regulation does not require the Member States to adopt any implementing measures. Such a situation has already occurred in the cases of *Régo-Quéré* and *Unión de Pequeños Agricultores*, to which reference has already been made.⁴⁴ However, the Court of Justice has refused to relax its interpretation of the concept of "individual concern", even where the result is that in certain cases individuals could not enjoy effective legal protection.⁴⁵ However, the Court of Justice did add that it is possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the EC Treaty, "but that it is for the Member States, if necessary, in accordance with Art.48 EU, to reform the system currently in force".⁴⁶

⁴¹ See Greiner, "Der Rechtschutz des Einzelnen gegen Sekundärrechtssakte der Union gem. Art.III-365 Abs. 4 Neufassung des Vertrags über eine Verfassung für Europa" (2004) *Eu.G.R.Z.* 571-573.

⁴² See *ECJ*, Case 25/62 *Piombetti v Commission* (1963) *E.C.R.* 35, at 103; *ECJ*, Case C-21/93 *Greenpeace Council and Others v Commission* (1993) *E.C.R.* I-1631, para.7.

⁴³ See T-455, *supra*.

⁴⁴ *CFI*, Case T-17/01 *Régo-Quéré v Commission* (2002) *E.C.R.* II-3365; *CFI* (order of November 24, 1999), Case T-17/99 *Unión de Pequeños Agricultores v Council* (1999) *E.C.R.* II-3137.

⁴⁵ *ECJ*, Case C-520/03 *P Unión de Pequeños Agricultores v Council* (2005) *E.C.R.* I-5671; *ECJ*, Case C-264/02 *P Commission v Régo-Quéré* (2004) *E.C.R.* I-3413.

⁴⁶ Case C-520/03 *P Unión de Pequeños Agricultores v Council* (2005) *E.C.R.* I-5671, para.45.

Opening for regulatory acts which do not entail implementing measures. It is in this context that the new Art.III-365(4) of the Constitution should be understood.⁴⁷ It provides that "[a]ny natural or legal person may [...] 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". Art.III-365(4) recaptures the substance of the fourth para.Art.230 of the EC Treaty but relaxes the admissibility conditions—by deleting the "individually concerned" condition—for regulatory acts which do not require implementing measures.

Concept of "regulatory act". The concept of a "regulatory act" is not defined among the legal instruments referred to in Art.I-33 of the Constitution. It is apparent, however, from the *actes préparatoires*⁴⁸ that the authors of that provision had in mind non-legislative acts of general application or, in other words, regulations and decisions with no specific addressees.⁴⁹

Extent of the opening. Once the provisions of the Constitution enter into force, an action for annulment brought by an individual against binding non-legislative acts of general application will be admissible if the individual successfully demonstrates that the act does not entail implementing measures and is of direct concern to him.⁵⁰

It must be stressed, however, that the opening created by Art.III-365(4) of the Constitution is not as large as the one envisaged by the Court of First Instance in its judgment in *Régo-Quéré*.⁵¹ This is because the relaxation of the admissibility conditions in *Régo-Quéré* would have covered both legislative and non-legislative acts of general application. In contrast, the opening created by Art.III-365(4) of the Constitution only covers non-legislative acts of general application. In other words, an action for annulment brought by an individual against a European law will be admissible only if the applicant successfully demonstrates that the act is of direct and individual (within the meaning of the *Piombetti* case law⁵²) concern to him or her irrespective as

⁴⁷ CONV 71401.

⁴⁸ CONV 71401.

⁴⁹ If a third party challenges a decision addressed to a specific addressee (see Constitution, Art.I-33(1), *infra* *subpara.*), he or she would have to satisfy the traditional test set out in the *Piombetti* case-law.

⁵⁰ As far as framework laws and regulations which entail implementing measures are concerned, the system of judicial protection will remain unchanged. An action for annulment brought by an individual against such an act will in principle be inadmissible, since the applicant will not be directly concerned by a Community act which still has to be implemented at national level (see, for example, *CFI*, Joined Cases T-17/93 and T-17/95 *in T-17/93 Schmeider and Giers v European Parliament and Council* (2000) *E.C.R.* II-3459, paras 32 and 71).

⁵¹ *CFI*, Case T-17/01 *Régo-Quéré v Commission* (2002) *E.C.R.* II-3365.

⁵² *ECJ*, Case 25/62 *Piombetti v Commission* (1963) *E.C.R.* 35.

to whether the act in question requires further implementation at national level.

So, Art.III-365(4) does not improve the legal protection afforded to individuals with regard to European laws. Indeed, since individuals will be individually concerned by a European law only in very exceptional situations,⁴⁴ they will normally not be in a position to challenge such acts before the Court of First Instance by bringing an action for annulment.

⁴⁴ See T-680 and T-681, *supra*. For a wider discussion of the consequences of Art.III-365(4), see Corbett: "An Effective Remedy For All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution" (2005) *TS-arg For.L.Rev.* 110, at 131-136.

VI Action for failure to act

1. The function of action and its relationship with action for annulment
2. Reviewable omissions
3. Standing
4. Procedure
5. Effect of finding infringement

Mandatory Reading

Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 428-433.
Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 8.

Tanasije Marinkovic, PhD.
Svetislava Bulajic, LL.M.

The Court's distinctive judicial procedures could be used to design an appropriate intervention procedure without adding to burdens or applicants in the shape of greater expense or delay. Strict time-limits can already be imposed for interventions with limited rights of contradiction and oral observations already require the Court's permission. Submissions could be limited as to length, increased use could be made of the *habeas corpus* if oral intervention were thought necessary, or they could be collected and evaluated by the Advocate General, forming part of his *Opinion*.

6 ARTICLE 265 TFEU AND THE FAILURE TO ACT

In certain circumstances positive duties are placed by EU law upon the EU institutions to act. They are under a duty to realise some Treaty objectives¹²² and secondary legislation often places duties upon the institutions.¹²³ The conditions for bringing an action if an institution fails to act in such circumstances are set out in Article 265 TFEU.

Article 265 TFEU

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

There is a similar distinction between privileged and non-privileged applicants as in Article 263 TFEU, with the former laid out in Article 265(1) TFEU and the latter in 265(2). Privileged applicants comprise a wider group under Article 265 TFEU than under Article 263 TFEU, as all EU institutions and Member States are granted that status, whilst under the latter provision it is available just to Member States, the Commission, the Parliament and the Council. The European Council, the European Central Bank and (hypothetically) the Court of Justice all have a wider standing, therefore, under Article 265 TFEU.¹²⁴

¹²² On the member transport policy, see Case 12/68 *Parliament v Council* [1968] ECR 1513.

¹²³ For example, the Commission is required to examine the fiscal and legal position of any road and about a breach of EU competition law which is made by a person with a big truck. *See* Case 242/80 *Arbeitsgemeinschaft der Wirtschaftsjuristen* [1980] ECR I-1413.

¹²⁴ The list of institutions is set out in Article 13 TFEU.

Quirns are also added to the provision by the Lisbon Treaty. Prior to the Treaty, only the Parliament, Council and Commission were institutions against whom an action could be brought. Two further institutions have been added to raise the European Council and the European Central Bank. The second paragraph, however, refers to an action only being available if the 'institution, body or agency' has been called upon to act. This suggests that, in principle, the action should be available against EU agencies, bodies and offices as well in the same way as Article 263 TFEU is available against acts taken by them. This is the preferable interpretation. It not only secures consistency between the provisions but also ensures that there is no lacuna in the rule whereby an EU body or agency can escape judicial scrutiny by simply doing nothing.¹²⁵

Articles 263 and 265 TFEU were described in an early judgment as prescribing 'one and the same method of recourse'.¹²⁶ This means, as one author put it, that:

the system of remedies ... would be incomplete if Community institutions were subject to judicial control only in respect of their positive actions while they could evade the obligations imposed upon them by simply failing to act.¹²⁷

It also means that the provisions should be interpreted in a parallel manner. There is thus a similar distinction between privileged and non-privileged applicants. Non-privileged applicants can only invoke Article 265 TFEU if they would be directly concerned by the regulatory act or directly and individually concerned by the non-regulatory act which has not been adopted.¹²⁸

However, there are some lacunae in this coverage.

First, an action under Article 265 TFEU can only be commenced against an EU institution. If it is under a duty to perform a task, if there is only a discretion, no remedy exists. The decision of the Court to rule in some circumstances that the matter is one of discretion rather than obligation has been controversial as it creates a gap in protection. We saw in Chapter 8 how the decision to hold that the Commission had complete discretion whether to launch enforcement proceedings against a Member State under Article 258 TFEU for infringement of EU law has led to private parties being largely excluded from this important process.¹²⁹

Secondly, an institution, if called upon to act,¹³⁰ avoids any further action if it defines its position within two months. The principle of complementarity would require that this position be an act capable of being reviewed under Article 263 TFEU. However, an institution can define its position without adopting an act that is reviewable under that provision.¹³¹ It can also act in a different way from that in which it was called upon to act.¹³²

Finally, the institution must be called upon to act by the applicant. If this does not happen, there will be no action.¹³³ Whilst this Article sets no time limit within which an action must

¹²⁵ Case T-41/92 *Sagor v SAR* [2005] ECR II-1717.

¹²⁶ Case 15/70 *Cheney v Commission* [1970] ECR 973.

¹²⁷ A. Tiedt, 'The Law as it Stands on the Appeal for Failure to Act' [1975] 2 LJS 65.

¹²⁸ Case T-335/94 *Air France v Commission* [2005] ECR II-1210; Case T-40/94 *Autodesk v Commission* [2007] ECR II-1229.

¹²⁹ Case 247/81 *Stor Svud v Commission* [1983] ECR 241. See pp. 141–2.

¹³⁰ Joined Cases T-41/92–T-42/92 and T-43/92–T-44/92 *Sagor v Commission*, Judgment of 3 September 2005.

¹³¹ Case 317/81 *Parliament v Council* [1983] ECR 4613; Case 332/87 *European Parliament v Council* [1988] ECR 551; Case T-185/94 *Centre National de la Recherche Scientifique v Commission* [1995] ECR II-1753.

¹³² Case C-25/95, *Fraiture v Commission* [1995] ECR I-1719; Case T-422/95 *Yukos v Commission*, Judgment of 7 October 2009.

¹³³ Joined Cases T-12/91–T-12/91 and T-85/94–T-85/94 *Reynolds v Commission*, Judgment of 3 September 2009.

be brought, if the institution's position on the matter is clear to the applicant, it must bring the request for action within a reasonable period. In *Netherlands v Commission*, a case which involved Article 35 ECSC, the parallel provision to Article 265 TFEU in the ECSC Treaty, the Commission informed the Dutch government that a French restructuring plan did not violate the Treaty provisions on state aids.¹²⁵ The Dutch government waited a further sixteen months before requesting the Commission to act. The Court, reasoning from the principle of legal certainty, stated that an applicant did not have a right to raise the matter with the Commission indefinitely and had delayed too long in this instance.

6 THE PLEA OF ILLEGALITY

Particularly in areas where the Commission enjoys delegated powers, parties face a problem if they want to challenge an act. The Commission measure may be addressed to them or to a direct and individual concern to them, but they may want to challenge the act on the basis that the parent measure is illegal. They may face difficulties here because the time limits have passed, or because they may not satisfy the *locus standi* requirements in relation to the parent instrument. The plea of illegality addresses this by allowing a party in proceedings against a measure to plead the inapplicability of its parent measure.

Article 277 TFEU

Notwithstanding the expiry of the period laid down in Article 263, fifth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

The plea of illegality is a permissive procedure. It cannot be brought as an independent action but can only be invoked in the context of proceedings brought under some other provision of the Treaties. To that end, the party must secure *locus standi* under the other procedure and observe the time limits set out in that procedure, albeit that the time limits for challenging the parent measure may have lapsed.¹²⁶ To give an example, a party might want to challenge a Decision on the grounds that the enabling Regulation was illegal. It would have to show that it had *locus standi* under Article 263 TFEU to challenge the Decision, and that it observed the time limits set out there for challenging the Decision within two months of its publication. It does not matter that it is more than two months since the Regulation was adopted.

The concern with the plea of illegality is that it should not lead to an abuse of process where it is used to subvert other procedures. This has led to two refinements.

First, a plea of illegality may not be invoked where a matter is pending before another court or in another action before the same court.¹²⁷ For this to be the case, it must be considered to be *lis pendens*. This will only happen if three conditions are met. The actions must be between the same parties, must seek the same object and must do so on the basis of the same

¹²⁵ Case 53/70 *Netherlands v Commission* [1970] ECR 525.

¹²⁶ Joined Cases 31/62 and 25/62 *Waldmann v Commission* [1962] ECR 505.

¹²⁷ Joined Cases T-24/90 and T-23/93 *Arco Steel v Council*, Judgment of 9 July 2008.

submissions. This will very rarely be the case. Even if the substance of the dispute is similar, the litigation before the courts may look at slightly different dimensions, and parties will, in any case, often use different arguments.

Secondly, a party who had an earlier opportunity to challenge the parent measure cannot subsequently raise the plea of illegality.¹²⁸ The most obvious example is privileged parties under Article 263 TFEU who had unlimited standing to challenge the parent measure at the time of adoption. If they could subsequently raise a plea of illegality, this would allow them to evade the time limits in that procedure and generate uncertainty. In *Spain v Commission*, the Court refused to allow a Spanish challenge to a 1992 Commission Decision extending the regime on subsidies to the motor vehicle industry.¹²⁹ For the basis of the Spanish challenge was that the initial 1990 regime on which the 1992 Decision was based was illegal. The Court ruled that as Spain had not challenged the 1990 regime at the time, it could not subsequently raise a plea of illegality.

However, the principle applies not just to privileged parties but to any party who had an earlier opportunity to bring the matter directly to the Court of Justice. In 1949 (No. 2), a 1955 Commission Decision that a subsidy from the German *Löwe* of Bavaria to the applicant, a textile company, was illegal was not challenged.¹³⁰ A new subsidy was authorised by a second Commission Decision on condition that the initial subsidy granted to the applicant be repaid. The applicant challenged the 1966 Decision, under a plea of illegality, claiming that its economic effects only became apparent following the second Decision. The General Court deemed this inadmissible, noting that, as the applicant could have challenged the first Decision using Article 263 TFEU, it was debarred now from bringing a challenge under Article 277 TFEU.

7 NON-CONTRACTUAL LIABILITY

The final head of action under which Union measures can be reviewed is that of non-contractual liability. In such circumstances, the applicant will not be seeking merely annulment of the measure but also damages from the EU institutions. This is governed by Article 340(2) TFEU.

Article 340(2) TFEU

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Although an equivalent Treaty provision has been present since the Treaty of Rome in the 1950s, the law on the non-contractual liability of EU institutions was reshaped by the *Brasserie du Pêcheur* judgment.¹³¹ This judgment, it will be remembered, set out the circumstances in

¹²⁸ On the only debate surrounding this, see D. Eide, 'Actual Remedy of Private Parties Against Normative Acts of the European Communities: The Role of the Exception of Illegality' [1999] 4 *EMLEN* 3; A. Barro, 'The Emergence of Illegality in Community Law: A Critical Analysis' [1994] 11 *EMLEN* 265.

¹²⁹ Case C-105/93 *Spain v Commission* [1995] ECR I-551.

¹³⁰ Joined Cases 2/44 and 7-45/53 *YAG (Lombard Degussa) v Commission* [1955] ECR I-1416.

¹³¹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1027. See pp. 324-7. See also T. Trivelpiece, 'Liability for Breach of Community Law: Growing Up and Making Pains?' *GMU* 11 (24 October 2011).

THE ACTION FOR FAILURE TO ACT

I. SUBJECT-MATTER

A. General

Judicial review covers both action and inaction. The action for failure to act is provided for in Art.232 of the EC Treaty and Art.148 of the EAEU Treaty. Its object is a declaration on the part of the Court of Justice or the Court of First Instance that the defendant institution acted unlawfully by failing to take a decision.⁵⁰ Accordingly, the action for failure to act forms part of the whole system of judicial review, which covers both action and inaction on the part of Community institutions.

8-301

B. Subject-matter of an action for failure to act

Subject-matter. The subject-matter of the action is confined to an inquiry into whether the omission to take a given decision was lawful.

8-302

Omission to take a decision. In the first place, the institution against which the proceedings are brought must have failed to take a decision.⁵¹ An action for failure to act will be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

8-303

The subject-matter of the action will cease to exist if the act to which it relates is adopted after the action was brought but before judgment, since then a declaration by the Court of Justice or the Court of First Instance that the initial failure to act was unlawful can no longer bring about the consequences prescribed by Art.233 of the EC Treaty.⁵²

⁵⁰ ECJ, Case 377/87 *European Parliament v Council* [1988] E.C.R. 4013, para.8; ECJ, Case 342/87 *Commission v Council* [1993] E.C.R. 4051, para.9.

⁵¹ Opinion of Advocate General J. Mischke in ECJ, Case 377/87 *European Parliament v Council* [1988] E.C.R. 4013, at 4027. See also ECJ, Case 671 *Kompetenzverstand v Commission* [1971] E.C.R. 705.

⁵² ECJ, Case 377/87 *European Parliament v Council* [1988] E.C.R. 4013, para.10; ECJ, Case 342/87 *Commission v Council* [1993] E.C.R. 4051, para.10; ECJ, Joined Cases C-15 and C-

2-364. Duty to act. Furthermore, a failure to take a decision is unlawful only if the defendant institution was under a duty to act.⁶⁰ The duty to act must derive from superior Community law.⁶¹ The reference in Art.252 of the EC Treaty to "this Treaty" does not mean that only a duty to act enshrined in an article of the Treaty may be enforced by means of an action for failure to act. In fact, an action will lie on the basis of any rule of Community law which is as such binding on the defendant institution and contains a duty to act.⁶²

The Commission has no duty to institute infringement proceedings under Art.226 of the EC Treaty against a Member State which violates Community law. If the Commission leaves a complaint filed for that purpose

108/91 *Budj and Oden v Commission* [1993] E.C.R. I-6981, paras 13-18; ECJ, Case C-25/91 *Papadimitriou v Commission* [1993] E.C.R. I-719, paras 11-12; ECJ (order of June 15, 1993), Case C-419/91 *Liberal Democrat v European Parliament* [1993] E.C.R. I-3153, para.4; CFI, Case T-28/90 *Adis Motor France and Others v Commission* [1992] E.C.R. II-2245, paras 34-38; CFI (order of November 23, 1993), Case T-56/92 *Zoexman v Commission* [1993] E.C.R. I-4267, para.28; CFI, Case T-32/93 *Leadbroke Racing v Commission* [1994] E.C.R. II-1015, para.12; CFI (order of November 15, 1996), Case T-364/95 *Kuchler-Winter v European Parliament* [1996] E.C.R. II-1593, para.36; CFI (order of November 26, 1996), Case T-326/93 *Kuchler-Winter v Commission* [1996] E.C.R. II-1519, para.13; CFI, Case T-212/95 *Oficemen v Commission* [1997] E.C.R. II-1161, para. 65-66; CFI (order of November 15, 1997), Case T-394/97 *T. Port v Commission* [1997] E.C.R. II-2125, para.22; CFI, Case T-312/98 *Intervet International v Commission* [2002] E.C.R. II-1145, para.67; CFI, Joined Cases T-344/00 and T-345/00 *CEPA and Pharmacia Europe v Commission* [2002] E.C.R. II-1445, para.85; CFI, Joined Cases T-257/01 and T-258/01 *SIC v Commission* [2004] E.C.R. II-743, paras 51-53 (this also applies where the act concerned was not submitted within a reasonable time).

⁶⁰ ECJ, Case 64/92 *Trader v Commission* [1994] E.C.R. 1395, paras 25-26; CFI, Case T-77/94 *ATEC v Commission* [1996] E.C.R. II-351, paras 55-72 (as for the question whether an action should be brought in the Court of Justice, either under Art.226 or under Art.238(2) (concerning State aid), this depends on how the Commission uses its discretion; it does not entail any obligation which may be invoked by the applicant for the purposes of establishing a failure to act on the part of the defendant. Such a claim will be inadmissible); CFI (order of November 26, 1996), Case T-167/95 *Kuchler-Winter v Council* [1996] E.C.R. II-1517, para.24; CFI, Case T-354/03 *Marichanidis Syntexis Typopolis Kai Synkriti Agrotiki Proton v Commission* [2005] E.C.R. II-5111, paras 43-44. But see CFI, Case T-17/99 *IF2 v Commission* [1999] E.C.R. II-1137, in which the Court of First Instance held that the applicant found itself in exceptional circumstances which allowed it to bring an action against the Commission for failure to adopt a decision under Art.236(3) of the EC Treaty even though the Commission has a wide discretion in this regard. It remains, however, to be seen whether this case-law is still good law in the light of ECJ, Case C-14/02 *P Commission v T-Mobile Austria* [2003] E.C.R. I-1293 (see 7-636, supra). See also Dory and Renst, "Reflections sur la spécificité du recours en carence" [2003] C.D.E. 596-636.

⁶¹ Such a duty can arise, for example, out of Art.233 of the EC Treaty. An action for failure to act is the appropriate means for obtaining a declaration that the failure by an institution to take the necessary measures to comply with a judgment of the Court of Justice or the Court of First Instance is unlawful (CFI, Joined Cases T-297/01 and T-254/01 *SIC v Commission* [2004] E.C.R. II-743, para.32).

⁶² ECJ, Joined Cases 10 and 16/63 *Endimio Zuccherificio Nazionale and Others v Commission* [1965] E.C.R. 459, para.16, where the Court of Justice used the expression "provision of Community law".

unanswered, an action for failure to act will not lie (see 5-028, supra).⁶³ However, the Commission is under an obligation to act upon a complaint regarding a violation of competition rules.⁶⁴ But the earliest moment at which the Commission may be under an obligation to take a decision on a complaint is when it has been able to examine all the considerations of fact and law brought to its notice by the complainant.⁶⁵

Identification of the act to be taken. The applicant must state what act the defendant institution has failed to adopt, failing which its application will be inadmissible.⁶⁶ It must also describe the act sufficiently precisely in order that the Court of Justice or the Court of First Instance may give a judgment which will enable the defendant institution to take the necessary measures to comply with it in accordance with Art.233 of the EC Treaty.⁶⁷

The act must be capable of having legal effects. The duty to take a decision must give rise to an act which is capable of having legal effects.⁶⁸ The nature of the legal effects required, however, is not always the same.⁶⁹

If the action for failure to act is brought by a natural or legal person, the defendant institution must have failed to "address to that person any act other than a recommendation or an opinion" (EC Treaty, Art.232, third para.). It follows that where an action for failure to act is brought by a natural or legal person, it will be admissible only if it relates to the defendant institution's failure to adopt a binding act.⁷⁰

If, in contrast, the action for failure to act is brought by a Member State or a Community institution, the act which was not performed does not

⁶³ CFI (order of February 19, 1997), Case T-217/95 *Intervet v Commission* [1997] E.C.R. II-141, para.31; CFI (order of June 5, 2000), Case T-143/02 *Oliva v Commission and Others*, not reported, para.11.

⁶⁴ For complaints alleging violation of Art.81 and/or Art.82 of the EC Treaty, see the case-law cited in 5-025, supra. In CFI, Case T-95/95 *Garcia del Real v Commission* [1995] E.C.R. II-3437, the Court held that the Commission's failure to deal with a complaint lodged by a competitor of a recipient of non-aided State aid constituted a failure to act. The Commission is likewise under an obligation to act where an undertaking lodges a complaint to the effect that a competitor is involved in a non-notified concentration falling within the scope of Regulation No 4054/89 (now Regulation No 139/2004) (ECJ, Case C-170/02 *F. Schmeiser v J.S. Novor and Others v Commission* [2003] E.C.R. I-9589, paras 27-36). For the Commission's handling of a complaint relating to the grant of State aid to a producer of military goods and the application of Arts 235 and 238 of the EC Treaty, see CFI, Case T-26/01 *Fiocchi Munizioni v Commission* [2003] E.C.R. II-3551.

⁶⁵ CFI (order of July 5, 1996), Case T-254/97 *Goldstein v Commission* [1999] E.C.R. II-2625, paras 26-28; see also CFI (order of January 10, 2003), Case T-209/04 *Spies v Commission*, not yet reported, para.40-44.

⁶⁶ ECJ (order of May 7, 1980), Joined Cases 114-117/79 *Fournier v Commission* [1980] E.C.R. 1523, at 1521.

⁶⁷ ECJ, Case 13/53 *European Parliament v Council* [1965] E.C.R. 1513, paras 35-37.

⁶⁸ Opinion of Advocate General I. Mischo in ECJ, Case 37/87 *European Parliament v Council* [1988] E.C.R. 4013, para.13, at 4029.

⁶⁹ Consequently, individuals cannot challenge an institution's failure to adopt a non-binding act, not even where the failure to act takes the form of an express refusal (see ECJ, Case 15/76 *Cornelissen v Commission* [1976] E.C.R. 575).

8-004

Only to act. Furthermore, a failure to take a decision is unlawful only if the defendant institution was under a duty to act.⁶³ The duty to act must derive from superior Community law.⁶⁴ The reference in Art.232 of the EC Treaty to "this Treaty" does not mean that only a duty to act enshrined in an article of the Treaty may be enforced by means of an action for failure to act. In fact, an action will lie on the basis of any rule of Community law which is as such binding on the defendant institution and contains a duty to act.⁶⁵

The Commission has no duty to institute infringement proceedings under Art.226 of the EC Treaty against a Member State which violates Community law. If the Commission leaves a complaint filed for that purpose

1980) *Buck and Götter v Commission* [1981] E.C.R. I-4091, paras 13-15; ECJ, Case C-235/81 *Peugeot Schenker v Commission* [1983] E.C.R. I-1713, paras 11-12; ECJ (order of June 18, 1990), Case C-452 *Liberal Democratic v European Parliament* [1991] E.C.R. I-3133, para.4; CFI, Case T-249/89 *André Huet and Others v Commission* [1992] E.C.R. II-2283, paras 34-35; CFI (order of November 28, 1993), Case T-349/91 *Kochman v Commission* [1993] E.C.R. II-1157, para.15; CFI, Case T-326/93 *Lefferts v Commission* [1994] E.C.R. II-1015, para.22; CFI (order of November 14, 1995), Case T-164/93 *Kühnelt-Winter v European Parliament* [1995] E.C.R. II-1571, para.26; CFI (order of November 14, 1996), Case T-325/93 *Kühnelt-Winter v Commission* [1996] E.C.R. II-1579, para.34; CFI, Case T-212/93 *Offemen v Commission* [1997] E.C.R. II-1411, paras 53-64; CFI (order of November 26, 1997), Case T-196/97 *T. Pao v Commission* [1997] E.C.R. II-2125, para.22; CFI, Case T-112/99 *Interet International v Commission* [2002] E.C.R. II-1145, para.61; CFI, joined Cases T-344/00 and T-345/00 *CEVA and Pharmacia Exportes v Commission* [2002] E.C.R. II-1445, para.83; CFI, joined Cases T-297/01 and T-298/01 *SIC v Commission* [2004] E.C.R. II-743, paras 57-75 (this also applies where the act concerned was not submitted within a reasonable time).

⁶³ ECJ, Case 648/81 *Transtr v Commission* [1984] E.C.R. I-331, paras 21-23; CFI, Case T-207/84 *ATSC v Commission* [1996] E.C.R. II-351, paras 55-72 (as for the question whether an action should be brought in the Court of Justice, either under Art.235 or under Art.232) (concerning State aid). This depends on how the Commission uses its discretion: it does not create any obligation which may be invoked by the applicant for the purposes of establishing a failure to act on the part of the defendant. Such a claim will be inadmissible; CFI (order of November 26, 1990), Case T-167/89 *Kühnelt-Winter v Council* [1991] E.C.R. II-1607, para.24; CFI, Case T-334/90 *Municipalité Syndicale Typographique du Syndicat Agraire Profession v Commission* [1993] E.C.R. II-3121, paras 42-44. But see CFI, Case T-179/88 *TP v Commission* [1989] E.C.R. II-1737, in which the Court of First Instance held that the applicant found itself in exceptional circumstances which allowed it to bring an action against the Commission for failure to accept a decision under Art.147(1) of the EC Treaty even though the Commission has a wide discretion in this regard. It remains, however, to be seen whether this case-law is still good law in the light of ECJ, Case C-14/02 *P. Commission v T-Mobile Austria* [2005] E.C.R. I-1231 (see 7-034, *supra*). See also *Dray and Rance, "Institutions sur le pied d'égalité et recours en annulation"* [2006] C.D.E. 586-616.

⁶⁴ Such a duty can arise, for example, out of Art.233 of the EC Treaty. An action for failure to act is the appropriate means for obtaining a declaration that the failure by an institution to take the necessary measures to comply with a judgment of the Court of Justice or the Court of First Instance is unlawful (CFI, joined Cases T-257/01 and T-368/01 *SIC v Commission* [2004] E.C.R. II-743, para.22).

⁶⁵ ECJ, joined Cases 13 and 18/88 *Edinburgh Zinnerfeld National and Others v Commission* [1989] E.C.R. 459, para.16, where the Court of Justice used the expression "provision of Community law".

unanswered, an action for failure to act will not lie (see 5-019, *supra*).⁶⁶ However, the Commission is under an obligation to act upon a complaint regarding a violation of competition rules.⁶⁷ But the earliest moment at which the Commission may be under an obligation to take a decision on a complaint is when it has been able to examine all the considerations of fact and law brought to its notice by the complainant.⁶⁸

Identification of the act to be taken. The applicant must state what act the defendant institution has failed to adopt, failing which its application will be inadmissible.⁶⁹ It must also describe the act sufficiently precisely in order that the Court of Justice or the Court of First Instance may give a judgment which will enable the defendant institution to take the necessary measures to comply with it in accordance with Art.233 of the EC Treaty.⁷⁰

The act must be capable of having legal effects. The duty to take a decision must give rise to an act which is capable of having legal effects.⁷¹ The nature of the legal effects required, however, is not always the same.

If the action for failure to act is brought by a natural or legal person, the defendant institution must have failed to "address to that person any act other than a recommendation or an opinion" (EC Treaty, Art.232, third para.). It follows that where an action for failure to act is brought by a natural or legal person, it will be admissible only if it relates to the defendant institution's failure to adopt a binding act.⁷²

If, in contrast, the action for failure to act is brought by a Member State or a Community institution, the act which was not performed does not

⁶⁶ CFI (order of February 13, 1997), Case T-117/96 *Intermar v Commission* [1997] E.C.R. II-341, para.37; CFI (order of June 5, 2002), Case T-142/01 *Gine v Commission and Others*, not reported, para.11.

⁶⁷ For complaints alleging violation of Art.81 and/or Art.82 of the EC Treaty, see the case-law cited in 3-013, *supra*. In CFI, Case T-95/90 *Generación Televisión v Commission* [1998] E.C.R. II-3437, the Court held that the Commission's failure to act, with a complaint lodged by a competitor of a recipient of non-notified State aid constituted a failure to act. The Commission is likewise under an obligation to act where an undertaking lodges a complaint to the effect that a competitor is involved in a non-notified concentration falling within the scope of Regulation No 4064/89 (now Regulation No 139/2004) (ECJ, Case C-176/02 *P. Schlusshering v. S. Alzer and Others v Commission* [2003] E.C.R. I-5589, paras 27-32). For the Commission's handling of a complaint relating to the grant of State aid to a producer of auxiliary goods and the application of Arts 295 and 298 of the EC Treaty, see CFI, Case T-26/01 *Alcibi Aluridim v Commission* [2003] E.C.R. II-5551.

⁶⁸ CFI (order of July 6, 1998), Case T-285/97 *Goddard v Commission* [1998] E.C.R. II-1529, paras 26-28; see also CFI (order of January 30, 2002), Case T-256/04 *Spain v Commission*, not yet reported, paras 41-44.

⁶⁹ ECJ (order of May 7, 1980), joined Cases 114-117/78 *Schmidt v Commission* [1980] E.C.R. 1139, at 1139.

⁷⁰ ECJ, Case 13/83 *European Parliament v Council* [1983] E.C.R. 1513, paras 15-17.

⁷¹ Opinion of Advocate General J. Mischo in ECJ, Case 370/87 *European Parliament v Council* [1988] E.C.R. 4017, para.32, at 4019.

⁷² Consequently, individuals cannot challenge an institution's failure to adopt a non-binding act, not even where the failure to act takes the form of an express refusal (see ECJ, Case 15/79 *Orsineschi v Commission* [1980] E.C.R. 975).

8-005

8-006

necessarily have to be binding in order to have legal effects and so an action may be brought in this case too. For instance, an action may be brought against the Commission if it fails to submit a proposal for a legislative measure to the Council relating to a matter on which the Community is under an obligation to legislate.⁴⁴² The rationale is that the Commission proposal is necessary in order to enable the Council and the European Parliament to play their respective roles in the legislative process.⁴⁴³

C. RELATIONSHIP BETWEEN THE ACTION FOR ANNULMENT AND THE ACTION FOR FAILURE TO ACT

407 No necessary link between the two forms of action. The action for annulment and the action for failure to act provide for one and the same means of recourse. Indeed, the possibility for individuals to assert their rights should not depend upon whether the Union has acted or failed to act.⁴⁴⁴

There is, however, no necessary link between the action for annulment and the action for failure to act since the action for failure to act does not always enable the applicant to induce the adoption of a measure which can be the subject of an action for annulment.⁴⁴⁵

First, Member States or Community institutions may compel an institution to adopt a measure by means of an action for failure to act, even though no action for annulment would be available against the act in question. Accordingly, the European Parliament is entitled to a declaration from the Court of Justice that the Council's failure to lay before it a draft budget is unlawful. Yet once the draft budget has been adopted, no action for annulment will lie against it since it is a preparatory act.⁴⁴⁶

⁴⁴² ECJ (order of July 11, 1996), Case C-445/91 *European Parliament v Commission*, not reported (failure of the Commission to submit the necessary proposals pursuant to Arts 14 and 111 of the EC Treaty for the liberalisation of the movement of persons; on an application from the European Parliament, an order was given declaring that there was no need to proceed to judgment following the submission of the relevant proposal by the Commission). If the Council is not under a duty to legislate, the Commission cannot be obliged to submit a proposal for a legislative measure to the Council (*Lamvik, Lawfulness and Legal Force of Community Decisions* (Sijthoff, Leyden, 1973), at 109). For a case in which the Council was under a duty to legislate, see ECJ, Case 11/83 *European Parliament v Council* (1983) E.C.R. 1513, paras 34-35.

⁴⁴³ The same reasoning applies to decision-making in connection with the Community budget; ECJ, Case 17/83 *European Parliament v Council* (1983) E.C.R. 4017 (action brought against the Council for failure to act on the ground that it had failed to place before the European Parliament, in accordance with Art. 117(4) of the EC Treaty, a draft general budget of the Community for the following financial year by no later than October 3).

⁴⁴⁴ ECJ, Case 15/70 *Chevalley v Commission* (1970) E.C.R. 975, para. 3; CFI, Case C-68/95 *T. Port* (1995) E.C.R. I-5855, para. 59.

⁴⁴⁵ ECJ, Case 302/77 *European Parliament v Council* (1978) E.C.R. 1515, para. 14.

⁴⁴⁶ *Ibid.*

Second, even if the applicant seeks the adoption of a binding act,⁴⁴⁷ it happens that the defendant institution can put an end to its failure to act by adopting a non-binding act against which an action for annulment would not lie. Since the failure to act has been terminated, an action for failure to act will no longer lie, unless at a later stage a further failure to act on the part of the defendant institution can be established in the light of new circumstances (see 8-014 and 8-015, *infra*).

Annulment action will lie only against a binding act. Once the institution adopts a binding act, an action will lie against it. The act in question may be a refusal to adopt the act sought⁴⁴⁸ or the adoption of an act different from the one requested.⁴⁴⁹ However, the failure to act is terminated by a definition of a position not constituting a binding act (see 8-014 and 8-015, *infra*); no action may be brought.⁴⁵⁰

The Court of Justice and the Court of First Instance will not tolerate any improper use of the action for failure to act. In the event that an institution has adopted a binding act, only an action for annulment will be available to challenge it. If the applicant has allowed the period for bringing an action to expire, it cannot provoke a failure to act by addressing a request to the institution concerned to revoke the measure adversely affecting it.⁴⁵¹ If the institution does not comply with such a request, moreover, it is not in breach of any obligation to act.

II. IDENTITY OF THE PARTIES

A. DEFENDANTS

Institutions and the European Central Bank. Under Art. 232 of the EC Treaty, an action for failure to act may be brought against the Council,

Unlike Member States and Community institutions, a natural or legal person can seek only the adoption of a binding act (e.g. a decision of the Commission finding an infringement of Arts 81 and 82 EC Treaty) under Art. 232 of the EC Treaty. For natural and legal persons, "[t]he concept of a measure capable of giving rise to an action is identical in Arts 173 and 175 (now Arts 230 and 232)" (ECJ, Case 15/70 *Chevalley v Commission* (1970) E.C.R. 975, para. 6).

⁴⁴⁸ ECJ, Case 42/71 *Nordgetreide v Commission* (1972) E.C.R. 135, para. 4 (an action for annulment brought by an individual will then be admissible if the measure sought, constituting the subject-matter of the refusal, satisfies the conditions laid down in the fourth para. of Art. 230 of the EC Treaty); ECJ, Case 44/81 *Germany v Commission* (1982) E.C.R. 1855, para. 6.

⁴⁴⁹ ECJ, Case 201 *Kommissionenverband v Commission* (1971) E.C.R. 795, para. 2.

⁴⁵⁰ ECJ, Case 43/85 *Lamvik v Commission* (1985) E.C.R. 19, at 27; ECJ, Case 42/71 *Nordgetreide v Commission* (1972) E.C.R. 135.

⁴⁵¹ ECJ, joined Cases 10 and 11/62 *"Eisenberg" Zentralfach National and Others v Commission* (1962) E.C.R. 459, para. 17.

the Commission, the European Parliament,⁶⁰ or the European Central Bank.

B. APPLICANTS

8-610 Institutions and Member States. Art.232 of the EC Treaty authorises "the Member States and the other institutions of the Community" to bring an action for failure to act. It confers that right of action on all the Community institutions.⁶¹ The European Central Bank has the right to bring an action for failure to act "in the areas falling within [its] competence". Only the Court of Justice and the Court of First Instance have no such right of action. This is because they are responsible for legal protection and do not themselves seek it.⁶²

8-611 Individual applicants. Under the third para. of Art.232 of the EC Treaty, a natural or legal person may complain to the Court of First Instance that "an institution of the Community has failed to address to that person any act other than a recommendation or an opinion". An action brought by a natural or legal person can therefore relate only to a failure to adopt an act which has a direct influence on that person's legal position.⁶³

The words "address to" preclude an applicant who is a natural or legal person from bringing an action for failure to adopt an act of general application.⁶⁴ On the other hand, in spite of the more stringent wording of the third para. of Art.232 by comparison with the fourth para. of Art.230 of the EC Treaty,⁶⁵ it is enough for a natural or legal person to be directly

and individually concerned by the act which the institution failed to adopt and which, formally, ought to have been addressed to another person (e.g. a Member State). This is because the Court of Justice has held that Arts 233 and 232 of the EC Treaty merely prescribe one and the same method of redress.⁶⁶ Consequently, the subject-matter of the right of action of a natural or legal person is not confined to the defendant institution's failure expressly to address a particular act to the applicant.⁶⁷ The idea behind this is to underscore the parallel between the action for annulment and the action for failure to act as far as the measure at issue is concerned⁶⁸ on the ground that the possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.⁶⁹

III. SPECIAL CHARACTERISTICS

A. PRE-LITIGATION PROCEDURE

The duty to raise the matter. An action for failure to act is admissible only if, before proceedings are brought, the defendant institution is requested to adopt the measure in question. The idea behind raising the matter with the institution in this way is to prompt it to adopt the measure within two months or at least to define its position in regard to the alleged failure to act.⁷⁰ The matter must be raised within a reasonable time after the

⁶⁰ CFI (order of May 22, 2000), Case T-102/99 *Associazione delle Camere Sociali Venete v European Ombudsman and European Parliament* [2000] E.C.R. II-4155, para.45 (the European Ombudsman is not a Community institution within the meaning of Art.232 of the EC Treaty).

⁶¹ ECJ, Case 134/83 *European Parliament v Council* [1985] E.C.R. 1511, paras 17-18. Note that the Court of Auditors is a "institution" (EC Treaty, Art.7); it may also bring an action for failure to act.

⁶² Opinion of Advocate General C.O. Lenz in ECJ, Case 11/81 *European Parliament v Council* [1985] E.C.R. 1513, at 1519.

⁶³ ECJ, Case 670 *Soriano v Commission* [1970] E.C.R. 315; ECJ, Case 157/73 *Chenille v Commission* [1974] E.C.R. 913; ECJ (order of October 17, 1984), Joined Cases 33 and 1436 *AN v Commission and Council* [1984] E.C.R. 3571, para.10; ECJ (order of March 16, 1990), Case C-37/85 *Enrich v Commission* [1990] E.C.R. I-1353, para.6; CFI (order of May 20, 1994), Case T-35/94 *J v Commission* [1994] E.C.R. II-391, para.36; CFI (order of July 4, 1994), Case T-13/94 *Century Oil Refiner v Commission* [1994] E.C.R. II-431, para.13.

⁶⁴ ECJ, Case 157/73 *Merckle v Commission* [1973] E.C.R. 197, para.4; ECJ, Case 134/73 *Hofler & Wollmer v Council* [1974] E.C.R. I, para.5; ECJ, Case 33/78 *Gmünder v Council and Commission* [1979] E.C.R. 1051, paras 11-15; ECJ (order of July 11, 1975), Case 63/75 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays v Commission* [1975] E.C.R. 2429, at 2431; CFI (order of November 26, 1996), Case T-15/95 *Kuchent-Winter v Council* [1995] E.C.R. II-1607, para.21; cf. *McDonagh*, "Pour un élargissement des conditions de recevabilité des recours en contrôle de légalité par des personnes privées en droit communautaire: le cas de l'Art.175 (now Art.232) de traité CE" (1994) C.D.E. 567-613.

⁶⁵ See also EC Treaty, Art.232, third para., of which the French and German versions are consistent in this regard: "de lui adresser un acte autre qu'une recommandation ou un avis"; "eine andere Akt als eine Empfehlung oder eine Stellungnahme an sie zu richten".

⁶⁶ ECJ, Case 157/73 *Chenille v Commission* [1973] E.C.R. 915, para.6; ECJ, Case C-83/95 *J. Port v Commission* [1995] E.C.R. I-6265, para.59; CFI, Case T-17/95 *JFA v Commission* [1995] E.C.R. II-1757, para.37; CFI (order of May 22, 2000), Case T-102/99 *Associazione delle Camere Sociali Venete v European Ombudsman and European Parliament* [2000] E.C.R. II-4155, para.47.

⁶⁷ See ECJ, Case 134/73 *Hofler & Wollmer v Council* [1974] E.C.R. I, para.5: "It appears that the action commenced by the applicant has the object of procuring a provision of a general regulatory character having the same legal scope as Regulation No 1356/72 and not an act concerning it directly and individually". An indirect interest which a natural or legal person might have in the adoption of the act requested is completely insufficient for him to be regarded as a potential addressee of the act. ECJ, Case 246/81 *Lord Seil v Commission* [1982] E.C.R. 2137, para.15; cf. CFI (order of January 23, 1991), Case T-3/90 *Prodifarm v Commission* [1991] E.C.R. II-1, paras 35-43; CFI, Case T-32/93 *Lonbrooke Racing v Commission* [1994] E.C.R. II-623, paras 40-43.

⁶⁸ ECJ, Case 247/83 *Jac Fruit v Commission* [1985] E.C.R. 291, para.13; ECJ (order of October 1, 2004), Case C-315/03 *P. Pérez Escobar v Commission*, not reported, paras 15-26 (the fact that an individual lodged a complaint with the Commission with respect to an alleged violation of Arts 81 and 82 of the EC Treaty is—as such—not sufficient for that individual to have the standing to bring an action under Art.232 of the EC Treaty before the Court of First Instance. The person concerned will have to demonstrate that he or she is directly and individually concerned by the decision which the Commission failed to adopt).

⁶⁹ ECJ, Case C-83/95 *J. Port v Commission* [1995] E.C.R. I-6265, para.59.

⁷⁰ ECJ, Case 17/81 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1955] E.C.R. I, at 5; ECJ (order of 18 November, 1959), Case C-24/59 *P. Perador Cargados y Jarama v Commission* [1959] E.C.R. I-6133, para.18.

applicant initially finds that there has been a failure to act. An eighteen-month period is unreasonable.⁷²

- 111 What has to be raised. The communication calling upon the defendant institution to act must make it clear that it is made pursuant to Art. 232 of the EC Treaty.⁷³ In addition, it must indicate precisely what measure(s) of Community law the applicant expects the defendant to adopt.⁷⁴ Since only the person who calls upon the institution to act is entitled to bring an action, it is important that he or she should make his or her identity clear.

- 114 Reaction of the institution put on notice. In order to have brought the failure to act in question to an end, the defendant institution must have "defined its position" within two months of its having been called upon to act (EC Treaty, Art. 232, second para.). Once the defendant institution has defined its position, an action for failure to act will be inadmissible.⁷⁵

The reaction of the institution which has been called upon to act will be deemed to be a definition of a position within the meaning of the second para. of Art. 232 of the EC Treaty only in so far as it explains the institution's stance with regard to the measure requested.⁷⁶ It is the content and not the form of the definition of a position which determines whether this condition has been met. Accordingly, the institution called upon to act may reject a request to adopt a particular measure by letter,⁷⁷ by telex⁷⁸ or implicitly by adopting a measure other than the one requested.

Although a definition of a position brings the failure to act to an end, thereby making it impossible to bring an action for failure to act any

⁷² ECI, Case 59/72 *Netherlands v Commission* [1971] E.C.R. 433, paras 22-24. See also ECI, Case C-170/02 *P. Schlüter-Verlag J.S. Meier and Others v Commission* [2003] E.C.R. I-9339, paras 35-38 (where an action for failure to act in respect of the Commission's failure to respond to a complaint to the effect that an unneeded merger had a Community dimension was declared inadmissible. The Court of Justice held that since four months had elapsed since the national authorities' decision approving the merger, it was no longer possible to call on the Commission to act within a reasonable time).

⁷³ ECI, Case 11/83 *European Parliament v Council* [1983] E.C.R. 1512, para. 24; ECI, Case 14/82 *Germany v Commission* [1984] E.C.R. 1431, para. 23; CFI (order of April 11, 1999), Case T-311/97 *Pescador Congelados Sogimar v Commission* [1999] E.C.R. II-1407, para. 21. ECI, Case 25/83 *Mitsui Comptroller v Commission* [1983] E.C.R. 1531, para. 8; CFI, Case T-22/91 *Asia Motor France and Others v Commission* [1992] E.C.R. II-2245, para. 22; CFI (order of April 30, 1999), Case T-311/97 *Pescador Congelados Sogimar v Commission* [1999] E.C.R. II-1407. For an instance in which the action was declared admissible only in part, see CFI, Case T-1756 *TET v Commission* [1999] E.C.R. II-1737, paras 41-45.

⁷⁴ See, however, CFI (order of February 21, 2005), Case T-478/04, *Compella v Commission*, not reported, in which the CFI found that such an action was manifestly lacking any foundation in law.

⁷⁵ A letter emanating from an institution, stating that examination of the questions raised is in progress, does not constitute a definition of position which brings to an end a failure to act (CFI, Case T-11259 *Interrel International v Commission* [2004] E.C.R. II-3643, para. 61; CFI, joined Cases T-346/00 and T-345/00 *CEVA and Pharmacie Serepierre v Commission* [2002] E.C.R. II-225, para. 83).

⁷⁶ ECI, Case 125/78 *CEVA v Commission* [1978] E.C.R. 5173, para. 24-25.

⁷⁷ ECI, Case 4/71 *Nordgerade v Commission* [1972] E.C.R. 135, para. 4.

more,⁷⁹ it is not always in the nature of a binding act against which an action for annulment will lie.⁸⁰

This will, of course, be the case where the invitation to act is made by a Community institution or a Member State with a view to the adoption of a preparatory act needed for the purpose of the Community's decision-making procedure (see 7-020 to 7-022 and 8-306, *supra*). The only way in which the Court of Justice can secure legal protection for the applicant in such a situation is to be relatively exacting in adjudging whether the content of the definition of a position is such as to bring the failure to act to an end. The reason is that, since an action for annulment is ruled out in any event as a potential means of recourse, the only avenue remaining is an action for failure to act if the defendant institution is not fulfilling its obligations and so blocking the Community's decision-making process.⁸¹

Even where the invitation to act comes from a natural or legal person, who, in principle, therefore has in mind the adoption of a binding act against which an action for annulment will lie (see 9-006, *supra*), it is possible for the failure to act to be brought to an end by a non-binding definition of a position. The procedure for the investigation of complaints relating to infringements of Arts 81 and 82 of the EC Treaty affords an illustration.⁸²

Complaint regarding infringement of Art. 81 or Art. 82 of the EC Treaty. A complaint is lodged in the hope that the Commission will find that there has been an infringement of Art. 81 or Art. 82 of the EC Treaty. But the complainant is not entitled to a definitive decision from the Commission on

⁷⁹ If the position defined by the institution concerned does not come up to the expectations of the person who requested the institution to act, that person may no longer challenge the position defined by means of an action for failure to act. This is because Art. 232 of the EC Treaty refers to failure to take a decision or to define a position, and not to the adoption of a measure different from that desired or considered necessary by the person concerned: ECI, Case 5/71 *Kampfenberger v Commission* [1971] E.C.R. 705, para. 2; ECI, joined Cases 156 and 22/85 *Irish Cement v Commission* [1983] E.C.R. 8473, para. 27; CFI (order of November 12, 1996), Case T-47/96 *JDOW v Commission* [1996] E.C.R. II-1559, para. 42; CFI (order of November 25, 1998), Case T-164/93 *Kuchler-Minter v European Parliament* [1998] E.C.R. II-1591, para. 27; CFI (order of November 25, 1998), Case T-226/93 *Kuchler-Minter v Commission* [1998] E.C.R. II-1615, para. 31; CFI, Case T-107/96 *Pemichon v Commission* [1998] E.C.R. II-1311, para. 30; CFI (order of March 11, 2002), Case T-380 *Schlüter-Verlag J.S. Meier and Others v Commission* [2002] E.C.R. I-1473, para. 21.

⁸⁰ Cf. Barav, "Considérations sur le spécificité du recours en annulation en droit communautaire" (1975) *RIDE* 32, at 61.

⁸¹ ECI, Case 13/63 *European Parliament v Council* [1963] E.C.R. 1513, para. 25; moreover, it was in an institutional context that the Court of Justice held—in all likelihood for these reasons—that an express refusal to act does not put an end to a failure to act: ECI, Case 30/57 *European Parliament v Council* [1958] E.C.R. 5615, para. 27.

⁸² For the Commission's handling of complaints relating to State aid, see CFI, Case T-95/96 *Germany v Commission* [1996] E.C.R. II-1737; CFI, joined Cases T-25/97 and T-258/01 *JSC v Commission* [2004] E.C.R. II-743.

the existence of the alleged infringement.¹²³ Yet it does have the right to a decision on the outcome which the Commission is to give to its complaint, so that, in the event that the complaint is rejected, it can be assured of being able to bring an action against the decision rejecting the complaint and hence of securing judicial review by the Court of First Instance (and, possibly, the Court of Justice).¹²⁴ As we know, before the complaint is rejected, the Commission should send a letter to the complainant pursuant to Art.7 of Regulation No 773/2004 (formerly Art.6 of Regulation No 2842/53¹²⁵) informing it of the reasons why it considers that on the basis of the information in its possession there are insufficient grounds for upholding the complaint and fixing a time-limit within which the complainant may make its views known in writing. Such a letter constitutes a definition of a position within the meaning of the second para. of Art.232 of the EC Treaty,¹²⁶ even though it is not a binding act against which an action for annulment will lie.¹²⁷

If the complainant wishes to avail itself of the procedure provided for in Art.232 of the EC Treaty in order to induce the Commission to take a decision on the outcome of its complaint, it will call on the Commission to take that decision (which, moreover, the complainant hopes will be favourable to it).¹²⁸ Only if the Commission is planning to reject its complaint, will the complainant receive, under the normal procedure in such a case, a letter pursuant to Art.7 of Regulation No 773/2004, i.e. a definition of a position which is not a binding act.¹²⁹ This provisionally

¹²³ ECJ, Case 125/78 *GEA v Commission* [1979] E.C.R. 3113, paras 17-18.

¹²⁴ CFI, Case T-792 *Aix-Marseille France and Others v Commission* [1993] E.C.R. II-665, cf. CFI (Order of November 29, 1993), Case T-1592 *Koelman v Commission* [1993] E.C.R. II-1267, paras 26-28 (action for failure to act held to be of no purpose because the Commission had definitively rejected the complaint) and CFI, Case T-575/93 *Koelman v Commission* [1995] E.C.R. II-1, in which the applicant sought the annulment of the definitive rejection of its complaint.

¹²⁵ Before the entry into force of Regulation No 2842/58, a similar obligation was imposed by Art.5 of Regulation No 59/63.

¹²⁶ ECJ, Case 125/78 *GEA v Commission* [1979] E.C.R. 3113, para.21; ECJ, Case C-262/95 *P. Guérin Automobiles v Commission* [1997] E.C.R. I-1503, para.53 (cf. the Opinion of Advocate General G. Tesauro in that case); CFI, Case T-136/94 *Guérin Automobiles v Commission* [1995] E.C.R. II-1753, para.26; CFI (Order of October 19, 2001), Case T-131/01 *P. Guérin v Commission*, not reported, para.14.

¹²⁷ CFI, Case T-64/99 *Automec v Commission* [1999] E.C.R. II-347, para.46; Case T-15/94 *Guérin Automobiles v Commission*, cited in the preceding n., para.41; CFI, Case T-38/96 *Guérin Automobiles v Commission* [1997] E.C.R. II-1223, para.31.

¹²⁸ CFI, Case T-25/90 *Aix-Marseille France and Others v Commission* [1992] E.C.R. II-2265, para.28.

¹²⁹ The fact that a complainant which requests that a decision be taken has to be satisfied in the first instance with an act which does not have the force of a decision, namely a definition of a position which does not bind the failure to act to an end, has to do with the Commission's obligation to take the intermediate step—designed to protect the complainant's interests—of notifying the draft decision, following which the complainant is entitled to submit observations. Sometimes, however, the decision is taken directly, whereupon an action for annulment will lie against it, see ECJ, Case C-39/93 *P. SFEI and Others v Commission* [1994] E.C.R. I-1531, paras 24-33.

exhausts the complainant's possibilities of recourse, but not necessarily for long. This is because the initiative reverts to the complainant. If it submits written observations within the prescribed period, the Commission must take, within a reasonable time,¹³⁰ a final decision on the outcome of the complaint in the light of those observations.¹³¹ If necessary, the complainant can call on the Commission pursuant to Art.232 of the EC Treaty to take the decision.¹³² If the Commission rejects the complaint, the complainant may bring an action for annulment; if the Commission does nothing at all, an action for failure to act will lie.¹³³

B. PROCEDURE BEFORE THE COURT

Conditions for admissibility. The letter before action marks the starting point of the two-month period which the institution has in order to bring the failure to act to an end. The failure to act does not end on the day when the institution concerned defines its position, but instead on the date when the party which called on it to act received that position.¹³⁴ If, during that period, the institution persists in its failure to act, Member States, institutions or natural or legal persons who have called upon it to act may bring an action before the Court of Justice or the Court of First Instance "within a further period of two months".¹³⁵ In the event that the institution concerned defines its position before the action is brought, the action will be inadmissible.¹³⁶ If the act in question is adopted after the action for

¹³⁰ ECJ, Case C-262/95 *P. Guérin Automobiles v Commission* [1997] E.C.R. I-1503, para.37. The call to act may not, however, be made at the same time as observations in a letter under Art.7 of Regulation No 773/2004. This is because the Commission must be given a reasonable period within which to examine the complainant's observations before being required to define its final position on the complaint (this can be inferred from the order for costs in a case where it was held that the action for failure to act was of no purpose at the time of the judgment; CFI, Case T-28/95 *DECC v Commission* [1996] E.C.R. II-3397, para.19). See also Case C-2004, *supra*.

¹³¹ Art.7(2) of Regulation No 773/2004 provides: "If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision". According to Art.7(3), "[i]f the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn".

¹³² Cf. Opinion of Judge D.A.O. Edward, appointed to act as Advocate General, in CFI, Case T-24/90 *Automec v Commission* [1992] E.C.R. II-4223, para.23.

¹³³ An action for failure to act will not be held to have lost its purpose merely because the restriction of competition referred to in the complaint has been terminated following the intervention of the Commission, since that does not deprive the Commission from defining its position on the applicant's complaint. If, therefore, the Commission has failed to define its position on the complaint, the action does not lose its purpose in those circumstances; CFI, Case T-74/92 *Leithorpe Racing v Commission* [1993] E.C.R. II-115, paras 55-61.

¹³⁴ CFI, Joined Cases T-154/97 and T-83/98 *Stevens v Commission* [2000] E.C.R. II-69, para.34.

¹³⁵ EC Treaty, Art.232, second para. For an action which was brought late, see CFI (Order of December 2, 2003), Case T-334/02 *Wormdianis Syntexias Typopofis Kai Synagoge Agrotikon Proionton v Commission* [2003] E.C.R. II-5121, paras 31-32.

¹³⁶ The Court will raise this question of inadmissibility of its own motion (CFI, Case T-26/01 *P. SFEI and Others v Commission* [2003] E.C.R. II-3951, paras 52-53).

THE ACTION FOR FAILURE TO ACT

failure to act has been brought but before judgment is given, the application becomes to no purpose (see 8-002, *supra*). In such a case, the defendant institution exposes itself to having an order for costs made against it.⁷⁰

The letter before action also determines the subject-matter of the action. The action can relate only to a failure to act which has been previously so raised with the defendant institution.⁷¹

- 8-017 Pleas in law. Under Art.232 of the EC Treaty, the only plea open to the applicant is that the failure to act constitutes "an infringement of this Treaty". As has already been mentioned, the expression "infringement of the Treaty" covers any Community provision under which an obligation to act arises for the defendant institution (see 8-004, *supra*). Some commentators maintain that an action will lie also against the defendant institution's failure to exercise a discretionary power where that failure amounts to a misuse of powers.⁷²

IV. CONSEQUENCES

- 8-018 Limited scope of the judgment. If the Court of First Instance or the Court of Justice finds that an institution has infringed the Treaty by failing to act, the institution is required under Art.233 of the EC Treaty to take the necessary measures to comply with the judgment. The scope of the judgment is limited. It merely reinforces the duty on the institution to act, but it does not take the place of the act which the institution failed to adopt. At most, the Court of Justice or the Court of First Instance may indicate what act is necessary in order to comply with its judgment.⁷³

⁷⁰ ECJ, Case 377/87 *European Parliament v Council* [1988] E.C.R. 4217, para. 3-10; CFI, Case T-112/95 *Office for the Environment v Commission* [1997] E.C.R. II-1161, paras 71-73. See, however, CFI (Order of November 25, 1997), Case T-39/97 *I. Par v Commission* [1997] E.C.R. II-1125, para. 35.

⁷¹ ECJ, Joined Cases 24 and 24/55 *Chambre Syndicale de la Sidérurgie de l'Est de la France and Others v High Authority* [1956] E.C.R. 181, at 184; ECJ, Joined Cases 41 and 50/55 *Henderson, Hughes and Others v High Authority* [1963] E.C.R. 493; ECJ, Case 13/69 *Enke v Commission* [1970] E.C.R. 535, para. 8-3.

⁷² Wechsbroeck and Wechsbroeck, *Régime des droits communautaires*, keyword: Carence (recours 23), (Ed. Dalloz, Paris, 1994), § 18. The argument is that the defendant institution's obligation is to bring to an end the "misuse of powers" brought about by its failure to exercise the power). In practice, this comes very close to reading into Art.232 of the EC Treaty (the case which was expressly contemplated by the second part of Art.135 of the ECSC Treaty).

⁷³ The Court does this in the body of the judgment, which helps to determine the scope of the operative part, of ECJ, Joined Cases 91, 151, 93 and 213/85 *Atlanta and Others v Commission* [1988] E.C.R. 2131, paras 26-27.

THE CONSTITUTION

V. THE CONSTITUTION

General. Since the action for annulment and the action for failure to act provide for one and the same means of recourse,⁷⁴ the wording of Art.III-367 of the Constitution relating to the action for failure to act has therefore been brought into line with that of Art.III-365 relating to the action for annulment. Art.III-367 of the Constitution thus provides that an action for annulment may be brought not only against the institutions already mentioned in Art.212 of the EC Treaty,⁷⁵ but also against the European Council and the bodies, offices and agencies of the Union.

8-019

⁷⁴ ECJ, Case 15/70 *Chenelley v Commission* [1970] E.C.R. 913, para. 5; CFI, Case C-65/95 *T. Por* [1996] E.C.R. I-3055, para. 25.

⁷⁵ The Council, the Commission, the European Parliament and the European Central Bank (which, as a result of Art.III-36(3) of the Constitution, becomes an institution).

VII The plea of illegality

1. Function of the plea and types of proceedings in which it can be used.
2. Acts that can be challenged
3. Parties who are allowed to use the plea

Mandatory Reading

Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 430-431.
Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 9.

be brought, if the institution's position on the matter is clear to the applicant, it must bring the request for action within a reasonable period. In *Netherlands v Commission*, a case which involved Article 95 ECSC, the parallel provision to Article 258 TFEU in the ECSC Treaty, the Commission informed the Dutch government that a French restructuring plan did not violate the Treaty provisions on state aid.¹²⁸ The Dutch government waited a further eighteen months before requesting the Commission to act. The Court, reasoning from the principle of legal certainty, stated that an applicant did not have a right to raise the matter with the Commission indefinitely and had delayed too long in this instance.

6 THE PLEA OF ILLEGALITY

Particularly in areas where the Commission enjoys delegated powers, parties face a problem if they want to challenge an act. The Commission measure may be addressed to them or be of direct and individual concern to them, but they may want to challenge the act on the basis that the parent measure is illegal. They may face difficulties here because the time limits have passed, or because they may not satisfy the *locus standi* requirements in relation to the parent instrument. The plea of illegality addresses this by allowing a party in proceedings against a measure to plead the inapplicability of its parent measure.

Article 277 TFEU

Notwithstanding the expiry of the period laid down in Article 263, 265, paragraph 1, any party may, in proceedings in which an act of a person, application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to obtain before the Court of Justice of the European Union the inapplicability of that act.

The plea of illegality is a parasitic procedure. It cannot be brought as an independent action but can only be invoked in the context of proceedings brought under some other provision of the Treaties. To that end, the party must secure *locus standi* under the other procedure and observe the time limits set out in that procedure, albeit that the time limits for challenging the parent measure may have lapsed.¹²⁹ To give an example, a party might want to challenge a Decision on the grounds that the enabling Regulation was illegal. It would have to show that it had *locus standi* under Article 263 TFEU to challenge the Decision, and that it observed the time limits set out there for challenging the Decision within two months of its publication. It does not matter that it is more than two months since the Regulation was adopted.

The concern with the plea of illegality is that it should not lead to an abuse of process where it is used to subvert other procedures. This has led to two refinements.

First, a plea of illegality may not be invoked where a matter is pending before another court or in another action before the same court.¹³⁰ For this to be the case, it must be considered to be *pendens*. This will only happen if three conditions are met. The action must be between the same parties, must seek the same object and must do so on the basis of the same

submissions. This will very rarely be the case. Even if the substance of the dispute is similar, the litigation before the courts may look at slightly different dimensions, and parties will, in any case, often use different arguments.

Secondly, a party who had an earlier opportunity to challenge the parent measure cannot subsequently raise the plea of illegality.¹³¹ The most obvious example is privileged parties under Article 263 TFEU who had unlimited standing to challenge the parent measure at the time of adoption. If they could subsequently raise a plea of illegality, this would allow them to evade the time limits in that procedure and generate uncertainty. In *Spain v Commission*, the Court refused to allow a Spanish challenge to a 1992 Commission Decision extending the regime on subsidies to the motor vehicle industry.¹³² For the basis of the Spanish challenge was that the initial 1990 regime on which the 1992 Decision was based was illegal. The Court ruled that as Spain had not challenged the 1990 regime at the time, it could not subsequently raise a plea of illegality.

However, the principle applies not just to privileged parties but to any party who had an earlier opportunity to bring the matter directly to the Court of Justice. In *TWD (No. 2)*, a 1995 Commission Decision that a subsidy from the German Land of Bavaria to the applicant, a textile company, was illegal was not challenged.¹³³ A new subsidy was authorised by a second Commission Decision on condition that the initial subsidy granted to the applicant be repaid. The applicant challenged the 1996 Decision, under a plea of illegality, claiming that its economic effects only became apparent following the second Decision. The General Court denied this inadmissible, noting that, as the applicant could have challenged the first Decision using Article 263 TFEU, it was debarred now from bringing a challenge under Article 277 TFEU.

7 NON-CONTRACTUAL LIABILITY

The final head of action under which Union measures can be reviewed is that of non-contractual liability. In such circumstances, the applicant will not be seeking merely annulment of the measure but also damages from the EU institutions. This is governed by Article 340(2) TFEU.

Article 340(2) TFEU

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Although an equivalent Treaty provision has been present since the Treaty of Rome in the 1950s, the law on the non-contractual liability of EU institutions was reshaped by the *Brasserie du Pêcheur* judgment.¹³⁴ This judgment, it will be remembered, set out the circumstances in

¹²⁸ Case 99/70 *Netherlands v Commission* [1971] ECR 439.

¹²⁹ Joined Cases 115/52 and 116/52 *Wilmess v Commission* [1953] ECR 305.

¹³⁰ Joined Cases T-346/93 and T-355/93 *ATA v Reed & Reed*, Judgment of 3 July 2007.

¹³¹ In the early debate surrounding this, see G. de Burca, 'Judicial Economy of Private Parties Against Normative Acts of the European Communities: The Role of the Exception of Illegality' (1986) 4 *CMR* 1; A. Biondi, 'The Exception of Illegality in Community Law: A Critical Analysis' (1974) 11 *CMR* 265.

¹³² Case C-105/90 *Spain v Commission* [1992] ECR I-1651.

¹³³ Joined Cases T-344 and T-416/93 *TWD Textilwerke Deggendorf v Commission* [1995] ECR I-2265.

¹³⁴ Joined Cases C-105/90 and C-106/90 *Brasserie du Pêcheur v Germany* [1996] ECR I-1025. See pp. 304–7. See also T. Tridimas, 'Liability for Breach of Community Law: Growing Up and Maturing Down?' (2002) 30 *CMR* 201.

THE OBJECTION OF ILLEGALITY

I. SUBJECT-MATTER

A. GENERAL

-001 Not an independent right of action. The objection of illegality as provided for in Art.241 of the EC Treaty and Art.156 of the EAC Treaty does not constitute an independent right of action.²⁰¹ It is an incidental plea in law²⁰² intended to avoid the application of unlawful Community acts of general application to the detriment of persons who are not—or no longer²⁰³—entitled to challenge them.²⁰⁴

-002 Essential function. Art.241 of the EC Treaty "gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Art.230 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void".²⁰⁵ It follows

²⁰¹ ECJ, Case 138/80 *Ambrosini v Council and Commission* [1982] E.C.R. 2141, para.17; ECJ, joined Cases 87 and 125/77, 213/3, 9 and 128/4 *Sotgiu and Others v Commission and Council* [1973] E.C.R. 1373, para.35.

²⁰² See Van Rijn, *Excepctie van onwettigheid en prejudiciële procedure breake geldigheid van gemeenschapsbepalingen* (Kluwer, Deventer, 1984), at 143-143; Scott and Horton (now Campbell and Powers), *The Law of the European Community* (Matthew Bender & Co., New York, 1976), at 5-340-341; Bressan and Hoskins, *Remedies in E.C. Law*, at 332-332. For the question of who is entitled to raise an objection of illegality, see 9-006 to 9-008, *infra*.

²⁰³ ECJ, joined Cases 31 and 126/82 *Höfner and Elser v Commission* [1982] E.C.R. 561, at 507. See also Baker, "The Exception of Illegality in Community Law: A Critical Analysis" (1974) C.M.L.Rev. 356, at 368; Simionidis, "The Plea of Illegality in EC Law" (2001) E.U.L.J. 150-155; Vogt, "Begründung von EG-Rechtsakten und Auslegungsbereich des Art.241 EGV" (2004) EuR. 615-624.

²⁰⁴ ECJ, Case 52/73 *Sinmonte v Commission* [1973] E.C.R. 777, para.35. See also ECJ, Case 95/81 *Marini v High Authority* [1981] E.C.R. 133, at 140; ECJ, Case 125/86 *Adenot v High Authority* [1987] E.C.R. 155, at 152-153; ECJ, Case 113/77 *Compagnie des Hauts Fourneaux de Chaux v High Authority* [1977] E.C.R. 221, at 224-225; ECJ, Case 162/80 *Andersen v European Parliament* [1980] E.C.R. 155, para.5; CFL, joined Cases

SUBJECT-MATTER

that the field of application of Art.241—according to which an objection of illegality may be raised only against a regulation—extends to "acts of the institutions which, although they are not in the form of a regulation, nevertheless produce similar effects and on those grounds may not be challenged under Art.230 by natural or legal persons other than Community institutions or Member States".²⁰⁶ In so deciding, the Court of Justice intimated that the essential function of the objection of illegality is to enable natural and legal persons to have set aside an act against which they cannot bring an action for annulment under the fourth para. of Art.230 of the EC Treaty, in a case where they seek the annulment by the Court of First Instance of an implementing measure adopted by the Community on the basis of that act.

B. ACTS AGAINST WHICH AN OBJECTION OF ILLEGALITY MAY BE RAISED

"Regulation". Under Art.241 of the EC Treaty, an objection of illegality may be raised in respect of "a regulation of the Council, of the Commission, or of the ECB [European Central Bank]" or "a regulation adopted jointly by the European Parliament and the Council". But, as has already been mentioned, for the purposes of the application of Art.241, any measure having similar effects to a regulation will be treated as if it were a regulation provided that natural or legal persons cannot bring an action for annulment against it pursuant to the fourth part of Art.230 of the EC Treaty (see 9-002, *supra*).²⁰⁷

In a recent case the Court of First Instance went even as far as allowing an objection of illegality to be raised against a resolution of the UN Security Council in an action for annulment brought against a Community regulation putting into effect, without the exercise of any discretion whatsoever, the said resolution of the Security Council.²⁰⁸ Given the primacy of resolutions of the Security Council over Community law, the Court of First Instance considered that it had competence to review,

T-6 and T-52/92 *Reinert v Commission* [1993] E.C.R. II-1047, para.36; CFJ, Case T-64/92 *Chenue de Chimie et Others v Commission* [1994] E.C.R. SC II-713, para.41 (English abstract at 1-A-277); CFJ, Case T-325/96 *Alfaro and Others v Commission* [1997] E.C.R. II-1655, paras 45-48 (an applicant who has brought an action for annulment against a decision approving an individual aid measure may raise an objection of illegality against the measure approving the general aid measure pursuant to which the individual aid was granted).

²⁰⁶ ECJ, Case 52/73 *Sinmonte v Commission*, cited in the preceding n., para.40; CFJ, joined Cases T-222/99, T-327/99 and T-325/99 *Martinez and Others v European Parliament* [2001] E.C.R. II-1321, para.134.

²⁰⁷ Accordingly, an undertaking can plead the illegality of the Commission's guidelines on the method of setting fines imposed for a breach of the competition rules in an action for annulment brought against a decision imposing a fine: ECJ, joined Cases C-155/02 P, C-205/02 P, C-206/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] E.C.R. I-5425, paras 212 and 213.

²⁰⁸ The regulation imposed certain specific restrictive measures against certain persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban.

indirectly, the legality of the resolution of the Security Council in question having regard only to *ius cogens* (understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, from which no derogation is possible) but not to Community law.¹⁰

9-004 Exclusion of decisions of which annulment could have been sought. According to the case-law, a party to proceedings may not rely on Art.241 of the EC Treaty in order to challenge the legality of a decision addressed to it where it could have applied for the decision to be annulled under Art.230.¹¹ This is because legal certainty would be affected if a party could still challenge such a decision by means of an objection of illegality after the time-limit for bringing an action against it had expired.¹² The only exceptions are where the party concerned was entitled to entertain reasonable doubt as to the admissibility of an action for annulment¹³ or in the exceptional case where the contested act contained such particularly serious and manifest defects that it could be deemed non-existent.¹⁴

9-005 An act of general application must be "at issue". Art.241 of the EC Treaty requires the "regulation" in respect of which the objection of illegality is raised to be "at issue". In the light of the essential function of the objection (see 9-002, *supra*), the case-law has interpreted that requirement as meaning that the general measure against which the objection is raised must constitute the legal basis of the individual measure which is being directly challenged.¹⁵ The upshot is that, in principle, an objection of illegality may be raised only against the provisions of a general act which the individual act implements.¹⁶ Nevertheless, other provisions of the general act may be affected by the objection if they are applicable to "the issue with which the application is concerned".¹⁷

¹⁰ CFI (Judgment of September 21, 2005), Case T-304/01 *Yanuf and Al-Sarakat International Foundation v Council and Commission*, not yet reported, paras 228-230 and 260-263.

¹¹ ECJ, Case 156/77 *Commission v Belgium* [1978] E.C.R. 1881, para.26. See also 9-007 and 9-008, *infra*.

¹² *Ibid.*, para.21.

¹³ CFI, Case T-343/97 *Schindler v Commission* [2004] E.C.R. SC II 635, para.26.

¹⁴ ECJ, Case 224/57 *Commission v Greece* [1958] E.C.R. 3511, para.15.

¹⁵ ECJ, Case 2/64 *Acciaierie Dalmie & Figh v High Authority* [1963] E.C.R. 175, at 187-189 (where the Court of Justice referred to a "direct legal connection between the contested measure and the ... general decision"); CFI, *Joined Cases T-222/59, T-321/59 and T-329/59 *Martinez and Others v European Parliament** [2001] E.C.R. II-3523, para.136.

¹⁶ ECJ, *Joined Cases 255/82 and 264/82 *Kropp v Commission** [1983] E.C.R. 2449, para.32; CFI, Case T-123/99 *Kie v OHIM* [2001] E.C.R. II-2233, para.25. See in this connection the important case of *Chenel* (ECJ, *Joined Cases C-432/95 P and C-433/95 P *Chenel v Council and Others** [2000] E.C.R. I-5535).

¹⁷ ECJ, Case 32/65 *Italy v Council and Commission* [1965] E.C.R. 389, at 409; cf. ECJ, Case 18/62 *Brugg v High Authority* [1953] E.C.R. 259, at 272-276; ECJ, *Joined Cases 143, 144, 221 and 224/62 *Peltronic-Korringa and Tjapstra v Commission** [1964] E.C.R. 551, para.26; see also Van Rijn, (2336, *supra*), at 194.

With the same concern to guarantee the essential function of the objection of illegality, it is considered in the case-law that such an objection may be raised against any act which cannot be contested for operation or another, but whose content was nevertheless determinative in the adoption of individual acts which may be directly challenged.¹⁸ Thus, an exception of illegality may be raised against the Commission's guidelines on the method of setting fines¹⁹ in an annulment action brought against a decision imposing fines although the guidelines do not constitute the legal basis of the contested decision. Indeed, the guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision.²⁰ Similarly, the Court of Justice has assessed, via an objection of illegality, the lawfulness of a letter in which the High Authority gave directions for interpretation to a body which had to apply only articles of the Treaty and secondary Community legislation, after finding that the letter did not constitute an act against which an action would lie.²¹ In practice, however, the inquiry into the legality of such directions for interpretation will generally coincide with the Court's interpretation of the provisions of Community law to which they relate. If the directions for interpretation are consistent with the Court's interpretation, they will be "lawful", otherwise not. The legality of the individual act therefore does not actually depend so much on the "legality" of the directions for interpretation, as on whether the interpretation of the provisions of Community law which they apply is or is not correct.

II. IDENTITY OF THE PARTIES

"Any party". Under Art.241 of the EC Treaty, "any party" may raise an objection of illegality.

Natural or legal persons. "Any party" covers, first, natural or legal persons who are unable to challenge before the Court of First Instance the act against which the objection is raised, (see 9-004, *supra*). Natural or legal

¹⁸ Van Rijn therefore suggests that an objection of illegality should be allowed to be raised against any general act, such as decisions approving the budget or directives addressed to all the Member States (see *Commission v Belgium*, at 255, together with the academic writings cited in support in n.138); see also the considerations put forward by Van Rijn (n.136, *supra*), at 187-188, who considers the availability of the objection of illegality against various sorts of acts in detail; in contrast, Laurs argues, on the basis of the clear wording of Art.241 of the EC Treaty, that objections of illegality should be able to be raised only against "regulations" (understood in the substantive sense of the term) (Laurs (n.635, *supra*), at 176).

¹⁹ [1994] O.J. C93.

²⁰ ECJ, *Joined Cases C-185/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v Commission** [2003] E.C.R. I-5425, paras 222 and 223; CFI, Case T-54/02 (Judgment of November 29, 2005) *Heubach v Commission*, not yet reported, para.15.

²¹ ECJ, *Joined Cases 32 and 55/58 *SNUPAT v High Authority** [1959] E.C.R. 137, at 140.

persons may therefore raise an objection against regulations and other general acts which they could not reasonably challenge in an action for annulment before the Court of First Instance, provided, of course, that the act concerned applies to the issue with which the application is concerned.¹¹¹

- 303 Member States and Community institutions. There is a school of thought in the literature to the effect that the fact that Member States and Community institutions may bring an action for annulment against any binding Community act precludes them from making use of the objection of illegality on the ground that, if they could, they would effectively be able to start time running again in breach of the principle of legal certainty.¹¹² But this view is not shared by all commentators. Some argue that Member States and Community institutions may also have recourse to Art.241 of the EC Treaty with a view to a finding that regulations and similar acts which are "at issue" are unlawful, even though they have not taken advantage of their right to bring an action for annulment against the acts in question within the period prescribed for bringing proceedings. This argument relies principally on the wording of Art.241 ("any party"), whilst referring at the same time to the ancillary function of the objection of illegality of avoiding the application of regulations and similar acts whose deficiencies and possible illegality become apparent to Member States or Community institutions after the time-limit for bringing proceedings has passed when they are implemented or raised in judicial proceedings.¹¹³ The unlawful nature of an act may not in fact appear so much on its face as from the manner in which it is interpreted and applied.¹¹⁴

The following picture emerges from recent case-law of the Court of Justice. The Court accepts that a privileged applicant may invoke the

¹¹¹ However, an objection of illegality cannot be raised by an individual against a regulation in the exceptional case where the regulation has a dual nature and should be considered to constitute a decision as regards the individual so that that individual could undoubtedly have sought the annulment of the regulation under Art.230 of the EC Treaty (see *ECJ, Case C-1100 Commission v ECB* (2001) E.C.R. I-7147, para.75; the Court of Justice cited by way of example regulations imposing anti-dumping duties. They have the dual nature of acts of a legislative nature and acts liable to be of direct and individual concern to certain traders).

¹¹² See, "Judicial Remedy of Private Parties against Normative Acts of the European Communities: The Role of Exception of Illegality" (1986) C.M.L.Rev. 7, at 11-13; Usher, "The Interrelationship of Arts 173, 177 and 184 (now Arts 230, 234 and 241) EEC" (1978) E.L.Rev. 38, at 37; Joffe, *Le contentieux*, at 134 et seq.

¹¹³ See to that effect Lacombe (n.14, *supra*), at 277-278, who systematically refutes Bebr's arguments (n.87, *supra*). See also Baras (n.735, *supra*), at 371; Van Rijn (n.736, *supra*), at 163; Dubois, "L'exception d'illégalité devant le Cour de Justice des Communautés européennes" (1973) C.D.E. 471, at 411-412.

¹¹⁴ See *ECJ, Case C-1100 Commission v ECB* (2001) E.C.R. I-7147, para.73, in which the ECJ considered that it had not brought an action for the annulment of Regulation No 1073/1999, in respect of which it subsequently raised an objection of illegality, because it believed that the regulation did not apply to it.

illegality of a regulation—that it could have challenged under Art.230 of the EC Treaty.¹¹⁵ The Court of Justice expressly confirmed this in its 2003 judgment in *Commission v ECB*.¹¹⁶ In that case, the Commission applied, under Art.230 of the EC Treaty, for the annulment of Decision 1998/726/EC of the European Central Bank of October 7, 1998 on fraud prevention.¹¹⁷ In fact, the Commission considered that that decision was in breach of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of May 25, 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).¹¹⁸ In the proceedings before the Court of Justice, the ECB objected, pursuant to Art.241 of the EC Treaty, that Regulation No 1073/1999 was unlawful. The Commission argued that that objection was inadmissible on the ground that the ECB had not brought an action for the annulment of the regulation within the two-month deadline prescribed by the fifth para. of Art.230 of the EC Treaty. In its judgment of July 16, 2003, the Court of Justice made a clear distinction between decisions, on the one hand, and regulations of a genuinely legislative nature, on the other. As far as decisions are concerned, the Court pointed to its case-law to the effect that a decision which has not been challenged by its addressee within the time-limit laid down by the fifth para. of Art.230 of the EC Treaty becomes definitive as against that person.¹¹⁹ This is because time-limits serve to ensure legal certainty by

¹¹⁵ As long ago as 1955, the Court of Justice had implicitly accepted that Member States could raise an objection of illegality against provisions of a Council regulation and a Commission regulation in an action for the annulment of another Council regulation. Although it did not consider whether Member States were entitled to invoke Art.241, it did reject the objection on the ground that it was directed against provisions of regulations which were not applicable to the time with which the application was concerned (*ECJ, Case 32/55 Italy v Council and Commission* (1956) E.C.R. 357).

¹¹⁶ *ECJ, Case C-1100 Commission v ECB* (2003) E.C.R. I-7147 (with a case note by Oudiz (2004) C.M.L. Rev. 1073-1077). A number of Advocates General of the Court of Justice had earlier expressed the view in Opinions that the wording of Art.241 does not preclude Member States and Community institutions from raising an objection of illegality (Opinion of Advocate General X. Rosner in *ECJ, Case 32/55 Italy v Council and Commission* (1956) E.C.R. 359, at 416; Opinion of Advocate General Sir Gordon Slynn in *ECJ, Case 31/65 France v Commission* (1967) E.C.R. 655, at 702-703; Opinion of Advocate General G.F. Menaldi in *ECJ, Case 254/86 Greece v Council* (1983) E.C.R. 3223, at 5343-5345). On this view, the possibility of Member States or Community institutions raising such an objection is not even subject to any limitation, because Art.241 does not so provide. Thus, a Member State does not have to show that there was a good reason why it did not act in time in bringing an action for annulment against the regulation or similar act at issue or that it was taken by surprise—after the time-limit for bringing an action for annulment had passed—by the intervention given to the act, which raised doubts as to its legality (Opinion of Advocate General Sir Gordon Slynn in *ECJ, Case 31/65 France v Commission* (1967) E.C.R. 659, at 703).

¹¹⁷ [1998] O.J. L311/04.

¹¹⁸ [1999] O.J. L33/61.

¹¹⁹ *ECJ, Case C-1100 Commission v ECB* (2003) E.C.R. I-7147, para.74 (with a case note by Oudiz (2004) C.M.L. Rev. 1073-1077). See also *Case C-133/02 FWD Textworts Gegenstand* (1994) E.C.R. I-831, para.12; *ECJ, Case C-285/93 Hoge* (1997) E.C.R. I-565, paras 15-24; *ECJ, Case C-289/99 Nestlé Suisse* (2001) E.C.R. I-1197, paras 23-42; *ECJ, Case C-241/01 National Farmers' Union* (2002) E.C.R. I-9079, para.34; *ECJ, Case C-154/01 Commission v Austria* (2004) E.C.R. I-4579, paras 40-41; see also *Case C-450/02*.

preventing unlimited proceedings from being brought against Community acts which have legal effects.

However, the Court further observed that this case-law did not rule out the possibility of raising an objection of illegality against "genuine" regulations. The reason for this is that Art.241 of the EC Treaty provides expressly that any party may, in proceedings in which a regulation of the kind referred to in Art.241 is at issue, plead the grounds specified in the second para. of Art.230 of the EC Treaty in order to invoke before the Court of Justice the inapplicability of that regulation.¹⁴ After finding that "the legislative nature of Regulation No 1373/1999 has not been challenged by any of the parties and that, more particularly, it has not been claimed that the regulation should be treated as a decision or that the ECB would, in such a case, be the addressee thereof", the Court declared the objection of illegality inadmissible.¹⁵

The possibility for Community institutions and Member States to raise an objection of illegality against regulations must be regarded as an exception based on a literal reading of the applicable provision of the Treaty. On the one hand, it is at odds with the principle of legal certainty to allow a privileged applicant which has not taken advantage of its right to apply for the annulment of an act within the prescribed time-limit a further opportunity to contest the legality of that act by raising an objection of illegality. On the other hand, Art.241 of the EC Treaty expressly provides that "any party"—hence also privileged applicants—can raise an objection against "regulations".¹⁶

The case-law has not extended the possibility of raising an objection of illegality to cover directives.¹⁷ This is because that possibility is not provided for in any provision of the Treaty. In this connection, the Court of Justice has not made any distinction between directives addressed only to certain Member States and directives addressed to all Member States.¹⁸

¹⁴ ECJ, Case C-1160/03 *Commission v ECB* [2005] E.C.R. I-7145, para.76.

¹⁵ *Ibid.*, paras 77-78. In his case note, [2004] C.M.L.Rev. 1073-1092, Odudu arrives at a restrictive interpretation of Art.241 of the EC Treaty. The author claims that "any party" will be considered to be circumventing the Art.230 time-limit, and thus prevented from raising the Art.241 plea of illegality, when it has notice both that a measure affects its interests and that it is able to challenge the measure.

¹⁶ ECJ, Case C-1196/03 *Commission v ECB* [2005] E.C.R. I-7147, para.26.

¹⁷ Thus, the Commission cannot, in infringement proceedings, claim that a directive the provisions of which were complied with by the Member State concerned, is in conflict with a view to demonstrating the existence of an infringement by that Member State of a Treaty provision (ECJ, Case C-475/01 *Commission v Greece* [2004] E.C.R. I-8925, paras 27, 13, 24 and 13).

¹⁸ Art.254(2) of the EC Treaty provides that directives which are addressed to all the Member States are to be published in the Official Journal of the European Union in the same way as regulations and are to enter into force, no longer upon notification to the Member States, but—again as in the case of regulations—on the twentieth day following that of their publication (unless they specify otherwise). What is involved therefore is directives of a general legislative character whose content and possible illegality might only become

Consequently, as far as the objection of illegality is concerned, directives share the same fate as decisions.¹⁹

Objection raised by the parties and exceptionally by the Court. Both applicants and defendants are entitled to raise an objection of illegality with a view to having a case decided in their favour.²⁰

In principle, an objection of illegality must be raised by one of the parties. Nevertheless, exceptionally, the Court of Justice or the Court of First Instance may consider whether a general act constituting the basis for the measure contested in the proceedings is unlawful of its own motion.²¹ The Court may do so in particular where the general act may possibly be unlawful for lack of competence or infringement of an essential procedural requirement (see 7-122, *supra*).

III. SPECIAL CHARACTERISTICS

A. REQUIREMENTS FOR ADMISSIBILITY

Action in connection with which the objection is raised must be admissible. An objection of illegality will be admissible only in so far as the direct action in connection with which it is raised is admissible.²² The applicant's interest in successfully raising an objection of illegality against the general act on which the contested individual measure is based coincides with its interest in its succeeding with its application for the annulment of that

applicant—precisely as in the case of regulations and similar acts—after the time for bringing proceedings has run out, for example, when the Commission informs the Member States of the precise content of their obligations in terms of implementation. Nevertheless, an objection of illegality raised by a Member State against such a directive was declared inadmissible (see ECJ (judgment of July 15, 2004), Case C-138/03 *Commission v Germany*, not reported, para.7; ECJ (judgment of July 15, 2004), Case C-139/03 *Commission v Germany*, not reported, para.7).

²⁰ See to that effect ECJ, Case C-74/91 *Commission v Germany* [1992] E.C.R. I-3437, para.12; see also ECJ, Case C-242/01 *Meinl v. Union* [2002] E.C.R. I-3679, para.39, in which the Court held that a Member State which was an addressee of a Commission decision on emergency measures to protect against bovine spongiform encephalopathy and which had not challenged the legality of that decision within the time limit laid down by the 4th para. of Art.230 of the EC Treaty did not have standing subsequently before a national court to invoke its unlawfulness in order to dispute the merits of an action brought against it. The decision was addressed to all the Member States and—despite its title—was legislative in nature.

²¹ *Wachbreucke and Wachbreucke, Réponse de droit communautaire*, key words: Exception d'illegalité (Ed. Dalloz, Paris, 1994). See ECJ, Case C-475/01 *Commission v Greece* [2004] E.C.R. I-8925, para.17.

²² ECJ, Case 14/59 *Société des Forges et Fonderies de Pont-à-Mousson v High Authority* [1959] E.C.R. 215, at 216; CFI (judgment of September 27, 2005), Joined Cases T-136/03 and T-135/03 *Common Market Fertilizers v Commission*, not yet reported, paras 51-54.

²³ Opinion of Advocate General F. Capotorti in ECJ, Case 43/76 *Reinartz, Commission and Council* [1977] E.C.R. 291, at 301.

measure. If the general act is declared inapplicable, the individual measure loses its legal basis and the action for annulment of that measure will succeed. If the objection is raised by the defendant, its interest in obtaining a declaration that a Community act which it has allegedly infringed is inapplicable is likewise self-evident.

- 9-011 Other conditions. As already noted, an objection of illegality may be raised only in respect of a general act which is applicable to the issue with which the application is concerned (see 9-005, *supra*).¹²¹ Furthermore, it must be raised in time, in principle in the application or the defence.¹²²

An objection of illegality may be raised against general acts outside the time-limit for bringing an action for annulment against them. This follows from the essential nature of the objection¹²³; it is also confirmed by Art.241 of the EC Treaty.

B. ACTIONS IN WHICH AN OBJECTION OF ILLEGALITY MAY BE RAISED

- 9-012 Any direct action. An objection of illegality may be raised after any direct action has been brought before the Court of Justice or the Court of First Instance. As we have already seen, objections of illegality are raised most often after an action for annulment has been brought.¹²⁴

Such an objection may also be raised, however, in proceedings for failure to act, either by the defendant institution, where it asserts that the general act which—the applicant claims—gives rise to an obligation for it to act is unlawful, or by the applicant, where it argues that a general act which the defendant institution invokes in order to deny the existence of any obligation to act is unlawful.¹²⁵

¹²¹ It is not sufficient that the act should have the "label" of a general act. According to the Court of Justice, the general principle, to which Art.241 of the EC Treaty gives expression and which has the effect of ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision. In this connection, the Court referred to regulations imposing antidumping duties by virtue of their dual nature (see ECJ, Case C-115/80 *Commission v ECR* [1981] E.C.R. I-1243, para.75, and ECJ, Case C-213/89 *Nachi Europe* [2001] E.C.R. I-1157, para.37).

¹²² An objection of illegality expressly raised for the first time in the reply is admissible if it constitutes the expansion of a plea raised by implication in the application. Cf. Judgment of November 13, 2004, Case T-175/01 *Feryns Nord v Commission*, not yet reported, para.154.

¹²³ ECJ, Case 183/85 *Stinor v Commission* [1986] E.C.R. 2775, para.11.

¹²⁴ For an example in an action for annulment based on Regulation No 4054, see CFJ, Case T-110/95 *AGK v Commission* [2001] E.C.R. I-1137.

¹²⁵ ECJ, Joined Cases 32 and 34/53 *INPRAAT v High Authority* [1955] E.C.R. 137, at 135 (in that ECSC case, the action for failure to act was to nullify an action to annul a decision). It is not as easy to raise an objection of illegality in proceedings for failure to act brought pursuant to Art.241 of the EC Treaty. Where the institution concerned has failed to act, the applicant can only pressure on what general measure the failure to act is based. Once the institution indicates the general act on which its failure to act is based, it has defined its position and the action for failure to act becomes inadmissible, see Van Sijl (6.735, *supra*), at 151.

In addition, it should be possible for a Member State to defend itself against an action for failure to fulfil obligations by raising an objection of illegality against a regulation. It would appear that no such possibility exists in the case of directives (see 9-008, *supra*).

In principle, it is also possible to raise an objection of illegality after bringing an action for damages.¹²⁶ In practice, however, recourse to such an objection in this connection will be of little utility. The illegality of the general act against which the objection is raised admittedly results in the act being declared inapplicable, but it does not as such result in a determination that the Community has incurred liability, irrespective of whether the general act allegedly caused damage as a result of its direct effect or because it served as the legal basis for individual implementing measures.¹²⁷

Lastly, an objection of illegality assumes importance in staff cases.¹²⁸

Objection cannot be raised in preliminary proceedings. An objection of illegality cannot be raised before the Court of Justice in proceedings for a preliminary ruling. That procedure simply reflects a relationship of cooperation between the national courts and the Court of Justice. The national court determines the question(s) to be brought before the Court of Justice and the parties to the main proceedings are not entitled to alter their scope.¹²⁹ Yet, "according to a general principle of law which finds its expression in Art.241 of the EC Treaty", interested parties in the main proceedings must be able to plead the illegality of the Community act on which the national decision adopted in their regard was based.¹³⁰ If they do so, the national court may (or must) apply to the Court of Justice for a preliminary ruling on the validity of the Community act at issue (see Ch.10, *supra*).

C. PLEAS IN LAW

Reference to the action for annulment. By virtue of Art.241 of the EC Treaty, any party may plead "the grounds specified in the second para. of Art.230" in order to claim that an allegedly unlawful regulation is inapplicable. The pleas of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application or misuse of powers (see 7-121 to 7-158, *supra*) are therefore potentially available in support of an objection of illegality.

¹²⁶ Lenz (16.14, *supra*), at 275.

¹²⁷ Cf. Doherty (16.14, *supra*), at 431.

¹²⁸ ECJ, Case 102/83 *Bourin v High Authority* [1984] E.C.R. 693; ECJ, Joined Cases 75 and 178/82 *Razouk and Beydoun v Commission* [1984] E.C.R. 1535, paras 15-18; CFJ, Case T-276/02 *Faltore v Commission* [2004] E.C.R. SC II-1393, paras 18-25; CFJ, Joined Cases T-215 and T-317/02 *Luis Herrera v Commission* [2004] E.C.R. SC II-1407, paras 38-39.

¹²⁹ ECJ, Case 44/66 *Fischer* [1963] E.C.R. 561, at 690.

¹³⁰ ECJ, Case 214/82 *Delors v Hamburg* [1983] E.C.R. 1771, para.10.

IV. CONSEQUENCES

9-215 In principle "inter partes". If an objection of illegality is successfully raised, the general act to which it relates is declared inapplicable for the purposes of the proceedings in which the objection was raised. It is inapplicable only in relation to the parties involved in those proceedings.¹²⁹ The general act subsists as far as third parties are concerned.¹³⁰

Nevertheless the institution which adopted the act declared inapplicable is under a duty to withdraw or adjust the act in order to eliminate the illegality found.¹³¹

V. THE CONSTITUTION

9-216 Broader scope of the objection. Art.III-378 of the Constitution provides: "Notwithstanding the expiry of the [two-month time limit for bringing an action for annulment], any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Art.III-365(2) in order to invoke before the Court of Justice of the European Union, the inapplicability of that act".

The wording of Art.III-378 of the Constitution is manifestly broader than the wording of the present Art.241 of the EC Treaty. It refers to acts of general application, which would undoubtedly cover the current category of directives under the EC Treaty (which, under the Constitution, will take the form either of a European framework law or of a European regulation).¹³² It remains to be seen, however, how the Court of Justice will reconcile Art.III-378 with the requirement of legal certainty.

¹²⁹ ECJ, Joined Cases 15-16, 52-53, 57-60, 116-117, 113, 112 and 115-137/73 *Sotgiu (née Karmay) and Others v Council and Others* [1974] E.C.R. 173, para.34; see also *Van Duyn* [1974] E.C.R. 1259, at 1259-1260.

¹³⁰ Nevertheless, the declaration that the act is inapplicable may have indirect effects on third parties. For example, if the implementation of the general act was determined by an individual act which was addressed to a number of persons, the annulment of the implementing measure on account of the non-applicability of the general act might also alter the legal position of persons to whom the implementing measure was addressed but who did not bring proceedings against it (*Lauritzen* (n.53), *supra*, at 180-181). In such an event, the Court of Justice or the Court of First Instance may of course restrict the effects of the declaration of nullity if such a step is necessary to protect the interests of third parties (see 7-173, *supra*); for an example, see ECJ, Case C-242/92 *Commission v Albani and Others* [1993] E.C.R. I-3533, para. 33-34.

¹³¹ Opinion of Advocate General Lagrange in ECJ, Case 1459 *Société des Fonderies de Pont-de-l'Écluse v High Authority* [1959] E.C.R. 113, at 143, who refers to "the need—more or less legal—to adopt a new decision", and in ECJ, Joined Cases 14, 16-17, 23, 24, 25-27/60 and 1661 *Meroni and Others v High Authority* [1961] E.C.R. 181, at 174; Opinion of Advocate General E. Roemer in ECJ, Joined Cases 9 and 10/60 *Windsor v High Authority* [1960] E.C.R. 197, at 227. Cf. ECJ, Joined Cases 75 and 117/82 *Ratzon and Sigmund v Commission* [1984] E.C.R. 1559, para.13.

¹³² See Constitution, Art.I-53.

VIII Action for damages

1. Non-contractual liability of the Community
 - 1.1. Liability for discretionary acts
 - 1.2. Liability for illegal non-discretionary acts
 - 1.3. Liability for lawful non-discretionary acts
 - 1.4. Liability for official acts of community servants
2. Contractual liability of the Community

Mandatory Reading

- Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 431-438.
Koen Lenaerts, Dirk Arts, Ignace Maselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2005 Chapter 11.
P. Craig, G. De Burca, *EU Law, Text, Cases and Materials*, 4th edition, Oxford University Press, 2008 Chapter 15.

be brought, if the institution's position on the matter is clear to the applicant, it must bring the request for action within a reasonable period. In *De Nederlandsche Bank v Commission*, a case which involved Article 95 ECSC, the parallel provision to Article 145 TFEU in the ECSC Treaty, the Commission informed the Dutch government that a French restructuring plan did not violate the Treaty provisions on state aids.¹⁴⁴ The Dutch government waited a further eighteen months before requesting the Commission to act. The Court, reasoning from the principle of legal certainty, stated that an applicant did not have a right to raise the matter with the Commission indefinitely and had delayed too long in this instance.

5 THE PLEA OF ILLEGALITY

Particularly in areas where the Commission enjoys delegated powers, parties face a problem if they want to challenge an act. The Commission measure may be addressed to them or be of direct and individual concern to them, but they may want to challenge the act on the basis that the parent measure is illegal. They may face difficulties here because the time limits have passed, or because they may not satisfy the *locus standi* requirements in relation to the parent instrument. The plea of illegality addresses this by allowing a party in proceedings against a measure to plead the inapplicability of its parent measure.

Article 267 TFEU

Notwithstanding the expiry of the period laid down in Article 263, fifth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

The plea of illegality is a parasitic procedure. It cannot be brought as an independent action but can only be invoked in the context of proceedings brought under some other provision of the Treaties. To that end, the party must secure *locus standi* under the other procedure and observe the time limits set out in that procedure, albeit that the time limits for challenging the parent measure may have lapsed.¹⁴⁵ To give an example, a party might want to challenge a Decision on the grounds that the enabling Regulation was illegal. It would have to show that it had *locus standi* under Article 263 TFEU to challenge the Decision, and that it observed the time limits set out there for challenging the Decision within two months of its publication. It does not matter that it is more than two months since the Regulation was adopted.

The concern with the plea of illegality is that it should not lead to an abuse of process where it is used to subvert other procedures. This has led to two refinements.

First, a plea of illegality may not be invoked where a matter is pending before another court or in another action before the same court.¹⁴⁶ For this to be the case, it must be considered to be *pendens*. This will only happen if three conditions are met. The action must be between the same parties, must seek the same object and must do so on the basis of the same

431 Judicial Review

submissions. This will very rarely be the case. Even if the substance of the dispute is similar, the litigation before the courts may involve slightly different dimensions, and parties will, in any case, often use different arguments.¹⁴⁷

Secondly, a party who had an earlier opportunity to challenge the parent measure cannot subsequently raise the plea of illegality.¹⁴⁸ The most obvious example is privileged parties under Article 263 TFEU who had unlimited standing to challenge the parent measure at the time of adoption. If they could subsequently raise a plea of illegality, this would allow them to evade the time limits in that procedure and generate uncertainty. In *Spain v Commission*, the Court refused to allow a Spanish challenge to a 1992 Commission Decision extending the regime on subsidies to the motor vehicle industry.¹⁴⁹ For the basis of the Spanish challenge was that the initial 1990 regime on which the 1992 Decision was based was illegal. The Court ruled that as Spain had not challenged the 1990 regime at the time, it could not subsequently raise a plea of illegality.

However, the principle applies not just to privileged parties but to any party who had an earlier opportunity to bring the matter directly to the Court of Justice. In *TWD (No. 2)*, a 1996 Commission Decision that a subsidy from the German Land of Bavaria to the applicant, a textile company, was illegal was not challenged.¹⁵⁰ A new subsidy was authorised by a second Commission Decision on condition that the initial subsidy granted to the applicant be repaid. The applicant challenged the 1996 Decision, under a plea of illegality, claiming that its economic effects only became apparent following the second Decision. The General Court decreed this inadmissible, noting that, as the applicant could have challenged the first Decision using Article 263 TFEU, it was debarred now from bringing a challenge under Article 267 TFEU.

7 NON-CONTRACTUAL LIABILITY

The final head of action under which Union measures can be reviewed is that of non-contractual liability. In such circumstances, the applicant will not be seeking merely annulment of the measure but also damages from the EU institutions. This is governed by Article 140(2) TFEU.

Article 140(2) TFEU

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the law of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Although an equivalent Treaty provision has been present since the Treaty of Rome in the 1950s, the law on the non-contractual liability of EU institutions was reshaped by the *Brasserie du Pêcheur* judgment.¹⁵¹ This judgment, it will be remembered, set out the circumstances in

¹⁴⁴ Case 15/71 *Netherlands v Commission* (1971) ECR 425.

¹⁴⁵ *Joined Cases C-1/61 and C-59/61 Netherlands v Commission* (1962) ECR 104.

¹⁴⁶ *Joined Cases T-4/94 and T-23/94 Dansk Selskab v Council*, Judgment of 5 July 2000.

¹⁴⁷ On the early debate surrounding this, see G. Eder, 'Judicial Remedy of Privileged Parties Against Normative Acts of the European Commission: The Role of the Exception of Illegality' (1964) 4 *OEJL* 7. A. Barro, 'The Extension of Illegality in Community Law: A Critical Analysis' (1974) 11 *OEJL* 355.

¹⁴⁸ Case C-125/93 *Spain v Commission* (1995) ECR I-1551.

¹⁴⁹ *Joined Cases T-244 and T-245/93 TWID Fortwærker Designting v Commission* (1995) ECR I-1255.

¹⁵¹ *Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur v Germany* (1996) ECR I-1025. See pp. 304-7. See also T. Tridimas, 'Liability for Breach of Community Law: Drawing Up and Following Down' (2001) 31 *OEJL* 381.

which Member States could be liable for individual loss that arose from their failure to comply with EU law. Aware of the inconsistencies that might otherwise arise, the Court stated that the same criteria set out in that case defining Member State liability should also govern the liability of EU institutions under Article 340(2) TFEU.¹⁴¹ To be sure, it has proved difficult for the Court of Justice to apply these parallels too formulaically but it has tried to remain true to similar principles for both.

7) Nature of the liability

The leading case following *Brasserie du Pêcheur* in which the Court considered the liability of the EU institutions was *Bergaderm*. A Commission Decision banned the use of a chemical, bergapten, in sun oil on the ground that it was carcinogenic. Bergaderm was the only company that produced sun oil using this chemical. Following the Decision, it went into liquidation. It sued the Commission, claiming that the latter had misinterpreted the scientific evidence. The application failed, but the Court set out new parameters for Article 340(2) TFEU.

Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm v Commission* (2000) ECR I-5191

33. [Article 340(2) TFEU] provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.
40. The system of rules which the Court has worked out with regard to that provision gives rise to a complex, albeit also, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question...
41. The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in the circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage...
42. As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties...
43. As to the second condition, as regards both Community liability under Article (268) EC, the predecessor to 340(2) TFEU, and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion...
44. Where the Member State or the institution in question has only considerably misused, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach...
46. In that regard, the Court finds that the general or individual nature of a measure taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.

¹⁴¹ *Brasserie du Pêcheur*, para. 40-41.

- The judgment sets out three conditions which must be met for the institutions to incur liability (paragraph 43). These are:
 - the conduct of the institution must infringe a rule of law intended to confer rights on individuals;
 - the breach of EU law must be sufficiently serious;
 - there must be a direct causal link between the breach by the EU institution and the damage sustained by the applicant.

As there was no liability in *Bergaderm*, the Court did not address in detail the third condition but only the first two. In this, it recast a distinction that it had previously made between legislative acts involving economic policy choices and other acts, with a far higher degree of fault required for liability for the former.¹⁴² In *Bergaderm*, the Court indicated that it will operate a single test which makes no distinction between the types of act being challenged. Within this single test, there will be a spectrum of cases. These will range from situations where the EU institutions are faced with complex choices and where they enjoy a fair degree of discretion, to more straightforward scenarios where they have little or no discretion. Questions of complexity and discretion will be central to determining the standard of liability in each case.

On relatively straightforward matters or where the EU institution has little or no discretion, the Court has stated, in regard to the first test that a superior rule must be breached, that the same must grant rights for individuals. Breach of an instrument, such as the WTO agreement, that does not do this will not lead to liability.¹⁴³ Beyond that, any breach of any EU legal obligation, be it substantive or procedural, will be sufficient.¹⁴⁴ A failure to exercise due diligence will also incur liability.¹⁴⁵ With regard to the second head of the test, in such circumstances mere illegality or failure to exercise due diligence will be sufficient.

The situation is different where the EU institutions enjoy a measure of discretion. With regard to the first part of the test, general principles of EU law, fundamental rights and the doctrine of misuse of powers have been held to be norms that will lead to liability.¹⁴⁶ The duty to give reasons, on the other hand, is not regarded as having that status, so a failure to give reasons cannot give rise to an action under Article 340(2) TFEU.¹⁴⁷ Similarly a failure of due diligence, be it in the form of an error of assessment or a failure to consider evidence that should have been considered, will not be sufficient to incur liability.¹⁴⁸

With regard to the second heading, *Bergaderm* indicated that a simple breach of EU law by an EU institution would not be sufficient for it to incur liability. The breach must be sufficiently serious and that would involve the EU institution 'manifestly and gravely' exceeding the limits on its discretion (paragraph 43). The meaning of this was addressed in most detail in *Schneider*. *Schneider* and *Legrand* were two companies specialising in electrical distribution and low voltage installations who merged into a single company. The Commission declared

¹⁴² Case 57/73 *Adlkon-Zeilinger-Gliedapparat v Council* [1973] ECR 575. For an excellent discussion of the position since *Bergaderm*, see L. Maron, 'The Role of Discretion in EU Law on Non-contractual Liability' (2009) 42 *CMR*, 577.

¹⁴³ Joined Cases C-12/04 and C-13/05 *FRANCO and Sotgiu v Council and Commission*, Judgment of 3 September 2008.

¹⁴⁴ Case T-33/03 *Schneider v Commission* (2007) ECR II-4213. The most extensive list of grounds can be found in Case T-41/05 *Stardis and Syk v Commission* (2008) ECR II-1545.

¹⁴⁵ Case T-174/04 *Früh-Werke v Commission* (2006) ECR II-3331.

¹⁴⁶ For a summary of the position, see Joined Cases T-42/03 and T-42/03 *Vincelguy and Expansive v Council and Commission* (2005) ECR II-2341.

¹⁴⁷ See, e.g., Case C-115/01 *P. Semerari v Council* (2002) ECR I-10281, para. 38 and the case law cited therein.

¹⁴⁸ Case T-112/03 *Mytilineos v Commission*, Judgment of 3 September 2008.

the merger incompatible with the common market and ordered a break-up of the company. In 2001, the General Court found the Commission decision to be illegal on two grounds.¹¹⁸ First, there were errors in its economic analysis of all the national markets other than the French market. Notwithstanding this, the General Court held that the competition effects on the French market were sufficient for the merger to be declared incompatible with the single market. In addition, in its initial statement of objections, the Commission had failed to tell Schneider in sufficiently clear terms what measures it needed to take to avoid the merger being declared illegal. Schneider then brought an action under Article 240(2) EC.

Case T-35/03 *Schneider v Commission* [2007] ECR II-2217

118. The system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the Community is based on a number of factors, the complexity of the situation to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question...
119. In that context, the Commission contends that, if it were to incur financial liability in circumstances such as those of this case, its capacity fully to function as a regulator of competition, a task entrusted to it by the EC Treaty, would be compromised as a result of the possible inhibiting effect that the risk of having to bear damages alleged by the undertakings concerned might have on the exercise of its functions.
120. It must be conceded that such an effect, contrary to the general Community interest, might arise if... the concept of a serious breach of Community law were conceived as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent liable to the normal standard of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion.
121. Therefore, a sufficiently serious breach of Community law, for the purposes of establishing the non-contractual liability of the Community, cannot be constituted by failure to fulfil a legal obligation, which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject as a result of the provisions governing the control of concentrations.
122. On the other hand, the right to compensation for damage resulting from the conduct of the institution becomes available where such conduct takes the form of action manifestly contrary to the rule of law and seriously detrimental to the interests of persons outside the institution and cannot be justified or accounted for by the particular constraints to which the staff of the institution, acting normally, is objectively subject.
123. Such a definition of the threshold for the establishment of non-contractual liability of the Community is conducive to protection of the need for discretion and freedom of assessment which must, in the general interest, be enjoyed by the Community regulator of competition, both in its discretionary decisions and in its interpretation and application of the relevant provisions of primary and secondary Community law, without thereby leaving third parties to bear the consequences of flagrant and inexcusable misconduct...
124. In principle, the point may not be raised that manifest and serious defects affecting the economic analysis underlying competition policy decisions may constitute sufficiently serious breaches of a rule of law to cause the Community to incur non-contractual liability.

¹¹⁸ Case T-35/03: *Schneider v Commission* [2007] ECR II-2217.

119. However, for such a finding to be made it is first necessary to verify that the rule infringed by the incorrect analysis is intended to confer rights on individuals. Whilst certain principles and certain rules which must be observed in any competitive analysis are indeed rules intended to confer rights on individuals, not all norms, whether of primary or secondary law or deriving from case law, which the Commission must observe in its economic assessments can be automatically held to be rules of that kind.
120. Next, it must be noted that the economic analysis necessary for the classification, under competition law, of a given situation or transaction are generally, as regards both the facts and the reasoning based on the account of the facts, complex and difficult intellectual tasks, which may consequently contain certain inadequacies, such as approximations, inconsistencies, or indeed certain omissions. In view of the time constraints to which the institution is subject, that is even more so where, as in the case of the control of concentrations, the analysis has a prospective element. The gravity of a documentary or logical inadequacy, in such circumstances, may not always constitute a sufficient circumstance to cause the Community to incur liability.
121. Last, it must be borne in mind that the Commission enjoys discretion in maintaining control over Community competition policy, which means that rigorously consistent and invariable practice in implementing the relevant rules cannot be expected of it and, as a result, that it enjoys a degree of latitude regarding the choice of the economic instruments available to it and the choice of the appropriate approach to the study of any matter (see, for example, regarding the definition of the relevant market, 122) provided that those choices are not manifestly contrary to the accepted rules of economic discipline and are applied consistently.

In *Schneider*, the General Court went on to find that there was liability because the Commission had violated Schneider's rights of defence by not telling it what corrective action it needed to take. It saw this question as unrelated to the complexity of the assessment, and therefore simple breach was sufficient to justify liability.¹¹⁹

The Court could have used a risk-based test. This would have involved the Court deciding, in conditions of uncertainty, whether EU institutions or private parties would be better equipped to bear responsibility for the costs of things going wrong. Misbehaviour by EU institutions would have been irrelevant to this test. Instead, the Court chose to apply a fault-based test. The virtues of such a test are that it carries with it a duty of care on the part of EU institutions to those affected by their actions. This test is not, however, without its own challenges. In this regard, EU law suggests a paradoxical standard. With regard to substantive obligations, only the most flagrant violations of clear obligations or arbitrary conduct will incur liability – a very narrow fault test indeed. As regards matters of process, the situation is reversed, with relatively small failures to observe due process or rights of defence being likely to lead to liability. The difficulty with this is that it provides incentives for EU institutions to focus on process in their activities at the expense of substance.

¹¹⁹ The finding of the General Court on this point was upheld on appeal. Case C-40/07 P *Commission v Schneider Electric*, Judgment of 16 July 2008.

(i) Presence of loss caused by the Union

The final condition for liability is the presence of a direct causal link between the breach of EU law and the damage. The range of types of loss that may be covered is, in principle, considerable. The position as to types of loss which may be recovered was most clearly set out by Advocate General Capotorti in *Praet-Arksdyk*:

It is well known that the legal concept of 'damage' covers both a material loss strictly so-called, that is to say, a reduction in the person's assets and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place (these two alternatives are known respectively as *damnum emergens* and *lucrum cessans*). The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place; the hypothetical nature of that restoration often entails a certain degree of approximation.¹⁵¹

The Court has thus taken a broad view of which loss may be recovered. It will include any accidental loss, such as penalties the applicant had to pay as a result of having to repudiate a contract,¹⁵² or bank interest as a result of loans taken out to pay money wrongfully levied.¹⁵³ The Court has also been ready to award compensation for non-pecuniary loss such as anxiety, hurt feelings¹⁵⁴ and harm to professional reputation.¹⁵⁵ The 'expectation interest' will also be protected. Compensation will be awarded, therefore, for loss of profits.¹⁵⁶

However, the establishment of loss is often a significant hurdle in practice for applicants.

The first problem is that of joint or concurrent liability situations where both an EU institution and a Member State may be liable.¹⁵⁷ There are two situations where this may occur.¹⁵⁸ The first is where a national authority implements or administers an unlawful Union measure, such as the transposition of a Directive or the collection of agricultural levies. The second is where a decision is taken jointly by a Member State and an institution, such as in the field of external trade, where Member States are permitted to restrict imports of third country goods once they have received the permission of the Commission. The most equitable solution would be to establish a system of joint and several liability. The applicant could choose whom to sue, with unsuccessful defendants recovering contributions from each other afterwards. Such a scheme, however, has not been established in EU law. Instead, the Court presumes that parties should first exhaust remedies in domestic courts,¹⁵⁹ although the presumption is rebuttable where it would be impossible for an applicant to obtain a remedy in a national court.¹⁶⁰

This has resulted in unsatisfactory and needless complexity, requiring, in some instances, that applicants simultaneously commence actions in both the domestic courts and the Court of Justice.¹⁶¹

Secondly, the burden of proof is upon applicants to show a direct causal link between the loss and the illegal act.¹⁶² The chain of causation can thus be severed by third parties, such as by an independent act of a Member State.¹⁶³ It is not sufficient to prove that the loss would not have occurred but for the illegal act.¹⁶⁴ There must be a sufficient proximity between the illegal act and the loss suffered.¹⁶⁵ In practice, this has made it very difficult for applicants to claim for loss of profits as these will often be too remote or speculative. For the Court has stated that it will only compensate damage that is actual and certain.¹⁶⁶ Even where a causal link is established between the loss suffered and the illegal act, the applicant might still not recover full compensation. This may be, first, as a result of the doctrine of contributory negligence, where the applicant is considered to have contributed to the damage as a result of a failure to take due care.¹⁶⁷ Secondly, the applicant is under a duty to mitigate any loss suffered. A failure to do so will result in compensation being reduced.¹⁶⁸ Finally, compensation will be reduced if there is evidence that the applicant has, or could have, passed the loss on to somebody else.¹⁶⁹

8 CONSEQUENCES OF ANNULMENT

The consequences of a finding of illegality are set out in Article 264 TFEU.

Article 264 TFEU

If the action is well founded, the Court of Justice shall declare the act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

A finding of invalidity can be made not just on the basis of Article 263 TFEU and under the plea of illegality, but also under a claim brought for damages.¹⁷⁰ This has erga omnes effect by binding all national courts in the European Union.¹⁷¹ In *SAZF*, the Court ruled that facts of the Community institutions are in principle presumed to be lawful and accordingly produce

¹⁵¹ Case 119/75 *Praet-Arksdyk v Council and Commission* [1975] ECR 2535, 2539-40.

¹⁵² Case 24/74 *OTSA v Commission* [1975] ECR 533.

¹⁵³ Case T-10/84 *NSN v Council and Commission* [1985] ECR II-2385.

¹⁵⁴ Case T-10/83 *IT-James v Commission* [1985] ECR 649.

¹⁵⁵ Case T-40/85 *Frederick and Day v Commission* [2000] ECR II-1545.

¹⁵⁶ Joined Cases 55/74-62/74 *Kampffmeyer v Commission and Council* [1976] ECR 711; *Delort Dore C-104/85 and C-27/80 Makry v Council and Commission* [1982] ECR I-3261.

¹⁵⁷ For detailed critique see A. Ward, *Judicial Review and the Rights of Private Parties to EU Law* (2nd edn, Oxford, Oxford University Press, 2007) 235-90.

¹⁵⁸ W. Wils, 'Concurrent Liability of the Community and a Member State' [1992] 27 *ELRev.* 351, 354-4.

¹⁵⁹ Case 58/71 *Industria v Commission* [1972] ECR 1069.

¹⁶⁰ Case 241/75 *Calvi v Commission and Council* [1976] ECR 1585.

¹⁶¹ Case T-16/79 *Wille v Council and Commission* [1981] ECR II-2539.

¹⁶² Case T-159/84 *Blockbuster BTV v Council and Commission* [1985] ECR II-1437. On this see A. Tots, 'The Concepts of Damage and Causality in Elements of Non-Contractual Liability' in H. Schermers et al. (eds), *Non-Contractual Liability of the European Communities* (Dordrecht, Martinus Nijhoff, 1988).

¹⁶³ Case 132/77 *Société pour l'Exploitation des Sources SA v Commission* [1978] ECR 1061.

¹⁶⁴ This is, however, a later position: Case T-47/83 *Wagner v Commission* [1985] ECR II-1473.

¹⁶⁵ Joined Cases 54/75, 113/75, 157/75, 235/75, 24/79, 23/79 and 45/79 *Guarinter France v Council* [1979] ECR 1261.

¹⁶⁶ Joined Cases T-190 and C-33/85A *Morillon v Council and ECJ* [2007] ECR II-4175.

¹⁶⁷ Case 145/83 *Adams v Commission* [1985] ECR 2533.

¹⁶⁸ Joined Cases C-104/89 and C-27/80 *Makry v Council and Commission* [1982] ECR I-3061.

¹⁶⁹ Case 132/74 *Praet-Arksdyk v Council and Commission* [1975] ECR 2535.

¹⁷⁰ Joined Cases 8/85, 7/85, 11/86-14/86 *Kampffmeyer v Commission* [1987] ECR 245.

¹⁷¹ See Case 66/80 *International Chemical Corporation v Administration des douanes* [1981] ECR 1151.

legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.¹²⁷ The Court went on to add the following rider:

by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be to be rated by the Community legal order must be treated as having no legal effect, even provisional, that is to say that they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.¹²⁸

A ruling to that effect will have the consequence of releasing all parties from any obligation in which they might have thought themselves subject under the measure. Otherwise, the effects will vary according to the measure declared invalid. A Regulation declared invalid is void not just between the parties to the dispute, but also in respect of third parties. While the presumption in the first paragraph of Article 264 TFEU is that it is void of itself, considerable discretion is given to the Court under the second paragraph of Article 264 TFEU, enabling it to determine the effects of its ruling. Accordingly, the Court may declare that only part of a measure is void, maintaining in place other aspects of it. Temporal limitations may also be placed upon an annulment, meaning that the legislation will remain in force until new legislation is passed to replace it.¹²⁹

FURTHER READING

- A. Arnull, 'Takes Applicants and the Action for Annulment Since *Costa*', (2001) 38 *Common Market Law Review* 7.
 The European Union and its Court of Justice (2nd edn, Oxford, Oxford University Press, 2005) ch. 3.
 P. Craig, *EU and Administrative Law* (Oxford, Oxford University Press, 2006) chs. 12, 13, 20.
 D. Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 *Yearbook of European Law* 211.
 C. Kilson, 'The Role of Discretion in EC Law on Non-contractual Liability' (2005) 42 *Common Market Law Review* 677.
 H. Weir, *Principles of Administrative Procedure in EC Law* (Oxford, Oxford University Press, 1995).
 E. Shapiro, 'Legitimate Expectations and Economic Liberty' (1990) 15 *European Law Review* 133.
 T. Twiss, 'Liability for Breach of Community Law: Growing Up and Maturing Down?' (2001) 38 *Common Market Law Review* 321.
 The General Principles of EU Law (2nd edn, Oxford, Oxford University Press, 2005).
 M. Vogt, 'Indirect Judicial Protection in EC Law: The Case of the Rule of Legality' (2006) 21 *European Law Review* 324.
 A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (2nd edn, Oxford, Oxford University Press, 2007) chs. 5, 6.
 M. Wils, 'Concurrent Liability of the Community and a Member State' (1992) 12 *European Law Review* 331.

¹²⁷ See Case C-107/93 *P. Gowanlock v SASP* (1994) ECR I-2555.

¹²⁸ *Id.*, para. 45.

¹²⁹ See e.g. Case C-355/95 *Parliament v Council* (1997) ECR I-2211.

11

EU Citizenship

CONTENTS

1 Introduction	(b) Separation, death and divorce
2 Evolution of Modern Citizenship	(c) Rights of children and carers
3 Nature of EU Citizenship	(d) The family and human rights
4 Right to Move and Reside within the Union	(e) Family members coming from outside the Union
(a) Conditions of residence	(f) Administrative formalities
(b) Right to equal treatment	(g) Grounds for exclusion
(i) Meaning of discrimination	5 Political Rights of EU Citizens
(ii) Scope of the prohibition	(a) Rights to vote and hold office
(iii) Equal treatment and social assistance	(b) Right to petition and hold the administration accountable
(iv) Restrictions on movement	(c) Right to diplomatic protection
(v) The internal situation and reverse discrimination	
5 Family rights	Further reading
(a) The EU idea of the family	

1 INTRODUCTION

This chapter considers the ideas and rights associated with European Union citizenship. This is granted by the Treaty to all those who are citizens of one of the Member States of the European Union. It is organized as follows.

Sections 2 and 3 discuss ideas of citizenship.

(a) Modern citizenship evolved in the period of the Industrial revolution, following the American and French revolutions. Society became less feudal and more democratic and individuals acquired more rights and possibilities. The core elements of the resulting notion of citizenship were legally enforceable rights, loyalty, a sense of belonging to the national community and participation in political decision-making.

LENAERTS K, ARD B, MASSELS J. "PROCEDURAL
LAW OF THE EUROPEAN UNION", SWEET &
MAXWELL, LONDON, 2006.

CHAPTER 11 362-457

THE ACTION FOR DAMAGES

I. SUBJECT-MATTER

A. GENERAL

Objective and conditions. An action for damages seeks to have the Community held non-contractually liable to make good any damage caused by its institutions or by its servants in the performance of their duties. The conditions for incurring liability are determined by the Court of Justice and the Court of First Instance "in accordance with the general principles common to the laws of the Member States" (EC Treaty, Art.288, second para.). The Court of Justice has drawn on those general principles—in so far as they could be identified—only as a source of inspiration with a view to developing an independent Community law on liability.¹⁴³ Liability on the part of the Community "presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and conduct alleged against the institution, and the illegality of such conduct".¹⁴⁴ 11-38

Exclusive jurisdiction. Art.285 of the EC Treaty confers on the Court of Justice exclusive jurisdiction to find the Community non-contractually liable.¹⁴⁵ This jurisdiction is now vested in the Court of First Instance by 11-38

¹⁴³ For an extensive discussion, see Fieser, "Étude de la responsabilité extracontractuelle de la Communauté économique européenne", in *Bibliothèque de droit international (Séminaire général de droit) de jurisprudence*, Paris, 1992, Vol.101, 501 pp., and Bradley and Rosch, *Remedies in E.C. Law*, p. 360-371.

¹⁴⁴ SCJ, Case 4/59 *Lüttke v Commission* (1971) E.C.R. 315, para.10. For non-contractual liability under the former rules of the ECSC Treaty, see Arts 34 and 40 of that Treaty, see also CFJ, Case T-122/89 *Stahlwerke Pöchlarn-Salzgrubner v Commission* (1991) E.C.R. II-177, which should be compared with SCJ, Case C-322/91 *P Commission v Stahlwerke Pöchlarn-Salzgrubner* (1993) E.C.R. I-2593.

¹⁴⁵ The Court has the same exclusive jurisdiction under Art.181 of the EASC Treaty. The fact that the Court has exclusive jurisdiction also means that a national court has no competence to order, with respect to one of the institutions of the Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, for the purposes of subsequent proceedings against the European Community to establish its non-contractual liability (ECJ, Case C-270/92 *Franz and Franer* (1993) E.C.R. I-10945, paras 43-45). In contrast, the terms of a contract for

virtue of Art.225 of the EC Treaty.³⁴² The exclusive jurisdiction of the Court of First Instance—and of the Court of Justice on appeal—to find the Community non-contractually liable guarantees the Community's independence in so far as its acts are not reviewed in the light of national law by national courts; in addition, it has the advantage of ensuring that there are uniform rules on liability for unlawful acts of the Community.

B. INDEPENDENT NATURE OF THE ACTION FOR DAMAGES

- 11-003 Independent form of action. The question arises as to the extent to which the independent nature of the action for damages is influenced by the existence of other procedures which are available to an applicant in order to have the legality of an act causing damage reviewed by the Community Court. More specifically, the question is whether the action for damages is an independent form of action or whether the applicant may bring such proceedings only after it has been determined in some other proceedings that the act in question is unlawful.³⁴³

Originally, the case-law seemed to take the second of these two approaches in that actions for damages seemed to be regarded as admissible only if an action for the annulment of the contested act had been brought.³⁴⁴ Shortly after, however, matters took a different turn when the Court of Justice described the action for damages as "an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose".³⁴⁵

compensation concluded with an individual in the name and on behalf of the Council and the Commission by the competent national authority pursuant to Regulation No 2387/73, which gave so-called SLOM producers the possibility of obtaining State-aid compensation following the judgment in *Kinder II*, were not categorised as non-contractual liability. They constituted contractual terms, which in the absence of an arbitration clause in favour of the Court of Justice within the meaning of Art.235 of the EC Treaty led to be adjudicated by the national courts (ECJ, Joined Cases C-31/73 to C-34/73 *Flemerie and Others* [1974] E.C.R. I-1211). For a distinction between contractual and non-contractual liability, see also CFI, Case T-144/91 *Dumortier F. Palma v Commission* [1994] E.C.R. II-1453 para. 41-42. See Scarus, *Art.15*.

- ³⁴² See Scarus, *Art.15*.
³⁴³ Mead, "The Relationship between an Action for Damages and an Action for Annulment: the Return of *Plaumann*", in Heukels and McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International, The Hague/London/Boston, 1997), at 245-253.

- ³⁴⁴ ECJ, Case 156/62 *Plaumann v Commission* [1963] E.C.R. 95, at 108: "An administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage on those whom it affects". On this view, a finding of an unlawful failure to act or a declaration by way of preliminary ruling that a measure was invalid was to be equated with a declaration that the measure was void.

- ³⁴⁵ ECJ, Case 489 *Lüttke v Commission* [1971] E.C.R. 535, at 336. See also ECJ (order of June 21, 1993), Case C-15/93 *Van Parijs and Others v Council and Commission* [1993] E.C.R. I-3335, para.14; ECJ, Case C-234/92 *P. European Ombudsman v Lamberz* [1994] E.C.R. I-3303, para.39; CFI, Case T-176/90 *Feder-Rederei v Council and Commission* [1992] E.C.R. II-315, para.35. In its Opinion in ECJ, Joined Cases 5 and 11/71 *Compagnie d'Approvisionnement, de Transport et de Crédit and Others v Commission* [1972] E.C.R. 55,

Consequently, an action for damages will be admissible even if no prior action for annulment³⁴⁶ or for failure to act³⁴⁷ has been brought and if no preliminary ruling declaring the offending act invalid has been obtained. The purpose of an action for damages is solely to obtain financial compensation and, on that ground, differs from that of other forms of action.³⁴⁸ What is more, the requirements in order for liability to be incurred are substantively very different from the criteria for reviewing the legality of an action or an alleged failure to act on the part of the Community.³⁴⁹ The fact that an action for annulment of an act of a Community institution which at the same time is the subject of an action for damages is inadmissible does not necessarily make the claim for damages inadmissible.³⁵⁰

at 431, Advocate General A. Dautheillet de Lamoignon argued cogently that the action for damages should be independent of any action for annulment. He pointed out that a declaration of nullity applies erga omnes and is retroactive. In his view, those far-reaching consequences explained why the authors of the Treaty had restricted individuals' access to the Court of Justice (now the Court of First Instance) on the basis of Art.230 of the EC Treaty and why the second para. of Art.231 of that Treaty had conferred on the Court of Justice the power to restrict the retroactive effect of a declaration of nullity. In contrast, the action for damages was an action for a declaration of subjective rights (i.e. rights pertaining to the applicant personally) and did not have the same far-reaching effects. Consequently, the same stringent conditions as in admissibility ought not to apply. The argument that the authors of the Treaty had sought—irrespective of the type of dispute—to prevent the Court of Justice from ruling on the legality of a general act on an application from individuals was therefore misconceived. See also Ojeda, "L'Action en dommages et intérêts par rapport au recours en annulation" [1999] R.N.C. 414-430. For staff cases, see Chidi, *supra*.

- ³⁴⁶ ECJ, Case 57/62 *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 915, para.3. A party may bring a claim for damages without there being any provision requiring it also to claim annulment of the unlawful act which gave rise to the damage (CFI, Case T-378/93 *Früh Marine v Commission* [1996] E.C.R. II-3531, para.45). There is also no requirement for the act which gave rise to the damage to be legally binding (CFI, Case T-269/90 *Lambert v European Ombudsman* [1992] E.C.R. II-2203, para.38). The annulment of a decision does not have any effect on the limitation period for bringing an action for damages. Indeed, the infringement of Community law, which allegedly causes harm, exists before the annulment of the decision by the Community Court (CFI (judgment of April 21, 2005), Case T-250/03 *Boivin v Commission*, not yet reported, paras 66-67).

- ³⁴⁷ ECJ, Case 4/65 *Lüttke v Commission* [1971] E.C.R. 125.

- ³⁴⁸ See, for instance, the Opinion of Advocate General F. Capotorti in ECJ, Case 65/77 *IFG v Commission* [1978] E.C.R. 351, at 375.

- ³⁴⁹ Consequently, a finding that an act is unlawful or that the Community has failed to act does not as such give rise to a right to compensation. But an action for damages which is brought together with an action for annulment and seeks compensation for damage allegedly caused solely by the unlawfulness of an act of an institution will be inadmissible if it appears from examination of the application for annulment that the act has no legal effects (ECJ (order of June 13, 1991), Case C-50/90 *Suzent v Commission* [1991] E.C.R. I-2917, para.15; ECJ (order of October 4, 1991), Case C-117/91 *Seaman v Commission* [1991] E.C.R. I-4335, para.32; CFI (order of October 16, 1996), Case T-18/96 *Sebas v Commission* [1996] E.C.R. II-1639, para.49). The Court of First Instance also dismissed a damages claim after annulling the act which had allegedly caused the damage, stating that it could not rule on that claim without prejudging the substance of any new decision to be taken by the Commission to comply with its judgment pursuant to Art.133 of the EC Treaty (CFI, Case T-242/90 *Le Centre v Commission* [2003] E.C.R. I-4251, paras 61-64).

- ³⁵⁰ ECJ, Case 175/64 *Roche v Commission* [1966] E.C.R. 735, para.31; CFI, Case T-115/94

11-004 Improper use of an action for damages. However, an action for damages will be inadmissible where it is used improperly as an action for annulment or for failure to act. An applicant who seeks to use an action for damages in order to obtain the specific outcome sought by one of those forms of action will be denied access to the Community Court. To use an action for damages for that purpose would amount to an abuse of process. Accordingly, an action for damages may not be brought in order to avoid the consequences of time having run out for bringing an action for annulment against an act against which the applicant could have brought such an action. The cover, unlawful purpose of the action for damages will be inferred from the fact that the reparation sought coincides with the benefit which the applicant would have obtained as a result of the annulment of the contested Community act¹¹⁷ or from the close connection between the damage which arose and the applicant's own failure to have recourse to another form of action.¹¹⁸ No matter how comprehensible this case-law may be, textbook writers correctly point out that it detracts from the autonomous nature of the action for damages.¹¹⁹

II. IDENTITY OF THE PARTIES

A. APPLICANTS

036 Any natural or legal person. Any natural or legal person who claims to have been injured by acts or conduct of a Community institution or its officials or servants may bring an action for damages in the Court of First Instance.¹²⁰

There is no requirement as to the applicant's nationality in the case of such an action.¹²¹

Georgianis v Commission [1995] E.C.R. II-2755, para.33; *CFI, Case T-435/93 Dreyfus v Commission* [1996] E.C.R. II-1201, para.67; *CFI, Case T-431/93 Richee v Commission* [1995] E.C.R. II-1131, para.64.

¹¹⁷ *ECJ, Case 39/83 Schrekenberg v Commission* [1985] E.C.R. 541, at 550; *Krohn v Commission*, cited in the preceding n., para.33; *ECJ, Joined Cases C-195 and C-205/94 P Pirelli and Imperia v Commission* [1995] E.C.R. I-1709, para.24; *CFI, Case T-524/91 Cofinif and Others v Commission* [1995] E.C.R. II-521, para.39-40; *Dreyfus v Commission*, cited in the preceding n., para.63; *Richee v Commission*, cited in the preceding n., para.65; *CFI (order of February 2, 1993), Case T-52/95 Polysar v Commission* [1995] E.C.R. II-151, para.31-45; *CFI, Case T-53/95 Logo v Commission* [1997] E.C.R. II-195, para.48-49; *CFI, Case T-54/95 Laydies v Commission* [1997] E.C.R. II-213, para.48-49; *CFI, Case T-136/98 Imperia v Commission* [2001] E.C.R. II-537, para.75-77; *CFI, Case T-130/00 Aniparte v Commission* [2002] E.C.R. II-3955, para.133-147.

¹¹⁸ *ECJ, Case 4/67 Muller (née Collignon) v Commission* [1967] E.C.R. 155, at 175; *Westbroeck and Westbroeck, Réseaux de drogue communautaire*, key words: Responsabilité (see *Le Communautaire*) (Ed. Dalloz, Paris, 1974), 14. Note also *ECJ, Case 153/73 Holtz & Willems v Council and Commission* [1974] E.C.R. 675, para.3-5; *ECJ, Joined Cases 197-203, 243, 245 and 247/80 Ludwigshöfener Zellwolle and Others v Council and Commission* [1981] E.C.R. 2111, para.4-5; *ECJ, Case C-67/89 SONTAG and Others v Commission* [1990] E.C.R. I-1511, para.24.

¹¹⁹ *ECJ, Case 112/83 OcéC v Commission* [1985] E.C.R. 2125, para.31.

¹²⁰ *CFI, Case 115/77 Nippon Seiko v Council and Commission* [1978] E.C.R. 1103; *ECJ, Joined Cases 235 and 235/82 Allet Corporation v Commission* [1984] E.C.R. 1005.

IDENTITY OF THE PARTIES

Injury must be personal. The injury for which the applicant seeks reparation must affect his or her own personal assets. Legal persons in particular must show that the damage sustained affected their own separate assets and not (exclusively) the personal assets of their members.¹²² They may also not claim compensation for the collective damage suffered by their members.¹²³

Action by subrogation. Nevertheless, a person who suffers injury may assign his or her right which was infringed, together with his or her claim to damages, to another person who will consequently be entitled to bring an action by subrogation.¹²⁴ Once the injured party has assigned his or her claim, that party ceases to have the right to bring an action.¹²⁵ If the assignment is of a fraudulent nature—if the assignor and/or the assignee is not in good faith—it may not be relied upon as against the defendant.¹²⁶

Member States. Art.235 and the second para. of Art.238 of the EC Treaty do not preclude Member States from bringing an action for damages. To date, no Member State has done so and hence there is no case-law concerning the conditions that such an action has to satisfy.

B. DEFENDANTS

General. The Community may incur liability under the second para. of Art.238 of the EC Treaty as a result of damage caused by its institutions (see 11-011, *infra*) or by its servants in the performance of their duties (see 11-012 to 11-014, *infra*). Community liability may also arise in conjunction with liability on the part of the Member States (see 11-015 to 11-017, *infra*). However, the Community cannot incur non-contractual liability for an act of primary Community law (such as amendments to the Treaties), since such an act cannot be imputed to a Community institution.¹²⁷

¹²² *ECJ, Case 114/83 Société d'Initiatives et de Coopération Agricole v Commission* [1984] E.C.R. 2187, para.3-5; *ECJ, Case 239/83 GAARM v Commission* [1984] E.C.R. 4133, para.4-5; *CFI, Joined Cases T-41 and T-434/93 Expansive in Levante Workers and Others v Commission* [1995] E.C.R. II-2941, para.76; *CFI, Case T-149/95 Coldiretti and Others v Council and Commission* [1998] E.C.R. II-3841, para.57-60; *CFI (order of July 2, 2000), Case T-37/98 Coldiretti and Others v Commission*, not reported, para.47.

¹²³ *ECJ, Case 72/74 Union Syndicale and Others v Council* [1975] E.C.R. 401, para.11; *ECJ, Case 138/72 Siderulgi v Council and Commission* [1979] E.C.R. 2555, para.5; *ECJ, Joined Cases 255-257, 255, 257/82, 5 and 51/82 and 252/82 Siderulgi and Others v Council and Commission* [1984] E.C.R. 3593, para.12; *CFI (order of July 2, 2000), Case T-307 Coldiretti and Others v Commission*, not reported, para.47.

¹²⁴ *ECJ, Case 153/73 Holtz & Willems v Council and Commission*, cited in the preceding n., para.7.

¹²⁵ *ECJ, Case 153/73 Holtz & Willems v Council and Commission*, cited in the preceding n., para.7.

¹²⁶ *ECJ, Case 153/73 Compagnie Continentale v Council* [1975] E.C.R. 115, para.16; *ECJ, Joined Cases 31 and 35/86 LAGA and Others v Council* [1988] E.C.R. 2385, para.19-21; *ECJ (order of July 3, 1999), Case C-35/93 P Edouard Dubois and Fir v Council and Commission* [1999] E.C.R. I-4215; *CFI, Case T-113/96 Edouard Dubois and Fir v Council and Commission* [1998] E.C.R. II-1153, para.47; *CFI (order of June 26, 2002), Joined Cases*

Similarly, acts of the Member States cannot cause the Community to incur liability.¹¹⁰

- 11-010 Institution to which the harmful act is attributable. Substantively, it is the Community which has to be regarded as being the defendant and not the institutions, since they have no legal personality.¹¹¹ Yet it is the Community institution to which the harmful act is attributable which has to be summoned before the Court of First Instance or the Court of Justice as representing the Community.¹¹² The Commission has no general right to represent the Community.¹¹³ It is advisable for the applicant to specify the institution against which its action is brought in its application, even though the Court of Justice takes a flexible, non-formalistic approach in this regard.¹¹⁴ If the damage was caused by more than one institution, they must all be brought into the proceedings.

1. Damage caused by institutions

- 11-011 Broad interpretation. The "institutions" which may cause the Community to incur liability under the second para. of Art.235 of the EC Treaty are not only those listed in Art.7(1) of that Treaty, but also all bodies and agencies active in the sphere of Community law, such as the European Central Bank,¹¹⁵ the European Investment Bank¹¹⁶ and the European Ombudsman.¹¹⁷

T-1256 and T-1361 *Agos and Others v Council and Commission* [2000] E.C.R. II-2473. The adoption (signature and ratification) of the Single European Act (or of any other Treaty amending the original EC Treaty) is an act of the Member States and cannot be attributed to the Community (CFI (order of June 15, 2000), Case T-61497 *Adamas Papi Robis and Others v Council and Commission* [2000] E.C.R. II-2367).

¹¹⁰ CFI (order of December 1, 2004), Case T-376/04 *Kochi-Sorensen*, not reported.

¹¹¹ ECJ, Case 302/87 *European Parliament v Council* [1988] E.C.R. 3513, para.9. It does not follow that because an action was brought directly against a Community body it is inadmissible. Such an action must be deemed to be directed against the Community represented by that body. ECJ, Case 333/86 *Stichting and Di Domenico v Commission* [1987] E.C.R. 3523, para.7; CFI, Case T-226/03 *Lamberti v European Ombudsman* [2004] E.C.R. II-2263, para.45.

¹¹² ECJ, Joined Cases 61-65/02 *Wachter-Hausmann and Others v Council* [1973] E.C.R. 1213, para.7; Opinion of Advocate General C.O. Lenz in ECJ, Case 52/85 *Ernst v Commission* [1984] E.C.R. 2295, at 2317-2318.

¹¹³ Art.252 of the EC Treaty is concerned only with the Community's power to act and its representation in the various Member States.

¹¹⁴ ECJ, Case 136/8, *Klein v EEC* [1968] E.C.R. 2815; compare CFI, Case T-245/91 *Edling v Council and Commission* [1998] E.C.R. I-771, para.25, in which the defendant institutions argued that the application was inadmissible on the ground that it designated the Council and the Commission as defendants and not the Community. The Court of First Instance held that this could not render the application inadmissible where it did not affect the rights of the defence.

¹¹⁵ The third para. of Art.235 of the EC Treaty provides that the second para. of that article is to apply under the same conditions to damage caused by the European Central Bank or by its servants in the performance of their duties.

¹¹⁶ ECJ, Case C-376/93 *SEDEM and Enay v EIB* [1992] E.C.R. I-5211, para.15.

man.¹¹⁸ This broad interpretation is designed to prevent the Community from escaping possible liability where it acts through bodies and agencies which are not institutions within the meaning of Art.7(1) of the EC Treaty,¹¹⁹ since national courts have no jurisdiction to find the Community non-contractually liable.

¹¹⁹ In contrast, acts of the European Council cannot cause the Community to incur liability.¹²⁰

¹¹⁸ CFI, Case T-369/03 *Lamberti v European Ombudsman* [2004] E.C.R. II-2303, para.49: the Court of First Instance declared admissible an action for compensation for the damage which Mr Lamberti allegedly sustained as a result of negligence on the part of the European Ombudsman in the performance of his duties. The judgment was upheld on appeal (ECJ, Case C-334/03 *European Ombudsman v Lamberti* [2004] E.C.R. I-2303).

¹¹⁹ Some bodies have legal personality. The Court of Justice or the Court of First Instance may hold that these bodies have incurred non-contractual liability pursuant to a specific provision in the decisions establishing them. See European Centre for the Development of Vocational Training: Art.15(2), first and second subparagraphs, of Regulation (EEC) No 337/75 of the Council of February 10, 1975 establishing a European Centre for the Development of Vocational Training; [1975] O.J. L35/1; European Foundation for the Improvement of Living and Working Conditions: Art.21(2), first and second subparagraphs, of Regulation (EEC) No 1161/75 of the Council of May 25, 1975 on the creation of a European Foundation for the Improvement of Living and Working Conditions; [1975] O.J. L135/3; European Agency for Cooperation: Art.18(2), first and second subparagraphs, of Council Regulation (EEC) No 3345/81 of October 26, 1981 setting up a European Agency for Cooperation; [1981] O.J. L251/1; European Environment Agency and the European Environment Information and Observation Network: Art.18(2), first and second subparagraphs, of Council Regulation (EEC) No 1183/83 of May 7, 1983 on the establishment of the European Environment Agency and the European Environmental Information and Observation Network; [1983] O.J. L128/7; European Training Foundation: Art.15(2), first and second subparagraphs, of Council Regulation (EEC) No 1366/83 of May 7, 1983 establishing a European Training Foundation; [1983] O.J. L136/1; European Monitoring Centre for Drugs and Drug Addiction: Art.16(1) of Council Regulation (EEC) No 3365/91 of February 8, 1991 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction; [1991] O.J. L36/1; European Agency for the Evaluation of Medicinal Products: Art.16(2) of Council Regulation (EEC) No 2386/93 of July 22, 1993 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products; [1993] O.J. L214/2; Office for Harmonization in the Internal Market (Trade Marks and Designs): Art.114(3) and (4) of Council Regulation (EC) No 40/94 of December 20, 1993 on the Community trade mark; [1994] O.J. L11/2; European Agency for Safety and Health at Work: Art.21(2), first and second subparagraphs, of Council Regulation (EC) No 2060/94 of July 18, 1994 establishing a European Agency for Safety and Health at Work; [1994] O.J. L216/1; Community Plant Variety Office: Art.13(3) and (4) of Council Regulation (EC) No 1100/94 of July 27, 1994 on Community plant variety rights; [1994] O.J. L217/1; Translation Centre for Bodies of the European Union: Art.15(2), first and second subparagraphs, of Council Regulation (EC) No 2565/94 of November 21, 1994 setting up a Translation Centre for bodies of the European Union; [1994] O.J. L251/1; European Monitoring Centre on Racism and Xenophobia: Art.15(2) of Council Regulation (EC) No 1031/97 of June 2, 1997; [1997] O.J. L151/2. Other "bodies" include the European Economic and Social Committee (EC Treaty, Art.7(2)), the Committee of the Regions (EC Treaty, Art.13(2)) and the European Ombudsman (EC Treaty, Art.155(1)).

¹²⁰ CFI (order of December 27, 2003), Case T-146/03 *Atkinson and Others v European Parliament and Others* [2003] E.C.R. II-6371, para.17.

2. Damage caused by servants of institutions in the performance of their duties

- 11-012 Acts carried out in performance of the servant's duties. The Court of Justice has regarded only a limited class of acts of servants of the institutions as acts carried out "in the performance of their duties" which are potentially capable of causing the Community to incur liability. The Community may be held liable only for damage caused by acts which are the "necessary extension" of the tasks entrusted to the institution to which the staff member belongs.¹⁰⁰

Where a servant drives his or her own car pursuant to a travel order, this does not satisfy that test, except in the case of *force majeure* or in exceptional circumstances of such overriding importance that the Community would otherwise have been unable to carry out the tasks entrusted to it. A servant who causes a road accident with his or her own car pursuant to a travel order issued by his or her institution therefore does not cause his or her institution to incur liability for the ensuing damage in the absence of *force majeure* or exceptional circumstances.¹⁰¹

- 11-013 Other acts. Servants are liable for acts not performed in pursuance of their duties. They are not immune from legal proceedings in respect of such acts under Art.12(a) of the Protocol on the Privileges and Immunities of the European Communities, since such immunity is limited to "acts performed by them in their official capacity, including their words spoken or written".

- 11-014 Immunity of the servant and liability of the Community. There is no parallel between the possible liability of the Community and the staff member's immunity from legal proceedings.¹⁰² If the staff member's immunity is waived, this does not prevent the wrongful act from causing the Community to incur liability. Consequently, an act which cannot be regarded as having been performed by the staff member in an "official capacity" within the meaning of Art.12(a) of the Protocol may nevertheless be deemed an act carried out "in the performance of his duties" and imputed to the Community.¹⁰³ The idea behind this case-law is to avoid the

¹⁰⁰ ECJ, Case 3559 *Seyn and Others* (1969) E.C.R. 321, para.7. The staff members concerned are the servants of any "institution" within the meaning of the second para. of Art.238 of the EC Treaty, including the European Central Bank (EC Treaty, Art.238, third para.).

¹⁰¹ ECJ, paras 8-11. Note that this judgment refers to Art.12 of the second para. of Art.238 of the EEC Treaty, the provisions corresponding to Art.239 and the second para. of Art.238 of the EC Treaty.

¹⁰² ECJ, Case 3559 *Seyn and Others* (1969) E.C.R. 321, para.7.

¹⁰³ Schöten and Szekely suggest that a single concept of an "official act" should be used both for the scope of the immunity from legal proceedings and for determining the scope of liability on the part of the Community. They argue that this concept should be given a broad interpretation so that the Community may be held liable for any official act, yet that

Community getting out of a claim all too easily by simply waiving the immunity of the staff member concerned, which would ultimately result in the injured party's risking coming up against an insolvent debtor—the staff member as opposed to the Community. As a result, concurrent claims against the Community (before the Court of First Instance) and against the staff member himself or herself (before the national courts) are not ruled out either.

3. Liability concurrent with that of Member States

Principle. The Member States make an extensive contribution to the implementation of Community law. If they act unlawfully in this connection, this may affect the assets of individuals.¹⁰⁴ 11-015

Sometimes the financial loss is exclusively ascribable to the Member State's infringing Community law in performing its executive task. But it may also arise because of the illegality of a Community act which was still regarded as valid at the time when it was implemented by the Member State. Lastly, the pecuniary loss may be the result of unlawful joint action on the part of the Community and a Member State.

In principle, the financial loss must be made good by the authority which caused it through its unlawful action. Accordingly, the Community must make good the financial loss caused by its institutions or by servants of its institutions in the performance of their duties, whilst the Member State will be liable for the financial loss caused by national authorities.¹⁰⁵

Grounds on which an act may be attributed to the Community or a Member State. Having stated this principle, however, the question remains as to the grounds on which an unlawful act may be attributed to a 11-016

financially should inevitably be waived where this does not conflict with the interests of the Community. The injured party would virtually always be able to make a claim against both the Community and the staff member concerned and so the fear of the Court of Justice that the Community might escape liability by acting quickly to waive the staff member's immunity would be groundless. "Official Acts of Community Servants and Art.238 (now Art.239) EC", in Heukels and McDonnell (eds) (n.359, *supra*), at 157-178.

¹⁰⁴ For an extensive discussion, see Wils, "Concurrent Liability of the Community and a Member State" (1992) E.L.Rev. 191-306; Schöten and Szekely, "Die Haftung der EG-Mitgliedstaaten gegenüber dem einzelnen bei Verletzung des Gemeinschaftsrechts" (1993) EoR 197 *et seq.* See also Goffin, "La responsabilité du recours au indemnité devant la Cour de Justice des Communautés européennes" (1993) J.T. 1-5.

¹⁰⁵ ECJ, Case 17584 *Kohn v Commission* (1983) E.C.R. 331, para.15; ECJ, joined Cases 33 and 3184 *Stelle Commercial and CATA v Commission* (1987) E.C.R. 3025, para.16-21. See also Meij, "Art.238 (now Art.239) EC and Local Remedies", in Heukels and McDonnell (eds) (n.359, *supra*), at 273-284. The same principle applies in the event of financial loss arising where a non-member country (e.g. an ACP country) and the Community act jointly. The non-member country is liable for the financial loss attributable to its act and the Community for the loss attributable to its act; ECJ, Case 11853 *CAC v Commission* (1987) E.C.R. 321, para.31; ECJ, Case 2182 *Muri v. Commission* (1985) E.C.R. 2739, para.4-8; ECJ, Case 25752 *Development and Geometry v Commission* (1988) E.C.R. 1507, para.14-17; ECJ, Case C-370-85 *SOEEM and Enay v EEC* (1987) E.C.R. 3-2581, para.25-30; CFI, Case T-52/89 *T. Port v Commission* (1991) E.C.R. 3-581, para.26.

Community institution or a national authority. This is the central question. The answer determines the extent to which the Community may be held liable for financial loss arising as a result of illegality vitiating the application of a Community provision by a national authority.²⁹⁴

The decisive criterion appears to be the respective decision-making powers of the Community and the Member States.

In *Muller*,²⁹⁵ the Court of Justice held that, on the basis of Community law in force, the Member States did not have the power to carry out the act which individuals had claimed, namely allocation of a milk quota. The refusal to perform the act sought could not therefore be attributed to them. The ensuing financial loss was in fact the result of the illegality of the underlying Community act which had not provided for the grant of milk quota, even though the mere instrumental application of the act was entrusted to the Member States. The conclusion reached was that the loss of earnings had to be made good by the Community.

In *Stoile Commerciale*,²⁹⁶ in contrast, the Court of Justice considered that the sole cause of the damage was a decision taken by a national authority pursuant to a general obligation imposed upon it by a Community regulation which did not, however, instruct it to take the specific decision that gave rise to the damage. Consequently, the national authority had in fact a genuine discretion in carrying out the general obligation imposed by the Community regulation and hence could have taken a different decision. The financial loss incurred therefore had to be made good by the Member State.²⁹⁷ Moreover, the underlying Community regulation as a whole was not unlawful.

A Member State which follows an opinion given by the Commission at its request remains liable for any damage which may nevertheless ensue from any infringement of Community law. This is because opinions are not binding and hence do not restrict the Member State's discretion. Such cooperation cannot make the Community liable.²⁹⁸

²⁹⁴ See, e.g., CFI, Case T-114/92 *Malguin-Verinhet v Commission* [2004] E.C.R. II-527, paras 26-31. See in this connection, De Visser, "The concept of Concurrent Liability and its Relationship with the Principle of Effectiveness: A One-way Ticket into Oblivion?" (2004) 31 N.J.E.C.L. 1, at 47-71.

²⁹⁵ ECJ, Joined Cases C-104/89 and C-37/90 *Muller and Others v Council and Commission* [1992] E.C.R. I-3651, para. 9; CFI, Case T-21/00 *Siret & Cie v Council* [2002] E.C.R. II-47, para. 36.

²⁹⁶ ECJ, Joined Cases 59 and 91/86 *Stoile Commerciale and CNEA v Commission* [1987] E.C.R. 3065, paras 19-21. See also CFI, Case T-263/94 *Schulte v Council and Commission* [2002] E.C.R. II-441, para. 51.

²⁹⁷ CFI, T-93/95 *Loge v Commission* [1998] E.C.R. II-355, para. 47; CFI, Case T-94/95 *Leventis v Commission* [1998] E.C.R. II-213, para. 47; see also CFI, Case T-145/01 *DLE Training v Council* [2003] E.C.R. II-6205, paras 80-82 and 91-97; after pointing out that the Member State had a genuine discretion in implementing the Community legislation in issue, the Court of First Instance held there was no direct causal link between the Council's conduct and the damage allegedly sustained by the applicant.

²⁹⁸ ECJ, Case 133/79 *Sanjames v Commission* [1980] E.C.R. 1389, para. 24; ECJ, Case 117/81 *Intergro v Commission* [1982] E.C.R. 2213, paras 8-9; CFI, Case T-54/96 *Olefiel Jalkanen and Fratelli Rubino Industrie Oliarie v Commission* [1998] E.C.R. II-3377, paras 86-87.

1. The position will be different only where, acting on the basis of a power conferred on it by Community law, the Commission imposes a requirement or a prohibition on a Member State, which has no choice other than to comply. Although, on the face of it, the financial loss results from the national "decision", it is really the outcome of the Commission's binding direction. The illegality on which the action for damages is based regards that direction alone and must therefore be attributed to the Commission, making an action for damages admissible.²⁹⁹

Genuine discretion of a Member State. Consequently, an infringement of Community law committed by a Member State which has a genuine discretion in implementing that law must be distinguished from a merely instrumental application by a Member State of an unlawful Community act where the Member State has no real discretion.

2. Pecuniary loss resulting from an infringement of Community law by a Member State

Member State's liability. The principle that a Member State will be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Art. 13 of the EC Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law.³⁰⁰

For these reasons, the Court of Justice has held that "it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible".³⁰¹ The action for damages must be brought in the national courts.³⁰² The conditions on which a Member State's liability under Community law will give rise to a right to damages are to be determined by national law, unless they have already been prescribed by Community law.³⁰³ The applicable national law must result in effective legal redress and

²⁹⁹ ECJ, Case 175/84 *Krohn v Commission* [1985] E.C.R. 753, paras 13-23.

³⁰⁰ ECJ, Joined Cases C-6 and C-93/90 *Francovich and Others* [1991] E.C.R. I-5357, paras 35-36. See, in relation to Art. 85 of the ECSC Treaty, ECJ, Case 6/60 *Albani* [1960] E.C.R. 355. See also 3-64 to 3-647, *supra*.

³⁰¹ *Francovich and Others*, cited in the preceding n., para. 31.

³⁰² ECJ (order of May 23, 1990), Case C-72/89 *Aire Mover France v Commission* [1990] E.C.R. I-2151, paras 14-15.

³⁰³ For the procedural conditions, see Joined Cases C-6 and C-93/90 *Francovich and Others* [1991] E.C.R. I-5357, para. 45; the basic conditions "depend on the nature of the breach of Community law giving rise to the loss and damage", *ibid.*, para. 35; and the Court of Justice has specified them accordingly. They are designed to ensure the full effect of the principle of State liability and hence the applicable national law must always satisfy them. Cf. ECJ, Case 102/76 *Grieco* [1975] E.C.R. 423, paras 12-14.

the rules on liability for loss or damage arising from breaches of Community law must be at least equivalent to the rules governing liability for loss or damage resulting from breaches of domestic law (see 3-341 to 3-347, *supra*).

Obviously, the Community cannot incur liability for damage resulting from breaches of Community law which are ascribable exclusively to a Member State.¹¹⁴

b. Pecuniary loss resulting from the unlawfulness of the Community measure implemented

11-019 Claim before the national court secures full compensation. Where a Member State carries out an allegedly unlawful Community act,¹¹⁵ an action for damages brought pursuant to Art.235 and the second para. of Art.238 will be inadmissible where the alleged damage can be made good by bringing a claim before the national courts. The Court of Justice has described the circumstances in which this is most likely to occur as follows: "Where an individual considers that he has been injured by the application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities. That court may, or even must, as provided for in Art.234, refer the question of the validity of the Community measure in dispute to the Court of Justice."¹¹⁶ This means that, in order to decide on the admissibility of an action for damages brought before it, the Court of First Instance has to consider whether bringing a claim before the national courts would be capable of securing full compensation for the alleged damage. This will depend first on the type of pecuniary loss which purportedly constitutes the damage, together with the possibility that the declaration of the invalidity of the Community act in question by preliminary ruling will constitute a direct basis for the national courts to remedy the pecuniary loss suffered. This has to be considered in

the light of the particular circumstances. Only if, on account of the type of the alleged damage or of the limited extent of the consequences of any declaration of invalidity by way of preliminary ruling, compensation cannot be obtained from the national courts, will an action for damages lie against the Community institution from which the act implemented by the Member State originated.¹¹⁷

Undue payment to a national authority. First, it may be that the pecuniary loss simply stems from a payment which the individual concerned made to a national authority pursuant to what he or she considers to be an unlawful Community act. In order to recover the undue amount paid over, together with the applicable interest at the legal rate, the individual concerned must apply to the national courts.¹¹⁸ Community law obliges the Member States to provide for legal proceedings enabling undue amounts paid to be recovered.¹¹⁹ The national courts have no jurisdiction themselves to declare that the Community act on the basis of which payment was made is invalid, but if they consider that there are grounds for doubting whether the act is lawful, they must make a reference to the Court of Justice for a preliminary ruling on its validity.¹²⁰ If the Court of Justice declares the Community act at issue invalid, it provides the national court in principle with a sufficient basis for ordering restitution of the undue amount. Hence, it is not possible to bring an action for damages under Art.235 and the second para. of Art.238 of the EC Treaty in respect of this kind of pecuniary loss.¹²¹ An action for damages under those provisions will lie only in the exceptional case where the Court of Justice limits the effects as regards the past of a preliminary ruling declaring an act invalid. In such case, the national court cannot order restitution of the undue payment. Since in such a case compensation for the alleged damage cannot be secured by bringing proceedings in the national courts, an action for damages may unquestionably be brought in the Court of First Instance against the institution in which the act in question originated.¹²²

11-020

¹¹⁴ Failure to bring an action against a Member State for failure to fulfil obligations under Community law under Art.225 of the EC Treaty cannot cause the Community to incur liability. Liability attaches only to the Member State (ECJ, Order of May 12, 1970, Case C-30/69 *Arrêt France v. Commission* [1970] E.C.R. I-2381, para.13; CFI, Order of April 15, 2002, Case T-35/99 *Aiger v. Commission* [2002] E.C.R. II-1031, para.13; CFI, Case T-289/03 *Lambert v. European Commission* [2003] E.C.R. II-2281, para.53; CFI, Order of January 14, 2004, Case T-132/01 *Makedonka Mero and Michenik v. Commission* [2004] E.C.R. II-151, para.42-47).

¹¹⁵ If the act has already been annulled or declared invalid at the time when it is implemented by the Member State, the latter will be guilty of a breach of Community law and the question of compensation for any pecuniary loss will be dealt with in accordance with the previous section (see 11-013, *supra*).

¹¹⁶ ECJ, Case 151/82 *Unifert v. Commission and Council* [1983] E.C.R. 1989, para.13; see also ECJ, Case 175/84 *Krohn v. Commission* [1985] E.C.R. 121, para.27; ECJ, Case 31/66 *De Saer Lijnen v. Council and Commission* [1967] E.C.R. 1677, para.8.

¹¹⁷ CFI (Judgment of November 21, 2004), Case T-166/03 *Confini Sociali di Dolomina and Others v. Commission*, not yet reported, para.315-316.

¹¹⁸ ECJ, Case 16/74 *Requie Fribre v. Commission* [1976] E.C.R. 677, para.11-12. See also ECJ, Case 95/71 *Hogemann v. Commission* [1972] E.C.R. 1005, paras 15-16, and Arts 2 and 4 of Regulation No 1430/79 [1979] O.J. L176/1, as amended by Regulation No 1554/89 [1989] O.J. L156/2, in connection with the recovery of overpaid import and export levies.

¹¹⁹ Cf. Tatham, "Restitution of Charges and Taxes levied by the Public Administration in Breach of Community Law: A Comparative Analysis" (1984) E.L.Rev. 145-153.

¹²⁰ ECJ, Case 114/83 *Fore-Fruit* [1987] E.C.R. 4195; see also 2-056 to 2-058, *supra*.

¹²¹ Naturally, this does not mean that the Community does not have to bear the financial burden of repayment. Repayment occurs as a result of a preliminary ruling by the Court of Justice declaring the Community act in question invalid, which is binding on all Community institutions. For the question of settlement as between the Community and the Member States, see Oliver, "Joint Liability of the Community and the Member States", in Honkela and McDonnell (eds), (2003), *supra*, at 335-338.

¹²² ECJ, Case 24/68 *Requie Fribre v. Commission* [1969] E.C.R. 1653, para.13-15.

11-021 National authority's unlawful refusal to effect a payment or to perform an act. Secondly, the pecuniary loss may possibly be caused by a national authority's refusal to effect a payment or to perform some other act, while the individual concerned takes the view that the refusal is based on an unlawful Community act. In so far as individuals seek only reparation for the pecuniary loss resulting from the refusal, namely payment of what they maintain they are owed, or adoption of the act to which they consider they are entitled (i.e. compensation in kind), the only question arising in principle is whether the declaration by preliminary ruling of the Court of Justice that the Community act on which the refusal is based is invalid affords in itself the legal basis needed by the national court in order to order the payment requested or, as the case may be, the adoption of the act requested. If the answer to that question is in the affirmative, an action for damages brought in the Court of First Instance against the institution from which the act originated will be admissible.¹²³ If, in contrast, the answer to that question is in the negative, such an action for damages will be inadmissible.¹²⁴

It should not come as a surprise in the light of the above that the admissibility of an action for damages should turn on a close analysis of the individual case. A degree of unpredictability of the outcome is therefore inevitable. For example, the importance of the time factor should not be underestimated. Even if a declaration of invalidity in preliminary ruling proceedings results in the national court's annulling the refusal to adopt the act requested (e.g. the grant of import licences), the loss of a number of years can no longer be made good. Consequently, an action for damages

¹²³ For examples, see ECI, Case 5574 *Société des Grands Moulins des Ardennes v Commission* [1975] E.C.R. 1531; ECI, Case 1279 *Höhr-Otto Wagner v Commission* [1973] E.C.R. 3657, paras 11-14; ECI, Case C-119/85 *AEPF and Others v Commission* [1990] E.C.R. I-2189, 22-24. Here, too, the mechanism for settlement of the financial burden operates, see O'Connell (n.91), *supra*.

¹²⁴ The examples in the case-law are generally concerned with cases in which the Community act was unlawful because it exhibited a *vice* which could be filed only by the necessary political decision; on the basis of the mere finding that the act is invalid, the national court cannot order compensation to be paid for the "alleged damage" and hence the injured party will be entitled to bring proceedings in the Court of First Instance: see, for instance, ECI, Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement de Transport et de Crédit, and Others v Commission* [1972] E.C.R. 351; ECI, Case 43/72 *Morici Assurances v Commission* [1973] E.C.R. 1555; ECI, Case 151/73 *Höhr v Commission* [1974] E.C.R. 675; ECI, Case 284/73 *Uniflex v Council and Commission* [1974] E.C.R. 1595, para.12; ECI, Case 31/85 *De Boer Bitter v Council and Commission* [1987] E.C.R. 2471, para.10; CFI Judgment of November 21, 1994, Case T-166/93 *Combinat Chimique de Dolomieu and Others v Commission*, not yet reported, paras 112-113 and 115-116. More exceptionally, the Court itself will limit the effects of the declaration of invalidity by way of preliminary ruling, with the result that that ruling no longer constitutes a legal basis justifying the national court ordering reparation of the financial loss: see ECI, Case 23/73 *Irish Airline v Council and Commission* [1973] E.C.R. 1555, para.6; ECI, Joined Cases 241-242, 245-252/78 *DGF v Council and Commission* [1979] E.C.R. 3317, para.6; ECI, Joined Cases 261 and 262/78 *Intergraph v Council and Commission* [1979] E.C.R. 3945, para.6.

brought against the Community institution from which the act declared invalid originated will be admissible.¹²⁵

Actual injury. Thirdly, the pecuniary loss may take the form of actual "injury", possibly alongside the financial loss resulting from an undue payment or from the fact that a payment or an act was unlawfully withheld. Examples include an undertaking becoming the subject of insolvency proceedings, a weakening of the undertaking's competitive position or the price of having at short notice to obtain credit. Compensation for such injury may be obtained only by bringing an action for damages in the Court of First Instance.¹²⁶

The Court of First Instance and the Court of Justice have exclusive jurisdiction to find the Community liable to make good actual injury following actions brought pursuant to Art.235 and the second para. of Art.285 of the EC Treaty.¹²⁷ If the Court of Justice has found that the illegality of the Community provision at issue does not cause the Community to incur liability because the relevant requirements are not satisfied, that finding makes it impossible to bring a claim before the national courts for a declaration that the Member State which implemented that provision is liable on account of the same illegality.¹²⁸ The judgment of the Court of Justice does not preclude "an action on grounds other than the unlawfulness of the Community measure in issue in that judgment brought against the competent national authorities for damage caused to individuals by the national authorities, even where they were acting within the framework of Community law".¹²⁹ In other words, a claim may be brought against Member States only where the damage stemmed from a wrongful act or omission on their part and not where the act or omission consisted in the due implementation of a Community measure which was later declared invalid.

c. Pecuniary loss resulting from unlawful joint action on the part of the Community and a Member State

Unlawful joint action of the Community and a Member State. The Community and a Member State act jointly where they both contribute to the adoption of a measure through the exercise of their own discretion. An

¹²⁵ ECI, Case 52/81 *Edin v Commission* [1984] E.C.R. 2155, paras 15-17; ECI, Case 175/84 *Krohn v Commission* [1985] E.C.R. 735, para. 21-22.

¹²⁶ For example, see ECI, Case 24/74 *Requena Frères v Commission* [1974] E.C.R. 677, paras 15-25; ECI, Joined Cases 116 and 124/71 *Amplon and Others v Council and Commission* [1972] E.C.R. 3475, para.3; CFI, Case T-16/94 *Nolle v Council and Commission* [1995] E.C.R. II-2159, paras 41-42; cf. Harding, "The Choice of Court Problem in Cases of Non-Contractual Liability under EEC Law" [1979] C.M.L.Rev. 369, at 372-373.

¹²⁷ ECI, Case 161/78 *Granville* [1978] E.C.R. 521, para.12.

¹²⁸ ECI, Joined Cases 105-122/77 *Antoni and Others v Greece and EEC* [1978] E.C.R. 5515, para. 15-16.

¹²⁹ *Ibid.*, para.19.

example is where Member States adopt protective measures with the agreement of the Community.¹¹ If such action is unlawful, here again a distinction has to be drawn between the three types of pecuniary loss mentioned above (see 11-321 to 11-322, *supra*). As far as the first two types of pecuniary loss are concerned, that is to say recovery of an undue payment or a claim for a payment or for an act which was wrongfully refused, proceedings must in principle be brought before the national courts.¹² In contrast, where actual "injury" is involved, although an action brought against the Community will be admissible before national remedies have been exhausted, the extent of the Community's liability will not be determined until the national courts have determined the proportion of the liability to be borne by the Member State under national law. The Court of Justice has held in that connection that "[i]t is necessary to avoid the applicants' being 'inefficiently or excessively compensated for the same damage by the different assessment of two different courts applying different rules of law'".¹³

III. SPECIAL CHARACTERISTICS

A. REQUIREMENTS FOR LIABILITY

- 11-324 Conditions. The classic requirements for liability—a wrongful Community act, loss or damage, and a causal connection between that act and the loss or damage—must be fulfilled if the Community is to be held liable (see 11-321, *supra*).¹⁴

1. The unlawful act

a. What test for unlawfulness?

- 11-325 Unlawfulness and fault. In the past the case-law was not always clear as to whether the unlawfulness of a Community act was based simply on the breach of a rule of superior law (objective or strict liability) or whether "fault" is also required on the part of the institution or person responsible for the act (subjective liability).¹⁵

- 11-326 Former ECSC Treaty. In the case of the ECSC Treaty, "fault" or "a wrongful act or omission on the part of the Community in the performance of its functions" (*faute de service; maladministration*) was required in order

¹¹ ECU, Joined Cases 5, 6 and 13-14/55 *Kampffmeyer and Others v. Commission* (1957) E.C.R. 245.

¹² *Id.*, at 241-244.

¹³ *Id.*, at 225.

¹⁴ ECU, Case 15/73 *Nick & Polverini v. Council and Commission* (1974) E.C.R. 473, para. 3.

¹⁵ Hermans-Rodière, "Un exemple de contentieux économique: le recours en indemnité devant la Cour de Justice des Communautés européennes" (1965) R.T.D.E. 5, at 13-23.

for the Community to incur liability (see Arts 34 and 40). Such a requirement to show fault meant that actual "blame" had to attach to the act.¹⁶ The criterion for determining blame was derived on an individual basis from the whole of the particular facts.¹⁷ The complexity of the situations with which the institution had to deal, the difficulties in applying the Treaty provisions and the discretion which the institution had under those provisions were taken into account.¹⁸ In addition, the fault had to be of a particular nature. Thus, only "unjustifiably bad administration"¹⁹ or "a lack of adequate supervision"²⁰ might be regarded as constituting fault capable of causing the Community to incur liability. Consequently, the fact that a Community act was unlawful did not necessarily mean that it had to be regarded as constituting "fault" giving rise to Community liability.

EC Treaty. The second para. of Art. 238 of the EC Treaty puts the Court of Justice and the Court of First Instance under a duty to determine any liability incurred by the Community "in accordance with the general principles common to the laws of the Member States". In theory, that provision provides an opportunity for formulating a system of objective or strict liability, in which a generally applicable criterion of unlawfulness is determined in advance, without having regard to the particular circumstances surrounding the Community act at issue.²¹ In that case, a breach of

¹⁶ Heubels, "De niet-contractuele aansprakelijkheid van de Gemeenschap ex art. 235, par. 2, EEC: Dynamiek en continuïteit (1955-1991)" (1992) S.E.W. 317-347.

¹⁷ ECU, Case C-260/91 *P. Commission v. Bakkerke, Peine-Jongheer* (1992) E.C.R. I-2339, para. 37. See also Lyden, "Three Questions on the Non-Contractual Liability of the EEC" (1985) 2 L.J.E.L. 105.

¹⁸ ECU, Joined Cases C-313 and C-344/81 *Flourbet and Others v. Commission* (1982) E.C.R. I-319, para. 24 (these criteria for determining the type of fault which must have been committed in order for the Community to incur liability applied in connection with both Art. 34 and Art. 40 of the ECSC Treaty).

¹⁹ ECU, Joined Cases 14, 15-17, 23, 24, 25-27/62 and 1/61 *Merani and Others v. High Authority* (1962) E.C.R. 163, at 169.

²⁰ ECU, Joined Cases 17 and 21/60, 2 and 3/61 *Justit's First-Lite, Cell and Others v. High Authority* (1961) E.C.R. 131, at 291. See, to the same effect, ECU, Joined Cases 23, 31, 35, 37-47, 49 and 51/63 *SA des Laminaires, Haute-Fourmeuse, Forges, Fonderies et Usines de la Providence and Others v. High Authority* (1965) E.C.R. 911, at 937.

²¹ Lyden (n.55, *supra*), at 109. See also van Gerven, "Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe" (1994) M.L.E.L. 6, at 25 and 37-38. This definition even affords room for objective, no-fault liability arising out of a lawful act which infringes the principle of "égalité devant les charges publiques" (a principle of French administrative law to the effect that public charges should be discharged equally). To cite, the Court of Justice has not yet accepted that type of liability, but has also not ruled out such a possibility.

²² ECU, Joined Cases 9 and 11/73 *Compagnie d'Approvisionnement de Transport et de Cédex and Others v. Commission* (1973) E.C.R. 131, para. 48; ECU, Case 15/73 *Developement and Others v. Commission* (1974) E.C.R. 473, para. 23; ECU, Case 16/73 *Developement and Others v. Commission* (1974) E.C.R. 473, para. 23; ECU, Case 17/73 *Edouard Dubois and Fils v. Council and Commission* (1973) E.C.R. I-125, para. 42. The Court of First Instance has stated that liability for a lawful act could be incurred only if the damage alleged affects a particular

kind of economic operators in a disproportionate manner by comparison with others.

a superior rule of law would be sufficient in itself to cause the act to be regarded as unlawful and hence to cause the Community to incur liability, regardless as to whether the act was actually blameworthy and hence violated by fault.¹⁴²

The concept of fault has not disappeared entirely from the system of liability founded upon the second para. of Art. 235 of the EC Treaty.¹⁴³ The case-law has swung between mentioning fault¹⁴⁴ and not mentioning it,¹⁴⁵ but it is of course in the background whenever the mere unlawfulness of a Community act is insufficient to render the Community liable.¹⁴⁶

(material damage) and exceeds the limits of the economic risks inherent in operating in the sector concerned (special damage), without the legislative measure that gave rise to the alleged damage being justified by a general economic interest (CFL Case T-184/93 *Donch Comité v Council and Commission* [1993] E.C.R. II-667, para. 80). See also CFL (December 14, 1995), Case T-65/93 *FLAMM and FLAMM Technologies v Council and Commission*, not yet reported, para. 167; CFL (December 14, 1995), Case T-38/93 *Seagrow v European Parliament and Others*, not yet reported, para. 174; CFL Case T-186/99 *Aria Cox and Others v Council and Commission* [2001] E.C.R. II-3597, para. 171; CFL Case T-176/00 *Ferdinand v Council and Commission* [2002] E.C.R. I-315, paras 54-57; CFL Joint Cases T-64/01 and T-43/01 *Affektroba Frucht-Compagnie and Others v Council and Commission* [2004] E.C.R. II-521, paras 150-155. See Broekhorst, "The Valid Legislative Act as a Cause of Liability of the Communities", in *Heintsch and McDonnell* (eds), (n.89, *supra*), at 153-163.

¹⁴² ECF, Case C-332/93 *P Bergaderm and Goupil v Commission* [2000] E.C.R. I-5291, para. 43-44.

¹⁴³ See CFL Case T-123/99 *Stahlwerke Peine-Solinger v Commission* [1999] E.C.R. II-219, para. 74, which reiterates the conditions having to be fulfilled before there can be "fault of such a nature as to render the Community liable under the second para. of Art. 235 [now Art. 228] of the E[EC] Treaty". Academics are divided on this point. Some maintain that the Court has abandoned the requirement for fault at least in the case of liability for legislative acts, and regards the illegality of the act as issue sufficient in certain circumstances to cause the Community to incur liability (Schöckweiler, Wiviers and Godart, "Le régime de la responsabilité extra-contractuelle des institutions juridiques dans la Communauté européenne" (1990) R.T.D.E. 77-78). Others still adhere to the concept of fault, considering that it imposes requirements additional to the unlawful nature of the act at issue (see, e.g. Concinet, "La faute dans le régime de la responsabilité extra-contractuelle des Communautés européennes" (1988) R.T.D.E. 187-190). The debate may, perhaps be reduced to what is to be understood by "fault" and, to that extent, is purely epistemological (see, for example, Cornelis, "De extra-contractuele aansprakelijkheid van de Gemeenschap (1975-1987)" (1984) S.E.W. 5, at 11, who argues that the distinction between "fault" and "illegality" is superfluous on the ground that both concepts are objective, the concept of "fault" being based on the objective criterion of "a normal, prudent person"). See, however, 11-038, *infra*.

¹⁴⁴ See, for example, ECF, Case 15/62 *Plaumann v Commission* [1963] 35, at 169; ECF, Joint Cases 5, 7 and 13-14/65 *Kernfänger and Others v Commission* [1967] E.C.R. 245, at 162; ECF, Case 30/65 *Becker v Commission* [1967] E.C.R. 285, at 289; ECF, Case 196/77 *Labaye v Commission* [1978] E.C.R. 293, at 304; ECF, Joint Cases 19-20, 25 and 30/78 *Nieder-Pärle and Others v Commission* [1979] E.C.R. 323, para. 31; ECF, Case 25/78 *Dowd v Commission* [1979] E.C.R. 3767, para. 22; ECF, Case 112/75 *Kohl v Commission* [1976] E.C.R. 1851, para. 14; CFL (order of December 11, 2003), Case T-345/03 *McKinnon and Others v European Parliament and Others* [2003] E.C.R. II-6097, para. 23; CFL (order of February 12, 2004), Case T-15/03 *French and Others v Council and Commission* [2004] E.C.R. II-169, para. 23.

¹⁴⁵ ECF, Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 975.

¹⁴⁶ See Mazlou, "Ulégalité et responsabilité en droit communautaire", in *Mélanges Roger J.*

Bergaderm judgment. The relevance of the question whether the test as to unlawfulness is objective or subjective seems to have been blurred following the judgment in *Bergaderm*.¹⁴⁷ In that case the Court of Justice aligned the conditions which must be met in order for the Community to incur liability on the conditions prescribed by Community law for a Member State to incur liability for damage sustained by individuals as a result of an infringement of Community law.

The case-law now requires there to have been a sufficiently serious breach of a rule of law intended to confer rights on individuals. Where the Community institution concerned has a discretion, a sufficiently serious breach will be involved where the Community institution concerned "manifestly and gravely" disregarded the limits on its discretion.¹⁴⁸ Where the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

In this connection, the general or individual nature of the measure taken by an institution is not a decisive criterion.¹⁴⁹ Furthermore, in both

¹⁴⁷ Delors (Larcier, Brussels, 1994), 255, at 400-401. Cf. Fuchs, "La responsabilité des Communautés européennes pour le comportement illégal de leurs organes" (1983) R.T.D.E. 1, at 14-15.

¹⁴⁸ ECF, Case C-332/93 *P Bergaderm and Goupil v Commission* [2000] E.C.R. I-5291, for a commentary, see Tridimas, "Liability for Breach of Community Law: Growing Up and Mellowing Down?" (2001) C.M.L.Rev. 333-352. See also CFL Case T-186/99 *Aria Cox and Others v Council and Commission* [2001] E.C.R. II-3597.

¹⁴⁹ For a commentary, see Mazlou, "The role of discretion in EC law on non-contractual liability" (2002) C.M.L.Rev. 617-653.

¹⁵⁰ The rules on liability set out in the judgment in *Bergaderm*, which formerly applied to a comparable degree for legislative acts involving an economic policy choice, largely correspond to the rule set forth in the *Schöppenstedt* judgment on liability for legislative acts according to which, "where legislative action involving measures of economic policy is concerned", the Community will be liable only for damage suffered by individuals as a consequence of that action where there has been "a sufficiently flagrant violation of a superior rule of law for the protection of the individual" (ECJ, Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 975, para. 11). That rule reflects the reluctance of the Court of Justice and the Court of First Instance to assess the legality of acts which inevitably involve choices made on the basis of considerations of expediency. The particular nature of the role played by the courts meant that they have to accept such choices. On those grounds, moreover, the Member States have sharply curtailed, or even ruled out altogether State liability for action taken under "statute law". See ECF, Joint Cases 63 and 94/76, 4, 15 and 40/77 *KNI and Others v Council and Commission* [1978] E.C.R. 1205, paras 5 and 6. "This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals. It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept, within reasonable limits, certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void". See also Schöckweiler, Wiviers and Godart (n.84, *supra*), at 54. On the other hand, the existence of rules governing such liability—no matter how restrictive they may be—expresses a genuine concern to afford individuals the

situations, account must be taken of the complexity of the situations to be regulated and of difficulties in the application or interpretation of the terms.

Consequently, it appears that the test for liability applied by the Court of Justice will always contain a major "subjective" element, which is related to the discretion available to the institution concerned. The liability test laid down in *Bergaderm* requires the discretion of the institution concerned to be identified, a finding to be made that the higher-ranking rule of law which has been breached is intended to confer rights on individuals and that the infringement in question constitutes a sufficiently serious breach of Community law.¹²⁹

- 11-029 Liability on account of a failure to act. Liability on the part of the Community on account of a failure to act must also be determined on the basis of the same criteria. Thus, the inaction of an institution may give rise to liability where it constitutes a clear and serious disregard of the limits imposed on the institution's discretion.¹³⁰

b. The Discretion of the Community Institution

- 11-030 General or individual nature of the act is irrelevant. The Court of First Instance and the Court of Justice have to determine the extent of the institution's discretion in the light of the legal context in which the measure at issue was adopted. It is irrelevant whether the measure is general or individual, normative (or legislative) or administrative (or implementing).¹³¹

widest possible legal protection in the absence of effective parliamentary control. See also the Opinion of Advocate General X. Roemer in ECJ, Case 571 *Zuckerfabrik Faber* [1977] E.C.R. 775, at 789.

¹²⁹ See also ECJ, Case C-312/92 *P. Commission v. Cornet and Ties* [1993] E.C.R. I-1335, para.34; CFI, Case T-210/00 *Alcatel v. Commission* [2002] E.C.R. II-47, para.32; CFI, Case T-55/00 *Dole Fresh Fruit International v. Council and Commission* [2003] E.C.R. II-577, para.71; CFI, Joined Cases T-64/01 and T-65/01 *Africanis Fruit-Compagnie and Others v. Council and Commission* [2004] E.C.R. II-521, para.71.

¹³⁰ ECJ, Case 32/81 *Grands Moulins de Paris v. Council and Commission* [1983] E.C.R. 4233, para.9; CFI (Judgment of March 17, 2005), Case T-215/03 *Agre and Others v. Commission*, not yet reported, para.56; ECJ (Judgment of July 12, 2005), Case C-154/03 *P. Commission v. CFMA, Ferret Armato and Piller-Entwässer*, not yet reported, paras 65-69 and 72.

¹³¹ ECJ, Case C-332/93 *P. Bergaderm and Goupil v. Commission* [1995] E.C.R. I-1587, para.45; CFI, Case T-155/95 *Dieckmann & Hansen v. Commission* [2000] E.C.R. II-3143, para. 45-46. The distinction between legislation and implementation of legislation is not reflected in the Community legal order in a distinction between "authorities" or "institutions" charged with rule-making at the legislative or implementation levels. The distinction between "legislation" and "implementation" depends on the legal basis pursuant to which the act of the relevant Community institution is adopted. Any act which is based directly on an article of the Treaty will be a legislative act. Any act based on secondary legislation will be an implementing or executive act. It is to be expected that legislative acts will tend more often to be rule-making in comparison with implementing measures. For further particulars, see Lecaillon, "Regulating the Regulatory Process: 'Delegation of Powers' in the European Community" (1991) *E.L.Rev.*, at 27-35. The type of measure involved may provide an indication of its discretionary nature. Regulations and directives are predominantly the legal

Discretion involves policy choices. It is critical whether the institution had a discretion when it adopted the measure. There will be a discretion where the Treaty provision or the provision of secondary Community law on which the measure is based requires the institution to make a policy choice.

This is what the Court of First Instance held in *Dieckmann*,¹³² which was concerned with a Commission decision excluding a State from the list of third countries from which importation of fishery products was authorised and placing that act in the context of the common agricultural policy, a policy area for which it had already been established that the Community institutions had a discretion. Moreover, it appeared from the legislative acts on which the Commission decision was based that the legislator had expressly conferred a broad discretion on the Commission as regards controlling the import of fisheries products.¹³³

Also the fact that the institution has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility obviously points to the existence of a discretion.¹³⁴

Case-by-case assessment. The fact, however, that an act was adopted in a policy area that frequently involves (economic) policy choices does not automatically lead to a finding that a discretion exists. The Community judiciary will always assess the margin of discretion in the light of the specific circumstances. Thus, in the *Fresh Marine Company* case, the Court of First Instance held that an act of the Commission by which an undertaking on the part of the applicant (offer to avoid the imposition of anti-dumping duties) was said to have been breached and anti-dumping

instruments which embody a legislative (and therefore often a discretionary) act. For regulations, see e.g. ECJ, Case 43/72 *Merkur-Warenhandels v. Commission* [1973] E.C.R. 1055; ECJ, Joined Cases 63-69/72 *Wendel-Hausmann and Others v. Council* [1973] E.C.R. 1229; ECJ, Case 57/76 *Merck v. Commission* [1977] E.C.R. 1051. The fact that a regulation is of direct and individual concern to a particular person within the meaning of the fourth para. of Art.230 of the EC Treaty does not mean that it loses its legislative nature for the purposes of an action for damages brought pursuant to the second para. of Art.232 (see, for example, ECJ, Case C-152/83 *Soyfimport v. Commission* [1990] E.C.R. I-277, at 2-1515). See also CFI, Joined Cases T-480 and T-481/85 *Arifian Rice Mills and Others v. Commission* [1995] E.C.R. II-2305, paras 150-156, where the *Soyfimport* test was applied. This approach was confirmed by the Court of Justice in ECJ, Case C-380/93 *Arifian Rice Mills and Others v. Commission* [1999] E.C.R. I-753, paras 35-53, and remains applicable in the context of the *Bergaderm* test-law. For directives, see ECJ, Case C-41/89 *Administración de Crédito v. Council and Commission* [1991] E.C.R. I-2389, para.11.

¹³² CFI, Case T-155/95 *Dieckmann & Hansen v. Commission* [2000] E.C.R. II-3143, paras 43-56.

¹³³ See also CFI, Case T-193/93 *Comit v. Commission* [2001] E.C.R. II-913, para.75 (the Commission has a margin of discretion in the area of the common organisation of markets, which involves constant adjustments to meet changes in the economic situation); CFI, Case T-110/00 *Pharm-Rendell v. Council and Commission* [2002] E.C.R. II-513, para.46; CFI, Case T-265/00 *Leibers v. European Ombudsman* [2002] E.C.R. II-2185, para.75.

¹³⁴ CFI, Case T-20/95 *Bocchi Food Trade International v. Commission* [2001] E.C.R. II-943, paras 91-93.

duties were imposed, "did not involve any choices of economic policy". In that connection, the Commission had "only very little or no discretion".¹¹³

- 11-033 European Ombudsman. In order to determine whether there has been a sufficiently serious breach of Community law rendering the Community non-contractually liable owing to the conduct of the European Ombudsman, regard must be had to the specific nature of the latter's function. In that context, it should be borne in mind that the European Ombudsman is merely under an obligation to use his or her best endeavours and that he or she enjoys wide discretion.¹¹⁴

c. A superior rule of law intended to confer rights on individuals

- 11-034 Hierarchy of norms. Any judicial review of the legality of an act involves checking whether it conflicts with superior law. This necessitates ascertaining the rank of the measure at issue in the hierarchy of norms.¹¹⁵
- 11-035 Superior rules of law. The superior rules of law are the provisions of the Treaties, the general principles of law and the Community measures on which the contested act is based.
- 11-036 Prior to the *Bergaderm* judgment. The Treaty provisions which were already used before the judgment in *Bergaderm* to test the legality of an act include Art.12, Art.28, Art.29, Art.33(1) and Art.34(3) of the EC Treaty.¹¹⁶

¹¹³ CFI, Case T-136/93 *Fresh Marine v Commission* [2000] E.C.R. II-1331, para.53, *apud* on appeal: ECJ, Case C-472/00 *P. Commission v Fresh Marine AS*, Judgment of the Full Court of July 10, 2003" (2004) C.M.L.Rev. 233-244.

¹¹⁴ ECJ, Case C-234/02 *P. European Ombudsman v Lamberti* [2004] E.C.R. I-2633, para.56.

¹¹⁵ The following hierarchy of norms obtains in the legal order of the European Community: at the top, the Treaties and the Acts of Accession, which constitute the basic constitutional charter (see ECJ, Case 294/83 *Las Vert v European Parliament* [1985] E.C.R. 1339, para.23). In addition, there is a series of decisions of a quasi-constitutional nature, such as the Decision on Own Resources (based on Art.265 of the EC Treaty) or the Decision and the act concerning the direct election of the European Parliament (based on Art.150(3) of the EC Treaty). The general principles of law, including fundamental rights, constitute the unwritten constitutional norms, which are on an equal footing with the Treaties and the other written constitutional rules. Next come the rules of international law which permeate the legal order of the Community, i.e. agreements and customary international law. At the third level, there are acts of Community institutions directly based on Treaty provisions. Finally, there are acts of Community institutions implementing earlier acts. For further details, see Lesaerts and Van Nuffel, *Constitutional Law of the European Union*, §17-652-§17-655, at 703-705.

¹¹⁶ See, as regards Art.12 of the EC Treaty, ECJ, Joined Cases 71 and 72/54 *Irving and Ladd v EEC* [1953] E.C.R. 2915; as regards Arts 28 and 29 of the EC Treaty, ECJ, Case 255/85 *Van den Bergh and August v Commission* [1987] E.C.R. 1135; as regards Art.33(1) of the EC Treaty, ECJ, Case 1785 *Vandemoortele v Commission* [1993] E.C.R. 1135, and, as regards Art.34(3) of the EC Treaty, ECJ, Case 282/82 *Deffer v Council and Commission* [1984] E.C.R. 2665. Art.12(4) and Art.37(2) of the EC Treaty do not constitute superior rules of law for the protection of individuals: CFI, Case T-571/93 *Leffevre and Others v Commission* [1995] E.C.R. II-2379, para.42.

The general rules of law which operated as superior rules of law included the principle of protection of legitimate expectation,¹¹⁷ the principle of proportionality,¹¹⁸ the principle of equal treatment (also known as the principle of equality or the prohibition of discrimination),¹¹⁹ the principle of care,¹²⁰ the principle of proper administration,¹²¹ and the prohibition of misuse of powers.¹²² Fundamental rights, such as the right to property,¹²³

¹¹⁷ ECJ, Case 74/74 *INTA v Commission* [1975] E.C.R. 533, at 543-550 (manifest infringement of the principle of protection of legitimate expectation); ECJ, Case C-152/83 *Jefferson v Commission* [1983] E.C.R. I-2471, para.26 (manifest infringement of that principle); ECJ, Joined Cases C-104/85 and C-30/90 *Heider and Others v Council and Commission* [1992] E.C.R. I-2051, para.15 (manifest infringement of that principle); CFI, Case T-472/93 *Compo Ebro Industrial and Others v Council* [1995] E.C.R. II-421, para.32 (no infringement of the principle of protection of legitimate expectation found); CFI, Joined Cases T-451/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] E.C.R. II-2941, paras 143-150 (no infringement of the principle of protection of legitimate expectation); CFI, Case T-521/95 *Adams and Others v EEC* [1996] E.C.R. II-2701, paras 55-56 (no infringement of the principle of protection of legitimate expectation); CFI, Case T-195/95 *Pharos v Commission* [1996] E.C.R. II-283, paras 53-54 (no infringement of the principle of protection of legitimate expectation).

¹¹⁸ ECJ, Joined Cases 83-85/72 *Portolan Hoesenacke and Others v Council* [1973] E.C.R. 1265, paras 18-20; ECJ, Joined Cases 279-283, 285 and 285/84 *Asia v Commission* [1987] E.C.R. 1065, para 35-37; ECJ, Case 275/53 *Vandemoortele v Commission* [1957] E.C.R. 1129, paras 32-34; ECJ, Case 265/55 *Van den Bergh and August v Commission* [1957] E.C.R. 1135, paras 30-34; CFI, Case T-152/55 *Perider v Commission* [1977] E.C.R. II-2421, paras 48-53 (no infringement of the principle of proportionality).

¹¹⁹ ECJ, Joined Cases 63 and 64/75, 4, 15 and 40/77 *NML and Others v Council and Commission* [1975] E.C.R. 1235, para.5; ECJ, Joined Cases 84 and 113/76, 167 and 209/78, 17-28 and 45/75 *Dumortier Fabre v Council* [1975] E.C.R. 3691, para.11; ECJ, Case 216/78 *Irving and Ladd v Commission* [1979] E.C.R. 2355, para.11; ECJ, Joined Cases 241-242, 245-250/78 *DOV v Council and Commission* [1979] E.C.R. 3017, para.21; ECJ, Joined Cases 161 and 262/73 *Interquell Störke-Chemie and Dietrich v Council and Commission* [1979] E.C.R. 3045, para.14; ECJ, Case 106/81 *Kind v EEC* [1982] E.C.R. 2835, paras 21-23 (no infringement of the principle of equal treatment); ECJ, Case C-61/82 *Assincher du Crédit v Council and Commission* [1983] E.C.R. I-1259, paras 14-23 (no infringement of the principle of equal treatment); CFI, Case T-120/87 *Stet-Telekom Fern-Telegraph v Commission* [1991] E.C.R. II-279, para.32 (manifest infringement of the principle of equal treatment); CFI, Case T-455/93 *Unifruit Heilbrunn v Commission* [1994] E.C.R. II-2201, paras 78-80 (no infringement of the principle of equal treatment); CFI, Case T-472/93 *Compo Ebro Industrial and Others v Commission* [1995] E.C.R. II-421, para.52; CFI, Joined Cases T-451 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] E.C.R. II-2941, para.101 (no infringement of the principle of equal treatment); CFI, Case T-152/95 *Perider v Commission* [1997] E.C.R. II-2421, paras 54-56 (no infringement of the principle of equal treatment).

¹²⁰ CFI, Case T-167/84 *Nelle v Council and Commission* [1985] E.C.R. II-2385, para.76 (no infringement of the principle of care).

¹²¹ CFI, Case T-101/96 *Pharos v Commission* [1996] E.C.R. II-283, paras 73-74 (no infringement of the principle of proper administration).

¹²² ECJ, Case C-115/85 *ALAPD and Others v Commission* [1986] E.C.R. I-2185, para.19; CFI, Joined Cases T-421 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] E.C.R. II-2941, paras 134-135 (no infringement of the prohibition of misuse of powers).

¹²³ ECJ, Case 57/83 *Flourbet v EEC* [1984] E.C.R. 4051, paras 1-12; ECJ, Case 28/84 *Zuckerfabrik Südzucker v Council and Commission* [1987] E.C.R. 49, paras 25-26.

the right to be heard (*audi alteram partem*)¹²⁴ and freedom to pursue an economic activity,¹²⁵ were also recognised as being superior rules of law.

11-021 The *Bergaderm* judgment. Since the judgment in *Bergaderm*, an infringement of a higher-ranking rule of law is capable of causing the Community to incur liability only where the higher-ranking rule of law is intended to confer rights on individuals.

That requirement appears to be based closely on the requirement laid down in the *Schöppenstedt* test: that a superior rule of law intended to protect an interest peculiar to the person concerned must be involved.¹²⁶ This doctrine of the *Schöppenstedt*,¹²⁷ which originates in German law and may be found also in some other jurisdictions,¹²⁸ has the aim of limiting liability. In the past, however, it was applied flexibly. The Court of Justice did not rule out the possibility of superior rules of law protecting both general and individual interests.¹²⁹ Accordingly, the prohibition of discrimination laid down in Art.24(2) of the EC Treaty assigns the common organisation of the agricultural markets and, at the same time, protects the interests of individual market participants.¹³⁰ In contrast, the requirement laid down by Art.253 of the EC Treaty for a statement of reasons is intended only to enable the Court of Justice or the Court of First Instance to review the legality of acts and does not serve any individual interest, with the result that an infringe-

ment of that requirement cannot make the Community liable.¹³¹ The same is true of "the system of the division of powers between the various Community institutions", which is designed to "ensure that the balance between the institutions provided for in the [EC] Treaty is maintained, and not to protect individuals".¹³² For those reasons, a declaration in a preliminary ruling that a provision which the Commission adopted *ultra vires* and hence in disregard of that system of institutions' balance is invalid does not render the Community liable.

Examples of superior rules of law intended to confer rights on individuals. Since the judgment in *Bergaderm* the Community judiciary has expressly (or sometimes indirectly) recognised as being higher-ranking rules of law 'conferring rights' on individuals: the principle of non-discrimination,¹³³ the principle of proportionality,¹³⁴ the principle of protection of legitimate expectation,¹³⁵ the right freely to exercise a trade or profession,¹³⁶ the duty of care,¹³⁷ the principle of the protection of property¹³⁸ and the prohibition of unjust enrichment.¹³⁹

In contrast, the principle of relative stability and respect for traditional fisheries rights governs only relations between the Member States and does not confer on individuals rights whose infringement would ground a claim in damages.¹⁴⁰ The same applies to the principle of sound administration.¹⁴¹

11-028

¹²⁴ CFI, joined Cases T-481 and T-424/93 *Exporteurs in Lescage, Vokker and Others v Commission* [1993] E.C.R. II-2541, para.154 (no infringement of the right to be heard).

¹²⁵ CFI, Case T-521/93 *Atlanta and Others v EC* [1996] E.C.R. II-1597, paras 62-64 (no infringement of the freedom to pursue an economic activity).

¹²⁶ This requirement was expressed for the first time in ECJ, joined Cases 9 and 12/80 *Roche v High Authority* [1961] E.C.R. 197, at 217, where the Court of Justice dismissed a claim for damages brought under Art.40 of the ECSC Treaty on the ground that the article of the Treaty which the Commission had allegedly infringed had been adopted only in the interests of the Community. It seems, however, that the provision concerned does not have to have direct effect (cf. ECJ, joined Cases C-6 and C-9/50 *Francovich and Others* [1991] E.C.R. I-2557, in which the applicant could not rely on the provision of the unimplemented directive because it did not have direct effect, but the directive was nevertheless regarded as a higher-ranking rule of law which conferred rights on individuals).

¹²⁷ Under German law, the public authorities are liable only if they cause damage and breach a 'Schonnorm' protecting an individual right, not of individuals in general, but of a specific group to which the interested party belongs; see *Wenck*, 'Liability for Legislative Act under Art.215(now Art.253)(2) EC', in *Meckels and McDonnell* (eds) (1986, supra), 123, at 136.

¹²⁸ See *Schockweiler, Wilms and Gerdts* (1983, supra), at 33, with mention Denmark, Greece, Italy, the Netherlands and Portugal in this connection.

¹²⁹ ECJ, joined Cases 5, 7 and 13-14/66 *Kampffmeyer and Others v Commission* [1967] E.C.R. 245, at 261-263.

¹³⁰ ECJ, joined Cases 33 and 34/64, 4, 15 and 40/73 *SNIE and Others v Council and Commission* [1979] E.C.R. 2389, para.5; ECJ, Case 230/78 *Industrieel v Council and Commission* [1979] E.C.R. 2555, para.11; ECJ, joined Cases 241-243, 245-247/78 *DOV v Council and Commission* [1979] E.C.R. 3217, para.11; ECJ, joined Cases 251 and 251/78 *Interpall, Stille-Chemie and Dietrich v Council and Commission* [1979] E.C.R. 2043, para.14.

¹³¹ ECJ, Case 105/81 *And v ZSC* [1982] E.C.R. 2385, para.14; ECJ, Case C-119/78 *AGROP and Others v Commission* [1989] E.C.R. I-2185, para.23; ECJ, Case C-75/81 *P. Eurochem and Others v Council* [1983] E.C.R. I-1005, para.53; CFI, Case T-356 *Emesa Sugar v Council* [2000] E.C.R. II-1515, para.62; CFI, joined Cases T-54/01 and T-55/01 *Affricanische Frucht-Compagnie and Others v Council and Commission* [2004] E.C.R. II-521, para.122.

¹³² ECJ, Case C-252/93 *Krausenhil v Commission* [1995] E.C.R. I-1537, paras 13-24; CFI, joined Cases T-66/01 and T-65/01 *Affricanische Frucht-Compagnie and Others v Council and Commission* [2004] E.C.R. II-521, para.115 (a possible unlawful delegation of powers by the Council to the Commission cannot cause the Community to incur non-contractual liability).

¹³³ CFI, Case T-36/00 *De's Fresh Fruit International v Council and Commission* [2003] E.C.R. II-377, para.75.

¹³⁴ CFI, Case T-40/96 *Emesa Sugar v Council* [2001] E.C.R. II-3515, para.64.

¹³⁵ CFI, Case T-41/98 *Emesa Sugar v Council* [2001] E.C.R. II-3515, para.64; CFI, Case T-155/98 *Dieckmann & Hansen v Commission* [2001] E.C.R. II-3143, para.57 (no express recognition); CFI, Case T-212/00 *Born & Cie v Council* [2001] E.C.R. II-47, para.57.

¹³⁶ CFI, Case T-32/98 *Born & Cie v Council* [2001] E.C.R. II-47, para.57.

¹³⁷ CFI, Case T-32/98 *Born & Cie v Council* [2001] E.C.R. II-47, para.57.

¹³⁸ CFI, Case T-32/98 *Born & Cie v Council* [2001] E.C.R. II-47, para.57.

¹³⁹ ECJ, judgment of November 23, 2004, Case T-265/03 *Carson Société de Dolanov and Others v Commission*, not yet reported, para.162.

¹⁴⁰ CFI, Case T-134/99 *Alca Cave and Others v Council and Commission* [2001] E.C.R. II-1591, para.122; CFI, judgment of October 19, 2005, Case T-415/03 *Co. S. de perchedes de "Los Perches" and Others v Council*, not yet reported, paras 35-61.

¹⁴¹ CFI, Case T-286/99 *Alca Cave and Others v Council and Commission* [2001] E.C.R. II-1591, para.43, in which the Court of First Instance held that the principle of sound administration did not confer any rights on individuals. See, however, CFI, Case T-173/04

or Art.253⁹⁴ and Art.307⁹⁵ of the EC Treaty. In principle, the WTO Agreement and its annexes do not constitute—under Community law—rules of law which create rights for individuals.⁹⁶

d. The requirement for a sufficiently serious breach

- 11-339 Institution has a discretion. The requirement for there to have been a sufficiently serious breach reflects once again the judiciary's reluctance to find the Community liable for loss or damage caused by acts involving policy choices. In these circumstances, there can have been a sufficiently serious breach of a superior rule of law only in the event that the Community institution in question manifestly and gravely disregarded the limits on the exercise of its powers.⁹⁷

- 11-340 Justifications. Accordingly, the "breach" of a superior rule of law is sometimes justified, *inter alia*, on the ground that an important general interest takes precedence over the individual interest of the injured party.⁹⁸

⁹⁴ *French Marine v Commission* (2000) E.C.R. II-3331, para.63. In *ECJ, Case C-277/00 Parf and Omer* (2004) E.C.R. I-9423, the Court of Justice ruled that Directives 94/19, 77/187, 89/269 and 89/544 do not confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities, if the compensation of depositors prescribed by Directive 94/19 is ensured. For a commentary, see Tison, "Do not attack the watchdog! Banking supervisor's liability after *Parf and Omer*" (2005) C.M.L.Rev. 655-675.

⁹⁵ *ECJ, Case C-260/01 F. Eurochem and Others v Council* (2003) E.C.R. I-1009, paras 95-99; *CFI, Case T-4/96 Emery Sugar v Council* (2001) E.C.R. II-3519, para.50.

⁹⁶ *CFI, Case T-295/97 T. Port v Council* (2001) E.C.R. II-3055, para.83, and *CFI, Case T-369/2000 Sinochem v Council* (2003) E.C.R. II-1121, para.35.

⁹⁷ *CFI, Case T-525/99 T. Port v Commission* (2001) E.C.R. II-581, para.51; *CFI, Case T-295/97 T. Port v Council* (2001) E.C.R. II-3053, para.51; *CFI, Case T-18/99 Cordis v Commission* (2001) E.C.R. II-913, para.46; *CFI, Case T-335/99 Societe Food Trade International v Commission* (2001) E.C.R. II-543, para.58; *CFI, Case T-174/99 Silver International v Council* (2002) E.C.R. II-417, para.61; *ECJ, Case C-93/02 P Silver International v Council* (2003) E.C.R. I-1347, para.51 (however, the Court of Justice does not rule out the possibility of reviewing the legality of Community acts in the light of the WTO rules in the event of a recommendation or ruling of the WTO Dispute Settlement Body against the Community (para.57-64)). See also Snyder, "The gatekeepers: The European Courts and WTO Law" (2003) C.M.L.Rev. 313-367; Wiers, "One Day, You're Gonna Pay The European Court of Justice in Euro" (2004) L.J.E.L. 143-151; Zonnekorn, "EC liability for non-implementation of WTO Dispute Settlement Decisions—are the dice cast?" (2004) L.J.E.L. 453-490.

⁹⁸ For legislative acts, see *ECJ, Joined Cases 33 and 34/75, 4, 15 and 40/77 HNL and Others v Council and Commission* (1975) E.C.R. 1204, para.6; *ECJ, Case 50/66 Grand v Meunier de Paris v Council and Commission* (1967) E.C.R. 4351, para.3; *ECJ, Case 136/83 Rogge's Feins v Commission* (1985) E.C.R. 1553, paras 25-29; *ECJ, Case C-332/93 P Rogge's and Gouff v Commission* (2000) E.C.R. I-5131, para.45. For public law procedures, see *CFI Judgment of March 11, 2003, Case T-18/01 AFSC Management Consultants and Others v Commission*, not yet reported, para.53.

⁹⁹ *ECJ, Case 50/75 Meunier v Commission* (1977) E.C.R. 1203, para.5; *ECJ, Case 31/76 Zuckerfabrik Eastlag v Council and Commission* (1981) E.C.R. 49, para.34; *ECJ, Case 58/76 Grand v Meunier de Paris v Council and Commission* (1981) E.C.R. 4613, para.12; *CFI, Case T-56/95 Dole Fresh Fruit International v Council and Commission* (2002) E.C.R. II-571, para.75.

or that the breach was the result of an erroneous, but excusable, approach to an unresolved legal question⁹⁹ or of the complexity of the situations to be regulated and the difficulties in the application or interpretation of the law.¹⁰⁰ The absence of such justification raises a presumption that the Community institution acted "arbitrarily" as a result of which the breach of the relevant superior rule of law is deemed to be sufficiently serious.¹⁰¹

Extent of the loss or damage. The Court of Justice has also tackled the question as to whether the Community institution concerned manifestly and gravely disregarded its powers in the light of an appraisal of the loss or damage caused thereby.¹⁰² The particular intensity of the damage and the fact that a limited or ascertainable number of persons were affected determine the matter.¹⁰³

Institution does not have a discretion. Where the institution does not have a discretion, a serious breach will be involved where there is a mere infringement of Community law, in particular a finding of an error which an administrative authority exercising ordinary care and diligence¹⁰⁴ would not have committed in analogous circumstances.¹⁰⁵

⁹⁹ *CFI, Case T-120/95 Stahlwerke Feinschmelzer v Commission* (1991) E.C.R. II-279, para. 105-118.

¹⁰⁰ *CFI Judgment of April 11, 2003, Case T-33/03 Heide v Commission*, not yet reported, para. 100-101.

¹⁰¹ *ECJ, Joined Cases 116 and 124/77 Anymin and Others v Council and Commission* (1979) E.C.R. 1491, para.19; *ECJ, Case 195/81 Kind v Commission* (1982) E.C.R. 2585, para.22.

¹⁰² *ECJ, Joined Cases 33 and 34/75, 4, 15 and 40/77 HNL and Others v Council and Commission* (1975) E.C.R. 1209, para.7; *CFI, Case T-55/00 Dole Fresh Fruit International v Council and Commission* (2003) E.C.R. II-571, para.73.

¹⁰³ *Id.*, cf. *CFI, Case T-120/95 Stahlwerke Feinschmelzer v Commission* (1991) E.C.R. II-279, para.131 (ruling under the ECSC Treaty); see also *ECJ, Case 50/66 Grand v Meunier de Paris v Council and Commission* (1967) E.C.R. 4351, para.21. The fact that the number of persons involved was ascertainable in *Muller* (*ECJ, Joined Cases C-54/85 and C-31/90 Muller and Others v Council and Commission* (1992) E.C.R. I-3651) was not mentioned as a requirement for liability. See the case note by Heukels (1993) C.M.L.Rev. 366, at 381.

¹⁰⁴ *CFI, Case T-174/99 Silver International v Commission* (2000) E.C.R. II-3331, para.61.

¹⁰⁵ *CFI, Joined Cases T-35/95, T-11/95, T-23/97, T-174/98 and T-225/99 Compagnie and Dole Fresh Fruit Europe/Commission* (2001) E.C.R. II-375, para.164. Various shortcomings in the performance of administrative acts were held to constitute fault (before the judgment in *Bogardus*). For a survey, see Schermers and Waelbroeck, *Judicial Protection*, 1169-1170, at 541-545 and Heukels (n.53, *supra*), at 322-323. See also Van der Woude, "Liability for Administrative Acts under Art.253(2) EC" in Heukels and McDonough (eds) (n.55, *supra*), at 103-113. What was involved was the usual form taken by unlawful conduct attributed to the institutions: *ECJ, Case C-55/90 Orio v Commission* (1992) E.C.R. I-2151, para.13. The shortcomings in question included lack of care in exercising implementing power: *ECJ, Case 169/73 Compagnie Conchylière v Council* (1975) E.C.R. 117, para.20; *CFI, Case T-514/53 Calvege and Others v Commission* (1955) E.C.R. II-411, paras 53-79 (by waiting fifteen months before rectifying a manifest error in paying a promised Community subsidy, the Commission exhibited an obvious lack of care); *ECJ, Joined Cases 5, 7 and 13-14/55 Kampffmeier and Others v Commission* (1957) E.C.R. 245, at 262; failure to adopt a required act: *ECJ, Joined Cases 3*

2. The loss or damage

General. The requirement for loss or damage is the second pillar on which Community liability is based. The requirement is satisfied when the existence and the extent of the damage have been proved.¹¹³ In practice, these constituent aspects of the concept of damage—existence, extent, and proof—are merged. For the purposes of the following survey, they will be considered separately.

a. Existence and extent of the damage

Existence of damage must be sufficiently certain. The loss or damage caused by an unlawful Community act will found a claim for damages only if its existence is sufficiently certain,¹¹⁴ in the form of a reduction in a person's assets (*diminution patrimoniale*) or loss of earnings (*hacum cessans*)¹¹⁵ or else of future¹¹⁶ or non-material¹¹⁷ damage.

and 1267 *Worthington v High Authority* (1961) E.C.R. 157, at 213; a defective system adopted by an authority which can be attributed to the Community; ECJ, Case 2163 *FERAM v High Authority* (1959) E.C.R. 145, at 251-252 (system adopted held not defective); ECJ, Case 3459 *Compagnie des Hauts Fourneaux de Cugnot v High Authority* (1961) E.C.R. 131, at 383 (system held not defective); ECJ, Joined Cases 46 and 4755 *Meroni and Others v High Authority* (1952) E.C.R. 41, at 42-43; lack of supervision; ECJ, Joined Cases 39 and 2166, 1 and 151 *Société Financière Cati and Others v High Authority* (1962) E.C.R. 211, at 257; failure to rectify information in time once it became clear that the information provided was incorrect; ECJ, Joined Cases 15-22, 25 and 2369 *Richard-Pierre and Others v Commission* (1973) E.C.R. 725, paras 35-42; failure to comply with internal rules; ECJ, Joined Cases 10 and 4772 *Di Pina v Commission* (1973) E.C.R. 761, para 24; breach of the duty of confidentiality; ECJ, Case 14563 *Adams v Commission* (1935) E.C.R. 333, paras 22-44; principle of sound administration; the Commission infringed that principle by sending a fax to the persons responsible nationally for a PHARE programme funded by the Commission in which it cast doubt on the financial reliability of an undertaking which had managed several PHARE projects, without checking the data on which the fax was based or giving the undertaking concerned the opportunity to put over its views; CFJ, Case T-21297 *New Europe Consulting and Brown v Commission* (1999) E.C.R. II-1420, paras 36-45. Note that it was held in the judgment in *Area Case* (CFJ, Case T-19599 *Area Case and Others v Council and Commission* (2002) E.C.R. II-3577, para 43)—admittedly in connection with a discretionary legislative act—that the principle of sound administration is not intended to confer a right on individuals.

¹¹³ Jahn, "The Concepts of Damage and Causality as Elements of Non-contractual Liability", in Heukels and McDonnell (eds) (n 88, supra), at 171-158.

¹¹⁴ See, for example, ECJ, Joined Cases 15-22, 25 and 2369 *Richard-Pierre and Others v Commission* (1973) E.C.R. 725, para 31; CFJ judgment of March 11, 2003, Case T-235370, *Area and Others v Commission*, not yet reported, paras 12-18 (existence of damage was not certain).

¹¹⁵ Opinion of Advocate General F. Capotorti in ECJ, Case 295/85 *Industria v Council and Commission* (1979) E.C.R. 1955, at 2953-2955.

¹¹⁶ Damage not yet sustained at the time when it is being appraised.

¹¹⁷ Such damage is not an actual reduction in assets, but the "collection" of unreasonable interference caused to an individual on account of an unlawful act or failure to act of a Community institution; CFJ, Case T-21197 *New Europe Consulting and Brown v Commission* (1999) E.C.R. II-1420, paras 35-35; CFJ, Case T-19599 *Area v EIS* (2002) E.C.R.

Loss of profit. As has already been mentioned, there are no objections in principle to an award of damages for loss of profit.¹¹⁸ The applicant must show that it was legitimately entitled in all the circumstances to make the profit and was only frustrated by the unlawful act of the Community institution.¹¹⁹

Future loss or damage. There has been a change as far as recovery of future loss or damage is concerned. Originally, the Court of Justice held, with regard to the ECSC Treaty, that a claim for compensation for damage which had not yet materialised was inadmissible.¹²⁰ It moderated its stance under the second para. of Art. 288 of the EC Treaty when it held that a claim for compensation for damage which was to materialise only in the future, yet was foreseeable with sufficient certainty, was admissible.¹²¹ It reached this view on the grounds that it might prove necessary to prevent even greater damage to bring the matter before the Court of Justice as soon as the cause of damage was certain and that most Member States recognised an action for declaration of liability based on future damage which was sufficiently certain.

Non-material damage. Where non-material damage is found, equitable¹²² or sometimes symbolic¹²³ damages may be awarded.

T-2119, para 51, in which the Court of First Instance held that the unlawful conduct at issue (failure to comply with a judgment) had placed the applicant in a prolonged state of uncertainty and anxiety with regard to the recognition of his rights and his professional future, with the indeterminate nature of his work status had caused him difficulties in finding employment, which constituted non-material damage.

¹¹⁸ ECJ, Joined Cases 5, 7 and 23-24/56 *Kampffmeyer and Others v Commission* (1967) E.C.R. 245, at 265; the alleged loss must not be essentially speculative in nature; consequently, the Court of Justice held in that case that the intended transaction must at least have been begun to be performed. See also CFJ judgment of July 19, 2003, Case T-26067 *Canary v Council and Commission*, not yet reported (award of damages for loss of profit).

¹¹⁹ ECJ, Case 2474 *CATA v Commission* (1975) E.C.R. 513, para 45; CFJ, Case T-231197 *New Europe Consulting and Brown v Commission* (1999) E.C.R. II-1420, paras 51-52.

¹²⁰ ECJ, Joined Cases 9 and 25/54 *FERAM and Others v High Authority* (1955) E.C.R. 312, at 320-321.

¹²¹ ECJ, Joined Cases 15-22/74 *Kampffmeyer and Others v Commission and Council* (1975) E.C.R. 711, paras 5-6.

¹²² ECJ, Joined Cases 756 and 7-757 *Algeria and Others v Common Assembly* (1957 and 1958) E.C.R. 58, at 65-67; ECJ, Case 110/53 *Belgium v Commission* (1955) E.C.R. 549, at 657; ECJ, Joined Cases 10 and 4772 *Di Pina v Commission* (1973) E.C.R. 763, paras 23-25; ECJ, Case 7507 *Moller v Commission* (1975) E.C.R. 297, paras 27-28; ECJ, Case 227/82 *Ortisch v Commission* (1983) E.C.R. 1339, paras 28-29; ECJ, Joined Cases 162/83 and 136/84 *Leusink-Schmitt v Commission* (1985) E.C.R. 283, para 23; CFJ, Case T-21297 *New Europe Consulting and Brown v Commission* (1999) E.C.R. II-1420, para 39; CFJ, Case T-235370 *Area and Others v Services v European Parliament* (1993) E.C.R. II-4215, para 123.

¹²³ See, for example, CFJ, Case T-1653 *Marconi v Commission* (1994) E.C.R. SC II-551, para 50 (English abstract at [1994] E.C.R. SC II-A-215). The Court sometimes considers that the judgment itself, together with its reasoning, affords sufficient redress for the damage sustained (ECJ, Joined Cases 59 and 126/85 *Tucker v Commission* (1985) E.C.R.

II-048

Determination of the quantum. The award of damages is intended to restore the injured party's financial situation to what it would have been in the absence of the unlawful act or as close as possible thereto.¹⁰⁰¹ The quantum of the damage is therefore determined by comparing the actual assets of the person concerned with his notional assets in the event that he had not been affected by the wrongful act.

The damage must be quantifiable,¹⁰⁰² since under Art.235 and the second para. of Art.238 of the EC Treaty, the Court of Justice and the Court of First Instance are empowered only to make an award of money. The damages are expressed in national currency or in euro. An "exact assessment" of the damage sustained is needed, but an approximate determination based on sufficiently reliable facts, preferably collected by an expert, will suffice if it is not possible to make an exact assessment.¹⁰⁰³

The question of the determination of the quantum of the damages will be reserved in the event that the necessary information is not available at the time when the finding of liability is made.¹⁰⁰⁴ In that event, the Court will indicate as far as possible a number of calculation criteria and invite the parties to reach agreement on the amount of the damages within a specified period and to submit the result to it. If the parties fail to reach agreement, the Court will itself determine the amount of the damages. The following sections set out a number of general calculation criteria.

1993, at 1921). See also ECJ, Joined Cases 44, 73, 194 and 258/85 *Hochbaum and Rewer v Commission* [1987] E.C.R. 3259, para.25; CFI, Case T-378/89 *Hanning v European Parliament* [1990] E.C.R. II-463, para.53; CFI, Case T-153/89 *Van Hecke v Commission* [1991] E.C.R. II-361, para.37; CFI, Case T-32/90 *Volger v European Parliament* [1992] E.C.R. II-121, para.46 (annulment of the contested decision constituted sufficient redress for the non-material damage sustained). But see ECJ, Case C-243/87 *Cohn v Commission* [1990] E.C.R. I-215, para.29 (annulment of the contested decision held not to constitute appropriate and sufficient redress for non-material damage suffered); CFI, Case T-165/89 *Plig v Commission* [1992] E.C.R. II-367, para.113.

¹⁰⁰¹ Opinion of Advocate General F. Capotorti in ECJ, Case 156/73 *Irish Airline v Council and Commission* [1975] E.C.R. 2935, at 2939. Van Gerven (supra), at 31, points out that the principle of "full compensation" applies; ECJ (order of the President of December 15, 1995), Case C-152/90 *R. Compagnie Aérienne d'Alger v Commission* [1995] E.C.R. I-4387, para.26. Cf. CFI, Case T-55/95 *Carone v Commission* [1995] E.C.R. II-1129.

¹⁰⁰² Text (supra), at 27.

¹⁰⁰³ ECJ, Joined Cases 29, 31, 35, 39-47, 50 and 51/63 *Ed. de Laminaria, Henri Fourment, Forget, Fonderie et Usine de la Providence and Others v High Authority* [1965] E.C.R. 911, at 939.

¹⁰⁰⁴ ECJ, Joined Cases 35-38/74, 15 and 100/75 *Coopérative Agricole de Céréaliers and Others v Commission and Council* [1975] E.C.R. 1515, para.5. The Court may find that liability exists in principle, indicating the wrongful act or omission, the type of damage and the causal connection between them, while deferring only the determination of the amount of damages (Ed. de Laminaria, Henri Fourment, Forget, Fonderie et Usine de la Providence and Others v High Authority, cited in the preceding n., at 945-947; see also ECJ, Case C-152/88 *Sotgiu v Commission* [1990] E.C.R. I-2477, para.35; ECJ, Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1991] E.C.R. I-3085, para.37-38; CFI, Case T-120/89 *Stalwerke Peine-Selver v Commission* [1991] E.C.R. II-279, para.237; CFI, Case T-76/95 *Jaruma v Council and Commission* [2001] E.C.R. II-241, paras 191-193). Initially, the Court may confine itself to the unlawful nature of the act at issue and defer finding the causal connection and the damage (ECJ, Case 36/78 *Grosche v Council and Commission* [1975] E.C.R. 1381, paras 4-6).

Damage in case of the unlawful collection of a charge or the withholding of a payment. If the damage originated in the unlawful collection of a charge or the unlawful withholding of a payment, the amount of the charge or payment in question will form the basis for calculating the damages.¹⁰⁰⁵ The fact that the amount of the damages coincides precisely with the charge or payment at issue does not detract from the autonomous nature of the action for damages. The payment of compensation is founded upon a legal basis—the second para. of Art.238 of the EC Treaty—different from that of the contested charge or payment.

Damage passed on to others. Loss or damage which the individual passes on to others is not eligible for an award of damages.¹⁰⁰⁶ So, if financial aid is withdrawn, a producer may recover his or her loss by increasing the price of his or her products. In so far as that price increase offsets the loss, it must be taken into account when quantifying the damage.¹⁰⁰⁷ However, it must be certain that the producer concerned did pass on the loss or could have done so.¹⁰⁰⁸

Interests. Default interest, calculated at the normal legal rate as from the date of judgment may be awarded.¹⁰⁰⁹ Interest is not due until the date of judgment since the extent of the damage is also determined at that date, which means that any increase in the damage from the time at which it arose until the date of judgment is therefore taken into account.¹⁰¹⁰ In itself

¹⁰⁰⁵ ECJ, Case 218/75 *Irish Airline v Council and Commission* [1975] E.C.R. 2935, para.13; ECJ, Joined Cases 54 and 113/76, 167 and 219/76, 27-28 and 45/79 *Dumortier Frères v Council* [1982] E.C.R. 1733, para.9-10.

¹⁰⁰⁶ *Irish Airline v Council and Commission*, cited in the preceding n., para.14; ECJ, Case 25/61 *Porto Agriculture v Council and Commission* [1961] E.C.R. 1701, paras 8-10; ECJ, Joined Cases 255-257, 265, 267/83 and 51/81 and 262/82 *Pino Frères and Others v Council and Commission* [1984] E.C.R. 3491, para.25-32. See, however, ECJ, Case 159/82 *San Giorgio* [1983] E.C.R. 3435, para.15: "In a market economy based on freedom of competition, the question whether, and to what extent, a fiscal charge imposed on an importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot or systematically held responsible."

¹⁰⁰⁷ Text (supra), at 187-190, sharply criticizes this approach. His principal arguments are that pricing policy depends on factors other than the withdrawal of financial aid and that this approach places an unreasonable burden on the individual concerned inasmuch as he or she has to pass on the loss to others, with the end result that the Community passes on its duty to pay compensation to the community in general and consumers in particular.

¹⁰⁰⁸ Similarly, there is an obligation on a prudent vendor to pass on the loss brought about by an unlawful act of a public authority in his or her selling prices if market conditions so permit.

¹⁰⁰⁹ ECJ, Case 218/75 *Irish Airline v Council and Commission* [1975] E.C.R. 2935, para.20. A claim for default interest does not have to be supported by specific reasons; see CFI, Joined Cases T-21/93, T-22/93 and T-23/93 *Calderon v Commission* [2004] E.C.R. II-337, paras 90-91.

¹⁰¹⁰ ECJ, Joined Cases 64 and 113/76, 167 and 219/76, 27-28 and 45/79 *Dumortier Frères v Council* [1982] E.C.R. 1733, para.11; Opinion of Advocate General G.F. Macaluso in ECJ,

cases, interest is due from the date on which the staff member lodged his complaint with the administration concerned pursuant to Art. 90(2) of the Staff Regulations or from the date on which a debt not paid by the administration became payable if that date occurred after the day on which the complaint was lodged.¹⁰⁵³

-652 Exchange rate. The exchange rate for an award of damages expressed is that ruling on the date of judgment.¹⁰⁵⁴

-653 Effect of other "Bergedorf" conditions. The extent of the compensation awarded also depends on the manner in which the requirement for there to be a causal connection between the unlawful Community act and the loss or damage is fulfilled (see 11-357 to 11-360, *infra*).

Furthermore, as has already been mentioned, in the case of an act involving policy choices the extent and the specific characteristics of the damage suffered play a particular role with a view to determining whether the relevant breach of a superior rule of law was sufficiently serious (see 11-041, *supra*).¹⁰⁵⁵

b. Proof of damage

-654 Applicant bears the burden of proof. The burden of proof has to be discharged by the applicant.¹⁰⁵⁶ He or she has to convince the Court of the existence of the damage and of its extent. The defendant may adduce factual evidence which casts doubt on the existence and extent of the

Case 25631 *Ponts Agriculture v Council and Commission* [1993] E.C.R. I-1787, at 1793-1794; ECI, Joined Cases 255-257, 263, 26783 and 51651 and 25282 *Bora Wilmer and Others v Council and Commission* [1994] E.C.R. I-3693, para. 37; ECI, Case C-3388 *Jeuneport v Commission* [1990] E.C.R. I-2577, para. 37; ECI, Joined Cases C-10639 and C-10640 *Müller and Others v Council and Commission* [1992] E.C.R. I-3091, para. 35. The award of interest, however, may be a means of assessing the total amount of the damage at the date of judgment. In that case, it is due from the day on which the damage materialised (ECI, Case 16382 *Gargueta v Commission* [1983] E.C.R. I-781, para. 19-21).

-653 ECI, Joined Cases 75 and 11782 *Rozewicki and Seydoux v Commission* [1984] E.C.R. I-359, para. 15; ECI, Case 15879 *Reuninger v Commission* [1985] E.C.R. I-31, para. 11; ECI, Joined Cases 534, 534, 537, 531, 535, 537 and 54179 *Amert and Others v Commission* [1993] E.C.R. I-31, para. 14; ECI, Case 35779 *Bozzella v Commission* [1995] E.C.R. I-1, para. 12.

-654 ECI, Joined Cases 64 and 11375, 163 and 23375, 22-23 and 4579 *Sumpter v Council* [1992] E.C.R. I-191, para. 11.

-655 For an application, see CFI, Joined Cases T-48253 and T-48183 *Auffmann, Ritz Müller and Others v Commission* [1995] E.C.R. II-2381, para. 200-201.

-656 ECI, Case 2474 *Roquette Frères v Commission* [1978] E.C.R. 577, para. 12-14. A head of damage (such as the payment of bank interest) which is incidental in relation to another head of damage and is not sufficiently proved does not qualify for compensation (CFI, Case T-269 *T. Poir v Commission* [2001] E.C.R. II-445, para. 54).

damage.¹⁰⁵⁷ As a public authority, the defendant may sometimes be compelled to disclose information to which it alone has access.¹⁰⁵⁸

11-055
Factual evidence. If the applicant does not succeed in proving that damage occurred and its extent, the application will be inadmissible¹⁰⁵⁹ or, albeit declared admissible, will be dismissed.¹⁰⁶⁰ The application must indicate the nature and extent of the damage sufficiently precisely.¹⁰⁶¹ For example, it is not sufficient for the applicant to allege that he or she suffered "serious damage". He or she must at least adduce factual evidence on the basis of which the nature and the extent of the damage may be assessed. The Court of Justice recognises that to hold an action inadmissible on this ground requires an assessment of the facts, in particular of whether the applicant has sufficiently proved the amount of compensation claimed by it in the application and the reply. It lies beyond the jurisdiction of the Court of Justice on appeal to rule on whether the assessment made by the Court of First Instance was well founded.¹⁰⁶²

11-056
Uncertainty about the extent of the damage. Uncertainty about the extent of the damage does not mean that the application will be declared inadmissible, provided that the case discloses a real possibility that damage has been suffered.¹⁰⁶³ Mention has already been made (see 11-048, *supra*) of the fact that where the Court finds the Community liable in an interlocutory judgment, it can set the parties a time within which they are to agree on the amount of damages. If they do not succeed and, in addition, the applicant does not adduce sufficiently precise evidence of the extent of the damage within the prescribed period, the application will be dismissed.¹⁰⁶⁴

-654 See the cases on passing on the loss (see 11-250, *supra*). The defendant has to show that the loss was actually passed on. The applicant may counter the defendant's evidence by showing that the loss was not passed on or that a price increase was attributable to other factors.

-655 Opinion of Advocate General M. Lagarde in ECI, Joined Cases 29, 31, 35, 39-47, 50 and 5115 *SA des Laiteries, Hérité Fournier, Forger, Fonderies et Usines de la Providence and Others v High Authority* [1965] E.C.R. 911, at 943-944.

-656 ECI, Case 55/82 *L. Michel v Commission* [1965] E.C.R. 591, at 635; CFI, Case T-9489 *Ausimex v Commission* [1993] E.C.R. II-357, paras 72-75; CFI, Case T-45293 *Le Teille and 1979 UK v Commission* [1994] E.C.R. II-733, paras 42-43.

-657 ECI, Case 1985 *Mitsubishi v High Authority* [1954 to 1955] E.C.R. 313, at 344-345; ECI, Joined Cases 24, 15-17, 22, 24, 25-2756 and 1951 *Mercati and Others v High Authority* [1964] E.C.R. 141, at 173; ECI, Case 15/63 *Lauritzen v European Parliament* [1964] E.C.R. 31, at 39; ECI, Case 25/74 *Roquette Frères v Commission* [1978] E.C.R. 577; ECI, Case 4579 *Poir v Council* [1993] E.C.R. 559, para. 12. For further particulars, see Tola (n.595, *supra*), at 124-125.

-658 ECI, Case 171 *Zuckerfabrik Schöppenstedt v Council* [1971] E.C.R. 575, para. 9; CFI, Case T-6485 *Ausimex v Commission* [1993] E.C.R. II-367, para. 73; CFI (order of November 21, 1996), Case T-5195 *Spécialité des Producteurs de Vodka v. J. J. J. and Others v Commission* [1996] E.C.R. II-2515, para. 22-23; CFI, Case T-14966 *Colindale v Council and Commission* [1993] E.C.R. I-3841, para. 47-51; CFI, Case T-2757 *Imet Europe v Court of Auditors* [1995] E.C.R. I-4325, paras 55 and 51.

-659 ECI, Case C-26954 *P. Barchin and Others v Council* [1995] E.C.R. I-515, para. 21.

-660 ECI, Case 1404 *CATA v Commission* [1975] E.C.R. 115; ECI, Case 10/73 *Gianaria v Council and Commission* [1975] E.C.R. 181, para. 4-5.

-661 ECI, Case 1404 *CATA v Commission* [1975] E.C.R. 115.

3. The causal connection

12-357 Damage must be a direct consequence of unlawful act. The Community will be liable only for damage which is a direct consequence of its unlawful acts.¹²⁵² The principle is reflected in the Treaties¹²⁵³ and links up with the law of the Member States. It is for the applicant to prove the causal connection.¹²⁵⁴

12-358 Case-by-case assessment. Whether or not the damage was a direct consequence of the Community act will depend on various circumstances.

Damage which is a consequence of damage caused in the first place by the Community act does not flow directly from that act and hence is too remote. Accordingly, loss suffered by members of the family of a member of the Commission's staff on account of the personal injuries and psychological sequelae suffered by that person as a result of a road accident attributable to careless maintenance of the car on the part of the Commission could not be indemnified.¹²⁵⁵

12-359 Chain of causation may be broken. The person concerned may also break the chain of causation if he or she contributed to the damage arising.¹²⁵⁶ He or she is under a duty to take all such measures within his or her sphere as may help to obviate the damage or limit its extent. Only damage arising to

¹²⁵² ECJ, Case 1560 *Worms v High Authority* [1962] E.C.R. 135, at 209; Opinion of Advocate General A. Delvigne de Larosière in ECJ, Case 459 *Larocq v Commission* [1971] E.C.R. 375, at 344; ECJ, Joined Cases 64 and 111/76, 157 and 230/76, 27-28 and 57/79 *Donat Cattin v Council* [1975] E.C.R. 1691, para.21; CFI, Case T-1356 *International Procurement Services v Commission* [1995] E.C.R. II-729, para.55; CFI, Case T-796 *Pertin v Commission* [1997] E.C.R. II-1861, para.41; CFI, Joined Cases T-213/95 and T-238/96 *SCX and FNK v Commission* [1997] E.C.R. II-1715, paras 9-15; CFI, Case T-1356 *SEAM v Commission* [1995] E.C.R. II-4673, paras 53 and 74; CFI, Case T-195/99 *Arco Cera and Others v Council and Commission* [2001] E.C.R. II-5391, para.152; CFI, Order of December 17, 2003, Case T-345/03 *Krikorian and Others v European Parliament and Others* [2003] E.C.R. II-6337, para.23.

¹²⁵³ The second para. of Art.236 of the EC Treaty provides that the Community is liable to make good any damage "caused by its institutions or by its servants in the performance of their duties" (italics supplied); CFI, Case T-273/97 *United Europe v Court of Auditors* [1999] E.C.R. II-1425, para.100.

¹²⁵⁴ ECJ, Joined Cases 197-206, 243, 245 and 247/80 *Ludwigshafen v Walzschütz and Others v Council and Commission* [1981] E.C.R. 3211, paras 31-36; ECJ, Case 316/81 *EWS v Commission* [1984] E.C.R. 1141, paras 16-17; CFI, Case T-145/01 *DLD Trading v Council* [2003] E.C.R. II-6055, para.73; CFI, Order of December 17, 2003, Case T-346/03 *Krikorian and Others v European Parliament and Others* [2003] E.C.R. II-6337, para.23.

¹²⁵⁵ ECJ, Joined Cases 165/83 and 136/84 *Leusink-Broummelink v Commission* [1985] E.C.R. 2401, para.22; see also the Opinion of Advocate General Sir Gordon Slynn, at 2515.

¹²⁵⁶ An undertaking cannot claim compensation for the costs it incurred relating to the provision of a bank guarantee when the Court of First Instance subsequently annuls the decision in which the Commission found that the undertaking concerned had infringed Arts.1 and Art.62 of the EC Treaty. This is because the damage suffered is the consequence of the undertaking's own decision not to comply with its obligation to pay the fine. CFI, Judgment of April 21, 2003, Case T-25/03 *Heide v Commission*, not yet reported, para.153.

the detriment of a person who showed normal prudence, is recoverable from the Community.¹²⁵⁷ If the person concerned did not show reasonable prudence, the Community will either not be liable¹²⁵⁸ or liable only for part of the damage suffered.¹²⁵⁹

Damage must be attributable to the Community. The Community will not be answerable for damage which is attributable exclusively to action by a Member State¹²⁶⁰ or action by an institution of a third country.¹²⁶¹ The Commission's failure to bring an action against a Member State for failure to fulfil obligations under Community law under Art.226 of the EC Treaty cannot cause the Community to incur liability. The reason for this is that the damage caused by the infringement of Community law is attributable only to the Member State concerned.¹²⁶² However, express Community approval of a national measure which is in breach of Community law may be regarded as the direct cause of any damage flowing from that measure.¹²⁶³

B. Limitation period

1. Commencement and duration

Period of five years. A claim against the Community for non-contractual liability becomes time-barred after a period of five years from the occurrence of the event giving rise thereto.¹²⁶⁴

¹²⁵⁷ ECJ, Case 16/82 *Société des Activités du Temple v High Authority* [1983] E.C.R. 285, at 356.

¹²⁵⁸ ECJ, Joined Cases 14, 16-17, 23, 24, 25-27/50 and 165 *Meroni and Others v High Authority* [1961] E.C.R. 181, at 171; ECJ, Case 457 *Müller (née Collignon) v Commission* [1957] E.C.R. 355, at 371 (application inadmissible); ECJ, Case 169/73 *Compagnie Continentale v Council* [1975] E.C.R. 117, paras 21-22; ECJ, Case 54/75 *Jorge v Commission* [1975] E.C.R. 1135, paras 46-47; ECJ, Case 156/81 *Glaifet Mediterranée v EEC* [1982] E.C.R. 5237, para.24; ECJ, Joined Cases C-124/93 and C-31/90 *Molder and Others v Council and Commission* [1993] E.C.R. I-3665, para.33, and the Opinion of Advocate General W. van Gerven, at 3-1122-3123.

¹²⁵⁹ ECJ, Case 145/53 *Adams v Commission* [1955] E.C.R. 2535, paras 53-55; ECJ, Case C-303/77 *Györfi v Commission* [1990] E.C.R. I-1251, paras 16-17; CFI, Case T-274/95 *Frank Marine v Commission* [2000] E.C.R. II-3311, paras 84-92.

¹²⁶⁰ ECJ, Case 132/71 *Société pour l'Exploitation des Sucres v Commission* [1973] E.C.R. 1061, para.27; CFI, Case T-245/01 *DLD Trading v Council* [2003] E.C.R. II-6055, paras 30-32 and 91-97. See also CFI, Judgment of November 30, 2005, Case T-236/02 *Autosalone Apra v EAEF*, not yet reported.

¹²⁶¹ CFI, Case T-223/95 *EVO v Council and Commission* [2002] E.C.R. II-2265, paras 41-46.

¹²⁶² ECJ, Order of May 23, 1990, Case C-70/90 *Alia Meyer France v Commission* [1990] E.C.R. I-2131, para.13; CFI, Case T-351/99 *Meyer v Commission and EBF* [2001] E.C.R. II-2031, para.12; CFI, Case T-308/00 *Lambert v European Ombudsman* [2002] E.C.R. I-220, para.53; CFI, Order of January 14, 2004, Case T-232/02 *Mehdornico Metro and Mithras v Commission* [2004] E.C.R. II-181, para.42-47.

¹²⁶³ ECJ, Joined Cases 5, 7 and 13-24/56 *Kampffmeyer and Others v Commission* [1956] E.C.R. 245, at 260 et seq.

¹²⁶⁴ Statute, Art.45. For an application, see CFI, Case T-143/97 *Von den Burg v Council and Commission* [2001] E.C.R. II-277. For an extensive discussion, see J. von den Burg, "The calculation of the period of limitation in claims against the European Community for non-contractual liability" (2001) E.L.Rev. 275-291.

11-052 Materialisation of the damage causes time to start running. The event that causes the claim to arise is the materialisation of the damage.¹⁰⁴ It is not until that time that all the conditions for liability to be incurred are fulfilled.¹⁰⁵ It is then that time starts running.

If the full extent of the damage does not materialise immediately but only over a period of time, the damages claim will be admissible only for compensation for the damage which arose during the period starting five years before the date on which the action was brought.¹⁰⁶

The possibility of bringing a claim for compensation for future damage or damage which has not yet been assessed does not influence when time starts to run. Time under the limitation period always starts to run when the damage materialises and not from the time when it became possible to bring an action for damages. If that were not the case, the claim for damages could be time-barred before the damage had actually materialised.¹⁰⁷

11-053 Legislative acts. The limitation period for Community liability for unlawful legislative acts also does not begin until the resulting damage materialises.¹⁰⁸ Neither notification of the act nor its entry into force as such causes the limitation period to begin running.

11-054 Unawareness of the event giving rise to the damage. Expiry of the limitation period cannot be pleaded against an applicant who was not aware in time of the event which gave rise to the damage and therefore did not have a reasonable time before the limitation period ran out in order to

¹⁰⁴ ECJ, Joined Cases 48 and 49/59 *Adenot and Others v High Authority* (1957) E.C.R. 411, at 423. The lodging of an action for annulment of a decision does not interrupt the limitation period for bringing an action for damages related to the harm caused by that decision. It is the alleged infringement of Community law in the contested decision which causes damage and not the finding of such infringement by the Court of First Instance: CFI (Judgment of April 21, 1993), Case T-28/93 *Heldin v Commission*, not yet reported, paras 33-36.

¹⁰⁵ CFI, Case T-19/99 *Perster v Commission* (1997) E.C.R. II-2437, paras 25-32: the applicant has to show that there is a link between the allegedly unlawful act and the time when the damage arose. If it fails to do so the claim will be inadmissible in any event in so far as it is based on an act which took place more than five years before the application was lodged.

¹⁰⁶ CFI, Case T-57/91 *Lefferts and Others v Commission* (1993) E.C.R. II-2079, para. 26; CFI, Case T-20/90 *Bret & Cie v Council* (1992) E.C.R. II-47, paras 44-45; CFI, Case T-174/00 *Stier International v Council* (2002) E.C.R. II-417, para. 4.

¹⁰⁷ Councils (n. 942, *supra*), at 9-10; ECJ, Joined Cases 35-36/74 *Kangnigter and Others v Commission and Council* (1978) E.C.R. 711.

¹⁰⁸ ECJ, Joined Cases 156-157, 255 and 257/82 and 5/81 *Sino-Porto and Others v Council and Commission* (1981) E.C.R. 33, paras 9-12; ECJ, Case 5/81 *De Franciscis v Council and Commission* (1982) E.C.R. 117, paras 9-11; ECJ, Joined Cases 264-267, 265, 267/80, 1 and 19/81 and 232/82 *Sino-Porto and Others v Council and Commission* (1984) E.C.R. 2493, para. 15; for an example of how to calculate the limitation period, see how it was done for each of the applicants in the 1984 *Sino-Porto* case, *Id.*, paras 16-24; CFI, Case T-20/94 *Marcenaro v Council and Commission* (1997) E.C.R. II-555, para. 187.

bring a claim.¹⁰⁹ The fact that the applicant was unaware must be excusable.¹¹⁰ This means that a normally prudent person who had done everything possible to become apprised of the facts which resulted in the damage would not have been in a position in the same circumstances to have been aware of the event which led to the damage.¹¹¹

Expiry of the limitation period must be raised by the defendant. As in most Member States, expiry of the limitation period cannot be raised by the Court of its own motion.¹¹²

2. Interruption of the limitation period

Art. 46 of the Statute. Art. 46 of the Statute of the Court of Justice provides that the period of limitation is to be interrupted if proceedings are instituted before the Court of Justice (or the Court of First Instance) or if prior to such proceedings an application is made by the aggrieved party to the relevant Community institution. In the latter event, proceedings must be instituted within the two-month period provided for in Art. 230; the provisions of the second para. of Art. 232 apply where appropriate.¹¹³

Reference to Arts 230 and 232 is made solely in connection with the possibility of interrupting the five-year limitation period prescribed by the first sentence of Art. 46 of the Statute. This reference is not intended to shorten the five-year limitation period, but simply to protect interested parties by preventing certain periods from being taken into account in calculating that limitation period. Its aim is merely "to postpone the expiration of the period of five years when proceedings instituted or a prior application made within this period start time to run in respect of the periods provided for in Art. 230 or Art. 232".¹¹⁴

¹⁰⁹ ECJ, Case 145/83 *Adenot v Commission* (1985) E.C.R. 3539, para. 53. See, however, ECJ (order of July 11, 1993), Case C-115/91 *P. Antonello Ippolito Rossi v Commission* (1993) E.C.R. I-6555, paras 20-21 (the fact that the person who sustained the damage was not aware at that time of the precise cause of the damage held to be irrelevant for the purposes of establishing the moment when time started to run); CFI, Case T-76/94 *Jansz v Council and Commission* (2001) E.C.R. I-243, para. 78.

¹¹⁰ Council of Advocate General G.F. Mancini in ECJ, Case 145/83 *Adenot v Commission* (1985) E.C.R. 3539, at 3539.

¹¹¹ Brackx and McDonnell, "Limitation of the Action for Damages against the Community: Considerations and New Developments," in Heukels and McDonnell (eds), (n. 850, *supra*), 31, at 115-123.

¹¹² ECJ, Case 12/85 *Requiere Frères v Commission* (1989) E.C.R. 1553, para. 72. See also Oufin, "La Cour de justice: Recours en indemnité," in *Les Nouvelles Droit des Communautés européennes* (Gardier, Brussels, 1989), 333, at 137.

¹¹³ The institution of proceedings before the national courts does not constitute an act interrupting the limitation period under Art. 46 of the Statute: ECJ (order of July 12, 2001), Case C-118/01 *P. Antonello Ippolito Rossi v Commission* (2002) E.C.R. I-6563, para. 37; CFI, Case T-24/93 *Büßing v Council and Commission* (1995) E.C.R. II-171, para. 72.

¹¹⁴ ECJ, Joined Cases 5, 7 and 15-24/85 *Kangnigter and Others v Commission* (1987) E.C.R. 245, at 249; CFI (Judgment of April 21, 2003), Case T-20/01 *Heldin v Commission*, not yet reported, paras 72-74.

If a prior application is addressed by the aggrieved party to the institution concerned, interruption will occur only if that application is followed by an application to the Court within the time-limits determined by reference to Arts 235 and 232 of the EC Treaty.¹⁰⁰ If the aggrieved party does not bring proceedings within those time-limits, the initial five-year limitation period continues to run in spite of the application made to the defendant institution. On the other hand, the limitation period is not reduced as a result.¹⁰¹

IV. CONSEQUENCES

A. JUDGMENT HOLDING THE COMMUNITY LIABLE

- 11-067 **Obligation to pay compensation.** If the Court of Justice or the Court of First Instance finds the Community liable, the Community will be obliged under the second para. of Art.238 of the EC Treaty to pay the necessary damages to the person concerned.
- 11-068 **Judgment is enforceable.** By virtue of Arts 244 and 255 of the EC Treaty, judgments of the Court of Justice and of the Court of First Instance are enforceable.¹⁰² Enforcement is carried out in accordance with the law of the Member State on whose territory it takes place. However, the property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.¹⁰³

B. JUDGMENT DISMISSING THE ACTION FOR DAMAGES

- 11-069 **Effect inter partes.** A judgment dismissing an application for damages does not take effect *erga omnes*.¹⁰⁴ Its force as *res judicata* extends only to the parties to the proceedings; they are no longer entitled to bring the same

¹⁰⁰ ECJ, Case 11/72 *Giordano v Commission* [1973] E.C.R. 413, para.6; CFI, Case T-222/97 *Steffens v Council and Commission* [1999] E.C.R. II-4175, para.35-41; CFI, Case T-76/94 *Jaruga v Council and Commission* [2001] E.C.R. I-241, para.81; CFI, order of September 19, 2001, Case T-332/99 *Jendat v Council and Commission* [2001] E.C.R. I-2551, para.47. For an exhaustively reasoned, specific application in the context of the *Wilder* cases, see, *inter alia*, CFI, Case T-143/97 *Van den Broek v Council and Commission* [2001] E.C.R. II-277, para.55-74; CFI, Case T-187/94 *Rudolph v Council and Commission* [2002] E.C.R. II-357, para.45-65; CFI, Case T-251/94 *Kunemann v Council and Commission* [2002] E.C.R. II-415, para.51-71.

¹⁰¹ ECJ, Case 11/92 *Giordano v Commission* [1993] E.C.R. 413, para.7; CFI, Case T-167/94 *Albis v Council and Commission* [1995] E.C.R. II-2539, para.10.

¹⁰² Judgments of the Court of First Instance are enforceable even if an appeal has been brought before the Court of Justice. Appeals do not have suspensory effect (Stichting, Art.56, 2nd para.). Yet the Court of Justice may order application of the judgment of the Court of First Instance to be suspended for the duration of the appeal proceedings pursuant to Arts 242 and 243 of the EC Treaty.

¹⁰³ Art.1 of the Protocol on the Privileges and Immunities of the European Communities. See Ch.14, infra.

¹⁰⁴ *Piquier, Les décisions de la Cour de Justice des Communautés européennes et leur effet juridiques* (Bruylant, Brussels, 1975), at 147.

claim before the Court on the basis of the same facts. Other persons wishing to bring an action for damages on the basis of the same facts may indeed do so.

V. THE CONSTITUTION

General. The Constitution merges the EC Treaty with the non-Community actions of the Union under what were the second and third pillars in the European Union, which is to have legal personality.¹⁰⁵ In this context, it is logical that Art.III-421 of the Constitution should provide that the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.¹⁰⁶ It may be regretted, however, that that article contains no reference to bodies, offices or agencies of the Union, even though the principle that the Union is responsible for acts committed by such bodies, offices or agencies is clearly established.¹⁰⁷

¹⁰⁵ Constitution, Art.1-6.

¹⁰⁶ Since the ECJ has legal personality (Constitution, Art.1-36, third para.), the ECJ itself—and not the Union—will have to make good damage caused by it or by its servants in the performance of their duties in accordance with the general principles common to the laws of the Member States (Constitution, Art.III-421, third para.).

¹⁰⁷ ECJ, Case C-30/89 *SGECM and Eloy v EEC* [1992] E.C.R. I-6111, para.15; CFI, Case T-125/90 *Lombardi v European Ombudsman*, [2002] E.C.R. II-2407, para.49, upheld by ECJ, Case C-234/02 *P European Ombudsman v Lombardi* [2004] E.C.R. I-2835, para.43-52.

1. INTRODUCTION

In the case of non-commercial liability, the Commission shall, in accordance with the principles common to the laws of the Member States, make good any damage caused by an institution or person servants in the performance of their duties.

2. CENTRAL ISSUES

- ¹ Similarly, under Art. 128 cannot be treated as the primary Treaty, since there do not constitute acts of the institution but are international agreements. Case T-112/95 *Edmond Dubois v. Fin. Control and Supervision* [1997] ECR II-1251.

- Case C-35634, *Guarantee for American, Cuban and British, Limited*, 77 Fed. 2d 1007, 1010 (1st Cir. 1944); Case C-35634 *Supra* note 10, 77 Fed. 2d 1007, 1010 (1st Cir. 1944).

The cases considered here are those where the decision-maker has a significant element of discretion. The norms challenged will normally be legislative in nature. An individualized norm, which contains a significant element of discretion, will however also be subject to the legal test discussed in this Section.

Case 597. Aktien-Zuckerfabrik Schöppenstedt v. De Meillon
[1911] 100 R. 375

¹ Note 2A renumbering Arts. 40 and 215 are pages Arts. 14 and 236.

1950年10月1日，中华人民共和国中央人民政府成立。这一天，毛泽东在天安门城楼上，向全世界宣告：中华人民共和国中央人民政府今天成立了！这一天，也是新中国历史上最光辉的一天。从这一天起，中国人民站起来了，中国历史掀开了新的一页。

¹ [C. 1967, c. 80, § 1(1), amended; C. 1970, c. 150, § 1.]

¹ Case 571 *Admiral-Bodenfels (Seppensdorf) v. Omeris* [1991] ECR II-3143; Cases 5 and 1107; *Compagnie d'Exploitation des Trains de l'Etat de la Grande-Bretagne de Nord-Sud v. Commissioners* [1973] ECR II-31; Case T-2532 *Früh-Werke Company SA v. Commission* [2001] ECR II-2311, para. 45-52. These cases however, do not appear to be sufficient to proceed with an Art. 133 action with respect to the Commission's Art. 133 action where the individual was directly and individually concerned by the binding order and could have successfully challenged it under Art. 134, but did not do so in a timely period of time in which the period for challenge had expired. See: Cases C-491 and C-503 *Ferreira v. Associação Nacional de Municípios Portugueses* and *Comissão Nacional de Defesa do Ambiente SA (Associação) v. Comissão Europeia* [1995] ECR II-3773; Case T-43/95 *Lago v. Commission* [1996] ECR II-2629; Case C-116/92 *Commission v. An-Centrale Koff Producten AS* [1993] ECR II-3243, para. 59. See generally, *Referred: The Relationship Between an Action for Compulsory and an Action for Annulment: The Theory of Proceedings*, by T. Weir and A. Macdonald (eds.), *Actions for Damages in Community Law* (1997), para. 1.

The ECJ decided that no breach of a superior rule of law could be proven on the facts. The test laid down has been taken to establish the general conditions for liability in this area.

(3) LEGISLATIVE AND NON-LEGISLATIVE DISCRETIONARY ACTS

The ECJ held in *Sergio*¹ and *Amisano*² that the crucial factor in determining the applicability of the *Schepers* test was the degree of discretion possessed by the institution in relation to the challenged measure. The general or individual nature of the measure was not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.³ This must be correct in principle. Many administrative measures involve discretionary choices which are just as difficult as those which have to be made in the context of legislative action. The very line between the two can be difficult to draw in substantive terms. This means that the *Schepers* test can apply to individualised acts which are not a significant element of discretion. It will also apply to legislative acts which involve an element of discretionary choice on the part of the Community institutions. Many legislative acts will have this feature, but there is no logical reason why this should be so for all acts of a legislative nature.

It is clear both in principle and on authority that whether an act is legislative for the purposes of the *Schepers* test will be dependent upon the substance of the measure, and not the legal form in which it is expressed.⁴ This means that it is always open to an applicant in an Article 238(2) action to claim that the measure, although called a regulation, was in reality an administrative decision.⁵ The converse is also true. It is possible for a measure to be a decision for some purposes but to be a legislative act for the purposes of Article 238(2).⁶ Moreover, the mere fact that an applicant has a sufficient interest for a challenge under Article 173 will not necessarily mean that the measure is not legislative for the purposes of the Article 238(2) action.⁷

(4) THE MEANING OF SUPERIOR RULE OF LAW

The case law shows that three differing types of norms can, in principle, qualify as superior rules of law for the protection of the individual.

First, it is clear that many Treaty provisions fall within this category. One of the most commonly cited grounds in cases under Article 238(2) is the ban on discrimination contained in Article 34(1), in the context of the Common Agricultural Policy (CAP). This is not surprising, given that many of the damages actions are brought pursuant to regulations made under the CAP.⁸

¹ Case C-352/98 *P. Lohmeier Pharmazeutiques v. Servier* [2000] ECR I-5291, para. 45.

² Case C-352/98 *P. Amisano v. AGRI* [1999] ECR I-715, para. 54-55.

³ See the Case C-432/92 *P. Commission v. French Republic* [1993] ECR I-2511, para. 27; Case C-311/90 *P. Commission v. Council* [1992] ECR I-1135, para. 35; Case C-281/92 *P. Hölzer* [1993] ECR I-1135, para. 47-48.

⁴ Case C-352/98 *P. Amisano v. AGRI*, n. 5 above, para. 57. A. Ardo, 'Discretion for Legislative Acts under Article 173(2)', EC in *Measures and Decisions* (eds.), n. 4 above, 131-132.

⁵ Case C-15/92 *Wap and O'Brien v. Commission* [1993] ECR I-2511, para. 35; Case T-42/93 *Compagnie Financière et Industrielle v. Commission* [1993] ECR II-421.

⁶ Case T-41/93 and 41/93 *Wap and O'Brien v. Commission* [1993] ECR II-421; Case C-370/93 *P. Amisano v. AGRI*, n. 5 above, para. 57.

⁷ Case T-41/93 and 41/93 *Wap and O'Brien v. Commission* [1993] ECR II-421; Case C-370/93 *P. Amisano v. AGRI*, n. 5 above, para. 57.

⁸ See, e.g., Case 11/73 *Wolke v. Commission* [1973] ECR 1219; Case 11/73 *Wolke v. Commission* [1973] ECR 1219.

A second ground of claim is that a regulation is in breach of a hierarchically superior regulation.⁹ The regulations made pursuant to, for example, the CAP may be 'one-off' provisions, but they may also relate to a prior network of regulations on the same topic. These may therefore be regulations enacted pursuant to more general regulations on the same topic.

A third ground that can sustain an action for damages is where the Community legislation is held to infringe certain general principles of law such as proportionality, legal certainty, or legitimate expectations.¹⁰

The ECJ does not articulate why the above might constitute superior rules of law, nor what other matters might be added to the list. The rules of the World Trade Organisation (WTO) cannot, subject to limited exceptions, be relied on in this context.¹¹ It is often left to the Advocate General to question the wisdom of adding to the list of such rules.¹² Superior sometimes seems to be equated with 'important', and sometimes with a more formalistic conception of one rule being higher than another as in the case of the regulation being in breach of a parent regulation. These various possible grounds of claim can be exemplified by considering the *CNTA* case.

Case T-94/94 *Compagnie Nationale Technique Agricole (CNTA) SA v. Commission* [1995] ECR 555

The *CNTA* case is a classic example of a damages action. It concerns a regulation made under the CAP which provided for a certain amount of aid to be paid to certain farmers. The regulation was challenged on the grounds that it was in breach of a superior rule of law. The ECJ held that the regulation was in breach of a superior rule of law and that the claimant was entitled to damages. The ECJ also held that the claimant was entitled to interest on the damages. The ECJ's decision in *CNTA* is a landmark case in the area of damages actions. It establishes that a regulation can be in breach of a superior rule of law and that a claimant can recover damages and interest. The ECJ's decision in *CNTA* is also a landmark case in the area of the CAP. It establishes that the CAP can be in breach of a superior rule of law and that a claimant can recover damages and interest. The ECJ's decision in *CNTA* is a landmark case in the area of damages actions. It establishes that a regulation can be in breach of a superior rule of law and that a claimant can recover damages and interest. The ECJ's decision in *CNTA* is also a landmark case in the area of the CAP. It establishes that the CAP can be in breach of a superior rule of law and that a claimant can recover damages and interest.

⁹ Case T-94/94 *Compagnie Nationale Technique Agricole (CNTA) SA v. Commission* [1995] ECR 555.

¹⁰ The duty to give reasons does not appear to qualify as a superior rule of law. See, e.g., Case 11/73 *Wolke v. Commission* [1973] ECR 1219; Case C-15/92 *Wap and O'Brien v. Commission* [1993] ECR I-2511, para. 35; Case T-41/93 *Wap and O'Brien v. Commission* [1993] ECR II-421, para. 47-48.

¹¹ Case C-187/93 *Portugal v. Council* [1994] ECR I-2159; Case T-41/93 *Wap and O'Brien v. Commission* [1993] ECR II-421, para. 47-48; Case T-41/93 *Wap and O'Brien v. Commission* [1993] ECR II-421, para. 47-48.

¹² See, e.g., Case 11/73 *Wolke v. Commission* [1973] ECR 1219, para. 47-48.

allow it to take a decision withdrawing compensatory amounts once it had found that it requires to be revised; that the Commission's decision be taken on the basis of an assessment of solely monetary factors to the exclusion of economic factors which in this case the Commission has taken into consideration.

10. It follows from the last sentence of Article 1(2) of Regulation No 2701 that the option for Member States to apply compensatory amounts may only be exercised where the monetary measures in question would lead to disturbances to trade in agricultural products.

11. As the application of compensatory amounts is a measure of an exceptional nature, this provision must be understood as enunciating a condition not only of the introduction but also of the maintenance of compensatory amounts for a specific product.

12. The Commission has a large measure of discretion for judging whether the monetary measure concerned might lead to disturbances to trade in the product in question.

13. In order to judge the risk of such disturbances, it is permissible for the Commission to take into account market conditions as well as monetary factors.

14. It has not been established that the Commission exceeded the limits of its power just defined when it considered towards the end of January 1974 that the stability of the market in coals and rape seeds was such that the application of compensatory amounts for these products was no longer necessary.

15. The ECJ then considered whether the withdrawal of the compensatory amounts violated certain general principles of law. It held that Regulation 185/72 was not retrospective, as had been claimed by the applicants. The Court then considered whether this withdrawal had violated the principle of legitimate expectations. It held that the object of the regulation for the fixing of refunds in advance on export orders could not be regarded as constituting a guarantee for traders against the risk of movements in exchange rates. It concluded as follows:

16. Nevertheless the application of the compensatory amounts in practice involves the exchange risk so that a trader, even a producer, might be induced to enter into a financial transaction against such a risk.

17. In these circumstances, a trader may legitimately expect that his expectations are not actually undermined by him because he has obtained, subject to a deposit, export licences for the amount of the refund in advance, no unforeseeable alteration which could have the effect of causing him inevitable loss by re-exporting him in the exchange rate.

18. The Community is therefore liable if, in the absence of an overriding matter of public interest, its Commission acted with immediate effect and without warning the withdrawal of compensatory amounts in a specific sector without adopting transitional measures which would at least permit traders either to avoid the loss which would have been suffered in the performance of export contracts, the existence and inevitability of which were established by the advance fixing of the refunds, or to be compensated for such loss.

19. In the absence of an overriding matter of public interest the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to protect by Regulation 185/72 transitional measures for the protection of the confidence which traders might legitimately have had in the Community rules.

The ECJ stated, however, that the Community was not liable to pay the full cost of the costs that would have applied to the transactions, but rather that the extent of the applicant's legitimate expectation was merely that of not suffering loss by reason of the withdrawal of the money. In later proceedings it was held that the applicant had not in fact suffered such losses.¹

¹ Case 14/74 [1975] ECR 259.

(2) THE MEANING OF FLAGRANT VIOLATION: THE EARLY CASE LAW

It is evident from *Schöppenstedt* that the individual must prove not only breach of a superior rule of law for the protection of the individual, but also that the breach was flagrant. This term was restrictively construed in the early case law.

Cases 53, 54/75, 4, 15, and 42/77 *Bayrische Rind-Vermehrungsanstalt v. GmbH & Co KG v. Council and Commission* [1975] ECR 1229

(Now TCA renumbering: Arts. 42 and 235 are now Arts. 34 and 232)

The Community had a surplus of milk in the form of large stocks of skimmed milk powder. In order to reduce these stocks a Regulation was passed, which imposed a restriction to purchase skimmed milk powder for use in certain feedings. This regulation claimed that this had reduced the costs of feeding to animals more expensive. In earlier cases the ECJ had held that the Regulation was null and void, because it was disproportionate and discriminatory. The applicants then sought damages. The ECJ held that the legislature could not be regarded as making its decisions on the grounds of applications for damages where it had adopted legislative measures in the public interest which might adversely affect the interests of individuals, and that therefore where there was a wide discretion it would be for the applicant to show that the EC had manifestly and gravely disregarded the limits on its powers.

THE ECJ

20. This is not in the field of a measure of economic policy such as the case in the present case, in view of its specific features. In this position it is necessary to observe that this measure affected very wide categories of traders, in other words all buyers of skimmed milk powder, so that its effects on individual traders were considerably lessened. Moreover, the effects of the Regulation on the price of feedings to animals in the production stage of these buyers were only a small price increase, the more than 2 per cent. This price increase was particularly small in comparison with the price increases resulting from the decision of suspension of the Regulation, from the new tables in the world market. These price increases concerning prices which were fixed by the Regulation in the context of the restriction from the obligation to contain skimmed milk powder, imposed by the Regulation. The effects of the Regulation on the price of feedings to animals in the production stage of these buyers were only a small price increase, the more than 2 per cent. This price increase was particularly small in comparison with the price increases resulting from the decision of suspension of the Regulation, from the new tables in the world market. These price increases concerning prices which were fixed by the Regulation in the context of the restriction from the obligation to contain skimmed milk powder, imposed by the Regulation.

It is apparent that the breach was held not to be manifest and grave because its effects were not regarded as serious enough to warrant recovery. In the *Argyros* case this condition was said to be a rather different way.

¹ See e.g. Case 13/77 *Commerzbank AG v. Hauptverband der Christlichen Gewerkschaften* [1977] ECR 1147.

**Cases 118 and 119: *Amplum NV and Tunnai Refineries Ltd. v. Council and Commission*
[1979] ECR 2457**

(Note T-6A renumbering: Arts. 23, 43, and 93 are now Arts. 21, 24, and 234)

The applicants manufactured isoglucose, a sweener for the foodstuffs which is produced by combining with sugar. There was a surplus of sugar which was a negative production constraint. The producers of isoglucose were therefore prevented from producing more, and it was decided that they should be subject to a production quota. This system of limits was introduced by Council Regulation (1416/73) and Commission Regulation (1555/73). In an earlier case the ECJ held that Regulation (1416/73) was valid, but as the parties' production limit imposed was in breach of Article 43(1), it was stated that the Council had nonetheless devised appropriate measures to ensure that the market was not flooded with isoglucose.¹¹ The applicants sought compensation for losses suffered. The Commission took the lead from the *Benelux* case, and then continued as follows:

THE ECJ

"In this respect, it must be recalled that the Council did not decide upon a uniform production level, but only the number of quotas allocated to the various States. The level of production in the whole of the isoglucose production, therefore, depended on the production of isoglucose was subject to a quota. The Council's decision to impose a quota was thus a measure to ensure that the market was not flooded with isoglucose."

"In fact, even though the fixing of the production quota was a measure of emergency, it was not of any nature to be regarded as a measure of emergency. It must be recalled that the Council, in the first place, did not decide upon a uniform production level, but only the number of quotas allocated to the various States. The level of production in the whole of the isoglucose production, therefore, depended on the production of isoglucose was subject to a quota. The Council's decision to impose a quota was thus a measure to ensure that the market was not flooded with isoglucose."

In the *Amplum* case the applicants did not lose because the effects of the breach were insufficiently serious: the losses were severe. The ECJ focused rather upon the manner of the breach. It was said not to be arbitrary for the following reason. The general aim of stabilising the market in sweeteners was a legitimate one for the Community to pursue. Mistakes had occurred in the particular way in which this was achieved, namely in the calculation of the levy. This was not, however, enough to render the decision arbitrary, especially given the fact that this was an emergency situation.

The result of *Benelux* and *Amplum* was that an applicant would have to show both that the effects of the breach were serious, in terms of the quantum of loss suffered, and also that the manner of the breach was arbitrary. These hurdles were not easy to surmount, particularly the second. It was rare for the Community institutions to promulgate a regulation which was wholly unrelated to the general ends they were entitled to advance under their powers in, for example, the agricultural sphere. The mistakes were likely to be made precisely in the carrying out of general, legitimate policies in an erroneous manner. Claimants did however occasionally win.¹²

¹¹ Cases 101 and 116/77 *Regel-Sonderheftung (Hilfsges.) Ltd. v. Intervention Board for Agricultural Products, Intervenor Dutch Intervention Board for Agricultural Products* [1977] ECR 2087.

¹² Cases 86, 137, 138, 226/73, 23, 24, and 45/79 *Chambre Agricola SA v. Council* [1979] ECR 1031.

**(2) THE MEANING OF FLAGRANT VIOLATION/
SERIOUS BREACH: THE CURRENT LAW**

More recent cases have evolved a less restrictive interpretation of the term flagrant violation. They have done so in two ways.

First the ECJ has modified its position in relation to the manner of the breach. In *Benelux*¹³ it was held that fault in the nature of arbitrariness was not required for liability. This modification fitted neatly with that in *Benelux*, which is the leading modern authority. In *Benelux* du Plessier¹⁴ the ECJ stated that the test for state liability in damages should not be different from that of the Community itself under Article 188(2).¹⁵ The ECJ's interpretation of the term 'serious breach' in *Benelux* du Plessier will therefore be of importance in the Article 234(2) jurisprudence. This has been confirmed by *Benelux*, where the ECJ completed the circle by explicitly drawing on the factors mentioned in *Benelux* du Plessier to determine the meaning of flagrant violation for the purposes of liability under Article 235(2).¹⁶ This means that under Article 235(2) the seriousness of the breach will be dependent upon factors such as the relative clarity of the rule which has been breached; the measure of discretion left to the relevant authority; whether the error of law was excusable or not; and whether the breach was intentional or voluntary.

**Case C-352/89 *Pharmaceutiques v. Commission*
[2000] ECR I-5131**

(Note T-6A renumbering: Art. 235 is now Art. 234)

This was an appeal from the CJ to the ECJ. The applicant sought damages for losses suffered by the passage of a directive, which prohibited the use of certain substances in cosmetics. The claimant inter alia, that the directive should be regarded as an administrative act, since it only concerned the applicant, the consequence being that liability pay would not flow for liability, rather than having to prove a sufficiently serious breach.

THE ECJ

"The applicant rules which the Court has worked out with regard to Article 235(2) take into account, inter alia, the complexity of situations to be regulated, difficulties in the application or interpretation of the legal and technical provisions, the margin of discretion available to the institution in question (in this case, the Commission)."

"The Commission stated that the conditions under which the State may incur liability for damages caused by the breach of Community law depend on the absence of particular justification, other than those governing the liability of the Community in the circumstances. The

¹³ Case C-352/89 *Pharmaceutiques v. Commission* [1991] ECR I-5131. See also Case T-125/89 *Pharmaceutiques v. Commission* [1991] ECR II-1339; Case C-412/89 *Industria de Productos Farmaceuticos v. Commission* [1992] ECR I-1337, para. 17-18.

¹⁴ Case C-44 and 45/79 *Benelux du Plessier SA v. Commission, R v. Secretary of State for Transport, Intervenor DC* [1979] ECR I-513.

¹⁵ See Case 1.

¹⁶ T. Tridimas, 'Liability for Breach of Community Law: Growing Up and Making Down' (2000) 33 *CMR* 501.

protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (*Braserie du Pêcheur*, para. 42).

42. As regards Member State liability for damage caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (*Brasserie du Pêcheur*, para. 51).

43. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion (*Brasserie du Pêcheur*, para. 55).

44. Where the Member State or the institution in question has only considerably misapplied, or even no discretion, the mismanagement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Hedley Lomas*, para. 58).

45. It is therefore necessary to examine whether... the Court of First Instance... in law this examination of the way in which the Commission exercised its discretion when it accepted the Adaptation Directive.

46. In this regard, the Court finds that the general or individual nature of measures taken by an institution is not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question.

47. It follows that the first ground of the appeal, which is based exclusively on the categorisation of the Adaptation Directive as an individual measure, has no arguable basis on the facts and must be rejected.

The second way in which the ECJ has become more liberal relates to the effect of the breach. The possibility of a large number of claimants will not in itself render Article 215(2) action. This is evident from the *Muller* case.¹¹ This was a request to the author of the case¹² where the ECJ held that a Community regulation which precluded Muller and many others from qualifying for a milk quota violated their legitimate expectations and was invalid. The ECJ held that a damages action could be in relation to a regulation that totally denied the farmers any quota at all. This regulation constituted a breach of the farmers' legitimate expectations, and there was no countervailing higher public interest justifying discretion.¹³ The ECJ reached the opposite conclusion in relation to the legality of a later regulation imposing a 60 per cent quota. The Court accepted that this, too, infringed the legitimate expectations of the applicants, but this illegality was not sufficiently serious, because there was a higher public interest at stake. The 60 per cent quota was a choice of economic policy made by the Council, tending to balance the need to avoid excess production with the interest of the farmers who had entered the milk scheme.

(F) THE PRESENT LAW: SUMMARY

1. For an applicant to succeed it is necessary to show that there has been a violation of a regulation or rule of law for the protection of individuals, that it was manifest and grave, or sufficiently serious, and that it caused the damage.

¹¹ Case C-104/89 and 105/89 *Muller, Council and Commission* [1991] ECR I-3061.

¹² Case T-20/88 *Muller v. Administration des Laiteries de Vion* [1989] ECR II-171.

¹³ See also Case C-151/88 *Segisport-Site Commission* [1990] ECR I-2137.

2. The key criterion as to whether it is necessary to show that the breach was sufficiently serious is the margin of discretion accorded to the author of the act. Where such discretion exists it will be necessary for the applicant to prove such a breach. This is irrespective of whether the measure is general legislative or individual administrative in nature.
3. The factors mentioned in *Brasserie du Pêcheur* and *Bergaderm*, which go to the issue of whether the breach was sufficiently serious, will be determinative in the Article 215(2) case law.
4. The applicant should not have to show that the loss suffered was serious. It is not part of the *Brasserie du Pêcheur* test, and should not, as a matter of principle, be required.
5. It is no longer fatal to a claim that there is a large number of potential applicants.

(G) THE PRESENT LAW: AN ASSESSMENT

The initial question is whether there are valid reasons for limiting liability under Article 215(2). Views on this will undoubtedly differ, but we believe that there are good arguments for doing so. Most of the major cases arise out of the CAP, under which the Community institutions have to make difficult discretionary choices of a legislative nature. This will often entail a complex process designed to balance the conflicting variables identified in Article 31. A finding of illegality *per se* should not suffice as the basis for a damages action. Such a strict standard of liability would render the decision-makers susceptible to a potentially wide liability, and would run the risk that the Court might be 'second-guessing' the decisions made by the Council and Commission on how the variables within Article 31 should be balanced.¹⁴ Analogous considerations have influenced UK courts in similar types of case.¹⁵ It would be feasible to regard illegality *per se* as the appropriate test under Article 215(2) if such illegality were to be taken as proven only where the conduct of the Community institutions was particularly flagrant. Such a test would however incorporate an element of serious breach into the definition of illegality.¹⁶

Secondly, if this is accepted the crucial issue is how to interpret the phrase 'flagrant violation' or 'serious breach'. In the past this was interpreted too restrictively to require something akin to arbitrary action. The approach in *Brasserie du Pêcheur* and *Bergaderm* is more nuanced, and it is to be welcomed. The existence of such a serious breach requires attention to the very factors identified in those cases. The mere fact that the general aim being pursued by the EC was legitimate should not serve to shield it from liability, if it can be shown that there was a serious breach in the manner of attaining this end, when judged by the *Brasserie du Pêcheur* criteria.

Thirdly, where loss has been caused by sufficiently serious illegal action, the applicant should not have to prove that the loss was particularly serious. The applicant will have to show that the illegality caused the loss, but there should be no requirement over and above this.¹⁷ The ordinary economic obligation of litigation should ensure that claims are, in general, only pursued when it is economically worthwhile to do so.

¹⁴ Cf. Opponent AG in Cases 83 and 84/76, 4, 15, and 42/77 *Reynold v. NVN Verreke v. Agribank* Cases 83 & 84/76 *Council and Commission* [1978] ECR II-99, 1113-1114.

¹⁵ P. Craig, 'Once More With the Breach: The Community, the State and Damages Litigation' [1987] 108 LSJ.

¹⁶ Cf. Opponent AG, 9, 38 above, 123.

¹⁷ 102, 103-104.

4. LIABILITY FOR NON-DISCRETIONARY ACTS

(a) THE GENERAL PRINCIPLE: ILLEGALITY, CAUSATION, DAMAGE

The discussion thus far has focused upon liability in damages for legislative and non-legislative acts which involve an element of discretion. The nature of the test that applies to liability for non-discretionary acts has been fairly clear.

The traditional approach was that where an act did not entail any meaningful discretionary choice then it would normally suffice to show the existence of illegality, causation, and damage.¹¹ Successful claims were relatively rare.

The more recent case law continues to distinguish between discretionary and non-discretionary acts, but does so within the framework of the sufficiently serious breach test. The modern formulation, set out in *Sergio* and subsequent cases, is that the applicant must prove that the rule of law infringed was intended to confer rights on individuals, that there must be a sufficiently serious breach, and a causal link between the breach and the resultant harm. Where however the Community institution has considerably reduced or no discretion, the mere infringement of Community law may be sufficient to establish the existence of the sufficiently serious breach.¹²

(b) APPLICATION OF THE GENERAL PRINCIPLE

The Court will inevitably have to decide whether there is discretion, with the consequence that the applicant must satisfy the sufficiently serious breach test, or whether in a case of no discretion the mere infringement of Community law may suffice for liability.¹³

Case C-350/95 P *Amillean Rice Mills NV v. Commission* [1997] ECR I-738

The applicants challenged, inter alia, respectively, the Joint Council Decision which provided for a relationship between the amounts of normal and intervention prices and the EC's intervention price. They also challenged a Commission Decision, which introduced specific measures for the application of the Joint Council Decision to the EC's intervention price. The applicants argued, inter alia, that the EC's intervention price was not a sufficiently serious breach, since the contested measures were not intended to confer rights on individuals.

¹¹ Cases 44-51/77 *Orion Maize*, *Commission* [1978] ECR 133; Cases T-481 and T-483 *Unijet v. Commission* [1979] ECR II-1051; *Commission v. EEC* [1981] ECR 3057, para. 16; Case C-167/81 *AXA v. Commission* [1982] ECR I-1441; Cases C-234 and C-236/91 *Agencia de Fomento SA and Maribel Leizaola SA v. Commission* [1992] ECR I-2311; Case T-135/94 *International Procurement Services v. Commission* [1995] ECR II-713, para. 40; Case T-17/95 *Frans Meijer v. Commission*, para. 50; Cases T-7/95, T-8/95, T-9/95, and T-10/95 *Comet Steel v. Commission* [2000] ECR II-2153, paras. 124-125; Case T-31/97 *Alstom v. Commission*, 16 Nov. 2000, para. 33-35.

¹² Case C-350/95 P *Amillean Rice Mills NV v. Commission*, paras. 43-46; Case C-471/97 P *Frans Meijer NV v. Commission*, paras. 25-27; Case C-12/97 P *Comet Steel v. Commission*, paras. 54-55; Cases T-136/95, T-137/95, T-138/95, T-139/95, T-140/95, T-141/95, T-142/95, T-143/95, T-144/95, T-145/95, T-146/95, T-147/95, T-148/95, T-149/95, T-150/95, T-151/95, T-152/95, T-153/95, T-154/95, T-155/95, T-156/95, T-157/95, T-158/95, T-159/95, T-160/95, T-161/95, T-162/95, T-163/95, T-164/95, T-165/95, T-166/95, T-167/95, T-168/95, T-169/95, T-170/95, T-171/95, T-172/95, T-173/95, T-174/95, T-175/95, T-176/95, T-177/95, T-178/95, T-179/95, T-180/95, T-181/95, T-182/95, T-183/95, T-184/95, T-185/95, T-186/95, T-187/95, T-188/95, T-189/95, T-190/95, T-191/95, T-192/95, T-193/95, T-194/95, T-195/95, T-196/95, T-197/95, T-198/95, T-199/95, T-200/95, T-201/95, T-202/95, T-203/95, T-204/95, T-205/95, T-206/95, T-207/95, T-208/95, T-209/95, T-210/95, T-211/95, T-212/95, T-213/95, T-214/95, T-215/95, T-216/95, T-217/95, T-218/95, T-219/95, T-220/95, T-221/95, T-222/95, T-223/95, T-224/95, T-225/95, T-226/95, T-227/95, T-228/95, T-229/95, T-230/95, T-231/95, T-232/95, T-233/95, T-234/95, T-235/95, T-236/95, T-237/95, T-238/95, T-239/95, T-240/95, T-241/95, T-242/95, T-243/95, T-244/95, T-245/95, T-246/95, T-247/95, T-248/95, T-249/95, T-250/95, T-251/95, T-252/95, T-253/95, T-254/95, T-255/95, T-256/95, T-257/95, T-258/95, T-259/95, T-260/95, T-261/95, T-262/95, T-263/95, T-264/95, T-265/95, T-266/95, T-267/95, T-268/95, T-269/95, T-270/95, T-271/95, T-272/95, T-273/95, T-274/95, T-275/95, T-276/95, T-277/95, T-278/95, T-279/95, T-280/95, T-281/95, T-282/95, T-283/95, T-284/95, T-285/95, T-286/95, T-287/95, T-288/95, T-289/95, T-290/95, T-291/95, T-292/95, T-293/95, T-294/95, T-295/95, T-296/95, T-297/95, T-298/95, T-299/95, T-300/95, T-301/95, T-302/95, T-303/95, T-304/95, T-305/95, T-306/95, T-307/95, T-308/95, T-309/95, T-310/95, T-311/95, T-312/95, T-313/95, T-314/95, T-315/95, T-316/95, T-317/95, T-318/95, T-319/95, T-320/95, T-321/95, T-322/95, T-323/95, T-324/95, T-325/95, T-326/95, T-327/95, T-328/95, T-329/95, T-330/95, T-331/95, T-332/95, T-333/95, T-334/95, T-335/95, T-336/95, T-337/95, T-338/95, T-339/95, T-340/95, T-341/95, T-342/95, T-343/95, T-344/95, T-345/95, T-346/95, T-347/95, T-348/95, T-349/95, T-350/95, T-351/95, T-352/95, T-353/95, T-354/95, T-355/95, T-356/95, T-357/95, T-358/95, T-359/95, T-360/95, T-361/95, T-362/95, T-363/95, T-364/95, T-365/95, T-366/95, T-367/95, T-368/95, T-369/95, T-370/95, T-371/95, T-372/95, T-373/95, T-374/95, T-375/95, T-376/95, T-377/95, T-378/95, T-379/95, T-380/95, T-381/95, T-382/95, T-383/95, T-384/95, T-385/95, T-386/95, T-387/95, T-388/95, T-389/95, T-390/95, T-391/95, T-392/95, T-393/95, T-394/95, T-395/95, T-396/95, T-397/95, T-398/95, T-399/95, T-400/95, T-401/95, T-402/95, T-403/95, T-404/95, T-405/95, T-406/95, T-407/95, T-408/95, T-409/95, T-410/95, T-411/95, T-412/95, T-413/95, T-414/95, T-415/95, T-416/95, T-417/95, T-418/95, T-419/95, T-420/95, T-421/95, T-422/95, T-423/95, T-424/95, T-425/95, T-426/95, T-427/95, T-428/95, T-429/95, T-430/95, T-431/95, T-432/95, T-433/95, T-434/95, T-435/95, T-436/95, T-437/95, T-438/95, T-439/95, T-440/95, T-441/95, T-442/95, T-443/95, T-444/95, T-445/95, T-446/95, T-447/95, T-448/95, T-449/95, T-450/95, T-451/95, T-452/95, T-453/95, T-454/95, T-455/95, T-456/95, T-457/95, T-458/95, T-459/95, T-460/95, T-461/95, T-462/95, T-463/95, T-464/95, T-465/95, T-466/95, T-467/95, T-468/95, T-469/95, T-470/95, T-471/95, T-472/95, T-473/95, T-474/95, T-475/95, T-476/95, T-477/95, T-478/95, T-479/95, T-480/95, T-481/95, T-482/95, T-483/95, T-484/95, T-485/95, T-486/95, T-487/95, T-488/95, T-489/95, T-490/95, T-491/95, T-492/95, T-493/95, T-494/95, T-495/95, T-496/95, T-497/95, T-498/95, T-499/95, T-500/95, T-501/95, T-502/95, T-503/95, T-504/95, T-505/95, T-506/95, T-507/95, T-508/95, T-509/95, T-510/95, T-511/95, T-512/95, T-513/95, T-514/95, T-515/95, T-516/95, T-517/95, T-518/95, T-519/95, T-520/95, T-521/95, T-522/95, T-523/95, T-524/95, T-525/95, T-526/95, T-527/95, T-528/95, T-529/95, T-530/95, T-531/95, T-532/95, T-533/95, T-534/95, T-535/95, T-536/95, T-537/95, T-538/95, T-539/95, T-540/95, T-541/95, T-542/95, T-543/95, T-544/95, T-545/95, T-546/95, T-547/95, T-548/95, T-549/95, T-550/95, T-551/95, T-552/95, T-553/95, T-554/95, T-555/95, T-556/95, T-557/95, T-558/95, T-559/95, T-560/95, T-561/95, T-562/95, T-563/95, T-564/95, T-565/95, T-566/95, T-567/95, T-568/95, T-569/95, T-570/95, T-571/95, T-572/95, T-573/95, T-574/95, T-575/95, T-576/95, T-577/95, T-578/95, T-579/95, T-580/95, T-581/95, T-582/95, T-583/95, T-584/95, T-585/95, T-586/95, T-587/95, T-588/95, T-589/95, T-590/95, T-591/95, T-592/95, T-593/95, T-594/95, T-595/95, T-596/95, T-597/95, T-598/95, T-599/95, T-600/95, T-601/95, T-602/95, T-603/95, T-604/95, T-605/95, T-606/95, T-607/95, T-608/95, T-609/95, T-610/95, T-611/95, T-612/95, T-613/95, T-614/95, T-615/95, T-616/95, T-617/95, T-618/95, T-619/95, T-620/95, T-621/95, T-622/95, T-623/95, T-624/95, T-625/95, T-626/95, T-627/95, T-628/95, T-629/95, T-630/95, T-631/95, T-632/95, T-633/95, T-634/95, T-635/95, T-636/95, T-637/95, T-638/95, T-639/95, T-640/95, T-641/95, T-642/95, T-643/95, T-644/95, T-645/95, T-646/95, T-647/95, T-648/95, T-649/95, T-650/95, T-651/95, T-652/95, T-653/95, T-654/95, T-655/95, T-656/95, T-657/95, T-658/95, T-659/95, T-660/95, T-661/95, T-662/95, T-663/95, T-664/95, T-665/95, T-666/95, T-667/95, T-668/95, T-669/95, T-670/95, T-671/95, T-672/95, T-673/95, T-674/95, T-675/95, T-676/95, T-677/95, T-678/95, T-679/95, T-680/95, T-681/95, T-682/95, T-683/95, T-684/95, T-685/95, T-686/95, T-687/95, T-688/95, T-689/95, T-690/95, T-691/95, T-692/95, T-693/95, T-694/95, T-695/95, T-696/95, T-697/95, T-698/95, T-699/95, T-700/95, T-701/95, T-702/95, T-703/95, T-704/95, T-705/95, T-706/95, T-707/95, T-708/95, T-709/95, T-710/95, T-711/95, T-712/95, T-713/95, T-714/95, T-715/95, T-716/95, T-717/95, T-718/95, T-719/95, T-720/95, T-721/95, T-722/95, T-723/95, T-724/95, T-725/95, T-726/95, T-727/95, T-728/95, T-729/95, T-730/95, T-731/95, T-732/95, T-733/95, T-734/95, T-735/95, T-736/95, T-737/95, T-738/95, T-739/95, T-740/95, T-741/95, T-742/95, T-743/95, T-744/95, T-745/95, T-746/95, T-747/95, T-748/95, T-749/95, T-750/95, T-751/95, T-752/95, T-753/95, T-754/95, T-755/95, T-756/95, T-757/95, T-758/95, T-759/95, T-760/95, T-761/95, T-762/95, T-763/95, T-764/95, T-765/95, T-766/95, T-767/95, T-768/95, T-769/95, T-770/95, T-771/95, T-772/95, T-773/95, T-774/95, T-775/95, T-776/95, T-777/95, T-778/95, T-779/95, T-780/95, T-781/95, T-782/95, T-783/95, T-784/95, T-785/95, T-786/95, T-787/95, T-788/95, T-789/95, T-790/95, T-791/95, T-792/95, T-793/95, T-794/95, T-795/95, T-796/95, T-797/95, T-798/95, T-799/95, T-800/95, T-801/95, T-802/95, T-803/95, T-804/95, T-805/95, T-806/95, T-807/95, T-808/95, T-809/95, T-810/95, T-811/95, T-812/95, T-813/95, T-814/95, T-815/95, T-816/95, T-817/95, T-818/95, T-819/95, T-820/95, T-821/95, T-822/95, T-823/95, T-824/95, T-825/95, T-826/95, T-827/95, T-828/95, T-829/95, T-830/95, T-831/95, T-832/95, T-833/95, T-834/95, T-835/95, T-836/95, T-837/95, T-838/95, T-839/95, T-840/95, T-841/95, T-842/95, T-843/95, T-844/95, T-845/95, T-846/95, T-847/95, T-848/95, T-849/95, T-850/95, T-851/95, T-852/95, T-853/95, T-854/95, T-855/95, T-856/95, T-857/95, T-858/95, T-859/95, T-860/95, T-861/95, T-862/95, T-863/95, T-864/95, T-865/95, T-866/95, T-867/95, T-868/95, T-869/95, T-870/95, T-871/95, T-872/95, T-873/95, T-874/95, T-875/95, T-876/95, T-877/95, T-878/95, T-879/95, T-880/95, T-881/95, T-882/95, T-883/95, T-884/95, T-885/95, T-886/95, T-887/95, T-888/95, T-889/95, T-890/95, T-891/95, T-892/95, T-893/95, T-894/95, T-895/95, T-896/95, T-897/95, T-898/95, T-899/95, T-900/95, T-901/95, T-902/95, T-903/95, T-904/95, T-905/95, T-906/95, T-907/95, T-908/95, T-909/95, T-910/95, T-911/95, T-912/95, T-913/95, T-914/95, T-915/95, T-916/95, T-917/95, T-918/95, T-919/95, T-920/95, T-921/95, T-922/95, T-923/95, T-924/95, T-925/95, T-926/95, T-927/95, T-928/95, T-929/95, T-930/95, T-931/95, T-932/95, T-933/95, T-934/95, T-935/95, T-936/95, T-937/95, T-938/95, T-939/95, T-940/95, T-941/95, T-942/95, T-943/95, T-944/95, T-945/95, T-946/95, T-947/95, T-948/95, T-949/95, T-950/95, T-951/95, T-952/95, T-953/95, T-954/95, T-955/95, T-956/95, T-957/95, T-958/95, T-959/95, T-960/95, T-961/95, T-962/95, T-963/95, T-964/95, T-965/95, T-966/95, T-967/95, T-968/95, T-969/95, T-970/95, T-971/95, T-972/95, T-973/95, T-974/95, T-975/95, T-976/95, T-977/95, T-978/95, T-979/95, T-980/95, T-981/95, T-982/95, T-983/95, T-984/95, T-985/95, T-986/95, T-987/95, T-988/95, T-989/95, T-990/95, T-991/95, T-992/95, T-993/95, T-994/95, T-995/95, T-996/95, T-997/95, T-998/95, T-999/95, T-1000/95, T-1001/95, T-1002/95, T-1003/95, T-1004/95, T-1005/95, T-1006/95, T-1007/95, T-1008/95, T-1009/95, T-1010/95, T-1011/95, T-1012/95, T-1013/95, T-1014/95, T-1015/95, T-1016/95, T-1017/95, T-1018/95, T-1019/95, T-1020/95, T-1021/95, T-1022/95, T-1023/95, T-1024/95, T-1025/95, T-1026/95, T-1027/95, T-1028/95, T-1029/95, T-1030/95, T-1031/95, T-1032/95, T-1033/95, T-1034/95, T-1035/95, T-1036/95, T-1037/95, T-1038/95, T-1039/95, T-1040/95, T-1041/95, T-1042/95, T-1043/95, T-1044/95, T-1045/95, T-1046/95, T-1047/95, T-1048/95, T-1049/95, T-1050/95, T-1051/95, T-1052/95, T-1053/95, T-1054/95, T-1055/95, T-1056/95, T-1057/95, T-1058/95, T-1059/95, T-1060/95, T-1061/95, T-1062/95, T-1063/95, T-1064/95, T-1065/95, T-1066/95, T-1067/95, T-1068/95, T-1069/95, T-1070/95, T-1071/95, T-1072/95, T-1073/95, T-1074/95, T-1075/95, T-1076/95, T-1077/95, T-1078/95, T-1079/95, T-1080/95, T-1081/95, T-1082/95, T-1083/95, T-1084/95, T-1085/95, T-1086/95, T-1087/95, T-1088/95, T-1089/95, T-1090/95, T-1091/95, T-1092/95, T-1093/95, T-1094/95, T-1095/95, T-1096/95, T-1097/95, T-1098/95, T-1099/95, T-1100/95, T-1101/95, T-1102/95, T-1103/95, T-1104/95, T-1105/95, T-1106/95, T-1107/95, T-1108/95, T-1109/95, T-1110/95, T-1111/95, T-1112/95, T-1113/95, T-1114/95, T-1115/95, T-1116/95, T-1117/95, T-1118/95, T-1119/95, T-1120/95, T-1121/95, T-1122/95, T-1123/95, T-1124/95, T-1125/95, T-1126/95, T-1127/95, T-1128/95, T-1129/95, T-1130/95, T-1131/95, T-1132/95, T-1133/95, T-1134/95, T-1135/95, T-1136/95, T-1137/95, T-1138/95, T-1139/95, T-1140/95, T-1141/95, T-1142/95, T-1143/95, T-1144/95, T-1145/95, T-1146/95, T-1147/95, T-1148/95, T-1149/95, T-1150/95, T-1151/95, T-1152/95, T-1153/95, T-1154/95, T-1155/95, T-1156/95, T-1157/95, T-1158/95, T-1159/95, T-1160/95, T-1161/95, T-1162/95, T-1163/95, T-1164/95, T-1165/95, T-1166/95, T-1167/95, T-1168/95, T-1169/95, T-1170/95, T-1171/95, T-1172/95, T-1173/95, T-1174/95, T-1175/95, T-1176/95, T-1177/95, T-1178/95, T-1179/95, T-1180/95, T-1181/95, T-1182/95, T-1183/95, T-1184/95, T-1185/95, T-1186/95, T-1187/95, T-1188/95, T-1189/95, T-1190/95, T-1191/95, T-1192/95, T-1193/95, T-1194/95, T-1195/95, T-1196/95, T-1197/95, T-1198/95, T-1199/95, T-1200/95, T-1201/95, T-1202/95, T-1203/95, T-1204/95, T-1205/95, T-1206/95, T-1207/95, T-1208/95, T-1209/95, T-1210/95, T-1211/95, T-1212/95, T-1213/95, T-1214/95, T-1215/95, T-1216/95, T-1217/95, T-1218/95, T-1219/95, T-1220/95, T-1221/95, T-1222/95, T-1223/95, T-1224/95, T-1225/95, T-1226/95, T-1227/95, T-1228/95, T-1229/95, T-1230/95, T-1231/95, T-1232/95, T-1233/95, T-1234/95, T-1235/95, T-1236/95, T-1237/95, T-1238/95, T-1239/95, T-1240/95, T-1241/95, T-1242/95, T-1243/95, T-1244/95, T-1245/95, T-1246/95, T-1247/95, T-1248/95, T-1249/95, T-1250/95, T-1251/95, T-1252/95, T-1253/95, T-1254/95, T-1255/95, T-1256/95, T-1257/95, T-1258/95, T-1259/95, T-1260/95, T-1261/95, T-1262/95, T-1263/95, T-1264/95, T-1265/95, T-1266/95, T-1267/95, T-1268/95, T-1269/95, T-1270/95, T-1271/95, T-1272/95, T-1273/95, T-1274/95, T-1275/95, T-1276/95, T-1277/95, T-1278/95, T-1279/95, T-1280/95, T-1281/95, T-1282/95, T-1283/95, T-1284/95, T-1285/95, T-1286/95, T-1287/95, T-1288/95, T-1289/95, T-1290/95, T-1291/95, T-1292/95, T-1293/95, T-1294/95, T-1295/95, T-1296/95, T-1297/95, T-1298/95, T-1299/95, T-1300/95, T-1301/95, T-1302/95, T-1303/95, T-1304/95, T-1305/95, T-1306/95, T-1307/95, T-1308/95, T-1309/95, T-1310/95, T-1311/95, T-1312/95, T-1313/95, T-1314/95, T-1315/95, T-1316/95, T-1317/95, T-1

way in which they would use their pension entitlement. The applicant sought a sum to satisfy compensation for losses which they had suffered.

THE ECJ

25. Apart from the exceptional instances, the adoption of an incorrect interpretation does not constitute in itself a wrongful act.

26. Even the fact that the authorities request those concerned to obtain information from the competent departments does not necessarily involve those authorities in an obligation to guarantee the correctness of the information supplied and does not therefore make them liable for any injury which may be occasioned by incorrect information.

27. However, whilst it may be possible to doubt the existence of a wrongful act concerning the supply of incorrect information, the same cannot be said of the determination of the facts giving rise to the information.

28. Although such recognition was possible as early as April 1959, it was not until the judgment of the ECJ at the end of 1973.

29. A correction made shortly before or after 13 April 1959, that is, in the period when those concerned had to make their decision, would be regarded as a wrongful act. It is not to avoid liability for the consequences of the wrong, but rather to avoid the consequences of a correction. In the other hand, a correction made after 13 April 1959, when the Communities have made their decision, is not a wrongful act.

Thus in *Alfa Romeo* the ECJ construed the requisite illegality for the purposes of damage liability as to include a mere incorrect interpretation of a regulation. Such regulations are often complex, and are open to more than one construction. To render the Communities liable in damages whenever such a construction proved to be incorrect would be to place the Communities in a position of a form of strict liability where the only condition for recovery would be proof that the interpretation adopted was incorrect, even if the interpretation was plausible, and even if the decision-maker had taken due care in reaching it.¹⁷

The ability to mould or shape illegality for the purposes of damage liability is also apparent in other cases. Thus in *Alfa Romeo* the applicant informed the Commission that his company was engaged in anti-competitive practices, but making it clear that the Commission must conceal his identity, in order to avoid repercussions from his employees. It was clear from the facts that the Commission officials had been negligent in allowing his name to become known, with tragic consequences for him and his family. He was awarded damages, subject to reduction for contributory negligence. In *Frank Meier*¹⁸ the applicant sought damages because the Commission had erroneously decided that the company was in breach of an undertaking it had given in relation to the dumping of salmon. The ECJ held that it was not necessary for the applicant to prove a sufficiently serious breach, since a legal error did not involve complex discretionary choices. A mere infringement of EC law would suffice. However it then defined the relevant error leading to illegality as being of ordinary

¹⁷ See the *Order* concerning liability to pay damages in Case C-242/85 *R v. M. S. P. (Italy)*, [1986] ECR II-1411. The court held that the Commission was liable in damages for its failure to take account of the fact that the applicant was a small business when it imposed a fine on it for breach of competition law. See also *Case C-242/85 R v. M. S. P. (Italy)*, [1986] ECR II-1411.

¹⁸ *Case C-242/85 R v. Frank Meier*, [1986] ECR II-1411.

¹⁹ *Case C-242/85 R v. Frank Meier*, [1986] ECR II-1411.

care and diligence by the Commission, and took account of the applicant's contributory negligence.¹⁹

(d) PRESENT LAW: SUMMARY

1. The traditional test for liability for non-discretionary acts was proof of illegality, causation, and damage. The more modern case law continues to distinguish between liability for discretionary and non-discretionary acts, but does so from within the framework of the sufficiently serious breach test where the Community institution has considerably reduced scope for discretion, the mere infringement of Community law may be sufficient to establish the existence of the sufficiently serious breach.
2. The CJ and ECJ will necessarily have to make a judgment as to whether an act, general or individual, falls to be judged by this test, rather than the test discussed in the previous section.
3. The CJ and ECJ will also have to decide what constitutes illegality for the purposes of liability for non-discretionary acts.

5. LIABILITY FOR OFFICIAL ACTS OF COMMUNITY SERVANTS

Article 175 allows for loss to be claimed where it has been caused either by the Community institutions or by the acts of its servants 'in the performance of their duties'. It is clear that not every act performed by a servant will be deemed to be an act in the performance of his duties. The matter is rendered more complex by the fact that Article 12 of the Protocol on the Privileges and Immunities of the European Communities states that 'Officials and other servants of the Community shall... be immune from legal proceedings in respect of acts performed by them in their official capacity'.

Case 5/83 *Singh v. Leclerc*
[1984] ECR 323

The applicant, a Belgian national, was employed by the Commission as a clerk. He was awarded damages for the loss of his job, which was caused by the Commission's failure to take account of the fact that he was a small business when it imposed a fine on it for breach of competition law. See also *Case C-242/85 R v. M. S. P. (Italy)*, [1986] ECR II-1411.

¹⁹ *Id.* para. 57-61.

those acts of its servants which, by virtue of administrative and direct responsibility, are the necessary extension of the tasks entrusted to its institutions.

In the light of the special nature of this legal system, it would not be unreasonable to extend it to categories of acts other than those referred to above.

A servant's use of his private car for his support during the course of his duties does not satisfy the conditions set out above.

A reference to a servant's privilege of a travel grant does not bring him within the scope of the conditions set out above, but is basically intended to ensure a reimbursement of his travel expenses involved in his mission of transport to his work in accordance with the standards laid down for this purpose.

Only in the rare case of force majeure or an exceptional circumstance of extreme importance that without the servant's using private means of transport the Community would have been unable to carry out the tasks entrusted to it could such a case be considered as part of the servant's performance of his duties, within the meaning of the second paragraph of Article 185 of the Treaty.

It follows from the above that the driving of a private car by a servant cannot be considered as the performance of his duties within the meaning of the second paragraph of Article 185 of the EEC Treaty.

The range of acts done by its servants for which the Community will accept responsibility is therefore narrow, and more limited than that which exists in the laws of most of the Member States. No real justification for the limited nature of this liability is provided by the EEC.

If the Community is not liable then an action can be brought against the servant in his or her personal capacity, and any such action is brought in national courts and is governed by national law. However, the Protocol on the Privileges and Immunities of the European Communities provides that servants have immunity from suit in national courts in relation to acts performed in their official capacity. The language of this provision differs from that of Article 288(2), which speaks in terms of servants acting in performance of their duties. Normally one would expect that where the Community is liable under Article 288(2), because the servant was acting in the performance of his or her duties, then it would also follow that the servant would not be personally liable, since he or she would be deemed to be acting in an official capacity. The interrelationship between these two provisions may, nonetheless, be more problematic, and the ECJ has held that the servant's personal immunity and the scope of the Community's liability for the acts of the servant are separate issues.¹¹ There is however much to be said for the view proffered by Schermers and Twiss that acts of servants in the performance of their duties (leading to the Community's liability) include but are not limited to acts performed by them in their official capacity (leading to the servant's immunity).¹²

It has been assumed thus far that the Community will be liable for the acts of its institutions, and for the acts of its servants, subject to the limitations of the *Seydoux* case. Where the EC establishes agencies it is common for the regulation establishing the agency to contain a provision equivalent to Article 288(2).¹³ The Community may well be responsible even in the absence of such an express provision where it has delegated certain functions to a Community body since the acts of that body, at least those of a governmental nature, will be imputed to the EC.¹⁴

¹¹ Case 219/83 *Comptex v. Colson* [1984] ECR II 425, 428.

¹² H. G. Schermers and Th. Twiss, 'Official Acts of Community Servants and Article 288(2)', in *Handbook of Community Law*, p. 439, n. 171.

¹³ P. Craig, *EU Administrative Law* (Oxford University Press, 1994), ch. 5.

¹⁴ Case 1/83 *Horn v. Hauptzollamt* [1983] ECR I 15.

6. LIABILITY FOR VALID LEGISLATIVE ACTS

(a) THE NATURE OF THE PROBLEM

Individuals may well suffer loss flowing from lawful acts of the Community, as well as from acts which are tainted with some form of illegality. This problem can occur in any legal system, but the potential for its occurrence in the Community is particularly marked.

M. J. Bronckhorst, *The Valid Legislative Act as a Cause of Liability of the Communities*¹⁵

There are many reasons why private individuals may have a particular interest in the existence of a clearly defined principle concerning Community liability for legal acts which result in damage to them. . . . Does a fisherman, who, by very short notice, has to make very important changes to his vessels, thus incurring substantial financial costs, have an action for compensation even if the Community measures as such cannot be challenged on the grounds of illegality?

Private individuals, operating in the field of the Common Agricultural Policy, may easily suffer financial loss because of the fact that competing producers are favoured by Community measures. Producers of vegetable oils may very well undergo the effects of a severe competition if producers of sugar or milk powder are able to dispose of large quantities of their products on the European markets with the help of Community subsidies.

The problem of loss being caused by lawful governmental action is not peculiar to the Community. Thus, French law recognises a principle of *dépense décaissée par charges publiques*, and German law has the concept of *Sonderopfer*. Under these principles loss caused by lawful governmental action can be recovered, albeit in limited circumstances.¹⁶ While there is liability for individuals in the situations postulated by Bronckhorst, the difficulties of deciding when to grant such compensation should not be underestimated.

P. Craig, *Compensation in Public Law*¹⁷

Legislation is regularly being passed which is explicitly or implicitly aimed at benefiting one section of the population at the expense of another. It is a matter of conscious legislative policy. This may be in the form of tax changes or a decision to grant selective assistance to one particular type of industry rather than another. Any proposition of state liability arising out of legislation as part of a state theory would necessarily be the drawing of a difficult line. It would be to be drawn between the case where the legislative action on a law or group was the aim of the legislation or a necessary consequence of it, and where legislation is passed which incidentally affects a particular firm or industry but where there is no legislative intention to compensate the firm for the loss suffered.

¹⁵ In *Handels- und Gewerkschaften v. Hauptzollamt*, [1983] ECR II 123-124.

¹⁶ *Id.*, 123-124.

¹⁷ [1990] 11 *ELR* 413, 452. See also Case T-113/85, *n. l.* above, for a good example of this in the Community context.

now Articles 30 and 34 E.C.³¹ and the applicants now claimed damages. The *sic ut* had been restored in the light of the ECJ's decision, but only for the future, and therefore losses had still been suffered in the intervening period. The Court found that there had been a marked and gross breach by the Community. Some of the applicants claimed that they should be compensated because they were forced to close their factories.

THE ECJ

21. The Council argued that the origin of the difficulties experienced by these undertakings is to be found in the circumstances peculiar to each of them, such as the characteristics of their plant and managerial or financial problems. The facts reported by the parties from the course of the proceedings are not such as to establish the true cause of the further damage alleged. However, it is sufficient to state that even if it were assumed that the abolition of the refunds exacerbated the difficulties encountered by these applicants, those difficulties would not have been a sufficiently direct consequence of the unlawful conduct of the Council for the Community to be liable to make good the damage.

It will be necessary for an applicant to show not only that the Community action caused the loss, but also that the chain of causation has not been broken by the Member State or the applicant. The ECJ has held that where the loss arises from an independent autonomous act by the Member State, the Community is no longer liable.³² However, this conduct has been made possible by an illegal failure of the Commission to exercise its supervisory powers, then it will be this failure which will be considered to be the cause of the damage.³³ There may be instances where both the Community and the Member State are responsible. This complex issue will be considered below.

It is not entirely clear what type of conduct by the individual will serve to break the chain of causation. Negligence or contributory negligence will at best either defeat the claim or to reduce the award of damages.³⁴ It has also been held that if the individual ought to have foreseen the possibility of certain events which might cause loss, then the possibility of claiming damages will be diminished or lost.³⁵ Moreover, an individual who believes that a wrongful act of the Community has caused loss has been encouraged by the Court to challenge the measure through Article 234. Thus, in *Amey* the ECJ stated that this was open to an individual, particularly where implementation was in the hands of national authorities.³⁶

(b) DAMAGE

The general objective when awarding compensation for loss in the context of non-contractual liability is to provide restitution for the victim in the sense of placing the victim in the situation

that would have pertained if the wrong had not been committed.³⁷ Although Article 234(2) speaks of the duty of the Community to make good any damage, it is clear that lesser will only be recoverable if they are certain and specific, proven, and quantifiable.³⁸

While the damage claimed must, in general, be certain, the Court held in *Kampffmeyer* that it is possible to maintain an action for imminent damage if it is possible with sufficient certainty even if the damage cannot yet be precisely assessed.³⁹ The rationale was that it might be necessary to pursue an action immediately in order to prevent even greater damage.

The idea that the damage suffered must be specific in the sense that it affects the applicant's interests in a specific and individual way is to be found in various guises in ECJ decisions. Thus, in the *Esperluète* case, considered above, the Court emphasized that the effects of the regulation did not exceed the bounds of economic risk inherent in the activity in question.⁴⁰ Similar themes concerning the special nature of the burden imposed on a particular trader can be found in the case law concerning the possible recovery for lawful governmental action.⁴¹ The question whether an applicant should have to prove abnormal or special damage in a case concerning unlawful Community action has already been discussed.

The injured party will have the onus of proving that the damage occurred. In general the individual will have to show that the injury was actually sustained.⁴² This may not be easy, and it is not uncommon for cases to fail for this reason.⁴³

The damage must also be quantifiable if the applicant is to succeed. In order to decide whether the loss is quantifiable, one needs to know what types of damage are recoverable. Advocate General Capotorti put the matter in the following way:⁴⁴

It is well known that the legal concept of 'damage' covers both a material loss (which serves, that is to say, a restitution to a person's assets) and a loss of opportunity (which serves to restore the assets which would have occurred if the harmful act had not taken place). These two concepts are known respectively as *damnum emergens* and *lucrum cessans*. The object of compensation is to restore the assets of the victim to the condition which they would have been in apart from the unlawful act, or at least to the condition closest to that which would have been achieved if the unlawful nature of the act had not taken place. The hypothetical nature of this restoration often entails a certain degree of speculation. These general remarks are not limited to the field of private law, but apply also to the activity of public authorities, and more especially to the non-contractual liability of the Community.

The ECJ will grant damages for losses actually sustained and will exceptionally award for non-material damage.⁴⁵ It is willing in principle also to give damages for lost profits, but is

³¹ Case C-32/87 *Griffiths v. SABEC (UK)* [1988] ECR II-341, para. 10; Case C-32/91 and 37/92 *Höfner v. Elze*, para. 53, 55; Case T-280/97 *Comet Srl v. Council* [2003] ECR II-2741, para. 37.

³² *Id.*, para. 51 above, 380-391.

³³ Case 55-58/71 *Kampffmeyer, Commission and Council* [1976] ECR 211, 245; Case T-75/85 *Comet Srl v. Council*, para. 277.

³⁴ See 561 above.

³⁵ See 592-593 above.

³⁶ Case 16/74 *Reynolds v. Council* [1976] ECR 437, 454, *Trabucchi AG*.

³⁷ See, e.g., Case 26/68 *Falck v. Commission* [1976] ECR 145, 156; Case T-139/77 *Port Gil v. Council* [1978] ECR II-453.

³⁸ Case 25/74 *Industria Agricola Camp v. Council* [1976] ECR 1355, 1357-1358.

³⁹ Case T-40/91 *Comet* [2003] ECR II-413, para. 38-40; Case T-207/91 *Juan-Pedro Amador v. Commission* [1994] ECR II-1682, para. 107-111; Case T-40/91 *Juan-Pedro Amador and Eusebio Amador v. European Parliament* [1994] ECR II-413, para. 132; Case T-325/92 *Gros v. Commission* [1993] ECR II-1173.

³⁷ Cases 134/76 and 137/77 *St. Michael v. H. T. de la Torre de Arce & S. de Arce and General Corporation Promoción Agrícola de la Compañía de Offici. Nacional de Ingresos y Rentas de Cuba* [1977] ECR 1295.

³⁸ Case 132/77 *Société pour l'Élaboration de Sucres SA v. Commission* [1978] ECR 106, 107-108.

³⁹ Case T-143 [1989] *Ministry of Agriculture v. High Authority* [1989] ECR 157, 242; Case 4/69 *Algem. Landbouw Groothandel v. Commission* [1970] ECR 315, 326-338.

⁴⁰ Case 142/83 *Adams v. Commission* [1985] ECR 1333, 1335; Case T-47/83, *Paul Marling v. Council*.

⁴¹ Case 57/82 *Stefanis v. Council* [1983] ECR II-1493; *Germany v. Commission* [1985] ECR II-411, 449; Case T-57/83 *Geplante, Gelande and Commission* [1985] ECR II-2373, 238-239; Case T-18/95 *Deutscher Gewerkschaftsbund v. Council* [1996] ECR II-587.

⁴² Cases 2/68 and 12/67 *Anyon v. Council and General Agreement on Tariffs and Commerce* [1975] ECR 3175.

relevant to date. Thus, in *Kampffmeyer*, while the Court admitted that lost profit was recoverable, it did not grant such damages to traders who had abandoned their intended transactions because of the unlawful act of the Community, even though these transactions would have produced profits.¹¹ In *OWF*, it was held that lost profits were not recoverable where the claim was based on the concept of legitimate expectations, since that concept only served to ensure that losses were not suffered owing to an unexpected change in the legal position; it did not serve to ensure that profits would be made.¹² However, in *Wider*¹³ the ECJ was prepared to compensate for lost profit, although it held that any such sum must take into account the interests which could have been earned from alternative activities, applying the principle that there is a duty to mitigate loss.

In quantifying the applicant's loss the Community institutions have argued that damages should not be recoverable if the loss has been passed on to the consumers. This was accepted in principle by the ECJ in the *Quellbrecht and Orin* litigation.¹⁴ Both has justly criticised this reasoning. He points out that whether a firm could pass on a cost increase to consumers would depend upon many variables, which might operate differently for different firms and which would be difficult to assess. He argues, moreover, that such an idea is wrong in principle, since it would mean that losses would be borne by consumers, rather than by the institutions which had committed the wrongful act.¹⁵

5. JOINT LIABILITY OF THE COMMUNITY AND MEMBER STATES

The joint liability of the Community and the Member States gives rise to complex problems which can be dealt with only in outline.¹⁶ The approach of O'Keefe, which distinguishes between procedural and substantive issues, will be adopted here.¹⁷

(a) PROCEDURAL ISSUES

In procedural terms it is not possible for Community non-contractual liability to be decided by national courts. Article 235 EC confers this jurisdiction on the ECJ and, while it does not state that this jurisdiction is exclusive, this is implied by Article 240 EC.¹⁸ Conversely, it is not possible for an individual to bring a direct action against a Member State before the ECJ, since there is no provision for this in the Treaty.

¹¹ Cases 5, 7, and 11-14/83 *Kampffmeyer v. Commission* (1985) ECR I-145, 149-157. See also Case T-15/83 *JS Co. Management Commission v. Commission* [1984] ECR II-211, paras. 113-114.

¹² Case 14/79 *OWF*, n. 12 above, 552.

¹³ Case C-15/85 and 17/85 *Wider* [1986] ECR I-1061.

¹⁴ See Case 231/84 *Leib v. Italy*, n. 66 above, 1574.

¹⁵ See n. 11 above, 113-115.

¹⁶ A. Davies, 'Restitution or Damages: National Court or European Court?' (1975-6) 1 *J. Legal Stud.* 413; T.C. Hartley, 'Concurrent Liability in EEC Law: A Critical Review of the Cases' (1977) 2 *ELRev* 248; W. W. Twiss, 'Concurrent Liability of the Community and a Member State' (1983) 12 *ELRev* 181.

¹⁷ R. O'Keefe, 'Joint Liability of the Community and the Member States', in: Weir and McDermott (eds.), *supra*, n. 4 above, ch. 14.

¹⁸ Art. 240 EC provides that jurisdiction is conferred on the Court of Justice by this Treaty, disputes within the Community which shall not on this ground be excluded from the jurisdiction of the courts or tribunals of the Member States. Cases 125-125/77 *Archer v. Commission* and 282, (1978) ECR 1235; Case T-15/85 *Carls*, n. 12 above, para. 22.

When an action is brought before the ECJ under Article 235(2), it is clear that Community law is applied. An action brought against a Member State in the national courts will be governed by national law. This will, however, include Community law. The national courts are under an obligation to provide an effective remedy for the enforcement of directly effective Community provisions and the rights against the State in such actions must be no less favourable than those which exist in domestic matters.¹⁹

(b) SUBSTANTIVE ISSUES

Joint liability of the Community and the Member States can arise in different situations. Two will be explored here.

The first is where the Community has taken inadequate steps to prevent a breach of Community law by national authorities. This issue arose in the *Lambrake* case where the Court appeared to accept that, in principle, such an action was possible.²⁰ However, there are considerable obstacles in the path of any such action. It is, for example, doubtful whether the Commission has a duty to bring an action under Article 235 EC against a Member State which is in breach of Community law.²¹ The position may well be different where the Commission has adopted a more formal measure which approves or the legal national action, as in *Kampffmeyer*.

Cases 5, 7, and 11-14/83 *Kampffmeyer v. Commission* (1985) ECR I-145

The facts of the case are as follows. The applicant, a German company, was a member of a consortium which had been awarded a contract by the Commission to supply and install a gas turbine engine for a power station. The consortium was composed of the applicant and a number of other companies. The applicant was the sole supplier of the gas turbine engine. The consortium was required to deliver the engine to the power station by a certain date. The applicant failed to deliver the engine on time, and the consortium was forced to pay a penalty to the Commission. The applicant claimed that the Commission was liable for the loss of profits suffered by the consortium as a result of the delay. The Commission denied liability, claiming that the applicant was responsible for the delay. The case was referred to the ECJ for a ruling.

¹⁹ See *Wider*, n. 13 above, 141.

²⁰ Case 255/83 *Archer v. Commission* [1984] ECR I-211.

²¹ See Case 12.

²² Cases 125 and 126/77 *Archer v. Commission* [1978] ECR I-1235.

Commission applied Article 2272 of Regulation No 19 in circumstances which did not justify protective measures in order to restrict the free movement from the Community of a commodity. As it was aware of the existence of regulations for feasibility, it caused damage to the interests of importers who had acted in reliance on the information provided in accordance with Community rules. The Commission's conduct constituted a wrongful act or breach of capacity of giving rise to liability on the part of the Community.¹²

[The ECJ then considered the appropriate form of official dispute compensation should be decided.]

However, with regard to any injury suffered by the applicants belonging to the first and second categories above-mentioned, those applicants have claimed that Court that the injury alleged is the subject of two actions for damages, one against the Federal Republic of Germany before a German court and another against the Community before the ECJ. It is necessary to avoid the applicants being placed in a disadvantageous position in relation to the same damage by the different assessment of their legal position applying national rules of law. Before determining the damage for which the Community should be liable, it is necessary for the national courts to have the opportunity to give judgment on any claim on the part of the Federal Republic of Germany. This is for the purpose of determining the damage before the applicants have produced the evidence which is necessary to establish the damage which may be done independently of the evidence asked of the applicants in the first category to the effect that they have exhausted all possible means of recovery of the amount improperly paid by way of fine. Furthermore, all want as a result of that such recovery was possible, this fact might have consequences bearing upon the calculation of the damages concerning the second category. However, the decisive nature of the said evidence required does not prevent the applicants from producing the other evidence previously indicated in the meantime.

It is clear from the *Kampffmeyer* case that the Community can, therefore, be liable when it has wrongfully authorized a measure taken by a national body. The procedural aspect of the case has, however, been criticized. It has been argued that there was no reason to require the applicants to proceed initially in the German courts, and that the ECJ's rationale for doing so was based implicitly on the assumption that the German authorities were primarily liable, with the Community bearing only a residual liability.¹³

This criticism may be overstated, and it may be necessary to distinguish the claim for the return of the levies paid from the more general tort action. As regards the former, the idea that the primary liability rested with Germany may well have substance, given that it was Germany which imposed the levy and it was Germany to which the funds were paid. As regards the latter, there is no particular reason why the liability of the Community should be seen as somehow secondary to that of the Member State.

The second situation in which the issue of joint liability may arise is where the Member State applies unlawful Community legislation. This can arise, for example, in the context of the CAP, where Community regulations will often be applied by national intervention boards. The general rule is that it is the national intervention boards, and not the Commission, which are responsible for the application of the CAP, and that an action must normally be commenced in the national courts.

¹² See *Opinion* at 14 above.

[Note too remembering Art. 177 is now Art. 224.]

Kraggeman was a Belgian company which imported wine from Greece which was in the third outside the Community. It alleged that it suffered loss because of a countervailing charge imposed on the import of wine from Greece to Belgium. This charge was imposed by a Council regulation and was levied by the Belgian authorities.

THE ECJ

2. Disputes concerning the levying on individuals of the charges and levies referred to in this provision must be resolved, applying Community law, by the national authorities and following the practical laid down by the law of the Member State.

3. Issues, therefore, which are raised during a procedure as to the interpretation and validity of regulations establishing the Community's own resources must be brought before the national courts which have at their disposal the procedure under Article 177 of the Treaty in order to ensure the uniform application of Community law.

14. The applicant maintains further that by reason of the defendant's behaviour it has suffered exceptional damage as a result of loss of profit, whereas even if the defendant's loss is on existing contracts.

15. The question of the possible liability of the Community is, in the first place, to decide whether the defendant's behaviour is the cause of the damage in question.

16. It has also been found that, in the context of the relationship between the defendant and the Commission authority which has led to the damage in dispute, the latter question comes under the jurisdiction of the national courts.

17. Accordingly, at the present stage of the proceedings no compensation for pecuniary damage may be claimed.

The decision in *Kraggeman* can be criticized since the money levied went into the Community's funds. The mere fact that the sums were collected by national authorities should make no difference, given that these sums were imposed by the Community and were collected on behalf of the Community by the Member State.¹⁴ It does, however, appear to be the case that an action to recover such a charge must be commenced in the national courts and that this is also so where a trader is seeking payment of a sum to which he believes himself to be entitled under Community law.¹⁵ It has also been held that this principle applies even where the Commission has sent letters to the national board setting out its interpretation of the relevant regulations.¹⁶ The authorities of a Member State may, however, be able to recover from Community funds where they have paid for losses which are the responsibility of the Community.¹⁷

¹⁴ See J.C. Harding, *The Foundations of European Community Law* (Oxford, Oxford University Press, 1977), 490.

¹⁵ Case 2674 *Société du Grains Marais de Anvers*, Commission (1977), ECR 1531.

¹⁶ Case 1177 *Société de la Vigne de la Vallée de la Moselle*, Commission (1978), ECR 1199; Case 2174 *Compagnie Agricole SA - Commission* (1982) ECR 3233.

¹⁷ This may be possible in the context of the CAP. The basis for shifting the loss to the Community was Council Reg 731/73 (1973) ECR 1423, and was based up with the operation of the SACGF, for discussion see *Opinion* at 76 above, 268-271; L.J. Usher, *Legal Aspects of Agriculture in the European Community* (Oxford University Press, 1977), 126-128, 150-151.

There are, however, a number of situations in which it is possible to proceed against the Community directly. First, if the Commission sends a decision which is interpreted, in the context of the relevant legislation, as an instruction to the national agency to act in a particular manner, then an action may be brought against the Commission for damages.¹² Secondly, it is possible to proceed against the Community where no action could conceivably be brought against any national authority, and hence there would be no remedy available in the national courts. Thus, in *Defrenne*, an applicant sought damages before the ECJ by reason of the failure of the Commission to pass a regulation which would have granted the applicant a subsidy for exports to Italy when the traffic line was devalued. It was held that the action could proceed before the ECJ, since proceedings in the national court would not have helped the applicant even if the relevant Community rules had been declared illegal pursuant to Article 134, that amendment could not have required the national authorities to pay high monetary compensation amounts to the applicant, without the prior intervention of the Community legislation.¹³ Thirdly, it is possible to bring a claim in the ECJ where the substance of the claim is that the Community has committed a tortious wrong to the applicant. Thus in *Dale*¹⁴ the essence of the claim was that the Community authorities had introduced a levy without transitional provisions and had thereby caused loss to the applicant in breach of its legitimate expectations. This claim could be pursued in the ECJ since the wrong alleged was entirely directed towards the Community's behaviour, and not that of the Member State.

9. LIABILITY IN CONTRACT

The discussion thus far has focused on the ECJ's non-contractual liability under Article 138(2). The Community will obviously also make contracts,¹⁵ and Article 134(1) provides that contractual liability shall be governed by the law applicable to the contract in question.

The meaning of this phrase requires explanation. Contracts are often made between parties in different countries, and therefore it is necessary to determine which law should govern the contract. The answer will often be of considerable importance, since the contractual rules in different countries may differ significantly as regards matters such as the place of formation of the contract and the types of damages which are recoverable. The body of law dealing with this issue is known as the conflict of laws or private international law. Contracts often have choice-of-law clauses, specifying the law to be applied. The Commission always inserts such a clause in its contracts. It has been held that this clause prevails, and cannot be displaced by argument that the contract was more closely connected with a different country from that specified in the choice-of-law clause.¹⁶

It would of course be possible in principle for a choice-of-law clause to specify Community law as that applicable to the contract. Article 238(1), in contrast to Article 134(1), does not state that the Community is to develop a system of law by drawing on the relevant general

¹² Case 105/84 *Defrenne v. Commission* [1985] ECR 323.
¹³ Case 21/67 *Defrenne v. Commission* [1966] ECR 1259; Case T-10/74 *Maffei v. Council and Commission* [1975] ECR II-2488; Case T-10/74 *Carls*, n. 15 above, para. 21.
¹⁴ Case 125/78 *Dale v. Commission* [1979] ECR 1133; Case T-1/79 *Carls*, n. 15 above, para. 26. The principle in the *Defrenne* case, which allows an action to proceed in the ECJ, may not apply if the national authorities themselves were simply to blame for the loss caused, as in *Individuals v. Council*, n. 13 above, para. 43.

¹⁵ T. M. M. The Commission's liability to the European Community is limited, in French and Italian, to the amount of the loss, n. 15 above, para. 21.

¹⁶ Case T-12/71 *Commission v. CDE* [1972] ECR 3521.

principles common to the laws of the Member States. The implication of this may be that the Community is not to develop its own Community contract law. However, such a development may well be necessary in the future, as an adjunct of the expansion of Community competence into novel areas.

Such a development can be seen, albeit indirectly, in staff cases. The Court has distinguished contracts of employment of certain Community officials as public-law contracts, emphasising that the work performed was of a governmental nature, with the consequence that the contracts were governed by administrative law. The Court did not state that any system of national administrative law was to be applied.¹⁷

Even if the parties to a contract choose a particular legal system to govern the substance of their contractual obligations, this still leaves open the issue of which court will have jurisdiction to try the dispute. The ECJ is empowered by Article 134 EC, which states that the Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.

10. LIABILITY TO MAKE RESTITUTION

Most legal systems recognise some species of liability in restitution or quasi-contract, in addition to that based on contract or tort. The precise nature of this liability continues to divide academics, but the better view is that it is distinct from both contract and tort. Restitution is not based upon a promise, but rather on unjust enrichment by the defendant, hence its difference from contract. Liability in restitution does not normally require a wrongful act by the defendant, in the sense of fault, and the measure of recovery is normally determined by the extent of the defendant's unjust enrichment rather than the extent of the loss of the plaintiff, hence its difference from most forms of tort liability. A common restitutory claim arises from payments made to public bodies when they have no right to the money. This is of considerable importance in the ECJ.¹⁸ It can arise in two types of situation.

On the one hand, there can be cases where a Member State has, for example, imposed a levy which is illegal under EC law, as exemplified by *Van Gend en Loos*. The matter will be referred to the national court, once the ECJ has found that the levy was in breach of Community law. It will be for the national court to devise a remedy to efface the Community right, and this will often take the form of the return of the sum which has been paid over to the national authority.¹⁹

On the other hand, there may be instances under, for example, the CAP in which money is paid from Community funds pursuant to a Community law obligation, where there may be no legal obligation to pay the sum. The Community Courts have held that unjust enrichment is a general principle of Community law,²⁰ and that proof of some independent unlawful act by the defendant is not required.²¹ Thus where a fine imposed for breach of the competition rules

¹⁷ Case 135 *Kippel v. Common Assembly* [1955] ECR 151; Case 43, 45, and 1453 *Van Laeken v. Commission* [1957] ECR 481.

¹⁸ A. J. (1982) *Restitution and European Community Law* (Manchester, 1982); R. W. (1982) *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EC* (Hart Publishing), ch. 4-5.

¹⁹ See Ch. 4.

²⁰ Case C-155/79 *Green v. Commission* [1980] ECR I-3845, para. 14; Case T-10/79 *Carls v. Council* [1980] ECR II-2487, para. 55; Case T-7/74 *Maffei v. Council* [1975] ECR II-2489, para. 21; Case T-12/73 *Individuals v. Commission* [1974] ECR II-1557, para. 137-138.

²¹ Case T-312/73 *Individuals v. Commission*, para. 31-32.

is annulled there is an obligation to return the money plus interest.⁴⁰ The ECJ has applied restitutionary principles in cases where there has been unjust enrichment by an individual against the Community.⁴¹ It is clearly correct in principle that a remedy should be available in favour of an individual, where the Community has been unjustly enriched at his or her expense, as where the EC has imposed an unlawful charge. If a levy imposed by a Member State which is unlawful because it is in breach of the Treaty is recoverable, so too should be an illegal charge levied by the Community. The matter is, however, complicated in two different ways.

First, there is case law of the ECJ, outlined above, which has insisted that in many such instances, the action should be commenced in the national court against the national collecting agency, even where the funds are treated as Community funds.⁴²

Secondly, there is the difficulty of locating restitutionary claims within the Treaty. While the wording of Article 245(2), which requires the Community to 'make good any damage caused' by its institutions, does not fit perfectly with the idea of a restitutionary action, it is however framed in terms of 'non-contractual liability', and this is clearly wide enough to cover restitutionary relief. Moreover, if the ECJ were to find that it had no jurisdiction over such actions, then Article 240 would mean that relief could be sought in an action against the Community in national courts. It is doubtful whether the ECJ would wish to be in a position where it had 'no control' over the development of appropriate restitutionary principles governing Community liability.

11. CONCLUSION

- i. The ECJ's jurisprudence under Article 245 has, in the past, been criticised for being overly restrictive. The case law was, until recently, unclear about the precise criteria for the application of the *Scheppenstest*.
- ii. It is now clear that the crucial issue is the discretionary or non-discretionary nature of the act. Discretionary acts will be subject to the *Scheppenstest* test. This requires proof of a breach of a superior rule of law for the protection of the individual, the breach must be sufficiently serious, there must be causation and damage. It is clear that the factors laid down in the case law on state liability in damages will be directly relevant when deciding whether there has been a sufficiently serious breach under Article 245.
- iii. Where the challenged act is not discretionary the traditional test for liability was proof of illegality, causation, and damage. The more modern case law continues to distinguish between liability for discretionary and non-discretionary acts, but does so from within the framework of the sufficiently serious breach test where the Community institution has considerably reduced or no discretion, the mere infringement of Community law may be sufficient to establish the existence of the sufficiently serious breach. It would be regrettable if this shift renders it more difficult to recover than hitherto.
- iv. The absence of any damages actions in relation to Third Pillar measures is regrettable, more especially because of the increased volume of legislation and the time that is now being wasted under this Pillar.

⁴⁰ Case T-17/93 *Carva v. 12* above, paras. 33–35.

⁴¹ See, e.g., Case 105/83 *McSweeney v. EEC* (1984) ECR II-3; Case 1/83 *McSweeney v. Commission* (1983) ECR 447.

⁴² See 233–240.

12. FURTHER READING

(a) Books

Hendrick, T., and McDonnell, A. (eds.), *The Action for Damages in Community Law* (Kluwer, 1997).

Schermers, H.G., Hendrick, T., and Mead, J. (eds.), *The Non-Contractual Liability of the European Communities* (Martinus Nijhoff, 1988).

(b) Articles

Hurdling, C., 'The Choice of Court Problem in Cases of Non-Contractual Liability under EEC Law' (1975) 16 *CMLERev* 335.

Harley, D.C., 'Concurrent Liability in EEC Law: A Critical Review of the Cases' (1977) 2 *ELRev* 245.

Hutton, C., 'The Role of Discretion in EC law on Non-Contractual Liability' (2005) 42 *CMLERev* 677.

Glover, R., 'Enforcing Community Rights in the English Courts' (1987) 52 *MLR* 881.

Griffiths, T., 'Liability for Breach of Community Law: Growing Up and Maturing Down' (1991) 118 *CMLERev* 301.

Wils, W., 'Concurrent Liability of the Community and a Member State' (1992) 17 *ELRev* 191.

IX Review of compliance by Member States - Action for infringement

1. The function and operation of the infringement procedure
2. Types of breach by Member States
3. Admissibility of the action
4. State defenses in enforcement proceedings
5. Effect of judgments against Member States

Mandatory Reading

- Daniël Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 315-349.
P. Craig, G. De Burca, *EU Law, Text, Cases and Materials*, 4th edition, Oxford University Press, 2008
Chapter 12.
Koen Lenaerts, Dirk Arts, Ignace Masch's (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 5.
A. Arnulf, *The European Union and its Court of Justice*, Oxford, 2006 Chapter 2.

- M. van Geew, 'Bridging the Unbridgeable: Community and National Tort Law After *Pavlov* and *Brasserie*' [1996] 45 *International and Comparative Law Quarterly* 597
- M.-C. Gauger, 'Accession and the Construction of a European Administrative Law tradition' (2007) 32 *European Law Review* 157
- K. Lenaerts and T. Courtillot, 'Of Birds and Bridges: The Role of Primary in Speaking Norms of EU Law' [2008] 33 *European Law Review* 237
- S. Prchal, *Directives in EC Law* (2nd edn, Oxford, Oxford University Press, 2005)
- J. Tölberg, 'Supranational Influence in EU Enforcement: the ECJ and the Principle of State Liability' (2000) 1 *Journal of European Public Policy* 164

8

Infringement Proceedings

CONTENTS

1 Introduction	(ii) Reasoned Opinion and the period for national compliance
2 The Different Roles of Infringement Proceedings	5 Administration of Infringement Proceedings
(i) Article 258 TFEU and the rule of law	(i) The Commission's discretion
(ii) Article 258 TFEU as a public policy instrument	(ii) Complaints and Article 258 TFEU
(iii) Article 258 TFEU as a public law arena	6 Sanctions
3 Scope of Member State Responsibility	(i) Article 258 TFEU and the Lisbon reforms
(i) Acts and omissions of all state agencies	(ii) Types of sanction under Article 258 TFEU
(ii) Accountability of state actors	(iii) Level of fines imposed
4 The Different Stages of Infringement Proceedings	Further reading
(i) Informal, other	
(ii) Letter of formal notice and Member State observations	

1 INTRODUCTION

This chapter considers the infringement proceedings that the Commission may bring against Member States for failure by the latter to comply with EU law. It is organised as follows.

Section 2 considers the main features of the infringement proceedings set out in Articles 258 to 260 TFEU. The central provision is Article 258 TFEU and it allows the Commission to take the Member State to the Court of Justice and to obtain a ruling that it has failed to comply with EU law. The roles of such proceedings are threefold: to secure the rule of EU law; as a public policy instrument to contribute to the effective functioning of EU policies; and as a public law arena, in which the different interests of the EU institutions, Member States, complainants and

EU citizens can be mediated. All three roles are important and there is a danger in overemphasising any one.

Section 3 considers the scope of Member States' responsibilities under Article 259 TFEU. Actions can be brought only against the state, but they can be brought for the failure of any state agency, including courts and local and regional government, even if it is constitutionally independent of the central government which is, in practice, the body against whom the action is taken. The state is also responsible not just for legal instruments that conflict with EU law but also administrative practices that conflict with EU law. These usually have to be general and consistent in nature to attract liability. The state is finally under a duty to secure and police the effective functioning of EU law, and will be held liable for a failure to do so.

Section 4 considers the stages of the Article 258 TFEU procedure. This will be begun following either a Commission investigation or, more often, a complaint by a third party. The procedure is a seven stage one, designed to give the Member State plenty of time to comply and plenty of scope for submitting observations on the Commission's complaint. Typically, it takes close to two years to complete. However, the overwhelming majority of cases are settled at the first stage where the Commission sends an informal letter to the Member State concerned. In addition, there are now moves to ascertain, where the procedure derives from a complaint, whether the complaint can be mediated between the complainant and the Member State without the Commission needing to be involved.

Section 5 considers the responsibilities and discretion of the Commission in the process. The Commission has complete freedom to decide whether to start the proceedings or to cease them. This has raised concerns about transparency, insufficiently rigorous prosecution by the Commission of EU law and, above all, exclusion of the complainant from the process. Following repeated criticism by the European Ombudsman, the Commission adopted a Communication in 2006, which grants the complainant some modest procedural guarantees. Centrally, there is a commitment to keep the complainant informed about the process and to reach a decision about whether to close a file or to instigate proceedings within twelve months.

Section 6 considers the sanctions that may be imposed. Following the Lisbon Treaty, the Court of Justice may impose a fine on the Member State under Article 256 TFEU where the proceedings concern a failure by the Member State to communicate national transposition of a Directive. For all other infringements, a second proceeding under Article 260 TFEU must be instigated. The Court may impose two types of fine. The lump sum penalises the state for non-compliance with the original judgment given under Article 256 TFEU. The penalty payment is calculated at a daily rate and is to induce the state to comply with the subsequent judgment given under Article 260 TFEU. The size of the fine is determined by the duration of the infringement, its seriousness and the capacity of the state to pay. Important guidelines were set out in a 2005 Commission Communication, although this does not bind the Court. In all cases, both the Commission and the Court will additionally look at what is needed to secure compliance and the overall proportionality of the sanction.

2 THE DIFFERENT ROLES OF INFRINGEMENT PROCEEDINGS

The enforcement of EU law through the assertion of individual rights before national courts discussed in the previous chapter is an important and distinctive feature of EU law. However, the enforcement of the EU legal order here is only seen as a byproduct of the assertion of

individual rights. The primary focus is to secure individual redress and the question of enforcement is tailored around this. The judgment might thus address only some features of the illegality. The status of the Court of Justice might mean that its rulings are not binding or even persuasive for other courts in that state, and they will certainly not bind courts in other Member States. Most importantly, the EU law in question must give rise to rights and somebody must be willing to litigate those rights. If it does not, there can be no enforcement. As we saw, only a very small proportion of EU law is litigated regularly in national courts.¹

With that in mind, it is worth turning our attention to the centralised procedures that exist for the enforcement of EU law against the Member States: the bodies that have the most extensive responsibilities for the administration of EU law in the Union. The principal procedures are set out in Article 258 TFEU.

Article 258 TFEU

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

¹ If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

There are a number of other provisions which allow legal proceedings to be brought against Member States for breaches of EU law. Article 259 TFEU allows Member States to take other Member States before the Court of Justice for failure to comply with EU law. Its use has been rare, Member States preferring to leave it to the Commission to take action rather than to institute legal proceedings themselves.² Article 106(2) TFEU allows legal proceedings to be brought against Member States for breach of the EU law provisions on state aids. However, it is Article 258 TFEU which plays the central role. At the end of 2007, the Commission was looking at 1,400 cases under it.³ In 2009 alone, the Commission filed 207 cases. Except for Bulgaria and Romania, actions were brought in that year against all states other than Denmark and Latvia.⁴ The actions also cover all sectors of EU law. In its 2008 report, the Commission reported that it had to police the Treaties, 10 000 Regulations and over 1 700 Directives under the procedure. It was active in most sectors of EU activity:

There continues to be a significant complaints and infringements case-load in environment, internal market, taxation and customs union, energy, transport and employment, social affairs and equal opportunities as well as health and consumer affairs and justice, freedom and security, with a rapidly increasing body of legislation of high interest to citizens.⁵

¹ See p. 157.

² Examples are rare. See Case 14/70 *France v United Kingdom* [1970] ECR 1203; Case C-300/93 *Adriano v Spain* [1995] ECR II-1213; Case C-450/04 *Spain v United Kingdom* [2006] ECR I-7917.

³ European Commission, 25th Annual Report from the Commission on the Administration of Community Law, COM (2008) 719, 3.

⁴ Court of Justice, Annual Report for 2004, Luxembourg, Court of Justice, 2006, 85–6. Bulgaria and Romania having only just acceded to the Union, there had not yet been time to consider whether there had been any infringements by them.

⁵ See above n.3, 2–3.

The use of Article 259 TFEU is wide-ranging and significant but its place within the architecture of EU law is far from settled. There are a number of different perspectives on the role it serves within the EU institutional settlement. Before going on to consider its legal dynamics, it is worth considering these perspectives not only for their own sake but because they shape analysis of the minutiae of the procedures themselves.

(i) Article 259 TFEU and the rule of law

The first view of Article 259 TFEU is that it is the procedure through which the Commission exercises its role as guardian of the Treaties. It is a policing procedure to secure the rule of EU law within the European Union. This is the view expressed in much legal scholarship.⁴ As we shall see in the judgment below, it is also the view of the Court of Justice. In *Commission v Germany*, the government of Lower Saxony concluded a contract for the collection of waste water which broke EU law on public procurement. The German government admitted it violated EU law but stated that the contract could not be terminated without payment of substantial compensation to the contractor. The Commission brought the infringement before the Court. The German government argued that it was inadmissible as there was no good reason for the Commission's action. It had admitted its guilt and the payment of compensation was disproportionately large when put next to the benefits of securing the EU law in question.⁵

Joined Cases C-26/91 and C-28/91 *Commission v Germany* [1993] ECR I-0609 (P).

22. ...in exercising its powers under Article 259 TFEU, the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end.
23. Since its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations ...
41. The Court has already held that it is responsible for determining whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognises that any individuals who have suffered damage because of it have a right to compensation ...
42. Since the finding of failure by a Member State to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom ... the Federal Republic of Germany may not rely on the fact that no third party has suffered damage ...
44. In the light of the foregoing, the actions brought by the Commission must be held to be admissible.

⁴ A. E. S. The Enforcement Procedure of Article 259 EEC: *Commission Decision* [1978] 4 ECLR 640.
⁵ A. G. O'Connell and B. W. H. 'Enforcement Action under Article 158 and 159 EEC' [1967] 14 ECLR 328. See a different and more recent view within the school of A. G. O'Connell, 'The Administrative Separation and Enforcement of EU Law, Powers, Procedures and Costs' (Oxford and Portland, 1999) especially 35-38.
⁶ For a useful discussion see Case C-75/92 *Commission v Italy*, Judgment of 10 September 1993.

The securing of the rule of law is an important function. As was stated above, Article 259 TFEU is the only institutional mechanism that gives practical legal support to many fields of EU law. It also has the advantage that it is, potentially at least, quite an egalitarian mechanism. The Commission, not private parties, bears the cost of litigation. It can therefore act for those who do not have resources or do not have standing, and also in cases where particularly large numbers of legal interests are adversely affected. There are, however, reservations to adopting such a view wholeheartedly.

First, conceiving the procedure in these terms is overly dogmatic. It can be excessively doctrinaire in individual cases. *Commission v Germany* is a case in point. The German government argued that there was no practical way for them to remedy the contract: it would violate individuals' property rights; it would disrupt construction of the waste water system as everything would have to be restarted; it would lead to the public authorities having to pay large amounts of compensation. The German government did not implement the judgment. It was then successfully prosecuted by the Commission under Article 260 TFEU and, finally, rescinded the contract.⁶ The problems still remained, however.

There is a second danger. Protecting the rule of law is valuable. It is not, however, an exclusive value. There are other values that may sometimes have to be weighed against it, particularly as in most cases we are not talking here about 'law' or 'the law' but rather 'EU law' or 'national law'. This is not just an ethical question but also a problem of mischaracterising the procedure. As *Commission v Germany* indicates, the Commission has a discretion whether or not to prosecute. The presence of that discretion indicates that other values and considerations can be taken into account by the Commission. As E. S. has noted, the mission of Article 259 TFEU is to consider whether 'the observed level of non-compliance is considered as a serious problem for a community'.⁷ The rule of law analysis treats this process as a black box, and this is questionable given its centrality in the process.

Thirdly, the analysis misrepresents the law. Article 259 TFEU does not permit the Commission to seek to ensure 100 per cent compliance with EU law 100 per cent of the time. There seems to be a threshold of illegality where the breach must be of a certain gravity before proceedings can be launched. The Court of Justice has been far from clear on the level of this threshold. In a number of cases, it has indicated that the Commission may initiate proceedings against a Member State for violation of EU law even in a specific case.⁸ The cases in which this has happened have all concerned residence or expulsion of non-nationals,⁹ or public procurement.¹⁰ The former often have particular civil liberties concerns, while the latter involve significant purchases whose tenders are necessarily very specific and in which it is difficult to look for a general practice. More often, the Court will find that the Commission may only bring an action if either the national law conflicts with EU law or there is a general and consistent administrative practice breaching EU law.

⁴ Case C-103/94 *Commission v Germany* [2007] ECR I-4153.

⁵ T. E. S. 'Non-Compliance in the European Union: A Study of Statistical Analysis' (2002) 3 ECLR 307, 318.

⁶ Case C-441/92 *Commission v Germany* [2004] ECR I-0046; Case C-197/93 *Commission v Italy* [2005] ECR I-07511.

⁷ See in addition to the cases cited above, T. E. S. 'Non-Compliance in the European Union: A Study' (2002) ECLR 307, 318.

⁸ Joined Cases C-26/91 and C-28/91 *Commission v Germany* [1993] ECR I-0609 is an example of the latter category.

In *Commission v Greece*, the Commission brought an action against Greece on the ground that its hospitals, in their tendering procedures for medical devices, were excluding devices that met EU law and standards. The Greek government claimed that it had transposed the relevant Directives into EU law and that it had sent a circular to Greek hospitals reminding them of their obligations under EU law. The Court nevertheless found a breach of EU law.

Case C-489/06 *Commission v Greece*, Judgment of 19 March 2008

46. ... even if the applicable national legislation itself complies with Community law, a failure to fulfil obligations may arise due to the existence of an administrative practice which infringes that law ...
48. In order for a failure to fulfil obligations to be found on the basis of the administrative practice followed in a Member State, the Court has held that the failure to fulfil obligations can be established only by means of sufficiently documented and cogent proof of the alleged practice; that administrative practice must be, to some degree, of a consistent and general nature and, in order to find that there has been a general and consistent practice the Commission may not rely on any presumption ...
49. It must be pointed out that, according to the information in the file before the Court, the products in question are products fulfilling the requirements of the European Pharmacopoeia technical standard and must, by their very nature, be purchased repeatedly and regularly by hospitals and, consequently, with an established degree of regularity.
50. None the less, at least 16 hospitals contracting authorities rejected the medical devices in question during tendering procedures, including the hospitals of Kanioti, Messolonghi, Agios Nikolaos of Crete, Vasilakia-Paraskevi of Heraklion, Arklio, Agios Savvas, Opi, Agios, Korgialio-Skoufa, Serres, Nafplio of Kalamata, Nauplio, P. G.A. Evrotas, Sparta, Paradedion of Tripoli, Hera Veroforos and Asclepio Voreia.
51. The list of the hospitals mentioned by the Commission shows a variety in the size of the establishments, since some of the largest Greek hospitals such as Agios Savvas, Nafplio and Asclepio Voreia are referred to, as well as medium-sized hospitals such as Agios, Agios Nikolaos of Crete or Sparta.
52. Moreover, that list refers to establishments with a geographical coverage encompassing the entire country with, in particular, hospitals in Athens, in the Peloponnese and on Crete, and concerns also a wide field of competence, including general hospitals, a children's hospital, a hospital treating cancer-related illnesses and a maternity hospital.
53. Therefore, it can be deduced that the administrative practice of the contracting authorities in question ... demonstrates a certain degree of consistency and generality.

(iv) Article 258 TFEU as a public policy instrument

It has been suggested that in determining whether an infringement can be pursued, regard will have to be had to the duration, geographical spread and number of infringements.¹⁴ As an overall statement, this might be right. Looking at the case law in the round, there seems to be policy sensitivity to whether a case can be pursued. It is not simply that within certain

¹⁴ J. Howarth, 'A New Dawn for Compliance Enforcement under Articles 258 and 259: Control and Persuasion (GAP) Infringements, Lumpy Sums and Penalty Payments' (2006) 41 *CMR* 31, 38. This article provides an earliest analysis of the development of this line of reasoning.

systems a single breach will be sufficient whilst in others it will not. Different approaches are taken within individual sectors. Both *Commission v Germany* and *Commission v Greece* concerned public procurement but the latter looked for a general and consistent practice whereas the former did not. It is possible that this had to do with the size and scale of the tender in the first instance.

This suggests a second function to Article 258 TFEU: that of being a public policy tool. Such a conception sees its dominant role as being to secure the effective functioning of EU policies. To be sure, realising the rule of law is part of this but only insofar as it is instrumental to bringing about a successful policy.¹⁵

On such a view, there would be a graduated view to enforcement. If a Member State's laws fail to comply formally with EU law, then there is no hope of realising the policy. There must always be the possibility of prosecution, as no policy can be realised if not even the formal norms are in place. In other fields such as human rights, prosecution may be desirable for individual breaches as these are not measured simply in terms of general compliance but individual violations are seen as, *per se*, egregious by virtue of the importance of these for the human condition. For other matters, prosecution only takes place where the alleged illegal behaviour seriously impedes the functioning of the policy. The Commission set out such a prioritisation in 2002.

European Commission, *Better Monitoring of the Application of Community Law*, COM(2002)725 final/4, 11–12

The Commission, in its White Paper on Governance,¹⁶ announced that it would conduct surveillance and bring proceedings against infringements effectively and fairly by applying priority criteria reflecting the seriousness of the potential or known failure to comply with the legislation. Fitting in the framework matched out by the White Paper, the criteria are based on accumulated experience. They rank the following infringements as serious:

- infringements that undermine the foundations of the rule of law
- breaches of the principles of the primacy and uniform application of Community law (systemic infringements that impact the procedure for preliminary rulings by the Court of Justice or prevent the national courts from acknowledging the primacy of Community law, or provide for redress procedures in national law which conflict with Community law as interpreted by the Court of Justice)
- violations of the human rights or fundamental freedoms enshrined in substantive Community law (e.g. interference with the exercise by European citizens of their right to vote, refusal of access to employment or social welfare rights conferred by Community law, threats to human health and damage to the environment with implications for human health)
- serious damage to the Community's financial interests (fraud with implications for the Community budget or violation of Community law in relation to a project receiving financial support from the Community budget)

¹⁵ On this discussion see M. Wardlaw, 'Non-compliance and the Commission's Role in Enforcement' (2005) 3 *JEPF* 1; M. Smith, *Control, Enforcement, Legitimacy and Good Governance in the EU* (Oxford, Routledge, 2005) 10–15, 114–15.

¹⁶ On this see pp. 352–3.

- (b) infringements that undermine the smooth functioning of the Community legal system:¹⁵
- Action in violation of an exclusive European Union power in an area such as the common commercial policy; serious obstruction of the implementation of a common policy;
 - Repetition of an infringement in the same Member State within a given period or in relation to the same piece of Community legislation; these are mainly cases of systematic incorrect application connected by a series of separate complaints by individuals;
 - Cross-border infringements, where this aspect makes it more complicated for European citizens to assert their rights;
 - Failure to comply with a judgment given by the Court of Justice against a Member State on an application from the Commission for 'State to comply with Community law'.

(c) infringements consisting in the failure to transpose or the incorrect transposal of directives which can in reality deprive large segments of the public of access to Community law and actually are a common source of infringements.

The above criteria will help the Commission to make the best use of the various mechanisms designed to restore a situation in line with the Treaties as rapidly as possible, bearing in mind that the Commission's purpose in monitoring the application of Community law and bringing proceedings against infringements is not to 'punish' a Member State, but to ensure that Community law is applied correctly.

In practice, where it is found that an infringement meets these priority criteria, infringement proceedings will be commenced immediately unless the situation can be remedied more rapidly by some other means. Other cases – of lower priority – will be handled on the basis of complementary mechanisms¹⁶ ... which does not rule out the possibility of bringing proceedings for failure to fulfil an obligation. This approach will meet a concern for efficiency – more rapid and effective intervention – including where proceedings for failure to fulfil an obligation would not be the most appropriate mechanism – while ensuring equal treatment for the Member States and for the different channels for dealing with infringements. Complaints, cases identified by the Commission itself, cases referred by the European Parliament or the European Ombudsman.

These criteria indicate a willingness to prioritise cases according to policy needs but they have not been interpreted too strictly. Protection of the environment and public health are mentioned as top priorities in the communication. However, this was not strictly followed. In the years following the communication, environment was the sector in which the Commission examined most cases, followed by internal market, energy, tax and employment.¹⁷

If Article 258 TFEU is used as a policy tool, however, that means that it cannot just be deployed strategically across sectors or against states, but it also has to be receptive to national capacities to realise a policy. Pragmatism is the order of the day, as its role is that of a regulatory tool deployed as part of the policy to secure the best possible results for the policy. Its use takes place against a context where it is not possible in any Member State to realise perfect application of EU law on the ground on a day-to-day basis.¹⁸ This derives from many

things, not least administrative resources and the general law-abidingness of the society. Public policy specialists have therefore noted in detailed and wide-ranging case studies that the capacity of states to implement EU law falls into a number of categories.¹⁹

J. Falkner and D. Trépo, *Three Worlds of Compliance or Four? The EU-15 Compared to New Member States* [2008] 45 *Journal of Common Market Studies* 290, 295–7, 308–9

In the world of law observance, the compliance goal typically overrides domestic concerns. Even if there are conflicting national policy styles, interests or ideologies, transposition of EU Directives is usually both in time and correct. This is supported by a 'compliance culture' in the sense of an 'issue-specific shared interpretive scheme ... a set of cognitive rules and recipes' ... Application and enforcement of the national implementation laws is also characteristically successful, as the transposition laws tend to be well considered and well adapted to the specific circumstances and enforcement agencies as well as court systems are generally well equipped and equipped with sufficient resources to fulfil their tasks. Non-compliance, by contrast, typically occurs only rarely and not without a fundamental domestic tradition or basic regulatory ideologies being at stake. In addition, instances of non-compliance tend to be remedied rather quickly ...

Obeying EU rules is at best one goal among many in the world of domestic politics. Domestic concerns frequently prevail if there is a conflict of interests, and each single act of transposing an EU Directive tends to support on the basis of a first cost-benefit analysis. Transposition is likely to be timely and correct where no domestic concerns contraindicate over the fragile aspiration to comply. In cases of a manifest clash between EU requirements and domestic interest politics, non-compliance is the likely outcome. While in the countries belonging to the world of law observance breaking EU law would not be a socially acceptable state of affairs, it is much less of a problem in one of the countries in this second category. At times, their politicians or major interest groups even openly call for disobedience with European duties – an appeal that is not met with much serious condemnation in these countries. Since administrations and judiciaries generally work effectively, application and enforcement of transposition laws are not a major problem in this world – the main obstacle to compliance is political resistance at the transposition stage ...

In the countries forming the world of transposition neglect, compliance with EU law is not a goal in itself. Those domestic actors who call for more obedience thus have even less of a sound cultural basis for doing so than in the world of domestic politics. At least as long as there is no powerful action by supranational actors, transposition obligations are often not recognised at all in these 'neglecting' countries. A posture of 'national amnesia' in the sense that 'indigenous standards are typically expected to be superior' may support this, as may administrative inefficiency. In these cases, the typical reaction to an EU-related implementation duty is inactivity. After an intervention by the European Commission, the transposition process may finally be initiated and may even proceed rather swiftly. The result, however, is often correct only on the surface, where literal translation of EU Directives takes place at the expense of careful adaptation to domestic conditions. For example, shortcomings in enforcement and application are a frequent phenomenon. Potential deficiencies of this type, however, do not belong to the defining characteristics of the world of transposition neglect ...

¹⁵ See pp. 312–4.

¹⁶ See, e.g. n. 19, 320–31.

¹⁷ For a case study of British, German, Spanish and Dutch applications for non-application of Directive 91/155/EEC, the Safety Data Sheet Directive, see E. Verwilt, *Three States, One System Opening the "Black Box" of EU Law in Action* (2007) 30 *WUf* 50.

¹⁹ Most extensively see E. Falkner et al., *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press, 2015).

...we suggest a third category: the 'work of dead letters'. Countries belonging to this cluster of anthropology may transpose EU Directives in a consistent manner, depending on the prevalent political constellation among domestic actors, but then there is non-compliance at the later stage of monitoring and enforcement. In this group of countries, what is written on the statute books simply does not, because it fails in practice. Shortcomings in the court system, the labour inspection and finally also in civil society systems are among the detrimental factors accounting for this.

Public policy analysis of Article 258 TFEU would have to be sensitive to the domestic environment with its deployment, mindful that it can only stimulate limited change and that use in the wrong circumstances could be counter-productive, leading to domestic counter-reactions or impoverishment of resources.²² There is much in such approaches but there are difficulties with overemphasising this dimension. First, it is not clear whether an overcharacterisation of Article 258 TFEU is not taking place here. This is a relatively crude instrument in regulatory terms which exists by law we shall see later, with the national government being faced under Article 260 TFEU if there is no compliance. To argue for its regulatory sensitivity is perhaps to argue for something that it is not. Secondly, as with all public policy instruments, there are concerns about things getting lost along the way. Regard to overarching Commission priorities can lead to local concerns which rely on Article 258 TFEU for protection getting lost. Finally, there is the law of perverse consequences. If one looks at the models of compliance suggested by Fahnstiel and Treib, the lesson would be to punish the law-abiding states more harshly through Article 258 TFEU as they are the ones who will respond best to it. By contrast, the fourth class should be left alone, as no amount of judgments will remedy the structural flaws of poor court systems or weak labour inspections. Yet, it is not clear that Article 258 TFEU is there to reinforce a world in which states are categorised into those seeking perfection, on the one hand, and those damned by their lack of resources, on the other.

(iii) Article 258 TFEU as a public law arena

Concerns about the dogmatism of the rule of law approach and the instrumentalism of the public policy approach have led to a third conception of the Article 258 TFEU procedure. In this, Article 258 TFEU is characterised not simply as single-faceted legal provision, but also as a unique space of interaction for a multitude of actors.²³ The procedure is a legal procedure involving national governments and the Commission. As we shall see, it involves other EU institutions, notably the Ombudsman, and EU subjects, be they complainants or those affected by national compliance or non-compliance with EU law. It is thus both a forum for interaction between the institutions and a forum for interaction between institutions and citizens. It is also

a procedure that involves the exercise of considerable administrative power. Successful Commission proceedings can change the quality of people's lives significantly.²⁴

All these dimensions mean that there is a politics to Article 258 TFEU that must be regulated and constrained through public law, and that the need for public law constraints is as pressing as with any powerful administrative process.

Such constraints would focus, first, on public participation in the process itself and the public accountability of the Commission for its action or inaction.²⁵ This is discussed in more detail when we examine the responsibilities of the Commission under the procedure themselves. As we shall see, whilst there are some constraints to enable some participation and accountability, there is a consensus amongst analysts that these are weak.

The constraints would focus, secondly, on the constraint of administrative power. US scholars have suggested that if the American experience is anything to go by, a central constraint on competence creep and the misuse of powers are what they describe as techniques of process. In the United States, the key ingredient in the protection of the various states against the legislative powers of the national government is the extreme difficulty of the process of passing federal law. Obtaining the agreement of the President and of sufficient numbers of Senators and Congressmen is, most of the time, far from straightforward. In the European Union, they suggest, the most effective check on excessive law-making may well lie in the fact that the vast bulk of EU law is administered, not by a pan-European executive, but by national and regional authorities within Member States.²⁶

In such a view, the Article 258 TFEU procedure is Janus-faced. It can be conceived as a threat to local autonomy and democracy by being the remorseless, insensitive instrument that enforces unjust, intrusive or unnecessary EU laws. Alternatively, it can be conceived as a political arena, where the implications of an EU law for a Member State are considered in the light of the local, regional or national implications that have come to the fore. It is one of the few places where national democracy can meet Union democracy, namely that German or Slovenian citizens can discuss how an EU measure affects Germany or Slovenia, respectively. To be sure, it may be argued that this also takes place when a state transposes a Directive. In the latter case, however, the norms are already set. There is a debate about how to manoeuvre around within them. The type of debate is different in the former context. It is the discussion about how to mitigate the rigour of the norms, possibly the case for selective non-enforcement of some of them, which cause most difficulties. The other feature of such a debate at this stage is that it is a debate *ex post facto*, where the implications of an EU law on the ground are now more imminent and local concerns more focused.

This role for Article 258 TFEU is not yet formalised. However, the question of whether the rigour of EU law could be mitigated for non-legal reasons was addressed in *Commission v Poland*. The Commission brought an action against a Polish law, the Law on Seeds, which, in effect, prohibited the marketing of genetically modified seeds in Poland. This violated Directive 2002/53/EC on the deliberate release into the environment of genetically modified organisms

²² A study of environmental and social policy use makes it Germany focused, but subsequent proceedings could stimulate compliance by placing the national administration and mobilising social groups in favour of change. It was not always effective and could stimulate a backlash, however. D. Fahnstiel, 'The European Court of Justice as an Agent of Europeanisation? Monitoring Compliance with EU Law' (2007) 34 *CEPS* 443.

²³ See, above, n. 14, 17.

²⁴ Pohl, 35–37 and ch. 7. Such a book is conceived as a study of the process and the response to the process.

²⁵ The starting point for such an analysis is R. Favelle, 'Sagepub Ethics: Citizen Access and the Global Activities in Commission Enforcement' (2000) 5 *EUJ* 4.

²⁶ E. Young, 'Protecting Member State Autonomy in the European Union: Some Preliminary Thoughts on American Federalism' (2003) 77 *New York University Law Review* 1612, 1718; O. Genschel, 'Taking Solidarity Seriously: Federalism in the European Community and the United States' (2000) 34 *Calwest. L.J.* 311, 353.

which allowed the marketing of those where they had been authorised by EU authorities. The Polish government justified its non-compliance by challenging both the ethics of genetically modified food and by arguing that their release violated important tenets of Catholic thought.

Case C-165/05 Commission v Poland, Judgment of 16 July 2006

43. In its defence and its rejoinder, the Republic of Poland concentrated its arguments wholly on the ethical or religious considerations on which the contested national provisions are based.
46. However, a Member State cannot rely in that manner on the views of a section of public opinion in order unlawfully to challenge a harmonising measure adopted by the Community institutions. As the Court observed in a case specifically concerning Directive 2002/46, a Member State may not plead difficulties of implementation which emerge at the stage when a Community measure is put into effect, such as difficulties relating to opposition on the part of certain individuals to justify a failure to comply with obligations and time-limits laid down by Community law.
47. Secondly, and as regards the more specifically religious or ethical arguments put forward by the Republic of Poland for the first time in the defence and rejoinder submitted to the Court, it must be held that that Member State has failed to establish that the contested national provisions were in fact adopted on the basis of such considerations.
48. The Republic of Poland essentially referred to a sort of general presumption according to which it can be taken as a surprise that such provisions were adopted in the present case. First, the Republic of Poland relies on the fact that it is well known that Polish society attaches great importance to Christian and Roman Catholic values. Secondly, it states that the political parties with a majority in the Polish Parliament at the time when the contested national provisions were adopted specifically called for adherence to such values. In those circumstances, according to that Member State, it is reasonable to take the view that the Members of Parliament, who do not, as a general rule, have scientific training, are more likely to be influenced by the religious or ethical issues which inspire their political action, rather than by other considerations. In particular, those faced to the complex scientific assessments relating to the protection of the environment or of human health.
49. However, such considerations are not sufficient to establish that the adoption of the contested national provision was in fact inspired by the ethical and religious considerations described in the defence and the rejoinder, especially since the Republic of Poland had, in the pre-litigation procedure, based its defence mainly on the shortcomings allegedly affecting Directive 2002/46, regard being had to the precautionary principle and to the risks posed by that Directive to both the environment and human health.

The reasoning is finely textured. It holds that Poland has failed to meet its obligations in EU law. However, whilst it holds that a state cannot defy EU law for populist reasons, it leaves open the question whether a state can do so for ethical or religious reasons. It does suggest that if such a defence does exist, it must be argued from the start and that the law or administrative practice in question must be justified on *clear* grounds. Leaving open the possibility of such a defence is not the same thing as suggesting that there is such a defence. We will have to await further clarification. At the moment, however, an opening is suggested for public deliberation at a local level, where, if a state or locality comes to a view that an EU law poses

insurmountable ethical or religious difficulties for it, and if wishing to protect a domestic provision on these grounds, this might not be incompatible with EU law.

Like the other two dimensions to Article 258 TFEU, there is a danger of focusing exclusively on it as 'public law' process. To do so would fail to distinguish Article 258 TFEU from other administrative processes. It clearly has distinctive functions of its own, namely, upholding the rule of EU law and contributing to the effective functioning of EU policies. There is also an internal tension in the vision of Article 258 TFEU. In some circumstances, it may seek to compel enforcement, namely where citizens adversely affected by illegal national behaviour press for enforcement action. In other circumstances, there is an idea that there should be constraints on enforcement action to allow local democracy to flourish. It is a challenge to know how to mediate between these tensions other than to suggest somewhat vaguely and unsatisfactorily that the procedure should be sensitive to both.

3 SCOPE OF MEMBER STATE RESPONSIBILITIES

One feature of the Article 258 TFEU process is that it may be used only against Member States. Although, formally, actions are brought against the state, in practice it is the central government which is proceeded against. This prompts two questions: first what is considered to be state action for the purposes of Article 258 TFEU; and secondly, what capacities and responsibilities are assumed of the state, in particular whether it should be accountable for everything that happens within its territory.

(i) Acts and omissions of all state agencies

The consistent position of the Court is that it is the state, not the government, which is responsible. From this it has derived two related doctrines.²⁴ First, it is the acts and omissions of state agencies, and only these acts and omissions, which attract liability. Secondly, the state is responsible for these agencies even if these are constitutionally independent.

The conception of a state agency is considered to comprise institutions from all tiers of government, be they national, regional or local.²⁵ It also comprises certain bodies that are not formally part of the state but which are subject to public authority.²⁶ Regulatory agencies, even if set up as independent private bodies, have therefore been held on this basis to be part of the state.²⁷ Private companies will be held to be a state agency if the government exercises considerable influence over them. In *CMA*, a public body financed by a levy on the German food and agriculture sector, the Fund, was set up to promote German agriculture. A private company, the CMA, was further established to realise the objectives of the Fund. It had to observe the latter's guidelines and was financed by it. The CMA adopted a quality label certifying the qualities of produce from Germany. The Commission argued this label violated the EU provisions on free movement, as it was only available to German produce. The German government argued, to no avail, that the CMA was a private body and, if, therefore, was not responsible.

²⁴ Case 71/85 *Germany v. Euphrat* [1986] ECR 237.

²⁵ Case 155/85 *Commission v. Italy* [1987] ECR 1031.

²⁶ Case 245/81 *Commission v. Ireland* [1982] ECR 4003; Case 212/87 *Apple v. Pear Development Council* [1988] ECR 4243.

²⁷ Case 7-91/95 *Stichting v. Commission* [1996] ECR I-4151.

Case C-325/00 *Commission v Germany (CMA)* [2002] ECR I-9977

17. In this regard, it must be recalled that the CMA, although set up as a private company, is
- established on the basis of a law, is characterised by that law as a central economic body and has, among the objects assigned to it by that law, the promotion, at central level, of the marketing and exploitation of German agricultural and food products;
 - is bound, according to its Articles of Association, originally approved by the competent federal ministers, to observe the rules of the Fund, 'but a public body, and additionally to be guided, in particular in relation to the management of its financial resources, by the general interest of the German agricultural and food sector';
 - is financed, according to the rules laid down by the AFG, by a compulsory contribution by all the undertakings in the sectors concerned.
18. Such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character... Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme, open to all undertakings of the sectors concerned, which can have effects on intra-Community trade similar to those arising under the scheme adopted by the public authorities.
19. Furthermore, it must be observed that:
- the Fund is a public-law body;
 - the CMA is required to respect the Fund's guidelines;
 - the financing of the CMA's activities, under legislation, comes from resources which are granted to it through the Fund; and
 - the Fund supervises the CMA's activities and the proper management of the finances which are granted to it by the Fund.
20. In these circumstances, it must be held that the Commission could rightly take the view that the contested scheme is attributable to the State.
21. Thus it follows that the contested scheme must be considered to be a public measure... attributable to the State.

Although it has never been raised in infringement proceedings under Article 258 TFEU, it seems that a body will be considered a state agency even if it is not subject to public authority but is performing a public service and, for that reason, has special powers.²⁰

This wide definition of the state to include private bodies subject to state influence or performing a public service and enjoying special powers makes sense from all three perspectives set out above. For the purposes of securing the 'rule of law', the state should not be able to evade its responsibilities by contracting out tasks. In terms of realising the public policy objectives of the Union, it is important, on the one hand, that States be able to organise themselves in the most efficient and effective manner possible, and this may involve privatisation. It is important, however, that their responsibility to secure a policy is not lost in this and their

²⁰ Case C-30/04 *Pacifico v Azienda Copulazione Unificata San Marino di Genova e Circolo Genovese Contrabbate* [2004] ECR I-7551. This is dealt with in more detail in Chapter 7 at pp.258-9.

responsibility to coordinate different organisations is not fragmented. Finally, in terms of public and democratic control, exposing the actions of private entities to public law procedures holds them accountable and subject to scrutiny.

The second dimension of the doctrine of state responsibility, that the government be responsible for the actions of constitutionally independent units, is more controversial. It has led to governments being accountable when they were unable, despite their best intentions, to get legislation through parliament.²¹ It also has led to central governments being responsible for the actions of regional authorities even when the former do not have the power under their constitutions to compel action by the latter.²² The most controversial application of this doctrine is holding states accountable for the actions of national courts. In *Commission v Italy*, infringement proceedings were brought against a series of decisions by the Italian Court of Cassation, the highest Italian civil court, in which the latter had consistently interpreted Italian law on customs duties in a way that conflicted with EU law.

Case C-129/00 *Commission v Italy* [2003] ECR I-14637

29. A Member State's failure to fulfil obligations may, in principle, be established under Article 258 TFEU, whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution...
30. The scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts...
31. In this case what is at issue is Article 25(2) of Law No. 428/1990 which provides that duties and charges levied under national provisions incompatible with Community legislation are to be repaid unless the amount thereof has been passed on to others. Such a provision is in itself neutral in respect of Community law in relation both to the burden of proof that the charge has been passed on to other persons and to the evidence which is admissible to prove it. Its effect must be determined in the light of the construction which the national courts give it.
32. In that regard, isolated or numerically insignificant judicial decisions in the context of case law taking a different direction, or still more a construction disavowed by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disavowed by the supreme court, but is rather confirmed by it.
33. Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law.

There is an element of *disingenuousness* in the judgment. The problem is framed as one of poor Italian legislation rather than as one of judicial practice which fails to comply with EU law. It was the Italian Court of Cassation's interpretation of those laws which generated the problem, however. The *disingenuousness* was in order to avoid directly contesting national

²¹ Case 22/68 *Commission v Belgium* [1973] ECR 1171.

²² Case 3/86 *Commission v Belgium* [1987] ECR 2167.

ments. A holding that national courts were in breach of EU law would have posed difficulties for the principle of judicial independence and impartiality, as it would have required the national government to intervene to suspend the judgments and would have thrown into doubt the binding effects of the judgments.²¹

If the challenge is most intense for breaches by the judiciary, it exists in relation to all constitutionally independent arms of government. The central authorities are being enjoined to trespass beyond their domestic constitutional limits to secure compliance with EU law. The problem arises from the fiction of the unitary state. In domestic law, individuals rarely sue the state but rather the agency which they allege is harming their interests. Litigation against the state in these instances causes many problems. Whilst it places duties on central authorities to uphold the rule of law, the constitutional independence of other actors may prevent effective measures by central government. They can only uphold the rule of law by violating domestic constitutional arrangements, thereby creating difficulties for the domestic rule of law. In public policy terms, a system of private incentives is established. As other governmental actors will not be litigated against, there is simply no reason for them to take measures to comply with EU law, as they know that central government (with whom they are often in competition) will be held accountable.²² Finally, this can hardly be good for local democracy. Powers of enforcement are used to justify central intervention at the domestic level to secure compliance, thereby curbing local self-government.

B Accountability of state actors

State agencies are clearly responsible for actions that violate EU law. The state will be responsible for any measure that formally conflicts with EU law, be it a law, statutory instrument or judgment. This is not completely clear-cut. It is for the Commission to prove that the national law conflicts with EU law. It is insufficient that it is ambiguous. The Court of Justice will therefore often insist that there be interpretations by national courts of the measure which conflict with EU law before holding that there is a violation.²³

The state is also responsible for administrative practices conflicting with EU law. As we have seen, in some cases, a specific act may be sufficient whilst, in others, the Court will look for a generalised practice.²⁴ These practices can also consist of omissions and failures to act, for state agencies are under positive duties to secure the effective functioning of EU law. These duties have been developed through the interpretation of the fidelity principle, Article 4(3) TEU, and they have been explored in more detail in Chapter 5.²⁵ To recap, briefly, however, the central duties for which states can be subject to infringement proceedings are:

331 Infringement Proceedings

- the duty to secure legal certainty for EU law;²⁶
- the duty actively to police EU law;²⁷
- the duty to penalise infringements of EU law under analogous conditions applicable to infringements of national law of a similar nature and importance²⁸ and to ensure that penalties for breach of EU law are effective, proportionate and dissuasive;²⁹
- the duty to notify the Commission of any problems applying or enforcing EU law.³⁰

These are general duties reflecting assumptions about state capacity and good faith in EU law. They apply with particular force in the case of enforcement proceedings, as it is here, in the context of an alleged failure by the state, that they are explored at most length. There is, however, one particular duty which is specific to the Article 258 TFEU procedure itself and relates to the question of the burden of proof. If the Commission notifies the state of a possible breach of EU law and provides sufficient evidence of that breach, the duty is on the state to investigate that breach in order to prove otherwise.

In *Commission v Ireland*, the Commission received twelve complaints of illegal dumping of waste or operating unlicensed waste dumps across Ireland in breach of EU environmental law. It wrote to the Irish government but received only limited reply. The Irish government argued that the Commission had failed to provide sufficient proof of its infringements.

Case C-454/01 *Commission v Ireland* [2005] ECR I-1131

41. ...in proceedings under Article [258] TFEU, for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption ...
42. However, the Member States are required, under Article [41] TFEU, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article [10] TFEU, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied ...
43. In this context, account should be taken of the fact that, where it is a question of checking that the national provisions intended to ensure effective implementation of the directive are applied correctly in practice, the Commission which ... does not have investigative powers of its own. In the matter, it is largely reliant on the information provided by any complainants and by the Member State concerned ...
44. It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom ...
45. In such circumstances, it is indeed primarily for the national authorities to conduct the necessary on-the-spot investigations, in a spirit of genuine cooperation and in fulfilment of each Member State's duty, recalled in paragraph 42 of the present judgment, to facilitate the general task of the Commission ...

²¹ Compare Case C-22/91 *Lasert v Austria* [1993] ECR I-239, affirmed at pp. 258–61.

²² In addition, for example, administrative coordination was re-affirmed and there was no work agreement that the Maltese regional government actually took the Finnish regional government to the Court of Justice through the preliminary reference procedure for its failure to observe the free movement provisions. Case C-413/00 *Government of the French Community and Walloon Government v Finnish Government* [Finnish Government Case] [2001] ECR I-1431.

²³ Case C-264/95 *Greenpeace v United Kingdom* [1997] ECR I-2649; Case C-41/94 *Commission v Ireland* [1995] ECR I-2945.

²⁴ See pp. 215–22.

²⁵ See pp. 213–22.

²⁶ Case C-158/95 *Commission v Italy* [Swampgate] [1997] ECR I-4427.

²⁷ Case C-255/95 *Commission v France* [Spanish construction] [1997] ECR I-2636.

²⁸ Case C-187/95 *Dracopoulou v Greek Government* [1997] ECR I-1185.

²⁹ Case 84/84 *Commission v Greece* [1985] ECR 2355.

³⁰ Case C-125/92 *Commission v Germany* [1993] ECR I-2553.

46. Thus, where the Commission relies on detailed complaints revealing repeated failures to comply with the provisions of the directive, it is incumbent on the Member State to contest specifically the facts alleged in those complaints...
47. Likewise, where the Commission has adduced sufficient evidence to show that a Member State's authorities have developed a repeated and persistent practice which is contrary to the provisions of a directive, it is incumbent on that Member State to challenge in substance and in detail the information produced and the consequences flowing therefrom.

The onus on the Commission, in the case of administrative failure to comply with EU law, is to make no more than a *prima facie* case. It must provide sufficient evidence for it to be plausible that there has been non-compliance. Whilst this question appears just to be an evidentiary one, its consequence is to impose some investigatory duties on the Member States, which stem from the duty of cooperation in Article 4(3) TFEU.⁴⁶ They must know what is going on in their own backyard. If they do not, they are responsible for the consequences. A lower threshold of proof will be adduced to show non-compliance.

4 THE DIFFERENT STAGES OF INFRINGEMENT PROCEEDINGS

The infringement proceedings are best seen as a series of stages which, extrapolated out, comprise:

- an informal letter to the Member State;
- a letter of formal notice to the Member State that it is in breach of EU law;
- the submission of observations by the Member State;
- the issuing of a reasoned opinion by the Commission setting out the breach of EU law;
- a period for the Member State to comply with the reasoned opinion and submit observations;
- referral to the Court by the Commission;
- judgment by the Court.

The process is arduous and time-consuming. In 2005, the average time taken was twenty-three months.⁴⁷ There are three central points in the process. There are the initial informal contacts between the Commission and the Member State; the letter of formal notice setting out the breach and the Member State's observations on this (sometimes known as the administrative stage); and the issue of a reasoned Opinion by the Commission with possible referral to the Court if the Member State does not comply with that Opinion.

(i) Informal letter

There are two procedures for detecting a complaint. The Commission may discover something problematic through its own investigations (own initiative), or it may receive a complaint of an infringement from a third party. Although this varies from year to year, in 2005, a not untypical

year, the latter accounted for 35.9 per cent of detections of infringements.⁴⁸ This figure underlines the role of complainants, however. Many infringement proceedings are begun because Member States have not communicated information that they have transgressed an EU law to the Commission, as is required of them. When these are taken into account, complaints are the main way for the Commission of finding out what is happening on the ground.

Initially, whether on the basis of its own investigation or on the basis of receiving a complaint, the Commission then sets out the reasons why it suspects an infringement has taken place to the Member State concerned. The Member State government is invited to reply and may supply further information. Around 30 per cent of proceedings are closed at this stage.⁴⁹ In 2007, concerned that it was letting its enforcement strategy be determined by which complaints arrived at its door, the Commission changed tack. Own initiative proceedings would continue to be resolved in the traditional way. Complaints by third parties were to be treated, from the first place, as a matter of dispute settlement with the State concerned. The State would be invited to resolve the dispute, with the Commission only stepping in and commencing proceedings if resolution was not possible. The approach is set out below.

European Commission, *A Europe of Results: Applying Community Law*, COM(2007)502, 7–8

As is the case now, enquiries and complaints raising a question of the correct application of Community law sent to the Commission would continue to be registered and acknowledged and the Commission would provide explanations of Community law. Where an issue requires clarification of the factual or legal position in the Member State, it would be transmitted to the Member State concerned. Unless urgency requires immediate action and when the Commission considers that the contact with the Member State can contribute to an efficient solution, the Member States would be given a short deadline to provide the necessary clarifications, information and solutions directly to the citizens or business concerned and inform the Commission. When the issue amounts to a breach of Community law, Member States would be expected to remedy, or offer a remedy, within set deadlines. When no solution is proposed, the Commission would follow-up, taking any further action, including through infringement proceedings, in accordance with existing practice.

In this way, Member States would have the opportunity to resolve issues arising within this agreed framework, operating at the point closest to the citizen, within its national legal and institutional context, in conformity with the requirements of Community law. With the necessary commitment, there would be a greater possibility for enquiries and complaints to be seen through to an early conclusion.

Transmission mechanisms would be established between the Commission and Member States. A central contact point within the Member State would have to process incoming enquiries and outgoing responses. This contact point would encourage the appropriate authority in the Member State to respond constructively, providing information, solving the problem or at least explaining its position.

The outcome of cases would be recorded to enable reporting on performance and any follow-up, including the registration and initiation of infringement proceedings. This reporting would identify the volume, nature and seriousness of problems remaining unresolved, indicating if additional specific problem-solving mechanisms or more national sector initiatives are needed.

⁴⁶ See the Case C-105/05 *Commission v Italy* (2006) ECR I-0475.

⁴⁷ European Commission, *25th Annual Report on Monitoring the Application of Community Law*, 2004/2005/177, 1.

⁴⁸ *Ibid.* 3.

⁴⁹ *Ibid.* 2.

These procedures are currently being tested in fifteen states but they move the Article 258 TFEU procedure away from the traditional paradigm of securing the rule of EU law. For, in instances where individuals settle with the Member State, that settlement may not address the wider legal issues that extend beyond the dispute. Enforcement would be privatised to the extent that complainant satisfaction would be the primary benchmark of whether the state had done enough legally. It is also to be wondered what this form of alternate dispute resolution will do in terms of securing the effective functioning of EU policies. There are something to be assessed in the round from a panoptic perspective, rather than from the point of view of reforming them around the circumstances of individual disputes, which pull policy this way and that. This is particularly significant in the light of the large proportion of proceedings both instigated by complainants and resolved at this stage. It might be considered that Article 258 TFEU is here moving towards a role of facilitating local democracy and national accountability, whereby pressure groups and citizens can wave the sword of EU law against abusive state action that is harming their interests. Yet, the procedure is flawed even from this perspective, as the extract below suggests.

M. Smith, 'Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process' [2006] 33 *European Law Review* 777, 793.

There are several worrying implications that flow from the adoption of the new pilot scheme. The most obvious is that the already protracted formal Article 258 procedure will be recognised even further because if the Member State does not resolve the complaint to the Commission's satisfaction, the regular Article 258 process may be initiated (i.e. investigation, negotiation, formal letter, etc.). Even if the complainant has already been through the pilot system it will not bypass any of the existing steps in the process. Another consequence of this elongated process is that complaints will no doubt suffer 'complaint fatigue' and simply give up pursuing the alleged infraction. This is underlined by the Commission's statements that the legitimacy of the Union depends on the continued participation of the citizens.

Despite this the Commission contends that 'with the necessary commitment' from the Member States, the pilot scheme will lead to a faster resolution of infractions. It is difficult to see how, if the Commission itself, with all its political and institutional weight, cannot easily obtain the information it requires from offending Member States, it is difficult to see how the citizen will manage this in its place. It is also possible that this will lead to a disparate enforcement of EU law across the Union depending on the administrative sophistication and the internal legal characteristics of each Member State. It is unlikely that this new initiative will increase either the efficiency or effectiveness of the enforcement mechanism; it simply draws out the administrative phase even further, pressuring the Member States with a greater opportunity to avoid their legal responsibilities.

The second major implication is that the Commission's new pilot scheme has the result of outsourcing its responsibility to deal with complainants to the very entity committing the alleged infraction. Whilst the Commission wishes to preserve its status as initial contact and regulatory point of focus in the 'information ladder' aspect of the complaint which is why, to the Commission's public, to detect infringement, the complainant will thereafter have been referred to the Member State and the Commission will play no further part.

(3) Letter of formal notice and Member State observations

The process begins with the Commission issuing a letter of formal notice. The reason for this is that Article 258 TFEU only allows the Commission to issue a reasoned opinion once the Member State concerned has had the opportunity to submit observations. For the latter to be able to do this, there must be a letter of formal notice upon which it can submit observations. As the letter of formal notice is seen as central to safeguarding the rights of defence, it is also seen as framing the dispute. The Commission can only take complaints to a Member State that are specifically set out in the letter of formal notice. A sense of the role of the letter of formal notice is provided in *Commission v Denmark*. The Commission brought an action against the Danish government for failing to transpose Directive 76/931/EEC on electrical energy meters into Danish law. The Danish government claimed that the letter of formal notice was insufficient as it had merely noted Denmark's failure to act and not set out what positive steps the Danish government needed to take to remedy the breach.

Case 211/81 *Commission v Denmark* [1982] ECR 4547

8. It follows from the purpose assigned to the pre-contentious stage of the proceedings for failure of a state to fulfil its obligations that a letter giving formal notice is limited to defining the subject matter of the dispute and to indicate to the Member State which is invited to submit its observations the facts enabling it to prepare its defence.
9. The opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 258 TFEU.
10. It appears from the documents before the Court that by a letter dated 21 May 1978 giving formal notice the Commission merely asserted that in its view the Danish Government had not put into force the measures necessary to transpose Directive 76/931 into national law but refrained from specifying the obligations which, in its view, were imposed on that State by virtue of the directive and which had been disregarded.
11. In the present case, however, that fact did not have the effect of depriving the Danish Government of the opportunity of submitting its observations to good effect. On 7 June 1978 the Commission had addressed to the Danish Government a letter setting out the precise reasons which led it to conclude that the Kingdom of Denmark had failed to fulfil one of the obligations imposed on it by Directive 76/931. It was by reference to the position adopted by the Commission in that letter of 7 June 1978 that the Danish Government submitted its observations on 12 August 1978.

Whilst the Commission does not have to set out what Member States need to do to comply with EU law, it must set out all legal complaints in the letter of formal notice. Anything not mentioned there will be deemed inadmissible.⁴⁵ However, the Commission can subsequently bring in new evidence to clarify the grounds on which it is making the complaint on condition that this does not alter the subject-matter of the dispute.⁴⁶

⁴⁵ Case C-97/94 *Commission v Italy* [2006] ECR I-01057.

⁴⁶ Case C-454/03 *Commission v Ireland* [2005] ECR I-03331.

(ii) Reasoned Opinion and the period for national compliance

If, after the Member State has submitted its observations on the letter of formal notice, agreement is still not reached, the Commission will issue a reasoned Opinion. As the subject-matter of the dispute is delimited by the formal letter of notice, the reasoned Opinion cannot modify the subject-matter of the dispute by introducing new claims.⁵⁷ It should therefore not amend conclusions contained in the letter of notice. However, account can be taken of changes in circumstances. In *Commission v Belgium*, the Commission challenged, in its letter of formal notice, a 1987 broadcasting law passed by the Flemish Communities.⁵⁸ The 1987 law was then replaced by a 1994 law. This latter law was challenged in the reasoned Opinion. The Court rejected a Belgian claim that this amendment compromised the latter's rights of defence, noting that the national provisions mentioned need not be identical if the change in legislation resulted in the system as a whole not being altered.

The Commission has less room for manoeuvre in the reasoned Opinion than in the letter of formal notice. Whilst the latter need do no more than give a summary of the complaints, the reasoned Opinion must give a coherent and detailed statement of reasons that led the Commission to believe that the Member State has breached EU law. This should include a detailed statement of the legal and factual context to the dispute and take account of any resolutions submitted by the Member State.⁵⁹ Finally, and importantly, the reasoned Opinion must also set out a reasonable period for compliance by the Member State. The following extract summarises the current position.

Case C-350/02 *Commission v Netherlands* (2004) ECR I-6213

18. In an action for failure to fulfil obligations the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission...
19. The proper conduct of that procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter...
20. It follows that the subject-matter of proceedings under Article [258 TFEU] is delimited by the pre-litigation procedure governed by that provision. The Commission's reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion... which for its part must contain a request and detail of explication of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty...
21. It should also be emphasised that, whilst the formal letter of notice, which constitutes an initial warning of the alleged infringement, may be useful in constraining the reasoned opinion, the Commission

⁵⁷ Case C-28/95 *Commission v Denmark* (1997) ECR I-4265.

⁵⁸ Case C-31/95 *Commission v Belgium* (1996) ECR I-44115.

⁵⁹ Case C-255/94 *Commission v Spain* (1995) ECR I-2375.

is none the less obliged to specify precisely in that opinion the grounds of complaint which it already raised more generally in the letter of formal notice and alleges against the Member State concerned, after taking cognizance of any observations submitted by it under the first paragraph of Article [258 TFEU]. That requirement is essential in order to delimit the subject-matter of the dispute prior to any initiation of the contentious procedure provided for in the second paragraph of Article [258 TFEU] and in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it by the Commission and can thus bring an end to the alleged infringements or put forward its arguments in defence prior to any application to the Court by the Commission.

Since the reasoned Opinion has been issued, the Commission must afford Member States sufficient time both to respond to the views it sets out and to comply with the Opinion.⁶⁰ The minimum time limit laid down will depend upon a number of factors. These include the urgency of the matter and when the matter was first brought to the attention of the Member State by the Commission.⁶¹

Perhaps the most stark example of what circumstances might be taken into account is *Commission v Belgium*. Under a 1985 law, Belgian universities were authorised to charge a supplementary fee (a 'microlevy') on nationals from other Member States who enrolled with them. The Commission considered such action to be illegal following the *Grovier* judgment, given on 11 February 1985.⁶² It had an informal meeting with Belgian officials on 25 June 1985, where it expressed that view but also stated that it was still considering the effects of the judgment. On 17 July 1985, it issued a letter of formal notice stating that, in view of the onset of the new academic year, the Belgian government should submit its observations within eight days. The Belgian authorities asked for more time. On 25 August 1985, the Commission issued a reasoned Opinion, with the Belgian government being given fifteen days to comply. The Belgian government claimed that the action was inadmissible given the limited time periods allowed for compliance.

Case 255/85 *Commission v Belgium (Grovier)* (1986) ECR 305

13. It should be pointed out first that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission.
14. In view of that first purpose the Commission must allow Member States a reasonable period to reply to the letter of formal notice and to comply with a reasoned opinion, or, where appropriate, to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case. Thus, very short periods may be justified in particular circumstances, especially where there is an urgent need to remedy a breach or where the Member State concerned is fully aware of the Commission's views long before the procedure starts.

⁶⁰ See e.g. Case C-11/91 *Commission v Denmark* (1992) ECR I-4567.

⁶¹ In determining this, account is taken not of when the letter of formal notice was sent but when informal contacts were first made. Case C-56/90 *Commission v United Kingdom* (1991) ECR I-4195; Case C-473/93 *Commission v Luxembourg* (1995) ECR I-2307.

⁶² Case 285/82 *Grovier (City of Ulège)* (1985) ECR 331.

15. It is therefore necessary to examine whether the shortness of the periods set by the Commission was justified in view of the particular circumstances of this case ...
16. ... the imminent start of the 1985 academic year may indeed be regarded as a special circumstance justifying a short time limit. However, the Commission could have taken action long before the start of the academic year because the major part of the Belgian provisions were already part of its legislation before the law of 21 June 1984. They were therefore known to the Commission at the latest when the judgment of 10 February 1985 was delivered, which was six months before the start of the 1985 academic year. Furthermore, it should be noted that at the time the Commission had not made any criticism of the mineral and has even given the impression, prior to the entry into force of the law in question, that it accepted that the mineral was compatible with Community law. In these circumstances the Commission cannot rely on urgency which is itself created by failing to take action earlier.
17. As for the Commission's alternative argument that the time limits laid down were not absolute, regard that consequently replies given after their expiry would have been accepted, it should be remarked that that factor is not relevant. A Member State to which a measure subject to a time limit is addressed cannot know in advance whether, and to what extent, the Commission will if necessary grant it an extension of that time limit. In this case, moreover, the Commission did not reply to the Kingdom of Belgium's request for an extension of time.
18. As regards the question whether the Kingdom of Belgium was aware sufficiently in advance of the Commission's views, it is common ground that although the Commission had expressed its views to the competent officials of the Belgian ministries of national education on 26 June 1985, at a meeting of the education committee of 27 and 28 June 1985 it stated that it was still considering the matter. The judgments of the Court in the field of university education. It follows that the Kingdom of Belgium was not fully informed of the definitive views of the Commission before these proceedings were brought against it.

It is only if compliance with the reasoned Opinion does not occur that the matter may be brought before the Court. Indeed, once the period set out in the reasoned Opinion has elapsed there is nothing a Member State can do to prevent the matter being heard by the Court. The latter has repeatedly stated that it will consider the position at the end of the period laid down in the reasoned Opinion, and will not take account of subsequent changes.⁵⁴ Compliance by the Member State with the reasoned Opinion after the deadline set out in the latter but before judgment will not therefore prevent the Court's declaring that the Member State has acted illegally.⁵⁵ The reasons are, first, that the unyielding nature of the procedure would, otherwise, be unable to capture breaches of a relatively short duration,⁵⁶ and, secondly, that Member States could, otherwise, manipulate the procedure by simply bringing their conduct to an end shortly before judgment was given.⁵⁷

⁵⁴ See e.g. Case C-461/88 *Commission v Greece* [1990] ECR I-4359; Case C-103/84 *Commission v Belgium* [1985] ECR I-2531.

⁵⁵ See e.g. Case C-445/92 *Commission v Spain* [1993] ECR I-4651.

⁵⁶ Advocate General Lenz in Case 242/85 *Commission v Greece* [1986] ECR I-1125.

⁵⁷ Advocate General Lagrange in Case 2781 *Commission v Italy* [1991] ECR I-112.

5. ADMINISTRATION OF INFRINGEMENT PROCEEDINGS

(i) The Commission's discretion

There are a number of remarkable features about the Article 169 TFEU process. The first is how few actions reach the Court of Justice. According to Commission figures, in 2007, only 7 per cent of proceedings reached the Court.⁵⁸ The heart of the infringement procedure is thus an administrative process, with judicial proceedings predominantly acting as a backdrop to structure the negotiations between the Commission and the Member States. Secondly, the Commission wins the overwhelming majority of cases that reach the Court. In 2006, for example, ninety-four Commission actions were successful and nine dismissed.⁵⁹ This is not atypical, with the Commission typically winning over 80 per cent of the cases arriving before the Court: a staggeringly high proportion when it is remembered that the case can be dismissed not just on substantive but also on procedural grounds.⁶⁰ The third feature is that the initiation and cessation of proceedings is entirely a matter of Commission discretion.⁶¹ Its motives for starting or stopping proceedings cannot be challenged⁶² and neither can protracted administrative delays in investigating proceedings unless they are so extreme that they would infringe the Member State's procedural rights by making it more difficult for the state concerned to refute the Commission's arguments.⁶³

These three features have raised a number of concerns.⁶⁴ From the perspective of securing the rule of EU law, there is simply a concern about Commission leniency. It might not take any proceedings where there is a serious infraction of EU law and the statistics suggest that it may well cease proceedings when national compliance is still far from perfect. Indeed, in 2006, the European Parliament deployed strong words in its assessment of the Commission's exercise of its discretion. In its report on the Commission's 2004 and 2005 Annual Reports, the European Parliament stated that it

Calls on the Commission to place the principle of the rule of law and citizens' experience above purely economic criteria and encourages it to urge the Commission to monitor carefully the respect of the fundamental freedoms and general principles of the Treaty as well as the respect of regulations and framework directives; invites the Commission to use secondary legislation as a criterion for determining whether there has been an infringement of fundamental freedoms; [and]

Calls on the Commission seriously to reassess its independence of Member States when it comes to the deadlines for submitting requested information to the Commission, adopting and communicating national implementing measures and correctly applying Community legislation at national, regional and local levels.⁶⁵

⁵⁸ European Commission, 25th Annual Report, para. 2.2.2.

⁵⁹ Annual Report of the Court of Justice 2006 (Luxembourg: Office for Official Publications of the European Communities, 2006) 93.

⁶⁰ D. Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 4 *EWU* 449, 452-3.

⁶¹ Case 48/85 *Infante v Commission* [1985] ECR 19, May; similarly see Case C-235/81 *Commission v Austria* [1982] ECR I-2187.

⁶² Case 418/84 *Commission v United Kingdom* [1985] ECR I-1371.

⁶³ Case C-95/89 *Commission v Netherlands* (now removed name from Treaty) [1991] ECR I-3465.

⁶⁴ For academic commentary see A. Morijnau, 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission (with Case-law Comments)' [1985] 1 *ELJ* 619; L. Hardin, 'What Future for the Commission Enforcement of Community Law?' [2002] 35 *ELJ* 445.

⁶⁵ European Parliament, Report on the Commission's 2004 and 2005 Annual Reports on Monitoring the Application of Community Law (2006), A6-5039/2006, para. 13.25.

Whilst this is something of an isolated condemnation, subsequent reports repeatedly focus on the lack of transparency of the process.⁶⁴ This is also of concern as it has led to abuse, with one celebrated instance of condemnation of the Commission by the Embroiderers in a case where a Greek official publicly involved with a Greek political party chose not to take action against the Greek government. The Embroiderers noted that it would be difficult for anybody not to doubt the impartiality of the Commission in this instance and to question whether it was acting in the Union interest.⁶⁵

There is also a concern from a public policy perspective about what checks and balances are in place to ensure that the Commission acts in a coherent and systematic manner in this field. In principle, the Commission investigates and prosecutes proceedings on the basis of the priority criteria set out in its 2002 Communication on better monitoring of the application of Community law described above. Yet, as Smith has observed, enforcement policy owes as much to the structures and politics of the organisation as anything else.

Mc Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Aldershot, Routledge, 2009) 135–7

When assessing the statistical information produced by the Commission, it must be acknowledged that there does seem to be a coherent output of the enforcement policy, although not one that necessarily matches the stated policy criteria. Whatever the stated approach to the enforcement policy, the result appears to guarantee that the environment sector always produces the greatest number of investigations and referrals to the ECJ. This sector is followed by cases on the internal market and energy and transport, although neither of these sectors are mentioned in the priority criteria at all. This of course may not be a result of the policy on enforcement, but rather the particular organisation of the Commission and the way in which each DG mobilises its resources to combat infringements. For instance, DG Environment is one of the few DGs that contains a unit specifically responsible for dealing with infringements, as opposed to (say) DG Justice, Freedom and Security, which has no such department and generates very few infringement cases. It may be that the type of legislation produced by DG Environment (predominantly directives) is particularly prone to generating infractions (which appears to be confirmed by the Commission's Annual Reports), or it may be that the subject matter is particularly unpopular with Member States. It could be that DG Environment is particularly focused upon enforcement more than other DGs.

The final concern is that this is an administrative process seemingly unconstrained by the usual public law disciplines of participation, accountability and transparency. The process has traditionally been an executive to executive one in which the only players were the central governments and the Commission. The Commission, as we shall see, was until recently not really publicly accountable for any of its actions. Finally, the process is secret. The General Court has held that Member States are entitled to expect that all documents relating to the investigative procedure as well as the reasoned Opinion remain confidential. They can therefore appear

⁶⁴ See e.g. European Parliament, *Report on the 25th Annual Report from the Commission on Monitoring the Application of Community Law (2002)*, A6-545/2003, para. 11.

⁶⁵ EC Decision on Complaint (2003/99/EC). For analysis of this see Smith, above n. 14, 113–15.

any publication by the Commission or dissemination to third parties. The reason, according to the General Court, is that such confidentiality facilitates amicable resolution of the dispute.⁶⁶ Nevertheless, it also creates a climate of public suspicion, as outsiders have no idea of what is being discussed or agreed, or even what conduct, however egregious, the Commission has discovered.

In recent years, there have been attempts to put some constraints on the exercise of Commission discretion in this area. These are, however, quite limited.

(ii) Complainants and Article 258 TFEU

Notwithstanding the key role which they play, complainants are frozen out of the procedure. They have no right to require the Commission to commence proceedings or to be involved in the dispute. In *Star Fruit*, a Belgian banana trader alleged that it had been prejudiced by the organisation of the French banana market, which it believed was contrary to EU law. The trader complained to the Commission but the latter did not commence proceedings against France. *Star Fruit* sought to take the Commission to court for failure to act. The Court of Justice ruled that the action was inadmissible.

Case 247/87 *Star Fruit v Commission* [1988] ECR 291

It is clear from the scheme of Article [258 TFEU] that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position.

12. It is only if it considers that the Member State in question has failed to fulfil one of its obligations that the Commission delivers a reasoned opinion. Furthermore, in the event that the State does not comply with the opinion within the period allowed, the institution has in any event the right, but not the duty, to apply to the Court of Justice for a declaration that the alleged breach of obligations has occurred.
13. It must also be observed that in requesting the Commission to commence proceedings pursuant to Article [258 TFEU] the applicant is in fact seeking the adoption of acts which are not of direct and individual concern to it within the meaning of the second paragraph of Article [263(4) TFEU] and which it could not therefore challenge by means of an action for annulment in any event.⁶⁷
14. Consequently, the applicant cannot be entitled to raise the objection that the Commission failed to commence proceedings against the French Republic pursuant to Article [258 TFEU].

This freezing out is controversial even within the EU judiciary. It excludes parties who are not merely at the centre of proceedings in that they are the impetus for them, but who are also often suffering significant adversity because of illegal acts by national governments. In many cases the General Court held that the 'principle of sound administration' required complainants to be able to seek judicial review of Commission decisions not to take action against Member States under Article 258(1) TFEU, the provision that allows the Commission to require Member

⁶⁶ Case 7-15/85 *France v Commission* [2001] ECR II-2647.

⁶⁷ There are, of course, strict requirements for challenging EU acts. They are discussed at pp. 414–24.

States to bring public undertakings into line with EU law.²² Even though the General Court distinguished this provision from Article 268 TFEU by suggesting (possibly for the moment) that this duty does not apply to the latter, the General Court was clearly laying the way for it to do so. It was the first time that it had been suggested that an individual could compel the Commission to take an action against a Member State and that the principle of sound administration is a general principle of EU law. The Court of Justice was, however, having none of it and, on appeal, overturned the judgement. It held that the Commission was not required to bring proceedings and that individuals could not require the Commission to take a position on a specific issue.²³

This lack of success before the Union courts led complainants during the 1990s to turn to the European Ombudsman.²⁴ Sufficiently concerned by the complaints it was receiving, the Ombudsman launched in 1997 an 'open initiative' enquiry into the Commission's handling of individual complaints of a breach of EU law by a national government. In its report it observed:

The Ombudsman has received many complaints concerning the administrative procedures used by the Commission in dealing with complaints lodged by private citizens concerning Member States' failure to fulfil their Community law obligations. The object of these complaints was ... the administrative process which takes place before judicial proceedings may begin. The allegations ... concerned, in particular, excessive time taken to process complaints, lack of information about the ongoing treatment of the complaints and not receiving any reasoning as to how the Commission had reached a conclusion that there was no infringement.²⁵

Matters reached a nadir in 2001 with the *Accorcionero Mérea* Decision. This concerned a complaint that the French authorities had violated EU public procurement law in a tender they had put out for construction of a mine in Thessaloniki. The Ombudsman found that there had been acts of maladministration, first, because the Commission had indicated to the complainant that it was closing the file because there was no breach of EU law. In fact, it had not told the truth. It closed the file as an act of political discretion rather than because of any finding as to the law.²⁶ Secondly, it found that the Commission had violated the complainant's right to be heard as it had sent its provisional views to the complainant eight days before closing the file and at the beginning of the summer holidays. This clearly gave the latter insufficient time.²⁷ As a consequence, in 2002, the Commission adopted a Communication setting out certain procedural entitlements for complainants.²⁸ This Communication includes the following central principles:

- Anybody may bring a complaint free of charge without having to prove an interest.
- All correspondence must be recorded. It will not be investigable if it is anonymous; fails to refer to a Member State; denounces private parties unless public authorities are involved or

fail to set out a grievance or set out a grievance in which the Commission has adopted a clear, public, consistent position or which fails outside EU law.

- The Commission Department will communicate with the complainant and inform them after each Commission Decision of the steps taken in response to the complaint.
- The Commission will endeavour to close the case or issue a formal notice within one year from registering the complaint.
- If the Commission closes the case, unless there are exceptional circumstances, the Commission will give the complainant four weeks to submit comments having set out the reasons for its Decision.

Whilst all this brings some transparency to the process, the Commission makes it clear that it still has complete discretion as to whether to initiate proceedings, and that any infringement action is a bilateral matter between it and the Member State concerned. It also leaves a number of procedural matters unaddressed. Rawlings has noted, for example, that citizen participation is left until very late in the day – four weeks before the closing of the file – and this rarely allows for effective input. He also noted that the commitment to close a file within a reasonable period of time tells us nothing about how the file is handled subsequent to a letter of formal notice being issued.²⁹ Smith has likewise noted that there is no commitment to fairness and non-discrimination in the investigation of the complaint and subsequent follow-up. She also wonders whether, significant though they are, these organisational changes are bringing any ethical change in the Commission.³⁰

8. SANCTIONS

(i) Article 260 TFEU and the Lisbon reforms

The procedure in Article 260 TFEU is long and cumbersome. At the end of it there is a simple declaration by the Court of Justice that the Member State has breached EU law. Member States are given plenty of time before having to comply and plenty of time to negotiate a good deal. Furthermore, the effect of a Court ruling is uncertain. Research by Chalmers found that in 2002, Member States had failed to comply with 27.32 per cent of the judgments given against them within twelve months.³¹ Legal commentators have claimed that this is because of the absence of sanctions in the procedure.³² At Maastricht, a procedure was therefore introduced whereby the Commission could take non-compliant states back to the Court to have them fined. The procedure prior to Lisbon was a repeat of that in Article 260 TFEU. There would be a new informal letter, a letter of formal notice, Member State observations, etc.³³ This entailed a total of fourteen stages from the first registration by the Commission of the breach before a sanction was introduced. The procedure was amended by the Lisbon Treaty and is now contained in Article 260 TFEU.

²² Case T-55/95 *Accorcionero Mérea* [2001] ECR II-211.

²³ Case C-14/00 *P. Commission v. France* [2001] ECR I-1021.

²⁴ Cf. these early years see Rawlings, above n. 20.

²⁵ European Ombudsman, *Open Initiative: Enquiry into the Commission's Administrative Procedures for Dealing with Complaints under Article 268 (now Article 265 TFEU)*, EC Annual Report 1997, 210.

²⁶ *Decisions of the European Ombudsman on Complaint 4632/2001 against the European Commission*, 31 January 2002, at 413, www.ombudsman.europa.eu/omb/decisions/decisions/2002/decisions.htm, accessed 1 September 2003.

²⁷ OJ L 2002, 41–42.

²⁸ European Commission, *On Resolution of the Complaints in respect of Maladministration of Community Law*, COM(2002) 41.

²⁹ Rawlings, above n. 20, 18.

³⁰ Smith, above n. 16, 191–4.

³¹ Chalmers, above n. 50, 431.

³² E. Syropoulos, *EC Law: New Sanctions, New Directions?* [1999] 35 *ACR* 690, 691; A. Laffont, *From Direct Effects to Sanctions: Setting New Standards of Enforcement of Community Law* [1992] 18 *ELRev* 1.

³³ This was formerly Article 169 EC.

Article 260 TFEU

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
 - ^a If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
 - This procedure shall be without prejudice to Article 259.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
 - ^b If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

The new provision introduces two significant procedural amendments to the previous position:

The first is in Article 260(2) TFEU. When an infringement proceeding is brought for failure to notify measures transposing a Directive, it is unnecessary to go through the procedures set out in Article 260(2) TFEU; instead, the Court can impose a sanction at the same time that it rules against the Member State under Article 258 TFEU.

The second concerns the procedure in Article 260(3) TFEU for other forms of breach of EU law. This has been truncated. There is no need for the Commission to issue a reasoned Opinion. It will still have to issue a Member State a letter of formal notice on which the latter can submit observations, but after that it can refer the matter to the Court. This does raise the question whether the letter of formal notice here is subject to the same legal constraints as the reasoned Opinion (but not the letter of formal notice) in Article 258 TFEU, namely whether it must give a statement of the reasons why there is still non-compliance and whether it must set out a reasonable period for compliance before the matter can be referred back to the Court. In *Commission v Portugal*, the Court stated that the opportunity for Member States to submit observations was an essential guarantee of both procedures.⁴² It would appear from this, therefore, that the Commission could not subsequently include complaints that were not in the original letter of formal notice and is under a duty both to consider national observations submitted in response

⁴² Case C-451/01 *Commission v Portugal*, Judgment of 10 September 2003.

to it and to give Member States a date for compliance. Otherwise, it would seem to prejudice these essential rights of defence. In short, therefore, the letter of formal notice would have to adopt the same features as the reasoned opinion in Article 258 TFEU.

Whilst these amendments speed up the procedure, there is the question of the distinction between breaches for non-notification of Directives and other breaches of EU law. For the latter, the requirement to go first through Article 258 TFEU and then through Article 260 TFEU renders prosecution of breaches still extremely cumbersome. The reason lies in national government opposition; this issue was discussed at the Future of Europe Convention, with national governments opposing the simultaneous imposition of sanctions for anything other than non-notification of measures transposing Directives.⁴³ Yet, given the length of the Article 258 TFEU procedure, it might be questioned where exactly their worries lie, and whether, at heart, they simply do not want EU law to be policed too vigorously. The length of the procedure limits the capacity of the proceedings both to uphold the rule of EU law and to be an effective and responsive public policy tool.

Finally, the effectiveness of the penalty payment should not be assumed. In the following extract, Harlow and Rawlings examined the impact of the first Article 260 TFEU case to reach the Court of Justice.⁴⁴

C. Harlow and R. Rawlings, 'Accountability and Law Enforcement: The Centrafact EU Infringement Proceedure' (2005) 31 *European Law Review* 447, 452–3

The first case to reach the Court involved Greece and concerned a toxic waste dump at Kateropolis (Katerini) in Epirus. On the basis of the years' non-compliance with an EC ruling, it ended in the imposition of a daily penalty payment of €10,000 coupled with an order to close the dump. Yet the penalty itself proved to be only a first step towards compliance. Six months later, when Greece began payment under threat that the Commission would otherwise withhold its aid payments, nothing had been done to remove the offending dump that was the subject of the proceedings. Six months later again, when the European Parliament's Environment Committee met in Brussels, it heard that Greece, which by now owed €4.10 million, had paid off €2.35 million, though otherwise the position had not changed; the fines were now met with a promise of rehabilitation. By keeping the matter as a constant agenda item, the Committee helped to secure closure of the dump. But the Committee had to return to Kateropolis in 2003, when it learned from the Commission that the new site was not functioning properly and that a formal notice had been served on the Greek authorities. These dismal facts underscore the difficulties associated with forcing governments into remedial action.

This case appears to be a healthy reminder to lawyers that a problem is not cured just because there is a court ruling. Court judgments are not self-executing and the judicial enforceability of the law can sometimes be a quite different thing from its judicial enforcement.

⁴³ See *Final Report of the Convention Circle on the Court of Justice*, COM(2002) 616/2.

⁴⁴ Case C-241/03 *Commission v Greece* (toxic dump), *Kateropolis* (2005) ECR I-8041. For further analysis, see M. Theodorou, 'An Analysis of the Recent Response of the Community to Non-compliance with Court of Justice Judgments: Article 260(2) EC TUE' 21 *ELRev* 25.

(ii) Types of sanction levied under Article 260 TFEU

Two types of financial sanction are mentioned in Article 260(1) TFEU: the lump sum and the penalty payment. The Commission has distinguished these in the following way. The lump sum is a single one-off sanction that penalises the state for its non-compliance between the date of the original judgment given under Article 138 TFEU and the subsequent judgment given under Article 260 TFEU. The penalty payment is a sanction which applies to each day of delay in compliance after the judgment given under Article 260 TFEU. It is thus calculated at a daily rate. It applies from the date of the second judgment under Article 260 TFEU and goes on indefinitely (in theory at least) or until state compliance.¹⁵

The wording of Article 260(1) TFEU states that a lump sum, or a penalty payment can be imposed. This would seem to suggest quite clearly that the Court cannot impose both in one same judgment. It must be one or the other. This assumption was overturned in *Commission v France*.¹⁶ In 1991, the Court upheld a Commission complaint that France had failed to comply with EU fisheries law between 1984 and 1987 by not sufficiently carrying out inspections or monitoring the mesh sizes of nets and by allowing undersized fish to be sold. Following a series of inspections of French ports during the 1980s, the Commission considered that very little was being done to comply with the judgment. It instigated Article 260 TFEU proceedings. The Commission asked for both a lump sum sanction and penalty payment to be imposed. The reason, it argued, was that they pursued different functions: the former was to punish the Member State for its behaviour prior to the Article 260 TFEU judgment; the latter was to insure the Member State to comply with that judgment as quickly as possible following its enforcement.

Case C-304/02 *Commission v France* (non-compliance with judgment) [2003] ECR I-4253

80. The procedure laid down in Article 260 TFEU has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective.
81. Application of both of these measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effect on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially establishes it.
82. That being so, recourse to both types of penalty provided for in Article 260(1) TFEU is not precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.

¹⁵ European Commission, *Application of Article 260 TFEU* (2004) 691, para. 123.

¹⁶ Case C-66/91 *Commission v France* [1991] ECR I-2021.

347 Infringement Proceedings

83. This interpretation cannot be countered by reference to the use in Article 260(2) TFEU of the conjunction 'or' to link the financial penalties capable of being imposed. As the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments have submitted, that conjunction may, significantly, have an alternative or a cumulative sense and must therefore be read in the context in which it is used. In light of the objective pursued by Article 260 TFEU, the conjunction 'or' in Article 260(1) TFEU must be understood as being used in a cumulative sense...
84. ...The procedure provided for in Article 260(1) TFEU is a specific judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persistency needed in order for the Member State in question to alter its conduct...
103. As to those submissions, while it is clear that a penalty payment is likely to encourage the defaulting Member State to put an end as soon as possible to the breach that has been established, it should be remembered that the Commission's suggestions cannot bind the Court and are only a useful point of reference... In exercising its discretion, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned...
104. In that light, and as the Commission has suggested in its communication of 15 February 1991, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly are effectively and, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations...
113. ...the French Republic should be ordered to pay to the Commission, into the account 'European Community own resources', a penalty payment of 102.5 x EUR 37 600, that is to say of EUR 37 360 250, for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-54/83 *Commission v France* has not yet been fully complied with.
114. In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since the judgment which initially establishes it and of the public and private interests at stake, it is essential to order payment of a lump sum (see paragraph 81 of the present judgment).
115. The specific circumstances of the case are fully assessed by setting the amount of the lump sum which the French Republic will have to pay at EUR 20 000 000.

The reference point for determining when there has been a failure to fulfil obligations under Article 260 TFEU and for prescribing sanctions is the date of expiry given in the letter of formal notice.¹⁷ From that point on, there is discretion to impose both a lump sum payment and a penalty payment. The Commission indicated in a Communication following the judgment that, as a general rule, it will press for both.¹⁸ Yet, the two have different functions, and this limits

¹⁷ It used to be the date in the reasoned Opinion: Case C-204/02 *Commission v France* [2004] ECR I-4262, para. 23.

¹⁸ European Commission Communication, n. 85 above, para. 100, 104.

when this can be done. The lump sum punishes the earlier non-compliance while; the periodic payment is intended to secure compliance with the final ruling under Article 260 TFEU. The Court has therefore indicated that it will not impose a penalty payment where the state concerned did not comply by the date set out in the letter of formal notice but has complied by the time of its ruling.¹⁵ It may, however, impose a lump sum in such circumstances.

There is a discretion not to apply a sanction at all. The Court has indicated that the question of whether to impose a sanction is a matter for its decision. In deciding whether to impose a fine it will look at what is appropriate in the circumstances and proportionate both to the breach and the state's capacity to pay.¹⁶ With respect to the lump sum, it will look at how long the breach persisted since the original judgment and its effect on public and private interests.

(ii) Level of fines imposed

The final amendment introduced by the Lisbon Treaty is set out in the final paragraph of Article 260(5) TFEU. This states that the Court cannot impose a fine in excess of that suggested by the Commission.¹⁷ This amendment reinforces the importance of the guidelines announced by the Commission on 15 December 2005.¹⁸

On the penalty payment, the Communication sets out a two stage formula. The first stage is a daily rate of €600 per day multiplied by a coefficient for seriousness (on a scale 1–20) and a coefficient for duration (on a scale 1–3). The coefficient for duration will be 0.10 for each month of continued infringement after the Article 260 TFEU judgment. The coefficient for seriousness is determined by the importance of the provision breached¹⁹ and the impact on particular and general interests. The second stage will apply a multiplier, *n*, to the amount reached in the first stage. This multiplier is based on the capacity of a state to pay and its votes in the Council, and ranges from 0.15 for Malta to 25.40 for Germany.

As regards the lump sum, the Communication suggests a minimum sum for each Member State based on the fault of the state in not complying with the initial judgment. These range from €100,000 for Malta to €12,500,000 for Germany. In addition, to calculate the lump sum a daily rate will be applied if its amount exceeds that of the minimum sum. This rate, which starts from the date of the Article 260 TFEU judgment, is €200 per day multiplied by the same coefficient for seriousness and by the same *n* multiplier as that described above.

The Commission acknowledges these formulas must operate in light of the proportionality principle. There may be cases, therefore, when it has to depart from them. It may ask only for a lump sum penalty where the Member State has taken all the necessary measures but some time is needed for the results to be realised. Similarly, it acknowledges that more lenient treatment may be appropriate where a Member State has made 'best efforts': it has taken all

practical steps but is still not yet fully compliant. There may also be times where the Commission has to suspend penalties to verify whether compliance has taken place or where it may only be practicable to award periodic penalties based on monthly intervals. The proportionality principle cuts both ways, however, and can be used to increase penalties. The Commission, therefore, indicates that where there are several heads of infringement, the Commission will ask for penalties, both the lump sum and daily penalty, to be applied to each one separately.

Whilst the Lisbon Treaty indicates that the Court cannot impose more severe penalties than those requested by the Commission, it can impose more lenient ones. The Court uses the same methodology as the Commission Communication but does not see it as binding. In cases brought before it, it reserves the right to apply the criteria in a manner independent from the Commission. This has resulted in its imposing alternative levels of fine from that proposed by the Commission where it sees issues such as the duration of the breach, or its seriousness differently.²⁰

FURTHER READING

- G. Falkner *et al.*, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press, 2005).
- A. G. Daefler, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Oxford and Portland, Hart, 1999).
- J. Harder, 'What Future for the Centralised Enforcement of Community Law?' [2002] 55 *Current Legal Problems* 495.
- C. Harlow and R. Rawlings, 'Accountability and Law Enforcement: The Centralised EU Infringement Procedure' (2006) 31 *European Law Review* 441.
- M. Mendicino, 'Non-compliance and the Commission's Role in Integration' (1996) 1 *Journal of European Public Policy* 1.
- R. Rawlings, 'Engaged Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4.
- N. Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (Aldershot, Routledge, 2009).
- E. Verheij, 'Even Judges, Unseen Practices: Opening the "Black Box" of EU Law in Action' (2007) 30 *West European Politics* 50.
- J. White and A. Dashwood, 'Enforcement Actions under Article 155 and 170 EEC' [1998] 14 *European Law Review* 388.

¹⁵ Case C-117/04 *Commission v France* [2006] ECR I-4461. This is also acknowledged in the European Commission Communication, above n. 15, para. 12.6.

¹⁶ Case C-112/03 *Commission v France*, judgment of 9 December 2004.

¹⁷ Previously, the Court mentioned it could impose a greater penalty than in the Commission's guidelines. Case C-117/04 *Commission v France* [2006] ECR I-4461.

¹⁸ European Commission Communication, above n. 15.

¹⁹ Importance is determined not by whether it is a Treaty provision or secondary legislation but by the perceived nature of the rule, so violations of fundamental rights or economic rights are always treated as very serious breaches. *Id.*, para. 16.1.

²⁰ Most recently see Case C-20/05 *Commission v Portugal* [2006] ECR I-1.

CRONG P. DE BUREAU "EU LAW, TEXT, CASES
AND MATERIALS" 12 4th ED, 2008
420-450

ENFORCEMENT ACTIONS AGAINST MEMBER STATES

1. CENTRAL ISSUES

- i. Amongst the tasks entrusted to the Commission by Article 211 EC is that of ensuring the proper application of Community law. The main component of the Commission's task in ensuring this is to monitor Member State compliance and to respond to non-compliance.
- ii. The Treaty provides for various enforcement mechanisms involving judicial proceedings against the Member States, which are brought either by the Commission or—much less frequently—by a Member State. Article 215 establishes the general enforcement procedure, giving the Commission broad power to bring enforcement proceedings against Member States which it considers to be in breach of their obligations under Community law.¹
- iii. The enforcement procedure functions in part as an elite means for resolving disputes involving Member States and only without recourse to litigation, in part as a channel for individuals to complain to the Commission about breaches of EC law, and in part as an objective law enforcement tool by the Commission.² It has also been described as a legal mechanism for extending the accountability of the different states involved, in particular the Member States and the Commission.³
- iv. As the number of infringement cases continues to rise, with the expansion of both EU policies and membership, the general enforcement mechanism has come under increasing

¹ See, e.g., Art. 211(1) on internal market matters, under Art. 215, the Board of the European Investment Bank and the Council of the European Central Bank have powers similar to those of the Commission under Art. 215. Art. 215 provides for an enforcement procedure where Member States have failed to fulfil an obligation under Community law. See also Art. 215(1) EC Treaty.

² The enforcement procedure under Art. 215 of the Treaty (which expired at the end of 2001) gave essentially more power to the Commission (then called the High Authority), which was empowered to require the Member States to fulfil their obligations without first bringing the case before the ECJ. However, the States could then bring the matter before the Court under Art. 215(1) EC Treaty.

³ See a discussion of the tension between Art. 215 and the principle of legal certainty in the Commission's Enforcement of Community Law (2000) 4 217.

⁴ C. Hatzidakis and J. Bowling, *Accountability and Law Enforcement: The Centralised EU Infringement Procedure* (2000) 10 217.

strained. Various attempts have been made to address the problem of overload and delay. The Commission has begun to emphasise preventive mechanisms and alternative methods of resolution, to prioritise certain kinds of breach, and to identify cases involving widespread, general, or persistent breaches. As of 2005, environmental cases continued to make up almost one quarter of the number of cases open.

- The pecuniary penalty mechanism of Article 228, which was created in the 1990s, allows the Commission to request the ECJ to impose a penalty payment on a Member State which has failed to comply with a previous judgment pursuant to Article 226. Although the number of judgments involving penalty payments remains small, both the early case law and the gradually expanding use by the Commission of Article 228 have begun to give shape to the procedure.

2. THE FUNCTION AND OPERATION OF THE INFRINGEMENT PROCEDURE

Article 215 provides:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
If the State concerned does not comply with the opinion within the prescribed time-limit, the Commission may bring the case before the Court of Justice.

(a) NATURE AND FUNCTION OF THE PROCEDURE

The Commission brings Article 215 proceedings either in response to a complaint from someone in a Member State or on its own initiative. Since it has no investigation service, complaints are brought on the basis of information gained from diverse sources, e.g. through the press, from European Parliament questions or petitions, or increasingly through modern technological sources such as databases indicating when Member States have failed to notify their implementation of a directive.

The Commission has repeatedly stated in its annual reports over the last ten or fifteen years that complaints from citizens constitute a significant source for the detection of infringements, and has suggested that the Article 215 procedure thus contributes towards creating a more participatory Community in which citizens can play a role in law enforcement.¹ In 1999 a standard complaint form was designed for individuals or small businesses. The Commission has equally emphasised the fact that the enforcement procedure is not intended primarily to provide individuals with a means of redress, but rather is an 'objective' mechanism for ensuring state compliance with EC law.² Indeed, the Commission has regularly

¹ For a useful description see B. Merson, *The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and to Develop New Instruments*, in: *Joint Working Paper* (4/2000).

² For the Commission's Annual Monitoring Report see *European Commission, Annual Monitoring Report*, 2000.

³ [1993] OJ C145.

⁴ See, e.g., 1994 Annual Report [1995] OJ C1218.

(2) OPERATION OF THE PROCEDURE

The infringement procedure can be divided into four distinct stages:

1. Negotiations at the initial pre-contentious stage give the Member State the occasion to explain its position and the opportunity to reach an accommodation with the Commission.
2. If the matter is not clarified or resolved informally between the two at this stage, the State will be formally notified of the specific infringement alleged by means of a letter from the Commission. The State is usually given two months to reply, except in cases of urgency, and the Commission normally decides within a year either to close a case or to proceed.
3. If after negotiation with the State, the matter has not been resolved, the Commission may proceed to the stage of issuing a reasoned opinion. The reasoned opinion sets out clearly the grounds on which the alleged infringement rests, and marks the beginning of the time period within which the Member State must comply if it is to avoid the final stage.
4. The final stage is referral of the matter by the Commission to the Court of Justice.

The Commission clearly continues to value and to affirm the 'de facto co-operation' dimension of the infringement procedure which enables disputes over enforcement to be resolved at the pre-contentious stage, or even after the formal stage has begun, without resort to the Court. During the mid-1990s, however, following a change of practice by the Commission concerning the issue of letters of formal notice, the number of referrals to the Court rose rapidly.²⁰ However, they subsequently stabilised again,²¹ leading the Commission to remark on the efficient handling of proceedings, and to suggest that 'in many cases the pre-litigation examination of compliance is enough to prompt the Member States to put the situation right'.²²

In its 2002 communication on Better Monitoring, the Commission emphasized a range of 'complementary mechanisms' for resolving instances of Member State non-compliance, such as problem-solving networks like the internal market SMD/TT network, national mediation, and even national judicial proceedings. Secondly, the Commission emphasized a range of mechanisms of infringement-prevention and management, such as interpretative communications, promotion of peer pressure, notification obligations, transparency campaigns, providing training, exchanges of information and practices, and so-called 'posting meetings' with Member States. These are all apparently intended to help Member States with compliance so that the need for recourse to formal infringement proceedings is correspondingly reduced. Thirdly, the Commission introduced a number of criteria for it to follow in prioritising particular kinds of infringement, beginning with infringements that 'undermine the foundations of the rule of law, secondly infringements that undermine the smooth functioning of the EC legal system, and finally the incorrect transposition or non-transposal of directives'.

In other words, the centralized EC enforcement mechanism of Article 226 is supposed to be just one mechanism, and usually a last-resort and carefully targeted mechanism, after other strategies to encourage compliance have failed, and after negotiation and constructive

interventions have not succeeded. Quite apart from the chronically limited time and resources of the Commission, there are pragmatic and political reasons for its exercise of political discretion and not to pursue every known Member State breach to judgment. As Rowlings has noted, 'Commission discretion allows, and scarce resources dictate, an ordered policy of selective enforcement'.²³ Finally, it is important to remember that enforcement actions successfully brought before the ECJ do not necessarily lead to compliance, even with the additional deterrent of the preliminary penalty procedure of Article 228 EC.

3. THE RELATIONSHIP BETWEEN THE 'PUBLIC' AND THE 'PRIVATE' ENFORCEMENT MECHANISMS

The early rulings of the ECJ which established the principle of direct effect made clear that the public enforcement procedures of Articles 226 and 227 (then Articles 169 and 170) provide merely one amongst several legal mechanisms for ensuring the application of Community law. According to the ECJ in *Van Gend en Loos*:²⁴

The vigilance of individuals concerned to protect their rights under this Treaty is a guarantee in addition to the supervision instituted by Articles 169 and 170, in the absence of the Commission and of the Member States.

Advocate General Roemer in the case argued that the preliminary rulings procedure and the infringement procedure are fundamentally distinguished by the fact that in a preliminary reference from a national court under Article 154, the ECJ will give only a ruling on the interpretation of Community law, leaving it for the national court to spell out the implications of that ruling in the particular case; whereas in proceedings under Article 226 or 227 (or Article 169 or 170), the ECJ will pronounce directly on the compatibility of a Member State's conduct with Community law.²⁵ In *Adithani-Zinnels* the ECJ ruled that proceedings brought by an individual were intended to protect individual rights in a specific case, whereas Commission enforcement proceedings were intended to ensure the general and uniform observance of Community law.²⁶ This meant that the two kinds of proceedings 'have different objects, aims and effects, and a parallel may not be drawn between them'.²⁷ Despite the attempts to maintain a clear distinction between the 'function' of a preliminary ruling and an enforcement action, however, it is evident from *Van Gend en Loos* and from many subsequent decisions that the ECJ, in the context of its preliminary rulings in interpretive jurisdiction, does often effectively decide whether a Member State is in breach of EC law.²⁸

Nevertheless, the two procedures continue to be treated in legal terms as quite distinct. Quite recently, the ECJ rejected the UK's argument that infringement proceedings by the Commission should be formed inadmissible on the basis that national judicial

²⁰ See the 1994 and 1995 Annual Reports for 1993 and 1994 (1995) OJ C291 and (1997) OJ C291 respectively.

²¹ See the 1994, 1995 and 1996 Annual Reports for 1993, 1994, and 1995, COM(1994) 261, COM(1995) 261, and COM(1996) 261 respectively.

²² See the Commission's position in COM(2002) 263, Commission Communication on Better Monitoring of the Application of Community Law.

²³ Rowlings, n. 1 above, 26.

²⁴ (1963) ECR I, 13.

²⁵ *Id.*, 15.

²⁶ Case C-157/88 *Adithani-Zinnels* *Marshall v. Newport City Council* [1989] ECR I-143, 151.

²⁷ *Id.*

²⁸ *Id.*, 15.

non-aligned parties against the Commission under Article 132 EC, which have attempted to require the Commission to initiate infringement proceedings under Article 136. The Court has consistently refused to admit such actions. Consistently with its "bilateral" rather than "industrial" conception of the infringement procedure, the ECJ in *Siret-Fruit* rejected an attempt by a company to use Article 132 to require the Commission to commence infringement proceedings against France:

The Court is compelled to state its disapproval of the Commission's behaviour in this regard. It is indeed unreasonable, as Ireland has pointed out, to allow a Member State five days to amend legislation which has been applied for more than 40 years and which, moreover, has not given rise to any action on the part of the Commissioner over the period which has elapsed since the accession of the Member State in question. Furthermore, it is clear that there was no particular urgency.⁹¹

Further, the Court has dismissed actions for annulment directed by an individual litigant against a 'decision' by the Commission not to commence proceedings against a Member State, again on the basis that this was a matter within the Commission's discretion and that the action sought—the adoption of a reasoned opinion—would not be susceptible in any case to an action for annulment.¹⁴

The Court's unwillingness to require the Commission, other than in a case in which the rights of a defence may be prejudiced, to initiate Article 226 proceedings within a reasonable time conforms with its approach to the action under Article 232 (ex Article 175). ECJ⁴ Proceedings under Articles 232 are brought against one of the Community institutions (rather than against a Member State), for failure to take action required by the Treaty. In the case of proceedings against a Community institution, the ECJ has held that the party bringing the action is required to do so within a reasonable period, even though Article 232 makes no mention of any time limit.⁴⁸

P. Snyders, *The Effectiveness of European Community Law*⁸⁶

153, 159, 160, and 171 are 153, 159, 160, and 171, respectively.

Paragraph 2 of a continuing resolution covering the Committee's conduct in which the Chairman is proceeding against Member States under Article 19 of the Statute, is necessary to ensure that the Committee can continue to carry out its functions under Article 19 of the Statute. The Committee is also required to carry out its functions under Article 19 of the Statute in order to ensure that the Committee can continue to carry out its functions under Article 19 of the Statute.

²⁴ Case 44233, n. 1. *See*, *supra* n. 17, Compare Case C-407/93 P *Zimmermann* and the *Stöckel* Commission (1997) ECR I-5843.

²¹ *Case C-27/93 Sweden v. Commission* [1993] ECR I-331; *Case C-70/95 Sweden v. Commission* [1995] ECR II-1331; *Case C-18/97 Sweden v. EC*: there is the important case the applicant wanted the Commission

to bring infringement proceedings against France as a basis for an action, French courts against the State's policies failed before the French courts in an action for damages.

21. See S. Sigmund, "Report of the European Policy Groups on Regionalism," 1992, *Journal of International Law and Economics* 1:1, 300.

System: The Dual Character of Supranationalism' (1991) 1 YJIL 387, 395.

⁴ Case 5972, 2002 WL 10047.

and professor of the East and West Studies which is no longer in existence, but the reasoning is presumably equally applicable to an L1 L2

The Commission itself has imposed certain administrative constraints on its own direction. For example, from 1989 onwards it decided to bring immediate infringement proceedings against a defaulting State as soon as the time limit for implementation of a directive has passed.¹⁵ And from 1990 on, the Commission began to issue letters of formal notice as a matter of routine whenever Member States had not notified national measures implementing Directives which are due for implementation.¹⁶ Further, we have seen that the Commission undertook to codify its own internal rules governing relations with individual complainants in response to pressure from the Ombudsman.¹⁷ It is likely, indeed, that both the supervisory role of the European Parliament and the administrative role of the Ombudsman have functioned as a positive influence on the Commission's conduct in the infringement procedure, and have strengthened the mechanisms and forms of accountability of the Commission within that process.

5. THE REASONED OPINION

(a) FUNCTION

The reasoned opinion which the Commission is required to issue and to notify to a Member State forms an important part of the pre-judicial procedure under Article 226, and provides the Member State concerned with a measure of protection. Together with the letter of formal notice the reasoned opinion (sometimes followed by a supplementary reasoned opinion¹⁸) is the official means by which the Commission communicates to the State the substance of the complaint against it, and specifies a time period within which the violation of Community law must be remedied. It is aimed to provide the Member State with a clear statement of the case against it, and to ensure respect for the principles of natural justice.¹⁹

(b) FORM AND CONTENT

The obligation to provide reasons is a requirement of general importance in Community law, and Article 154 of the Treaty expressly requires regulations, directives, and decisions to state the reasons on which they are based. Article 226 extends this requirement to opinions issued by the Commission under the enforcement procedure. Although the reasoning requirement in EC law constitutes an essential procedural requirement, breach of which constitutes a ground for annulment of a measure under Article 230, the Commission's opinion under Article 226 is not subject to an action for annulment because it does not have binding effect.²⁰ According to Advocate General Lagrange in an early case:

The Commission's reasoned opinion is not a measure of enforcement, but a preparatory act which is necessary for the Commission to bring an action for annulment before the Court of Justice.

¹⁵ 7th Annual Report (1991) OJ C200X.

¹⁶ 14th Annual Report, p. 3 (hereafter cited).

¹⁷ COM(2001) 141, p. 24 (hereafter cited).

¹⁸ See, e.g., Case C-354/93 *Commission v. Ireland* [2001] ECR I-5257; Case C-355/93, *Commission v. Italy* [2001] ECR I-5261.

¹⁹ *Evans*, n. 35 above, 445.

²⁰ Case 65/85 *Franz Lohrke Case (Lohrke GmbH v. Commission)* [1985] ECR II.

²¹ Case 7/51 *Commission v. Italy* [1951] ECR 127, 124, 125.

However, although a reasoned opinion may not be the subject of a direct action for annulment, a Member State which is the subject of such an opinion may contest the lack of adequate reasoning in a different way, by raising the matter before the ECJ if and when the enforcement proceedings reach that stage.²¹ In an early case in which Italy challenged the legal form and content of the reasoned opinion, the ECJ replied:

The Commission must state the reasons for its decision to bring proceedings against a Member State. It must also state the reasons for its decision to bring proceedings against a Member State. It must also state the reasons for its decision to bring proceedings against a Member State.

This means that the Commission is not obliged in its reasoned opinion to address or to answer every argument made by the Member State at the pre-litigation stage, nor to indicate what steps should be taken by the State to remedy the alleged breach.²² Further, the initial letter of formal notice need not meet particularly strict requirements, since the reasoned opinion is the crucial document which sets out the complaint to which the Member State must respond. Nonetheless, the essence of the complaint must be the same in the formal letter.²³ The reasoned opinion, and in the Commission's application to bring the case before the ECJ.²⁴ But so long as the Commission sets out clearly in the reasoned opinion the grounds on which it has relied in concluding that the State has violated Community law, and the particular complaints which will form the subject-matter of the proceedings,²⁵ the reasoning requirement will be satisfied.

Given that the reasoned opinion is intended to operate as a procedural protection for the Member State, the Commission is not entitled to amend the substantive content of its submission when the case comes to be heard before the Court, even if both parties wish the Court to consider other aspects of the State's conduct which took place after the date of the reasoned opinion.²⁶ In such a case, the Commission cannot amend its complaint to include a fresh objection after the reasoned opinion has been issued, but must initiate the entire Article 226 procedure again. This requirement that the content of the reasoned opinion be essentially the same as (although not necessarily in every respect identical to²⁷) the submissions contained in the Commission's application to the Court has been reiterated many

²¹ In Case C-415/93 *Commission v. Germany* [1995] ECR I-3449; Case C-171/97 *Commission v. Germany* [1998] ECR I-3471; and Case C-354/93 *Commission v. Germany* [1995] ECR I-5257, the ECJ discarded several challenges by Germany to its reasoned opinion, on the ground that it had been adopted by the College of Commissioners without having for it the opinion before them. The ECJ said that it was sufficient for the Commission to have available to them, at the time the information on which the decision to commence proceedings had been based.

²² Case 1/61 *Commission v. Italy* [1961] ECR 317, 327.

²³ Case C-11/89 *Commission v. Portugal* [1991] ECR I-3558, para. 22.

²⁴ For a case in which an alteration of breach of Art. 12 EC was not admitted by the Court, because the second letter had not referred to it, see Case C-371/94 *Commission v. Italy* [2000] ECR I-4523.

²⁵ See Case C-151/93 *Commission v. Germany* [1995] ECR I-5442, para. 34; Case C-165/97 *Commission v. Italy* [1999] ECR I-4771, para. 75.

²⁶ Case C-315/94 *Commission v. Austria* [1995] ECR I-3472, para. 36-41, where part of the Commission's complaint was held inadmissible because it was not in the reasoned opinion.

²⁷ Case 7/61 *Commission v. Italy* [1961] ECR 127, where Italy had concluded from the content of the reasoned opinion, issued in remedy for the alleged violation. Although both Italy and the Commission wished the Member State to take into account the impact of the new law (which the Commission considered to be inadequate to cure the breach), the ECJ refused to do so.

²⁸ See, e.g., Case C-411/94 *Commission v. Germany* [1995] ECR I-4985, para. 24-25.

times.²² However, it would not be sufficient for the Commission when the matter comes before the Court simply to refer in its application to all the reasons set out in the letter of formal notice and the reasoned opinion. Rather the application itself must contain a statement of the grounds on which it is based.²³

On the other hand, where enforcement proceedings brought by the Commission have been found by the ECJ to be inadmissible on the ground that the Commission's application is based on an objection different from that in the reasoned opinion, the Commission is not obliged to recommence the entire pre-litigation procedure but may lodge a fresh application before the Court based on the same objections as the reasoned opinion originally issued.²⁴ And where EC legislation on which the reasoned opinion was based has been amended prior to the case coming before the ECJ, this does not necessarily mean the Commission has to withdraw the action or issue a new reasoned opinion, so long as the obligations under the amended measure correspond to those arising under the original legislation.²⁵

There is one circumstance in which the Court will accept an application made by the Commission which is not the same as it was under the reasoned opinion, and that is where the change made is what is contained in the reasoned opinion rather than expanding it in a way which could disadvantage the respondent State.²⁶ And finally, an extension of the subject-matter of the dispute to events which took place after the reasoned opinion is acceptable in so far as they are of the same kind and constitute the same conduct as the events to which the opinion referred,²⁷ or only if the later evidence is not being used to establish a specific violation, but rather to support the argument that the other violation alleged are part of a general and persistent pattern.²⁸ This can be seen with particularly notable effect in a case brought against Greece for general and persistent breach of the EC Waste Directive.²⁹

The Commission is also not prohibited from responding, during the hearing before the Court, to arguments and defences raised by the respondent Member State, even where it has not made these points in the reasoned opinion itself.³⁰ And the Member State cannot complain of a breach of the right to a fair hearing by the fact that the Commission, in its application to the ECJ, does not take account of facts or defences put forward by the Member State after the expiry of the period set by the reasoned opinion.³¹

(c) CONFIDENTIALITY OF THE REASONED OPINION

In a number of cases, individual complainants who had sought to persuade the Commission to bring proceedings against a Member State and who were disappointed by the Commission's

²² See, e.g., Case 132/83 *Commission v. Austria* [1983] ECR II-3747; 12-1983; Case 166/82 *Commission v. Italy* [1982] ECR II-319 and more recently Case C-125/93 *Commission v. Netherlands* [1994] ECR I-4211.

²³ Case C-42/92 *Commission v. Germany* [1992] ECR I-1205, para. 7-8. See also Case C-45/92 *Commission v. Denmark*, [1992] ECR I-1187.

²⁴ Case C-57/84 *Commission v. Italy* [1985] ECR I-1145.

²⁵ Case C-95/93, n. 55 above; Case C-375/94 *Commission v. Belgium* [2005] ECR I-3689; Case C-218/03 *Commission v. Austria* [2004] ECR I-3335.

²⁶ See Case C-181/83 *Commission v. Germany* [1984] ECR I-5519, and for a similar judgment under Art. 138 EC see Case C-47/84 *Commission v. France* [1984] ECR I-2481.

²⁷ Cases C-31 *Commission v. France* [1982] ECR I-1213, para. 22; Case C-114/86 *Commission v. Italy* [1988] ECR I-627, para. 14; Case C-232/93 *Commission v. United Kingdom* [1994] ECR I-1621, para. 12-13.

²⁸ Case C-140/77 *Commission v. Ireland* [1978] ECR I-3511, para. 16-17, discussed below at n. 115-116 infra.

²⁹ Case C-121/97 *Commission v. Greece* [1998] ECR I-4567, para. 16.

³⁰ Case C-46/88 *Commission v. Netherlands* [1988] ECR I-3951.

efforts to secure or refuse to do so, subsequently sought to obtain disclosure of the reasoned opinion and of other documents then relevant to the investigative proceedings. Yet, despite an initial setback for the Commission in the *WVF* case,³² neither the Community Courts nor even the Ombudsman³³ has been prepared to require disclosure or to secure non-disclosure of a reasoned opinion, a draft reasoned opinion, or indeed of any documents relating to the investigative stage of the infringement procedure.

In *WVF*, the CJ ruled, in relation to a Commission investigation into possible breaches of EC law, that:

In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.³⁴

Similarly, in the *Bovarian Lager* case the Court ruled, in the context of a draft reasoned opinion which was not ultimately sent by the Commission to the Member State under investigation, that since the procedure was still at the stage of investigation at the time, the Member States were entitled to expect confidentiality from the Commission.³⁵ Finally, in *Terzo*, which concerned a request for access to a range of documents including letters of formal notice and reasoned opinions, the CJ ruled:

The requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgments of the Court of Justice. The preservation of this objective, particularly in the resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings, on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Article 4(1) EC.

Access to Commission documents is now governed by Regulation 1049/2001, and the Commission has continued to rely successfully on the exemption in Article 4(2) thereof governing protection of the purpose of inspections, investigations and audits to refuse access to documents relating to infringement proceedings. Nevertheless, even though it is not required to and cannot be compelled to do so, the Commission now does occasionally publish its reasoned opinions, in particular in cases where the State itself does not wish for it to remain confidential.

³² See Case T-104/88, n. 15 above, in which the CJ restricted the Commission's ability to rely on a particular exemption to the obligation to provide access to documents at a mandatory general exemption rather than an individual discretionary one.

³³ See n. 14 above.

³⁴ *Id.*, para. 62.

³⁵ Case T-253/97 *Bovarian Lager*, n. 19 above, para. 46.

³⁶ Case T-19/99 *Terzo*, n. 15 above, para. 25.

6. WHY IS AN ENFORCEMENT ACTION ADMISSIBLE AFTER THE BREACH IS REMEDIED?

Article 258 sets out the conditions which must be satisfied before the Commission may initiate enforcement proceedings in the Court. If the Commission has notified a reasoned opinion or has not given the Member State concerned a period of time within which to cure the alleged infringement, the action will not be admissible. On the other hand, once those conditions have been fulfilled and the period laid down by the Commission for compliance has expired without any action being taken by the Member State, it is no answer for that State to assert, when the case is heard before the ECJ, that the breach has since been remedied.

The question for the ECJ is whether the Member State was in breach at the time the Commission initiated proceedings before the Court. The Court's approach here contrasts with its approach to actions brought against a Community institution for failure to act, just as it did concerning the time of delay in initiating proceedings.⁴¹ In proceedings against the European Parliament under Article 258 for failure to act, the ECJ held that the action was devoid of purpose since the institution in question had acted to remedy its default.⁴² Yet where proceedings have been brought under Article 258 by the Commission against Member States, such actions have been declared admissible by the Court even though the State in question had remedied its breach by that time. Several reasons have been offered to explain why enforcement actions may be admissible after the infringement has been cured.

In the first place, the Commission argues that it has a continued interest in bringing the action, not least to prevent States from undermining infringement proceedings by bringing their illegal conduct to an end just before judgment is rendered, and possibly re-commencing that same conduct again afterwards.⁴³ Secondly, it is important for the Court to be able to rule on the legality of breaches of short duration, since there may be no less serious than longer breaches.⁴⁴ However, if the effects of a specific infringement have actually come to an end before the expiry of the period set out in the reasoned opinion,⁴⁵ the action before the ECJ will be inadmissible even if the Commission fears that a similar breach is likely to occur again in the future.⁴⁶ A third reason for giving judgment even after the breach has been remedied is in order to establish the basis for liability on the part of a defaulting Member State.⁴⁷ An individual's action for redress before the national courts—which has been cited by the Commission as one of the best ways of combating recidivism⁴⁸—could derive considerable assistance from a prior finding of the ECJ that the Member State in question had acted in violation of Community law.⁴⁹ A prior finding by the ECJ of an infringement is likely to be an

⁴¹ See above, 435–437.

⁴² Case 377/81 *Comptex v. Parliament* [1983] ECR 4217. The position, however, might be different if it were likely that some party might later wish to seek redress from the institution in question for an action by the legal fiction to act.

⁴³ See Lagrange AG in Case 2581 *Commission v. Italy* [1981] ECR 317 at 334.

⁴⁴ See Case AG in Case 242/85 *Commission v. Greece* [1986] ECR 1333, 1344.

⁴⁵ Recurring legislation to 'cure' an earlier breach will not be accepted by the ECJ: Case C-323/92 *Commission v. Belgium* [2003] ECR I-4307.

⁴⁶ E.g., Case C-95/92 *Commission v. Italy* [1993] ECR I-3153; Case C-925/91 *Commission v. Italy* [2003] ECR I-3613.

⁴⁷ Case T-15/88, n. 43 above, para. 16; Case C-58/93 *Commission v. Spain* [1994] ECR I-2237, para. 34.

⁴⁸ COM(1992)125 on Better Monitoring of the Application of Community Law.

⁴⁹ For discussion of the principle of state liability in an aggrieved individual's breach of EC law, following Case C-6 and 9/93 *Francovich and Bonifazi v. Italy* [1991] ECR I-3357, see Ch. 1.

effective means, even if not a necessary one, of showing the illegality of state action when damages are sought for loss caused by that action.⁵⁰

7. TYPES OF BREACH BY MEMBER STATES OF COMMUNITY LAW

Article 258 is very general in its description of a Member State violation for the purposes of enforcement proceedings. The Commission must simply consider that a State 'has failed to fulfil an obligation under this Treaty'. This may include actions as well as omissions on the part of States, failure to implement directives, breaches of specific Treaty provisions or of other secondary legislation, or of any rule or standard which is an effective part of Community law. Cases involving breaches by Member States in the sphere of the Community's external relations have come before the Court in recent years.⁵¹

An interesting and unusual example of breach of an EC Treaty provision can be seen in a case brought against Ireland for having brought dispute-settlement proceedings involving the interpretation of EC law against the UK, in relation to the MOX nuclear reprocessing plant in the UK, to a tribunal under the International Convention of the Law of the Sea, rather than before the ECJ.⁵² According to the ECJ, a breach of this nature involves a manifest risk that the international order laid down in the Treaty and consequently the autonomy of the Community legal system may be adversely affected.⁵³

Certain kinds of breach are far more often the subject of infringement proceedings than others, and the following examples illustrate some of the sorts of breaches with which the cases are concerned.

(A) BREACH OF THE OBLIGATION OF CO-OPERATION UNDER ARTICLE 10 EC

Case 95/81 *Commission v. Netherlands*
[1982] ECR 1151

The Commission brought proceedings against the Netherlands concerning its failure to implement Directive 70/156/EEC on the harmonization of the laws, regulations, administrative provisions and decisions of the Member States relating to the approval of motor vehicles. The Commission argued that the Netherlands had failed to provide the necessary information to the Commission to enable it to carry out its supervisory functions. The Commission requested that the Court should order the Netherlands to provide the necessary information and to pay the costs of the proceedings.

⁵⁰ See the attempt in Case T-115/87 *Swansea v. Commission* [1988] ECR II-371 to obtain an interlocutory ruling from the ECJ for this precise purpose.

⁵¹ E.g. the *Opinion* of the Court in Case C-45/93 *Commission v. United Kingdom* [1993] ECR I-3153; Case C-170/93 *Commission v. Poland* [1994] ECR I-3143. Also Case C-483/91 *Commission v. Germany* [1993] ECR I-4185 on failure to fulfill the Commission's demand for a waterways agreement with Austria, which was later taken over by the State.

⁵² Case C-284/01 *Commission v. Ireland* [2003] ECR I-4335.

⁵³ *Id.*, para. 34.

However, failure to comply with the duty to provide information but rather failure to fulfil the obligation to implement the Directive.

THE ECJ

6. It should be emphasised that, in proceedings under Article 173 of the EEC Treaty, failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation, while the obligation has not been fulfilled, it is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in doing so the Commission may not rely on any presumption.

However, although the Commission cannot rely on a presumption of breach where a Member State fails to provide information on compliance,¹¹ the ECJ has ruled that once the Commission has produced sufficient evidence to show that the Member State appeared to be violating Community law, it is incumbent on the State not simply to deny the allegations, but to contest the information produced in a substantive way.¹² Further, even though the burden of proof lies with the Commission to show breach, where the compliance is of inadequate transposition of a directive it is not necessary for the Commission actually to demonstrate the harmful effects of the transposing legislation.¹³

In the bathing water case above, the EC went on to say that all Member States had an obligation under Article 10 EEC to facilitate the achievement of the Commission's tasks, including that of monitoring compliance with the Treaty. This particular mode of infringement is frequently invoked by the Commission in enforcement actions where Member State authorities refuse or fail to respond to its requests for information.¹⁴ Clearly, if a Member State is not willing to respond at the pre-litigation stage of an investigation by the Commission for the purposes of infringement proceedings, it will be very difficult for the Commission to establish whether or not there has been a breach by the State. The Commission's attempt to find a way round this is to initiate separate enforcement proceedings on the basis of a breach of the obligation of co-operation.¹⁵

(3) INADEQUATE IMPLEMENTATION OF COMMUNITY LAW

In many cases, the cause of the Commission's complaint is not the complete failure to transpose or to implement Community legislation, but rather its inadequate implementation.

¹¹ Case C-217/93 *Commission v. Germany* [1995] ECR I-5215; Case C-212/93 *Commission v. Spain* [1994] ECR I-4915.

¹² Case T-22/94 *Commission v. Spain* [1995] ECR II-35, para. 11; Case C-258/93, n.21 above, para. 22.

¹³ Case C-391/93 *Commission v. Ireland* [1995] ECR I-4921.

¹⁴ Case T-22/94, n.11 above.

¹⁵ Paragraph 40 of Art. 173, *supra*; Case C-258/93 *Commission v. Spain* [1995] ECR I-5121; Case C-219/93 *Commission v. Italy* [1993] ECR I-1419; Case C-274/93 *Commission v. Belgium* [1994] ECR I-4179; Case T-22/94, n.13 above.

Case 167/93 *Commission v. France* [1994] ECR I-359

[Note that, pursuant to Art. 43 is now Art. 259]

The French legislature had failed to repeal a provision of the French Code du Travail. Under the Treaty, the Commission has the right to bring an action against a Member State which has failed to fulfil its obligations under the Treaty.

In the case of Directives, which are not directly applicable, it is always incumbent on the Member States to implement them fully. Even where directives are verbatimly directly effective or can be given indirect domestic effect in another way, this does not reduce the obligation on the State to implement them properly. Article 249 EEC provides that the manner and form of implementation of directives are a matter for each Member State to decide, but this has not prevented the ECJ from reviewing the adequacy of the chosen method of implementation. According to the Court, the freedom of a Member to decide on the manner of implementation does

A further objection to a Member State's reliance on such 'whimsical' administrative practices is that, quite apart from their uncertainty and alterability, they lack the appropriate publicity to constitute adequate implementation.¹⁶ However, the ECJ does not always condemn a Member State which has failed to adopt any specific measure to implement a directive, it is evident from the following case in which the Commission brought enforcement

¹⁶ Case 16/81 *Commission v. Netherlands* [1982] ECR I-551, para. 12.

¹⁷ Case 167/93 *Commission v. France* [1994] ECR I-359.

proceedings against Germany for failure to implement Directives 77/452 and 77/453 governing the right of establishment and freedom to provide services for nurses.

**Case 25/34 Commission v. Germany
[1965] ECR 1551**

(Note to A numbering: Art. 185 is now Art. 249)

12. The German Government does not deny that mere administrative practices, which by their nature can be modified as and when the administration pleases and which are not published widely enough, cannot be regarded as proper fulfilment of the obligation imposed on the Member States by Article 185 of the Treaty. It is the Court's constant practice, however, that the government claims that that principle cannot be applied in this instance because the administrative practice in question cannot be changed as and when the administration pleases and it has been given sufficient publicity.

After summarizing the Commission's counter-argument, the ECJ ruled as follows:

13. Faced with those conflicting views, the Court considers it necessary to take into account the third paragraph of Article 185 of the Treaty, according to which a directive is binding upon the Member States in which it is addressed, but leaves them the choice of form and methods.

14. It follows from that provision that the implementation of an EC Directive does not require legislative action by the Member States, but that they are free to choose the form and methods of carrying out their obligations. It is therefore not necessary for the Commission to prove that the administrative practice in question is a permanent and general practice. It is sufficient for it to show that the practice in question is a permanent and general practice. It is sufficient for it to show that the practice in question is a permanent and general practice.

In subsequent judgments the ECJ added to this by ruling that proper transposition was particularly important for individuals to know their rights when those on whom the directive in question conferred rights were nationals of other Member States.¹⁴¹

However, in proceedings brought by the Commission against the UK for improper implementation of the Product Liability Directive (85/374), the ECJ made an interesting use of the 'indirect effect' of directives—in the obligation on national courts to construe domestic law in accordance with a relevant directive¹⁴²—to dismiss the Commission's application. Whereas the Commission argued that the UK was in breach of the Directive because national courts would be required to interpret national law *ex lege* in order to conform with its requirements, the ECJ simply ruled that there was nothing to suggest that the UK courts would not, if called upon to do so, interpret the relevant national law—the Consumer Protection Act—in the light of the wording and purpose of the Directive so as to give effect to its aim.¹⁴³

¹⁴¹ See Case C-33/92 *Commission v. Greece* [1993] ECR I-467, para. 3; Case C-39/95 *Commission v. Germany* [1997] ECR I-1823, para. 34–35; Case C-162/97 *Commission v. Italy* [1998] ECR I-541.

¹⁴² Case C-105/95 *Commission v. United Kingdom* [1997] ECR I-4449.

¹⁴³ Contrast Case C-85/91 *Roquette-Francis* [1992] ECR I-5475, in which the ECJ ruled that where a Member State had not implemented the property, the capacity of national courts and apparently inconsistent national legislation in the way which conformed with a directly harmonized law would not absolve the Member State from the obligation to implement properly.

Finally, where national legislation has been the subject of different judicial interpretations, some of which are consistent with and others inconsistent with EC law, the ECJ has ruled that at the very least such legislation must be sufficiently clear to comply with EC law.¹⁴⁴

**(c) BREACH OF A POSITIVE OBLIGATION TO ENSURE
THE EFFECTIVENESS OF COMMUNITY LAW**

In furtherance of its policy of encouraging Member States to take active steps to assure the effectiveness of Community law, the Court has declared that Article 10 EC is breached if a Member State fails to penalize those who infringe Community law in the same way as it penalizes those who infringe national law, and in a way which is 'effective, proportionate and dissuasive'.¹⁴⁵

Secondly, a Member State may be in breach of the Treaty where it fails to prevent action by other persons which is frustrating Community objectives, even if there is no discrimination or double standards of the kind suggested in the case above. Thus in proceedings brought by the Commission against France, the ECJ found that in failing to take adequate steps to prevent violent and disruptive protests by French farmers which were hindering the free movement of agricultural goods, the Member State was in breach of its obligations under the Treaty.¹⁴⁶

(d) GENERAL AND PERSISTENT BREACHES

The Commission has at times used the infringement procedure to monitor Member State implementation of a particular law or set of laws, and in some cases to challenge relatively minor breaches where they are part of a pattern of inadequate implementation and compliance in practice.¹⁴⁷ And even when legislation is properly implemented, a State may be held in breach if an administrative practice infringes EC law, at least in circumstances where the practice in question is consistent and general.¹⁴⁸ In cases of this kind, according to the ECJ, the Member State's failure to fulfil obligations can be established only by means of 'sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts', which is different from the kind of evidence usually required when the breach concerns the terms of national legislation.¹⁴⁹

In a landmark case against Ireland in 1964, described by one commentator as 'path-making',¹⁵⁰ the Court ruled that a general administrative practice could actually be deduced from a selected number of individual infringements, so that a finding of 'general and persistent breach' could be made against the State.¹⁵¹ The Commission brought proceedings against Ireland citing twelve individual complaints relating to waste disposal which allegedly violated

¹⁴⁴ Case C-113/96 *Commission v. Italy* [1997] ECR I-4417, para. 33.

¹⁴⁵ Case 19/88 *Commission v. Greece* [1989] ECR II-278; Case 143/83 *Commission v. Denmark* [1984] ECR II-317, para. 8–13.

¹⁴⁶ Case C-185/95 *Commission v. France* [1997] ECR I-4559. For a case which is a contribution to the border-line between this and the case referred to in the previous footnote see Case C-50/91 *Commission v. France* [1992] ECR I-5475 and the comments by B. Knorr and S. Dalmatovic [1992] 29 *EMLR* 1113.

¹⁴⁷ See Case C-33/92 *Commission v. Greece*, and the comments by J. van Marrewijk [1993] 30 *EMLR* 471.

¹⁴⁸ Case C-41/92 *Commission v. Germany* [1993] ECR I-9449.

¹⁴⁹ Case C-441/92 *Commission v. Italy* [1993] ECR I-4417. In this case the ECJ found that the Commission had not proved that the German practice of routine prosecution of infringements of EC law was sufficiently consistent and general, rather than being more a series of isolated occurrences, 21–53.

¹⁵⁰ J. P. Wevers, 'A New Dawn for Commission Enforcement under Articles 125 and 126 EC' [1965] 42 *CMR* 241.

¹⁵¹ Case C-48/64 *Italy v. France*.

the Waste Directive, and argued that these were examples which illustrated breaches of a more general nature.¹⁰¹ The Commission sought judgment not only on the twelve specific complaints but also on the general and persistent nature of the deficiencies in Ireland's implementation of the Directive. Ireland challenged this claim, arguing that the twelve complaints in the reasoned opinion definitively delimited the subject-matter of the action against it. The ECJ however supported the Commission's argument and declared, on the basis of an examination of the individual complaints brought, that Ireland was generally and persistently failing in its obligation to implement the provisions of the Directive correctly.¹⁰² In terms of procedure the ECJ ruled that once the Commission had adduced sufficient evidence (of individual complaints) to show a persistent and repeated practice of breach, it was up to the State to challenge the detail of the evidence provided and the consequences flowing from it.

(c) ACTION BY THE COURTS OF A MEMBER STATE

Failure by a Member State's judiciary to comply with Community law has never formed the basis of an Article 225 judgment against that State, even though the action of national courts is often implicated in a particular breach.¹⁰³ Yet the Court has always said that Member States are responsible even for actions and inactions on the part of constitutionally independent organs of the State, and we have seen recently that the ECJ ruled that a State may be liable in damages to individuals for breaches of EC law committed by national courts of last instance.¹⁰⁴ Nonetheless, the ECJ has not yet directly addressed the question whether a national court could be the subject of infringement proceedings under Article 226,¹⁰⁵ and it has been suggested that the Commission has deliberately sought to avoid such politically sensitive cases.¹⁰⁶

In 1996, however, the Commission took the unprecedented step of issuing a reasoned opinion against Sweden, citing the failure of its supreme courts to make references to the ECJ under Article 234 and the absence of any law or regulation governing the procedure for making preliminary references.¹⁰⁷ It seems that, although the Swedish government has proposed no formal procedural legislation in an attempt to resolve the case politically before it is referred to the ECJ, it is far from being accepted within Sweden that there has in fact been any violation of EC law by the Swedish courts.¹⁰⁸

8. STATE DEFENCES IN ENFORCEMENT PROCEEDINGS

Although Member States have not lacked ingenuity or resourcefulness in providing reasons to justify their failure to fulfil Treaty obligations,¹⁰⁹ the ECJ has not been very receptive to such arguments. In the case in which an intervening Member State put forward a defence on behalf

¹⁰¹ *ibid.*, para. 22.

¹⁰² *ibid.*, paras. 227, 228, 272, 273, 281.

¹⁰³ See e.g., Case C-28/92, *n. 124* above.

¹⁰⁴ See Case C-21/01 *Köbler* [2002] ECR I-19033, See Ch. 9 for discussion.

¹⁰⁵ See however the view of Warner AG in Case 107/83 *n. 4*, *in* *Evans* [1977] ECR 1395, 1402.

¹⁰⁶ *Evans*, *n. 3* above.

¹⁰⁷ Document number C(1996)2596 of 7 Oct. 1996, relating to infringement proceedings 1996/160.

¹⁰⁸ U. Eerdmans, 'Confronting Member State Courts under EC Law' [2005], available at www.eurlex.europa.eu/legislation/legislation.htm.

¹⁰⁹ See e.g., Case C-351/92 *Commission v. Ireland* [1993] ECR I-4555.

of the State against which infringement proceedings had been brought, the intervention was rejected as inadmissible and the ECJ found a breach of EC law.¹¹⁰ Many 'defences' have been unsuccessfully pleaded in infringement proceedings. There is, however, nothing to prohibit Member States from introducing surprise defences which they did not raise in the pre-litigation procedure, even though the Commission certainly cannot introduce surprise complaints in the same way.¹¹¹ Further, the fact that a Member State's infringement has had 'no adverse effect' is not a defence to infringement proceedings.¹¹²

(a) FORCE MAJEURE

On many occasions, States have invoked difficulties in their parliamentary procedures, or problems with the separation of powers within their systems, to explain delay in compliance with EC law, but these have consistently been rejected by the ECJ. It has ruled on the one hand that a State is responsible for breach whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution,¹¹³ and on the other hand that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time limits laid down in Community directives.¹¹⁴ The ECJ did however agree that force majeure could be pleaded in a case where a bomb attack prevented 'insurmountable difficulties', rendering compliance with the Treaty impossible.¹¹⁵

(b) LACK OF INTENTIONAL WRONGDOING BY THE STATE

The Court has been similarly dismissive of arguments by Member States that they were not at fault, or were not deliberately delaying or opposing EC law, for response to such pleas has been to declare that 'the admissibility of an action based on Article 169 (now 226) of the Treaty depends only on an objective finding of a failure to fulfil obligations and not on proof of any fault or opposition on the part of the Member State concerned'.¹¹⁶ Similarly, the Court has rejected the relevance of arguments that the Member State's breach was 'minor',¹¹⁷ or that it was the result of 'human error'.¹¹⁸ The Court looks only to see whether or not the infringement

¹¹⁰ Case C-39/92, *n. 55* above, where the UK intervened to argue that the breach alleged concerned violation of international law obligations and not of EC law.

¹¹¹ Case C-414/97 *Commission v. Spain* [1998] ECR I-5313.

¹¹² Case C-45/97 *Commission v. Portugal* [1998] ECR I-259; Case C-36/95 *Commission v. Spain* [1996] ECR I-1213.

¹¹³ Case T-169 *Commission v. Italy* [1977] ECR II-237, para. 12.

¹¹⁴ E.g., Case 152/83 *Commission v. Italy* [1984] ECR II-551, para. 4; Case C-51/91, *n. 126* above; Case C-112/90 *Commission v. Belgium* [1991] ECR I-639; Case C-338/97 *Commission v. Spain* [1998] ECR I-2321; Case C-336/97 *Commission v. Italy* [1998] ECR I-4420.

¹¹⁵ Case 10/57 *Commission v. Italy* [1972] ECR II, para. 24. However, even in this case the Court was not satisfied that the bomb attack rendered compliance unreasonably difficult by the time proceedings were brought. See also Case 12/58 *Commission v. Greece* [1958] ECR II-49; Case C-334/97 *Spain v. Commission* [1998] ECR I-2145, para. 14, for definition of force majeure in other circumstances.

¹¹⁶ Case 301/81 *Commission v. Belgium* [1982] ECR I-437, para. 1.

¹¹⁷ Case C-48/97 *Commission v. Italy* [1997] ECR I-4457.

¹¹⁸ Case C-355/01 *Commission v. Italy* [2004] ECR I-1113, para. 43.

has taken place as alleged, and the breach need not involve any deliberate infringement or moral wrongdoing on the part of the Member State.¹⁴²

(c) THE COMMUNITY MEASURE ON WHICH THE INFRINGEMENT PROCEEDINGS ARE BASED IS ILLEGAL

Case 129/83 *Commission v. Greece*
[1984] ECR 151

(Note that according to Arts. 51, 153, 119, 173, and 178 are now
Arts. 89, 226, 227, 235, and 243)

A year after adopting a decision under Article 90 EC declaring Greek legislation on pollution enforcement to be incompatible with the Treaty, when Greece had taken no action to amend the legislation, the Commission brought infringement proceedings before the ECJ. The Greek Government contested the lawfulness of the Commission's initial Article 90 decision.

THE ECJ

14. The system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 159 and 170, which permit a declaration that a Member State has failed to fulfil its obligations, and those contained in Articles 173 and 175, which permit judicial review of the lawfulness of measures adopted by the Community institutions for the failure to adopt such measures. Those remedies have different objectives and are subject to different limits. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot therefore plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision.

It therefore seems that it is not possible for a Member State to plead the illegality of an earlier Community decision addressed to it in order to resist judgment against it in Article 226 proceedings for failure to comply with that decision. The rationale is that if the Member State objected to the decision, it had the opportunity at the time of bringing a direct action for its amendment under Article 230. However, a plea of illegality might be a defence to an action under Article 226 where the Community measure was so gravely flawed as to be legally inoperative or where the earlier measure was not a decision addressed to the Member State in question, but a regulation the illegality of which might not have been apparent to the Member State until the Commission brought enforcement proceedings.¹⁴³ It may also be possible for

¹⁴² See however Case C-14/83 *Commission v. United Kingdom* [1983] ECR I-1493, in which the Court was indirectly impressed by the 'omniscient conduct' of the UK in later voluntarily remedying its breach in order to escape further penalties.

¹⁴³ See Maréchal, *AS* in Case 224/78 *Commission v. Greece* [1980] ECR 3513, 3519-3545; Case 225/77 *Commission v. Greece* [1978] ECR 3671, 3677. For an unsuccessful attempt to plead the illegality of a decision (which the State had failed to implement) see Case C-24/91 *Commission v. Germany* [1992] ECR I-5471.

the illegality of the decision to be pleaded in an extreme case where the decision infringes a principle of a constitutional nature.¹⁴⁴

(2) OTHER MEMBER STATES ARE ALSO IN BREACH

This ground has been pleaded numerous times by Member States, without success.¹⁴⁵ The idea that the obligation to comply with Community law is a reciprocal one which depends on full compliance by other Member States has long been rejected by the ECJ. Since *Van Gend en Loef*¹⁴⁶ the ECJ has been determined to distinguish Community law from traditional forms and principles of international law,¹⁴⁷ in which the reciprocity principle has a much more central role. However, this has not deterred Member States from continuing to raise the concept of reciprocity in their defence in EC infringement proceedings.¹⁴⁸

5. ARTICLE 227

In addition to the Commission's enforcement power under Article 226, Article 227 of the EC Treaty provides a means for any Member State to initiate an action against another State which it considers to be in breach of the Treaty.¹⁴⁹ Article 227 provides:

A Member State which considers that another Member State has failed to fulfil its obligations under the Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after inviting the States concerned to submit their views. The Commission shall deliver a reasoned opinion after inviting the States concerned to submit their views. The Commission shall deliver a reasoned opinion after inviting the States concerned to submit their views.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Unlike under Article 226, the Member State bringing the action does not first have to contact the Member State which is the subject of the complaint. Instead the matter must first be brought by the complainant State before the Commission. The procedure thereafter is similar to that under Article 226, except that in the case of Article 227 both States must be heard and given a chance to make oral and written submissions before the Commission gives its reasoned opinion. Given that Article 227 provides a mechanism for Member States rather than the Commission to bring another State before the ECJ, it seems the complainant State may bring the case to the ECJ even where the Commission takes the view that there is no breach.

Article 227 has very rarely been used, no doubt because of the ill-will it could occasion (and reflect) between Member States, and because of their preference for resolving disputes by

¹⁴⁴ Cases 6 and 11/83 *Commission v. France* [1983] ECR I-525; Case 247/83 *Commission v. Germany* [1979] ECR I-1311; Case 156/77 *Commission v. Belgium* [1978] ECR I-811.

¹⁴⁵ See, e.g., Case C-14/83 *Commission v. United Kingdom* [1983] ECR I-1493.

¹⁴⁶ Case 26/62 [1962] ECR I-1.

¹⁴⁷ See Case 107/83 *Commission v. Italy* [1984] ECR I-27, para. 1.

¹⁴⁸ For a recent example see Case C-265/93 *Commission v. Luxembourg* [1995] ECR I-4963.

¹⁴⁹ See also Art. 146 ECHR 1950.

political means.¹³⁷ Where political solutions fail, however, States have occasionally had recourse to this mechanism. In 1978 France, with the support of the Commission, successfully brought proceedings against the UK over a fishing dispute.¹³⁸ In 1995 Belgium, without the support of the Commission but with the support of four other Member States, brought an unsuccessful action against Spain in relation to its rules of origin requirements for Rioja wine.¹³⁹ And in 2002, Spain brought an action against the UK on account of the way in which the UK extended voting rights in European Parliament elections to residents of Gibraltar.¹⁴⁰ The Commission encouraged the two States to resolve the dispute amicably and declined to have a reasoned opinion,¹⁴¹ given the sensitivity of the underlying bilateral issue,¹⁴² but the ECJ ultimately upheld the conduct of the UK as found against Spain.

12. ARTICLE 225: THE PECUNIARY PENALTY

The provision for a penalty payment to be imposed against a Member State which has failed to comply with a previous enforcement judgment of the Court was first introduced into Article 118 EC by the Treaty on European Union in 2001. It was intended to give teeth to the infringement procedure, and to provide a sharper incentive for Member States to comply with ECJ rulings against them. Prior to the existence of the penalty payment option, the only way provided under Article 228 to 'enforce' compliance with a judgment against a Member State under Article 226 was by bringing the State before the ECJ again, for another declaratory ruling.

Article 228 now provides:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures in time, it may bring the State before the Court of Justice. The Commission shall submit a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time laid down by the Commission, the latter may bring the case before the Court of Justice. In such cases, it shall specify the amount of the lump sum or penalty payment to be paid by the Member State as a constraint which it considers appropriate in the circumstances.

3. If the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on that State.

This procedure shall be without prejudice to Article 226.

¹³⁷ In 1981 the procedure was first initiated by the Commission in response to a complaint from France against the Netherlands, which had two reasoned opinions by the Commission (see Case 18/84 *France v. Netherlands* [1984] ECR II, para. 6).

¹³⁸ Case 14/78 *France v. United Kingdom* [1978] ECR 2923.

¹³⁹ Case C-28/95 *Belgium v. Spain* [1996] ECR I-3313.

¹⁴⁰ Case C-103/01 *Spain v. United Kingdom* [2002] ECR I-7717. The UK action had been responsive to the judgment of the European Court of Human Rights in *Appleby* [2001] 4 EHRR 413, *Merseydove*, *United Kingdom*, ECHR, 1991-1.

¹⁴¹ Case C-115/04, n. 145 above, para. 21.

No upper limit to the amount of penalty is specified,¹⁴³ and the Court is not bound to follow the proposal of the Commission. There is no mechanism for collection of the payment should a Member State refuse to comply,¹⁴⁴ and there is no power to seek an injunction¹⁴⁵ or to order a Member State to take specific action.¹⁴⁶ The Court has also indicated that it has no jurisdiction under Article 228 to require Member States to comply with its judgment within a specified period of time.¹⁴⁷

Initially it seemed that, unlike a declaratory judgment under Article 226 which would be given by the ECJ even where the Member State had complied with the Commission's reasoned opinion before judgment, as long as the State had not complied before the expiry of the period laid down in the reasoned opinion, the ECJ would not impose a periodic penalty in circumstances where the Member State had apparently complied before the date of the Article 228 judgment.¹⁴⁸ However, with the introduction of lump sum payments to penalise a state breach which continues between the date of the initial Article 228 judgment and the date of the Article 228 judgment the practice has changed, and judicial proceedings will not now be withdrawn just because a State has belatedly complied.¹⁴⁹ On the other hand, it is clear that the success of Article 228 cases depends largely on the quality of the evidence submitted by the Commission, and the continuing saga of Italian employment discrimination against foreign-language learners demonstrates the difficulties often for individual complainants (who, as we have seen, are in no sense parties to the case) when the Commission fails to bring sufficient evidence to prove its allegations.¹⁵⁰

After a slow start, Commission is gradually making more use of the procedure for proposing pecuniary penalties,¹⁵¹ bringing it most frequently in cases involving serious and persistent breaches, and particularly in the sphere of environmental policy.¹⁵² The Commission also now publishes, in an annex to its annual reports on monitoring the application of EC law, a list of Article 228 judgments with which individual Member States have not yet complied, together with an indication of what action it is taking (under Article 226 or otherwise) against those States. And although the number of judgments actually given remains very low, the Court of Justice has handed down a number of significant rulings which are gradually giving

¹⁴³ Art. 228, which provides for the imposition of penalties by the Court under reg. 1 adopted by the Council and the Parliament, also specifies that the Court's jurisdiction under such legislation may be unlimited.

¹⁴⁴ For a critical analysis see *Mc. The Commission, An Analysis of the National Responses of the Commission to Non-compliance with Court of Justice Judgments* (Art. 228) [2002] 27 *ELRev* 35.

¹⁴⁵ Although the Court has power to order injunctive measures in interim proceedings under Art. 243, it does not have such power under Art. 228, when giving judgment in infringement proceedings.

¹⁴⁶ See Case C-155/71 *Commission v. Germany* [1972] ECR I-859, para. 44-45.

¹⁴⁷ Case C-473/93 *Commission v. Luxembourg* [1994] ECR I-3167, para. 51-52. However, in Case C-281/01 *Germany v. Italy* [2002] ECR I-815, para. 6, the ECJ ruled that, although Art. 228 did not specify the period within which a judgment must be complied with, the interest in the immediate and useful application of Community law required compliance as soon as possible.

¹⁴⁸ See Case C-115/04 *Commission v. Italy* [2005] ECR I-8885, concerning the long-running complaint about inadequate discrimination against foreign-language learners, where the Court did not impose a penalty imposed by the Commission on the basis that Italy appeared to have substantially complied by the date the Court examined the facts. In fact Italy had been argued that Italy had not complied with the previous judgment, and that the law itself introduced in purported compliance with that earlier judgment had left the affected individuals in a worse position than they had been under the original discriminatory employment conditions. See *M. Redfern, Further on Algeria*, Feb. 2007.

¹⁴⁹ Case C-104/03 *Commission v. France* [2004] ECR I-4253, and the Commission's memo ECU(2004)1421.

¹⁵⁰ N. 151 above.

¹⁵¹ For criticism of its under-use see European Parliament resolution on the Commission's 2004 and 2005 Annual Reports on monitoring the application of Community law [2005] and 2006], P6-TA(2006)222.

¹⁵² For a pending environmental case see Case C-524/04 *Commission v. Germany*, action brought by the Commission on 7 Dec. 2004.

shape to the penalty payment procedure. Many of the cases involve practices which by their nature are not susceptible to immediate or easy resolution, such as improving the quality of bathing water or maintaining a system of fisheries inspection and monitoring which is capable of ensuring that conservation regulations are observed in practice. However, when the period of time over which the Member State's breach persists becomes excessive, the Court seems willing to impose the sharper incentive of a penalty payment.

Initially in 1994 and 1997 the Commission published a memorandum on the application of the Treaty provision, and a method of calculation for penalties.¹²⁷ In these documents the Commission argued that the amount should reflect the aim of the sanction, i.e. to secure effective compliance with EC law as quickly as possible, and that the most appropriate means of achieving this aim would be a periodic penalty running from the date of service of the ECJ's judgment. In the Commission's view, penalties should always be deterrent and never purely symbolic. The daily penalty should be calculated on the basis of three criteria: (1) the seriousness of the infringement (including not only failure to comply with an ECJ judgment, but also the seriousness of the original infringement in terms of both effects and symbolism), (2) its duration, and (3) the need to ensure that the penalty itself is a deterrent to further infringement. The method of calculation should involve a uniform flat-rate amount per day of delay to penalise the violation of the principle of legality, multiplied by factors reflecting the seriousness of the infringement and its duration,¹²⁸ and by a factor representing the ability of the Member State to pay and the number of votes it has in the Council. This initial approach was amended and supplemented by the Commission in a memorandum in 2005, following a number of rulings by the Court in particular on the issue of lump sum payments.¹²⁹ While these had not been ruled out in its initial guidelines, the Commission had clearly expressed a strong preference for periodic penalties, and in practice a lump sum penalty had never been proposed to the Court.

The Court itself ever since its first ruling on the pecuniary penalty,¹³⁰ has repeatedly emphasised that while it agrees with much of the guidance published by the Commission, it is not bound by the Commission's advice.¹³¹ In a case against Spain concerning non-compliance with a judgment concerning the quality of bathing water, for example, the Court rejected the Commission's proposal to impose a daily penalty on Spain, and instead imposed an annual penalty to be assessed on an ongoing basis so as to reflect the progress towards compliance effected by Spain.¹³² This was because of the nature of the breach, and in particular the difficulty of knowing, until a considerable period of time after the fact, that the quality of bathing water did conform to the limit values set by EC law.¹³³ And in a case against France involving inadequate implementation of the Product Liability Directive, the Court rejected the Commission's guidelines for calculating the coefficient relating to the duration of the infringement.¹³⁴

¹²⁷ See [1994] OJ C242/5 and [1997] OJ C242/2 for discussion see Theodorsson, n. 133 above.

¹²⁸ See the Commission's several notices on the 'sanction coefficient' in 2001 (2001/23/EC), 2002 (2002/23/EC), 2003 (2003/23/EC).

¹²⁹ See [2005] OJ C153/1.

¹³⁰ Case C-31/73 *Commission v. Greece* [1973] ECR I-4303. For comment see L. Bernick, 'Punishing Member States for Defying Their Sentence or Sinner (and) Sinner' (1973) 11 *ELR* 245 and C. Hatzis (2001) 3 *ELR* 111.

¹³¹ *Ibid.*, para. 47-48. Although the Court did rule against Greece and imposed a penalty, it reduced the amount of the periodic penalty payment proposed by the Commission.

¹³² Case C-412/01 *Commission v. Spain* [2003] ECR I-4211. For comment see M. Laffont (2003) 11 *ELR* 210.

¹³³ The Court did similarly in Case C-304/03, n. 153 above, ruling the periodic penalty proposed by the Commission and imposing fines a half-yearly rather than a daily basis, in order to prompt towards compliance to be required.

¹³⁴ Case C-177/04, n. 24 above.

More fundamentally, the Court in 1994 imposed the first lump sum penalty payment on a Member State for a longstanding violation, even though the Commission had not recommended this.¹³⁵ The case, in which thirteen other Member States intervened, was brought against France for non-compliance with a judgment dating from 1991 concerning the modifying and implementation of EC rules on fisheries conservation. Four of the intervening Member States supported the possibility of imposing a lump sum penalty concurrently with a periodic penalty on the basis that the lump sum payment was a complementary deterrent measure. The twelve other States, however, put forward several arguments based on the Treaty text as well as on policy and principle, against the concurrent imposition of both penalties. The Court dismissed all of these arguments:

Case C-324/02 *Commission v. France*
[2004] ECR I-6251

80. It is pointed out that the Court has, in the past, imposed a lump sum penalty on a Member State for non-compliance with a judgment establishing the breach of public law. The Court has, however, in the past, imposed a periodic penalty on a Member State for non-compliance with a judgment establishing the breach of public law. The Court has, however, in the past, imposed a lump sum penalty on a Member State for non-compliance with a judgment establishing the breach of public law.

81. The Commission's proposal to impose a daily penalty on Spain, and instead imposed an annual penalty to be assessed on an ongoing basis so as to reflect the progress towards compliance effected by Spain. This was because of the nature of the breach, and in particular the difficulty of knowing, until a considerable period of time after the fact, that the quality of bathing water did conform to the limit values set by EC law. And in a case against France involving inadequate implementation of the Product Liability Directive, the Court rejected the Commission's guidelines for calculating the coefficient relating to the duration of the infringement.

82. That being so, it is not to be expected that the Commission's guidelines for the imposition of a lump sum penalty did not lead to any violation of the principle of legal certainty nor did the fact that the Commission had not proposed the imposition of a lump sum penalty in this particular case present any obstacle to the imposition of such a penalty by the Court. The ECJ rejects the argument that it is needed 'political legitimacy' to impose a financial penalty not suggested by the Commission, and declared that the financial penalties to be imposed should be decided upon according to the degree of persistence needed in order for the Member State in question to alter its conduct.¹³⁶ The rights of defence of the Member State were not affected by its being unable to put forward arguments against a lump sum, in the Court's view, because the Article 158(2) procedure was to be viewed as a method of enforcement of the earlier judgment, following a finding, based on *inter partes* proceedings, that a breach of EC law persisted.¹³⁷

The Court took the view that the absence of any Commission guidelines for the imposition of a lump sum penalty did not lead to any violation of the principle of legal certainty nor did the fact that the Commission had not proposed the imposition of a lump sum penalty in this particular case present any obstacle to the imposition of such a penalty by the Court. The ECJ rejects the argument that it is needed 'political legitimacy' to impose a financial penalty not suggested by the Commission, and declared that the financial penalties to be imposed should be decided upon according to the degree of persistence needed in order for the Member State in question to alter its conduct.¹³⁸ The rights of defence of the Member State were not affected by its being unable to put forward arguments against a lump sum, in the Court's view, because the Article 158(2) procedure was to be viewed as a method of enforcement of the earlier judgment, following a finding, based on *inter partes* proceedings, that a breach of EC law persisted.¹³⁹

¹³⁵ Case C-31/73, n. 153 above. In subsequent case against France where necessary, the Commission had requested only a periodic penalty and not a lump sum, the ECJ considered whether a lump sum should nevertheless be imposed, but decided that it should not: Case C-177/04, n. 14 above.

¹³⁶ Case C-324/02 *Commission v. France* n. 151 above, para. 92-93.

¹³⁷ *Ibid.* para. 93.

Interestingly, especially in view of the extensive counter-arguments made by several Member States against the power of the Court to impose a lump sum penalty where it had not been proposed by the Commission in accordance with pre-established criteria, the ECJ's reasoning on the amount of the lump sum penalty was minimal in the extreme. The Court simply stated in two brief paragraphs that:

114 In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since the judgment with penalties established in order to protect the public and private interests at issue, it is essential to order payment of a lump sum (see paragraph 11 of the present judgment).

115 The specific circumstances of the case are likely to be assessed by the amount of the lump sum which the French Republic will have to pay at EUR 50 000 000.

Following the case, the Commission amended its original guidelines, referring not only to the definability of a lump sum payment where Member States have delayed considerably in compliance, but also to the principle of proportionality and equal treatment of the Member States, which had been emphasized by the ECJ in other Article 228 judgments,¹¹⁴ as well as the need for sanctions to be foreseeable.¹¹⁵ On lump sum payments, the Commission indicated that it would henceforth propose at least a minimum lump sum payment to the Court in every Article 228 case, to reflect the principle that any case of persistent non-compliance... in itself represents an attack on the principle of legality.¹¹⁶

The Commission made a range of other recommendations in its follow-up memorandum, e.g. proposing that distinct sanctions could be imposed for distinct infringements within the context of a single case, to allow for greater precision and adaptability. Drawing on the Spanish bathing water and French fisheries cases, it also proposed to allow for adjustment of sanctions to reflect partial or gradual compliance, and for periods such as six months or a year, rather than only daily penalties. A procedure to allow for the suspension of penalties after appropriate verification of compliance with conditions set down by the Court was also suggested. Several other guidelines were laid down, including factors which would aggravate or mitigate the seriousness of a breach for the purposes of calculating the penalty due. However, shortly after the fisheries judgment imposing both a lump sum and a six-monthly period penalty upon it, France challenged the decision made by the Commission pursuant to that judgment.¹¹⁷ The Commission in its decision claimed that France was continuing its failure to comply fully with the original judgment under Article 228 and should pay the periodic penalty. In an action for annulment lodged before the Court of First Instance, France has claimed that the Commission lacked competence to impose the periodic penalty, that it erred in its assessment that the French breach continued, and that in any case the penalty imposed was too high.¹¹⁸

It is evident that the Article 228 mechanism, although slow to develop and to take shape, now represents the sharp end of the overall enforcement procedure, with a distinctly less diplomatic and more formal legal flavour than the Article 226 stage. However, it is also evident that the burden is on the Commission to marshal the appropriate evidence against the

¹¹⁴ Case C-332/97 *Commission v. Greece* (2002) ECR I-1149; Case C-71/01, *Spain v. Italy*, 2002 ECR I-1151.

¹¹⁵ 550 (2005), 458.

¹¹⁶ 2144, para 12. Since then the Commission has begun to request lump sum penalties too, e.g. Case C-21/02 *Commission v. Luxembourg* (not brought to 12 May 2006).

¹¹⁷ Case T-38/05 *France v. Commission*, action brought on 12 May 2006.

¹¹⁸ 2142.

Member State before the ECJ, and that a failure to do so in Article 228 proceedings may well undermine the effect of a previous Article 226 judgment against a State.¹¹⁹

11. INTERIM MEASURES

Under Articles 242 and 243 EC the ECJ has the power to prescribe interim measures which it considers to be necessary in a case which has been brought before it.¹²⁰ Although interim measures may be sought in any case before the ECJ,¹²¹ they may be particularly useful for the Commission to seek at the same time as proceedings under Article 226.

When in Article 226 proceedings a breach is found, the Court simply declares that the Member State has failed to fulfil its obligations, and its ruling does not have any effect on the impugned national provision, indeed as a general matter, actions before the ECJ do not have suspensory effect.

Article 242 however provides:

Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 243 then provides:

The Court of Justice may in any case before it prescribe such provisional measures as it may consider necessary.

The Court's Rules of Procedure specify that such interim measures may not be ordered unless there are circumstances giving rise to urgency, as well as factual and legal grounds which establish a *prima facie* justification for granting the measures sought. The effect of the urgency requirement is that the interim measures requested must be of such a nature as to prevent the injury which is alleged. Further, the Commission must display diligence in response to a complaint made against a Member State if it is seeking interim measures, given the requirement of urgency, and the ECJ may refuse to order such measures if it has not done so.¹²²

12. CONCLUSIONS

Reflecting on the use of Article 228 after the first lump-sum judgment against France, together with the Court's willingness to support the Commission's use of Article 226 to pursue 'general' and persistent breaches in the case against Ireland, Wonnemann has argued that the Commission now possesses a formidable set of tools under Articles 226 and 228 EC to tackle infringements of Community law effectively and that Member States cannot afford to flout Community

¹¹⁹ On the long-running saga of Sanjerga large lagoon in Italy see Case C-21/03 *Commission v. Italy* (2005) ECR I-4923 and C-14/04 *Commission v. Italy* (2005) ECR I-4917, 4931 above.

¹²⁰ See also Art. 29 ECSC, 117-118 ECHR; C. Dier, *Interim Measures of Protection in the European Court of Justice* 4 ECLR 349, C. Dier, *The Effect of Interim Measures of the ECJ* (1995) 23 OJEC Rev. 259; F. Oliver, *Interim Measures Before the European Court of Justice* (1991) 13 OJEC Rev. 2.

¹²¹ See, e.g., the Court's dismissal of Greece's objection to an application for interim measures in the context of Art. 226 in *Interim proceedings against Greece* (1994) ECR I-1514.

¹²² Case C-47/04 *Commission v. Belgium* (1994) ECR I-1514.

law.¹¹⁷ Despite this positive appraisal of some of the more effective enforcement tools which have been developed, it is equally true that the enforcement machinery is under great strain with the expansion of the EU and the continued rise in the number of complaints. According to Munn, even the supplementary mechanisms which have been introduced to try to cope with the increasing load are inadequate, thus presenting the Commission with two possibilities: '(C)laim to implement a filter in order to limit the number of infringement procedures; or secondly, to fight for a drastic reform of tools to control the application of Community law'.¹¹⁸ While arguing against a policy of selectivity and filtering, and in favour of a more fundamental reform of the enforcement tools to allow for a more genuinely reactive mechanism, he suggests that selectivity and filtering is nonetheless the most likely immediate future direction to be taken.

- i. Some of the main criticisms of the enforcement procedure over the years, including its lack of effectiveness, the lack of an adequate role for individual complainants, and the often unresponsive attitude of the Commission, have gradually been addressed. The penalty payment procedure under Article 123, and the development of a procedure for punishing 'general and persistent breaches' has begun to tackle aspects of the effectiveness problem; and pressure from the Ombudsman and the European Parliament has encouraged the Commission to follow somewhat more regular and transparent administrative procedures including in its dealings with individual complainants.
- ii. Despite the various reforms, the overall enforcement mechanism continues to be divided into distinct phases: parts of it operating in a bilateral and diplomatic dispute-resolution mode, parts of it according to a more formal, judicially-orientated sanction procedure, and parts of it as a quasi-administrative complaint procedure.
- iii. The main challenge for the enforcement procedure at present is the pressing risk of overload, despite the array of preventative, alternative and supplementary mechanisms proposed by the Commission. Unless a more thoroughgoing reform and buttressing of the enforcement mechanism is undertaken, it seems likely that its accessibility to individual complainants will continue to shrink, and that the Commission will move increasingly towards prioritising certain categories of breach.

13. FURTHER READING

(a) Books

- GH Tolkat, A., *The Administrative Supervision and Enforcement of EC Law* (Hart, 1993).
 Schermers, H., *Judicial Protection in the European Union* (2nd edn, Kluwer, 1992).
 Tubb, J., *European Governance and Supranational Institutions Making States Comply* (Routledge, 2003).

(b) Articles

- Borchardt, G., 'The Award of Interim Measures by the European Court' (1995) 22 *CMER* 209.

¹¹⁷ Wenzel, n. 114 above.

¹¹⁸ Munn, n. 5 above.

Ernst, A., 'The Enforcement Procedure of Article 169 EEC: Commission Discretion' (1975) 4 *ELRev* 442.

Gray, C., 'Interim Measures of Protection in the European Court' (1975) 4 *ELRev* 83.

Hatley, G., and Rawlings, R., 'Accountability and Law-Enforcement: The Centralised EU Infringement Procedure' (1995) 24 *ELRev* 447.

Mattschmidt, R., 'The Enforcement Procedure under Article 169 of the EC Treaty and the Powers of the European Commission: *Quia Custodiet Custodiamur*' (1995) 1 *EPL* 535.

Munn, R., 'The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate', Jean Monnet Working Paper 2004.

Rawlings, R., 'Engaged Filter, Citizen Action and Institutional Archades in Commission Enforcement' (1990) 6 *ELJ* 4.

Theodorou, M., 'An Analysis of the Recent Response of the Community to Non-compliance with Court of Justice Judgments: Art. 228' (2003) 27 *ELRev* 25.

Wemmers, E., 'A New Dawn for Commission Enforcement under Arts. 126 and 123 EC: General and Persistent (GAP) Infringements, Lump Sums, and Penalty Payments' (2006) 43 *CMER* 31.

LENARTS K, ARTS B, MASERIS F. "PRACTICE
LAW OF THE EUROPEAN UNION", SWEET

MAXWELL, LONDON, 2006.

CHAPTER 5 128-133

ACTION FOR INFRINGEMENT OF COMMUNITY LAW BY A MEMBER STATE

I. SUBJECT-MATTER

A. GENERAL

Objective nature. The action for failure to fulfil obligations (or infringement proceedings)¹¹ is for the purpose of obtaining a declaration that the conduct of a Member State infringes Community law and of terminating that conduct.¹² The action is objective in nature and the only question raised is whether or not the defendant Member State has breached Community law.¹³ In determining whether the alleged infringement took place, the Court of Justice takes no account of subjective factors invoked to justify the Member State's conduct or omission, the frequency or the scale of the circumstances complained of¹⁴ or of the fact that there is no evidence that the infringement of Community law was intentional.¹⁵ No reasonable-

ness test may be applied. The objective nature of the action for failure to fulfil obligations does not mean, however, that the Court of Justice does not subject the relevant conduct of the Member State concerned to thorough examination, from the point of view of both the law and the facts. In contradistinction to the action for annulment (see Ch.7, *infra*), the Court of Justice does not confine its examination to a number of "grounds" on which the application must be based. Any infringement of Community law may be "found" pursuant to Arts 226-228 of the EC Treaty.¹⁶

Purpose. The "finding" of an infringement serves principally to enforce the actual application of Community law by the Member State in breach. In the first place, since *Francovich*,¹⁷ a Member State may incur liability under Community law for a breach of a Community provision. The judgment finding the infringement may ground liability.¹⁸ In addition, Art.228 of the EC Treaty provides for options for enforcing such a judgment.¹⁹

The action may also be used as a means of determining the exact nature of the obligations of a Member State in the event of differences of interpretation of Community law.²⁰ After the Court of Justice has given judgment, the Member State concerned may no longer contest the extent of its Community obligations. If the Member State continues to be in breach of its obligations, this will constitute a sufficiently serious breach of

¹¹ EC Treaty, Art.226; EAEU Treaty, Art.141. A somewhat similar procedure under the third pillar may be found in Art.35(7) of the EU Treaty (see Ch.22, *infra*).

¹² ECJ, Joined Cases 15 and 157/76 *France v Commission* [1979] E.C.R. 321, para.27.

¹³ See, *inter alia*, ECJ, Case 1/65 *Commission v Italy* [1962] E.C.R. 413, at 413; ECJ, Case 415/85 *Commission v Ireland* [1988] E.C.R. 3657, para.3-5; ECJ, Case 415/85 *Commission v United Kingdom* [1988] E.C.R. 3727, para.3-5; ECJ, Case C-140/90 *Commission v United Kingdom* [2001] E.C.R. I-10374, para.34. See also ECJ, Case 321/91 *Commission v Belgium* [1993] E.C.R. 457, para.4; the well-foundedness of an action under Art.226 of the EC Treaty depends only on an objective finding of a failure to fulfil obligations and not on proof of any intent or opposition on the part of the Member State. See further ECJ (Judgment of September 3, 2004), Case C-381/02 *Commission v Italy*, not reported, paras 11-14; ECJ (Judgment of September 16, 2004), Case C-243/02 *Commission v Italy*, not reported, para.25.

¹⁴ ECJ, Case C-404/99 *Commission v France* [2001] E.C.R. I-1657, para.11.

¹⁵ See, for instance, the case-law rejecting the following as pleas in justification: difficulties in the domestic decision-making process (ECJ, Case 56/81 *Commission v Netherlands* [1982] E.C.R. 1191, para.12; ECJ, Case 57/81 *Commission v Netherlands* [1982] E.C.R. 1615, para.13; ECJ, Case 301/81 *Commission v Belgium* [1983] E.C.R. 457, para.5; ECJ, Joined Cases 277-280/85 *Commission v Belgium* [1988] E.C.R. I, para.5; ECJ, Case C-339/97 *Commission v Italy* [1999] E.C.R. I-3595, para.24; the fact that other Member States are also guilty of the infringement (ECJ, Case 32/75 *Commission v Italy* [1976] 17, para.13; ECJ, Case 78/75 *Stühls & Wehly* [1977] E.C.R. 595, para.24; ECJ, Case 332/75 *Commission v France* [1976] E.C.R. 2715, para.15; ECJ, Case 342/72 *Commission v Germany*

[1974] E.C.R. 775, para.11; ECJ, Case C-36/99 *Plangoules* [1999] E.C.R. I-33, para.3). See also Dashwood and White, "Enforcement Actions Under Arts 169 and 170 (now Arts 226 and 227) EEC" (1989) E.L.Rev. 383, at 400-401; Joliet, *Le contentieux*, at 21; Nafilyan, "La position des États membres et le recours en manquement des Arts 169 (now Art.226) CEE et 170 CEEA" (1977) R.T.D.E. 114, at 215; Waelbroeck, Waelbroeck and Vandendender, *La Cour de Justice*, in Waelbroeck, Louis, Vignes, Dorez and Vandendender, *Commentaire Mager* (2nd ed., Éditions de l'Université de Bruxelles, Brussels, 1993), Vol.15, at 74-76. See, however, *Mesters de Wilmers and Verougstraete*, "Proceedings against Member States for Failure to Fulfil their Obligations" (1970) C.M.L.Rev. 135, who at the time of the "breakthrough" of the action for failure to fulfil obligations in the Court's case-law and advocated, with certain reservations, merging the objective nature of the action with full powers on the part of the Court to take account also of subjective factors. This does not seem to have been followed.

¹⁶ For a wide-ranging discussion of Art.226 of the EC Treaty, see Shive, "Les techniques contentieuses d'application du droit des Communautés européennes" (1985) R.T.D.E. 23-239.

¹⁷ ECJ, Joined Cases 2-6 and C-55/80 *Francovich and Others* [1991] E.C.R. I-3357 (see I-3441, *supra*).

¹⁸ See the settled case-law since ECJ, Case 33/72 *Commission v Italy* [1972] E.C.R. 101, para.12, in which it was held that the judgment by the Court under Arts 169 and 170 (now Arts 226 and 227) may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties". See also I-3441 to I-3443, *supra*.

¹⁹ The procedure provided for in Art.228 of the EC Treaty may be applied only where the Court has determined pursuant to Art.226 or Art.227 of the EC Treaty that the Member State has failed to fulfil an obligation under the Community law (ECJ, *Order of the President of May 31, 2001*, Case C-314/97 *R-EX Commune de Marouville et Vionville v Commission* [2001] E.C.R. I-4225, para.19).

²⁰ ECJ, Case 7/71 *Commission v France* [1971] E.C.R. 1101, para.49.

Community law, which may cause it to incur liability vis-à-vis injured individuals.²⁴

- 5-003 Procedure. The procedure is set forth in Arts 226, 227 and 228 of the EC Treaty²⁵ (Arts 141, 142 and 143 of the EEC Treaty are identical).²⁶ The action for failure to fulfil obligations is the only procedure—apart from some special procedures (5-015 to 5-024, *infra*)—which allows the Court of Justice to measure the conduct of a Member State directly against Community law.²⁷

B. FAILURE OF A MEMBER STATE TO FULFIL AN OBLIGATION UNDER THE TREATY

1. What rules are covered by the expression "an obligation under this Treaty"?

- 5-004 All rules of Community law. The expression "an obligation under this Treaty" covers all rules of Community law which are binding on the Member States. These are all the Treaty provisions, binding acts of Community institutions,²⁸ international agreements concluded by the Community²⁹ and the general principles of law recognised by the Court of

Justice. A finding that those rules have been infringed may be made as a result of an action brought pursuant to Arts 226 to 228 of the EC Treaty.³⁰

General principles of law. A finding that a Member State has infringed general principles of law, including fundamental rights, may be made only in so far as the national conduct falls within the scope of Community law. This will be so in particular where the Member State justifies its conduct on one of the grounds provided for in the Treaty.³¹

Conventions pursuant to Art.193 of the EC Treaty. It is an open question whether a Member State may be brought before the Court of Justice for infringing a convention concluded pursuant to Art.193 of the EC Treaty. Some commentators have argued that this is possible on the ground that Art.193 puts the Member States under a duty to enter into negotiations with each other in order to achieve clearly defined Community objectives.³² Others contend that a distinction should be made between the obligation to conclude the convention under Art.193 and the obligations ensuing out of such a convention for Member States. They maintain that the latter obligations are not part of Community law.³³ The Court of Justice has not yet had to rule on the question.³⁴

²⁴ See 5-341, *supra*.

²⁵ Under Art.237(2) of the EC Treaty actions may be brought against a national central bank for failure to fulfil obligations. Proceedings are to be brought by the European Central Bank, which has the same powers as the Commission has under Art.226 of the EC Treaty. Under Art.237(3) of the EC Treaty, the Board of Directors of the European Investment Bank may bring an action in the Court of Justice against a Member State in relation to the fulfilment of its obligations under the Bank's Statute. In this connection, the Board of Directors enjoys the powers conferred upon the Commission by Art.226 of the EC Treaty: see CFI (order of April 10, 2009), Case T-361/09 *Mege v. Commission* [2009] E.C.R. II-1331, para.12. For an extensive discussion of legal protection within the framework of the European System of Central Banks, see Gaubert, "Gerichtliche Kontrolle im Europäischen System der Zentralbanken" (2006) EuR 517-533. Art.104(1) of the EC Treaty rules out the possibility of bringing an action against a Member State for failing to fulfil its obligations under Art.124(1)-(9) by failing to avoid an excessive government deficit.

²⁶ See, e.g., ECJ, Case C-51/93 *Commission v. United Kingdom* [1994] E.C.R. I-1477.

²⁷ ECJ, Case 18/63 *Fayon v. Commission* [1964] E.C.R. 1623, para.12; CFI, Case T-15/93 *Gordier v. Commission* [1993] E.C.R. II-1215, para.51. Since *Van Gend & Loos* (ECJ, Case 26/62 *Van Gend & Loos* [1963] E.C.R. I, at 10-11), however, the Court of Justice has held that it can use the procedure for a preliminary ruling on interpretation in order to appraise a Member State's conduct indirectly against Community law.

²⁸ ECJ, Case C-295/98 *Commission v. Austria* [2000] E.C.R. I-7387, para.41. The infringement of a directive which has been annulled but whose effects the Court of Justice preserved in the judgment until such time as it had been replaced by a new directive in compliance with the Court's judgment may form the subject of an action for failure to fulfil obligations. It made no difference that the Council and the European Parliament did not adopt the new directive until four years had elapsed.

²⁹ EC Treaty, Art.360(7); ECJ, Case 124/81 *Kupferberg* [1982] E.C.R. 3641, para.14; ECJ, Case C-415/94 *Commission v. Germany* [1995] E.C.R. I-3535, para.15; ECJ, Case C-13/00 *Commission v. Ireland* [2002] E.C.R. I-2343, para.22, in which the Court held that Ireland's failure to accede to the Bern Convention as required by Art.5 of Protocol 23 to the EEA

Agreement (a mixed agreement concluded by the Community, its Member States and non-member countries and related to an area covered in large measure by the Treaty) came within the Community framework. This therefore constituted a failure to fulfil obligations within the meaning of Art.226 of the EC Treaty. See also ECJ, Case C-465/01 *Commission v. Austria* [2004] E.C.R. I-8291; ECJ, Case C-235/00 *Commission v. France* [2004] E.C.R. I-9325, para.22-31; provisions of a mixed agreement come within the Community framework if they—even in the absence of specific Community legislation regarding the issue covered by these provisions (e.g. discharges of fresh water and alumina into saltwater marsh)—concern a field (e.g. environmental protection) in large measure covered by Community law; if this is the case, the Court of Justice has jurisdiction to assess a Member State's compliance with the provisions concerned of the mixed agreement in proceedings brought before it under Art.226 of the EC Treaty.

³⁰ For a discussion of the sources of Community law, see Lesaerts and Van Nuffel, *Constitutional Law of the European Union*, Part IV, at 663 of *supra*, and Breakey and Haines, *Remedies in E.C. Law*, at 1-26.

³¹ ECJ, Case C-268/85 *ERT* [1991] E.C.R. I-2525, para.42; ECJ, Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] E.C.R. I-4685, para.51.

³² See Dashwood and White (n.15, *supra*), at 290; cf. Pescatore, "Remarques sur la nature juridique des décisions des représentants des États membres réunis au sein du Conseil" (1965) S.E.W. 579, at 583-534.

³³ See Schwartz, "Voies d'uniformisation du droit dans la CEE: règlements de la Commission ou conventions entre les États membres" (1976) J.D.I. 131, at 161.

³⁴ However, the Court has held in its case-law on the Brussels Convention—which has since been replaced except so far as Denmark is concerned by Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([2001] O.J. L 12/1; corrigendum in [2001] O.J. L30/25), which manifestly forms part of Community law—that the provisions of that convention were "linked to the EEC Treaty" and that this allowed the Court of Justice to assess the compatibility of those provisions with Art.12 of the EC Treaty (prohibition of discrimination on grounds of nationality); ECJ, Case C-593/92 *Mund & Fier* [1994] E.C.R.

In any event, it is agreed that compliance with conventions concluded by the Member States outside Art.293 cannot be enforced by proceedings under Arts 226 and 227 of the EC Treaty, even if they do contribute to the attainment of the objectives of the EC Treaty.¹²

2. What is meant by "failure to fulfil"?

Any shortcoming. Since the action for failure to fulfil obligations is objective in nature, any shortcoming by a Member State in respect of its obligations under Community law will ground a claim for a declaration that it is in breach. The frequency or scale of the shortcoming is irrelevant. Likewise the fact that the failure had no adverse effects.¹³ A minimum, isolated and negligible infringement of Community law is sufficient for the action to be declared well founded.¹⁴ It lies with the Commission or the applicant Member State (see 5-025 and 5-029, *infra*) to assess whether it is appropriate to bring an action. Once the action is pending, the Court of Justice has to consider whether or not the alleged infringement was committed.¹⁵

Administrative practice. Not only the exercise by a Member State of its regulatory powers can constitute a failure to fulfil an obligation of the Treaty.¹⁶ An administrative practice can also be the subject-matter of an action for failure to fulfil obligations when it is, to some degree, of a consistent and general nature.¹⁷

¹² 457, paras 11-12). Admittedly, the Court has not provided any answer to the question whether infringements on the part of Member States of the Brussels Convention can be the subject of proceedings brought under Arts 226 and 227 of the EC Treaty. It may be considered, however, that the answer must be in the negative, given that the Court of Justice mentioned the Brussels Convention and the national provisions to which it refers on an equal footing when it stated that they are linked to the EC Treaty and therefore "within the scope of application of this Treaty" within the meaning of Art.17 of the EC Treaty. As a result, the Brussels Convention turns over as a joint measure of the Member States, which, in common with unilateral national measures, must be compatible with Community law, but does not form part of it.

¹³ See Dackwood and White (n.13, *supra*), at 390, who refer to the Convention for the European Patent for the Common Market, which provides for a special procedure for failure of Member States to fulfil their obligations in Art.10(2) and (3) (1976) O.J. L179.

¹⁴ ECJ, Case C-359/97 *Commission v Portugal* [1999] E.C.R. I-2459, para.22; ECJ, Case C-348/97 *Commission v Germany* [2000] E.C.R. I-4439, para.32.

¹⁵ Then, the Commission may ask the Court of Justice to find that, in not having achieved, in a specific case, the result intended by the Directive, a Member State has failed to fulfil its obligations (ECJ, Joined Cases C-28/91 and C-29/91 *Commission v Germany* [1993] E.C.R. I-3609, para.39; ECJ, Case C-157/93 *Commission v Spain* [1995] E.C.R. I-2911, para.44).

¹⁶ ECJ, Case C-225/83 *Commission v Italy* [1994] E.C.R. I-1575, para.6.

¹⁷ ECJ, Case 8/73 *Commission v Italy* [1973] E.C.R. 561, paras 3-5; ECJ, Case 34/91 *Commission v Italy* [1992] E.C.R. 739, para.4; ECJ, Case 9/92 *Commission v Italy* [1992] E.C.R. 4215, para.15; ECJ, Case 326/84 *Commission v Italy* [1985] E.C.R. 299, para.9.

¹⁸ ECJ, Case 21/84 *Commission v France* [1985] E.C.R. 1335, paras 13 and 15; ECJ, Case C-387/95 *Commission v Germany* [2004] E.C.R. I-3151, para.42; ECJ, Case C-434/01 *Commission v Ireland* [2003] E.C.R. I-3331, para.25. The Commission does not prove the existence of an administrative practice—which must be, to some degree, of a consistent and general nature—by making reference to a single complaint (ECJ, Case C-25/93 *Commission v Belgium* [2003] E.C.R. I-3755, paras 28-30).

It will be easier to make a finding that there has been a failure to fulfil an obligation where it stems from the existence of a provision of national law which infringes Community law¹⁸ than where it stems out of a so-called "administrative practice"¹⁹ of a Member State, which assumes that a particular pattern of behaviour can be discerned on the part of the authorities of the defendant Member State.²⁰

Case-law. A rule established by case-law in a Member State may also constitute a failure to fulfil obligations.²¹

International agreements. The conclusion by a Member State of an agreement with a third State constitutes a violation of the EC Treaty if such conclusion infringes Community law, e.g. where it infringes the exclusive external competence of the Community.²² Even the negotiation of a bilateral agreement may constitute such infringement.²³

Similarly, a Member State may not invoke as a justification for an infringement of Community law the existence of an international agreement with other Member States to which it was a party prior to its accession to the Union. Indeed, Art.307 of the EC Treaty does not

¹⁸ However, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (ECJ, Case 228/85 *Commission v United Kingdom* [1987] E.C.R. I-2343, para.37).

¹⁹ See, for example, ECJ, Case 21/84 *Commission v France* [1985] E.C.R. 1335; ECJ, Case 35/84 *Commission v Italy* [1985] E.C.R. 545; ECJ, Case C-157/93 *Commission v Spain* [1995] E.C.R. I-2911; ECJ, Case C-400/92 *Commission v Netherlands* [2004] E.C.R. I-11375.

²⁰ ECJ, Case C-129/96 *Commission v Italy* [2003] E.C.R. I-14437, para.33 (case note by Rees and Di Federico (2005) C.M.L.Rev. 323-345). Where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law. See also ECJ (order of June 3, 2005), Case C-356/03 *P. Klinger v Germany*, Council and Commission (2005) E.C.R. I-4567, para.25; ECJ, Case C-219/02 *Alcor Verijs* [2003] E.C.R. I-25055, para.41. See also 5-031, *infra*.

²¹ ECJ, Case C-264/03 *Commission v Luxembourg* [2005] E.C.R. I-4205 paras 34-37.

²² *Id.*, *Commission v Luxembourg*, not yet reported, paras 37-39; the adoption by the Council of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation. Therefore, if a Member State negotiates and/or concludes and ratifies a bilateral agreement in the field concerned without cooperating or consulting with the Commission, that Member State compromises the achievement of the Community's task and the attainment of the objectives of the Treaty and violates Art.10 of the EC Treaty. Even the willingness of the Member State concerned to denounce the protested bilateral agreement on the entry into force of a multilateral agreement binding the Community does not demonstrate compliance with the obligation of sincere cooperation laid down in Art.10 of the EC Treaty. See also ECJ (Judgment of July 14, 2005), Case C-439/01 *Commission v Germany*, not yet reported, paras 80-84.

authorise Member States to exercise rights under international agreements which conflict with Community law in intra-Community relations.⁴³

- 5-011 Act or failure to act. The failure to fulfil obligations can arise both out of an act and out of a failure to act on the part of the Member State.⁴⁴ The classic example of the latter is failure by a Member State to implement a directive in national law.⁴⁵ Failure to respond to a request from the

⁴³ ECJ (Judgment of July 7, 1965, Case C-14/61 *Commission v Austria*, not yet reported, paras 71-75).

⁴⁴ ECJ, Case 33/69 *Commission v Italy* (1970) E.C.R. 15, para.9 (where the application of Community regulations requires a modification of certain public services or of the rules governing them, the failure of the authorities concerned to take the necessary measures constitutes a failure within the meaning of Art.125). The French authorities' failure to adopt all necessary measures to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals constituted a failure to fulfil obligations under Art.25, in conjunction with Art.10 of the EC Treaty, and under the common organisation of the markets in agricultural products (ECJ, Case C-265/93 *Commission v France* [1997] E.C.R. I-8959). The failure of the French authorities to take penal or administrative action pursuant to Regulation No 2241/97 against those responsible in cases of infringement of Community rules on the conservation and control of fishery resources constituted a failure to fulfil obligations (ECJ, Joined Cases C-418/90 and C-425/90 *Commission v France* [2002] E.C.R. I-3559, paras 60-64).

⁴⁵ A few examples: ECJ, Case 386/85 *Commission v Italy* [1987] E.C.R. 1051; ECJ, Case 1/86 *Commission v Italy* [1986] E.C.R. 1321; ECJ, Case C-290/85 *Commission v Belgium* [1986] E.C.R. I-2851, paras 3-10. Each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (see ECJ, Case C-315/97 *Commission v Italy* [1999] E.C.R. I-3771, para.19; ECJ, Case C-97/00 *Commission v France* [2001] E.C.R. I-2355, para.5; ECJ, Case C-476/99 *Commission v Sweden* [2002] E.C.R. I-4147, para.15). A provision of a directive which contains only relations between a Member State and the Commission or the other Member States need not, in principle, be transposed. However, given that the Member States are obliged to ensure that Community law is fully complied with, it is open to the Commission to demonstrate that compliance with a provision of a directive governing these relations requires the adoption of specific transposing measures in national law (ECJ, Case C-295/01 *Commission v France* [2003] E.C.R. I-1369, para.9; ECJ, Case C-429/01 *Commission v France* [2003] E.C.R. I-2435, para.5; ECJ, Case C-416/03 *Commission v Italy* [2005] E.C.R. I-3537, paras 38-39 at 52-53). For the purposes of the implementation of a directive conferring rights on individuals in a Member State, it is essential for national law to guarantee that the directive is effectively applied in full, that the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights and obligations: ECJ, Case C-365/93 *Commission v Greece* [1995] E.C.R. I-459, para.9; ECJ, Case C-429/01 *Commission v France* [2003] E.C.R. I-1435, para.13. It is not invariably necessary formally to incorporate the provisions of a directive in an express, specific legislative provision. Depending on the content of the directive, a general legal framework may suffice. In particular, the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts: ECJ, Case C-25/84 *Commission v Germany* [1985] E.C.R. 1681, paras 21-22; ECJ, Case C-256/01 *Commission v France* [2003] E.C.R. I-11365, para.15; ECJ, Case C-418/01 *Commission v*

Commission for information will also constitute a failure to fulfil obligations, namely of the obligations ensuing for Member States from Art.10 of the EC Treaty.⁴⁶ An example of conduct contrary to Community law is the imposition of administrative formalities restricting the import of goods and therefore infringing Art.28 of the EC Treaty.⁴⁷

Legal provision which is no longer applied. The existence of a legal provision conflicting with Community law may also be categorised as a "failure", even if it is not or no longer being applied by the national authorities. The fact that such a provision exists is liable to create uncertainty in those subject to the law about the possibility of relying on Community law. That uncertainty impedes the operation of Community law and is regarded as a "failure to fulfil" an obligation.⁴⁸ Only where such a provision can have no effect at all which conflicts with Community law, will its mere existence be insufficient to constitute an infringement of Community law.⁴⁹

Conversely, a failure to fulfil obligations may arise owing to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law.⁵⁰

⁴⁶ Italy [2005] E.C.R. I-3537, para.40. The obligation to transpose directives into national law requires a "positive act of transposition" if the directive in question expressly requires the Member States to refer to it in adopting provisions or when officially notifying the provisions adopted: ECJ, Case C-130/95 *Commission v Germany* [1997] E.C.R. I-6749, para.5; ECJ, Case C-160/95 *Commission v Spain* [1997] E.C.R. I-7337, para.13.

⁴⁷ ECJ, Case C-82/03 *Commission v Italy* [2004] E.C.R. I-6635, para.15; ECJ, Case C-464/01 *Commission v Ireland* [2003] E.C.R. I-3331, paras 195-200.

⁴⁸ A few examples: ECJ, Case 154/85 *Commission v Italy* [1987] E.C.R. 2115, para.12; ECJ, Case C-50/82 *Commission v Belgium* [1984] E.C.R. I-1019, para.12.

⁴⁹ ECJ, Case 157/73 *Commission v France* [1974] E.C.R. 359 (see Barav, "Failure of Member States to Fulfil Their Obligations Under Community Law" (1975) *CM.L.Rev.* 359, at 374-376); ECJ, Case 156/73 *Commission v Italy* [1979] E.C.R. 3247, para.22; ECJ, Case 163/83 *Commission v Italy* [1985] E.C.R. 2345, para.14; Case 134/85 *Commission v Italy* [1985] E.C.R. 1159, para.23; ECJ, Case 74/86 *Commission v Germany* [1986] E.C.R. 2139, para.20; ECJ, Case 34/87 *Commission v Greece* [1993] E.C.R. 4425, para.5; ECJ, Case C-157/96 *Commission v France* [1997] E.C.R. I-1485, para.14; ECJ, Case C-358/98 *Commission v Italy* [2000] E.C.R. I-1155, para.13; ECJ, Case C-145/95 *Commission v Italy* [2002] E.C.R. I-2235, paras 32 and 37; ECJ (Judgment of July 7, 2005), Case C-216/04 *Commission v Italy*, not reported, para.13.

⁵⁰ ECJ, Case 25/89 *Commission v Italy* (1970) E.C.R. 15, paras 14-17. The entire duty which Italy imposed on oyster shells and hales differed depending on whether they were imported or produced by the Italian processing industry. Nevertheless, they were exempt from the duty if they were used for certain specified purposes. The high level of duty made it impossible in practice to use the products for purposes other than those to which the exemption applied. The existence of differential taxation was therefore sufficient to constitute an infringement of Art.90 of the EC Treaty.

⁵¹ ECJ, Case C-212/89 *Commission v Italy* [2001] E.C.R. I-4923, para.34; ECJ, Case C-376/03 *Commission v Italy* [2005] E.C.R. I-3547, para.13.

5-013 Non-binding acts. Even acts of a Member State which are not binding under the domestic legal system, may result in a failure to fulfil obligations under Community law in so far as their potential effects are comparable with those resulting from binding measures. A large-scale campaign launched by the Irish Government to promote the sale of Irish goods on the home market was accordingly held to be a measure of equivalent effect contrary to Art.23 of the EC Treaty.¹

5-014 Acts affecting the jurisdiction of the Court of Justice. Acts of a Member State which affect the jurisdiction of the Court of Justice will invariably contravene Community law. For instance, a Member State is prohibited from transposing a regulation, which has direct effect, into national law, thereby concealing its Community origin, which would be liable to jeopardise the making of preliminary references on the interpretation or validity of the regulation.²

5-015 National rules allegedly violating the Treaty but complying with a directive. A failure to fulfil obligations under Community law will, however, not be found in case a national rule, which at first sight conflicts with a provision of the EC Treaty, expressly complies with a provision of secondary Community legislation. The Court thus dismissed an infringement action brought against Greece with respect to the reduced rate of excise duty applicable in this Member State for ouzo. The Commission considered that this reduced rate was incompatible with Art.90 of the EC Treaty prohibiting discriminatory internal taxes. The Court, however, found that a provision of Directive 92/33 explicitly allowed Greece to apply a lower rate of excise duty for ouzo. Since that provision had not been declared invalid or annulled by the Court of Justice and since it could also not be considered to be non-existent, its legal effects were presumed to be lawful. Greece therefore did not fail to fulfil its obligations under Community law by maintaining in force a national measure complying with that provision of a directive.³

¹ ECJ, Case 249/81 *Commission v Ireland* [1982] E.C.R. 4003, para.37.

² ECJ, Case 35/72 *Commission v Italy* [1973] E.C.R. 107, paras 16-17; ECJ, Case 14/73 *Frontelli v Italy* [1973] E.C.R. 361, para.14; ECJ, Case 5/73 *Amsterdam Bus* [1973] E.C.R. 137, paras 4-5.

³ ECJ, Case C-475/91 *Commission v Greece* [2004] E.C.R. I-8521, paras 14-24. An individual who cannot bring an action directly against a directive before the Community judicature may, however, raise the unlawfulness of the directive before a national court, which may (or must) make a reference for a preliminary ruling to the Court of Justice.

4-C) RELATIONSHIP WITH SPECIAL LEGAL PROCEDURES TO OBTAIN A DECLARATION FROM A MEMBER STATE HAS FAILED TO FULFIL ITS OBLIGATIONS UNDER COMMUNITY LAW

1. Relationship between Arts 226 and 227 of the EC Treaty and Art.83(2) of the EC Treaty

Procedure under Art.83(2) of the EC Treaty. Under Art.83 of the EC Treaty, the Commission is empowered to rule on the compatibility of State aid with the common market.⁴ Both existing aid and the introduction or alteration of aid are subject to supervision by the Commission.⁵ Any plans to grant or alter aid must be notified to the Commission pursuant to Art.83(3) of the EC Treaty.⁶

The Commission may take action against aid which it considers, on the basis of Art.87 of the EC Treaty, to be incompatible with the common market in accordance with the procedure laid down in Art.83(2). It makes a finding that the aid is incompatible and orders the Member State concerned to abolish or alter the aid within a specified period. If the Member State fails to comply with the decision within the prescribed period, the Commission or any other interested party may, by way of derogation from Arts 226 and 227, refer the matter directly to the Court of Justice.⁷

Art.83(2) of the EC Treaty secures all interested parties, the right to submit observations.⁸ In addition, on application by a Member State, the Council may, acting unanimously and by way of derogation from Art.87, decide that the aid must be considered to be compatible if such a decision is justified by exceptional circumstances.⁹

Relationship with Arts 226 and 227 of the EC Treaty. The question arises as to whether, despite the existence of the special procedure provided for in Art.83(2), the general procedure set out in Art.226 may still be used by the Commission to find infringements of Art.87.

⁴ For a survey of the case-law of the Court of Justice, see Winter, "Supervision of State Aid: Art.83/now Art.87 in the Court of Justice" (1993) 20 M.L.Rev. 311-329.

⁵ For the distinction between "existing" and "new" aid and an explanation of the respective powers of the Commission and the national courts in supervising aid for compatibility with the common market, see ECJ, Case C-44/93 *Nymn-Les Assurances du Crédit* [1994] E.C.R. I-3629, paras 13-17; CFI, Joined Cases T-195/01 and T-237/01 *Gibraltar v Commission* [2002] E.C.R. II-2309; see also Council Regulation (EC) No. 559/1993 of March 22, 1993 laying down detailed rules for the application of Art.(83) of the EC Treaty [1993] O.J. L31.

⁶ The applicable procedural requirements are laid down in Regulation No. 659/1999 (see preceding n.). For a survey of the procedural requirements existing prior to that regulation, see Scott, "Procedural Aspects of State Aid: the Guardian of Competition versus the Sunday Villains" (1999) 26 M.L.Rev. 741-750.

⁷ EC Treaty, Art.83(2), second subpara.

⁸ ECJ, Case C-294/93 *British Aerospace and Rover v Commission* [1992] E.C.R. I-491, para.1.

⁹ EC Treaty, Art.83(2), third subpara. For the powers of the Council under this provision, see ECJ, Case C-11/92 *Commission v Council* [2004] E.C.R. I-6333, paras 23-31.

In the first place, the procedure provided for in Art.88(2) affords all interested parties guarantees commensurate with the specific problems raised by State aid for competition in the common market; those guarantees are much more extensive than those afforded by the pre-litigation procedure under Art.226, in which only the Commission and the Member State concerned take part. Accordingly, if the Commission wishes to make a finding that a State aid is incompatible with the common market, it is obliged to follow the procedure set out in Art.88(2).⁴

However, the existence of the procedure laid down in Art.88(2) does not preclude an aid measure being found incompatible with rules of Community law other than Art.87 by means of the Art.225 procedure.⁴

Lastly, in the event of an infringement of a decision made pursuant to the first subpara. of Art.88(2), the Commission may elect either to bring the matter directly before the Court of Justice under the second subpara. of Art.88(2) or to initiate the Art.225 procedure.⁶

S-018 Violation of the obligation to notify aid. The Commission also often has a choice between the Art.88(2) procedure and that provided for in Art.226 where a Member State fails to inform the Commission in time, contrary to Art.88(3), of a plan to grant new aid or altered aid.⁴ The fact that the duty to notify the Commission has been infringed, however, does not make the aid incompatible with the common market. Accordingly, the Commission must initiate an examination of the compatibility of the non-notified aid with the common market under Art.88(2). In that event, it may require the aid to be suspended pending the outcome of its examination and order the Member State to provide information under a procedure pursuant to Art.88(2).⁵ If the Member State refuses to suspend the aid, the Commis-

* E.C.J. Case 265/81 *Commission v France* [1985] E.C.R. 419, para. 17.

¹¹ ECJ, Case 199/82 *Commission v France* [1983] E.C.R. 413, para.11.

¹² ECJ, Case 72/79 *Commission v Italy* [1980] E.C.R. 341, para.12; ECJ, Case 76/73 *Commission v Italy* [1978] E.C.R. 1533, para.9 (for Case two arguments, see Gilmour, "The Enforcement of Community Law by the Commission in the Context of State Aids: the Relationship Between Arts 93 and 169 (now Arts 88 and 225) and the Choice of Remedies" [1981] C.M.L.Rev. 63-77); ECJ, Case 330/83 *Commission v France* [1985] E.C.R. 435, para.17; ECJ, Case C-158/83 *Commission v Greece* [1985] E.C.R. II-1125, para.1.

4 ECI, Case 74/72 *Commission v Germany* [1973] E.C.R. 623, paras 8-12 (action based on the second subpara. of Art.38(2)); ECI, Case 155/83 *Commission v Italy* [1984] E.C.R. 3849 (action based on Art.126); ECI, Case C-254/90 *British Aerospace and Rover v Commission* [1992] E.C.R. I-492, para.12 (the Commission may also take the approach that the infringement of its decision constitutes new aid within the meaning of Art.38(3); if so, it must start up the special procedure under the first subparagraph Art.91(1) itself and it necessary take a fresh decision after having put interested parties on notice in suitable observations); ECI, para.13; ECI, Case C-404/90 *Commission v Spain* [1993] E.C.R. I-6885, para.25. See the case notes by Joris (1991), S.E.W. 658-703 and Blumann, "Régime des aides d'Etat: jurisprudence récente de la Cour de justice (1989-1991)" (1992) R.M.C. 751, at 751-755.

* ECJ, Case 173/73 *Italy v Commission* (1974) E.C.R. 705, para.3; see also Bianculli, "Le contrôle de la Cour de Justice des Communautés européennes en matière d'aides publiques" (1980) A.J.D.A. 423 at 424.

* E.C.J., *Case C-321/87 France v Commission* [1988] E.C.R. I-507, paras 14-23; E.C.J., *Case C-142/87 Belgium v Commission* [1988] E.C.R. I-559, paras 15-19.

sign may bring the matter directly before the Court of Justice pursuant to the second subpara of Art.88(2)¹⁰ or bring an action against the Member State under Art.226.¹¹

A finding by the Commission, after carrying out an examination, that the non-notified aid measure is compatible with the common market does not retroactively remedy the infringement of the Treaty caused by the failure to notify. Since Art.68(2) of the EC Treaty has direct effect, national courts are obliged to regard as unlawful any acts performed to implement the non-notified aid before the Commission made its finding that the aid was compatible with the common market, and impose the appropriate sanctions.¹⁷

Aid to agriculture. Since "the Council is entitled to lay down, within the context of the regulations establishing the common organisation of the markets in agricultural products, provisions prohibiting wholly or partially certain forms of national aids for the production or marketing of the products in question and . . . an infringement of such a prohibition may be dealt with within the specific framework of such an organisation", "the procedure laid down by Art.126 is to be used in order to determine the infringement." Under Art.36 of the EC Treaty, all the provisions of Arts 78 to 89 are applicable to production of and trade in agricultural products only to the extent determined by the Council within the framework of measures adopted for the organisation of agricultural markets. This explains why recourse by a Member State to Arts 87 to 89 on aid cannot receive priority over the provisions of a regulation on the organisation of a sector of the agricultural market.¹⁹ Consequently, the fact that there is a special procedure in Art.88 of the EC Treaty for appraising the compatibility of State aid with the common market cannot preclude recourse to the Art.126 procedure in the event that the Commission considers that an aid measure of a Member State infringes the provisions of a regulation organising a sector of the agricultural market, even though the aid measure is also open to criticism under Art.87 of the EC Treaty.

2. Relationship between Arts 226 and 227 of the EC Treaty and Art. 66(3) of the EC Treaty

Procedure under Art.86(3) of the EC Treaty, Art.86(3) of the EC Treaty charges the Commission with supervising Member States' compliance with their obligations with regard to public undertakings and undertakings in

⁴ ECJ, Case C-205/87 *France v. Commission*, cited in the proceedings, para. 20.

¹¹ *Id.*, para.23. See also Arts 11 and 12 of Regulation No 659/69 (1969) O J L222.

⁴¹ ECI, Case 124/75 *Levret* [1975] E.C.R. 167; ECI, Case C-354/50 *Fédération Nationale des Commerces Séviers de Produits Alimentaires et Others* [1951] E.C.R. 7-3555; ECJ, Joined Cases C-26/70 and C-25/71 *Van Colfer and Cizeau* [2003] E.C.R. I-12249, para.51.

* *SCJ, Case 72/73 Commission v Italy* [1978] E.C.R. 2411, para.12. See also *Case C-62/83 Commission v Greece* [1984] E.C.R. I-2401.

¹¹ E.C.J. Case 177/83 *McGarrahan* (1975) E.C.R. 2151, paras 11 and 21; see also *Biancamano* (— 63, *supra*) at 426.

which they have granted special or exclusive rights, and expressly confers on it the power to use two legal instruments to this end, namely directives and decisions.

The Commission is empowered to use directives to specify in general terms the obligations arising under Art.85(1) of the EC Treaty. It exercises that power where, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them, under that provision of the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfil a particular obligation under the EC Treaty.¹²

The powers exercised by the Commission under Art.85(3) by decision are different from those which it exercises by directive. Decisions are adopted in respect of a specific situation in one or more Member States and necessarily involve an appreciation of the situation in the light of Community law. They specify the consequences arising for the Member State concerned, regard being had to the requirements which the performance of the particular tasks assigned to an undertaking imposes on it where it is entrusted with the operation of services of general economic interest (Art.85(1) and (2)).¹³ If the power to adopt decisions conferred on the Commission by Art.85(3) is not to be deprived of all practical effect, the Commission must be empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which the decision is addressed must take in order to comply with its obligations under Community law.¹⁴ Even though there is no express provision to this effect in Art.85(3)—unlike in Art.225 and Art.69(1)—the general principle of respect for the rights of the defence requires that the Member State concerned must receive an exact and

¹² ECJ, Case C-22/85 *France v Commission* [1991] E.C.R. I-1221, para.17; ECJ, Case C-153/89 *Portugal v Commission* [2001] E.C.R. I-1411, para.26. Cf. for the use of directives in specific cases, Arts 38 and 51 of the EASC Treaty. See also Leenders, 'Northern Border Installation: A Case-Study' (1988) E.L.Rev. 158, at 171-175. In *Commission v Portugal*, the Portuguese government argued that the Commission was wrong to commence an action for failure to fulfil obligations under Art.225 of the EC Treaty and that it ought to have followed the procedure provided for in Art.86(3) of the EC Treaty and adopted a harmonisation directive. The Court rejected this argument, holding that, notwithstanding its other powers under the Treaty to ensure that Member States comply with Community law, the Commission enjoyed a discretion in deciding whether or not to commence an action for failure to fulfil obligations. It was not required to justify its decision, nor would the admissibility of the action be dependent upon the circumstances dictating its choice [ECJ, Case C-10/85 *Commission v Portugal* [2001] E.C.R. I-4145, para.17].

¹³ ECJ, Joined Cases C-43 and C-54/80 *Netherlands and Others v Commission* [1991] E.C.R. I-565, para.27; ECJ, Case C-153/89 *Portugal v Commission* [2001] E.C.R. I-1411, para.27.

¹⁴ *Netherlands and Others v Commission*, para.12. The fact that other Member States also infringe the Treaty by granting similar exclusive rights does not oblige the Commission to bring proceedings under Art.225 of the EC Treaty and exercise its power to address a decision to those Member States under Art.85(3) of the EC Treaty [ECJ, Case C-161/89 *Commission v Portugal* [2001] E.C.R. I-1411, para.11, *et seq.*].

complete statement of the objections which the Commission intends to raise against it. It must also be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties.¹⁵

Commission's discretion. The Commission's power to appraise, in a decision adopted pursuant to Art.85(3), the conformity with the Treaty of measures adopted or applied by Member States with regard to undertakings referred to in Art.85(1) does not run counter to the powers conferred on the Court of Justice by Art.226 of the EC Treaty. If the Member State does not comply with the decision, this may form the basis for infringement proceedings under Art.225.¹⁶

Whether the Commission may bring an action for failure to fulfil obligations before it has adopted a decision pursuant to Art.85(3), depends in all likelihood on the requirements of the rights of the defence. The procedure which affords the strongest guarantees for the Member State concerned should probably take precedence at the stage of the initial examination of the compatibility of a national measure with Art.85(1) and (2) of the EC Treaty by analogy with the aforementioned case-law on Art.88(2) (see S-017, *supra*).¹⁷ In any event, it is certain that Member States may invariably bring an action under Art.227 of the EC Treaty against a Member State for failure to fulfil its obligations under Art.85(1) and (2), even if the Commission has not yet exercised its powers under Art.85(3) to address a decision to the Member State concerned.

3. Relationship between Arts 226 and 227 of the EC Treaty and special procedures relating to the improper use of derogating provisions

Other procedures. Apart from Art.83(2), the EC Treaty provides for other cases in which, by way of derogation from the procedure laid down in Arts 226 and 227, the Commission or a Member State may bring a Member State directly before the Court of Justice, namely where the derogating provisions provided for in the Treaty are misused (EC Treaty, Arts 55(4) and Arts 136 to 138). The opportunity afforded to the Commission by Art.95(6)¹⁸ of the EC Treaty in order to bring a matter directly before the Court of Justice without incurring the delay of a pre-litigation procedure is

¹⁵ *Netherlands and Others v Commission*, para.45-46.

¹⁶ ECJ, Case C-15/87 *Commission v Greece* [1988] E.C.R. 3431. It appears from this judgment that if the Member State to which the Commission's decision is addressed contests its legality, it must bring an action for annulment within the *time-limit* laid down by Art.230; thereafter, the Member State may not plead the unlawfulness of the decision as a defence in proceedings for failure to fulfil obligations.

¹⁷ Besides, the Court of Justice itself has strongly emphasised the parallel between Art.85(3) and Art.133; see ECJ, Joined Cases C-48 and C-48/80 *Netherlands and Others v Commission* [1991] E.C.R. I-565, para.31-32.

¹⁸ This was formerly part of Art.109a(4) of the EC Treaty.

intended to serve the Community interest of protecting in full the establishment of the internal market. However, this does not preclude the Commission from opting to bring proceedings under Art.226 of the EC Treaty in the interests of the defendant Member State.¹⁷

The action that the Commission or any Member State may bring against a Member State pursuant to the second para of Art.228 if it considers that that State is making improper use of the powers provided for in Arts 295 and 257 does not involve a pre-litigation stage (which is precisely the difference compared with proceedings under Arts 226 and 227), but does afford the guarantee that the Court of Justice is to give its ruling in camera, this being essential in the case of a politically charged dispute.¹⁸

4. Relationship between Arts 226 and 227 of the EC Treaty and special procedures relating to public procurement contracts

- 5-323 Special procedures relating to public procurement contracts. The Commission is empowered to order the suspension of the award of a public procurement contract under Art.3 of Council Directive 89/665/EEC of December 21, 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts¹⁹ or under Art.8 of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.²⁰

- 5-324 Commission's discretion. Even if it were it preferable that the Commission should use the procedure for direct intervention established by those directives, such a procedure is a preventive measure which can neither derogate from nor replace the powers of the Commission under Art.226 of

¹⁷ It is argued that proceedings should have to be brought under Art.226 of the EC Treaty against a failure of a Member State to notify the Commission of the application of a national measure conflicting with a harmonising measure adopted pursuant to Art.93(1) of the EC Treaty. If proceedings under Art.226 were to be allowed, this might also mean that a Member State would in some cases have the power not to notify the Commission of a national measure (although it is considered that this is not the case) on the ground that such proceedings relate only to "improper use of the powers provided for in this Article" (see Ryan, "How will Art.100a(now Art.93)(4) work? A Comparison with Art.93(now Art.88)" (1987) C.M.L.Rev. 688, at 700-701). For the Commission's handling of a complaint on account of the grant of State aid to a manufacturer of military goods and the application of Arts 156 and 259 of the EC Treaty, see CFI, Case T-2671 *Fiorio/Mission v Commission* (2000) E.C.R. II-5591.

¹⁸ See ECJ (order of the President of March 15, 1995), Case C-122/94 *Commission v Greece* (1995) E.C.R. I-1313. A case brought under Art.226 or 227 of the EC Treaty is heard in principle in public, although the Court of Justice may decide otherwise of its own motion or on application by the parties for serious reasons (Stabitz, Art.31).

¹⁹ (1989) O.J. L265/31.

²⁰ (1992) O.J. L26/4.

the EC Treaty.²¹ The fact that the Commission used or did not use that procedure is therefore irrelevant where it is a matter of deciding on the admissibility of infringement proceedings. The Commission alone is competent to decide whether it is appropriate to bring proceedings under Art.226 of the EC Treaty for failure to fulfil obligations. Thus, the choice between the two procedures is within its discretion.²²

II. IDENTITY OF THE PARTIES

A. THE APPLICANT

Commission. Under Art.226 of the EC Treaty, only the Commission may bring an action against a Member State.²³ That power is consistent with its task of ensuring that Community law is applied.²⁴ The Commission exercises its supervisory task of its own motion in the general interest of the Community²⁵ and does not have to show the existence of a specific interest in bringing proceedings.²⁶ It itself assesses whether it is appropriate to bring proceedings under Art.226 and has therefore no obligation to do so in the event of an alleged infringement of the Treaty.²⁷ In view of the objective

²¹ See, in the context of Directive 89/665, ECJ, Case C-359/93 *Commission v Netherlands* (1995) E.C.R. I-117, para.11; ECJ, Case C-78/94 *Commission v Greece* (1995) E.C.R. I-1791, para.11; ECJ, Case C-353/95 *Commission v Ireland* (1996) E.C.R. I-8163, para.22; ECJ, Case C-326/96 *Commission v Austria* (1999) E.C.R. I-7479, para.21 and, in the context of Directive 92/13, ECJ, Case C-254/92 *Commission v Greece* (2000) E.C.R. I-4713, para. 25-26.

²² ECJ, Case C-394/92 *Commission v Greece* (2001) E.C.R. I-4713, para. 25-26.

²³ For the (lack of) capacity of the Court of Auditors to bring an action for failure to fulfil obligations, see Leghissim, "The European Court of Auditors: current legal issues" (2000) C.M.L.Rev. 123-146, at 140.

²⁴ EC Treaty, Art.171, first indent; ECJ, Case C-412/92 *Commission v Germany* (1995) E.C.R. I-1197, para.15.

²⁵ ECJ, Case 167/73 *Commission v France* (1974) E.C.R. 358, para.15; ECJ, Case C-191/95 *Commission v Germany* (1997) E.C.R. I-5449, para.35; CFI, Case T-205/00 *Lambert v Orindamon* (2002) E.C.R. II-2203, para.55. See also Goffin, "Le management d'un Etat membre selon la jurisprudence de la Cour de Justice des Communautés européennes", in *Mélanges Fernand Deshayes, la construction européenne* (Nathan/Labor, Paris/Bruxelles, 1979), Vol.1, 211; and Leghissim and Van Nuffel, *Constitutional Law of the European Union*, § 10-257, at 427.

²⁶ ECJ, Case C-412/92 *Commission v Germany* (1995) E.C.R. I-1197, para.16; ECJ, Case C-182/94 *Commission v Italy* (1995) E.C.R. I-1463, para.5; ECJ, Case C-333/99 *Commission v France* (2001) E.C.R. I-1025, para.5; ECJ, joined Cases C-414/93 and C-415/93 *Commission v France* (2007) E.C.R. I-5365, para.29; ECJ, Case C-475/96 *Commission v Germany* (2001) E.C.R. I-5453, para.38.

²⁷ ECJ, Case C-87/95 *SONOTON and Others v Commission* (1996) E.C.R. I-1951, para. 6-7; ECJ, Case C-206/93 *Commission v Greece* (1995) E.C.R. I-4299, para.5; ECJ, Case C-203/93 *Commission v Italy* (1995) E.C.R. I-4313, para.13; ECJ, Case C-243/95 *Commission v Denmark* (1997) E.C.R. I-3352, para.30; ECJ, Case C-333/96 *Commission v Ireland* (1998) E.C.R. I-5565, para.12; ECJ, Case C-313/98 *Commission v France* (2001) E.C.R. I-2521, para.14; ECJ, Case C-183/93 *Commission v Germany* (2000) E.C.R. I-4219, para.15; ECJ,

nature of the action, the Court must consider whether or not there has been a failure to fulfil obligations as alleged, without its being part of its role to take a view on the Commission's exercise of its discretion.⁵² The decision to apply to the Court of Justice for a declaration that a Member State has failed to fulfil its obligations cannot be described as a measure of administration or management and hence may not be delegated; it must be taken by all the members of the college of Commissioners, who should bear collective responsibility for it.⁵³ The formal requirements for effective compliance with that principle of collegiate responsibility are less strict in this case than in the case of the adoption of decisions affecting the legal position of individuals.⁵⁴ The reason for this is that, whilst the decision to commence proceedings for failure to fulfil obligations before the Court constitutes an indispensable step for the purpose of enabling the Court to give judgment by way of a binding decision on the alleged failure to fulfil obligations, it does not *per se* alter the legal position of the Member State in question. Consequently, it is sufficient that the decision to bring an action was the subject of collective deliberation by the college of Commissioners and that the information on which the decision was based was available to the members of the college. However, it is not necessary for the college itself formally to decide on the wording of the acts which give effect to the decision and put them in final form.⁵⁵

The involvement of the Court is not always necessary or appropriate in order to ensure that the Member States effectively apply Community law.

Case C-47/93 *Commission v Belgium* [2002] E.C.R. I-9331, para.15; ECI, Case C-40/93 *Commission v Luxembourg* [2002] E.C.R. I-9741, para.37. See also the second part of Art.226 of the EC Treaty, which provides that the Commission may bring the matter before the Court of Justice if the Member State concerned fails to comply with the reasoned opinion within the period laid down by the Commission. See also ECI, Case C-32/93 *Commission v Netherlands* [2000] E.C.R. I-3463, para.20. See Evans, "The Enforcement Procedure of Art.226 (now Art.226) EEC: Commission Discretion" (1979) E.L.Rev. 442-455. The controversy in academic writings as to whether or not the Commission has a discretion to bring an action and the allegedly different implications of the first and second parts of Art.226 of the EC Treaty (see, for example, Smith and Harrop (now Campbell and Power), *The Law of the European Community* (Matthew Bender & Co., New York, 1976), 6-311) has been overtaken by case-law. For a survey of the use of Art.226 of the EC Treaty, see Thomas, "Enforcement of Community Law by the Commission as 'droit communautaire'" (1991) R.M.C. 637-651.

⁵² ECI, Case C-15/93 *Commission v Spain* [2002] E.C.R. I-5257, para.15.
⁵³ ECI, Case C-15/93 *Commission v Germany* [1995] E.C.R. I-3445, para.35-37; and ECI, Case C-37/97 *Commission v Germany* [1999] E.C.R. I-2175, para.13-21, in which the Court justified this position in terms, *inter alia*, of "the discretionary power of the institution", which "if it is to be a guardian of the Treaty ... is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations".

⁵⁴ See Lameris and Van Nul, *Constitutional Law of the European Union*, 506-563, at 436-437.

⁵⁵ Case C-19/95 *Commission v Germany*, paras 47-48. See also ECI, Case C-192/97 *Commission v Germany* [1999] E.C.R. I-2175, para.13-21; ECI, Case C-195/97 *Commission v Germany* [1999] E.C.R. I-3257, para.19-21. The decision to bring an action is therefore not a challengeable act within the meaning of Art.226 of the EC Treaty (CFI, Joined Cases T-37/93, T-37/94, T-38/93, T-39/93 and T-40/93, *Philip Morris International and Others v Commission* [2000] E.C.R. II-1, para.79).

The Commission is therefore also free to determine the time when it brings any proceedings.⁵⁶ In contrast, the Commission is not empowered to determine conclusively whether given conduct of a Member State is compatible with the Treaty. The rights and duties of Member States may be determined and their conduct appraised only by judgment of the Court of Justice.⁵⁷ Consequently, a decision by the Commission not to bring proceedings against a Member State does not mean that it is not in breach of Community law.⁵⁸

No standing for individuals. Individuals may not bring actions for failure to fulfil obligations before the Court of Justice (or the Court of First Instance).⁵⁹ If the need arises, they must contest the conduct of the Member State in a national court.⁶⁰ The latter may (or must) request a preliminary ruling from the Court of Justice in order indirectly to have the conduct complained of reviewed in the light of the requirements of Community law (see Chs 2 and 6).⁶¹ Furthermore, persons considering that a Member State is infringing Community law may lay a complaint before the Commission.⁶² The Commission, however, is under no obligation to act on the complaint.⁶³

⁵⁶ ECI, Case 3/68 *Commission v Italy* [1968] E.C.R. 413, at 438; ECI, Case 7/71 *Commission v France* [1971] E.C.R. 1191, para.5; ECI, Case 32/68 *Commission v Belgium* [1968] E.C.R. 1451, para.12; see also ECI, Case C-42/92 *Commission v Germany* [1993] E.C.R. I-1057, para.17-19. Although the Court was surprised at the Commission's having brought an action more than six years after the national legislation at issue had entered into force, it held that the Commission was not obliged to act within a specified period.

⁵⁷ ECI, Joined Cases 142 and 143/83 *Ensslin and Salinger* [1983] E.C.R. 1413, para.15.
⁵⁸ Where it subsequently appears that the Member State is indeed infringing Community law, the fact that the Commission did not bring an action for failure to fulfil obligations may, in certain circumstances, constitute a reason for limiting the temporal effects of a judgment of the Court or a reference for a preliminary ruling which brings the infringement to light (see 6-434, *infra*). This may also be relevant in ascertaining whether the breach of Community law was sufficiently serious as to cause the Member State to incur liability vis-à-vis individuals who suffered loss or damage as a result of it, see 3-341, *supra*.

⁵⁹ See, e.g., CFI (order of July 8, 2004), Case T-213/04 *Amione*, not reported. Individuals may also not have the Court of First Instance review the legality of national measures through an action for annulment brought against the Commission (CFI, Case T-348/03 *Perakianis v Union of Concerned Citizens and Exporters v Commission* [2003] E.C.R. II-4415, para.55).

⁶⁰ The fact that individuals have brought proceedings before a national court cannot prevent the bringing of an action by the Commission under Art.226 of the EC Treaty, since the two procedures have different objectives and effects (ECI, Case 31/59 *Commission v Italy* [1959] E.C.R. 25, para.8; ECI, Case 35/85 *Commission v Belgium* [1986] E.C.R. 1143, para.24; ECI, Case C-310/01 *Commission v Italy* [2004] E.C.R. I-5375, para.39).

⁶¹ ECI, Case 142/83 *Ensslin*, 3703, para.8. See also ECI, Joined Cases C-156/96, C-311/96 and C-196/96 *Emmald Meer v Commission* [1998] E.C.R. I-309, para.46. For further discussion of this point, see Timmermans, "Judicial Protection against the Member States: Arts 159 (now Art.226) and 177 (now Art.234) revisited", in Carlin and Heukels (eds), *Institutional Dynamics of European Integration: Essays in Honour of H.G. Schermers* (Martinus Nijhoff, Dordrecht, 1994), Vol. II, at 391-477.

⁶² See 16100a, "La participation du plaignant à la procédure en infraction et en élit communautaire diligente par la Commission" (2003) R.M.C. 519-528.

⁶³ CFI (order of January 14, 2004), Case T-22/02 *Makrodonika Meats Mechaniki v Commission* [2004] E.C.R. II-15, para.41-47 and the case-law cited therein. Consequently, the parties

- 5-027 Rejection of a complaint. The Commission's decision rejecting a complaint cannot be challenged by an action for annulment,¹²⁰ since the Commission does not adopt any binding legal act in the course of the pre-litigation stage¹²¹; it does not determine the rights and duties of the Member State or afford any guarantee that a given line of conduct is compatible with the Treaty. Accordingly, an opinion of the Commission cannot release a Member State from its Treaty obligations and certainly does not give it a licence to restrict rights which individuals derive from the Treaty.¹²² Consequently, the Commission's decision rejecting a complaint from individuals does not affect their legal position since the Commission is simply refusing to take measures which in no event would have legal effects for them.
- 5-028 Failure of the Commission to bring an infringement action. If the Commission (saves the complaint) unanswered, an action for failure to act will not lie, since the Commission has no infringed duty to act.¹²³ The same is true where the Commission fails to bring proceedings in the Court in the event of a Member State's infringing a decision adopted pursuant to Art.88(2) of the EC Treaty.¹²⁴ In addition, natural or legal persons may bring such an action against the Commission only if it failed to adopt an act

of an individual who makes a complaint against an undertaking for infringement of Art.84 and/or Art.85 of the EC Treaty (see T-303 and T-423, *infra*) differs fundamentally from that of an individual who brings a complaint against a Member State for infringement of Community law (CFI (order of September 19, 2003), T-247/04 *Aeroprop and Edis v Commission*, not yet reported, paras 40-61).

¹²⁰ ECJ, Case C-37/89 *SONITO and Others v Commission* [1990] E.C.R. I-1581, paras 5-6; CFI, Case T-145/91 *Renio and Others v Commission* [1992] E.C.R. II-2417, para.52; CFI, Case T-575/93 *Kosimov v Commission* [1996] E.C.R. II-2, para.71; CFI, Case T-111/95 *FT Promedia v Commission* [1998] E.C.R. II-2537, para.97. Since the Commission likewise has a broad discretion in carrying out the function conferred on it by Art.85 of the EC Treaty of ensuring that Member States fulfil their obligations in respect of public undertakings and undertakings to which Member States grant special or exclusive rights, individuals who requested the Commission to intervene pursuant to that article may not bring an action for annulment against the decision by which the Commission refuses to act against a Member State infringing Art.86(1) and (2) of the EC Treaty: ECJ, Case C-105/95 *P. Sanderwald der Bilanzrevisor v Commission* [1997] E.C.R. I-347, paras 26-30 (cf., however, the Opinion of Advocate General A. La Pergola, paras 14-21, who took a different view); CFI (order of January 23, 1995), Case T-84/94 *Sanderwald der Bilanzrevisor v Commission* [1995] E.C.R. II-111, para.22; ECJ, Case C-141/92 *P. Commission v T-Mobile Austria* [2003] E.C.R. I-1133, para.75 (annulling the CFI's judgment in Case T-34/99 *Telecomunicazioni Service v Commission* [2002] E.C.R. I-311, in which the CFI had found that the rejection of an Art.86 complaint constituted a reviewable act).

¹²¹ ECJ, Case C-89/93 *Lévis v Commission* [1994] E.C.R. I-1, at 20: the Court held that "[a] measure taken by the Commission during [the pre-litigation] stage has any binding force"; CFI (order of September 8, 2003), Case T-109/03 *Gud v Commission*, not reported, para 44.

¹²² ECJ, Joined Cases 141 and 143/80 *Ensslin and Seifried* [1981] E.C.R. 1431, paras 16-18.

¹²³ CFI (order of February 19, 1997), Case T-117/96 *Intertronic v Commission* [1997] E.C.R. II-141, para.32; CFI (order of June 3, 2002), Case T-143/02 *Olve v Commission and Others*, not reported, para.11.

¹²⁴ CFI Case T-17/94 *ALTEC v Commission* [1995] E.C.R. II-351, paras 63-72.

addressed to them, other than a recommendation or an opinion.¹²⁵ Since in a procedure pursuant to Art.226 of the EC Treaty the Commission addresses to the Member State concerned only a reasoned "opinion", natural or legal persons are precluded from bringing an action for failure to deliver such an opinion.¹²⁶

A failure on the part of the Commission to bring an action for failure to fulfil obligations will not ground an action for damages either.¹²⁷ The reason for this is that the Commission's inaction does not infringe Art.226 of the EC Treaty and therefore cannot be regarded as constituting fault.¹²⁸ In such a case, the source of any damage lies in the Member State's infringement of the Treaty and not in any shortcoming of the Commission.

Member States. Under Art.227 of the EC Treaty, a Member State may also bring a matter before the Court of Justice if it considers that another Member State has failed to fulfil an obligation under Community law. The Member State must first submit a complaint to the Commission. The Commission delivers a reasoned opinion, after giving each of the States concerned the opportunity to submit its own case and its observations on the other party's case both orally and in writing. The opinion sets out the Commission's view as to whether or not the alleged infringement of Community obligations under the Treaty is made out. If the Commission has not delivered an opinion within three months of the date of receipt of the complaint, the matter may be brought before the Court of Justice.

The Commission may also bring the matter before the Court itself pursuant to Art.226 of the EC Treaty. If it does so, it does not prevent the Member State from also bringing an action. In the event that the Commission's reasoned opinion falls short of the Member State's expectations, it may add to it in its application.

¹²⁵ ECJ, Case 247/87 *Star Fruit v Commission* [1989] E.C.R. 291, paras 10-14; ECJ (order of May 21, 1990), Case C-72/89 *Asia Motor France v Commission* [1990] E.C.R. I-2181, para.1; CFI (order of December 14, 1993), Case T-25/93 *Carbo Alcano-Carb v Commission* [1993] E.C.R. II-1332, para.55; CFI (order of May 27, 1994), Case T-5/94 *J v Commission* [1994] E.C.R. II-391, para.16; CFI (order of July 4, 1994), Case T-13/94 *Conway Oil Refiner v Commission* [1994] E.C.R. II-431, para.13.

¹²⁶ ECJ (order of March 20, 1993), Case C-371/89 *Enrich v Commission* [1993] E.C.R. I-1555. Individuals may possibly take up the matter with the European Ombudsman. For example, see the decision in complaint 4726/3.56 against the European Commission ([1997] O.J. C324/3) and the decision in complaint 17697/1994 against the European Commission available from www.ombudsman.eu.int.

¹²⁷ ECJ (order of May 15, 1990), Case C-72/89 *Asia Motor France v Commission* [1990] E.C.R. I-2181, para.13; CFI (order of July 3, 1997), Case T-201/95 *Smanner and Others v Commission* [1997] E.C.R. II-1611, para.30; CFI (order of May 3, 1999), Case T-153/98 *Smüller v Council and Commission*, not reported, para.12.

¹²⁸ However, the Commission's conduct may possibly infringe other Treaty provisions and hence potentially make it liable in damages if all the necessary conditions are fulfilled (see Calli, *supra*). The Court of Justice has declared actions for damages for infringement of the second para of Art.97 (since repealed) of the EC Treaty and Arts 28(2), 241 and 226, respectively, admissible but unavailing (ECJ, Case 469 *Lamotte v Commission* [1971] E.C.R. 125; ECJ, Case 49/75 *Producte Danon v Commission* [1976] E.C.R. 1).

To date, only four actions have been brought under Art.227 of the EC Treaty, and only two of them resulted in a judgment.¹³⁰

B. THE DEFENDANT

030 Member State. An action under Arts 226-227 may be brought in the Court of Justice only against a Member State.

031 Nation of Member State. By "Member State" is meant the entity under international law which acceded to the Treaties. Any act or failure to act by any agency of the State or constitutionally independent bodies or institutions which are to be regarded as public bodies may potentially cause the Member State to become liable under Community law.¹³¹ The domestic organisation of a Member State may not detract from the full effect of Community law.

Consequently, it may be that a Member State is found guilty of infringing Community law even though the infringement was committed by a subsidiary and the national government, which represents the "Member State" before the Court of Justice, was not at fault and has no defence under domestic law.¹³² The rationale of the Court's case-law is that the Member State is under a Community-law duty to construct its constitutional structure in such a way as to avoid that evil.

032 Legislature, executive and judiciary. An act or omission of the legislative authority of a Member State can certainly give rise to an action for failure to fulfil obligations.¹³³ The same is true for shortcomings of the executive branch. Shortcomings in the way in which national courts apply Community

law may also be imputed to the Member States.¹³⁴ In all likelihood, an ordinary judicial error is not sufficient.¹³⁵ If a (supreme) national court deliberately ignored or disregarded Community law, this could certainly bring the Community liability of the relevant Member State into play.¹³⁶

Private companies controlled by public authorities. Lastly, acts of legal persons governed by private law which are controlled by the public authorities may result in an infringement of Community law on the part of the Member State concerned.¹³⁷ An example is the Irish Goods Council which was set up to organise the "Buy Irish" campaign in Ireland. The acts of the Irish Goods Council had to be imputed to the Irish State, since its membership, funding and aims were determined by the Irish government.¹³⁸

III. SPECIAL CHARACTERISTICS

A. THE PRE-LITIGATION STAGE OF THE PROCEDURE

Objective. The aim of the pre-litigation stage of the procedure is to give the Member State an opportunity (a) of remedying the infringement before the matter is brought before the Court of Justice and (b) of putting forward

¹³⁰ ECJ, Case 141/78 *France v. United Kingdom* [1979] E.C.R. 2521; ECJ, Case C-33/93 *Belgium v. Spain* [2000] E.C.R. I-3113.

¹³¹ ECJ, Case 7/65 *Commission v. Belgium* [1975] E.C.R. 255, para.15; ECJ, Case 169/82 *Commission v. Italy* [1984] E.C.R. 1601; ECJ, Case 185 *Commission v. Belgium* [1987] E.C.R. 1779; ECJ, Joined Cases 237-238/85 *Commission v. Belgium* [1988] E.C.R. I-2; ECJ, Case 45/87 *Commission v. Ireland* [1988] E.C.R. 4929; ECJ, Case C-52/83 *Commission v. Germany* [1991] E.C.R. I-4953; ECJ, Case C-31/93 *Commission v. Italy* [1991] E.C.R. I-3927. See also the definition of the expression "Member State" in ECJ (order of March 21, 1997), Case C-55/97 *Région Wallonne v. Commission* [1997] E.C.R. I-2537, para.16-17.

¹³² ECJ, Case 239/83 *Commission v. Belgium* [1986] E.C.R. 2445, para.13-14. In Belgium, there is a system of substitution whereby the federal authorities may, subject to certain conditions, invest themselves with powers of a sub-entity in order to give effect to a judgment of the Court of Justice finding Belgium guilty of an infringement of Community law by that entity (Belgian Constitution, Art.169 and Art.183); of the Special Law on Institutional Reform, for a commentary, see Egelsers, "De Europeesrechtelijke aansprakelijkheid van de nieuwe verzorging instans de internationale betrekkingen van de Belgische Gemeenschappen en Geesten" [1994] S.E.W. 47-81.

¹³³ ECJ, Case 370 *Commission v. Italy* [1970] E.C.R. 991, para. 3-9; ECJ, Case 54/91 *Commission v. Italy* [1992] E.C.R. 739, para.4; Case 42/82 *Commission v. Italy* [1982] E.C.R. 4313, para.15; Case 359/84 *Commission v. Italy* [1986] E.C.R. 553, para.5.

¹³⁴ ECJ, Case C-129/93 *Commission v. Italy* [2003] E.C.R. I-14637, para. 25-41 (with case notes by Pothou-Beaugendre in (2004) R.T.D.E. 229-235 and by Rossi and Di Federico in (2005) C.M.L.Rev. 819-844); an Italian law, which in itself was not contrary to Community law, was interpreted by a large part of the Italian judiciary, including the *Corte suprema di cassazione*, in a way which was incompatible with Community law. This led to the finding that Italy was in breach of its obligations under the EC Treaty. See also ECJ, Case C-274/01 *Kohler* [2003] E.C.R. I-10239 as regards State liability for infringements imputable to the judiciary. See also De Bellefleur, "L'Art.169 du traité de Rome, et l'efficacité du contrôle communautaire par les manquements des Etats membres" (1977) R.T.D.E. 173, at 174.

¹³⁵ ECJ, Case C-129/93 *Commission v. Italy* [2003] E.C.R. I-14637, para.32 (with case notes by Pothou-Beaugendre in (2004) R.T.D.E. 229-235 and by Rossi and Di Federico in (2005) C.M.L.Rev. 819-844); where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with Community law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to secure its application in compliance with Community law. See also ECJ (order of June 3, 2003), Case C-295/03 *E. Müller v. Germany, Council and Commission* [2003] E.C.R. I-4867, para.28.

¹³⁶ Opinion of Advocate General L.P. Warner in Case 30/77 *Bonifazi* [1977] E.C.R. 1959, at 1031. See also 2-653 and 2-654, *supra*, for the possibility of bringing proceedings under Arts 226-227 of the EC Treaty against a Member State where one of its courts infringes the obligation to seek a preliminary ruling under the third part of Art.234.

¹³⁷ ECJ, Case 349/81 *Commission v. Ireland* [1982] E.C.R. 4005, para.15; ECJ, Case C-325/90 *Commission v. Germany* [2002] E.C.R. I-9977, para.14-21.

¹³⁸ ECJ, Case 349/81 *Commission v. Ireland* [1982] E.C.R. 4005, para.15; see also Dashwood and White (n.13, *supra*), at 351; ECJ, Case C-325/90 *Commission v. Ireland* [1998] E.C.R. I-9555, para.23; the State is liable for acts of an individual undertaking which is State-owned and acts as a contracting authority within the meaning of the directives on public contracts awards. See also CJ (order of 29 September 1997), Case T-31/97 *Sotgiu v. Commission* [1997] E.C.R. II-1523, para.36.

its defence to the Commission's complaints.¹⁴ Moreover, during the pre-litigation stage the Commission and the Member State may come to an accommodation, thus rendering a court hearing unnecessary.¹⁵ Lastly, the proper conduct of the pre-litigation procedure constitutes an essential guarantee, not only in order to protect the rights of the Member States concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as to its subject-matter.¹⁶ The scope of the dispute is defined in the pre-litigation procedure. As a result, in the contentious proceedings the Court may only judge the merits of the pleas in law put forward by the Commission in the pre-litigation procedure.¹⁷

2. Letter of formal notice

- 5-035 Content and purpose. The Art.226 procedure formally commences on receipt of a letter before action from the Commission giving the Member State formal notice. As a rule, the letter will have been preceded by informal contacts between the Commission and the Member State by which the former starts its investigation into the possible infringements of Community law.¹⁸

The purpose of the letter of formal notice or letter before action is to delimit the subject-matter of the dispute and to provide the Member State, which is asked to submit observations, with the information necessary in order for it to prepare its defence.¹⁹

Consequently, the letter of formal notice must precisely specify the obligation which the Commission maintains the Member State has failed to

fulfil and the grounds on which the Commission takes this view.²⁰ Any vagueness in the letter of formal notice depriving the Member State of the opportunity of submitting observations to good effect may be remedied by the Commission's sending a new letter of formal notice setting out in time additional particulars or information.²¹ At that point in the pre-litigation stage, it is sufficient if the Member State receives an initial brief summary of the complaints.²² The test is whether the Member State was placed in possession of all the relevant information needed for its defence.²³

Formal notice must be complete. The Member State must be put on notice of the whole of the alleged infringement of Community law. The complaints may not be subsequently extended in the reasoned opinion, since that would be in breach of the Commission's duty to give the Member State concerned a fair hearing.²⁴ The illegality cannot be regarded as cured even by the fact that the Member State put forward a defence in its observations or the reasoned opinion to the new complaints enlarging the scope of the dispute.²⁵

Essential procedural requirement. Because it gives the Member State concerned the opportunity to submit prior observations, the letter of formal notice constitutes an essential procedural requirement for the legality of the procedure for a declaration that a Member State has failed to fulfil its

¹⁴ ECI, Case 74/82 *Commission v Ireland* [1984] E.C.R. 317, para.13; ECI, Case C-287/90 *Commission v Germany* [2002] E.C.R. I-5611, para.15.

¹⁵ Consequently, the Commission is justified to refuse to disclose a letter of formal notice and a reasoned opinion requested under the right of access to documents by an individual who lodged a complaint. This is because the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure and also after proceedings are brought in the Court. This enables discussions to continue between the parties even after proceedings have been brought with a view to reaching a speedy resolution (CFL Case T-19/95 *Pearle and Others v Commission* [2001] E.C.R. II-3677, para. 51-55).

¹⁶ ECI (order of July 12, 1955), Case C-265/94 *Commission v Spain* [1995] E.C.R. I-3775, para.17; ECI, Case C-352/01 *Commission v Ireland* [2003] E.C.R. I-11433, para.12.

¹⁷ ECI, Case C-158/94 *Commission v Italy* [1997] E.C.R. I-4765, paras 59-60; ECI, Case C-158/94 *Commission v France* [1997] E.C.R. I-5815, paras 126-103.

¹⁸ For a more extensive survey of the Commission's activities in this "administrative stage", see Rideau and Picot, *Code de procédures juridictionnelles*, at 168-174, and Sweeney and Hoskins, *Remedies in E.C. Law*, at 153-254.

¹⁹ ECI, Case 274/83 *Commission v Italy* [1985] E.C.R. 1077, para.15; ECI, Case 235/87 *Commission v Greece* [1995] E.C.R. 6347, para.12.

²⁰ ECI (order of September 13, 2000), Case C-341/97 *Commission v Netherlands* [2000] E.C.R. I-6511. A detailed opinion within the meaning of Art.21(1) of Directive 93/85 (procedure for the provision of information in the field of technical standards and regulations) informing a Member State that a national measure notified to the Commission did not comply with Community law cannot be regarded as a letter of formal notice within the meaning of Art.215 of the EC Treaty. At the time when such a detailed opinion is delivered, the Member State to which it is addressed cannot have infringed Community law, since the measure exists only in draft form.

²¹ ECI, Case 211/81 *Commission v Denmark* [1982] E.C.R. 4347, paras 10-11.

²² ECI, Case 274/83 *Commission v Italy* [1985] E.C.R. 1077, para.11; ECI, Case C-285/94 *Commission v Italy* [1996] E.C.R. I-4403, para.16; ECI, Case C-275/94 *Commission v Italy* [1997] E.C.R. I-4745, para.13; ECI, Case C-125/95 *Commission v France* [2000] E.C.R. I-1445, para.70. It is the letter of formal notice, the Commission wrongly refers to Art.226 of the EC Treaty instead of to Art.141 of the EABC Treaty where the failure to fulfil an obligation relates to the latter Treaty, that irregularity cannot result in the application being inadmissible if, in the circumstances of the case, the right of defence of the Member State concerned are not affected.

²³ ECI, Case 225/87 *Commission v Greece* [1988] E.C.R. 6347, para.13.

²⁴ ECI, Case 318/81 *Commission v Italy* [1984] E.C.R. 2733, para.6; ECI, Case C-145/93 *Commission v Italy* [1995] E.C.R. I-5381, paras 17-18 (the reasoned opinion and the application made to the Court pursuant to the second para. of Art.226 of the EC Treaty were flawed with regard to the rights of the defence (i) since they referred to rules of Community law other than those cited in the letter of formal notice and (ii) since a change in the legal situation was likely to have affected the assessment of the compatibility of the national legislation in question with Community law).

²⁵ Case 216/81 *Commission v Italy*, para.7.

obligations.¹²⁰ Even if the Member State does not wish to make any observations, the Commission must comply with that requirement.¹²¹

- 5-035 Sufficient time for lodging observations. The Member State must have a reasonable time in which to make its observations. The reasonableness of the period prescribed by the Commission has to be assessed in the light of the particular circumstances. Thus, the urgent nature of the case or the fact that the Member State was fully apprised of the Commission's position even before the letter of formal notice may warrant setting a short period.¹²² However, the urgency of the case may not be brought about by the Commission itself, for instance because it was tardy in bringing proceedings for failure to fulfil obligations. Moreover, a Member State cannot be regarded as having been fully apprised of the Commission's position before the letter of formal notice where the Commission did not make any clear view known to it.¹²³

2. Reasoned opinion

- 5-039 Content and purpose. If the Member State fails to remedy the failure to fulfil obligations under Community law, the Commission may issue a reasoned opinion. That document describes the infringement of Community law in detail and prescribes the time within which the Member State must put an end to it. As in the case of the letter of formal notice, delivery of a reasoned opinion is an essential procedural requirement for the purposes of the legality of the proceedings and the admissibility of any proceedings brought against the Member State in the Court of Justice.¹²⁴

The issue of a reasoned opinion constitutes a preliminary procedure, which does not have any binding legal effect for the addressee. It is merely a pre-litigation stage of a procedure which may lead to an action before the Court. The purpose of that pre-litigation procedure provided for by Art.226 of the EC Treaty is to enable the Member State concerned to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position. If that attempt at settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute. However, the Commission is not empowered to determine conclusively, by reasoned

opinions formulated pursuant to Art.226, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty. According to the system embodied in Arts.226 to 228 of the EC Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court. The reasoned opinion therefore has legal effect only in relation to the commencement of proceedings before the Court so that where a Member State does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence proceedings before the Court.¹²⁵

Collegiate responsibility of the Commission. A decision to issue a reasoned opinion is subject to the principle of collegiate responsibility, since it is not a measure of administration or management and therefore may not be delegated. Here too, however, a less stringent approach to effective compliance with the principle of collegiate responsibility applies, having regard to the legal consequences attaching to reasoned opinions in that it is not necessary for the college itself formally to decide on the wording of the act which gives effect to the decision to issue a reasoned opinion and put it in final form. It is sufficient that the decision was the subject of collective deliberation by the college of Commissioners and that the information on which the decision was based was available to the members of the college.¹²⁶

Reasoned opinion must be coherent and detailed. The opinion is sufficiently reasoned if it contains a coherent and detailed statement of the reasons which led the Commission to believe that the Member State in question has failed to fulfil an obligation under the Treaty.¹²⁷ The opinion may only relate to shortcomings of the Member State which were mentioned in the letter of formal notice.¹²⁸

Relationship with the formal notice. The reasoned opinion must be clear in itself.¹²⁹ A general reference to the letter of formal notice is not sufficient. Whilst the formal letter of notice, which comprises an initial succinct résumé of the alleged infringement, may be useful in construing

¹²⁰ ECJ, Case C-326/91, *Commission v Italy* [1993] E.C.R. I-3133, para. 21-24; ECJ, Case C-141/89 *Commission v Denmark* [1991] E.C.R. I-3352, para. 13.

¹²¹ ECJ, Case 31/69 *Commission v Italy* [1972] E.C.R. 13, para. 13-14; ECJ, Case 114/81 *Commission v United Kingdom* [1982] E.C.R. 363, para. 9; ECJ, Case 174/82 *Commission v Italy* [1983] E.C.R. 1077, para. 21.

¹²² ECJ, Case C-471/93 *Commission v Luxembourg* [1995] E.C.R. I-3277, para. 25; ECJ, (President of November 15, 2005), Case C-922/05 *Commission v Austria*, not yet reported, para. 33-34.

¹²³ ECJ, Case 291/85 *Commission v Belgium* [1987] E.C.R. 315, para. 10-12.

¹²⁴ *Commission v Belgium*, at 72; ECJ, Case 325/82 *Commission v Germany* [1984] E.C.R. 371, para. 8; ECJ, Case C-152/83 *Commission v Luxembourg* [1991] E.C.R. I-3261, para. 3.

¹²⁵ This summary is based on ECJ, Case C-31/95 *Commission v Germany* [1996] E.C.R. I-5449, paras 44-45, and the case-law cited therein.

¹²⁶ *Ibid.*, para. 34-36 and 48.

¹²⁷ ECJ, Case 1/61 *Commission v Italy* [1961] E.C.R. 317, at 327; ECJ, *Commission v Germany*, cited in the preceding n., para. 3; ECJ, 14/92 *Commission v Ireland* [1984] E.C.R. 317, para. 20; ECJ, Case C-275/94 *Commission v Italy* [1997] E.C.R. I-4743, para. 19; ECJ, Case C-358/02 *Commission v Netherlands* [2004] E.C.R. I-6213, para. 20; ECJ, C-148/02 *Commission v France* [2004] E.C.R. I-5143, para. 27.

¹²⁸ ECJ, Case C-145/01 *Commission v Italy* [2003] E.C.R. I-5531.

¹²⁹ In case of doubt as to the clarity of a reasoned opinion, the reply of the government concerned to the opinion can be taken into account in order to assess whether the grounds of complaint raised by the Commission were comprehensible (ECJ, Case C-451/01 *Commission v Germany* [2004] E.C.R. I-11703, para. 32).

the reasoned opinion, the Commission is none the less obliged to specify precisely in that opinion the grounds of complaint which it already raised more generally in the letter of formal notice and alleges against the Member State concerned, after taking cognizance of any observations submitted by it under the first para. of Art.226 EC. That requirement is essential in order to delimit the subject-matter of the dispute prior to any initiation of the contentious procedure provided for in the second paragraph Art.226 and in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it by the Commission and can thus bring an end to the alleged infringements or put forward its arguments in defence prior to any application to the Court by the Commission.¹⁴⁰

In the reasoned opinion, however, the Commission may set out the complaints contained in the letter of formal notice in more detail and refine them.¹⁴¹ The Commission takes account in the reasoned opinion of the observations submitted by the Member State in response to the letter of formal notice.¹⁴² If, nevertheless, the reasoned opinion contains new complaints, the Court of Justice will have regard in the subsequent judicial proceedings only to those contained both in the letter of formal notice and in the reasoned opinion.¹⁴³ This is because the Member State was in a position to submit observations only on those complaints in accordance with the first para. of Art.226 of the EC Treaty before the Commission delivered its reasoned opinion.

5-043 Reasoned opinion may propose measures to be taken. The Commission also may—but is not obliged to¹⁴⁴—set forth the measures which need to be taken in order to bring the infringement to an end. To this extent, the

Member State's freedom to determine the manner in which it terminates the relevant infringement of Community law is restricted. The fact that the Court of Justice is confined to making a "finding" that there has been a failure to fulfil an obligation does not affect this power of the Commission. This is because the aim of Art.226 proceedings is to achieve the practical elimination of infringements.¹⁴⁵ Where the Commission indicates in its reasoned opinion the measures required to this end and the Member State does not act on it, the "finding" made by the Court of Justice refers both to the actual infringement of Community law and to the measures which could have been taken in order to bring the infringement to an end. As a result, the Member State then knows—from the reasoning of the Court's judgment finding the infringement—what measures indicated in the reasoned opinion are capable of bringing the failure to fulfil obligations to an end.

5-044 Prescribed period. The Commission must prescribe in the reasoned opinion the time within which the Member State must comply with it. The period must be reasonable having regard to the circumstances of the case.¹⁴⁶ The Court of Justice has no power to alter the period prescribed by the Commission.¹⁴⁷ An action for failure to fulfil obligations brought after the expiry of a period which was too short to enable the Member State to take the necessary measures or, as the case may be, to prepare its defence will be declared inadmissible.¹⁴⁸ The application may be declared admissible, however, if in the actual case the aims of the pre-litigation procedure were nevertheless achieved in spite of the unreasonably short period of time allowed to the Member State.¹⁴⁹

B. THE STAGE OF THE PROCEDURE BEFORE THE COURT OF JUSTICE

1. Conditions of admissibility

a. The requirement for the pre-litigation stage of the procedure to be properly conducted

5-045 Objective. The proper conduct of the pre-litigation stage of the procedure is, as noted above, an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to

¹⁴⁰ ECJ, Case C-150/92 *Commission v Netherlands* [2004] E.C.R. I-6211, para.21.

¹⁴¹ ECJ, Case 274/83 *Commission v Italy* [1985] E.C.R. 1077, para.22; ECJ, Case C-355/01 *Commission v Spain* [2003] E.C.R. I-13145, para.25; ECJ, Case C-135/00 *Commission v Finland* [2002] E.C.R. I-14165, para. 75-81.

¹⁴² If the Commission takes no account in the reasoned opinion of the observations submitted by the Member State concerned in response to the letter of formal notice, this may mean that the nature and scope of the dispute are not precisely defined at the time when the case is brought before the Court. If so, the Court will hold that the pre-litigation procedure was not properly conducted and declare the application manifestly inadmissible (ECJ (order of July 11, 1995), Case C-265/94 *Commission v Spain* [1995] E.C.R. I-1975, para. 14-15. Although, in principle, the Commission is required to state in its reasoned opinion how it assesses the Member State's observations, even if they are received late, a failure to do so will not result directly in the inadmissibility of the application if it did not make it impossible for the Member State to put an end to the infringement, did not compromise its rights of defence and had no effect on the definition of the subject-matter of the dispute. (ECJ, Case C-352/02 *Commission v Ireland* [2004] E.C.R. I-11433, para. 14-22).

¹⁴³ ECJ, Case 51/73 *Commission v Italy* [1984] E.C.R. 2735, para. 6-8; ECJ, Case C-152/99 *Commission v Italy* [2001] E.C.R. I-4007, para.54.

¹⁴⁴ ECJ, Case C-147/93 *Commission v Portugal* [1995] E.C.R. I-3659, para.22. It is only where the Commission intends to make failure to adopt measures to enable the infringement complained of to be remedied the subject-matter of its action for failure to fulfil obligations that it has to specify these measures in the reasoned opinion (ECJ, Case C-325/94

Commission v Austria [1993] E.C.R. I-7479, para.35; ECJ, Case C-394/02 *Commission v Greece* [2005] E.C.R. I-4713, para.23).

¹⁴⁵ ECJ, Case 74/73 *Commission v Germany* [1975] E.C.R. 513, para. 10-13.

¹⁴⁶ ECJ, Case 74/82 *Commission v Ireland* [1984] E.C.R. 917, para. 5-12; ECJ, Case 233/83 *Commission v Belgium* [1985] E.C.R. 523, para.14; ECJ, Case C-56/90 *Commission v United Kingdom* [1992] E.C.R. I-4205, para.18; ECJ, Case C-328/86 *Commission v Austria* [1988] E.C.R. I-7479, para.21; ECJ (judgment of November 15, 2005), Case C-320/03 *Commission v Austria*, not yet reported, para. 33-34 (one week was deemed to be sufficient). See also 5-038, *supra*, in relation to the time prescribed for submitting observations on the letter of formal notice.

¹⁴⁷ ECJ, Case 235/81 *Commission v Italy* [1982] E.C.R. 2577, para.6; ECJ, Case 29/81 *Commission v Italy* [1982] E.C.R. 2555, para.6.

¹⁴⁸ ECJ, Case 133/85 *Commission v Belgium* [1988] E.C.R. 505, para.20.

¹⁴⁹ For an example, see Case 54/82 *Commission v Ireland* [1984] E.C.R. 317, para.13.

ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.¹²⁹ For those reasons, the Commission must take account in the reasoned opinion of the observations submitted by the Member State concerned in response to the letter of formal notice so that the Court may judge, when proceedings are brought, what specific obligations the Commission claims the Member State concerned has breached. If the Commission fails to satisfy this requirement, this may mean that the subject-matter of the dispute is not precisely defined. Such an irregularity in the conduct of the pre-litigation stage of the procedure may result in the application being declared manifestly inadmissible.¹³⁰

b. The requirement for the letter of formal notice and the reasoned opinion to accord with the application by which an action for failure to fulfil obligations is brought before the Court

- 3-045 Consistency between the pre-litigation stage and the application. Since the subject-matter of the proceedings is defined in the pre-litigation stage, the application by which the action for failure to fulfil obligations is brought before the Court of Justice must accord both with the reasoned opinion and with the letter of formal notice.¹³¹ Where necessary, the Court will take up this point of its own motion.¹³² This means that the alleged infringement of Community law must be defined in both the application and in the reasoned opinion in consistent, sufficiently precise terms, and that the application must be based on the same pleas and arguments as the reasoned opinion.¹³³ For example, the Commission cannot extend an action brought against a Member State for failing to implement a directive in national law to cover the infringement of failing in practice to comply with provisions of the directive where that complaint was not raised during the

¹²⁹ ECJ, Case C-133/93 *Commission v France* [1994] E.C.R. I-5883, para.33; ECJ, Case C-257/90 *Commission v Germany* [1992] E.C.R. I-5811, para.17; ECJ, Case C-354/92 *Commission v Netherlands* [1994] E.C.R. I-6213, para.19.

¹³⁰ ECJ (order of July 21, 1995), Case C-244/94 *Commission v Spain* [1995] E.C.R. I-3475.

¹³¹ ECJ, Case C-240/96 *Commission v United Kingdom* [1997] E.C.R. I-2023, para.36; ECJ, Case C-359/92 *Commission v Netherlands* [1994] E.C.R. I-6213, paras 13-19. It goes without saying that the application must accord with the general requirements of Art.21 of the Statute and Art.35(1)(c) of the ECJ Rules of Procedure (see ECJ, Case C-52/93 *Commission v Denmark* [1993] E.C.R. I-2187, para.17) (14-03 to 14-013, *supra*).

¹³² ECJ, Case C-41/92 *Commission v Greece* [1994] E.C.R. I-3771, para.14-15.

¹³³ ECJ, Case C-357/91 *Commission v Netherlands* [1992] E.C.R. I-3195, para.14; ECJ, Case 305/91 *Commission v Italy* [1993] E.C.R. I-2133, para.22; ECJ, Case C-243/89 *Commission v Denmark* [1993] E.C.R. I-3351, para.13; ECJ, Case C-356/92 *Commission v Italy* [1994] E.C.R. I-1, para.12; ECJ (Judgment of September 7, 1994), Case C-456/92 *Commission v Belgium*, not reported, paras 17-21.

pre-litigation stage.¹³⁴ However, the statement of the subject-matter of the proceedings in the reasoned opinion does not invariably have to be exactly the same as the form of order sought in the application if the subject-matter of the proceedings has not been extended or altered but simply restated in greater detail¹³⁵ or if the subject-matter—compared to the pre-litigation proceedings—has been limited.¹³⁶

Moreover, an application will be admissible only in so far as the Commission adduces matters of fact and law which support the conclusions set out in general terms in the reasoned opinion and the application.¹³⁷

Infringement relates to a cluster of acts. Where an action for failure to fulfil obligations relates, not to a single act, but to a cluster of acts, each involving a separate infringement, the Member State must have been given an opportunity in the pre-litigation stage to set forth its defence to each breach of which it stands accused. If the letter of formal notice referred only to certain isolated cases, the action cannot extend to the whole collection of acts categorised as infringements. In this event, the application will be admissible only to the extent to which the acts complained of in the application were also dealt with in the pre-litigation stage.¹³⁸

¹³⁴ ECJ, Case C-337/92 *Commission v Germany* [1993] E.C.R. I-5871, para.20-21. Where the Commission has given a Member State formal notice of a failure to transpose a directive and the Member State adopts some implementing measures after the pre-litigation stage but not all those necessary in order to transpose the directive, the Commission may restrict the form of order sought in the application made to the Court to those provisions not yet implemented at that time; ECJ, Case C-112/94 *Commission v Ireland* [1995] E.C.R. I-4363, para.7-9, but see ECJ, Case C-274/93 *Commission v Luxembourg* [1995] E.C.R. I-2019, para.12-11.

¹³⁵ ECJ, Case C-183/00 *Commission v Finland* [2001] E.C.R. I-34159, para.23; the fact that in the application the Commission set out in detail the complaints it had already made in a more general way in the letter of formal notice and the reasoned opinion has no effect on the scope of the proceedings; ECJ, Case C-279/94 *Commission v Italy* [1997] E.C.R. I-4743, para.25; ECJ, Case C-52/90 *Commission v France* [1992] E.C.R. I-3427, para.44; ECJ, Case C-35/93 *Commission v Spain* [1993] E.C.R. I-5437, para.15; the Commission can reward the complaint in the application to take account of additional evidence produced after notification of the reasoned opinion; ECJ, Case C-255/93 *Commission v France* [2000] E.C.R. I-2487, paras 29-33; where, in its reply, the Commission amends its grounds of complaint so as to go beyond a mere restatement, albeit in greater detail, of the initial complaint or thereby raises submissions before the Court which were not put forward during the pre-litigation procedure or in the application initiating the proceedings, the Court will hold that the Commission must be deemed to have withdrawn its original complaint and declare the application inadmissible.

¹³⁶ ECJ, Case C-111/91 *Commission v Portugal* [1994] E.C.R. I-5517, para.52-53; the Commission can base its application on a complaint which was raised only in the alternative in the pre-litigation procedure in so far as the complaint was set out in the reasoned opinion; ECJ, Case C-233/93 *Commission v Austria* [1995] E.C.R. I-935, para.29; limitation of the subject-matter of the proceedings in the application as a result of a modification of the national legislation concerned.

¹³⁷ ECJ, Case C-425/97 *Commission v France* [2000] E.C.R. I-437, para.55.

¹³⁸ ECJ, Case 306/83 *Commission v Italy* [1985] E.C.R. 935, para.15-15.

5-048 Modification of national legislation. If, in both the pre-litigation stage (the letter of formal notice and the reasoned opinion) and in its application, the Commission complains of a specific shortcoming on the part of the Member State, the latter cannot claim that the application is irregular on the ground that the same shortcoming was due in the pre-litigation stage to a different national provision than the one to which it was attributable at the time when the action was brought. This is because the shortcoming with which the Member State is charged is not the existence of a specific provision incompatible with Community law, but the specific shortcoming arising as a result of such provision. As a result, a change in the national provision in the course of or after the pre-litigation procedure does not jeopardise the admissibility of the action for failure to fulfil obligations.¹⁴⁰ Neither does the opposite situation affect the admissibility of the application. Where Community law changes in the course of the pre-litigation procedure (after the submission of a letter of formal notice and of the reasoned opinion), the Commission may still bring, for example, an admissible application for a declaration of failure to fulfil obligations in respect of an original version of a subsequently amended or withdrawn directive if the obligations are retained in the new provisions.¹⁴¹

5-049 Infringements committed after the notification of the reasoned opinion. The requirement that the reasoned opinion and the application must accord with each other does not preclude infringements committed by the Member State after notification of the reasoned opinion from nevertheless being covered by the application provided that the conduct at issue is of the same kind as that complained of in the opinion. Accordingly, the Court of Justice was entitled to take account of administrative practices which were applied after the reasoned opinion was given but were substantively the same as those referred to in the reasoned opinion.¹⁴² Factual circumstances referred to in the reasoned opinion which continued after it was given may unquestionably be reviewed by the Court of Justice for the whole of their duration.¹⁴³

¹⁴⁰ ECJ, Case 43/64 *Commission v Italy* [1965] E.C.R. 357, at 364-365; ECJ, Case C-42/69 *Commission v Belgium* [1990] E.C.R. I-2821, para.11; ECJ, Case C-105/91 *Commission v Greece* [1992] E.C.R. I-5871, para.13; ECJ, Case C-44/95 *Commission v Belgium* [1996] E.C.R. I-4113, para.74; ECJ, Case C-315/93 *Commission v Greece* [1997] E.C.R. I-5531, para.36; ECJ, Case C-203/93 *Commission v Austria* [2005] E.C.R. I-553, paras 27-31. However, in *Commission v France* (ECJ, Case C-177/03 *Commission v France* [2004] E.C.R. I-1167, para.27) the Court ruled that where the relevant national provisions have fundamentally changed between the expiry of the period laid down for compliance with the reasoned opinion and the lodging of the application, that change in circumstances may render the judgment to be given by the Court useless. According to the Court, in such situations, it may be preferable for the Commission not to bring an action (which would, however, be admissible) but to issue a new reasoned opinion precisely identifying the complaints which it intends pursuing, having regard to the changed circumstances.

¹⁴¹ ECJ, Case C-363/97 *Commission v Italy* [1999] E.C.R. I-7773, para.36.

¹⁴² ECJ, Case 45/82 *Commission v France* [1983] E.C.R. 1513, para.26; ECJ, Case 21/86 *Commission v Italy* [1988] E.C.R. 697, para.11.

¹⁴³ *Commission v France*, cited in the preceding n., para.23.

Measures taken in order to comply with the reasoned opinion. An infringement arising where a Member State takes measures in order to eliminate an infringement complained of by the Commission may be the subject of an action for failure to fulfil obligations only if a new pre-litigation stage is held. This is because the infringement resulting from the measures in question is not the same as the breach originally complained of. It is therefore impossible to bring a new action on the basis of the original pre-litigation procedure without infringing the requirement that the subject-matter of the reasoned opinion and the application must be the same.¹⁴⁴

New application may remedy defects. If the Court declares an application inadmissible on the ground that the application does not square with the reasoned opinion, the Commission may remedy the defects by submitting a new application based on the same complaints, pleas in law and arguments as the reasoned opinion. If it does this, it is not under a duty to start the pre-litigation stage afresh or to issue a supplementary reasoned opinion.¹⁴⁵

c. Existence of a failure to fulfil obligations

Infringement no longer exists on the expiry of the period prescribed in the reasoned opinion. In principle, an action for failure to fulfil obligations is admissible only if the infringement complained of exists on the expiry of the period prescribed by the reasoned opinion.¹⁴⁶ The action is to no purpose if the Member State has taken measures in time in order to eliminate the infringement at issue.¹⁴⁷

Similarly, the application will be to no purpose where all the legal effects of the national conduct at issue had been exhausted on the expiry of the period prescribed by the reasoned opinion.¹⁴⁸ Thus, as far as concerns the

¹⁴⁴ ECJ, Case 7/65 *Commission v Italy* [1970] E.C.R. I-1, paras 4-5; for further examples, see Case 39/85 *Commission v Belgium* [1986] E.C.R. 579 and ECJ, Case C-287/97 *Commission v Belgium* [1998] E.C.R. I-215, para.25.

¹⁴⁵ ECJ, Case C-37/94 *Commission v Italy* [1995] E.C.R. I-1249, para.14.

¹⁴⁶ ECJ, Case C-156/97 *Commission v France* [1999] E.C.R. I-1113, para.15; ECJ, Case C-34/95 *Commission v Belgium* [2000] E.C.R. I-10633, para.16; ECJ, Case C-47/00 *Commission v France* [2001] E.C.R. I-2387, para.36; ECJ, Case C-13/00 *Commission v Luxembourg* [2001] E.C.R. I-4795, para.14; ECJ, Case C-28/01 *Commission v Spain* [2002] E.C.R. I-2501, para.11; ECJ (judgment of October 27, 2005), Case C-525/03 *Commission v Italy*, not yet reported, paras 8-17. Where the Commission brings an action under Art.63(2) of the EC Treaty on the ground that the Member State concerned has not complied with a decision requiring unlawful State aid to be repaid, the reference date for determining the failure to fulfil obligations is that provided for in the decision or, where appropriate, that subsequently fixed by the Commission: ECJ, Case C-378/95 *Commission v Belgium* [2001] E.C.R. I-3107, para.29; ECJ, Case C-49/00 *Commission v Italy* [2004] E.C.R. I-3155, para.24.

¹⁴⁷ ECJ, Case 240/85 *Commission v Greece* [1988] E.C.R. 1813, para.16; ECJ, Case C-438/99 *Commission v Italy* [2001] E.C.R. I-1025, para.16-17.

¹⁴⁸ ECJ, Case C-352/90 *Commission v Italy* [1992] E.C.R. I-2353, paras 11-13.

award of public procurement contracts, an action for failure to fulfil obligations will be inadmissible if, when the period prescribed in the reasoned opinion expired, the contract in question had already been completely performed.¹⁴⁵

5-351 Infringement ceases after the prescribed period. If the Member State has not taken measures in time, the application will be admissible. Even if the Member State remedies the infringement after the prescribed period has expired but before the action is brought, the application will still be admissible. In the light of the potential liability on the part of the Member State, there remains an interest for the Community, other Member States and individuals in the Court's making a finding that there has been an infringement. The finding may then serve as the basis for claims for damages.¹⁴⁶

The Commission is always presumed to have an interest. Nevertheless, the Court of Justice will inquire into that interest in a case where the action was brought at a time when the infringement of Community law with which the Member State was charged had in fact come to an end.¹⁴⁷

5-352 Acknowledgement of the infringement by the Member State. The fact that the Member State acknowledges that it has failed to fulfil its obligations and its resultant liability during the pre-litigation stage of the procedure or after the action has been brought before the Court of Justice does not mean that the application is to no purpose. Otherwise, the Member State would be at liberty, at any time during the proceedings, to have them brought to an end without any judicial determination of the breach of obligations and of the basis of its liability and the exclusive jurisdiction of the Court of Justice to make a determination—after an action has been

¹⁴⁵ ECJ (Judgment of September 9, 2004), Case C-225/03 *Commission v Germany*, not reported, paras 12-13 (action was admissible since the contracts were not completely performed); ECJ, Case C-394/02 *Commission v Greece* [2005] E.C.R. I-4711, paras 18-19 (action was admissible since only 55 per cent of the works had been completed when the period prescribed by the reasoned opinion expired).

¹⁴⁶ ECJ, Case 39/72 *Commission v Italy* [1972] E.C.R. 101, para.11; ECJ, Case 36/83 *Commission v Italy* [1986] E.C.R. 539, para.16; ECJ, Case 121/84 *Commission v Italy* [1986] E.C.R. 1293, para.8; ECJ, Case 154/85 *Commission v Italy* [1987] E.C.R. 771, para.6; Case 143/85 *Commission v Greece* [1988] E.C.R. 1835, para.14; ECJ, Case 253/85 *Commission v Belgium* [1986] E.C.R. 3271, para.8; ECJ, Case C-249/88 *Commission v Belgium* [1991] E.C.R. I-1275, para.41; ECJ, Case C-351/88 *Commission v Germany* [1991] E.C.R. I-2567, para.11; Case C-398/89 *Commission v Germany* [1991] E.C.R. I-2807, para.15; ECJ, Case C-25/90 *Commission v Greece* [1992] E.C.R. I-377, para.12; ECJ, Case C-250/89 *Commission v Ireland* [1992] E.C.R. I-6185, para.7; ECJ, Case C-311/91 *Commission v Germany* [1994] E.C.R. I-2939, para.3; ECJ, Case C-283/94 *Commission v Italy* [1995] E.C.R. I-4485, para.25; ECJ, Case C-115/00 *Commission v Luxembourg* [2001] E.C.R. I-4735, para.17; ECJ, Case C-255/01 *Commission v Luxembourg* [2002] E.C.R. I-3159, para.11; ECJ, Case C-205/01 *Commission v Austria* [2004] E.C.R. I-1117, para.15-19; ECJ, Case C-265/03 *Commission v Spain* [2004] E.C.R. I-8227, para.24. See also O'Brien (n.33, supra), at 215.

¹⁴⁷ ECJ, Case 26/68 *Commission v France* [1970] E.C.R. 555, paras 9-15 (the Court held that the Commission did have an interest in bringing the proceedings).

brought—as to whether or not Community law has been infringed would be impaired.¹⁴⁸

6. Time-limits

Commission's discretion. In exercising its powers in connection with an action for failure to fulfil obligations, the Commission does not have to comply with any time-limits. It is free to judge at what time it starts the pre-litigation stage and at what time after the expiry of the period prescribed by the reasoned opinion it brings an action before the Court of Justice.¹⁴⁹ Yet the Commission may not abuse its discretion.¹⁵⁰ For instance, if the pre-litigation procedure is excessively long, the Member State may find it more difficult to refute the Commission's arguments and this may constitute an infringement of the rights of the defence. The Member State has to prove that the unusual length of the pre-litigation procedure had adverse effects on the way in which it conducted its defence.¹⁵¹ Only if it succeeds in proving this, will the application be declared inadmissible. However, the burden of proof is difficult for the Member State to discharge, since there will generally be factors justifying the unusually long lapse of time between the "infringement" and the commencement of the procedure or the

5-355

¹⁴⁸ ECJ, Case C-143/89 *Commission v Denmark* [1993] E.C.R. I-1353, para.30; ECJ (Judgment of March 1, 2005), Case C-414/03 *Commission v Germany*, not reported, paras 8-9. An application from a Member State for the proceedings to be stayed in order to allow it to put an end to the infringement and hence in the expectation of a hypothetical withdrawal of the action by the Commission cannot be granted, since a failure to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period prescribed in the reasoned opinion (ECJ, Case C-356/00 *Commission v Luxembourg* [2002] E.C.R. I-1749, paras 12-13).

¹⁴⁹ ECJ, Case 1983 *Commission v Italy* [1988] E.C.R. 423, at 425; ECJ, Case 1/71 *Commission v France* [1971] E.C.R. 1001, paras 2-8; ECJ, Case 124/82 *Commission v Belgium* [1984] E.C.R. 1861, para.12; ECJ, Case C-56/90 *Commission v United Kingdom* [1993] E.C.R. I-4105, para.15; ECJ, Case C-317/92 *Commission v Germany* [1994] E.C.R. I-2519, para.4-5; ECJ, Case C-313/99 *Commission v France* [2001] E.C.R. I-1925, para.25 (in that case the Commission brought an action seven years after it had received the observations of the Member State concerned on the reasoned opinion); ECJ, Case C-430/00 *Commission v France* [2002] E.C.R. I-4535, para.23; It would appear, however, that the principle set out in *idem* precludes the Commission from bringing an action for failure to fulfil obligations where the Court has already given a judgment in respect of that failure (ECJ, Case C-117/85 *Commission v Italy* [1987] E.C.R. I-8305, para.25 (where the Court held that the principle set out in *idem* had not been violated as regards the question whether the Member State concerned had implemented the directive within the prescribed period, since the earlier judgment of the Court related to provisions other than those at issue in the new proceedings)). Where it determines that a Member State has not taken the measures necessary to comply with a judgment finding an infringement, the Commission can apply to the Court to impose a lump sum or a penalty payment pursuant to Art.228 of the EC Treaty.

¹⁵⁰ ECJ Case C-177/03 *Commission v France* [2004] E.C.R. I-11671, para.11.

¹⁵¹ ECJ, Case C-54/99 *Commission v Netherlands* [1999] E.C.R. I-2461, paras 14-16; ECJ, Case C-473/98 *Commission v Austria* [2002] E.C.R. I-7797, paras 34-39.

unusual duration of the pre-litigation stage and causing them not to be regarded as excessive.¹⁷⁵

2. Aspects of the treatment given to the substantive claim

a. Burden of proof

- 5-056 Commission bears the burden of proof. The burden of proof has to be discharged by the Commission.¹⁷⁷ It has to adduce evidence to the Court of Justice that the infringement existed at the time when the period prescribed by the reasoned opinion expired.¹⁷⁸ The Commission may not rely on any presumptions (of law) in this connection.¹⁷⁹ It is settled case-law that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts. Therefore, if a national provision can be interpreted in two ways—one

¹⁷⁵ In Case 77/73 *Commission v France* [1973] E.C.R. 1603, the Commission applied to the Court of Justice in 1971 to find an infringement which had existed since 1965. The infringement did not come to light until 1973 and the Commission formally started the procedure in April 1970 following informal contacts with the Member State. In Case 324/82 *Commission v Belgium* [1984] E.C.R. 1861, the Commission waited until the directive concerned had been implemented in all the Member States before investigating the contested Belgian measures. In Case C-56/85 *Commission v Netherlands* [1991] E.C.R. I-2451, the Commission waited for the Court of Justice to give judgment in another case and for the reaction of the Netherlands government. See also ECJ (Judgment of December 2, 2004), Case C-42/03 *Commission v Spain*, not reported, paras 1-15.

¹⁷⁷ ECJ, Case 26/61 *Commission v Netherlands* [1962] E.C.R. 1791, para.6; ECJ, Case C-245/83 *Commission v Belgium* [1991] E.C.R. I-1275, para.9; ECJ, Case C-224/91 *Commission v Greece* [1992] E.C.R. I-4725, para.12; ECJ, Case C-375/90 *Commission v Greece* [1992] E.C.R. I-2055, para.33; ECJ, Case C-65/99 *Commission v Germany* [2000] E.C.R. I-1615, para.36; ECJ (Judgment of July 15, 2004), Case C-419/03 *Commission v France*, not reported, paras 7-8. See also Louis, "Le rôle de la Commission dans la procédure en manquement selon la jurisprudence récente de la Cour de justice", in *Du droit international au droit de l'Union européenne* (Paris: Larcier, 1997), 357, at 357-405. However, it is not sufficient for the Commission, in order to claim that the defendant Member State has not complied with a provision of Community law, merely to cite that provision in the context of the reasoned opinion or of the application which covers the legal context and which is purely descriptive and lacking of any explanatory character (ECJ, Case C-272/99 *Commission v Italy* [2001] E.C.R. I-9313, para.11).

¹⁷⁸ ECJ, Case 121/84 *Commission v Italy* [1986] E.C.R. 1077, paras 10-12; ECJ, Case 185/84 *Commission v France* [1986] E.C.R. 419, paras 35-39; ECJ, Case 258/85 *Commission v Belgium* [1988] E.C.R. 4343, para.15; ECJ, Case C-157/92 *Commission v Netherlands* [1992] E.C.R. I-5899, para.12; ECJ, Case C-165/97 *Commission v France* [1999] E.C.R. I-1715, para.40; ECJ, Case C-357/98 *Commission v France* [2000] E.C.R. I-8377, para.45; ECJ, Case C-347/98 *Commission v Belgium* [2000] E.C.R. I-3327, para.39; ECJ, Case C-268/99 *Commission v Italy* [2001] E.C.R. I-4196, para.27; ECJ (Judgment of September 16, 2004), Case C-148/02 *Commission v Italy*, not reported, para.28 (in assessing whether or not there has been an infringement, the Court takes no account of information provided to the Commission by the Member State after the expiry of the period prescribed in the reasoned opinion).

¹⁷⁹ ECJ, Case 293/87 *Commission v Netherlands* [1989] E.C.R. 5383, para.11; ECJ, Case C-51/94 *Commission v Germany* [1996] E.C.R. I-3968, para.51; ECJ, Case C-214/93 *Commission v Greece* [2000] E.C.R. I-5601, para.42; ECJ, Case C-147/00 *Commission v France* [2001] E.C.R. I-1387, para.27.

consistent with and another one inconsistent with Community law—the Commission will have to prove that the national courts interpret the domestic provision at issue inconsistently with Community law.¹⁸⁰

An application from the Commission for an expert's report to be commissioned by the Court will be refused, since if it were granted the Commission itself would not be providing evidence of the alleged failure to fulfil obligations.¹⁸¹

It is only when the Commission has produced sufficient evidence of the failure to fulfil obligations that the defendant Member State has to adduce its counter-arguments.¹⁸²

Duty of Member States to cooperate in good faith. Member States are under a duty, by virtue of Art.10 of the EC Treaty, to facilitate the achievement of the Commission's tasks, which consist in particular, in accordance with Art.211 of the EC Treaty, in ensuring that the measures taken by the institutions pursuant to the Treaty are applied.¹⁸³ It follows that the Member States are required to cooperate in good faith with the inquiries of the Commission pursuant to Art.226 of the EC Treaty, and to provide the Commission with all the information requested for that purpose.¹⁸⁴ A failure to comply with this obligation may result in a finding of a failure to fulfil an obligation under the Treaty.¹⁸⁵

Many directives incorporate that duty to cooperate in good faith and to provide information in a specific provision. Such a provision will require Member States to provide clear, accurate information about the legal and administrative provisions adopted in order to implement the directive in question which enables the Commission to ascertain whether the Member State has effectively and completely implemented it.¹⁸⁶

When a directive imposes upon the Member States an obligation to provide information, the information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions

¹⁸⁰ ECJ, Case C-356/92 *Commission v United Kingdom* [1994] E.C.R. I-3415, para.16; ECJ, Case C-500/95 *Commission v United Kingdom* [1997] E.C.R. I-2649, para.17; ECJ, Case C-287/02 *Commission v Belgium* [2005] E.C.R. I-3761, para.28-30.

¹⁸¹ ECJ, Case 141/87 *Commission v Italy* [1988] E.C.R. 943, para.17.

¹⁸² ECJ, Case 272/85 *Commission v Greece* [1986] E.C.R. 4375, para.21.

¹⁸³ ECJ, Case C-339/00 *Commission v Italy* [1991] E.C.R. I-5987, para.14; ECJ, Case C-494/01 *Commission v Ireland* [2005] E.C.R. I-1351, para.19.

¹⁸⁴ ECJ, Case C-65/92 *Commission v Greece* [1992] E.C.R. I-5245, para.14. A Member State cannot therefore claim that the Commission's application is inadmissible because the details of the national law and practice are not specific enough (ECJ, Case C-406/97 *Commission v Netherlands* [2000] E.C.R. I-6417, para.17). Failure to cooperate in good faith with the Commission will constitute a breach of the obligation imposed on the Member State by Art.10 of the EC Treaty (ECJ, Case C-82/03 *Commission v Italy* [2004] E.C.R. I-6515).

¹⁸⁵ ECJ, Case C-82/03 *Commission v Italy* [2004] E.C.R. I-6515, para.15; ECJ, Case C-494/01 *Commission v Ireland* [2005] E.C.R. I-3331, paras 19-20.

¹⁸⁶ See, for example, ECJ, Case 774/81 *Commission v Italy* [1985] E.C.R. 1077, para.42.

by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Art 226 of the EC Treaty in order to establish the failure to fulfil the obligation.¹¹⁷

5-058 Member State complies with secondary Community law. The Commission cannot make reference directly to a provision of the EC Treaty in order to prove an infringement where a provision of a directive explicitly allows the Member State concerned to adopt the act allegedly violating the EC Treaty. A directive is indeed presumed to be lawful. A Member State which complies with the provisions of such Community act cannot be held not to fulfil its obligations under Community law.¹¹⁸

b. Substantive defence of the Member State

5-059 Objective nature of the action. The chances of success of defence pleas which a Member State wishes to raise are determined first by the objective nature of actions for failure to fulfil obligations (see 5-001, *supra*). The Court of Justice pays no regard to the underlying reasons for the breach or to circumstances which in fact limited its adverse effects or explain the breach. It is virtually certain that a defence based on such pleas will fail. Accordingly, a Member State may not plead provisions, practices or situations existing in its internal legal system (such as those resulting from its federal organisation)¹¹⁹ in order to justify a failure to comply with Community obligations.¹²⁰ Moreover, the fact that the failure to fulfil obligations had no adverse effects is irrelevant.¹²¹ Neither does the fact that

a directive with direct effect produces the same result in practice as if the directive had been implemented properly and in time justify a failure to fulfil the obligation to implement it.¹²² What is more, a Member State cannot rely on the principle of protection of legitimate expectations—so far as that principle can be invoked by a Member State at all—because that defence is incompatible with the objective nature of these proceedings.¹²³

Secondly, the special nature of Community law prevents a Member State from relying on a number of common defences in international law. For instance, a Member State cannot justify its failure to perform its obligations by reference to the shortcomings of other Member States, since the Treaty did not merely create reciprocal obligations between the Member States, but also established a new legal order governing the procedures necessary for the purposes of having any infringement of Community law "declared and punished".¹²⁴

5-060 Illegality of the Community act. It appears from the case-law that a Member State can plead the illegality of a regulation in proceedings for failure to fulfil obligations.¹²⁵ In contrast, a Member State is not entitled to raise the claim that a directive or a decision addressed to it is unlawful.

¹¹⁷ ECJ, Case 55/81 *Commission v Netherlands* (1982) E.C.R. 1791, para.8; ECJ Case C-455/01 *Commission v Italy* (2005) E.C.R. I-9335, para.20.

¹¹⁸ ECJ Case C-478/01 *Commission v Greece* (2004) E.C.R. I-8913, paras 15-24. See 5-015, *supra*.

¹¹⁹ ECJ, Case C-234/99 *Commission v Belgium* (2000) E.C.R. I-5597, para.23; ECJ, Case C-358/03 *Commission v Austria* (2004) E.C.R. I-1265, paras 12-13: the fact that Austrian constitutional law precludes the Federal State from adopting transposition measures in the place of a *Länder* and that only censure by the Court of Justice confers the power on the Federal State to undertake the transposition cannot justify an infringement for which the Federal State bears responsibility under Community law. Although each Member State may freely allocate areas of internal legal competence as it sees fit, the fact remains that it alone is responsible to the Community under Art 226 of the EC Treaty for compliance with obligations arising under Community law.

¹²⁰ ECJ, Case 52/73 *Commission v Italy* (1974) E.C.R. 271, para.14; ECJ Case C-165/97 *Commission v France* (1999) E.C.R. I-3715, para.12; ECJ, Case C-478/01 *Commission v Greece* (2004) E.C.R. I-8913, para.11. The argument that the rule of Community law infringed is incompatible with national public policy is, therefore, also inadmissible (ECJ, Case C-510/02 *Commission v France* (2004) E.C.R. I-3827, para.35).

¹²¹ ECJ, Case C-152/97 *Commission v Portugal* (1999) E.C.R. I-259, para.12.

¹²² ECJ, Case 104/75 *Commission v Belgium* (1980) E.C.R. 1473, para.12; ECJ, Case 330/81 *Commission v Belgium* (1983) E.C.R. 461, para.13; ECJ, Case C-431/93 *Commission v Germany* (1995) E.C.R. I-1335, para.24; ECJ, Case C-253/95 *Commission v Germany* (1996) E.C.R. I-2421, para.13. The obligation to ensure the full effectiveness of a directive, in accordance with its objective, cannot be interpreted as meaning that the Member States are released from adopting transposition measures where they consider that their national provisions are better than the Community provisions concerned and that the national provisions are therefore more likely to ensure that the objective pursued by the directive is achieved. According to the Court's case-law, the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive by the national authorities (see, ECJ, Case C-385/92 *Commission v Italy* (2004) E.C.R. I-9127, para.33).

¹²³ ECJ, Case C-63/95 *Commission v Spain* (2001) E.C.R. I-445, para. 22-27; ECJ, Case C-99/92 *Commission v Italy* (2004) E.C.R. I-1353, para. 20-21, in which the Court held that a Member State whose authorities have granted aid contrary to the procedural rules laid down in Art 88 of the EC Treaty may not plead the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Arts 87 and 88 of the EC Treaty would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the Treaty inoperative.

¹²⁴ ECJ, Case 52/73 *Commission v Italy* (1974) E.C.R. 271, para.11; ECJ, Case C-11/95 *Commission v Belgium* (1995) E.C.R. I-4115, paras 35-37; ECJ, Case C-123/96 *Portugal v Commission* (2001) E.C.R. I-2513, para.22; ECJ (Judgment of July 15, 2004), Case C-115/03 *Commission v Germany*, not reported, para.8.

¹²⁵ ECJ, Case C-11/00 *Commission v ECs* (2001) E.C.R. I-7174, paras 74-78. Art 241 of the EC Treaty provides, without exception, that an objection of illegality may be raised "in proceedings in which a regulation of the kind referred to in Art 241 is at issue". As a result, the objection of illegality expressly constitutes part of the system of legal remedies provided for in the Treaty and does not threaten the stability of that system (see also Schermers and Waelbroeck, *Judicial Protection*, § 1265, at 624 who likewise argue in favour of the admissibility of the objection; Gaffin (n.35, *supra*), at 217).

where it is accused of breaching, such a measure and the time-limit for applying for its annulment has expired or even where it has brought an action for annulment and not at the same time a (successful) application for interim measures to suspend the contested act pending the judgment in the main proceedings.¹⁴⁷ The Court of Justice takes the view that to allow this defence would jeopardise the stability of the system of legal remedies established by the Treaty and the principle of legal certainty on which it is based.¹⁴⁸

In the exceptional case where the directive or decision infringed contained such serious and manifest defects that it could be deemed non-existent, the Court of Justice may be asked to declare it non-existent, thereby making the claim of an infringement to no purpose.¹⁴⁹

- 5-361 Violation of the Treaty but compliance with Community legislation. Where the Commission deems that a national rule violates a Treaty provision, the Member State concerned can justify its national legislation by referring to the fact that it expressly complies with a provision of secondary Community law. Provisions of secondary Community law are indeed presumed to be lawful (as long as they are not annulled or declared unlawful by the Community judicature).¹⁵⁰

- 5-362 Pleas refuting the breach in an objective manner. The Member State's defence is not restricted to a limited number of pleas. Any plea, of law or fact, which refutes the alleged breach in an objective manner is admissible. In addition, the Member State may raise defences not relied upon in the

¹⁴⁷ In Case C-251/95 *Commission v France* [2001] E.C.R. I-2537 the Court held in connection with an action brought under Art. 53(2) of the EC Treaty that France had failed to fulfil its obligations by not implementing a Commission decision requiring it to recover unlawful State aid. That decision was deemed to be lawful despite the action for annulment already brought by France (ECJ, Case C-17/99 *France v Commission* [2001] E.C.R. I-1461).

¹⁴⁸ ECJ, Case 156/77 *Commission v Belgium* [1978] E.C.R. 1811, para. 15-25; ECJ, Case 52/83 *Commission v France* [1983] E.C.R. 3701, para. 10; ECJ, Case 52/84 *Commission v Belgium* [1985] E.C.R. 39, para. 13; ECJ, Case 228/85 *Commission v Greece* [1986] E.C.R. 1511, para. 14; ECJ, Case C-34/93 *Commission v Germany* [1993] E.C.R. I-3437, para. 10 (concerning a directive); ECJ, Case C-335/91 *Commission v Greece* [1993] E.C.R. I-3131, para. 10; ECJ, Case T-434/91 *Commission v Portugal* [2000] E.C.R. I-4491, para. 24 (this also applies to an action brought on the basis of Art. 6(2) of the EC Treaty); ECJ, Case C-100/93 *Commission v France* [2001] E.C.R. I-5565, para. 101; ECJ, Case C-55/00 *Commission v France* [2002] E.C.R. I-3517, para. 28; ECJ, Case C-34/01 *Commission v Austria* [2004] E.C.R. I-4579, para. 41; ECJ (Judgment of July 15, 2004), Case C-113/03 *Commission v Germany*, not reported, para. 7. See 5-062, *supra*.

¹⁴⁹ ECJ, Case 234/91 *Commission v Greece*, cited in the preceding n., para. 15-16; ECJ, Case C-434/91 *Commission v Portugal* [2000] E.C.R. I-4697, para. 35. The beginnings of this case-law may be found in Joined Cases 5 and 11/59 *Commission v France* [1959] E.C.R. 543, para. 11-13.

¹⁵⁰ ECJ, Case C-415/01 *Commission v Greece* [2004] E.C.R. I-5523, para. 26. See 5-015, *supra*. An act of secondary Community law is presumed to be lawful, unless it is tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order so that the act must be regarded as legally non-existent (504, para. 19).

pre-litigation procedure.¹⁵¹ The pleas must, however, be raised *timously* in the defence.¹⁵²

Thus, a Member State may claim that it was "absolutely impossible" for it to have adopted measures capable of eliminating the infringement or, in proceedings based on Art. 6(2) of the EC Treaty,¹⁵³ to implement the decision properly (see 5-016, *supra*). In such case it would have to prove the existence of such a situation of *force majeure*¹⁵⁴ but may plead it only for the period necessary in order to resolve the difficulties.¹⁵⁵ In compliance with the duty of cooperation imposed by Art. 10 of the EC Treaty, the Member State must inform the Commission of the difficulties arising in applying a Community provision, with a view to their seeking a solution together. If the Member State does not do so, its *force majeure* defence will fail because the Member State will in any event be in breach of that obligation to cooperate.¹⁵⁶

IV. CONSEQUENCES

A. RESULT OF THE ACTION

Declaratory judgment. The Court of Justice either finds the infringement made out or dismisses the application.¹⁵⁷ The judgment finding the failure to fulfil obligations is purely declaratory. The infringement existed before the Court made its finding. It does not have the power to require specific measures to be taken in order to give effect to the judgment. At the most, it may indicate such measures as it considers necessary in order to eliminate

¹⁵¹ ECJ, Case C-41/97 *Commission v Spain* [1998] E.C.R. I-5535, para. 13-15.

¹⁵² ECJ, Case C-51/93 *Commission v Luxembourg* [2005] E.C.R. I-3767, para. 22: plea raised for the first time in the rejoinder was inadmissible.

¹⁵³ See, e.g., ECJ, Case C-415/01 *Commission v Greece* [2004] E.C.R. I-5525, para. 43-43.

¹⁵⁴ ECJ, Case 52/84 *Commission v Belgium* [1985] E.C.R. 39, para. 14; ECJ, Case 234/91 *Commission v Netherlands* [1985] E.C.R. 251, para. 21-21.

¹⁵⁵ ECJ, Case C-55/00 *Commission v France* [2002] E.C.R. I-3519, para. 331.

¹⁵⁶ ECJ, Case 52/84 *Commission v Belgium* [1985] E.C.R. 39, para. 15. See also ECJ, Case C-345/93 *Commission v Italy* [1995] E.C.R. I-343, para. 13; ECJ, Case C-343/93 *Commission v Italy* [1995] E.C.R. I-473, para. 17; ECJ, Case C-95/00 *Commission v Italy* [2004] E.C.R. I-3353, para. 15-18 and ECJ, Case C-415/01 *Commission v Greece* [2004] E.C.R. I-5525, para. 43, in which the Court held that the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled the difficulties to be overcome. For an example of a breach of the duty to cooperate in good faith, see ECJ, Case C-52/03 *Commission v Italy* [2004] E.C.R. I-4635.

¹⁵⁷ If the Court does not have sufficient information to find that the act of the Member State constitutes a failure to fulfil obligations, it may ask the parties to resume examination of the question at issue and report to it, after which the Court will give final judgment (see ECJ, Case 170/75 *Commission v United Kingdom* [1983] E.C.R. 417, para. 24).

the infringement found.²⁰ In addition, the Court may not set a period of time for compliance with its judgment, since Art.228 of the EC Treaty does not confer a power on it to do so.²¹ Equally, the Court may not declare acts (or failures to act) on the part of a Member State unlawful, void or not applicable. Only the national courts have the power to do so under national law.²² The Court of Justice may find only that the act (or failure to act) was or was not contrary to Community law.

B. LEGAL FORCE OF THE JUDGMENT DECLARING THAT A MEMBER STATE HAS FAILED TO FULFIL ITS OBLIGATIONS

5-064 Duty for the Member State to take the necessary measures. Art.228(1) of the EC Treaty puts the Member State which has been found by the Court of Justice to have failed to fulfil its Treaty obligations under a duty to take the necessary measures to comply with the Court's judgment. That duty, which also arises because the judgment has the force of *res judicata*, entails a prohibition having the full force of law against applying a national rule held to be incompatible with Community law and an obligation to take every measure to enable Community law to be fully applied.²³ The duty to give effect to the Court's judgment is borne by all institutions of the Member State concerned within the fields covered by their respective powers. The legislative and executive authorities have to bring the offending provisions of domestic law into conformity with the requirements of Community law. The courts of the Member State concerned have to disregard those provisions in determining cases.²⁴

Because the judgment has the force of *res judicata*, the Commission may not make an application for interim measures pursuant to Art.243 of the EC Treaty in order to require the Member State to desist from an infringement of Community law which has already been found by judgment of the Court of Justice. This is because the Member State is required to take the necessary measures under Art.228(1) of the EC Treaty. No further decision of the Court, in interlocutory or other proceedings, is required.

²⁰ In the reasoned opinion, the Commission may prescribe the measures which it deems necessary in order to eliminate the infringement. In addition, in a procedure under Art.169(2) of the EC Treaty, the Commission may adopt a decision finding that a measure constitutes aid incompatible with the common market and requiring the unlawfully granted aid to be repaid. If the Member State concerned fails to comply with that decision, the Commission may bring an action in the Court for failure to fulfil the specific obligation to obtain repayment of the aid (ECJ, Case 73/72 *Commission v Germany* [1973] E.C.R. 813, para.12) (see 5-015, *supra*).

²¹ ECJ, Case C-415/83 *Commission v Luxembourg* [1985] E.C.R. I-3107, para.52.

²² Opinion of Advocate General G. Reischl in Case 141/84 *France v United Kingdom* [1975] E.C.R. 1313, at 2946.

²³ ECJ, Case 45/71 *Commission v Italy* [1972] E.C.R. 417, para.3; ECJ (order of March 25, 1983), joined Cases 24 and 97/82 R *Commission v France* [1983] E.C.R. 1313, para.16; ECJ, Case C-12/91 *Commission v Italy* [1993] E.C.R. I-451, para.24.

²⁴ ECJ, joined Cases 214-31/82 and 51/82 *Waterschap* [1982] E.C.R. 4337, para.14.

Where the Commission sought such interim measures, the Court held that they were not necessary within the meaning of Art.243 of the EC Treaty.²⁵

Court may limit the temporal effects. Exceptionally, by virtue of the general principle of legal certainty inherent in the Community legal order, the Court may limit the effects in time of a judgment given on the basis of Art.226 of the EC Treaty.²⁶ The declaratory nature of the judgment does not preclude the Court from deciding, in application of that general principle, to restrict the right to rely upon a provision it has interpreted with a view to holding in question legal relations established in good faith. The Court will only take such a step in exceptional circumstances. The fact that a finding of failure to fulfil obligations (which is invariably coupled, explicitly or implicitly, with an interpretation of the applicable provision of Community law) will have serious financial consequences for the Member State concerned is not sufficient in itself to justify limiting the scope of the judgment.²⁷

Position of individuals. The judgment finding the infringement of Community law does not as such confer any rights on individuals. Individuals may not rely directly on such a judgment before the national courts, but only on the "provision" of Community law having direct effect which the judgment finds has been infringed by the Member State.²⁸

In the event that an individual pleads a provision of Community law in his defence which does not have direct effect, but which has been found by the Court of Justice to have been infringed by the Member State concerned, the national court, as an institution of that Member State, must ensure in the exercise of its functions that it is complied with by applying national law in such a way that it is compatible with the obligations that—according to the judgment of the Court—ensue from Community law for that Member State.

Judgment may constitute the basis for State Liability. The finding of a failure to fulfil obligations may potentially form the basis for liability on the part of the Member State concerned.²⁹ However, it appears from the case-

²⁵ ECJ (order of March 25, 1983), joined Cases 24 and 97/82 R *Commission v France* [1983] E.C.R. 1313, para.15.

²⁶ ECJ, Case C-415/83 *Commission v Luxembourg* [1985] E.C.R. I-3107, para.43. Cf. ECJ, Case C-39/91 *Commission v United Kingdom* [2002] E.C.R. I-4353, para. 91-93, in which the Court avoided the question of principle.

²⁷ ECJ, Case C-357/87 *Commission v France* [1989] E.C.R. I-5125, para. 49-52; ECJ, Case C-425/95 *Commission v Greece* [2002] E.C.R. I-2793, para. 42-44.

²⁸ ECJ, joined Cases 214-31/82 and 51/82 *Waterschap* [1982] E.C.R. 4337, para. 15-18.

²⁹ ECJ, Case 39/72 *Commission v Italy* [1973] E.C.R. 102, para.17; ECJ, Case 305/84 *Commission v Italy* [1986] E.C.R. 395, para.18; ECJ, Case 24/85 *Commission v Greece* [1985] E.C.R. 1325, para.14; ECJ, Case C-257/87 *Commission v Greece* [1989] E.C.R. I-25; ECJ, Case C-249/93 *Commission v Belgium* [1995] E.C.R. I-2175, para.41.

law that a Member State may incur liability only in the case of a sufficiently serious breach of Community law.¹²¹ A judgment finding a failure to fulfil obligations is in itself not enough, certainly not for loss or damage which arose before judgment was given. The requirement for a "sufficiently serious breach" of Community law does not square completely with the strict or objective nature of an action for failure to fulfil obligations,¹²² since the Court of Justice also takes other factors into account where the Member State had a discretion in applying Community law, such as whether or not the breach was intentional and whether any mistake of law was excusable. It is self-evident that if the failure to fulfil obligations continues after delivery of the judgment declaring the Member State concerned to be in breach of its obligations, that itself will constitute a sufficiently serious breach of Community law and cause the Member State to incur liability to make good any loss or damage which occurred in that period (see 3-043, *supra*).

In addition, it must be noted that the Community provision infringed must confer a "right" on individuals in order for the issue of State liability to arise.¹²³ It follows that a finding of an infringement in proceedings under Arts 226-227 of the EC Treaty does not automatically result in the Member State concerned incurring liability under Community law. Yet it may well be that the Member State will incur liability in damages under national law for loss or damage caused by an infringement of a Community provision even though that provision does not directly confer any "right" on individuals.

- 5-065 Period within which the Member State must comply with the judgment. The Treaty itself does not specify the period within which the judgment must be complied with, but the Court of Justice has held that the process must be initiated at once and completed as soon as possible.¹²⁴

¹²¹ ECI, Joint Cases C-45 and C-46/93 *Brasserie du Pêcheur and Factortame (Second Stage)* [1995] E.C.R. I-1023, para.93.

¹²² Moreover, there is no need for the Court of Justice to have made a finding that the Member State is in breach in order for the Member State to incur liability. The national courts may themselves find that the Member State has infringed Community law. If difficulties arise in this connection, they may always avail the help of the Court of Justice by making a reference for a preliminary ruling. This power of the national courts is important. Since the Commission has a discretion whether to bring proceedings under Art.226 of the EC Treaty, individuals may play a major, complementary role in enforcing Community law by invoking *Francovich* liability in national courts (cf. ECI, Case C-81/92 *Faccini Dori* [1994] E.C.R. I-3123, paras 27-29; see in particular, Curia, "De rechtsbescherming van rechtshouders" (1993) SEW. 93, at 95).

¹²³ Schöckweiler, "La responsabilité de l'entité nationale en cas de violation du droit communautaire" (1992) R.T.D.E. 27, at 45.

¹²⁴ ECI, Case 69/65 *Commission v Italy* [1967] E.C.R. 73, para.5; ECI, Case 159/87 *Commission v France* [1988] 4093, para.14; ECI, Case C-345/92 *Commission v Germany* [1993] E.C.R. I-1115, para.5; ECI, Case C-334/94 *Commission v France* [1995] E.C.R. I-1137, para.11; ECI, Case C-357/97 *Commission v Greece* [2000] E.C.R. I-841, para.32.

C. SANCTIONS FOR FAILURE TO COMPLY WITH THE JUDGMENT

Art.228(2) of the EC Treaty. The Commission is responsible for ensuring that the judgment finding a breach of Community law is complied with. If the Member State fails to take the necessary measures, under the first para. of Art.228(2) of the EC Treaty the Commission must first give it written notice, giving it an opportunity to submit any observations. It then issues a reasoned opinion "specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice". If the Member State then fails to take the necessary measures within the time-limit laid down by the Commission, it may be brought before the Court of Justice again with a view to a finding that it has failed to comply with the original judgment (or to give effect to it in time or correctly). In bringing the case before the Court, the Commission may specify such lump sum or penalty payment to be paid by the Member State as it considers appropriate in the circumstances.¹²⁵

In proceedings under Art.228(2) of the EC Treaty, the Court of Justice has jurisdiction to assess the suitability and effectiveness of any measures which the Member State has taken in compliance with the original judgment. The Commission must provide the Court with the information necessary to determine the extent to which a Member State has complied with a judgment declaring it to be in breach of its obligations.¹²⁶ As that judgment has the force of *res judicata*, the dispute as to the original failure to fulfil obligations may not be reopened in proceedings under Art.228(2) of the EC Treaty. The only matter in issue is the alleged failure to give effect to the original judgment.

Lump sum or penalty payment. The Court may impose a lump sum or penalty payment pursuant to the third subpara. of Art.228(2) of the EC Treaty in the event that it finds that the original judgment has not been complied with. Whilst the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on an assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially

¹²⁵ In the "Communication from the Commission—Memorandum on applying Art.171 (now Art.228) of the EC Treaty" (SSC 14200; 1995) O.J.C 24/95, the Commission expresses a preference for penalty payments on the ground that this is the most appropriate instrument for securing compliance with the judgment as rapidly as possible. The amount of the payment should be calculated in the light of the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to future infringements. See on this subject, Masson, "L'échec du droit de l'article 228 § 2-CE" (1994) R.T.D.E. 639-651.

¹²⁶ ECI, Case C-351/97 *Commission v Greece* [2000] E.C.R. I-5007, para.73.

established it. Even where the Commission has in its application asked only for the imposition of a daily penalty payment, the Court of Justice may have recourse to both types of penalty provided for in Art.228(2) of the EC Treaty. The imposition of such a "double" penalty is appropriate in particular where the breach of obligations has continued for a long period and tends to persist.²⁰

5-071 Court's discretion. Where the Court imposes a penalty payment, its amount (which must ensure that penalty payments have coercive force and that Community law is applied uniformly and effectively) must be determined having regard to the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. Regard should also be had to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.²¹ Where a Member State has taken certain measures—but not all that are needed—to comply with the Court's judgment finding that it has failed to fulfil its obligations, the amount of the penalty payment will take account of the progress which it has made in complying with its obligations.²²

5-072 New failure to comply with the judgment. Failure to comply with a judgment constitutes an infringement of Art.228 of the EC Treaty and may therefore give rise in its turn to a finding of liability on the part of the Member State concerned.

V. THE CONSTITUTION

5-073 Arts III-360 and III-361 of the Constitution reproduce the provisions of Arts 226 and 227 of the EC Treaty verbatim.²³ However, with respect to the Court's jurisdiction to impose a lump sum or a penalty payment on a Member State, the rather inefficient procedure at present provided for in

²⁰ ECJ (Judgment of July 12, 1995), Case C-344/93 *Commission v France*, not yet reported, paras 33-34 and 53-55. According to the Court (para.33), the conjunction 'or' in Art.228(2) of the EC Treaty to link the financial penalties capable of being imposed may, figuratively, have an alternative or a cumulative sense and must therefore be read in the context in which it is used. In light of the objective pursued by Art.228 of the EC Treaty, the conjunction 'or' in Art.228(2) must be understood as being used in a cumulative sense.

²¹ *Ibid.*, para.93; ECJ, Case C-275/93 *Commission v Spain* [2003] E.C.R. I-10441, para.52. For an exhaustive discussion of whether a judgment of the Court of Justice imposing a penalty payment on a Member State is or is not "enforceable", see Hübner, "Durchsetzbarkeit von Zwangsgeld-Urteilen des EuGH gegen Mitgliedstaaten" (2003) EuR 497-532.

²² ECJ, Case C-193/01 *Commission v Spain* [2003] E.C.R. I-14161, para.38.
²³ Regrettably, Art.III-360 of the Constitution mentions a failure of a Member State to fulfil "an obligation under the Commission" (italics added). It would have been possible to incorporate the English correspondence by mentioning instead a failure to fulfil "an obligation under the law of the Union".

Art.228 of the EC Treaty has been modified. Indeed, as the law stands at present it is only when a Member State fails to comply with a judgment of the Court of Justice finding an infringement that the Commission can initiate new proceedings before the Court—after having completed another two-stage pre-litigation procedure (letter of formal notice and reasoned opinion)—in which it asks the Court to impose a pecuniary sanction upon the Member State concerned. As a result, Art.228 of the EC Treaty has so far been applied on only a few occasions since it was incorporated into the Treaty in 1993.²⁴

Changes. Art.III-361 of the Constitution provides that where a Member State has failed to fulfil its obligation to notify²⁵ measures transposing a European framework law,²⁶ the Commission may bring a case before the Court asking the latter to find an infringement and to impose a pecuniary sanction. The obligation to make payment would take effect on the date set by the Court in its judgment. By contrast, as far as other infringements are concerned, e.g. incorrect implementation of European framework laws and other violations of Union law, the imposition of a pecuniary sanction would still be conditional upon a first judgment of the Court of Justice finding against the Member State and non-compliance with the judgment by the Member State concerned. However, the Constitution renders the second action somewhat less onerous by doing away with the need for a reasoned opinion in the pre-litigation stage. So, if in the future—when the Constitution has entered into force—the Commission considers that a Member State has not taken the necessary measures to comply with a judgment of the Court finding an infringement, it will be able to bring an action before the Court in which it asks for the imposition of a pecuniary sanction, after having invited the Member State concerned to submit its observations.²⁷

Retrospective pecuniary sanctions. The authors of the Constitution did not consider it necessary explicitly to grant jurisdiction to the Court to impose pecuniary sanctions retrospectively (as from the first day of the infringement). A provision in that regard was not necessary since the current Art.228(2) of the EC Treaty allows the Court to impose, not only a penalty payment to be paid per day of infringement as from the day the judgment is given, but also a lump sum which can be determined having regard to the gravity of the infringement in the period preceding the judgment.²⁸

²⁴ ECJ, Case C-391/97 *Commission v Greece* [2003] E.C.R. I-5147; ECJ, Case C-273/01, *Commission v Spain* [2003] E.C.R. I-14141; ECJ (Judgment of July 12, 2005), Case C-124/01 *Commission v France*, not yet reported.

²⁵ According to document CONV 13473, this is where the Member State has not taken any implementing measure.

²⁶ Constitution, Art.III-362(3).

²⁷ Constitution, Art.III-361(3).

²⁸ CONV 13473; see also the Opinion of Advocate-General L. A. Geelhoed of April 29, 2004 in ECJ (Judgment of July 12, 2005), Case C-124/01 *Commission v France*, not yet reported, paras 31-32.

Infringement proceedings

One of the novel features of the Community legal order is the mechanism it provides for dealing with Member States which fail to comply with their Treaty obligations. Under the rules of public international law, the enforcement of such obligations is normally left to the Contracting Parties to sort out among themselves. If there is a court to which they can have recourse, its jurisdiction may not be compulsory.¹ By contrast, the EC Treaty gives the Commission, an institution independent of the Member States which is required² to act in the general interest of the Community, the power to bring proceedings before the Court against any Member State which fails to comply with the requirements of the Treaty. That power derives principally from Article 226 (ex 166) EC, which provides:

If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

All Member States are automatically subject to the jurisdiction of the Court under Article 226; no express declaration to that effect is necessary and no reservations are permitted.³ Rulings of the Court under Article 226 were originally purely declaratory, Member States simply being required by Article 228 (ex 171) EC to take the steps necessary to comply with the Court's judgment.⁴ Since the entry into force of the TEU, the Court has enjoyed the power to impose financial sanctions on Member States which fail to take such steps.⁵ That power is discussed below.

The statistics published by the Commission⁶ show that complaints from individuals and businesses represent the largest single source of detected infringements.

¹ See *Smith*, 'The enforcement procedure of Article 169 EEC: Commission discretion' [1975] 4 *ELR* 441, 445; *Dischard and White*, 'Enforcement action under Art 169 and 170 EEC' (1988) 14 *ELR* 363, 366.

² See *Art. 165* (ex 53(2), 95(9)) (ex 106(4)) and 293 (ex 225) EC; *CFR Art. 231(2)* (ex 123(4)) EC.

³ A corresponding power granted to the Member States under Article 217 (ex 170) EC has in practice been little used.

⁴ Article 226 requires that the judgment must be complied with as soon as it is delivered and be complied with as soon as possible. See e.g. *Joined Cases 227 to 229/85 Commission v Belgium* [1986] ECR II, para 11.

⁵ See *Art. 228(2)* (ex 171(2)) EC.

⁶ See e.g. its 21st Annual Report on Monitoring the Application of Community Law (2003), COM(2004) 539 final.

Significant numbers of cases fall by the wayside as the procedure advances, so that of the total number of cases in which proceedings are formally launched only a small fraction are ultimately referred to the Court of Justice. Be that as it may, the judicial statistics show that, in 2004, they represented by far the largest category of directions brought before the Court. In that year, infringement was declared in nearly all the judgments given under Article 226. The Member States with the highest number of infringement actions brought against them in 2004 were Greece and Italy, with 27 each. Of the six founding Member States, Italy has most often been the subject of such actions. These figures have several implications. First, they suggest that there are considerable variations in the extent to which Member States comply with their Treaty obligations. Secondly, complaints are often essential to alert the Commission to potential infringements. Thirdly, infringement actions impose a significant burden on the Court of Justice, even though some are relatively straightforward and are now dealt with by three-judge chambers. Finally, the procedure is a fairly effective way of inducing Member States to toe the line.

Infringement proceedings therefore involve two principal actors beside the Court of Justice: the Commission and the defendant State. Often, the complainant constitutes a third actor with an interest in the conduct and outcome of the proceedings. In what follows, the attitude of the Court to each of these actors will be considered. The Court's overriding preoccupation has been to ensure that the Member States comply with their obligations. This has led it to treat the Commission more leniently on the whole than the Member States and to adopt a somewhat dismissive attitude to complainants.

The Court and the complainant

The Court has been unwilling to accord complainants any rights to challenge the way in which complaints are handled by the Commission, notwithstanding their importance to the proper functioning of the infringement procedure.⁷ The Court has consistently held that, if the Commission decides not to institute proceedings, its decision cannot be challenged by a third party with an interest in having the alleged breach established.⁸ As the CJ explained in *SDDDA v Commission*,⁹ '[t]he Commission is not bound to initiate an infringement procedure against a Member State; on the contrary, it has a discretionary power of assessment, which rules out any right for individuals to require it to adopt a particular position. No action for failure to act under Article 226 (ex 175) EC therefore lies against it should it decline to do so.' The Court will not enquire whether the Commission's discretion was wisely exercised.¹⁰

⁷ See *Rowling*, 'Engaged citizens and action and institutional attitudes in Commission enforcement' (2003) 6 *ELJ* 4.

⁸ See e.g. *Case C-195/95 Commission v Germany* [1996] ECR I-5449; *Case 247/87 Sir Foster v Commission* [1988] ECR I-251.

⁹ *Case T-47/95 (1996) ECR II-1559*, para 42.

¹⁰ *Case C-122/83 Commission v France* [1984] ECR I-4259, para 5.

The Court's restraint may seem surprising. Presumably it would intervene if a complainant could show that no action had been taken because the President of the Member State concerned was the sister of the President of the Commission. In less clear-cut cases, several reasons may be advanced to explain the Court's stance. One is the wording of Article 226, which appears to leave it to the Commission to decide whether the Treaty has been infringed and, if it thinks so, whether to bring the matter before the Court. No reference is made to the possibility that the Commission might be influenced by a complaint made by third parties, who are not therefore given any procedural rights. In reaching its decision, the Commission appears to be entitled to take into account all the relevant circumstances. These may include not just the technical question whether an infringement has taken place but also the overall political context. If all this had to be explained to complainants, the administrative burden on the Commission would be considerable.¹³ Moreover, the Court might not be well placed to assess the policy considerations taken into account by the Commission in deciding whether or not to bring proceedings. The very possibility that these considerations might be aired in public could hamper the search for a settlement before the case reached the Court.¹⁴ In any event, the objective legal position is not affected by the Commission's response to a complaint designed to trigger the Article 226 procedure. As the Court explained in *Amministrazione delle Finanze dello Stato v Eurojust and Solange*,¹⁵ 'the Commission may not, by adopting an attitude in the context of that procedure, release a Member State from its obligations or impair rights which individuals derive from the Treaty'.

The case law on the rights of complainants under Article 226 contrasts strikingly with the early case law of the CFI on the right of access to information. At Maastricht in 1992, the Member States issued a declaration underlining the role transparency in decision making played in strengthening 'the democratic nature of the institutions and the public's confidence in the administration'. The following year, the Council and the Commission agreed a Code of Conduct concerning public access to their documents.¹⁶ The Code was implemented by means of decisions adopted by the two institutions¹⁷ laying down a general principle of public access to documents subject to certain somewhat imprecise exceptions. In a series of cases, the CFI quashed refusals by the Council to disclose documents without examining the substance of the competing interests at stake by subjecting it to strict procedural requirements.

¹³ See Tormontreau 'Judicial protection against Member States: Articles 163 and 171 revisited' in Gordin and Szabla (eds), *Judicial Protection of European Integration* (1994), 295.

¹⁴ See Case T-165/93 *HWF UK v Commission* [1997] ECR II-2113, para 43. The Court held in that case that the Commission was entitled to refuse the public access to documents connected with proceedings under Art 226 where disclosure might jeopardize the chances of a settlement. See also Case T-359/97 *Bavaria Lager* [1999] ECR II-2117; Case T-15/95 *Pont and Oudet v Commission* [2001] ECR II-2577.

¹⁵ Joined Cases 142 and 143/80 [1981] ECR 1493, para 18. See also joined Cases 314 to 316/81 and 317/82 *Amministrazione delle Finanze dello Stato v Eurojust* [1982] ECR 4307, para 14-16.

¹⁶ Cf 1993 L 340/43.

¹⁷ Council Dec 93/731, Cf 1993 L 340/43; Commission Dec 94/30, Cf 1994 L 46/33. See also Reg 1049/2001 regarding public access to European Parliament, Council and Commission documents, Cf

In *Carvel and Guardian Newspapers v Council*,¹⁸ for example, the Council denied a journalist working for the Guardian newspaper access to certain documents on the basis that they referred directly to the deliberations of the Council and that disclosure would be incompatible with the principle of the confidentiality of its proceedings enshrined in its Rules of Procedure. When the applicant challenged the Council's refusal before the CFI, the Council argued that the process of negotiation and compromise through which it worked would be compromised if national delegations thought their positions might subsequently be made public through the disclosure of documents.¹⁹ There is an obvious analogy between that argument and the claim that the process of finding a settlement would be jeopardized if the Commission had to explain why it had decided not to pursue an alleged infringement by a Member State of its obligations. In the *Carvel* case, however, the CFI did not consider the Council's argument strictly relevant to the applicant's claim. The documents he had requested belonged to a category which, under its decision on access to documents, the Council had a discretion to disclose. The CFI said that, in exercising that discretion, the Council must 'genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations'.²⁰ The CFI found that the Council had automatically rejected the applicant's request without engaging in the balancing exercise required of it. The contested decision was therefore quashed.

The principle laid down in the *Carvel* case led the CFI to quash another Council decision, refusing the applicant access to certain documents in *Svenske Journalförbundet v Council*.²¹ There another Council decision refusing the applicant access to certain documents was quashed by the CFI, this time on the basis that it was not properly reasoned. The statement of reasons for a decision refusing access to a document had to contain, for each category of documents concerned, the particular reasons why disclosure was being refused. In the contested decision, the Council had not specified which of the exceptions in the decision on public access to its documents it was invoking in relation to each of the documents requested. It was not therefore possible to check whether the Council had carried out a genuine balancing of the interests concerned. In a later case,²² the CFI held that, even where one of the exceptions applied, the Council was obliged to consider whether partial access could be granted to a document unless 'the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work'.²³

2001 L 145/43; de Leeuw, 'The Regulation on public access to European Parliament, Council and Commission documents in the European Union: are citizens better off?' [2000] 28 EIR 324; Orlitzky, 'The Council of the European Union and access to documents' (2005) 30 EIR 675.

¹⁸ Case T-194/94 [1995] ECR II-2785.

¹⁹ Para 65.

²⁰ Case T-14/98 *Handels v Council* [1999] ECR II-2427.

²¹ Para 35 of the judgment. An appeal to the Court was unsuccessful: see Case C-351/99 *Svenske Journalförbundet v Council* [2001] ECR I-5565.

²² See para 52 of the judgment.

²³ Case T-174/95 [1996] ECR II-2249.

These cases show how elementary procedural requirements can encourage institutions to take certain interests seriously without interfering with their ultimate responsibility for balancing the various substantive interests involved. If the Court had been prepared to recognize a need to review the exercise by the Commission of the discretion conferred on it by Article 226, it might have intervened to protect the position of complainants more forcibly. Its continuing refusal to do so led disgruntled complainants to turn for help to the European Ombudsman who, in April 1987, began an enquiry under Article 195 (ex 138e) EC into the way in which the Commission dealt with complaints by private parties alleging infringements by Member States of their Treaty obligations.²¹ The Ombudsman found no maladministration, but the Commission agreed to inform all complainants in advance when it was minded to close a file in order to give them the opportunity to submit observations before the Commission came to a definitive conclusion.

In its White Paper on European Governance issued in July 2001,²² the Commission offered guidance on the criteria it would apply in prioritising cases. It said it would focus on alleged infringements concerning:

- the effectiveness and quality of transposition of directives...
- ... the compatibility of national law with fundamental Community principles;
- cases that seriously affect the Community interest (e.g. cases with cross-border implications) or the interests that the legislation intended to protect;
- cases where a particular piece of European legislation creates repeated implementation problems in a Member State; and
- cases that involve Community financing.

Cases falling within those categories would, the Commission said, be handled as a priority. In other cases, different forms of intervention would be explored before formal infringement proceedings were launched.

The Commission also announced in its White Paper that it intended to codify its administrative rules on the handling of complaints. The need for further attention to be given to that issue was underlined by the report of the European Ombudsman for that year,²³ which recorded his decision on a complaint lodged in 1993. The complainant had made an allegation to the Commission that Greece had infringed its obligations, but the Commission eventually decided to close the case. The Ombudsman found that the Commission's letter to the complainant informing him of its decision implied that it had been reached because the Commission considered that there had been no infringement of Community law. The Ombudsman found, however, that the Commission had reached its decision in the exercise of its discretion notwithstanding evidence of a possible infringement. The Commission's failure to provide the complainant with adequate reasons for its decision to close the file

constituted an instance of maladministration. The Ombudsman also criticised the Commission for failing to give the complainant enough time to submit observations on its intention to close the file.

The criticisms made by the Ombudsman in his 2001 report led the following year to the publication by the Commission in the Official Journal of a communication on relations with complainants in cases of alleged infringements of Community law by Member States.²⁴ In an Annex to the Communication, the Commission gave a detailed description of the administrative measures for the benefit of the complainant with which it undertakes to comply when handling his/her complaint and assessing the infringement in question. The Annex dealt with such matters as how to make a complaint, recording complaints, acknowledging receipt of correspondence, keeping complainants informed of the steps taken in response to their complaint and time limits. It stated that, in the absence of exceptional circumstances, where a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks.²⁵ Commission decisions would be published on the internet and some would be the subject of a press release. The right of complainants to approach the Ombudsman if they considered the Commission guilty of maladministration in handling a complaint was specifically mentioned.

The Commission emphasised in its communication that, as the Court had recognized, it enjoyed a discretion in deciding whether and when to commence infringement proceedings and whether to refer a case to the Court. The standard complaint form, referred to in the Annex to the communication, invites potential complainants to consider seeking redress from the national courts and administrative authorities, who may be able to act more quickly than the Commission and to offer a more immediate remedy, such as damages or a ruling on the validity of the contested national measure. The form notes that 'any finding of an infringement by the Court of Justice [under Article 226] has no impact on the rights of the complainant, since it does not serve to resolve individual cases.'

However, the number of complaints made to the Commission reflects the difficulties in taking action in the national forum encountered by many of those affected by breaches of the Treaty by Member States. National administrative authorities are likely to be reluctant to concede that measures they may themselves have introduced, perhaps after taking legal advice, are unlawful. Proceedings in the national courts are almost certain to be costly and time consuming and may seem too risky in the absence of authoritative support for the view that the State concerned has failed to comply with its obligations. If proceedings in the national courts are necessary to secure an individual remedy, they may seem more attractive

²¹ European Ombudsman, *Annual Report for 1993*, 270-1.

²² COM(2001) 425, 25-6. See also 'Better monitoring of the application of Community law' COM(2002) 125 final, 10-12.

²³ European Ombudsman, *Annual Report 2000*, 115-119.

²⁴ OJ 2002 C 24/43. See also 'Better monitoring of the application of Community law' above n 25 at 11-14.

²⁵ Annex, para 12.

after successful infringement proceedings by the Commission for the judgment of the Court will establish conclusively that a breach of the Treaty has taken place.

The Commission does not seek to contest the importance of the role played by complainants in detecting infringements of Community law by the Member States. The criteria for prioritising complaints set out in the White Paper on governance and the administrative procedure the Commission has undertaken to follow give the Court of Justice an opportunity to follow the example set by the Ombudsman and the CFI in the cases on access to documents referred to above. The Commission should be required to justify a refusal to give priority to a complaint by reference to the criteria contained in the White Paper and to comply with the procedural requirements it has imposed upon itself.²² In that way, the Court could help to bolster the accountability of the Commission and the legitimacy of the procedure. From a pragmatic point of view, a greater degree of judicial oversight of the Commission might help to ensure that potential complainants do not lose faith in a procedure which depends on them for its effectiveness.

The Court and the Commission

The Court has been willing to allow the Commission a degree of flexibility in the internal procedure it follows in deciding whether proceedings under Article 226 should be brought. In *Commission v Germany*,²³ it was argued that the proceedings were inadmissible because the issue of the reasoned opinion and the decision to commence proceedings before the Court had been delegated to a single Commissioner instead of having been the subject of a decision by the Commission sitting as a college. The Commission explained that because of the number of infringement proceedings, Commissioners did not have before them draft reasoned opinions when they decided to issue such measures. However, they did have available to them the facts of each case and details of the provisions of Community law which the Commission's services considered to have been breached. They therefore took the decision in principle to issue the reasoned opinion and to commence proceedings before the Court in full knowledge of the essential facts. Drafting of the reasoned opinion then took place at administrative level under the responsibility of the competent Commissioner. The Court ruled that this procedure was acceptable. It was true that the functioning of the Commission was governed by the principle of collegiate responsibility and that therefore 'both the Commission's decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfil obligations must be the subject of collective deliberation by the college of Commissioners'. However, it was not necessary 'for the college [as a formal body,] to

²² Cf. Case T-7/93 *Almado Chavakis v Commission* [1994] ECR II-1741, para 53, where the CFI held that the Commission could not depart from rules it had imposed on itself regarding access to its decision cases.

²³ Case C-152/95, above n. 9. See also Case C-372/91 *Commission v Germany* [1993] ECR I-3175.

decide on the wording of the acts which give effect to these decisions and put them in final form'.²⁴

Once proceedings are in motion, the Court insists on strict compliance by the Commission with the procedural requirements laid down by Article 226. Of particular importance is the deadline which must be laid down in the reasoned opinion for compliance by the Member State.²⁵ That deadline determines the relevant date for the purposes of any subsequent proceedings before the Court,²⁶ for compliance with its obligations by the Member State concerned after the deadline has passed does not prevent the Commission from bringing the matter before the Court. Thus, in *Commission v Austria*,²⁷ the Court held that the quashing of the contested national measure with retrospective effect after the expiry of the deadline did not prevent the Commission from continuing with the case. Although the Commission is free to withdraw its action in circumstances such as these, it is regarded by the Court as retaining an interest in pursuing it because a judgment 'may be of substantive interest as establishing the basis of a responsibility that a Member State can incur as a result of its default, as regards other Member States, the Community or private parties'.²⁸

A case which illustrates strikingly both the extent of the Commission's discretion to pursue proceedings before the Court and its occasional reluctance to withdraw actions which seem to have lost much of their purpose is *Commission v Germany*.²⁹ In that case, the Commission brought proceedings against Germany for failure to comply with various Council directives on waste. All had been substantially amended or repealed during the administrative or judicial phases of the proceedings. The Court said that it was 'somewhat surprising[...] that the Commission brought its action more than six years after the entry into force of the basic German legislation on the shipment of waste, and did so at a time when the Community had in fact changed its policy in that field along the same lines as those followed by that legislation'.³⁰ However, the Court ruled that the Commission was entitled to decide when it was appropriate to bring an action. It was not for the Court to review the exercise of that discretion. The Court therefore concluded that the action was admissible.

Given the difficulty now being encountered by the Court in coping with its workload, one may ask whether this approach, perhaps justified in the early days of the Community's development, should be modified. It may be contrasted with its attitude in proceedings for failure to act under Article 232 (ex 175) EC. If the respondent institution remedies its inaction after the commencement of proceedings, the

²⁴ Para 48. ²⁵ See the second paragraph of Art 226 (ex 165).

²⁶ See eg. Case C-352/95 *Commission v Italy* [1997] ECR I-2051; Case C-23/95 *Commission v Luxembourg*, judgment of 27 October 2005; Case C-325/01 *Commission v Italy*, judgment of 27 October 2005.

²⁷ See Case 19/72 *Commission v Italy* [1973] ECR 101, para 11; Case C-29/90 *Commission v Greece* [1992] ECR I-1571, para 12. On the liability of Member States to private parties for breaches of Community law, see ch 5.

²⁸ Case C-432/92 [1993] ECR I-1697. See also Case C-117/03 *Commission v France*, judgment of 7 December 2004, para 18-22.

²⁹ Para 27. See also the comments of AG Jucunda at [1995] ECR I-3087, 1105-6 and 1122-3.

Court means the subject-matter of the action as having ceased to exist,²¹ notwithstanding the hypothetical possibility that an action for damages might be brought against the institution concerned under the second paragraph of Article 238 (ex 215) EC. It may be argued that this approach should be extended to actions under Article 226, so that compliance by the Member State with its Treaty obligations before the Court gave judgment would be treated as depriving the action of its subject-matter even though the deadline laid down in the reasoned opinion had expired. In these circumstances the proceedings may be considered to have served their purpose of securing respect for the Treaty.

An attempt to draw an analogy with the action for failure to act was made by the German Government in *Commission v Germany*.²² There, the Commission had brought two cases against Germany for breach of the Community legislation on the award of public contracts. The German Government argued that the proceedings were inadmissible, since there was an ongoing breach to be terminated. The relevant Community legislation consisted solely of procedural rules. The effects of a breach of those rules were exhausted as soon as the breach had taken place. Since the breach had been admitted, there was, the Government argued, no longer any objective interest in pursuing the matter. The German Government pointed out that proceedings for failure to act were inadmissible when the institution concerned defined its position after having been called upon by a complainant to act. The Court's case law established that there was no objective interest in obtaining a ruling from the Court if the institution concerned admitted that there had been an unlawful failure to act.

The Court pointed out, however, that the adverse effect on the internal market of an infringement of the rules on the award of public contracts subsisted while the contracts concluded in breach of those rules remained in force. In the present case, the contracts concerned would continue to produce effects for decades. It could not therefore be maintained that the alleged breaches of obligations came to an end before the periods laid down in the reasoned opinion expired.²³ The admissibility of the actions was not affected by the fact that the German Government had acknowledged the breach and accepted that a claim for damages could be brought before the national courts by anyone who had suffered loss as a result of it even if the Court did not make a declaration that there had been a failure to meet obligations. The German Government could not base any argument on either a comparison with the action for failure to act provided for in Article 232 EC over the circumstances in which the Court considers that a failure to act has been brought to an end.²⁴ Might the Court take a different view as to the relevance

of Article 232 in infringement proceedings where the alleged breach had been terminated and its effects corrected before judgment had been given? This seems unlikely in the absence of a significant change in policy. As the Court explained in *Commission v Denmark*:²⁵ "Otherwise, by admitting their breach of obligations and accepting any ensuing liability, Member States would be at liberty at any time during Article 169 (now 226) proceedings before the Court to have them brought to an end without any judicial determination of the breach of obligations and of the basis of their liability."

Where the Commission decides to make an application to the Court, it bears the burden of proving that the alleged infringement took place. That burden may be a heavy one. In *Commission v Belgium*,²⁶ the Court said that "it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose..." The Court added that, where the action concerns, not just the terms of a national provision, but the way in which a national provision is applied, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice of the national administration and/or courts, for which the Member State concerned is answerable.²⁷ Thus, in *Commission v Denmark*²⁸ the Commission sought a declaration that Denmark had failed to apply properly a directive on tax exemptions for means of transport temporarily imported from one Member State into another. The Court dismissed the application as inadmissible on the basis that it does no more than mention a number of provisions of the directive, certain judgments of the Court and Articles 5 (later 10), 8a (later 10), 93 (later 90) and 169 (later 249) of the Treaty; the application does not give any details of the facts and circumstances which allegedly gave rise to the failure by the Danish authorities to fulfil their obligations.²⁹ Where a Member State is required by a directive to inform the Commission of the measures it has introduced to comply with it, failure to satisfy that requirement may amount to a breach of Community law, but it does not entitle the Commission to assume that no implementing measures have in fact been adopted.³⁰ Moreover, the mere existence in a Member State of a situation which is inconsistent with a directive does not in itself entitle the Commission to conclude that the directive concerned has not been properly implemented. However, the persistence of such a situation may indicate a failure by the State concerned to comply with its obligations.³¹

²¹ See e.g. Case 377/83 *Parliament v Council* [1985] ECR 4017. The issue is discussed by AG Michalowski in Case C-29/85 and C-28/85 [1986] ECR I-5465.

²² Joined Cases C-28/85 and C-29/85 [1986] ECR I-5465. ²³ Para 29.

²⁴ Para 43 of the judgment. Cf. *The Role and Future of the European Court of Justice*, a report of the EC Advisory Board of the British Institute of International and Comparative Law chaired by Lord Slynn, 1994, 52.

²⁵ Case C-241/95 [1997] ECR I-3251, para 30.

²⁶ Case C-297/93, judgment of 12 May 1995, para 27.

²⁷ Case C-51/90 [1992] ECR I-2137. See also Case C-347/93, *Commission v Greece* [1995] ECR I-1741; Case C-55/99 *Commission v France* [2000] ECR I-11499; Case C-127/93 *Commission v Italy* [1994] ECR I-5205; Case C-455/90 *Commission v Luxembourg* [2000] ECR I-1555; Case C-424/93 *Commission v United Kingdom* [2000] ECR I-11219.

²⁸ See Case C-58/81 *Commission v Netherlands* [1982] ECR I-1751.

²⁹ See Case C-265/97, *Commission v Italy* [1999] ECR I-7713, para 49.

³⁰ Para 23.

³¹ Para 18.

The Court and the defendant State

In *Commission v Italy*,⁴⁷ the Court underlined the departure Article 226 represented from the classic mechanisms of public international law. It declared:

In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules.

For a State unilaterally to break, according to its own conceptions of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discriminations at the expense of their nationals, and above all of the nationals of the State itself which places itself outside the Community rules.

The essential question in nearly all infringement actions is accordingly whether, objectively speaking, the situation in the defendant State is consistent with the requirements of Community law. Except in cases of *force majeure*, a concept which is construed narrowly,⁴⁸ the Court will not be interested in how any inconsistency may have arisen. The Commission is not required to show 'error or opposition on the part of the Member State concerned'⁴⁹ or 'to draw distinctions based on the nature or gravity of the infringement'.⁵⁰ In the absence of a procedural irregularity or a failure on the part of the Commission to prove the alleged infringement, or a misunderstanding by the Commission of what national law or Community law requires, the range of defences available to Member States is therefore limited.

Thus, it is no defence that national legislation, although technically incompatible with Community law, is in practice applied in accordance with the requirements of the Treaty. The Court has said that the mere maintenance in force of such legislation 'gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law'.⁵¹ The need to avoid this type of uncertainty has also led the Court to refuse to allow Member States to rely on the fact that the provisions of Community law which have been breached are directly effective and may therefore be relied on in the national courts, which, in accordance with the doctrine of the primacy of Community law, are required to accord them precedence over inconsistent provisions of national law. The Court has stated that 'the primacy and direct effect of the provisions of Community law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law'.⁵²

⁴⁷ Case 39/72 [1973] ECR 101, para 34.

⁴⁸ See Case 101/84 *Commission v Italy* [1985] ECR 2629.

⁴⁹ Case C-215/93, *Commission v Greece* [1995] ECR I-4511, para 25.

⁵⁰ Case C-14/90 *Commission v United Kingdom* [2003] ECR I-10319, para 34; Case C-454/99 *Commission v United Kingdom* [2001] ECR I-10323, para 27.

⁵¹ Case 161/73 *Commission v French Republic* [1974] ECR 359, para 41.

⁵² Case 164/85 *Commission v Italy* [1985] ECR 1739, para 12.

Not can Member States rely on a failure by the Community institutions to comply with their own obligations under the Treaty. In *Commission v Luxembourg and Belgium*,⁵³ the Court said that 'the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable... [E]xcept where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.' The appropriate remedy for a Member State in such circumstances would be a direct action against the institution in question. Similarly, a Member State may not justify a breach of Community law on the ground that its object was to correct the effects of such a breach by another Member State. The Court made it clear in *Commission v France*⁵⁴ that '[a] Member State cannot, under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to [obviate] any failure on the part of another Member State to comply with the rules laid down by the Treaty'. The Court pointed out that a Member State which considers the action of another Member State incompatible with Community law can take action at the political level, invite the Commission to bring proceedings against that State under Article 226 or take action itself under Article 227. Moreover, reservations or statements made by the Member State concerned in the course of the procedure leading to the adoption of an act which is alleged to have been breached will not be taken into account by the Court, since 'the objective scope of rules laid down by the common institutions cannot be modified by reservations or objections which Member States have made at the time the rules were being formulated'.⁵⁵

As was pointed out in *Commission v Ireland*,⁵⁶ '[i]t is well established in the case-law of the Court... that a Member State may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from Community law. Moreover, it has been held on several occasions... that practical difficulties which appear at the stage when a Community measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations'. In particular, the Court has made it clear that the obligations arising from the Treaty 'devolve upon States as such and the liability of a Member State under Article 169 [para 225] arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.⁵⁷ Thus, it is no defence that draft legislation intended to give effect to the requirements of Community law lapsed due to the dissolution of the national parliament.⁵⁸

⁵³ Joined Cases 93 and 91/83 [1984] ECR 625, 631.

⁵⁴ Case 321/76 [1979] ECR 3725, para 9.

⁵⁵ Case C-39/93 [1995] ECR I-4271, para 21.

⁵⁶ Case 71/83 *Commission v Belgium* [1976] ECR 237, para 15.

⁵⁷ See also e.g. Case 91/79 *Commission v Italy* [1980] ECR 1659.

It follows that proceedings under Article 226 could in principle be brought against a Member State if its courts failed to comply with their obligations under the Treaty, at least if the failure were deliberate or systematic.⁴¹ However, it might be less provocative to challenge the competent national authority's failure to introduce legislation which is sufficient to give effect to the requirements of Community law. In *Commission v Italy*,⁴² the Commission sought a declaration that Italy had failed to meet its Treaty obligations by maintaining in force a legislative provision which, as construed and applied by the domestic administrative authorities and courts, was producing a result which was contrary to Community law. The Court said that, although the contested legislative provision was not self-evidently incompatible with Community law, its effect had to be determined in the light of the way it was interpreted by the national courts. The Court acknowledged that 'isolated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disavowed by the national supreme court, cannot be taken into account'. However, a 'widely-held judicial construction' which, as here, had been confirmed by the supreme court, was relevant to the question whether the State concerned had failed to meet its obligations.⁴³ Where the case law on the meaning of national legislation was inconsistent, the Court held that, 'in the very least, such legislation is not sufficiently clear to ensure its application in compliance with Community law'.⁴⁴ The Court concluded that Italy had breached its obligations by failing to amend a provision 'which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Court's supreme *di cassazione* in a way which resulted in a situation which was contrary to Community law'.⁴⁵

The Court has even held that a Member State may incur liability under Article 226 (ex 159) as a result of the actions of private individuals where it has not taken appropriate steps to prevent such actions from interfering with the proper functioning of the common market. This was established in *Commission v France*,⁴⁶ where the Commission argued that France had breached its Treaty obligations by failing to take effective action to prevent imports of fruit and vegetables from other Member States from being disrupted by acts of violence committed by French farmers. The Court held that the Treaty required the Member States to take all necessary and appropriate measures to ensure that the fundamental principle of the free movement of goods was respected on their territory. Although the Member States had a margin of discretion

in determining what measures were most appropriate to eliminate barriers to imports in a given situation, it was the responsibility of the Court to ensure that this margin had not been exceeded. The Court concluded that in the present case the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.⁴⁷

How effective are infringement proceedings?

In its original form, the EC Treaty did not provide for any form of sanction should a Member State fail to comply with a judgment against it under Article 226. None the less, the Court succeeded in fashioning out of that article an effective means of policing the Member States. It refused to entertain essentially subjective defences advanced by Member States while at the same time insisting on strict compliance by the Commission with the procedural requirements of the Treaty and the burden of proof. Statements on the Court's copy-book are perhaps the extent of the margin of discretion it has been prepared to allow the Commission and the cavalier way it has treated complainants. However, the intervention of the Ombudsman and the Commission's response in identifying the criteria it uses in prioritizing complaints and tightening up the procedure for dealing with them offers the Court an opportunity to require the Commission to conduct itself in a way which is commensurate with modern expectations of accountability and good administration.

The Commission's current policy of targeting particular types of infringement⁴⁸ contrasts with the policy it adopted in the late 1970s, when the initiation of proceedings became almost routine.⁴⁹ In particular, failures to implement directives were pursued with especial vigour. That policy led to an increase in the number of rulings given by the Court and a concomitant rise in the number which were not complied with in the absence of further action by the Commission. In order to give Member States an added incentive to comply with rulings against them under Article 226, a new second paragraph was added to Article 228 at Maastricht giving the Court the power to impose financial sanctions on those which failed to do so. Article 228(2) provides that if the Commission considers that the State concerned has not taken the measures necessary to comply with the Court's judgment, it

shall, after giving that State the opportunity to submit its observations, first: a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

⁴¹ See *Donat Cattin and White* (see above, n 1 at 29).
⁴² Case C-153/80 (1981) ECR I-3431; Case C-224/81 *Italy* (1982) ECR I-1025, where the Court held that a Member State was obliged to make good damage caused to its individuals by an infringement of Community law stemming from a decision of a national court. The latter case is discussed in ch 5.

⁴³ Para 33.
⁴⁴ Para 41 of the judgment. Cf Case C-300/93 *Commission v United Kingdom* (1997) ECR I-3543; Case C-244/93 *Commission v Netherlands* (2001) ECR I-3541; Case C-7/02 *Commission v Spain*, judgment of 9 September 2004; Case C-137/03 *Commission v Belgium*, judgment of 12 May 2005.
⁴⁵ Case C-265/93 (1997) ECR I-4959. See *Nicola, Angry farmers and passive government: private conflict and the free movement of goods* (1995) 23 ECR 467.

⁴⁶ Para 45. The Commission was supported in its application by the United Kingdom. By a stroke of irony, the judgment was delivered at a time when British farmers were initiating their French colleagues to intervene with imports of beef from the United Kingdom, apparently with the acquiescence of the French authorities.
⁴⁷ See *Donat Cattin and White*, above, n 1 at 39-40; Snyder, 'The effectiveness of European Community law: legislation, process, tools and techniques' (1991) 55 MLR 14, 23; Everling, 'The Member States of the European Community before their Court of Justice' (1984) 9 ECR 215, 218-20.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 228.

One drawback of this procedure is that the Commission may not ask for the imposition of a financial penalty in its initial application to the Court under Article 226. Moreover, no further penalties are envisaged if a Member State refuses to pay a sanction imposed on it.¹⁶ On the other hand, although the Commission is required to follow an administrative procedure which corresponds to that laid down in the first paragraph of Article 226, involving an opportunity for the State concerned to submit its observations and the issue of a reasoned opinion, it is not required to specify the amount of any sanction it considers appropriate until it brings the case before the Court. It will also be noted that the Treaty does not set any limit to the amount of the penalty which the Court may impose.

By the time the Maastricht Treaty was signed on 7 February 1992, the Court of Justice had held in the famous *Francovich* case,¹⁷ decided the previous November, that there was a principle 'inherent in the system of the Treaty' that Member States were liable to compensate individuals for damage caused by breaches of Community law for which they were responsible. That principle deprived Article 228(2) of much of its significance, but there remain some situations where the principle of State liability is unlikely to have much practical effect. The conditions laid down in *Francovich* and the Court's later case law on the principle of State liability might not be satisfied. The loss suffered by a potential plaintiff might be too small to justify the cost of bringing proceedings; causation might be hard to prove. In some cases, it might be undesirable to leave matters until a willing litigant emerges. In circumstances such as these, the imposition of a financial sanction under Article 228(2) may be particularly appropriate.

In 1996, the Commission issued a Memorandum on applying Article 228(2) (now 225) of the EC Treaty¹⁸ in which it set out its views on how the second paragraph of that article might be applied. The Commission observed that the penalty payment, rather than the lump sum, was the 'most appropriate instrument' for achieving the objective

Börsel, 'Guarding the Treaty: the compliance strategies of the European Commission', in Börsel and Chalmers (eds), *The State of the European Union 1996* (1997), ch 5 at 253-5.

¹⁶ Cf Art 86 ECSC, which provided that, where a Member State's failure to comply with its Treaty obligations had been established, the High Authority could, with the assent of the Council acting by a two-thirds majority: (a) suspend the payment of any sum which it might be liable to pay to the State in question under the Treaty, and (b) take measures, or authorise the other Member States to take measures, which would otherwise be prohibited as incompatible with the common market for coal and steel, in order to correct the effects of the infringement. These apparently draconian sanctions were never imposed.

¹⁷ [1996] OJ C-2/5.

¹⁸ Joined Cases C-5/90 and C-4/90 [1991] ECR I-5357. See ch 5.

of the infringement procedure, which was 'to secure compliance as rapidly as possible'. The Commission noted that the amount of the penalty would be calculated on the basis of three criteria: (a) the seriousness of the infringement, (b) its duration and (c) the need to deter further infringements. The Commission acknowledged that failure to comply with a judgment of the Court was always a *serius in se* matter, but said that it would also take account of the effects of the underlying infringement and the importance of the rules which had been infringed. In January 1997, the Commission issued further guidance on how it proposed to calculate the appropriate penalty in particular cases. It announced¹⁹ that the amount of any penalty payments proposed to the Court would be calculated by multiplying coefficients reflecting the gravity and duration of the infringement by an 'invariable factor' based on the gross domestic product of the Member State concerned and the weighting of votes in the Council.

The Commission's annual Reports on Monitoring the Application of Community Law suggest that the sanctions available under Article 228(2) play a useful role in encouraging Member States to comply with their obligations, most cases being resolved satisfactorily without a further judgment of the Court.²⁰ The first case to proceed to judgment was *Commission v Greece*,²¹ a judgment dated 4 July 2000 in which the Court decided to impose on Greece a penalty of €20,000 for each day of delay in taking the measures necessary to comply with a ruling given on 7 April 1992 finding Greece to be in breach of its obligations under two directives on the disposal of waste.²² While emphasising that they could not bind it, the Court in that case endorsed the guidelines on the calculation of penalty payments laid down by the Commission, observing: 'Those guidelines... help to ensure that it acts in a manner which is transparent, foreseeable and consistent with legal certainty' and that they were 'designed to achieve proportionality in the amounts of the penalty payments to be proposed by it'. The Court stated that the Commission's suggestion that account should be taken of the defendant State's gross domestic product and the number of votes it had in the Council 'appears appropriate in that it enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range'.²³ The Court declared:²⁴

the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations.

¹⁹ See [1997] OJ C 43/2.

²⁰ See e.g. the Commission's 21st Annual Report on Monitoring the Application of Community Law [2002], COM(2004) 839 final Annex II, Table 2.5.

²¹ Case C-37/97 [2000] ECR I-5047. The second was Case C-278/01 *Commission v Spain* [2003] ECR I-4414.

²² Para 37 of the judgment.

²³ Para 38.

²⁴ Para 92.

In accordance with the Commission's application, the penalty imposed by the Court ran from the date of the second judgment. However, it would not have been inconsistent with the Treaty had it run from the date of the underlying breach (in a case such as this, the expiry of the deadline for implementing the relevant directive)³² or that of the first judgment of the Court finding Greece to be in breach of its obligations.³³ Measures to give effect to that judgment were finally adopted by the Greek authorities on 26 February 2001, so they paid a total penalty of €5,400,000 for the period between July 2000 and March 2001.³⁴

The institution of proceedings under Article 228(2) also led France to lift a ban on the importation of British beef imposed during the BSE crisis and declared unlawful by the Court in December 2001.³⁵ The Commission announced in November 2002 that it would not be pursuing its application to the Court for the imposition of a penalty.³⁶ The lesson of that case is unclear. On the one hand, it could be interpreted as showing the effectiveness of Article 228(2) in securing compliance. On the other, it could be seen as undermining the capacity of Member States to postpone compliance. According to the 20th Report on Monitoring the Application of Community Law,³⁷ 'the British beef controversy prompted the Commission to consider the possibility of proposing that the Court of Justice should order not only a periodic penalty payment but also a fine, to give Member States an incentive to comply with judgments holding them to be in default.'³⁸

The issue arose in another case involving France,³⁹ in which the Commission asked the Court to impose a daily penalty payment running from the date of its second judgment until its first judgment⁴⁰ had been implemented. Advocate General Geelhoed took the view that the infringement⁴¹ was so serious that the Court should impose both a lump sum and a penalty payment. As he pointed out:⁴² 'Where a Member State succeeds in complying with the obligations it neglected before such a penalty is payable, the final result may be that no sanction is imposed. Though effective in finally ensuring compliance, the imposition of a periodic penalty payment may not therefore always be an appropriate response to the infringement in question. Because that suggestion involved a change to the nature of the sanction specified by the Commission, the oral procedure was reopened⁴³ so that argument could be heard on whether this was permissible.'⁴⁴

³² In the *Greece* case, the defendant should have implemented both directives by 1 January 1991; see part 1 of the judgment.

³³ See Case C-1/00 *Commission v France* [2001] ECR I-9393.

³⁴ See Commission press releases IP/02/1035 and IP/02/1671.

³⁵ COM(2002) 649 final, 9.

³⁶ The Treaty gave those affected by the French ban a remedy in the French courts in any event; see Case C-161/01 *Alabon v France* [2003] ECR I-3079.

³⁷ Case C-204/01, judgment of 12 July 2005.

³⁸ Case C-46/03 *Commission v France* [2004] ECR I-3737, judgment of 11 June 2004.

³⁹ Which involved failure to ensure compliance with Community measures on the conservation of fishery resources.

⁴⁰ Part 25 of his Opinion of 29 April 2004.

⁴¹ See the Court's Order of 16 June 2004.

⁴² AG Geelhoed gave a second Opinion on 18 November 2004. He maintained his view that the Court was entitled to impose both a lump sum and a penalty payment, even where the Commission has

In its judgment, the Court stated that, while the penalty payment was particularly well suited to inducing the State concerned to terminate the breach swiftly, 'the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.'⁴⁵ The imposition of both types of penalty was therefore permissible, particularly where the breach had continued for a long time and was likely to persist. The Court rejected the argument that, in the absence of Commission guidelines on how to calculate a lump sum, the imposition of such a sanction would infringe the principles of legal certainty and transparency. While such guidelines do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty... the fact remains that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court...⁴⁶ The Court imposed on France (a) a penalty payment of €57,761,250 for each period of six months from delivery of its second judgment at the end of which its first judgment had still not been fully implemented; and (b) a lump sum of €20,000,000. Had the Court ruled out the imposition of both types of sanction in the same case, a similar result could have been achieved by making the penalty payment take effect from a date prior to the Court's second judgment or by ruling its amount or by a combination of both.

The effect of the Constitutional Treaty

The Constitutional Treaty would leave unchanged the classic elements of the infringement procedure.⁴⁷ However, it would streamline the procedure for imposing sanctions in two ways. First, where the State concerned has already been found by the Court to be in breach of its obligations, one of the administrative stages of the procedure (the issuing of a reasoned opinion) would be omitted.⁴⁸ Second, the Commission would be able in its initial application to the Court to ask the Court to impose a financial penalty where 'the Member State concerned has failed to fulfil its obligation to notify measures transposing a European framework law' (broadly equivalent to an EC directive).⁴⁹ In the *Atax* case, the relevant provision—Article 11-362(3)—is oddly worded in two respects. First, the Constitutional Treaty would not require Member States to notify measures transposing a European framework law; they would only be under such an obligation if it were laid down in the framework law concerned. More significantly, a mere failure to notify national implementing measures would evidently not justify the imposition of a penalty if the framework law

only suggested a penalty payment. However, he said that where the Court was contemplating the imposition of a more severe sanction than that suggested by the Commission, the parties should be heard first.

⁴⁵ Part 37.

⁴⁶ Part 38.

⁴⁷ See Arts 226-228 and 251.

⁴⁸ See Art 22-350(2).

⁴⁹ See Art 11-351; Cf.

had actually been implemented. The text should have referred simply to failure to transpose a European framework law.

Notwithstanding the importance of ensuring the proper implementation of directives/European framework laws, the decision of the Member States to single out this particular species of infringement reflects governments' traditional wariness of judicial oversight. If the concern were purely with ensuring compliance, it would have been more effective to give the Commission a general right to ask in its initial application for a penalty to be imposed. That wariness is also evident in a limit introduced by the Member States on the amount of the sanction the Court could apply. Where a sanction was requested by the Commission in its initial application, the Court would not be able to impose one which exceeded the amount specified by the Commission.¹⁷ That limit did not appear in the Draft Constitutional Treaty¹⁸ and would not apply where the Commission made a separate application requesting a sanction.¹⁹ The latter procedure would be available to the Commission if a sanction initially imposed on a Member State for failure to transpose a European framework law proved inadequate. It seems odd to envisage a limit in the one case but not in the other.

¹⁷ See the comments of AG Geelhoed in his second Opinion in Case C-364/02, above at 91.

¹⁸ See Art. III-151(2).

¹⁹ See Art. III-162(2).

X The role of national courts

1. Application of Community Law
2. The principle of national procedural autonomy
3. The requirements imposed by Community Law
 - 2.1. Principle of Equivalence
 - 2.2. Principle of Effectiveness
4. The principle of State liability for breach of EC Law
5. The interrelationship between action for infringement, reference for a preliminary ruling and action for damages in the national court

Mandatory Reading

Damien Chalmers, Gareth Davies & Giorgio Monti, *European Union Law*, Cambridge University Press, 2010, 267-314.

Koen Lenaerts, Dirk Ales, Ignace Meselis (ed. Robert Bray), *Procedural Law of the European Union*, Sweet & Maxwell, London, 2006 Chapter 3.

The Agency also has to work within the aegis of a Multi-annual Framework established by the EU political institutions, which sets out the thematic areas within which it is to function. Its work is confined either by institutional requests, in the case of opinions, or, more generally, by the political agenda of the EU institutions. This inevitably confines not only the Agency activities, but also the type of rights examined by the Agency. The Framework for 2007–2012 is a case in point. It takes a reasonably broad remit, but has excluded analysis of social rights, bioethical rights and the war on terror, all of which are touched upon significantly by Union activities.¹⁰

The Agency, therefore, is very much a reflection of the debate on the establishment of an EU fundamental rights policy. Its remit, as with the policy, is partial, unstable and makes distinctions which are hard to justify. Yet, for those who advocate a fundamental rights policy, the establishment of an Agency with the legal power to police all EU legislation for compliance with fundamental rights, and with the power to act as a hub for European civil society and awareness of these matters, is indeed a powerful step forward.

FURTHER READING

- P. Alston et al. (eds.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999).
 P. Alston and J. Weller, "An Ever Closer Union" in Need of a Human Rights Policy" (1999) 9 *European Journal of International Law* 659.
 M. Avbelj, *The European Court of Justice and the Question of Value Choices*, Jean Monnet Working Paper 6/04.
 R. Eganer, "Creating European Rights: National Values and Supranational Interests" (2005) 11 *Columbia Journal of European Law* 341.
 A. v. Toghiani, "The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union" (2005) 27 *Common Market Law Review* 1237.
 J. Omer and A. Williams, "Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Coordination' or 'Institutional' Justice?" (2009) 15 *European Law Journal* 452.
 D. Harvey and J. Mahoney (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart, 2009).
 M. Kirsch, "The Open Architecture of European Human Rights Law" (2006) 11 *Modern Law Review* 183.
 B. Kenney and A. Davies, "State Techniques to Limit Long: The Migrant & Their between EU Law, International Law and the European Convention on Human Rights following the UN Sanctions Cases" (2008) 45 *Common Market Law Review* 73.
 K. Gervais and E. de Smit, "A 'Bill of Rights' for the European Union" (2001) 38 *Common Market Law Review* 703.
 J. Mahony, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?" (2004) 15 *Common Market Law Review* 1131.
 E. Stein and A. Ward (eds.), *The EU Charter of Fundamental Rights* (Oxford, Hart, 2004).
 A. Williams, *EU Human Rights Policies: A Study in Law* (Oxford, Oxford University Press, 2004).

¹⁰ Decisions 2006/201/EC Implementing Regulation 161/2007/EC on reports on adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012 (2006) OJ L26/14, article 1.

7

Rights and Remedies in National Courts

CONTENTS

- 1 Introduction
- 2 Direct Effect and the Idea of an EU Right
- 3 Exploitation of Direct Effect
 - (i) Relating the criteria towards a test of justifiability
 - (ii) The state's duty to protect individual rights and the emergence of horizontal direct effect
- 4 Direct Effect and the Development of EU Remedies and Procedures
 - (i) Pan-European remedies in national courts
 - (ii) Union oversight of local remedies in domestic courts
- 5 Direct Effect and Secondary Legislation
 - (i) Establishment of the direct effect of Directives and national resistance
 - (ii) Vertical direct effect of Directives
 - (iii) Debate about horizontal direct effect and incidental direct effect
- 6 Indirect Effect
 - (i) Arrival of indirect effect
 - (ii) When does the duty of indirect effect arise?
 - (iii) Range of measures that national courts must take into account
- 7 State Liability
 - (i) Arrival and challenges of state liability
 - (ii) Conditions of liability
 - (iii) Liability of judicial institutions
- 8 Drawing the Threads Together

Further reading

1 INTRODUCTION

This chapter considers the rights and remedies that EU law allows to be invoked in national courts. It is organized as follows.

Section 2 looks at the origins of direct effect. Direct effect is the doctrine which provides for EU law to be invoked in national courts: initially, direct effect was a 'defensive' right directed at administrations, which required them not to violate entitlements granted directly and unconditionally to private parties by Treaty provisions.

Section 3 looks at how, over time, direct effect was reconceptualised as providing rights which generate a full set of entitlements against all parties and impose a duty on administrations and

courts to protect and realise these entitlements for individuals. This led to EU Treaty provisions being capable of being invoked both against the state (vertical direct effect) and against private parties (horizontal direct effect).

Section 4 considers what remedies and procedures are available to individuals where an EU provision is invoked in a domestic court. As a general rule, these are a matter for domestic law. This autonomy is subject to two constraints. The remedies and procedures for infringement of EU law rights should be, first, no less favourable than those for similar domestic claims, and secondly, should not make it practically impossible to exercise EU rights. However, there is a right to EU remedies in four circumstances: a right to restitution for illegally levied taxes; a right to interim relief pending a preliminary reference to the Court of Justice; a right to claim damages or force repayment of illegal subsidies in the field of EU competition law; and, finally, a right to sue the state for damages where a serious breach of EU law by it has led to loss for the individual.

Section 5 considers the granting of direct effect to secondary legislation. Direct effect is granted to all binding instruments of EU law: Treaty provisions, Regulations, international agreements, Directives and Decisions. The first three sets of instruments are capable of both vertical and horizontal direct effect. Directives and Decisions are only capable of being invoked against the state. Whilst Directives are not capable of horizontal effect, like other binding instruments of EU law they can generate incidental effects for third parties. This occurs, first, where an individual invokes a Directive against the state and this imposes burdens on private parties. It occurs, secondly, where a private party challenges another under national law, and the latter invokes the Directive as a shield requiring the state to protect it from the private action under national law.

Section 6 considers the doctrine of indirect effect. As significant as direct effect, this requires national courts to interpret all national law, insofar as this is possible, in the light of all EU law. This duty encompasses non-binding instruments, such as Recommendations, as well as binding instruments. It has generated concerns about legal certainty, both as to when the duty first arises and as to the strength of the duty of interpretation.

Section 7 considers the doctrine of state liability. This requires states to compensate individuals where a breach of EU law by the state has led to loss for the individual and the provision breached creates rights for the individual. State liability covers all governmental institutions, including acts of the judiciary. If EU law allows Member States some discretion, there is a further condition to attract liability: the breach must be sufficiently serious. Typically, there are four circumstances which attract liability: failure to transpose a Directive; breach of a clear provision of EU law; failure to comply with settled case law; and failure to comply with a judgement of the Court of Justice.

Section 8 considers how the Lisbon Treaty might reshape the field through the introduction of a new provision, Article 18(1) TEU, which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. This might simply be a codifying provision. Alternatively, it might impose a stronger duty on Member States to give effect to EU rights and to protect EU entitlements more fully.

2 DIRECT EFFECT AND THE IDEA OF A UNION RIGHT

We last considered *Van Gend en Loos* in Chapter 5. There are two central elements to that judgment.

The first concerns claims made about the quality of EU law. The Court of Justice claimed that EU law did not fall within traditional categories of international law but rather formed a new sovereign legal order with a new powerful authority. The consequences of this were addressed in Chapter 5.

The second element is the establishment of a new system of individual rights through the doctrine of direct effect. This element has different dynamics. The language of rights calls for us to rethink EU law in terms of the maximum benefits it can grant individuals, both collectively and individually. It therefore pushes for interpretations which maximise individual entitlements and autonomy. It also requires consistency in the interpretation of the Treaty. Provisions appearing on their face to grant individuals direct benefits cannot be interpreted differently, simply because the consequences for the reorganisation of legal authority between EU law and national law are too extravagant. Equally, interpretive techniques used to develop one provision cannot be denied without reason to the interpretation of another provision.

If these elements have distinct rationales, in *Van Gend en Loos* they inform one another. If the justification for the establishment of these rights is the presence of a sovereign legal order, the vehicle for the expression of this order is the development of a system of judicially protected rights.

The facts of the case have been discussed earlier.¹ At its heart, however, was the question whether the provision that is now Article 25 TEU, prohibiting the imposition of customs duties or charges having equivalent effect on imports from other Member States, could be invoked as a matter of EU law in the Dutch court where it had been asserted.

Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I

The first question ... is whether Article [25 TEU] has direct application in national law in the sense that nationals of Member States may on the basis of this article lay claims to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions ...

... The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasised that ... [creating] the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the foundations of the Community. It is applied and explained by Article [25 TEU].

¹ See p. 26.

The wording of Article 38 TFEU contains a clear and unconditional prohibition which is not qualified by a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it equally applied to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 38 TFEU does not require any legislative intervention on the part of the States. The fact that under this article it is the Member States who are made the subject of a negative obligation does not imply that their national's cannot benefit from this obligation.

It follows from the foregoing considerations that according to the spirit, the general scheme and the wording of the Treaty, Article 38 TFEU must be interpreted as conferring direct effects and creating individual rights which national courts must protect.

If ground-breaking in its development of a sovereign legal order, the judgment is narrow in two respects.

First, its ambit is circumscribed. The judgment does not state that all Treaty provisions can be invoked by individuals in national courts. It only holds that some provisions, which meet certain criteria – namely that they are clear, unconditional, negatively phrased and require no legislative intervention – can be invoked by individuals. Moreover, the judgment only indicated with certainty that one provision met this: the entire Article 38 TFEU prohibiting customs duties and charges having equivalent effect. A sovereign legal order composed solely of the individual right to import or export goods free of customs duties is a very limited creature, indeed. This is undoubtedly why the judgment did not provoke more controversy at the time. Yet, the judgment also created instability. For *Van Gend en Loos* offered an almost endless possibility for more provisions to be found to generate individual rights. In every case where this occurs, however, there will be a renewed debate about the reorganisation of legal power entailed by this. Does it grant too much power to the Union, to judges or to particular litigants? The open-ended nature of *Van Gend en Loos* entails this will be a recurring debate that erupts whenever a provision is held to generate individual rights for the first time.

Secondly, the judgment is narrow in its understanding of what is meant by a right. To be sure, the judgment talks about the Treaty imposing obligations on others, be these national courts, administrations or private parties.¹ But it is very vague about the extent and nature of the obligations that are owed to the right-holder by others. At its narrowest, EU law may only grant certain rights vis-à-vis the state: a duty for it not to violate certain interests. Such rights are little more than an immunity from national law in which the holder can do things that others cannot (e.g. withhold taxes). A broader conception of rights involves the holder being able to call on all parties to respect, protect and make good the interests that lie at the heart of the right. Such a right can be asserted against anybody and it calls for full redress of the interests if they are infringed.

The wording of *Van Gend en Loos* suggested that it was concerned with the former type of right.² The stipulation that provisions be negatively phrased meant that national administrations

¹ For a useful discussion see T. Twiss and C. Kilian, 'Making Sense of Rights: Community Rights in EC Law' (1999) 24 *ELRev* 121.

² On this early period see T. Twiss, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *CPJL* 111, 121–2.

could only be called upon to refrain from doing things but not be called upon to take positive action to protect individuals. It is a duty not to violate, addressed only to the national administration. Equally, the requirement of internal clarity suggested that courts could not be called upon to exercise interpretive discretion on behalf of the right-holder, as 'unclear' provisions necessitating the exercise of such discretion would simply not be directly effective. Finally, the proviso that provisions be unconditional suggested courts could not be called upon to weigh individual entitlements against other public interests if these were recognised by EU law.

Alongside this, the judgment was silent on the types of procedure, remedies or enforcement mechanisms that should be deployed to protect the right. If the language of rights pushes for full protection of an individual's entitlements by all parties, it looked in *Van Gend en Loos* as if its use was somewhat rhetorical, for the Court has been much more reserved in terms of the duties it imposes on other parties. As we shall see in the rest of this chapter, the case law of the Court is marked by a push and pull between these two elements.

3 EXPLOITATION OF DIRECT EFFECT

In the 1960s, the Court applied the doctrine of direct effect to a limited number of provisions, which met the criteria set out in *Van Gend en Loos*.³ It also did not elaborate on the implications for parties when they benefited from a directly effective provision. Most Treaty provisions only entered fully into force, however, with the end of the transitional period in 1970. In the early 1970s, the Court sought to expand direct effect in a number of directions.

3.1 Relaxing the criteria: towards a test of justiciability

First, the Court began to relax the criteria for when a provision may be directly effective. In *Van Duyn*, it stated that even if the provision did not set out an absolute entitlement, it could still be invoked in national courts if any qualification or condition was subject to judicial control. As no provision or condition in the Treaty has ever been held to be outside judicial control, this effectively discarded the requirement that a provision be unconditional.⁴ In *Reyners*, the Court held that what is now Article 48 TFEU, which imposes positive obligations on Member States to enable freedom of establishment, was directly effective, thereby sweeping away the insistence that only negatively phrased provisions could be invoked in national courts.⁵

If EC Treaty provisions no longer needed to be negative or unconditional to be directly effective, this begged the question which criteria they did need to meet. This issue came up most acutely in the case of *Defrenne* (No. 2). Under Belgian law, female air stewards were required to retire at the age of 40, unlike their male counterparts. Gabrielle Defrenne had been forced to retire from the Belgian national carrier, Sabena, on this ground in 1963. She brought an action claiming that the lower pension payments this entailed breached the principle now in Article

³ Case 55/58 *Doncker v NZA* [1958] ECR 123; Case 21/61 *Flora v. Bouffard*; *Gohl v. Hauptmann*; *Marshall v. Southampton* [1962] ECR 133; Case 11/63 *Reyners v. Belgium*; *Levy v. Belgium* [1963] ECR 452. On the early developments see A. Dashwood, 'The Principle of Direct Effect in European Community Law' (1978) 15 *JCMS* 223; P. Craig, 'There was a Time in the West: Direct Effect and the Federalisation of EC Law' (1993) 12 *ELRev* 452, 462–72.

⁴ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337.

⁵ Case 129/79 *Reyners v. Belgium* [1980] ECR 611.

157(1) TFEU that 'each Member State shall ensure and maintain the principle that men and women should receive equal pay for work of equal value'. Yet on the face of it, there appeared to be a number of obstacles to the provision being directly effective. It was argued, first, that the provision set out general principles about the broad treatment of men and women in the workplace rather than conferring individual rights and, secondly, that it was programmatic in nature, requiring further measures for its implementation.

Case 43/75 *Defrenne v. Sabena* (No. 2) [1976] ECR 455

16. Under the terms of the first paragraph of Article [157 TFEU] the Member States are bound to ensure and maintain the application of the principle that men and women should receive equal pay for equal work...
18. For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article [157 TFEU] between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the Article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit legal provisions of a Community or national character.
19. It is impossible not to recognise that the complete implementation of the aim pursued by Article [157 TFEU], by means of the eradication of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level...
21. Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article [157 TFEU], must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.
22. This applies even more to cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.
23. As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.
24. In such situation, at least, Article [157 TFEU] is directly effective and may thus give rise to individual rights which the courts must protect.

The Court gave the provision a double meaning to enable the finding of direct effect. On the one hand, it required a programmatic, wide-ranging, ambitious purpose, namely to secure equality between men and women within the economic system as a whole. On the other hand, the Court gave the provision a second interpretation, namely this, namely to prohibit pay discrimination between men and women in individual workplaces. This was considered sufficiently precise to be invoked in national courts. However one looks at it, the Court had significantly relaxed the requirement for legal clarity. To acknowledge that a provision has too uncertain an ambit to be invoked, *per se*, in national courts and to suggest that it has a double meaning is to indicate that it is not clear.

Since *Defrenne* (No. 2), the Court has moved away from using the criteria set out in *Van Gend en Loos*. Instead, the test has become whether the substance of the provision is sufficiently

precise and unconditional.¹ In the eyes of one judge, the invocability of Treaty provisions has now been reduced to a simple question of justiciability.² Yet what does this mean? The Court will not look at whether the provision is qualified by other provisions or constraints, but simply at whether the provision is 'unequivocal'.³ This suggests that it is not important simply that a provision sets out some entitlements that are clearly for the benefit of individuals but that it also sets out direct duties on national administrations to protect these entitlements. That these may have some discretion about how to protect the entitlements is not important.⁴

(ii) The state's duty to protect individual rights and the emergence of horizontal direct effect

If *Defrenne* (No. 2) signalled a willingness on the part of the Court to allow a wider array of Treaty provisions to be directly effective, it was also important for a second reason. It was stated earlier that if only provisions which were negatively phrased were directly effective, that doctrine only imposed a duty on Member States not to violate individual entitlements set out in the Treaty. Any positively phrased obligation, such as a duty to protect or secure, would be held not to be directly effective. While *Defrenne* (No. 2) was not the first case to hold a positively phrased obligation to be directly effective,⁵ it was the first to address the institutional implications of this for the Member States. The Belgian government argued that the discrimination was not perpetrated by it but by Sabena, a commercial operator. It therefore could not be held liable for this. By contrast, it argued that Sabena could not be liable for obligations under Article 157 TFEU, as the latter explicitly addressed these to the Member States, and only the administration was therefore bound.

Case 43/75 *Defrenne v. Sabena* (No. 2) [1976] ECR 455

10. It is... impossible to put forward arguments based on the fact that Article [157 TFEU] only refers expressly to Member States.
11. Indeed as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
12. The very wording of Article [157 TFEU] shows that it imposes on States a duty to bring about a specific result to be materially achieved within a fixed period.
13. The effectiveness of this provision (and) is affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this.⁶ It is to act...

¹ See the early Case 146/75 *Marshall v. Southampton & South West Hampshire Area Health Authority* [1979] ECR 1221. In more recent times, examples include Joined Cases C-53/93 *De Weert* and *De Weert v. Development Bank* [1994] ECR I-4483; Joined Cases C-192/93–194/93 *Arany v. Republic of Hungary* [1994] ECR I-4455.

² P. Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' [JMLC] 3 *ELRev* 156, 176–7.

³ Case C-181/87 *Stichting Shell v. Galsberg*, judgment of 11 February 1989, para. 24.

⁴ Case C-266/87 *Marshall v. Southampton & South West Hampshire Area Health Authority*, judgment of 27 July 1989; Case C-124/89 *Polysar Italia v. Cofide*, judgment of 12 February 1990.

⁵ Case 2/74 *Agropur v. Belgium* [1974] ECR 571.

34. To accept the contrary view would be to risk making the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article (13) TEU.
35. Finally, in its reference to 'Member States', Article (157 TFEU) is alluding to those States in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.
36. Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.
37. Therefore, the reference to 'Member States' in Article (157 TFEU) cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.
38. Furthermore, it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.
39. In fact, since Article (157 TFEU) is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.

Direct effect is not therefore just about protecting individuals from states violating their rights. The doctrine also imposes duties upon the state to secure the protection of these rights. In this regard, *Defrenne (No. 2)* makes two particularly important findings. First, it reminds national courts that they are part of the state and that this duty to protect falls particularly strongly on them. Secondly, it notes from this that courts may find that Treaty provisions can be invoked against other private parties, who therefore have a duty to respect EU law. It therefore established two forms of direct effect, which have been referred to in the academic literature in the following manner:

- (a) vertical direct effect: this is where a party invokes a provision of EU law in a national court against a Member State;
- (b) horizontal direct effect: this is where a party invokes a provision of EU law in a national court against a private party. A corollary of this right is that private parties have responsibilities in EU law for which they can be held liable in national courts if they fail to discharge them.

From a perspective of developing individual rights, this judgment can be viewed very positively. Discrimination on grounds of gender is both egregious and a long-standing problem in the workplace. The grant to the victims of this new legal instrument to protect themselves can only be viewed positively. Moreover, in a market economy, where most employment is in the private sector, it clearly makes sense for it to be available against private employers.

At the beginning of this chapter, we also noted that the story of direct effect was one of an ongoing reorganisation of legal power. Here, the judgment in *Defrenne (No. 2)* was far more disorientating. The grant of horizontal direct effect opens the possibility for Treaty provisions to be invoked not only in the relatively limited setting of litigation of illegal behaviour by the state, but also in the much more unconfined world of private litigation. EU law would not only be deployed to govern a much wider array of disputes, but it would also provide more opportunities to challenge national law, as individuals would no longer need to seek judicial

review. They could simply say that it did not govern the legal dispute between them and another private party. This was all too much for the British and Irish governments. They argued, shamefully, that to allow the principle of equal pay for men and women the work of equal value to be invoked in national courts would lead to an unimaginable disruption of economic life. The Irish government argued that the costs of compliance would exceed Irish receipts from the European Regional Development Fund for the period 1975-77 and the British government argued that it would add 0.5 per cent to labour costs. A considerable admission, it might be thought, on the part of these two governments as to the degree of exploitation of women in their respective jurisdictions.

Case 42/75 *Defrenne v Sabena* (No. 2) [1976] ECR 455

61. The Governments of Ireland and the United Kingdom have drawn the Court's attention to the possible economic consequences of a ruling that would have the effect of the provisions of Article (157 TFEU), on the ground that such a decision might, in many branches of economic life, result in the introduction of charges dating back to the time at which such effect came into existence.
62. In view of the large number of people concerned such charges, which undertakings could not have foreseen, might seriously affect the financial situation of some undertakings and even cause some of them to bankruptcy.
63. Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise for future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.
64. However, in the light of the context of several of the Member States ... it is appropriate to take into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article (157 TFEU), although not yet prohibited under their national law ...
65. In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past.
66. Therefore, the direct effect of Article (157 TFEU) cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.

The Court gave here what is known as a prospective ruling. To manage the consequences of departing so far from Member State expectations, it said, in effect, that what is now Article 157 TFEU was subject to two interpretations. For discrimination occurring prior to the date of the judgment, the provision was interpreted as not being directly effective. The opposite was true for discrimination which occurs after the date of the judgment. The symbolism of this is considerable, however. As Rasmussen has observed, these two interpretations embody the illusion that the Court is engaging in a neutral exercise of merely giving life to the text. It is impossible to maintain this myth while ruling that Article (157) was deprived of direct effect until the day of pronouncement of the Court's decision; only to produce such effects from that day onwards.¹²

¹² K. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff, 1985) 443.

4 DIRECT EFFECT AND THE DEVELOPMENT OF EU REMEDIES AND PROCEDURES

Although direct effect refers only to the right to invoke a provision in a national court, this has little substance if no remedies follow. After all, individuals go to courts for redress; this, to be meaningful, it would seem, that remedies should follow from the successful invocation of direct effect. This begs the question whether direct effect also requires national courts to put in place particular procedures and remedies. This was first broached in *Rewe*. The German authorities had unlawfully levied charges for health inspections on fruit and vegetables in this instance. *Rewe*, a trader, claimed a refund of these before the German Administrative Court. The German authorities argued that the limitation period for claiming a refund had passed and *Rewe* would not have been able to claim a refund if the measure had breached an exclusively domestic law. *Rewe* saw this as a denial of its rights.

Case 33/76 *Rewe-Zentralfinanz and Others v Landwirtschaftskammer für das Saarland* [1976] ECR 1989

5. The provision(s) laid down ... have a direct effect and confer on citizens rights which the national courts are required to protect.

Applying the principle of cooperation laid down in Article [40] EU, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary ... the Treaty entails(s) appropriate measures to be taken to remove differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to disturb or hamper the functioning of the common market.

In the absence of such measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed. The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.

The test set out in *Rewe* is beset by contradiction. On the one hand, it argues for national procedural autonomy by saying that the question of remedies is for the national legal system to decide, subject to those for breach of directly effective provisions being no less favourable than those relating to similar domestic claims.¹³ On the other hand, the requirement that national

¹³ This constraint is known as the *equivalence principle*. The question of deciding whether a domestic measure is comparable to an EU measure is for the national court and the Court of Justice has stated that they must look to the purpose and essential characteristics of the legislation to see if they are similar. Case C-285/95 *Pedersen v. Madsen* [1997] ECR I-4625; Case C-104/96 *Levi v. Jorrijs* [1998] ECR I-4753. M. Dougan, 'National Remedies Before the Court of Justice', *Journal of European Law*, 2004, 25-6.

procedures and remedies should not make it practically impossible to exercise EU rights pushes for the development of a Union system of remedies. This is particularly the case if we think of direct effect as enabling individuals to require courts to protect their entitlements. This is nothing if it is not a remedy. If we say that these obligations are a matter for national courts themselves to decide, then the right becomes hollow.

This tension has led to considerable complexity in the case law. Yet it is possible to discern two trends. The first trend concerns those instances where the Court of Justice will require the national court to provide, as a matter of course, a particular remedy. In such circumstances, the failure to provide this remedy is seen as a failure to secure the right provided by the directly effective provision.

The second trend concerns those instances where EU law leaves it almost entirely for national law to determine the remedies and procedures for the protection of directly effective provisions, subject to some loose EU constraints. This is less prescriptive, but it also entails that the level of protection offered and, indeed, the substance of these rights, will vary from Member State to Member State.

(i) Pan-European remedies in national courts

There are four circumstances where EU law requires particular remedies to be provided in national courts. The first of these is the principle of state liability which allows for individuals, under certain circumstances, to sue the state for damages where they have suffered loss as a result of the state's illegal behaviour. This is dealt with later in the chapter,¹⁴ and is a self-standing procedure that is conceptually distinct from direct effect. There are, however, three circumstances where directly effective rights lead to particular remedies. These are repayment of charges or taxes levied for breach of EU law; damages and repayment for breaches of EU competition law; and the granting of interim relief where a national court wishes to make a preliminary reference to the Court of Justice.¹⁵ Each is constrained by a particular justification. For the first two types of remedy are restitutory in nature. At their heart lies the idea that an individual or state should not be enriched as a result of its behaviour, and that to allow this would be a denial of other parties' directly effective rights. The third remedy, as we shall see, is concerned to secure the effective operation of a procedure before the Court of Justice rather than a national court, namely the preliminary reference procedure.

Repayment of charges or taxes levied contrary to EU law was considered in *See Grigoris*, the facts in which were remarkably similar to *Rewe*.¹⁶ The Italian state had levied charges for health inspections contrary to EU law. Under Italian law, however, there was no repayment of any illegal tax where the Italian state believed that the sums involved had been passed on to other persons, typically through higher pricing. *See Grigoris* challenged this. The structure of the Court's reasoning in this case was different from that in *Rewe*. In *See Grigoris*, the Court held that entitlement to the repayment of charges levied contrary to EU law was 'a consequence of, and an adjunct to, the rights conferred by EU law'. Whilst the Court created some

¹⁴ See pp. 301-12.

¹⁵ There is also, of course, the remedy of state liability described above, where individuals can sue states to recover sums for loss suffered as a result of a state's failure to comply with EU law.

¹⁶ Case 155/82 *Amministrazione delle Finanze dello Stato v See Grigoris* [1983] ECR 3585.

leeway for the national system by providing that it was for it to determine when taxes have been passed on and therefore could not be recovered, the balance drawn was very different from Rome. A concrete remedy, namely the right to restitution of illegally levied taxes, was put in place.

In subsequent years, the Court has extended this remedy.¹⁷ It applies not just to taxes levied by the state, but to taxes and charges levied by public bodies.¹⁸ Illegal requirements to pay tax in advance¹⁹ and the levying of guarantees in breach of EU law.²⁰ The conditions for non-repayment have also become highly circumscribed. If charges or taxes have only partially been passed on to other persons, the Court has ruled that the national authority can only refuse to pay that part which had been passed on by the person claiming repayment.²¹ To determine the amount, the Court has held that national courts must engage in economic analysis, as the degree of enrichment will be affected not just by the increase in price but also by possible decline in volume of sales as a result of that increase.²² Finally, the Court has touched on the level of compensation that may be recovered. It has ruled that claimants are entitled not only to repayment of the tax, but also compensation for any losses that accrued as a result of not having this revenue available to them.²³

The second type of remedy is in the field of competition. The Court has ruled that contracts which breach Article 101 TFEU, the provision prohibiting cartels and anti-competitive conduct by two or more parties, are not only void, but allow individuals to claim damages where they can show that there is a direct causal link between the harm suffered and the illegal conduct or contract.²⁴ Similar reasoning operates in the field of state aids. The Court has ruled that if a national court finds that an unlawful aid has been paid to an undertaking by a national authority, it must order repayment of that aid, as it is under a duty to provide protection to individuals against illegal state aids.²⁵ We can draw parallels with the reasoning in these cases and the reasoning deployed in cases concerning illegally levied taxes because, in addition to wishing to secure the full effect of the provisions, the Court does not wish to see the unjust enrichment of those who have benefited from illegal conduct.²⁶ It is thus the recipient of the illegal aid whom the national authorities must recover the money from and the Court is silent about which third party may recover compensation for loss suffered from anti-competitive practices, focusing instead on the duty of the party engaging in the illegal practice to make good.

¹⁷ On this remedy see J. Nitz, 'National Procedural Autonomy and the Effectiveness of EU Law: Challenge the Charge, Pay for Your Pollution, See For Damages?' [2006] 35 J. L. & Econ. 109.

¹⁸ Case C-241/95 *OTSA* v *OTSA* [1997] ECR I-0445.

¹⁹ Joined Cases C-391/93 and C-403/93 *Maniaghi* v *Sto* [2000] ECR I-0327; Case C-443/94 *Taxi Drivers in the EU Group* v *Commission* v *United Kingdom* [2005] ECR I-0353, para. 223.

²⁰ Case C-400/94 *W. J. Janssens* v *St. Adolphe* [2005] ECR I-0425.

²¹ Joined Cases C-192/95-C-214/95 *Conzani* and *Others* [1997] ECR I-0454, para. 37 and 38.

²² Case C-192/95 *Conzani* and *Others* [1997] ECR I-0454; Case C-202/94 *Morris & Simpsons* v *CEE* [2000] ECR I-0315.

²³ Joined Cases C-391/93 and C-403/93 *Maniaghi* v *Sto* [2000] ECR I-0327; Case C-443/94 *Taxi Drivers in the EU Group* v *Commission* v *United Kingdom* [2005] ECR I-0353.

²⁴ Case C-453/93 *Georgiadis v. Ombudsman* [2000] ECR I-0287; Joined Cases C-285/94-C-288/94 *Windsor* v *Windsor* and *Others* v *City of London* v *Commission* v *United Kingdom* [2005] ECR I-0451; *See* also S. Deakin, 'Scope of Damages and the Principle of Individual Liability' in *European Union: Development of the Principle of Effective Judicial Protection by the Court of Justice* (2006) 11 *ELRev*, 547.

²⁵ Case C-453/94 *Georgiadis* [2000] ECR I-0287; Case C-194/94 *Reed* v *Reed* [2000] ECR I-0473.

²⁶ Case C-453/94 *Georgiadis* [2000] ECR I-0287 (see what was then Article 11 EC); Case C-249/92 *Sto* [1993] ECR I-0425.

The third remedy is that of interim relief sought before national courts pending a reference to the Court of Justice. In *Factortame*, a challenge was made by a number of Spanish fishermen to the United Kingdom's Merchant Shipping Act 1988. This Act made it very difficult for non-British boats to fish in British waters by imposing, most notably, a series of residence requirements as a precondition. It was argued that this violated what is now Article 49 TFEU, the provision on freedom of establishment. The national court referred the matter to the Court of Justice. In the meantime, the House of Lords found that the applicants would suffer irreparable damage if interim relief was not granted. However, the House of Lords ruled that, notwithstanding this finding, English courts had no jurisdiction to suspend the Act as the remedy was at that time barred by statute. It referred the question of whether this rule of national law should be set aside in circumstances where its application would deprive a party of the enjoyment of rights derived from EU law. The Court of Justice had little difficulty in answering in the affirmative.

Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd* (1990) ECR I-2433

19. If accordance with the case law of the Court, it is for the national courts, in application of the principle of cooperation set down in Article [60] TFEU, to ensure the legal protection which persons derive from the direct effect of provisions of Community law ...
20. The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law ...
21. It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the merits of the rights claimed under Community law. It follows that a court which in these circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.
22. That interpretation is reinforced by the system established by Article [257] TFEU, whose effectiveness would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice.
23. Consequently, the reply to the question raised should be that Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which prevents it from granting interim relief is a rule of national law must set aside that rule.

There are two features of note in *Factortame*.

The first is that the particular remedy sought is drawn (in paragraph 20) from a new line of reasoning: that of securing the full effectiveness of EU law. It is the strongest assertion made

for pan-European remedies, as it suggests that wherever there is an EU right there should be a corresponding EU remedy. After *Factortame*, it looked for a while as if the Court might be moving to develop a fully fledged system of EU remedies²⁰ and a number of authors argued for this on the basis of the effectiveness of EU law alone, independent of any other doctrine, requiring the development of a system of substitute remedies applicable in national courts.²¹

The second issue is a corollary of this and questions, if this is so, what principles should govern the type of remedy provided. This goes above all to the law of remedies and not the uniformity of EU law. Its difficulties were illustrated in *Factortame*. The judgment is vague about when a national law should be suspended, suggesting that it should happen whenever the effectiveness of EU law is being undermined. By contrast, the Court has operated a different set of principles when relief is sought against a national law implementing an EU measure.²² In such circumstances, the challenge is seen as being, in reality, against the EU measure. Relief will only be granted if there is serious and irreparable damage to the applicant, and this must be weighed against other considerations such as the damage to the Union legal order and its financial interests. From the perspective of two applicants, whose interests have been damaged equally, this difference seems perverse.²³ It also illustrates the challenges for EU law in developing a system of remedies that is both uniform and sensitive to different circumstances.

There has, thus, been a firm move away from developing pan-European remedies in recent years. With the exception of the limited instances described above, EU law accepts that the development of remedies to secure direct effect is overwhelmingly a role for the national legal system. The Union will intervene only if there has been a severe failure of protection by the domestic system.

This was most strongly set out in *United Unibet*, a British gambling company, sought to advertise its Internet gambling services in the Swedish media. Some gambling activities contravened Swedish law. The Swedish authorities therefore obtained injunctions and initiated criminal proceedings against those who had provided advertising space to Unibet. No action was brought against Unibet itself. However, Unibet brought an action for a declaration that the Swedish law violated what is now Article 56 TFEU, which provides for the right to provide services in another Member State. In Swedish law, no possibility existed for an individual to bring a self-standing action for a declaration that a Swedish statute was illegal in the absence of a specific legal relationship. The Swedish court asked whether effective protection of an individual's rights in EU law required the creation of a new independent remedy permitting an action for a declaration that a national law is illegal.

²⁰ D. Curia and C. Morandau, 'Application and Enforcement of Community Law by the Member States: Action in Search of a "Last Guarantee" Script' in D. Curia and T. Szyszczak (eds), *Constitutional Governance of European Integration* (The Hague, Martinus Nijhoff, 1994).

²¹ See para. 21–2. See also Case C-204/90 *Sumitomo (Mitsubishi) v. Japan* [1991] ECR I-4161. For an excellent discussion of the debate see T. Twiss, 'Black White and Grey: Harmonicity of Directives Enforced' [2002] 21 *JELS* 327; J. Leckner and T. Twiss, 'Dilemma and Dilemma: The Role of Priority in Settling Harms of EU Law' [2006] 21 *JELS* 387; M. Douglas, 'When Worlds Collide: Competing Values of the Relationship Between Direct Effect and Supremacy' [2007] 44 *CMR* 94, 97.

²² Joined Cases C-410/88 and C-493/85 *Zuckerfabrik Südzucker AG and Zuckerfabrik Süsser* [1987] ECR I-415; Case C-445/93 *Atlanta Franchising GmbH v. Gröben* [1995] ECR I-2761; Case C-443/92 *T. Port* [1994] ECR I-4605; Joined Cases C-451/01, C-41/04, C-43/04 and C-154/04 *Maritime Maritime and Maritime Agencies v. Fawcett* [2005] ECR I-1011.

²³ This has already been considered in some detail at pp. 272–3.

Case C-432/03 *United v. Justinian* [2007] ECR I-2271

37. It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and which has also been reaffirmed by Article 41 of the Charter of Fundamental Rights of the European Union ...
38. Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law ...
39. It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law ...
40. Although the EC Treaty has made it possible in a number of instances for private persons to bring a self-standing action, where appropriate, before the Community Court, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law ...
41. It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law ...
42. Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection ...
43. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be as less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) ...
44. Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective ... of ensuring effective judicial protection of an individual's rights under Community law ...
45. In that regard, it is to be noted ... that the principle of effective judicial protection does not require it to be possible, as with a free-standing action which seeks primarily to dispute the compatibility of national provisions with Community law, provided that the principles of equivalence and effectiveness are observed in the domestic system of judicial remedies.
46. Firstly, it is apparent from the order for reference that Swedish law does not provide for such a free-standing action, regardless of whether the higher-ranking legal rule to be complied with is a national rule or a Community rule ...
47. It is necessary ... to establish whether the effect of the indirect legal remedy provided for by Swedish law for disputing the compatibility of a national provision with Community law is to render practically impossible or excessively difficult the exercise of rights conferred by Community law ...
48. In that regard, each case which raises the question whether a national procedural provision renders the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances ...

55. It is apparent from the order for reference that Swedish law does not prevent a person, such as Unibet, from disputing the compatibility of national legislation, such as the law on lotteries, with Community law but that, on the contrary, there exist various indirect legal remedies for that purpose.
56. Thus, first, the Högre domstolen states that Unibet may obtain an examination of whether the law on lotteries is compatible with Community law in the context of a claim for damages before the ordinary courts.
57. It is also clear from the order for reference that Unibet brought such a claim and that the Högre domstolen found it to be admissible.
58. Consequently, where an examination of the compatibility of the law on lotteries with Community law takes place in the context of the determination of a claim for damages, that action constitutes a remedy which enables Unibet to ensure effective protection of the rights conferred on it by Community law.
59. It is for the Högre domstolen to ensure that the examination of the compatibility of that law with Community law takes place irrespective of the assessment of the merits of the case with regard to the requirements for damage and a causal link in the claim for damages.
60. Secondly, the Högre domstolen adds that, if Unibet applied to the Swedish Government for an exception to the prohibition on the promotion of its services in Sweden, any decision rejecting that application could be the subject of judicial review proceedings before the Regeringsrätten, in which Unibet would be able to argue that the provisions of the law on lotteries are incompatible with Community law. Where appropriate, the competent court would be required to disapply the provisions of that law that were considered to be in conflict with Community law.
61. It is to be noted that such judicial review proceedings, which would enable Unibet to obtain a judicial decision that those provisions are incompatible with Community law, constitute a remedy which ensures effective judicial protection of its rights under Community law.
62. Moreover, the Högre domstolen states that if Unibet disregarded the provision of the law on lotteries and administrative action or criminal proceedings were brought against it by the competent national authorities, it would have the opportunity, in proceedings brought before the administrative court or an ordinary court, to dispute the compatibility of those provisions with Community law. Where appropriate, the competent court would be required to disapply the provisions of that law that were considered to be in conflict with Community law.
63. In addition to the remedies referred to in paragraphs 56 and 58 above, it would therefore be possible for Unibet to claim in court proceedings against the administrative or criminal proceedings that measures taken or required to be taken against it were incompatible with Community law on account of the fact that it had not been permitted by the competent national authorities to promote its services in Sweden.
64. In any event, it is clear from paragraphs 56 to 61 above that Unibet will be regarded as having available to it legal remedies which ensure effective judicial protection of its rights under Community law. It, on the contrary, as mentioned at paragraph 52 above, it was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law, that would not be sufficient to secure for it such effective judicial protection.
65. Accordingly, the answer to the first question must be that the principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Article 156 TFEU, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish.

The message of the judgment is twofold. First, there will only be Union review if there has been a very strong failure of protection of the applicant or she has not been given the same level of protection as that available in a comparable domestic action. There is a presumption of trust in the national system, which involves a presumption of good faith (the equivalent principle) and a presumption of capacity (the rules that redress can be impossible or excessively difficult to obtain). Secondly, the Court will look to the local legal context to decide whether these requirements have been fulfilled. This focus on local context emphasises the relevance of the Court to develop an autonomous system of remedies to be applied in domestic courts. For the absence of a particular remedy or procedure may indicate inadequate protection in one national legal context, but not in another. In such circumstances, it is difficult to develop general rules that all Member States must provide certain forms of redress.

(ii) Union oversight of local remedies in domestic courts

Notwithstanding that remedies are predominantly for the domestic system to decide, there must still be some standard which indicates when these remedies make the exercise of EU rights 'excessively difficult'. The Court's case law is quite intricate here. It is worth looking at its approach to substantive remedies, domestic procedural rules and limitations periods separately. For its degree of intervention has been different in each of these fields.

On remedies, the Court has said very little except where a Member State limits the level, or type of compensation in a *a priori* way. National measures which try to cap levels of compensation at very low levels are thus illegal,²² as are those which provide for only nominal compensation with no regard to the damage sustained.²³ Similarly, Member States are not allowed to prevent compensation for certain types of damage, notably economic loss.²⁴

The Court's case law has been more extensive on procedures. The central thread here is recent times has been that judicial protection involves certain minimum fundamental rights guarantees. In Unibet, the Court thus roots its reasoning in the judicial guarantees provided by the European Convention on Human Rights and the EU Charter of Fundamental Rights and Freedoms. First noted by the Court in the 1990s,²⁵ this reasoning has come to mean a number of things.

First, there is a requirement of judicial control so that national courts cannot be barred from considering directly effective provisions. A national requirement stating that certain forms of activities clearly falling within a Directive were not subject to judicial control was therefore found to be illegal.²⁶ The principle of effective judicial control also means that any decision of a professional or administrative body exercising an EU right must be subject to judicial review and, to enable that review to be meaningful, must state the reasons for the decision.²⁷

²² Case C-47/91 *Marschall v Land Nordrhein-Westfalen* [1993] ECR I-4149.

²³ Case C-45/92 *Van Gend & Loos v Land Nordrhein-Westfalen* [1994] ECR I-1151.

²⁴ Joined Cases C-45/91 and C-93/91 *Procureur du Roi v Dassonville and S v Secretary of State for Transport, ex parte Factortame (No. 3)* [1996] ECR I-1433.

²⁵ For example, see A. Arnulf, *The European Union and the Court of Justice* (2nd edn, Oxford, Oxford University Press, 2006) ch. 6.

²⁶ Case T-124/94 *Intervall v C.I.G. of Deutsche der Royal Dutch/Shell* [1996] ECR II-151.

²⁷ Case T-22/95 *Unilever v Hyman* [1997] ECR II-457.

Secondly, national courts must secure the proper conduct of the proceedings.³⁷ To that end, parties must be given a genuine opportunity to raise pleas based on EU law before them.³⁸ In addition to this, if parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it.³⁹ Parties must also be given sufficient time to prepare their defence and must be protected from abusive use of the litigation process by their adversaries.⁴⁰ Alongside this, in *Impact v M&A*,⁴¹ although the Court did not refer to this line of reasoning, it stated that individuals should be able to bring their action before a single court for a single claim, and cannot be required to bring different elements of it before different courts.⁴² The reasoning was that the procedural complications and cost thus imposed on parties made it excessively difficult for them to pursue their claim. Yet, this could be related to courts' duties to secure proper conduct of the proceedings.

There is a final category of cases, where the claimant has not pursued a claim within the limitation period set by national law or has not taken action to avert loss. In both instances, the Court of Justice has indicated that the Member State has to take action here provided it is reasonable. Reasonable limitation periods may be set⁴³ and Member States may impose requirements on claimants to mitigate the loss or exercise due diligence to avoid the loss.⁴⁴ Yet, as both limitation periods and due diligence preconditions can be used to bar access to courts, the Court has been willing to scrutinise the 'reasonableness' of national measures here in quite some depth.

With regard to limitation periods, the Court will look therefore at whether individuals did not bring a claim within the required time because of unconscionable behaviour by the defendant,⁴⁵ or the state,⁴⁶ which induced them to defer their action. In the field of consumer law, this has been taken a step further and also applied to failures to act, so that it is unreasonable for national limitation periods to apply if, in breach of EU legislation, vendors fail to tell consumers of their right to terminate contracts.⁴⁷ Dougan has thus talked of an estoppel principle where defendants guilty of some form of unconscionable conduct cannot benefit from national limitation periods. Yet, as he has noted, the doctrine is extremely vague as to the level of unconscionability required and the issue of when it is reasonable for the claimant to rely on it.⁴⁸ The Court of Justice will also look at the date from when the limitation period runs to ascertain that it does not start too early. It has thus held that limitation periods which begin from the day on which an anti-competitive practice is adopted might be unreasonable.⁴⁹ Similarly, it

has held that in the case of people employed on a series of short-term contracts, the limitation period begins from the end of the relationship, not the end of each of the contracts.⁵⁰

The Court of Justice's central concern about national conditions requiring an applicant to exercise due diligence to avert loss revolves around national stipulations that an individual cannot claim for loss which would not have arisen if she had acted earlier. Initially, the Court suggested that a national requirement of due diligence could legitimately demand that parties show that they had used all legal remedies available to them before claiming for loss.⁵¹ However, in *Moldanec-Siebert*,⁵² the Court considered a British requirement that a firm could not claim for interest suffered from a tax advantage illegally denied to it on the grounds that it should have claimed and then sued. It considered that the requirement of prior litigation made the exercise of the applicant's rights excessively difficult and was therefore illegal. The Court recognised these approaches in *Danke Siebert*, a case concerning a German ban on uncastrated male pigs from Denmark which had lasted six years before it was challenged.⁵³ The Court considered that national courts could impose a duty of due diligence and this could include a requirement for the applicant to show that she had availed herself in time of all the legal remedies available. However, this requirement would not be available if use of these remedies would give rise to excessive difficulties or could not reasonably be required.

5 DIRECT EFFECT AND SECONDARY LEGISLATION

The vast bulk of EU law is contained not in the Treaties, but in secondary legislation.⁵⁴ It was not surprising, therefore, that early on after the end of the transitional period, the question arose as to whether the different types of secondary legislation were capable of direct effect.

The most straightforward case was that of Regulations. Decreed to have general application, be binding and directly applicable in all Member States, Regulations are the closest thing the Union has to domestic statutes.⁵⁵ They were therefore held to be capable of direct effect in the same way as Treaty provisions in *Leontidis*.⁵⁶

International agreements made by the Union with non-EU states have also been held to be capable of direct effect. This will not be the case with all international agreements, however. The test is a two-tier one.⁵⁷ First, the wording, nature and purpose of the agreement is compared with some international agreements considered incapable of generating direct effect simply by virtue of their overall framework being too flexible and open-ended. Secondly, the specific provision is considered in the light of this. Only if it is sufficiently precise and unconditional will it be directly effective.

³⁷ Case C-112/93 *Archer v. Softex* [1995] ECR I-4553.

³⁸ Joined Cases C-412/95-C-415/95 *Van der Weert v. Minister van Landbouw, Natuur en Voedselzaken* [2000] ECR I-4333.

³⁹ Case C-275/01 *Stylianou* [2003] ECR I-3735.

⁴⁰ Case C-443/01 *Jeffery v. Borth* [2003] ECR I-9411.

⁴¹ Case C-54/04 *Impact v. M&A* [2006] ECR I-2442.

⁴² Case C-54/05 *Polubinski v. STS* [2007] ECR I-4325.

⁴³ Joined Cases C-46/93 and C-48/93 *Santerre de France v. Germany* [1995] ECR I-1729; Joined Cases C-95/97 and C-96/97 *Scorée v. Agence de la Santé - Office of General Judgment* of 11 June 2000.

⁴⁴ In *Leone*, an employer of a female employee is obliged to pay her a wage contingent on how long it was taking her to avert loss when she discovered the full *Leone* Case C-315/95 *Leone v. Jansing* [1997] ECR I-3135.

⁴⁵ Case C-337/90 *Servino v. Citta di San Marino* [1992] ECR I-1077; Case C-241/96 *Almonacid* [2000] ECR I-4415.

⁴⁶ Case C-481/95 *Heckler* [2001] ECR I-3945.

⁴⁷ Dougan, above n. 11, 380-2.

⁴⁸ Joined Cases C-255/04-C-258/04 *Maroufis Mavrouli and Others v. Lloyd Adriatic Assicurazioni SpA and Others* [2006] ECR I-5619. Much will depend on when the harm and identity was established in *Danke Siebert*, the Court indicated that what will be crucial is when the injured party became aware of the loss. Case C-464/04 *Danke Siebert v. Germany*, Judgment of 24 March 2006.

⁵⁴ Case C-101/88 *Prothen v. Webersaap* [1990] ECR I-1321.

⁵⁵ Joined Cases C-46/93 and C-48/93 *Santerre de France v. Germany* [1995] ECR I-1729.

⁵⁶ Case C-445/98 *Danke Siebert v. Germany*, Judgment of 24 March 2000.

⁵⁷ The different types of secondary legislation have been considered in Chapter 3. See pp. 91-102.

⁵⁸ Their implications were somewhat known as European law is the field of international Treaty, Article 100(1) CT. See also J. Wilson, 'Direct Effect and Direct Application: Two Distinct and Different Concepts in Community Law' [1973] 5 *GILLIES* 425.

⁵⁹ Case C-201/91 *Leontidis v. Hellenic Ministry of Agriculture* [1993] ECR I-333. See also Case C-26/93 *Demades v. Italy* [1994] ECR I-101.

⁶⁰ The standard formulation is Case C-264/96 *Maroufis Mavrouli v. Agnoloni* [1998] ECR I-3441; Case C-255/04 *Maroufis Mavrouli and Others v. Lloyd Adriatic Assicurazioni SpA and Others* [2006] ECR I-5619. This has led, in practice, to international agreements being given a wide variety of legal effects within EU law. P. Eekhout, *External Relations of the European Union: Legal Dimension* (Frederix, Oxford University Press, 2004) ch. 5.

3) Establishment of the direct effect of Directives and national resistance

The position of Directives is more complicated. Directives are binding upon Member States as to the result to be achieved but leave discretion to the national authorities over how to realise this. This could lead to a number of objections being made against Directives being capable of direct effect:

- The discretion given to Member States to implement Directives should result in individuals being able to derive rights only from the acts of national authorities themselves, and not from the Directives themselves.
- To grant direct effect to Directives would blur the distinction between Directives and Regulations, a distinction clearly spelt out in Article 249 TFEU, as both would have similar legal effect.
- In numerous fields, the Union enjoys a competence to adopt Directives but not Regulations, so that according to Directives full direct effect would amount to a blurring of the distinction between the two legal forms, allowing the Union in effect to legislate through the backdoor in areas that the Treaty had not permitted through the front.⁸⁴

Notwithstanding these arguments, the Court of Justice ruled in *Van Duyn* that Directives could generate direct effect.⁸⁵ *Van Duyn* was refused leave to enter the United Kingdom in order to take up an offer of a secretarial post at the Church of Scientology, as the UK government had imposed a ban on foreign scientologists entering the United Kingdom. She challenged the ban on the grounds, inter alia, that it breached Directive 64/221/EEC, which required that any ban be based upon the personal conduct of the individual. The Court considered that her association with the Church of Scientology met the requirements of the Directive. It considered, first, whether the Directive was capable of direct effect.

Case 41/74 *Van Duyn v Home Office* (1974) ECR 1337

12. ... It would be incompatible with the binding effect attributed to a Directive by Article [248 TFEU] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of action, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article [267 TFEU], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national court. It is necessary to ascertain, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals.

⁸⁴ On this debate see S. Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement in National Courts* (Hart, Oxford, Oxford University Press, 2005) 214–22, 221–2.

⁸⁵ Directives have also been held, on similar grounds, to be capable of having direct effect. See Case 5/72 *Prati v. Ministero Finanze* (1972) ECR 433.

This reasoning is remarkably weak. It starts from an a contrario position of whether there is any good reason why Directives should not have direct effect. The arguments that their binding nature and their effectiveness require that they be invoked in national courts are simply no arguments. For, quite simply, neither of these qualities prescribes the types of effects a Directive should have in a domestic legal system. Indeed, no less a figure than Federico Mancini, a former judge at the Court, has admitted that this judgment goes beyond the letter of Article 248 TFEU, the provision that sets out the central characteristics of Regulations and Directives.⁸⁶ More significantly, the ruling provoked a strong counter-reaction from both French and German courts. The view of the French Conseil d'Etat, the highest court of administrative law in France, can be seen in its judgment in the *Cohn-Bendit* case.⁸⁷ Cohn-Bendit was a German national who had been a leader of student disturbances in 1968. He was offered a job as a broadcaster in France. The French Minister of the Interior sought to deport him. Cohn-Bendit invoked Directive 64/221/EEC stating that it required that any decision be both formally reasoned and that the grounds for the decision be made known to the immigrant. As this had not happened, the decision was illegal, he argued.

Minister of the Interior v. Cohn-Bendit (1988) 1 CMLR 543

... It appears clearly from the provisions of Article [248 TFEU] that if Directives bind Member States with regard to the result to be achieved and if, in order to achieve the results which they define, the national authorities of Member States are under an obligation to adapt their legislative and regulatory provisions to the Directives which are addressed to them, these authorities remain the only competent authorities to determine the fact, to give to the implementation of these directives and to determine themselves, under the control of the national judicial authorities, their own method for achieving the effect in internal national law...

... Directives cannot be invoked by persons within the jurisdiction of those Member States in order to support a legal action undertaken against any administration the action with regard to an individual...

... It follows from the foregoing that M. Cohn-Bendit cannot hope to succeed in his argument... to annul the decision of the Minister of the Interior...

The Court of Justice tried to bolster its position by resorting to a new justification in *Ratti*.⁸⁸ The stopped argument. This stated that, as Directives impose a duty upon Member States to adopt the appropriate implementing measures by a certain date, it would be wrong for Member States to be able to rely upon and gain advantage through their failure to carry out this obligation. They are thus 'stopped' or prevented from denying the direct effect of Directives once the time limit for their implementation into national law has expired. Thus, in *Ratti*, a trader was prosecuted for not labelling his solvents in accordance with Italian law. He sought to rely upon two Directives. While the transitional period for one of these had expired, it had not for the other. The Court held that he could rely only upon the first Directive. The Member State was stopped by its failure to take the necessary implementing measures from denying this

⁸⁶ S. Mancini and E. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice* (1995) 1 CMLR 467, 477.

⁸⁷ Similar reasoning by the German Bundesverwaltungsgericht in *Lehmann v. Minister für Inneres* (1988) 1 CMLR 529.

⁸⁸ Case 142/78 *Adolfes v. Pohl* (1978) ECR 2429. See also Case 29/1 *Recherches Chimiques Belges* (1982) ECR 51.

Directive's direct effect. The other Directive was not directly effective, however, as the Member State was still within its period of grace. Directives will be directly effective, therefore, only from the end of the transposition period and, even then, will be capable of direct effect only if the Member State has failed to implement them or has not implemented them correctly. Where Directives are correctly implemented, individual rights flow from the national implementing provisions and not from the Directives themselves.

(i) Vertical direct effect of Directives

The estoppel argument has one important implication. As the direct effect of Directives is predicated on the 'fact' of the Member State, parties may invoke Directives against the state, but it does not follow from the estoppel argument that parties may invoke Directives in national legal proceedings against other private parties. In other words, the estoppel argument may be used to justify the vertical direct effect of Directives, but not their horizontal direct effect. This limitation was set out in *Marshall*. Marshall, a dietitian employed by a British health authority, was dismissed at the age of 61 on the ground that she had passed the pensionable age, which was, at that time, 60 years for women. A man would not have been dismissed at that age, but Marshall had no redress under the Sex Discrimination Act 1975 because of a blanket exclusion in that Act relating to terms and conditions relating to death and retirement. She claimed that there had been a breach of article 5 of the Equal Treatment Directive 76/207/EEC, which provides for equal treatment for men and women concerning the terms and conditions of dismissal.

Case 152/84 *Marshall v Southampton and SW Hampshire Area Health Authority* [1985] ECR 723.

46. With regard to the argument that a Directive may not be relied upon against an individual, the court emphasized that according to Article [225 TFEU], the binding nature of a Directive, which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person.
47. In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a Directive as against the State, he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. It is, nevertheless, necessary to prevent the State from taking advantage of its own failure to comply with Community law ...
48. The argument submitted by the United Kingdom that the possibility of relying on provisions of the Directive against the respondent (an organ of the State) would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the Member State concerned has correctly implemented the Directive in national law.

Marshall created a distinction between Regulations and Directives by holding that only the former were capable of horizontal direct effect. This addressed some of the initial concerns about the direct effect of Directives but created problems of its own. For one thing, it generated

uncertainty by begging the question as to which bodies formed part of the state and could consequently be sued. Defining the state can, to be sure, be something of a endless task. The multiple legal structures that form part of the state are frequently a consequence of historical happenstance, on the one hand, and ensuring remuneration of the place of public intervention, on the other.⁶¹

The question was addressed most clearly in *Forster v British Gas*, which indicated that the test for when a body would form part of the state was one of EU law not national law. Like *Marshall*, *Forster* was forced to retire at 60 years, whereas men could continue working until aged 65. She and four other women invoked the Equal Treatment Directive against her former employer, British Gas. The latter was at the time a nationalised industry. Its board members were appointed by a British minister who could also issue to the board various directions and instructions. In addition, the board was required to submit periodic reports to the Secretary of State.

Case C-158/89 *Forster v British Gas* [1990] ECR I-3313.

17. The Court further held that ... Marshall that where a person is able to rely on a Directive as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with Community law.
18. On the basis of these considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a Directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.
19. The Court has accordingly held that provisions of a Directive could be relied on against tax authorities ... local or regional authorities ... constitutionally independent authorities responsible for the maintenance of public order and safety ... and public authorities providing public health services ...
20. It follows that a body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals, is included ... among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon.

The test of whether a body is part of the state is a dual one. A body may be deemed to be part of the state on functional grounds. In subsequent cases, the Court has made clear that it is sufficient that an entity is carrying out a public service and, for that reason, has special powers. Its legal form and the presence of state control is not determinative. In *Vassallo*, the Court held, therefore, that a Directive could be invoked against an Italian hospital which, although it received public funding, was not run by the Italian state but was an autonomous establishment with its own directors. In that instance, it was crucial for the Court of Justice that the hospital, notwithstanding this, was still seen by the national court as part of the public sector and performing a public service.⁶²

⁶¹ On this see D. Gorton, 'The Problem of Governmental Delinquency: On Direct Effect of Directives in the Common Law Context' (1992) 15 *ELRev* 155, 156-9.

⁶² Case C-258/94 *Vassallo v Azienda Ospedaliera Regionale San Martino* [1996] *Collected Cases of the Grand Chamber* (2000) ECR I-7251.

In other cases, the Court will look at the degree of state control. It has thus held that any entity which forms part of, or is subject to the authority of, public authority forms part of the state, and can be sued. In *Rohrbeck*, two Austrian companies that were owned by a public authority and carried out landreclamation and gardening activities were held to be part of the state.³⁵ This was not done on the grounds that they carried out a social function (their mission was to employ people with disabilities) but purely by virtue of the local authority ownership.

The difficulties of definition were not the only problems generated by *Marshall*. Its style of analysis sits uncomfortably with *Defrenne v Sabena*.³⁶ The latter holds that obligations addressed to Member States lead, by virtue of their binding nature, to horizontal direct effect, as they require courts to apply EU law in cases before them, whereas in *Marshall* the opposite is stated. More practically, the rule in *Marshall* creates illogical outcomes: *Marshall* could rely on the Directive because she was employed by a public authority, a part of the state. Had she been employed by a private hospital, she would not have been able to rely on the Directive. Thus, a somewhat arbitrary, two-tier legal system has been created, in which parties have greater protection against public bodies than against private ones, notwithstanding the fact that their functional relationship with the two may be the same. Finally, *Marshall* rests on a false assumption. It is difficult to see how the estoppel argument can justify reliance on a Directive against a public health authority. For, certainly, the state is responsible for implementing Directives and public health authorities are a part of the state, but there is no sense in which public health authorities are responsible for transposing the terms of equal pay. Directives into national law – yet here, the Directive was held to be enforceable as against the authority.

(F) Debate about horizontal direct effect and incidental direct effect

For the reasons outlined above, *Marshall* came under withering attack from academic commentators³⁷ and Advocate General.³⁸ Undoubtedly, this provided the context for some of the doctrines subsequently developed, notably indirect effect and state liability. Yet, notwithstanding this, the Court has resolutely stated that Directives are not capable of horizontal direct effect as they cannot impose obligations on individuals.³⁹ However, the full force of this has been overshadowed by the phenomenon of 'triangular situations' or 'incidental direct effects'. The idea of a triangular situation is that a dispute between two parties may affect the legal rights of a third party or impose a financial burden on them. This creates a dilemma: *Marshall* holds, on the one hand, that an individual can sue the state and, on the other, that it shall not impose obligations on a private party. What happens when both are present?

³⁵ Case C-187/91 *Sonia Rohrbach v. Austria* [1993] ECR I-4025.

³⁶ Case C-256/96 *Defrenne v Sabena* [1996] ECR I-465.

³⁷ D. Gorton, 'The Effectiveness of Judicial Protection of Individual Rights' (1996) 27 *Common Law Journal*, 1. See also, 'Remarks After Marshall' [1996] 11 *Legal Studies* 651; A. Gough, 'Fifty Years and the End of Marshall' (1996) 57 *MLR* 459; D. Twiss, 'Incidental Effect of Directives: A Mixed Opportunity?' (1996) 19 *ELRev* 611.

³⁸ Advocate General Van Gerven in Case C-187/91 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4067; Advocate General Jacobs in Case C-187/90 *Van Duyn v. Home Office* [1994] ECR I-4077; and Advocate General Lenz in Case C-187/90 *Van Duyn v. Home Office* [1994] ECR I-4075.

³⁹ The principle of such is often seen as best where the government intervenes to argue against horizontal direct effect. See, e.g. C-187/90 *Van Duyn v. Home Office* [1994] ECR I-4075. For more recent examples see Case C-356/95 *Faccini D'Amore* [1997] ECR I-4131; Case C-415/96 *Grip* [1997] ECR I-4075; Case C-107/95 and C-108/95 *Werner v. Neufeldt and Others v. Deutschland* [1997] ECR I-4131.

This was first addressed head on by the Court in *Wells*.⁴⁰ The case concerned a challenge to a British government decision authorising a quarry in Wales to carry out mining operations opposite the claimant's house without its having carried out an environmental impact assessment as required by Directive 85/337/EEC.⁴¹ The British government argued that to allow the challenge would have the effect of the Directive denying the quarry its rights under English and Welsh law. The Court was dismissive of this, stating that a Directive's having adverse repercussions on a third party could not prevent its being invoked against the state.

The Court extrapolated on this in *Armon*. A telephone service provider challenged a decision by the German regulatory authority to allow Deutsche Telekom, the owner of the telephone network in Germany, to charge for use of that network. It was argued that two Directives precluded this charge where the network was run by a market dominant business, as was the case here, and the fees were unrelated to the costs of connection. Whilst the case was brought against the German regulator, its central target was, of course, Deutsche Telekom and the fees it was charging.

Joined Cases C-152/87-C-154/87 *Armon v Bundesrepublik Deutschland* [2008] ECR I-5959

35. It should be recalled that, according to settled case-law, a Directive creates of itself no direct obligations on an individual, but can only confer rights. Consequently, an individual may not rely on a Directive against a Member State where it is a matter of a State obligation directly linked to the performance of a specific obligation falling pursuant to that directive, as a third party ...
36. On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from relying on the provisions of a Directive against the Member State concerned ...
37. In the main proceedings ... the actions before the referring court have been brought by private persons against the Member State concerned, represented by the national regulatory authority which made the contested decision and has sole competence to set the rates of both the connection charge at issue in the main proceedings and the interconnection charge to which the latter is added.
38. It is clear that Deutsche Telekom is a third party in relation to the dispute before the referring court and is not capable of suffering adverse repercussions because it feared the connection charge at issue in the main proceedings and because, if that charge were removed, it would have to increase its own subscribers' rates. Such a removal of benefits cannot be regarded as an obligation falling on a third party pursuant to the Directives relied on before the referring court by the appellants in the main proceedings.

If *Armon* held that additional costs or removal of benefits for a third party were not a reason to prevent an individual invoking a Directive in national courts, it was still opaque about when Directives can be invoked in national courts.⁴² Nyssens and Larchoff suggest that there are three circumstances. The first is when a Directive entitles an individual to require the Member State to do something but this places a burden on another party. This is uncontroversial. It happens when individuals invoke Directives requiring local authorities to set things out properly

⁴⁰ It had been touched on but not addressed in a number of cases, with the first being Case C-41/91 *Commission v. Germany* [1993] ECR I-4189. For a review of these see R. Nyssens and A. Larchoff, 'Direct Effect of Directives in Triangular Situations' (1994) 17 *ELRev* 201; D. Gough, 'Triangular Situations: The Group of States for the Control of Horizontal Direct Effect of Community Directives' (1997) 11 *EPJ* 545; P. Bechet and A. Gough, 'The Direct Effect of European Directives Towards the State Act' (2007) 11 *CEIL* 401.

⁴¹ Case C-261/95 *R v Secretary of State for Transport, Local Government and the Regions, ex parte Mifsud* [1997] ECR I-4223.

⁴² On this see Advocate General Maduro in Case C-415/95 *Werner v. Neufeldt and Others v. Deutschland* [1997] ECR I-4131, para. 120-3.

for public tender. Such tenders require significant information from other companies and are costly.⁷¹ The second is where Directives require states to impose a burden on third parties whilst not allowing any third party the symmetrical right to require that they do so. Nevertheless, any such third party might be able to invoke the provisions of a Directive in a national administrative court.⁷² This was the situation in *Wells and Arco*. Neither of the applicants had an *ex ante* right to compel a decision to be taken, but once one was taken in breach of the Directive which affected their interests they were able to challenge it. The third situation is the most controversial. It occurs where a Directive grants a party a legal right to shield itself from certain activities by the Member State. In defiance of this, the Member State engages in those activities in such a way that they create rights in national law for third parties. Can the Directive be invoked by the individuals in litigation with these third parties?

This happened in *CIA*. *Signalson* and *Securitel* sought to restrain *CIA* Security from marketing an alarm system on the grounds that it had not received authorisation as required by Belgian law. This requirement of prior authorisation breached EU law, however, as, under Directive 83/189/EC, it should have been notified to the Commission. This had not happened and *CIA* therefore argued that the national law was inapplicable.

Case C-134/94 *CIA Security International v Signalson & Securitel* [1995] ECR I-1201

44. That view cannot be adopted. Articles 8 and 9 of Directive 83/189 lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles may be relied on by individuals before national courts.
45. It remains to examine the legal consequences to be drawn from a breach by Member States of their obligation to notify and, more precisely, whether Directive 83/189 is to be interpreted as meaning that a breach of the obligation to notify, constituting a procedural defect in the adoption of the technical regulations concerned, renders such technical regulations inapplicable so that they may not be enforced against individuals.
46. The German and Netherlands Governments and the United Kingdom consider that Directive 83/189 is solely concerned with relations between the Member States and the Commission, that it merely creates procedural obligations which the Member States must observe when adopting technical regulations. Their competence to adopt the regulations in question after expiry of the suspension period being, however, unaffected, and finally, that it contains no express provision relating to any effects attaching to non-compliance with those procedural obligations.
47. The Court observes first of all in this context that none of those factors prevents non-compliance with Directive 83/189 from rendering the technical regulations in question inapplicable.
48. For such a consequence to arise from a breach of the obligations laid down by Directive 83/189, an express provision to this effect is not required. As pointed out above, it is undisputed that the aim of the Directive is to protect freedom of movement for goods by means of preventive control and that the obligation to notify is essential for achieving such Community control. The effectiveness of Community control will be the more greater if the Directive is interpreted as meaning that breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals.

⁷¹ Case 132/83 *French Dataflow v Algemein* [1989] ECR I-1031.

⁷² *Myriam and Cedric*, above, n. 68, 472.

Whilst *CIA* was decided prior to *Arco*, the latter reinforces it conceptually. If a Directive grants directly effective rights, no enforcement actions can be taken using state apparatus, be it through the courts, the administration or the police, to rob the individual of the benefit of those rights. It does not matter whether it is another private party aiding the state to take this action or whether the administration does it at its own behest. Turned around, this means that whilst an individual cannot lodge a claim against another party involving a Directive, by virtue of the lack of horizontal direct effect, she can always use the Directive as a shield to protect herself from actions brought against her by other parties.

If this does not result in Directives placing obligations on private parties, it does result in their affecting the latter's entitlements and rights significantly, and the question has to be asked how this is consistent with the ethos of *Marshall*, which is that states should bear the burden of unimplemented Directives as these are addressed to them.⁷³

The other challenge is a substantive one. It is that of 'regulatory gaps'. If a Directive can be invoked to prevent a national law being applied but cannot be fully applied itself, this leaves a 'lawless' situation, where the public good at the heart of the dispute is unprotected. This arose in *Leemans Lemmers* was breathalysed by Dutch police, who used a breathalyser conforming to Dutch regulations, which had not been notified to the Commission as required by Directive 83/189/EC.⁷⁴ He challenged his resulting conviction on the basis that a lawful test had not taken place, as the regulations authorising use of this breathalyser were illegal. The Court found that the Dutch regulations could be enforced against *Leemans*. It observed that the purpose of the Directive was to facilitate free movement of goods. Whilst this required that an unnotified technical regulation would be unenforceable wherever it hindered the use or marketing of a product, it did not render regulations inapplicable where this was not the case. *Unilever* elaborated on this.⁷⁵ *Unilever* had delivered some Italian olive oil to Central Food. A regulation of the contract was that the oil should be labelled in accordance with Italian law. Central Food refused to accept the oil as it did not comply with a 1958 Decree stating that olive oil could not be termed 'Italian' unless the entire cycle of harvesting, production, processing and packaging had taken place in Italy. This Decree had been notified to the Commission, but had been less quickly implemented. The Court stated that this legal implementation meant that the law in question would be unenforceable against individuals if it hindered the marketing or use of a product. This was the case here. Marketing was hindered not merely where a good was directly prevented from being sold by a technical regulation but could also occur indirectly, where a regulation was used to allow a party in civil proceedings to revoke a contract and thereby prevent a good from being marketed.

These two cases limit but do not resolve the problem of the regulatory gap. To be sure, claims must be brought with the purpose of marketing goods. Yet, even where this is the motivation for the litigation, there is still the problem that public goods, such as protection of the consumer or the environment, will be unprotected once the national measure is declared invalid. In *Unilever*, for example, it is possible to argue that an effect of the judgment was to weaken consumer protection by leaving the consumers of this oil uninformed as to its origin.

⁷³ S. Weatherill, 'Effect of Directive 194 Breach of Contract' (2003) 26 *ELRev* 177, 182-3.

⁷⁴ Case C-328/87 *Leemans* [1989] ECR I-3711.

⁷⁵ Case C-44/94 *Unilever SpA v Central Food SpA* (2000) ECR I-1513.

6 INDIRECT EFFECT

Direct effect has, in the last twenty years, become merely one route amongst others through which individuals may invoke EU law in national courts. It is arguable, indeed, that it is no longer even the predominant doctrine in that regard – this may be the doctrine of indirect effect. As the development of direct effect has faltered, the doctrine of indirect effect has expanded. Back in 1995, an empirical study found that it was deployed more widely in British courts than direct effect.¹⁶ Despite the greater academic attention that is generally given to direct effect, it has therefore been argued persuasively that indirect effect is currently the main form of ensuring effect of Directives whether correctly, incorrectly or not transposed at all.¹⁷

□ Arrival of indirect effect

Indirect effect began inconspicuously in *Van Duyn*.¹⁸ Two female social workers were refused employment in a German prison by virtue of their sex. They sued in the German labour court relying on the German law implementing Directive 75/100/EEC, the Equal Treatment Directive. Under that, the German court could only order that they be compensated for such losses as they had suffered as a result of applying for the positions which had been denied them. In this case the *travel* expenses to the interviews. The national court referred the question of whether such a restriction in the availability of compensation was compatible with EU law, in particular article 6 of the Directive, which required persons who considered themselves wronged to be able to pursue their claims by judicial process. This relevant provision was unconditionally clear and unconditional to satisfy the test for direct effect. However, the Court of Justice ruled that this did not necessarily mean that the Directive could be of no assistance to the claimants.

Case 14/83 *Van Duyn v. Kraemann* [1984] ECR 1621

22. It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the Directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledges that those candidates have rights of which they may avail themselves before the courts.
23. Although ... the implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to pursue the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.
24. In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the Directive...

¹⁶ D. Gellens, 'The Possibility of EU Judicial Politics within the United Kingdom' (2000) 23 WEP 169, 182.

¹⁷ G. Refin, 'The Doctrine of Guidance: Interpretation: Marleasing Legal Uncertainty' (2001) 23 JELS 189, 206.

¹⁸ See also Case 79/83 *Marleasing* [1984] ECR 1131.

25. ... The Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article 100/EEC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, binding on all the authorities of Member States including, for matters within their jurisdiction, the courts, it follows that, in applying national law and in particular the provisions of national law specifically introduced in order to implement Directive 75/100, national courts are required to interpret their national law in the light of the wording and purpose of the Directive...

For many years, it seemed the application of the doctrine of indirect effect – the duty to interpret national law in accordance with EU law – was quite limited. Following *Van Duyn*, the doctrine only applied where national laws were implementing Directives and a provision was highly ambiguous. However, such an interpretation was scotched by the Court in its ruling in *Marleasing*. *Marleasing* brought an action against *La Comercial* in order to have the latter's articles of association declared void as having been created for the sole purpose of defrauding and evading creditors. The Spanish Civil Code stated that contracts made with 'lack of cause' were void. Directive 68/151/EEC contained an exhaustive list of reasons under which companies could be declared void. Avoidance of creditors was not on that list.

Case C-106/88 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1989] ECR I-4135

26. ... as the Court pointed out in its judgment in *Van Duyn* ... the Member States' obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article 100/EEC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, binding on all the authorities of Member States including, for matters within their jurisdiction, the courts, it follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 100/EEC.

Marleasing expanded the law of indirect effect in two ways. First, it required all national legislation to be interpreted in the light of EU law, irrespective of whether it is implementing legislation or not, and irrespective of whether it was enacted prior or subsequent to the provision of EU law in question. In this instance, the Spanish Civil Code, which contained civil/commercial law, had to be interpreted in the light of a subsequent piece of EU company legislation. Secondly, it strengthened the national courts' interpretative duty. As Davies and Ewing observed 'it is no longer sufficient for a national court to turn to Community law only if the national provision is "ambiguous". Its priority must be to establish the meaning of the Union obligation and only then to consider whether it is possible to achieve the necessary reconciliation with the national law'.¹⁹

The *Marleasing* judgment narrowed the gap that the Court of Justice had created in *Marshall*,²⁰ where it held that Directives only had vertical direct effect. For the expansion of the duty of

¹⁹ D. Davies and B. Ewing, 'The Duty of National Courts to Interpret Provisions of National Law in Accordance with Community Law' (1991) 10 ELJ 111, 113.

consistent interpretation allowed Directives to govern the substance of disputes between private parties. As long as there was a national law which allowed some room for interpretation, it could be manoeuvred to comply with the Directive, thereby allowing it to determine the dispute indirectly via the medium of the national law. It is to be emphasised, therefore, that *Marleasing* concerned a dispute between two private parties. While *Marleasing* allows for Directives to be involved in the adjudication of relations between private parties, the judgment does not go so far as to insist that Directives should govern such relations in an exclusive manner. Instead, it creates a new form of what might be termed 'inter-legality', in which a mix of national and EU law regulates a dispute, with the EU element opening up adjudication to wider norms and concerns, whilst the national law element ensures that the local traditions and trajectories surrounding the dispute are not overturned.

M. Avretz, 'In-Between Worlds: Mediating and the Emergence of "Strategic" Legal Reasoning' (2005), 11 *European Law Journal* 765, 781–2

- The internal culture-specific constraints on national adjudication remain unaffected by the requirement for interpretation in conformity with Directives: oral specificities of the various legal discourses are not pushed aside, say, by rational arguments that in the end are always weaker than the constraints of organically grown legal cultures. For ultimately it is the legal policies present in the private law of the individual Member States that act as 'regulators' in the process of incorporating Community private-law positions into the national legal discourses. They are ensuring that two separate sets of norms do not emerge in Member States' civil legal systems – one deriving from the historical trajectory of the State concerned, the other dictated by the Community. They alone can offer guarantees for a Community private law integrated into the national legal culture, and this fact immediately makes it clear how they ensure the evolutionary capacity of national law in the face of the European Community: by on the one hand – as artificial combinations of 'flexible' and 'fixed' control parameters – blocking the propagation of the 'permutations' from European law throughout the national private law, without on the other losing the national law's responsiveness to EC law.

Although some have argued that *Marleasing* created a skilful new balance between EU and national law, others have criticised the judgment for generating considerable uncertainty.³⁰ The sources of this uncertainty are twofold. The first stems from the strength of the duty of interpretation. It is clearly strong but the extent of that strength is uncertain. It is something stronger than giving effect to EU law-compliant interpretations when there are two equally plausible interpretations. It is something less than requiring national law to be overridden. Between these poles, however, it is very unclear whether the national judge is to give more weight to the national law or EU law provisions in question. The second derives from the duty to interpret the national law in the light of all EU law. Put simply, there is so much of the latter and it is so wide-ranging that it is very difficult for national lawyers or judges to consider any Union provision that might cut across some national dispute in an incidental manner.

The risks posed to legal certainty have been partially recognised by the Court of Justice. It has held that indirect effect does not require *ex ante* interpretations of national law. That is to say, the strength of the interpretive obligation is not so strong as to require a provision of

national law to be given a meaning that contradicts its 'ordinary' meaning.³¹ Furthermore, the Court has been particularly wary of using the doctrine in the field of criminal law, where the liberties of the individual are at stake, or where it seems that the effect will be to impose strong obligations on individuals. In *Accord*, the Court stated:

The obligation of the national court to refer to the content of the Directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a Directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the Directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that Directive's provisions.³²

Notwithstanding this, the Court has continued to regard indirect effect as being as important as ever and, in recent years, as illustrated below, it has sought to expand it.³³

(ii) When does the duty of indirect effect arise?

The date from when direct effect takes effect varies. For Regulations, it is stated in the Regulation or, failing that, twenty days after publication.³⁴ In the case of Directives, we saw that a Directive may have direct effect only after the date has passed by which Member States are required to transpose it into national law, and only if they have failed to do so.³⁵ However, the basis for indirect effect is different from direct effect. In the case of Directives it derives not from the state's failure to comply with EU law but rather from the duty in what is now Article 4(2) TEU to take all measures to ensure compliance with EU law.³⁶ This begs the question as to whether there is a different starting date for indirect effect.

This became an issue in *Mangold*.³⁷ In 2000, Mangold, who was 56 years old, entered into an eight-month fixed-term employment contract with Helm, a German lawyer. He subsequently challenged the fixed-term nature of this contract on the grounds that it contravened Directive 2000/78/EC which, *inter alia*, prohibited discrimination on grounds of age. The basis was that Germany introduced a 2002 law which only allowed fixed-term contracts for workers younger than 51 years old in exceptional circumstances, whereas this restriction did not apply for older workers. Although adopted in 2000, the Directive was not due to be transposed until December 2003, and Member States could even request (provided they made annual reports to the Commission) that transposition not occur until December 2006. The German government argued that it had a freedom, and that the Directive could not generate legal effects, prior to that date. The Court disagreed. It stated that it was the duty of the national court to set aside

³⁰ Most notably, Case C-134/04 *Wagner-Meland v. Fines de Commerce Salmstad* [2005] ECR I-4911.

³¹ Case C-154/95 *Arany* [1996] ECR I-4701, para. 42. See also Case C-314/05 *Depled v. Southampton* [2007] ECR I-5755. On this see P. Craig, 'The Legal Effect of European Policy, Rules and Directives' [2005] 34 *Colinva* 284, 284–4.

³² Affirmation here included Joined Cases C-261/02–C-461/02 *Prigge and Others v. Deutsche Aero Lines* [2004] ECR I-4435; Case C-112/04 *Adeneler and Others v. Elliniki Ellinika Synallagma* [2006] ECR I-4051.

³³ Joined Cases C-319/07–C-392/07 *Angelidis v. OMAK*, Judgment of 10 April 2008. For analysis, see S. Dukes, 'Twenty Years after Van Gend: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' [2008] 30 *ELRev* 318.

³⁴ Article 297 TFEU.

³⁵ See pp. 287–8.

³⁶ Cf. also see Advocate General Kokott in Case C-112/04 *Adeneler and Others v. Elliniki Ellinika Synallagma* [2006] ECR I-4051, para. 47–50.

³⁷ Case C-144/04 *Mangold v. Helm* [2005] ECR I-9581.

³⁸ G. de Burca, 'Giving Effect to European Community Directives' [1992] 55 *MEL* 315.

any provision of national law which conflicted with the Directive even if the time limit for transposition had not passed. Its reasoning was twofold. First, it argued that Member States were under a duty to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by the Directive. This was reinforced by the terms of the Directive, which provided for an exceptional period for transposition to enable progressive realisation of the measures necessary to meet its objectives. The 2001 law, insofar as it exacerbated age discrimination, violated this duty. Secondly, the Directive gave effect to a fundamental principle of EU law, that of non-discrimination. Observance of this principle could not be conditional simply upon expiry of a transposition period. The judgment was heavily criticised both within the Court and by academics for its *equus* reasoning.¹¹¹ It was unclear whether the judgment's reasoning was confined to the particular Directive in question or what the underlying basis was for this new obligation.

The position was clarified in *Adeneler*. Eighteen employees were on a variety of fixed term contracts with the Greek milk board, which came to an end between June and September 2000. Greece was due to have implemented Directive 1999/70/EC on fixed term work by July 2002, which provided that fixed term contracts would only be allowed if there were objective reasons. This had been interpreted to mean that there had to be precise and concrete circumstances which provided a need for a fixed term contract. The Greek court asked from what moment a national court was required to interpret the Directive.

Case C-212/04 *Adeneler and Others v ELGO (Ελληνικός Οργανισμός Γαλακτός)* 2005 ECR I-6057

112. With a view, more specifically, to determining the date from which national courts are to apply the principle that national law must be interpreted in conformity with Community law, it should be recalled that that obligation, arising from the second paragraph of Article [30] TEU, the third paragraph of Article [258] TFEU, and the directive in question itself, has been increased in particular where a provision of a directive lacks direct effect, be it that the relevant provision is not sufficiently clear, precise and unconditional to produce direct effect or that the dispute is exclusively between individuals.
114. Also, before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law.
115. Accordingly, where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired.
116. It necessarily follows from the foregoing that, where a directive is transposed belatedly, the date on which the national implementing measures actually enter into force in the Member State concerned does not constitute the relevant point in time. Such a solution would be liable seriously to jeopardise the full effectiveness of Community law and its uniform application by means, in particular, of directives.
117. In addition, ... it should be pointed out that it is already clear from the Court's case law that the obligation on Member States under the second paragraph of Article [30] TEU, the third paragraph of Article [258] TFEU and the directive in question itself, to take all the measures necessary to achieve the

¹¹¹ See different views on *A. Dashwood, From Van Duyn to Marshall via Marleasing: Direct Effect in Absentia?* (2006-07) 34 *CRIMS* 11; C. Twiss, *Forcing Member States to Comply with EU Directives: Harsh and Direct Effect – A Line of Delineating Coherence?* (2007) 44 *ELJ* 1173.

result prescribed by the directive is binding on all national authorities, including, for matters within their jurisdiction, the courts.

118. Also, directives are either (i) published in the Official Journal of the European Communities in accordance with Article [258] TFEU, and, in that case, enter into force on the date specified in them or, in the absence thereof, on the 30th day following that of their publication, or (ii) notified to those to whom they are addressed, in which case they take effect upon such notification, in accordance with Article [259] TFEU.
119. It follows that a directive produces legal effects for a Member State to which it is addressed – and, therefore, for all the national authorities – following its publication or from the date of its notification, as the case may be.
120. In the present instance, Directive 1999/70 states, in Article 3, that it was to enter into force on the day of its publication in the Official Journal of the European Communities, namely 10 July 1999.
121. In accordance with the Court's settled case law, it follows from Article 4(3) TEU, in conjunction with the third paragraph of Article [258] TFEU and the directive in question itself that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it, in this connection it is immaterial whether or not the provision of national law at issue which has been adopted after the directive in question entered into force is concerned with the transposition of the directive.
122. Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect, the obligation to refrain from taking measures as set out in the previous paragraph, applied just as much to national courts.
123. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

There is, thus, a direct obligation on national courts. The full force of the duty to interpret only takes effect from the date of transposition. Prior to that, there is a more limited duty. National courts must interpret national law in such a manner that it does not compromise realisation of a directive's objective from the end of the transposition period. The meaning of this obligation is very unclear. In *VTB-VAB Advocate General Trstenjak* stated:

... if the national court cannot quell the suspicion that a piece of national legislation is liable to prevent the achievement of the result prescribed by a directive which is imminently due to be implemented once the period for transposition has expired, it is obliged to take the necessary measures even before the transposition phase has ended. Such measures also include, in principle, the possibility of disapplying the offending national law if an interpretation of the current law in conformity with the directive is out of the question.¹¹²

Adding, however, a national court to engage with a particular form of interpretation on the basis of a suspicion is a real threat to legal certainty. The concrete circumstances in which this will occur will inevitably always be difficult to ascertain and the strength of interpretive obligation is extremely tenuous. It is difficult to reconcile this with the Court's repeated concern that

¹¹² *Advocate General Trstenjak*, in *VTB-VAB v Tootal*, Judgment of 13 April 2006, para. 52.

Directives should not place obligations on individuals. For the latter now live under a shadow where they do not know what obligations Directives impose, and this can only have a chilling effect on their behaviour.

(iii) Range of measures that national courts must take into account

A final issue to be addressed is the question of which instruments national courts are required to consider. It might have been thought in the wake of *Van Gend en Loos*, that national courts would be required to consider only such instruments as may be directly enforceable in national courts (i.e. Treaty provisions, Regulations, Decisions and Directives). As early as 1959, however, the Court established that the duty of consistent interpretation was a free-standing principle in its own right. It may have been developed in the context of finding ways to make Directives effective before national courts, but from as early as 1959 that has not been its sole purpose. In *Grimaldi*,³⁸ the Court held that national courts were to take account not just of 'hard law' but also of legally non-binding recommendations.

More dramatic was the Court's ruling in *Papino*, which controversially extended indirect effect to the third pillar of the European Union.³⁹ *Papino* arose out of a dispute relating to the interpretation by an Italian criminal court of Council Framework Decision 2003/226/JHA, concerning the safeguards afforded to vulnerable victims when they appear as witnesses in criminal proceedings. Framework Decisions were pieces of legislation that existed under the third pillar of the original TEU. They were to be binding upon the Member States as to the results to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.⁴⁰ The Court noted, notwithstanding this, that the language of this provision is similar to that used by what is now Article 288(3) TFEU for Directives. The British and Italian governments argued, however, that this could not be the case as there was no third pillar equivalent of the duty of cooperation which was then set out in Article 10 EC, and is now contained in Article 40(1) TEU. The Court rejected this. It noted that what is now Article 1(3) TEU stated that the Treaty marked a new stage in the process of ever closer union and that the task of the Union was to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples. It stated this would be difficult if the principle of loyal cooperation, did not apply to the third pillar. National courts were therefore under an obligation to interpret national law in the light of Framework Decisions.

With the coming into force of Lisbon, *Papino* must be seen in a new light. Framework Decisions no longer exist, and there is no pillar structure in the previously understood sense. The decision's significance lies in the reasoning used. It provides an alternate basis for indirect effect: the general obligation resulting in the objective of ever closer union set out in Article 1(3) TEU. This is intriguing and concerning. The language is vague and open-ended. It suggests that the duties of indirect effect might simply be part of a parcel of duties on Member States which is continually evolving and thus never fully known.

³⁸ Case 127/88 *Grimaldi* v *France* (for *Milkmaid* Provisions) [1989] ECR I-2601.

³⁹ Case C-105/00 *Papino* [2001] ECR I-5245. For analysis see, for example, 'Extending Indirect Effect to the Third Pillar: The Significance of *Papino*' [2001] 30 *ELRev* 319; S. Peck, 'Sovereign Rights: The Courts' Activist Protection in the Third Pillar After the *Papino* and *Singh* Judgments' [2001] 44 *Oxford J.L.* 141; E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the *Papino* Judgment' [2001] 3 *European Constitutional Law Review* 5.

⁴⁰ Article 1(4)(3) TEU. On this see A. Tizzano, 'On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-Executing Instruments' [2004] 14 *ELJ* 672.

7 STATE LIABILITY

(i) Arrival and challenges of state liability

The doctrine of indirect effect only partially addresses the 'gap' left by Directives only having vertical direct effect. There are two circumstances where it will not come to the rescue of individuals granted entitlements by Directives. One is where there is no national measure to interpret, and the other is where the national legislation contradicts the Directive. In each instance there is a problem, as there is nothing to interpret – so the individual cannot be helped – but these cases represent the most flagrant violations of EU law by Member States.

This scenario arose in *Francovich*. Italy had persistently failed to implement the terms of Directive 80/267/EEC, a measure that was intended to guarantee to employees a minimum level of protection under Community law in the event of the insolvency of their employer. The Directive provided in particular for specific guarantees of payment of unpaid wage claims. It should have been implemented by October 1983, and in 1987 the Commission brought a successful enforcement action against the Italian government for its failure to transpose the Directive.⁴¹ Even after the judgment, there was still no transposition. *Francovich* concerned an action by thirty-four employees, who were owed back-pay by employers that had now gone bankrupt, against the Italian state for the losses they had suffered as a consequence of its failure to transpose the Directive.

Joined Cases C-6/90 and C-9/90 *Francovich and Bonifazi v Italy* [1991] ECR I-5357

31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. These rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions...
32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals...
33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.
34. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.
35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

⁴¹ Case 22/87 *Commission v Italy* [1988] ECR I-2423.

Both Granger's and Harlow's work assumes that formal legal structures lead to particular forms of enforcement. More recent work challenges this and argues that even when these are in place, widespread variation takes place. A series of case studies carried out by Stephenie of public interest litigation in relation to nature protection Directives in the Netherlands, France and Germany found widespread variation.¹³² He concluded that decentralised enforcement relied on a series of features, which were rarely all in place at the same time. These included organisational capacity of groups to litigate, effective access to courts unimpeded by standing rulings or financial restrictions, willingness by courts to give full interpretations, and preparedness of the administration to implement court rulings fully and quickly. In very few states can all these matters be taken for granted.

(ii) Conditions of liability

Francovich only considered the narrow circumstances of when a Member State had failed to transpose a Directive. Its language was wider than that, and this left open the question of when a Member State would be held liable for breaching EU law: a question that exercised all the national governments in the run-up to the Treaty of Amsterdam.¹³⁴ This was addressed in *Brasserie du Pêcheur and Factortame II*. These joined cases were referred in 1991 but, aware of their sensitivity, the Court did not decide them until 1996. *Brasserie du Pêcheur*, a French firm, had been forced to discontinue exports of beer to Germany in 1981 by virtue of a German 'purity law' which prohibited beers being marketed as beer if they contained additives. This law was declared illegal in 1987 on the ground that it contravened Article 34 TFEU, the provision outlawing quantitative restrictions or measures having equivalent effect on the free movement of goods.¹³⁵ *Brasserie du Pêcheur* sought compensation of DM1,500,000 for the loss of sales between 1981 and 1988. The facts of *Factortame* were given above.¹³⁶ After the system of registration contained in the Merchant Shipping Act 1988 had been declared illegal, the applicants claimed for damages against the British government.

Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame* (No. 3) [1996] ECR I-1029

39. Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage...
39. In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 10(1) TFEU...
40. In addition, ... it is pertinent to refer to the Court's case law on non-contractual liability on the part of the Community.

¹³² Z. Szeperow, *The Judicial Enforcement of EU Law through National Courts: Frameworks and Gaps* (2005) 14, 209, 218.

¹³⁴ See, in particular, the Memorandum to the 1994 Intergovernmental Conference by the United Kingdom to the Court of Justice, London, 200, 1996 I.

¹³⁵ Case 175/84 *Commission v Germany* (Greena Deal) [1987] ECR 1227.

¹³⁶ See p. 275.

41. First, ... Article 134(1) TFEU refers as regards the non-contractual liability of the Community, to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.
42. Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.
43. The system of rules which the Court has worked out with regard to Article 134(1) TFEU, particularly in relation to liability for legislative measures, takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the laws and, more particularly, the margin of discretion available to the author of the act in question.
44. Thus, in developing its case law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.
45. The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers...
46. That said, the national legislature – like the Community institutions – does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich* relates, Article 125 TFEU places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a Directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the member State's liability for failing to transpose the Directive.
47. In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.
48. In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of fisheries, specifically beer, in the absence of Community harmonisation. The national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.
49. As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, is within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.
50. Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51. In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties...
54. The first condition is manifestly satisfied in the case of Article [24 TEU]. The relevant provision in Case C-46/93, and in the case of Article [49 TFEU], the relevant provision in Case C-46/93...
55. As to the second condition, as regards both Community liability under Article [240 TFEU] and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits of its discretion.
56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the commission, and the adoption or retention of national measures or practices contrary to Community law.
57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settlement of case law of the Court on the matter from which it is clear that the conduct in question constituted an infringement...
65. As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.
67. As appears from ... *Francovich*, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation...
68. Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained in as to ensure the effective protection for their rights.
69. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

The Court's judgment suggests a distinction between instances where Member States have some discretion and contexts where they do not. In the latter contexts, three criteria must be met for liability:

- the provision must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties. In the former context, there is a

requirement for the breach to be sufficiently serious. It suffices that the provision be intended to confer rights and that there be a causal link between the breach of EU law and the individual damage sustained.

Yet, in determining whether a breach is sufficiently serious to justify liability, the Court will look at the degree of discretion afforded by EU law. If there is little or no discretion, the Court will treat the breach as sufficiently serious to incur liability. This has led to the categories being fixed in recent years. It appears Member States will be deemed to have no discretion where they fail to transpose a Directive in any way at all.¹⁰⁷ In recent years, the Court has indicated these are not the only circumstances. In *AGM-COS.MET*, the Court held that a failure by the Finnish government to let machines, which complied with EU law, onto its market led to liability without the need to consider the question of the seriousness of the breach. This was because the relevant EU Directive contained a market access clause requiring the machines to be allowed to be marketed, and this gave the Member States no discretion.¹⁰⁸ By contrast, in *Synthor*, the British government was held liable for refusing to recognise the marketing authorisation of a drug certified by the Dutch authorities on the ground that the breach was a sufficiently serious one.¹⁰⁹ It was held that it was sufficiently serious as the provision allowed states to discretion to refuse initial recognition unless they followed a special procedure which had not been invoked by the British government in that case.

In such circumstances, it makes more sense to consider the precise circumstances where liability will be found. *Francovich* and *Brasserie du Pêcheur* suggest three circumstances where liability will be easily found. These are:

- a complete failure to transpose a Directive;
- breach of an order of the Court of Justice;
- breach of settled case law.

There are a whole host of other circumstances where liability might be incurred.¹¹⁰ These include breach of an EU legal norm; breach of case law that is not completely settled; and inadequate transposition of or compliance with a Directive. In all these circumstances, the Court looks at the clarity of the provision or law. If it was reasonably capable of bearing the meaning understood by the Member State¹¹¹ or if there is no consensus as to the meaning of the provision, then no liability will be found.¹¹² In short, liability occurs only when Member States are breaching EU law in a manner that must be obvious to them and one which leaves little room for doubt. State liability is thus a backstop measure. It is there to penalise the very 'wayward state' rather than to be concerned with redress for litigants. For, if it were the latter, there would be little justification for such a restrictive test. This, in turn, raises an important question: is it really for the Court of Justice to decide whether positive measures should be attached to the Treaty?

¹⁰⁷ *Joined Cases C-46/93 and C-48/93 Francovich and Bonifazi v Italy* [1993] ECR I-5051.

¹⁰⁸ *Case C-46/93 AGM-COS.MET v Suomen valtio and Terveystieteiden tutkimuskeskus* [1997] ECR I-5214.

¹⁰⁹ *Case C-45/92 R v Secretary of State for Health ex parte Syntex* [1993] ECR I-1591.

¹¹⁰ For a discussion of the cases following *Francovich* see L. Twiss, 'Liability for Breach of Community Law: Keeping It and Moving It', [2002] 31 *Common Law* 201, 210.

¹¹¹ *Case C-391/91 S v ASA Touborg*, or *State of the Netherlands v ASA Touborg* [1993] ECR I-1621.

¹¹² *Case C-271/95 Ashburys (Germany) v Bank für Sozialwirtschaft AG* [1997] ECR I-1633.

(iii) Liability of judicial institutions

Emmerich de Meuse indicated that states were liable for acts of all public institutions. This has led to arguably the most interesting and certainly the most challenging dimension to state liability, liability for rulings by national courts. This arose in *Köbler v Austria*.¹¹² Köbler was a professor employed in an Austrian university. Part of his salary was based on length of service, but periods of employment in universities in Member States other than Austria did not count towards this aspect of his salary. The Austrian Administrative Court initially decided to refer the matter to the Court of Justice, but then withdrew the reference on the grounds that the matter had already been decided by the Court, which had ruled in law.¹¹³ Köbler brought an action in damages, arguing that the state was liable in respect of the court's ruling on the grounds that it failed to refer the matter when obliged to do so and had given an erroneous ruling. The Court of Justice agreed that the measure violated Article 45 TFEU on freedom of movement of workers. It considered whether this gave grounds for liability.

Case C-224/01 *Köbler v Austria* [2003] ECR I-233

11. In the light of the essential role played by the judiciary in the protection of the rights conferred by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance.
14. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter formally be corrected, individuals cannot be deprived of the possibility of remedying the State liable in order in that way to obtain legal protection of their rights.
15. Moreover, it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that under the third paragraph of Article 235 TFEU, a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.
16. Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance ...
17. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection, arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of res judicata, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.
18. In that regard the importance of the principle of res judicata cannot be disputed. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that

¹¹² Z. Wüst, *OPOR, COURT and Weinmann* (in Köbler v Austria) [2003] 41 CMLR 117.

¹¹³ The Austrian court sought to rely on the Court of Justice's ruling in Case C-15/95 *Schubert-Lengsfeld* [1996] ECR I-49.

judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called in question.

19. However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.
40. It follows that the principle of res judicata does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance.
41. Nor can the arguments based on the independence and authority of the judiciary be upheld.
42. As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.
43. As to the argument based on the risk of a diminution of the authority of a court adjudicating at last instance owing to the fact that its final decisions could by implication be called in question in proceedings in which the State may be rendered liable for such decisions, the existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.
44. Several governments also argued that application of the principle of State liability to decisions of a national court adjudicating at last instance was precluded by the difficulty of designating a court competent to determine disputes concerning the reparation of damage resulting from such decisions.
45. In that connection, given that, for reasons essentially connected with the need to secure for individuals protection of the rights conferred on them by Community rules, the principle of State liability inherent in the Community legal order must apply in regard to decisions of a national court adjudicating at last instance, it is for the Member States to enable those affected to rely on that principle by affording them an appropriate right of action. Application of that principle cannot be compromised by the absence of a competent court ...
51. As to the condition to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties ...
52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringed a rule of Community law is governed by the same conditions.
53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at

last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.

54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.
55. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under Article 237(3) TFEU.
56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter...
123. Community law does not expressly cover the point whether a measure for rewarding an employer's loyalty to his employer, such as a loyalty bonus, which amounts to an obstacle to freedom of movement for workers, can be justified and thus be in conformity with Community law. No reply was to be found to that question in the Court's case law. Nor, moreover, was that reply obvious.
123. In the second place, the fact that the national court in question ought to have maintained its request for a preliminary ruling... is not of such a nature as to invalidate that conclusion. In the present case the Verwaltungsgerichtshof had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in *Schöningh-Kousschepanian*... Thus, it was owing to its incorrect reading of that judgment that the Verwaltungsgerichtshof no longer considered it necessary to refer that question of interpretation to the Court.
124. In these circumstances and in the light of the circumstances of the case, the infringement of law cannot be regarded as being manifest in nature and thus as sufficiently serious.

At the time, only Spain and Austria had systems of liability for judicial decisions in place. As illustrated below, the judgment raised questions about legal certainty and traditional judicial hierarchies.

H. Scott and N. Barber, 'State Liability under Francovich for Decisions of National Courts' (2004) 120 *Law Quarterly Review* 403, 404–5

The extension of *Francovich* liability to courts of last decision has profound implications for the domestic legal hierarchy. After *Köbler* the English High Court could find itself compelled to pass judgment on a decision of the English House of Lords. A litigant disappointed by the House of Lords' decision could start a fresh action against the United Kingdom. The High Court, a few months later, would then be called on to assess whether the House of Lords had made an error of law that was sufficient to warrant damages. The High Court would, almost certainly, refer the question to the ECJ under Article 237 TFEU. If it thought there was any doubt as to the correctness of the *Barry* ruling, in response to such a reference the ECJ would give a ruling on the content of European law...

This prospect raises a number of problems for domestic legal systems. First and most specifically, it induces legal certainty. This is not, as some in *Köbler* like to argue, because it allows the reopening of concluded cases. Once the State's highest court has ruled, the judgment is definitive between the parties and cannot be challenged; the principle of *res judicata* is not affected. The *Francovich* action is a separate legal right and is directed against the State, a body which, obviously, would not have been a party to the original action. However, *Köbler* does have the effect of allowing litigants a second chance

to raise the legal question apparently resolved in the primary action frustrated in the House of Lords, the litigant could re-start the process through *Francovich* in the High Court. Secondly, the decision upsets the domestic legal hierarchy. The High Court would be obliged to question the correctness of a decision of the House of Lords made a few months prior to it, could have to decide whether there was a sufficient chance of error to warrant a reference to the ECJ, and, when this ruling was rehearsed, how severe the error had been. Further problems might arise as the secondary action progressed up the legal order, perhaps ending with one group of Law Lords ruling on the judgment of their colleagues. Thirdly, the decision has the potential to create serious constitutional conflict within the domestic legal order. The German Constitutional Court has ruled that in exceptional cases it might refuse to accept rulings of the ECJ (see *Brunner* [1994] 1 CMLR 57). Such a decision was then challenged under *Francovich*; a first instance judge might be forced to choose between loyalty to the final court of appeal and to the ECJ.

Köbler was challenged in *Traghetti*.¹⁵ The Italian Court of Cassation, the top civil court, had ruled in a dispute between ferry operators that a subsidy granted to a ferry operation did not violate EU law on state aids as it followed the Court of Justice's settled case law. *Traghetti*, the ferry operator bringing the proceedings, had meanwhile gone into liquidation. Its administrator considered that the Court of Cassation had misapplied the law and brought an action for damages. However, Italian law excluded liability for damage where any infringement was the result of a court of last instance's interpretation of the law or assessment of the facts and evidence. The Court of Justice reiterated that the *Köbler* judgment applied to all courts, including courts of last instance, and that it applied not just to refusals to apply EU law but also to poor interpretations of EU law. This raised the question of what was the basis of such liability: was there a requirement for intentional fault and serious misconduct on the part of the court, or was it sufficient that it was incompetent?

Case C-173/03 *Traghetti del Mediterraneo v Italy* [2006] ECR I-5737

42. With regard, finally, to the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled... that the Court held, in the *Köbler* judgment, that State liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.
43. Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 237 TFEU. It is in any event presumed where the decision involved is made in manifest disregard of the case law of the Court on the subject...
44. Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law...

¹⁵ D. Nantopoulos, '... And We Keep on Missing It: Enforcing State Liability', [2007] 32 *ELRev* 115.

Aside from reaffirming *Kohler*, *Traghetti*¹¹² indicates liability is to be determined on the basis of a competence-based rather than fault-based test. It will be incurred not merely where a national court of last resort deliberately flouts EU law, but also where it fails to interpret EU law in the manner that one would expect of a reasonable court. To be sure, it is too simplistic to argue the test is merely one of whether a court could reasonably have come to the interpretation it did, and if not then the state is liable for damages. Yet, the test, namely whether the interpretation was manifestly inappropriate, is not so different from the standard applied to the nationally competent court. The relevant question would then be how far the national court must fall below that standard in order to attract state liability.¹¹³ On this basis, an action for state liability may involve an action before a court of first instance attacking the national court in the land for behaving not just incompetently but very incompetently! This raises all kinds of questions about conflict of interest and about the actual competence of the junior court to hear the action. More structurally, there is the question of whether fixing states in the test way to go about improving weak, often poorly funded judiciaries.

B DRAWING THE THREADS TOGETHER

As mentioned at the beginning of this chapter, this field sits atop two tectonic plates. On the one hand, there is the logic of competing legal orders. This pushes for the primacy of EU law but acknowledges the autonomy of local legal orders, the sensitivities involved, and the difficulties of imposing uniform and centralized solutions. On the other, there is the logic of individual rights which pushes for the full protection of individual entitlements. If, at any moment, most notably over Directives but also over the question of remedies, one of these logics prevails, the other re-emerges through the establishment of a new doctrine.

Further uncertainty has been added by the Lisbon Treaty, which questions whether the balance needs to be readjusted with the introduction of the following provision:

Article 19(1) TEU

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

On the one hand, the appearance of this provision is that of a codifying provision. It seems to ask no more of Member States than the current case law, namely that they give effective protection to EU rights. In that sense, you might expect it to be no more than a rearticulation of existing case law. On the other hand, it might be thought that if a new provision is added, there has to be a reason for this. This reason might be to emphasise a stronger idea of effectiveness, in which the need for remedies is made more salient as a provision of EU law, and in which a tighter, more overarching link is made between the grant of rights and the provision of remedies. It might be (and we cannot yet know) that it effects a revolution in which the logic of rights is made to prevail over that of the balance of legal orders.

¹¹² The general view is that the standard is quite low and that liability will be found only in exceptional cases.
¹¹³ See also, *State Liability for Breaches of Community Law by National Courts in the Enforcement of a National Infringement of the Applicable Law as Inevitable Obstacle* [2008] 46 *Common Law Review* 773.

T. Ellensberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *Common Market Law Review* 1199, 1233–3.

The characteristic feature of an effective subjective right is the imposition of an obligation on everybody to abstain from any acts considered to interfere with that right. The types of rights primarily of interest in the Community law context are more 'relational' in nature, meaning that they create specific obligations between certain persons. These obligations, and corresponding rights, notably comprise (i) obligations to perform in a certain way (e.g. obligations to provide certain services, grant specific benefits, or effect equal treatment); furthermore, (ii) (secondary) obligations to make good damage or restore assets received without valid title; and, finally, (iii) obligations to abstain from certain conduct including the commission of delicts.

With regard to remedies, the decisive point now is that if the legal obligation making up the right is established in a clear and unequivocal manner, the necessary remedy for the protection of this right is equally apparent. This is so because this obligation can be directly translated into (or actually constitutes) a concrete claim. Such 'state rights', in other words, automatically imply the appropriate remedy and course of action required for its enforcement. Thus, once it is established that a private actor or the State is under an obligation towards certain persons to make good harm caused by illegal conduct, to repay money collected though not being due, or to abstain from or to commit certain acts, it follows that the beneficiaries have ascending rights, or to be more precise, claims. These claims to compensation, repayment or abstainment also constitute the respective components of these remedies. These remedies have a procedural component as well in that they represent the claims in a legally enforceable form, i.e. in a form which allows its enforcement by a (national) court. If the claim-right and resulting remedy is established by Community law, the division of labour between Community law and national law in the enforcement of individual rights becomes, in principle, clear. Exclusively Community law determines the existence of the remedy. National law would have a merely auxiliary function. It would designate the competent courts to adjudicate the substantive claims in question and provide the appropriate procedural framework.

FURTHER READING

1. Bellen, 'The Doctrine of Consistent Interpretation: Managing Legal Uncertainty' [2007] 21 *Oxford Journal of Legal Studies* 537.
2. Bouter, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' [2008] 46 *Common Law Review* 773.
3. Craig, 'The Legal Effects of Directives: Policy Rules and Exceptions' [2008] 34 *European Law Review* 349.
4. Dawood, 'From Van Duyn to Marleasing via Mandado: Reducing Direct Effect to Absurdity?' [2006–07] 9 *Cambridge Yearbook of European Legal Studies* 81.
5. Douglas, 'National Remedies Before the Court of Justice (Dubord, Part, 2005)'.
6. 'When Worlds Collide: Competing Visions of the Relationship Between Direct Effect and "Sovereignty"' [2007] 44 *Common Market Law Review* 531.
7. Drake, 'Twenty Years After Van Gendin: The Impact of "Indirect Effect" on the Protection of the Individual's Community Rights' [2005] 30 *European Law Review* 525.

- W. van Groenou, 'Bridging the Unbridgeable: Community and National Tort Law After *Francovich* and *Brasserie du Lait*' [1996] 45 *International and Comparative Law Quarterly* 521
- M.-P. Sengen, 'Francovich and the Construction of a European Administrative Jurisprudence' [2009] 32 *European Law Review* 157
- K. Lenaerts and T. Courtillot, 'Of Birds and Bees: The Role of Primary in Invoking Norms of EU Law' [2009] 32 *European Law Review* 129
- S. Prechal, *Directives in EU Law* (2nd edn, Oxford, Oxford University Press, 2005)
- J. Tallberg, 'Supranational Influence in EU Enforcement: the ECJ and the Principle of State Liability' [2009] 7 *Journal of European Public Policy* 104

8

Infringement Proceedings

CONTENTS

1 Introduction	(6) Reasoned Opinion and the period for national compliance
2 The Different Roles of Infringement Proceedings	5 Administration of Infringement Proceedings
(a) Article 258 TFEU and the rule of law	(a) The Commission's discretion
(b) Article 258 TFEU as a public policy instrument	(b) Complainants and Article 258 TFEU
(c) Article 258 TFEU as a public law arena	6 Sanctions
3 Scope of Member State Responsibilities	(a) Article 260 TFEU and the Union reforms
(a) Acts and omissions of a state agency	(b) Types of sanction levied under Article 260 TFEU
(b) Accountability of state actors	(c) Level of fines imposed
4 The Different Stages of Infringement Proceedings	Further reading
(a) Informal letter	
(b) Letter of formal notice and Member State observations	

1 INTRODUCTION

This chapter considers the infringement proceedings that the Commission may bring against Member States for failure by the latter to comply with EU law. It is organised as follows.

Section 2 considers the main features of the infringement proceedings set out in Articles 258 to 260 TFEU. The central provision is Article 258 TFEU and it allows the Commission to take the Member State to the Court of Justice and to obtain a ruling that it has failed to comply with EU law. The rules of such proceedings are threefold: to secure the rule of EU law; as a public policy instrument to contribute to the effective functioning of EU policies; and as a public law arena, in which the different interests of the EU institutions, Member States, complainants and

LEWIS & CLARK, ARMS & MAXWELL Y. "PROCEDURAL
LAW OF THE EUROPEAN UNION", SWEET & MAXWELL
LONDON, 2006.

CHAPTER 3

93-121

THE PRINCIPLE OF THE FULL EFFECTIVENESS OF COMMUNITY LAW AND ITS IMPACT ON NATIONAL LAW RELATING TO PROCEDURE AND SANCTIONS

National procedural law. As has already been mentioned, Community law falls to be applied principally by national courts. Since the Community does not have procedural law or law governing sanctions of its own,¹⁴ it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.¹⁵

3-001

Judicial supervision. The full effectiveness of Community law is achieved only if individuals can assert before their national courts the rights which

3-002

¹⁴ What is meant is all those rules of law which come into play in order to apply Community law in the Member States' legal systems. They may have to do with the conduct of judicial proceedings, such as rules on admissibility, procedural time-limits and rules of evidence, or with the execution of judgments. However, concepts of civil law or other substantive law (for example, the concept of unjust enrichment) may sometimes be relevant.
¹⁵ See, e.g. ECJ, Case C-215/84 *Est* [1985] E.C.R. I-4951, para. 25, which refers to the judgments in *Reed* and *Comet* (ECJ, Case 32/78 *Reed* [1976] E.C.R. 1829, third subpara. of para. 5; ECJ, Case 43/75 *Comet* [1975] E.C.R. 2041, para. 13). In *Reed* and *Comet*, the Court referred to "action at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law" (emphasis added). But the duty for Member States to ensure effective legal protection may also require access to the national courts for individuals who seek protection against acts of national authorities infringing provisions of Community law which do not have direct effect (see, e.g. ECJ, Joined Cases C-6 and C-9/92 *Franzovich and Others* [1993] E.C.R. I-5357). The Court further pointed out in *Reed* (fourth and fifth subparas of para. 5) and *Comet* (paras 14 and 15) that "[w]here necessary, Art. 100 to 102 and 235 (now Arts 94 to 97 and 108) of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to disturb or hamper the functioning of the common market", but that "[i]n the absence of such harmonisation the rights conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules". This does not, however, preclude having the national procedural rule against Treaty provisions relating to the four freedoms see ECJ, Case C-412/97 *ED* [1999] E.C.R. I-1345.

they derive from Community law.³⁴ Accordingly, the Member States are under an obligation to designate the competent court or tribunal to which individuals may apply with a view to protecting the rights which they derive from the application of Community law.

- 1-083 Constraints. As far as the application of national rules relating to procedure and sanctions by national courts and tribunals is concerned, two difficulties arise. First, these national rules may impede the effective application of Community law, and thereby affect its primacy and direct effect.³⁵ Secondly, uniform application of Community law may be jeopardised as a result of diverging national laws.³⁶

In order to deal with these difficulties, Art.10 of the EC Treaty places national courts and tribunals under a duty to ensure the 'full effectiveness of Community law'.³⁷ The Court of Justice has defined this duty by means of a number of Community constraints with which national procedural law and law relating to sanctions must comply.³⁸ Those constraints (the principles of equivalence and effectiveness) are a practical expression of the principles of the primacy and direct effect of Community law³⁹ and also of

³⁴ See, on this subject, Eilmarsberger, 'The relationship between rights and remedies in EC law: in search of the missing link' (2004) C.M.L. Rev. 1199-1246.

³⁵ The national law may apply very short limitation periods or deal with the burden of proof or admissible evidence in such a way that the party relying on Community law is unable or has extreme difficulty in proving its claims.

³⁶ Bridge, 'Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States' (1984) E.L. Rev. 28-42. For examples of judgments in which the Court has expressed regret at the lack of Community provisions harmonising procedures and time-limits, see ECJ, Case 132/79 *Expres Dairy Foods* (1980) E.C.R. 1617, para.42, and ECJ, Case 14/81 *Promme* (1981) E.C.R. 1445, para.4.

³⁷ ECJ, Case C-213/87 *Factortame and Others (Factortame 2)* [1993] E.C.R. I-2433, para.42. For a useful discussion of this topic, see Bressley and Hoskins, *Remedies in EC Law*, at 56-117. In *Re Secretary of State for the Home Department, ex parte Gallagher* (1995) 2 C.M.L.R. 551, Lord Bingham CJ referred to the 'cardinal principle of Community law' that national laws should provide 'effective and adequate redress for violations' of that law.

³⁸ The relevant case-law is remarkable in that the Court of Justice does not have jurisdiction to rule directly on questions of national procedural law (indeed, it systematically refuses to answer preliminary questions relating to the interpretation or validity of national law), yet will nevertheless seize upon the basis in Community law of national courts' obligation to achieve a particular result in order to provide very concrete guidance as to how that obligation must be complied with. For a critical appraisal, see the Opinion of Advocate General D. Ruiz-Jarabo Colomer in Case C-50/02 *Reichelt* (2004) E.C.R. I-6553, paras 33-54.

³⁹ Grévy and Bonichot, 'Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les Etats membres', in *L'Europe et le Droit—Mélanges en l'honneur de J. Soubelet* (Ed. Dalloz, Paris, 1991), 397, at 398, observe in this connection that 'La Cour ne fixe pas les règles de procédure nationales, elle énonce les exigences du droit communautaire qu'elles doivent satisfaire' [The Court does not fix national procedural rules, it sets forth the Community-law requirements which they must fulfil]. See also in this connection Kalmár, 'Do the Member States possess judicial procedural "autonomy"?' (1977) C.M.L. Rev. 1389-1412, who argues that Member States do not possess 'procedural autonomy', but that national procedural law is an 'ancillary body of law' whose function is to 'ensure the effective application of substantive

enabling individuals to claim before national courts the full enforcement and protection of the rights which they derive from Community law.⁴⁰

1. THE NEED FOR JUDICIAL SUPERVISION

Access to a court. The full effectiveness of Community law can be attained only if individuals can assert the rights which they derive from Community law before a national court. Consequently, the Member States must provide them actual access to a court and to judicial proceedings.⁴¹ Those obligations are not only connected with the full effectiveness of Community law but also reflect a general principle of law which underlies the constitutional traditions common to the Member States and is laid down in

Community law'. He points out that where national courts apply Community law, they belong functionally to the Community legal order and therefore cannot be said to possess procedural autonomy. Of the approach taken by Prechal 'Community Law in National Courts: the Lessons from Van Gend en Loos' (1998) C.M.L. Rev. 681, at 686-687, who emphasises that Community law is part of the national legal order and that the primacy of Community law only applies within the realm of the substantive law.

⁴⁰ See also Barry, 'La plénitude de compétence du juge national et sa qualité de juge communautaire', in *L'Europe et le Droit—Mélanges en l'honneur de J. Soubelet* (Ed. Dalloz, Paris, 1991), at 1-23; Bergsmidt, 'Principles of Equivalence and Effectiveness' (2003) The EC Tax Journal, Vol. 5, 12-13; O'Leary, 'The Decentralised Enforcement of Community Law Rights: Judicial Snakes and Ladders', in *Constitutional Adaptation in European Community and National Law, Essays for the Hon. Mr Justice O'Higgins* (Butterworths, Ireland), Dublin, 1992, at 35-45; Girard, 'Les principes d'équivalence et d'efficacité: encadrement du développement de l'autonomie procédurale des Etats membres' (2002) R.T.D.E. 134-192; Jacobs, 'Remedies in National Courts for the Enforcement of Community Rights', in *Libro amicorum D. de Petrucci* (Editorial, Temus, Madrid, 1993), at 365-382; Nachev, 'La protection des droits conférés par l'ordre juridique européen', in Tardif, Veitke and Michel (eds), *Aspects du droit européen* (Editions universitaires Fribourg Suisse, Fribourg, 1991), at 43-70; Oliver, 'Le droit communautaire et les voies de recours nationales' (1992) C.J.E. 343-374; Köben, *Die Einwirkung der Rechtsprechung der Europäischen Gerichte auf das Mitgliedstaatliche Verfahren im öffentlich-rechtlichen Streitigkeiten* (Springer Verlag, Berlin, 1996), 473 pp; Rodríguez Iglesias, 'Zu den Grenzen des verfahrensmässigen Autonomie der Mitgliedstaaten bei der Anwendung des Gemeinschaftsrechts' (1997) EuGRZ 285-295; Sorens, 'Le droit communautaire et l'application des règles procédurales nationales' (2000) I.T.D.E. 49-53; Szymczak, 'Making Europe more Relevant to its Citizens: Effective Judicial Process' (1996) E.L. Rev. 351-364; van Groenou, 'Bridging the Gap between Community and National Law: Towards a Principle of Homogeneity in the Field of Legal Remedies' (1995) C.M.L. Rev. 679-701, and 'Of Rights, Remedies and Procedures' (2000) C.M.L. Rev. 951-986; see also Ward, 'Government Liability in the United Kingdom for Breach of Individual Rights in European Community Law' (1990) Anglo-Am.L.R. 1-11.

⁴¹ Provided that in any event the Member States must ensure effective protection for individual rights derived from Community law, Community law is not involved in resolving questions of jurisdiction in which the classification of certain legal situations based on Community law may give rise in the national judicial system (ECJ, Case C-448/93 *SEW* [1995] E.C.R. I-173, para 52; ECJ, Case C-324/01 *Stähler* (2003) E.C.R. I-18279, para.47). See also ECJ, Case C-155/04 *Appenzeller* (2005) E.C.R. I-4351, para.34.

THE PRINCIPLE OF THE FULL EFFECTIVENESS OF COMMUNITY LAW

Arts 6 and 13 of the ECHR.¹⁰¹ That general principle of law is also enshrined in the first para. of Art.47 of the Charter of Fundamental Rights of the European Union.¹⁰²

3-065 Equal treatment. In addition, it is a corollary of the prohibition of discrimination enshrined in Art.12 of the EC Treaty that nationals of a Member State carrying out an economic activity on the market of another Member State which falls within the scope of the Treaty must be able to bring actions in the courts of that Member State on the same footing as nationals of that State in order to resolve any disputes arising from their economic activities.¹⁰³ Consequently, a Member State is precluded from requiring provision of security for costs by a legal person established in another Member State or by a national of another Member State, even if the person concerned is also a national of a non-member country in which he or she is resident,¹⁰⁴ who has brought an action in its courts against one of its nationals or a company established in its territory where security for costs cannot be required to be provided by legal persons from the State in question¹⁰⁵ and the action is connected with the exercise of fundamental freedoms guaranteed by Community law.¹⁰⁶

3-066 Statement of reasons. In addition, national law must provide for effective judicial review.¹⁰⁷ To that end, the court before which the case is brought should generally be empowered to require the competent authority to state the reasons for any national decision which is contested on the basis of Community law.

¹⁰¹ ECU, Case 112/84 *Johansen* [1985] E.C.R. I-551, paras 27-28; ECU, Case C-79/91 *Officina Farrell v. Commission* [1992] E.C.R. I-6313, paras 13-14. Indirect confirmation of this is provided by ECU, Case C-34/95 *Dorrich GmbH* [1997] E.C.R. I-4561, para.40; ECU, Case C-15/97 *Colex* [1998] E.C.R. I-5199, para 22-23; ECU, Case C-76/99 *Tyrol* [2000] E.C.R. I-3353, para.22; ECU, Case C-432/97 *HT* [1999] E.C.R. I-2405, para.28; ECU, Case C-124/95 *Siplo* [2000] E.C.R. I-2271, paras 15-23. As far as Art.6 of the ECHR is concerned, see also the judgment of the European Court of Human Rights of September 24, 2002 in Case 3752-053 *Pietilä and Pietilä v. Finland*.

¹⁰² 2000 O.J. C 364/1.

¹⁰³ ECU, Case C-43/85 *Durr, Deleste, Aldebeu and Fardary* [1986] E.C.R. I-4662.

¹⁰⁴ ECU, Case C-122/94 *Jelkova and MTS Smevler* [1995] E.C.R. I-5325, para.30.

¹⁰⁵ ECU, Case C-323/93 *Hoyer* [1997] E.C.R. I-1771, para.22.

¹⁰⁶ *Ibid.*, para.23. See Ackermann's case note to *Case Time-Judgments* [1999] C.M.L.Rev. 712-719. In *Flaggold v. Mifflin* [1996] 1 Q.B. 557, the Court of Appeal followed the emergent case-law of the Court of Justice on the ground that to require security for costs under what was then Rules of the Supreme Court, Ord. 23, from Irish nationals resident in Ireland would be discriminatory and not justified in view of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. See now Civil Procedure Rules, R.25(2)(a)(ii).

¹⁰⁷ ECU, Case 112/84 *Hoyers and Others* [1987] E.C.R. I-597, paras 14-15; ECU, Case C-340/99 *Macropoulos* [2001] E.C.R. I-2357, para.27; ECU, Case C-104/91 *Agrotech Farrell and Others* [1992] E.C.R. I-3091, para.15; ECU, Case C-111/97 *Seebur Austin* [1998] E.C.R. I-5411, para.15; ECU, Case C-224/95 *Decimier* [2000] E.C.R. I-577, para.63; ECU, Case C-451/00 *Schreier* [2003] E.C.R. I-6411, para.62.

THE NEED FOR JUDICIAL SUPERVISION

Individuals must also be able to defend their rights in the best possible circumstances and be in a position to 'decide' with a full knowledge of the facts whether they will benefit from going to court. The competent authority is therefore under a duty to inform them of the grounds for its decision, either in the decision itself or in a subsequent communication made at their request. The possibility of bringing legal proceedings and the duty to state reasons are designed, among other things, effectively to protect the fundamental rights conferred on individuals by Community law. These Community law requirements apply only to final decisions of national authorities, not to opinions or to measures taken at the preparatory or investigative stage.

Deficiencies of the system. The fact that Member States are under a duty to ensure effective legal protection may entail a national court's being obliged to hold that a particular claim based on a breach of Community law is admissible even though in normal circumstances—i.e. if it was based simply on an infringement of national law—such a claim would not be admissible¹⁰⁸ (e.g. a claim brought against a Member State for reparation of damage caused by a breach of Community law¹⁰⁹ or a claim for interim relief in the shape of the suspension of a provision of national law which is in breach of Community law¹¹⁰). The question arises as to whether a national court has to take account of the restrictive admissibility requirements prescribed by the fourth para. of Art.230 of the EC Treaty¹¹¹ where an individual seeks legal protection against the application in the national legal order of allegedly unlawful provisions of Community law which are of general application.¹¹²

The point of departure for the reasoning of the Court of Justice in this connection is that by Arts 230 and 241, on the one hand, and Art.234, on the other, the EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review by the Community Courts of the legality of acts of the institutions. Under that system, where natural or legal persons, by reason of the conditions for admissibility laid down in the fourth para. of Art.230 of the EC Treaty, cannot directly

¹⁰⁸ See, e.g. ECU, Case C-15/94 *Koppensteiner* [2005] E.C.R. I-4235, paras 10-19.

¹⁰⁹ ECU, Joined Cases C-5 and C-76/90 *Francovich and Others* [1991] E.C.R. I-5357; ECU, Joined Cases C-44 and C-48/93 *Brasserie du Pêcheur and Factotame* [1996] E.C.R. I-1229; see 3-041, *infra*.

¹¹⁰ ECU, Case C-213/93 *Pennings and Others (Factotame II)* [1995] E.C.R. I-2431; see 3-051, *infra*.

¹¹¹ See 3-023, *infra*.

¹¹² See Gill-Laur, "L'arrêt *Smith de Piquet* et la question de la subsidiarité judiciaire en matière de droit de l'Union" (2003) C.D.E. 177-201; Lonsens and Corbaut, "Judicial review as a contribution to the development of European constitutionalism" (2003/2004) Y.E.L.R. 43; Nihoul, "Les recours des particuliers contre les actes communautaires de portée générale: No, mais développement dans la jurisprudence" (2003) J.T.D.E. 34-43; Tonneau, "Déclarations, décisions, recommandations, subsidiarité, regional policy measures, and the Constitutional Treaty" (2004) E.L.Rev. 54-121.

challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Art.241 of the EC Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity.⁴²

A complete system of legal remedies may not normally have any gaps. Nevertheless, the preliminary ruling procedure and the objection of illegality to which the Court of Justice refers in its case-law does not invariably afford a sufficient legal remedy for an individual who seeks to contest the validity of a Community act of general application.⁴³ The reason for this is that recourse to Arts 234 and 241 of the EC Treaty is conditional upon the existence of a national or a Community implementing measure, respectively, which will permit the individual to contest the validity of the Community act of general application before the national court or the Community Courts in an action brought against the implementing measure. Where a Community act requires no implementing measures at national level, as is often the case with regulations, and national law affords no form of declaratory relief, an individual must first infringe the Community act before he or she can challenge its validity in the national courts. The same problem arises where there are national implementing measures—e.g. where directives have to be implemented in national law—but those measures cannot be challenged directly under national law.

- 3-008 Possible solutions. If it is assumed that the system of legal remedies is already "complete",⁴⁴ two solutions are conceivable. Either the Court of Justice puts a more flexible construction on what is to be understood by "individual concern" within the meaning of the fourth para. of Art.230 of the EC Treaty so that individuals whose legal position is affected by a Community act of general application are entitled to contest that act directly in the Court of First Instance by means of an action for annulment or the national courts must fill the gap.

This question was raised in the *Unión de Pequeños Agricultores*⁴⁵ and *Jégo-Quéré*⁴⁶ cases. It appears from these cases, first, that the Court of

⁴² ECJ, Case 254/63 *Leir Vitz v European Parliament* (1968) E.C.R. I-1339, para.23; ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677, para.40; ECJ, Case C-167/02 *P. Rodley and Others v European Parliament* (2004) E.C.R. I-3149, para.46.

⁴³ See the case-law referred to in the preceding note.

⁴⁴ *Ibid.*

⁴⁵ CFI (order of November 23, 1999), Case T-173/98 *Unión de Pequeños Agricultores v Council* (1999) E.C.R. II-5377; ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677 (upheld on appeal).

⁴⁶ CFI, Case T-17/01 *Jégo-Quéré v Commission* (2002) E.C.R. II-3363, para.41; overturned on appeal in ECJ, Case C-403/02 *P. Commission v Jégo-Quéré* (2004) E.C.R. I-3425.

Justice is entirely unwilling to embark upon the relaxation of the admissibility requirements set out in the fourth para. of Art.230 of the EC Treaty which had been proposed by the Court of First Instance in *Jégo-Quéré*.⁴⁷ Referring to its judgment in *Plaumann*,⁴⁸ the Court of Justice held that a measure is of individual concern to natural or legal persons "where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee".⁴⁹ No other interpretation of this admissibility condition is possible, it held, "without going beyond the jurisdiction conferred by the Treaty on the Community Courts".⁵⁰ Consequently, an individual cannot bring an action for annulment before the Court of First Instance against an act of general application, such as a regulation which does not distinguish him or her individually in the same way as the addressee, even where it can be shown, following an examination by that Court of the particular national procedural rules, that those rules do not allow the individual to bring proceedings before a national court to contest the validity of the Community measure at issue.⁵¹

As far as the second solution is concerned, the Court of Justice repeatedly states that the right to effective legal protection is one of the general principles of law stemming from the constitutional traditions common to the Member States and that that right is enshrined in Arts 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵² The Court of Justice draws the following conclusion from this: "Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection".⁵³ Notwithstanding the wording used, what is involved here is only a commitment to make best endeavours and then it rests only on the hypothesis that there are national implementing measures for the unlawful Community act at issue. Accordingly, the Court of Justice

⁴⁷ See 1-035, *infra*.

⁴⁸ ECJ, Case 25/62 *Plaumann v Commission* (1963) E.C.R. 95, at 151.

⁴⁹ ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677, para.55.

⁵⁰ *Ibid.*, para.44; ECJ, Case C-157/02 *P. Rodley and Others v European Parliament* (2004) E.C.R. I-3149, para.25; ECJ, Case C-403/02 *P. Commission v Jégo-Quéré* (2004) E.C.R. I-3425, para.35.

⁵¹ ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677, para.45; ECJ, Case C-263/01 *P. Commission v Jégo-Quéré* (2004) E.C.R. I-3425, para.33.

⁵² ECJ, Case 222/84 *Sehon v Commission* (1986) E.C.R. 1631, para.15; ECJ, Case C-424/95 *Commission v Austria* (2001) E.C.R. I-9785, para.45; ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677, para.39; ECJ, Case C-263/02 *P. Commission v Jégo-Quéré* (2004) E.C.R. I-3425, para.33.

⁵³ ECJ, Case C-263/02 *P. Commission v Jégo-Quéré* (2004) E.C.R. I-3425, para.31 (emphasis added); ECJ, Case C-50/00 *Unión de Pequeños Agricultores v Council* (2002) E.C.R. I-6677, para.41. This wording is included virtually verbatim in Art.1-25(1) of the Constitution.

has held that "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 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".⁴¹

The Court of Justice thus leaves two loopholes open in the system of judicial protection. On the one hand, the degree of judicial protection available to an individual is made dependent on the ability and creativity of the national judge to provide such a remedy. On the other hand, the Court provides no solution for those situations where no national implementing measures exist, despite the claim made by the applicants in *Agro-Quêr* and *Unión de Pequeños Agricultores* that they were precisely in this kind of situation.⁴² It cannot therefore be inferred from the case-law of the Court of Justice that a national court is obliged to declare admissible an action brought against the public authority's intention to apply a regulation or to transpose a directive into the national legal order where the procedural law of the Member State in question does not provide for such a form of "declaratory relief".⁴³ On the contrary, the Court of Justice is resigned to

⁴¹ ECJ, Case C-263/02 *P. Commission v. Agro-Quêr* [2004] E.C.R. I-3435, para 31 (emphasis added); ECJ, Case C-520/03 *P. Unión de Pequeños Agricultores v. Council* [2005] E.C.R. I-5677, para 41.

⁴² Lenaerts and Cortaert, "Judicial Review as a contribution to the development of European constitutionalism" (2003/2004) Y.E.L. 1-45.

⁴³ In the judgment of December 12, 2002 in Case C-431/01 *British American Tobacco and Imperial Tobacco* [2002] E.C.R. I-11453, the Court of Justice ruled on the admissibility of a reference for a preliminary ruling made in proceedings for declaratory relief concerning the validity of a directive. The Court declared that the question was admissible on the ground that "the opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law". Ntoulou infers from this that there is an obligation for Member States to adapt their procedural rules so as to give individuals the opportunity to contest in the national courts the national authorities' intention to implement a directive. This would enable individuals to contest the legality of a directive in the national courts, which might then make a reference for a preliminary ruling to the Court of Justice (see Ntoulou, "Le recours des particuliers contre les actes communautaires de portée générale. Nouveaux développements dans la jurisprudence" (2003) R.T.D.E. 33-43). In our view, such an obligation cannot be inferred from the *British American Tobacco* judgment. See Lenaerts and Cortaert, "Judicial review as a contribution to the development of European constitutionalism" (2003/2004) Y.E.L. 1-43; see also Gellens, "L'arrêt *Unión de Pequeños Agricultores* et la subsidiarité juridictionnelle et effective" (2003) C.D.E. 177-202; Temple Lang, "Declarations, regional authorities, subsidiarity, regional policy measures, and the Constitutional Treaty" (2004) E.L.Rev. 34-105. As far as declaratory relief and the validity of a regulation are concerned, see ECJ, Cases C-27/00 and C-220/00 *Omega Air and Others* [2001] E.C.R. I-2565, in which the Court of Justice did not even consider the admissibility of the reference for a preliminary ruling.

the fact that in some cases an individual must first infringe a Community act before he or she can challenge its validity.⁴⁴

The Court of Justice therefore posits a third solution, which, however, boils down in practice to recognition of the incompleteness of the system of legal remedies. This is because it refers to the possibility for Member States to alter the existing system of legal protection under Art.48 of the EU Treaty.⁴⁵

Constitution. The Member States have taken up this invitation. In the first place, Art.11-345 of the Constitution relaxes the conditions for the admissibility of actions brought by individuals for the annulment of regulatory acts which do not entail implementing measures.⁴⁶

Then, as far as judicial review by national courts is concerned, Art.1-25 of the Constitution provides as follows: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." On the one hand, it may be objected that this provision adds nothing to the *acquis*, since it amounts to a virtually verbatim repetition of a passage from the Court's judgments in *Agro-Quêr* and *Unión de Pequeños Agricultores*,⁴⁷ from which the Court merely inferred an obligation to make best endeavours. On the other hand, it cannot be ruled out that this provision, read against the background of the incorporation in the Constitution of the Chapter of Fundamental Rights of the European Union, which confers on "everyone whose rights and freedoms guaranteed by the law of the Union are violated" the right to "an effective remedy before a tribunal",⁴⁸ and the recent case-law of the Court of Human

⁴⁴ ECJ, Case C-263/02 *P. Commission v. Agro-Quêr* [2004] E.C.R. I-3425, para 34; CFI (order of June 23, 2005), Case T-316/04 *Eridania Sadam and Others v. Commission*, not yet reported, para 42.

⁴⁵ ECJ, Case C-520/03 *P. Unión de Pequeños Agricultores v. Council* [2005] E.C.R. I-5677, para 45. See in this connection Gellens, "L'arrêt *Unión de Pequeños Agricultores* et la subsidiarité juridictionnelle et effective" (2003) C.D.E. 177-202; Gellens, "Access to Justice in the European Court of Justice in Luxembourg" (2003) E.L.Rev. 132-144; Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Agro-Quêr* et *Ci. 34 v. Commission* and *Unión de Pequeños Agricultores v. Council*" (2003) Mod.L.Rev. 124-135; Grosser, "The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?" (2003) M.J.E.C.L. 221-248; Hand, "Talking with the 'poorly' treatment in Times of Constitutional Reform: The European Court of Justice on Private Applicants' Access to Justice" (2003) 10 M.J.E.C.L. 2, 265-290; Krugener, "Die Ambivalenten effektiven Rechtsbehelfen Einzelner gegen EG-Verordnungen" (2003) Zf.R.V. 123-131; Mehdi, "La recevabilité des recours formés par les personnes physiques et morales à l'encontre d'un acte de portée générale: l'ajournement n'aura pas eu lieu..." (2003) R.T.D.E. 13-50; Usher, "Direct and individual concern: an effective remedy or a conventional solution?" (2005) E.L.Rev. 575-602.

⁴⁶ See 7-154 to 7-158, *supra*.

⁴⁷ See n. 417, *supra*.

⁴⁸ Constitution, Art.11-37.

Rights⁴⁰ will prompt the Court of Justice to transform the obligation to make best endeavours into an obligation to achieve a particular result. Effective legal redress would then mean that national courts would be obliged to interpret and apply their national rules of procedural law in such a way as to give natural and legal persons the possibility to act against the national authorities' intention to apply or implement a Community measure of general application where it appears that those persons cannot attack the measure directly in the Court of First Instance by means of an action for annulment. Only then would the system of legal redress enshrined in the Treaty be complete⁴¹ in actual fact and not just on paper.

II. CONSTRAINTS: EQUIVALENCE AND EFFECTIVENESS

- 3-010 General. The Court of Justice laid down the two most important constraints at the same time as it held that, in principle, national procedural rules and rules on sanctions are to apply, namely (1) that those rules may not be less favourable than those governing similar domestic actions (principle of equivalence),⁴² and (2) that they may not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).⁴³
- 3-011 Principle of equivalence. Above all, there is the requirement for procedural equal treatment of claims based on Community law and those based on national law, for example as regards the effects of the expiry of a time-limit for bringing proceedings or of an error in drawing up the document originating proceedings. In addition, it must be possible for every type of

⁴⁰ In its judgment of September 14, 2001 in Case T-7524/95 *Pohl and Reibke v Finland*, the European Court of Human Rights ruled that the European Convention on Human Rights had been violated on account of the fact that no remedy was available against a Finnish decree which curtailed the applicants' rights. The idea that one could obtain judicial review by first breaching the contested act was rejected by the European Court of Human Rights in the following terms: "no one can be required to breach the law so as to be able to have a 'civil right' determined in accordance with Article 511" (para. 44).

⁴¹ See 3-007, *supra*.

⁴² ECJ, Case 33/76 *Roux* (1976) E.C.R. 1339, third subpara. in fine of para.1; ECJ, Case 45/76 *Comet* (1976) E.C.R. 2441, para.13 in fine; ECJ, Case 51/79 *Arco* (1979) E.C.R. 2545, para.12; ECJ, Case 816/79 *AGRECO* (1980) E.C.R. 2559, para.13; ECJ, Case C-235/91 *Steinhilber-Niering* (1993) E.C.R. I-5475, para.15, and ECJ, Case C-410/91 *Johansen* (1994) E.C.R. I-5435, para.21; ECJ, Case C-180/91 *Drachampsch* (1997) E.C.R. I-2255, para.20.

⁴³ *Roux*, cited in the preceding n., sixth subpara. of para.1; *Comet*, para.18; *Arco*, para.12 in fine, and *AGRECO*, para.13 in fine. See also ECJ, Case C-311/98 *Edo* (1999) E.C.R. I-4951, paras 19 and 24, ECJ, Case C-290/98 *Spaer* (1999) E.C.R. I-4997, para.11, ECJ, Joined Cases C-273/98, C-252/98 and C-251/98, *Ayuda E-logic and Others* (1999) E.C.R. I-5023, para.27, and ECJ, Joined Cases C-52/99 and C-53/99 *Camerotto and Vignone* (2001) E.C.R. I-1395, para.21.

action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect.⁴⁴

In order to decide whether procedural rules relating to a claim based on national law and those relating to claims based on Community law are equivalent, the national court must verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, as well as the operation of that procedure and any special features of those rules.⁴⁵

Principle of effectiveness. In addition, national procedural rules and rules relating to sanctions, albeit complying with the principle of equivalence, "may not be so framed as to render virtually impossible the exercise of rights conferred by Community law".⁴⁶

Case-by-case approach. National procedural rules and rules relating to sanctions are assessed by the Court of Justice on a case-by-case basis in the light of the constraints they contain, which means that the categories described below must be regarded as being open to enlargement.

A. LOCUS STANDI AND INTEREST IN BRINGING PROCEEDINGS

Principle. The rules of national law relating to an individual's *locus standi* and interest in bringing proceedings may not detract from the full effectiveness of Community law. In a first attempt to define the Community law requirements from the point of view of the principles of equivalence and effectiveness, the Court of Justice has held that persons who do not come within the scope *ratione personae* of a provision of Community law may nevertheless have an interest in the provision being taken into account *vis-à-vis* the person protected.⁴⁷ In this way, they may have sufficient *locus standi* under Community law, which must be recognised in national law.

Thus, an undertaking which is not a competitor of the beneficiary of unlawful State aid may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the

⁴⁴ ECJ, Case 156/80 *Roux* (1981) E.C.R. 1335, para.44. The Court of Justice specified in *Perquival* that the principle of equivalence "must be applied not only with regard to provisions of national law on limitation of actions and recovery of sums paid-through not due, but also to all procedural rules governing the treatment of comparative situations, whether administrative or judicial" (ECJ, Case C-14/92 *Perquival* (1993) E.C.R. I-6513, para.62).

⁴⁵ ECJ, Case C-71/98 *Franssen and Others* (2000) E.C.R. I-3231, para.45.

⁴⁶ ECJ, Case 199/81 *San Giorgio* (1983) E.C.R. 3555, para.12 (this phrase has tended to be rendered in English as "framed in such a way as to prevent or make it impossible"; ECJ, Joined Cases C-45/91 and C-48/91 *Brasserie du Pêcheur and Factortame IV* (1996) E.C.R. I-1229, para.74); in his Opinion in ECJ, Case 2/94 *Duckworth International* (1995) E.C.R. I-3459, point 15, Advocate General F.G. Jacobs suggests "unduly difficult".

⁴⁷ ECJ, Joined Cases C-87-93/90 *Vander and Others* (1991) E.C.R. I-3757, paras 23-24 (with a case note by Frickel (1991) S.E.W. 183-189).

last sentence of Art.88(3) of the EC Treaty. This will be the case, for example, where the undertaking concerned is subject to a tax which forms an integral part of a measure implemented in breach of the prohibition referred to in that provision.⁴⁰

3. LIMITATION PERIODS AND RULES OF EVIDENCE

Limitation periods. It may appear from a judgment of the Court of Justice giving a preliminary ruling that the imposition of a particular charge or the refusal to grant a particular social advantage conflicts with Community law. Where a person seeks recovery of the charge or payment of the advantage unlawfully denied before a national court, the national procedural rules should apply. Those rules may provide for limitation periods. According to a consistent line of cases, limitation periods are compatible with Community law, provided, of course, that the principles of equivalence and effectiveness are respected.⁴¹ According to the Court of Justice, this does not amount to a temporal limitation of the effects of an interpretative judgment which falls outside the competence of a national court.⁴² This is because national procedural rules providing for limitation periods do not detract from specific rights which individuals derive from Community law. It merely results in them having to bring their claim within a particular period.⁴³

Rules of evidence. As far as the application of rules of evidence is concerned in proceedings in which an individual asserts rights derived from Community law, the Court of Justice considers that, in the absence of Community legislation, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible provided that the principles of equivalence and effectiveness are respected.⁴⁴

1. Recovery of unlawful charges

Heterogeneity of national systems. The question of challenging charges unlawfully claimed or the recovery of charges unduly paid is dealt with in divergent ways in the various Member States and even within a given

⁴⁰ ECJ, Case C-174/82 *Streekgewest Westelijk Noord-Brabant* [2005] E.C.R. I-25, para.19 (with a case note by Jans and van de Gronden [2005] S.E.W. 194-231).

⁴¹ ECJ, Case 45/75 *Comet* [1975] E.C.R. 243, paras 17-18; ECJ, Case 61/79 *Denkavit Industrie* [1980] E.C.R. 1205, para.23; ECJ, Case C-30/94 *Heckl Perfection* [1997] E.C.R. I-4385, para.43; ECJ, Case C-231/95 *Adi* [1996] E.C.R. I-4911, para.22.

⁴² See 6-104, *infra*.

⁴³ ECJ, Case C-131/95 *Adi* [1996] E.C.R. I-4551, paras 15-18.

⁴⁴ ECJ, Joined Cases C-11/98 and C-405/98 *Mar-Jana and Jago* [2000] E.C.R. I-1997, para.29. Accordingly, a provision of national procedural law under which, in judicial proceedings in which it is sought to establish State liability, and a view to obtaining compensation for damage caused by a breach of Community law, witness evidence is admissible only in exceptional cases is permissible to the extent to which it does not infringe the principles of equivalence and effectiveness (ECJ, Case C-225/98 *Douglas* [2000] E.C.R. I-371, paras 63-72).

Member State depending on the sort of tax or charge concerned. In some cases, the law requires both complaints addressed to the tax office and appeals to comply with fairly strict requirements as to the form in which and the time-limits within which such legal claims or applications may be submitted. In others, actions for the recovery of unduly paid charges must be brought before the ordinary courts, for instance in the form of an action based on an undue payment; such actions are subject to varying time-limits which in some cases correspond to the normal limitation period laid down by the ordinary law.⁴⁵

Constraints. The heterogeneity of the national systems is the upshot in particular of the lack of Community rules on the recovery of unlawfully imposed national charges. As has already been observed, this is because in such a situation it is for the national law of each Member State to designate the competent court and lay down the procedural rules governing legal claims for protecting the rights which individuals derive from Community law, provided that those rules are not more unfavourable than those that apply to similar national claims (principle of equivalence) and do not render the exercise of rights conferred by Community law virtually impossible or excessively difficult (principle of effectiveness).

Periods of limitation. It clearly appears from the case-law of the Court of Justice on the recovery of a charge levied under national law but undue under Community law,⁴⁶ that the setting of 'reasonable periods of limitation of actions' satisfies in principle the rest of the principles of equivalence and effectiveness.⁴⁷

Principle of equivalence. In the first place, as far as the application of the principle of equivalence is concerned, a Member State may not lay down provisions for the repayment of a charge declared contrary to or incompatible with Community law by the Court of Justice which set conditions specifically relating to the charge in question that are less favourable than

⁴⁵ ECJ, Case 51/79 *Denkavit Industrie* [1980] E.C.R. 1205, paras 23-24; ECJ, Case 61/79 *Denkavit Industrie* [1980] E.C.R. 1205, paras 23-24, and Case C-231/95 *Adi* [1996] E.C.R. I-4551, para.36.

⁴⁶ A clear exposition of all these aspects of this doctrine is set out in ECJ, Joined Cases C-192/93 to C-213/93 *Comet and Others* [1997] E.C.R. I-153, paras 19-24. See also Joined Cases C-397/93 and C-416/93 *Meininger-Gesellschaft and Others* [2001] E.C.R. I-1727, paras 32-35; ECJ, Case C-147/01 *Wabert's Wine World and Others* [2003] E.C.R. I-1365, paras 93-113; Opinion of Advocate-General L. A. Geelhoed in Case C-123/00 *Commission v Italy* [2003] E.C.R. I-14642, points 63-101; Opinion of Advocate-General D. Ruiz-Jarabo Colomer in Case C-10/02 *Reichelt* [2004] E.C.R. I-6023, points 23-43.

⁴⁷ ECJ, Case 12/76 *Rewe* [1975] E.C.R. 1563, seventh and eighth subparagraphs of para.5; ECJ, Case 45/75 *Comet* [1975] E.C.R. 243, paras 17-18; ECJ, Case 61/79 *Denkavit Industrie* [1980] E.C.R. 1205, para.23; ECJ, Case C-26/95 *Palmisani* [1997] E.C.R. I-4395, para.29; ECJ, Case C-92/94 *Heckl Perfection* [1997] E.C.R. I-4385, para.48; ECJ, Case C-225/98 *Douglas* [2000] E.C.R. I-371, para.19; ECJ, Case C-343/96 *Lierke* [1999] E.C.R. I-579, para.26.

those otherwise laid down for repayment of charges.⁴³ In contrast, Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, for which the period allowed is more favourable, provided that that time-limit applies in the same way to actions based on Community law for repayment of such charges as to those based on national law.⁴⁴ Consequently, observance of the principle of equivalence hinges on correctly identifying what claims—based on Community law or based on national law—are of the same kind. It seems appropriate to use the most precise comparative criterion, namely the recovery of charges paid but undue (undue either under Community law or under national law).⁴⁵

Accordingly, Community law does not preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies. The same test is applied where a Member State adopts rules which retroactively restrict the right to repayment of a sum levied but not due, in order to forestall the possible effects of a judgment of the Court of Justice.⁴⁶

- 3-521 Principle of effectiveness. As far as the principle of effectiveness is concerned, the Court of Justice considers that it is compatible with Community law to lay down reasonable limitation periods for bringing proceedings.⁴⁷ A reasonable limitation period finds its justification in the fundamental principle of legal certainty which protects both the taxpayer

⁴³ See, e.g., ECI, Case 369/85 *Pons* [1985] E.C.R. 355, paras 13 and 19, in which the Court of Justice held that a Belgian law restricting the right to repayment of an excise-duty imposed on students from other Member States contrary to Community law made it impossible to exercise the rights guaranteed by Art. 12 of the EC Treaty (then Art. 9) of the EEC Treaty. See also ECI, Case C-343/96 *Dilepport* [1999] E.C.R. I-579, para 37-45.

⁴⁴ It is a matter of national law whether, in the case of a claim for repayment of a charge which is contrary to Community law and therefore undue, the legal relationship between the national tax authorities and companies in a Member State is regarded as a fact relationship or whether the rules of the ordinary law govern that legal relationship. The primacy of Community law which caused the imposition of the charge to be undue has no bearing on the classification in national law of the claim to repayment. (See ECI, *Joined Cases C-135/79 to C-139/79 Dyco GE* [1980] E.C.R. I-637, para 25-37.)

⁴⁵ ECI, Case C-211/95 *Edö* [1996] E.C.R. I-4951, para 35-37; ECI, Case C-260/96 *Spur* [1997] E.C.R. I-4997, para 20-21.

⁴⁶ ECI, Case C-343/96 *Dilepport* [1999] E.C.R. I-579, para 43; ECI, Case C-147/01 *Weber's Wine World and Others* [2003] E.C.R. I-1165, para 52.

⁴⁷ ECI, Case C-78/93 *Frenon and Others* [2000] E.C.R. I-9121, para 41; ECI, Case C-125/01 *Phidre* [2003] E.C.R. I-9315, para 35.

and the administration concerned. Such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by Community law.⁴⁸

The Court of Justice has regarded a national limitation period of three years from the date of the contested payment as reasonable.⁴⁹ Of course, national limitation periods are assessed on a case-by-case basis.⁵⁰

Reduction of a limitation period. If a Member State decides to reduce a limitation period, the new reduced period should itself be reasonable. Reducing a limitation period will infringe the principle of effectiveness where the legislation which effected the reduction does not include transitional arrangements allowing an adequate period after its enactment for lodging the claims for repayment which persons were entitled to submit under the original legislation.⁵¹ As far as the duration of the requisite transitional period is concerned, the Court of Justice has further specified that it must be sufficient to allow taxpayers who initially thought that the old period for bringing proceedings was available to them a reasonable period of time to assert their right of recovery. The Court considered that a transitional period of 90 days prior to the retroactive application of a period of three years for initiating proceedings in place of a five-year period was clearly insufficient. If an initial period of five years was taken as a reference, 90 days left taxpayers whose rights accrued approximately three years earlier in a position of having to act within three months when they had thought that almost another two years were still available. Consequently, the Court of Justice considered that where a period of ten or five

⁴⁸ ECI, Case C-211/95 *Edö* [1996] E.C.R. I-4951, para 35. The fact that the Court has given a preliminary ruling interpreting a provision of Community law without limiting the temporal effects of its judgment does not affect the right of a Member State to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of charges levied in breach of that provision must be commenced (ibid., para 25).

⁴⁹ ECI, Case C-211/95 *Edö* [1996] E.C.R. I-4951, para 35; ECI, Case C-260/96 *Spur* [1997] E.C.R. I-4997, para 19; ECI, *Joined Cases C-279/96, C-280/96 and C-281/96 Arnoldo Energie and Others* [1998] E.C.R. I-5015, para 17-18; ECI, Case C-343/96 *Dilepport* [1999] E.C.R. I-579, para 74; see also ECI, *Joined Cases C-216/99 and C-223/99 Ricardo Price and CASER* [2001] E.C.R. I-6761, para 75. In *Requete Fritas* (ECJ, Case C-35/99 *Requete Fritas* [2000] E.C.R. I-10465), the Court of Justice considered that a national limitation period for a claim for the recovery of undue payment of up to a minimum of 4 years and a maximum of 5 years preceding the year of the judicial decision finding the rule of national law establishing the tax to be incompatible with a superior rule of law was reasonable.

⁵⁰ Assessment of the reasonableness of a limitation period is done on a case-by-case basis, taking account of each case's own factual and legal context as a whole. It is not possible to infer from such assessments a general rule which can be applied mechanically in every field (ECJ, Case C-479/00 *Confair* [2002] E.C.R. I-3057, para 37). The Court of Justice has held, e.g. that a short limitation period of two weeks to contest a decision to award a public procurement contract is reasonable (ECJ, Case C-40/99 *Universale Bau and Others* [2000] E.C.R. I-11517, para 71-72).

⁵¹ ECI, Case C-60/00 *Marko & Spencer* [2002] E.C.R. I-6321, para 34-42 (where the Court of Justice held that a three-year limitation period was reasonable, but that the principle of effectiveness had been infringed because the new legislation did not provide for a transitional limitation period and was applicable immediately with retroactive effect).

years for instituting proceedings is reduced to three years, the minimum transitional period required to ensure that rights conferred by Community law can be effectively exercised and that normally diligent taxpayers can familiarise themselves with the new regime and prepare and commence proceedings in circumstances which do not compromise their chances of success can be reasonably assessed at six months.⁴³

3-023 Charge passed on to third parties. In principle, a trader who has paid a charge which was levied unduly is entitled to recover the sum in question. The tax authorities may refuse to repay such a charge only where repayment would result in the trader being unjustly enriched.⁴⁴ Therefore, from the point of view of Community law, there is nothing to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers. In principle, therefore, national legislative provisions which preclude the repayment of taxes, charges and duties levied contrary to Community law are not to be regarded as being in breach of Community law where it is clear that the persons who had to pay them actually passed them on to others.⁴⁵

3-024 Burden of proof. However, rules of evidence which render it virtually impossible or extremely difficult to recover a charge levied contrary to Community law are in breach of Community law.⁴⁶ A national provision which imposes on the taxpayer the negative burden of proving that the charge was not passed on to third parties or embodies a presumption that the charge was passed on does not satisfy the requirements of Community

⁴³ ECJ, Case C-253/00 *Grundig Italiana* (2002) E.C.R. I-2003, paras 35-42 (reducing a five- to ten-year limitation period to three years requires a minimum transitional period of six months). In contrast, in *Reichle* (ECJ, Case C-30/02 *Reichle* (2004) E.C.R. I-9051, para 21), a limitation period of 90 days was held to be compatible with the principle of effectiveness. In that case, however, there was not originally a longer limitation period which was subsequently reduced to 90 days.

⁴⁴ ECJ, Joined Cases C-392/93 to C-415/93 *Comet and Others* (1997) E.C.R. I-163, paras 20-22; ECJ, Case C-147/90 *Weber's Wine World and Others* (2000) E.C.R. I-11155, para 16.

⁴⁵ ECJ, Case 61/79 *Dombart Italiana* (1980) E.C.R. 1305, para 14; ECJ, Case 58/79 *Aur* (1980) E.C.R. 101, para 25; ECJ, Case 120/79 *Excess Duty Foods* (1980) E.C.R. 1387, para 12; ECJ, Case 159/82 *San Giorgio* (1983) E.C.R. 1353, para 13; ECJ, Joined Cases C-193/95 to C-212/95 *Comet and Others* (1997) E.C.R. I-155, para 12; ECJ, Case C-343/96 *Düper* (1999) E.C.R. I-579, para 47. For a critical commentary on this rule, see, inter alia, Hubert, "La répartition de l'impôt au droit communautaire" (1991) R.T.D.E. 443-453. The same principle is applied in respect of a claim for reimbursement of levied "Community charge": ECJ, Case 86/80 *International Chemical* (1982) E.C.R. 1151, paras 23-25.

⁴⁶ Similarly, rules of evidence which render it virtually impossible or extremely difficult to demonstrate that a provision of Community law having direct effect has been breached also violate Community law: ECJ, Cases C-442/85 *GP-Lux* (1987) E.C.R. I-4445, para 44.

law.⁴⁷ Accordingly, a national tax authority (or a national court) cannot merely state that a charge was passed on in the selling price to consumers, that the economic burden which the charge represented for the taxable person is neutralised and that, consequently, repayment would automatically entail unjust enrichment of the trader.⁴⁸

Payment under protest. A Member State may not make the recovery of a sum which was paid to a public authority under a mistake of law and was not due under Community law depend upon the payment having been made under protest, since such a condition is liable to prejudice effective protection of the rights conferred by Community law on the individuals involved.⁴⁹

Interest. As for the question as to whether interest is payable on wrongly levied charges, according to the case-law it is "for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated".⁵⁰ However, the principles of equivalence and effectiveness must be complied with. Thus, Community law does not preclude, in the event of the repayment of charges levied in breach thereof, payment of interest calculated by methods less favourable than those applicable under the ordinary rules governing actions for the recovery of sums paid but not due between private individuals, provided that those methods apply in the same way to such actions brought under Community

⁴⁷ ECJ, Case 139/82 *San Giorgio* (1983) E.C.R. 1355, para 14; ECJ, Joined Cases 131/ 375 and 178/82 *Pienco and Grand* (1983) E.C.R. 1095, para 22-23; ECJ, Case C-343/96 *Düper* (1999) E.C.R. I-579, para 43; ECJ, Joined Cases C-441/93 and C-442/93 *Mitsubishi* (2000) E.C.R. I-745, paras 42-41. See also ECJ, Case C-129/00 *Commission v Italy* (2003) E.C.R. I-14337, where the Court held that Italy had infringed Community law in so far as the case-law of the Court supreme of commerce was in breach of the principles enshrined in the judgments in *San Giorgio* and *Düper*. See, with regard to the abuse of law, ECJ, Case C-113/99 *Evand-Swabe* (2000) E.C.R. I-1159, para 54, in which the Court of Justice held that it was necessary to prove the existence of two elements, namely a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules had not been achieved, and a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. It is for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of Community law is not thereby undermined (see also Joined Cases C-415/97 and C-416/97 *ARCO Chemie Netherlands and Others* (2000) E.C.R. I-4715, para 41).

⁴⁸ ECJ, Case 159/82 *San Giorgio* (1983) E.C.R. 1355, para 14; ECJ, Case C-343/96 *Düper* (1999) E.C.R. I-579, paras 48, 51 and 54; ECJ, Joined Cases C-441/93 and C-442/93 *Mitsubishi* (2000) E.C.R. I-745, paras 36-37; ECJ, Case C-167/01 *Weber's Wine World and Others* (2003) E.C.R. I-11365, para 110-111. For an enlightening analysis, see the Opinion of Advocate General L.A. Geelhoed, in Case C-129/00 *Commission v Italy* (2003) E.C.R. I-14340, points 65-100.

⁴⁹ ECJ, Case C-212/94 *FAG and Others* (1995) E.C.R. I-363, para 72.

⁵⁰ ECJ, Joined Cases C-392/93 and C-415/93 *Comet and Others* (1997) E.C.R. I-163, para 36.

law as to those brought under national law.⁴³ As far as the principle of effectiveness is concerned, the Court of Justice has made it clear that national law must enable interest to be paid where this is essential if the damage caused by a breach of the Treaty is to be repaired. This will be the case, for example, where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely.⁴⁴

2. Recovery of unlawful State aid

- 3-027 **Obligation to recover.** Where the Commission orders the recovery of State aid paid over unlawfully under Community law, applicable provisions of national law may not affect the scope and effectiveness of Community law.⁴⁵ The decision declaring the aid incompatible with the common market will generally require the authority which granted the aid to recover it in accordance with the rules of national law. But the application of those rules must not make it impossible in practice to recover the sums irregularly granted or be discriminatory in relation to comparable cases which are governed solely by national legislation.⁴⁶

3. Claims for an advantage due under Community law

- 3-028 **Limitation period.** An individual who claims a certain advantage on the basis of Community law from a national authority will normally also have to assert his or her claim within a specific time-limit. Here, too, the case-law assumes that a reasonable limitation period finds its justification in the fundamental principle of legal certainty.⁴⁷
- 3-029 **Claim based on a directive.** It may happen that individuals base their claim to a certain social advantage on the provisions having direct effect of a directive which the Member State concerned failed to implement in time.

⁴³ ECI, Joined Cases C-275/96, C-280/96 and C-281/96 *Ansaldo Energia and Others* (1997) E.C.R. I-5015, para 24-36.

⁴⁴ ECI, Joined Cases C-397/93 and C-410/93 *Metalgesellschaft and Others* (2000) E.C.R. I-1727, para 37-38.

⁴⁵ The same basic rules also apply to the recovery by national authorities of Community aid which has been unduly paid: ECI, Case C-295/95 *Oelzele Hamburg and Schmidt Söhne* (1997) E.C.R. I-4757 (specification of the requirements of Community law for the application of the principle of the loss of unjust enrichment on which the recipient of undue Community aid may possibly rely in order to avoid having to make repayment to the national authorities).

⁴⁶ ECI, Joined Cases 255-258/92 *Deutsche Milchwerke* (1993) E.C.R. 2630, para 11-24; ECI, Case 24/81 *Commission v Germany* (1989) E.C.R. 175, para 12; Cf. Case T-439/93 *Siemens v Commission* (1995) E.C.R. II-1675, para 62. For an example in which various principles of national law were set aside, see ECI, Case C-245/93 *Alexa Deutschland* (1997) E.C.R. I-1391. Nevertheless, it cannot be predicted that a recipient of illegally granted aid may rely on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and was declined to refund the aid (ECI, Case C-95/02 *Commission v Italy* (2004) E.C.R. I-3353, para 20).

⁴⁷ ECI, Case C-76/98 *Fritzen and Others* (2000) E.C.R. I-3207, para 33; ECI, Case C-125/01 *Pyrotek* (2003) E.C.R. I-9373, para 34.

In such a case, is the national court entitled to apply the limitation period provided for in its national procedural law? The answer given initially by the Court of Justice was unqualifiedly in the negative. Accordingly, it held in *Emmott* that, in the light of the particular nature of directives, "Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by [a directive], on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system".⁴⁸ The rationale was that so long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights.⁴⁹

Subsequently, the Court of Justice has refined that case-law. It is only where it appears that, as a result of the application of a limitation period, an individual has no possibility at all of asserting the rights conferred upon him or her by a directive that the limitation period may not be applied.⁵⁰ A national rule which restricts the retroactive effect of a claim to an unpaid social security benefit is compatible with Community law, even where the claim is based on a provision with direct effect of a directive which has not been properly transposed into national law. This is because such a rule does not affect the individual's actual right to the relevant benefit. Furthermore, Community law does not preclude the application of a provision of national law whereby benefits for incapacity for work are payable not earlier than one year before the date of claim, in the case where an individual seeks to rely on rights conferred by a provision with direct effect of a directive which was not transposed into national law on time.⁵¹

⁴⁸ ECI, Case C-223/97 *Emmott* (1999) E.C.R. I-4249, para 17 and 24, at I-4258-4259 (case note by Symonides (1999) C.M.L.Rev. 624-625; for a very critical commentary, see Hoskins, "Tilting the Balance: Supremacy and National Procedural Rules" (1999) E.L.Rev. 363-377). For a good exposition of the criticism levelled against *Emmott* and of the way in which the Court of Justice has subsequently distinguished that case, see Bradley and Hoskins, *Revisited* in E.C.L.J., at 115-117. As far as the "particular nature of directives" is concerned, see ECI, Case C-513/92 *Finchietti Dori* (1994) E.C.R. I-3125.

⁴⁹ ECI, Case C-265/93 *Emmott* (1995) E.C.R. I-4249, para 21.

⁵⁰ ECI, Case C-90/94 *Haack-Petroleum* (1997) E.C.R. I-4325, para 52; ECI, Joined Cases C-124/93 and C-125/93 *France and Skovboe Denmark* (1997) E.C.R. I-4361, para 48; ECI, Case C-183/93 *Finmark and Others* (1997) E.C.R. I-6783, para 52.

⁵¹ ECI, Case C-333/92 *Steenhorst-Neerings* (1993) E.C.R. I-5475, para 24, with a case note by Anido Souto (1994) C.M.L.Rev. 575-587; ECI, Case C-410/92 *Johansen* (1994) E.C.R. I-5455, para 24, with a case note clearly summarizing this question by Docksey (1995) C.M.L.Rev. 1447-1459. For the application of these principles to the recovery of unlawful charges, see Edin (n.44, *supra*), para 40-45; (see also Edin, *supra*), para 24-32; *Ansaldo Energia and Others* (n.43, *supra*), para 13-23. In each of those judgments, the Court of Justice held that having regard to the documents before the Court and the arguments presented at the hearing, it did not appear that the conduct of the Italian authorities, in conjunction with the existence of the contested time-limit had the effect, as it did in *Emmott* (n. 48, *supra*), of depriving the claimants of any opportunity of enforcing their

2-030 Principle of effectiveness. In contrast, a national provision which is such as to render any action by individuals relying on Community law impossible in practice is incompatible with Community law. Thus, the Court of Justice held in *Mogorin and Cunningham*⁴² that Community law precludes the application, to a claim based on Art.141 of the EC Treaty for recognition of the claimants' entitlement to join an occupational pension scheme, of a national rule under which such entitlement is limited to a period which starts to run from a point in time two years prior to commencement of proceedings in connection with the claim. Unlike rules which in the interests of legal certainty merely limit the retrospective scope of a claim for certain benefits and do not therefore strike at the very essence of the rights conferred by the Community legal order, a rule such as the one at issue in *Mogorin and Cunningham* was such as to render any action by individuals relying on Art.141 of the EC Treaty impossible in practice. In fact, the rule at issue meant that a large number of years of service were not taken into account in calculating the pensions to which those concerned would have been entitled in the future.⁴³

3-031 Decelt. Lastly, the principle of effectiveness precludes the application of a national limitation period, which is *per se* reasonable, where the claim was brought out of time owing to the default of the other party. Accordingly, Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, there being no possibility of extending that period, where the delay in bringing a claim is attributable to the fact that the employer deliberately misrepresented to the employee the level of remuneration received by persons of the opposite sex performing like work.⁴⁴

C. ASSESSMENT OF THE LEGALITY OF NATIONAL PROVISIONS IN THE LIGHT OF COMMUNITY LAW

2-032 Inapplicability of conflicting national rules. The national court's obligation to give full effect to Community law means that it must "if necessary, [refuse] of its own motion to apply any conflicting provisions of national

rights before the national courts. Community law does not preclude the application of a period of limitation or prescription laid down by a rule of national law which restricts the period prior to the bringing of the claim in the national court in respect of which reimbursement of undue payments may be obtained, where that rule is not discriminatory and does not prejudice the actual right conferred on individuals by a preliminary ruling on invalidity. See, *ECJ, Case C-212/94 F&C and Others* [1995] E.C.R. I-1339, paras 61-64; *ECJ, Case C-49/94 Henk-Peterlein* [1997] E.C.R. I-1653, paras 45-51; *ECJ, Joined Cases C-114/93 and C-115/93 Toubon and Obermaier* [1997] E.C.R. I-4261, paras 44-49; *ECJ, Case C-182/95 Parnock and Others* [1997] E.C.R. I-5783.

⁴² *ECJ, Case C-145/95 Mogorin and Cunningham* [1997] E.C.R. I-1153.

⁴³ *Ibid.*, paras 41-45.

⁴⁴ *ECJ, Case C-514/93 Lever* [1995] E.C.R. I-7131, para 34.

legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means".⁴⁵ By that ruling, the Court of Justice debarred Member States from placing any restriction on their courts in declaring inapplicable provisions or principles of national law which conflict with Community law. If there is nevertheless such a restriction, national courts must simply set it aside on the basis of Community law, which is binding upon the Member State of which they are institutions.⁴⁶

Avoiding conflict. This principle can be respected without any difficulty where a provision of national law conflicts with a provision of the EC Treaty having direct effect, a regulation, or even a directive in proceedings between a private party and public authorities. The situation is, however, different in proceedings exclusively between private parties. Since a directive cannot of itself apply in proceedings exclusively between private parties, a national court cannot be obliged simply to set aside a provision of national law conflicting with a provision of a directive, even if it concerns a clear, precise and unconditional provision seeking to confer rights or impose obligations on individuals. Nevertheless, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by it. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not require merely those provisions to be so interpreted but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive. In that context, if the application of interpretative methods recognised by national law enables a provision of domestic law to be construed, in certain circumstances, in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive. The principle of interpretation in conformity with Community law thus requires the national court to do whatever lies within its power, having regard to the whole body of rules of national law, to ensure that the directive is fully effective.⁴⁷

⁴⁵ *ECJ, Case 126/77 Sommadossi* [1978] E.C.R. 429, operative part, at 545-546. With regard to the non-applicability of a technical provision which was not notified in accordance with Directive 1976/267 as then applicable in the context of a dispute between individuals relating in particular to contractual rights and obligations, national law will determine what consequences (as regards the possible nullity or unenforceability of the contract) arise from the non-applicability of the technical provision (*ECJ, Case C-159/90 Sopad Audio* [1992] E.C.R. I-3031, para 53).

⁴⁶ Cf. *Cartoon, "Droit communautaire et droits nationaux concurrentes ou primaires: La contribution de l'arrêt 'Sommadossi'"* [1978] R.T.D.E. 351-415.

⁴⁷ *ECJ, Joined Cases C-297/91 and C-487/91 Pfeiffer and Others* [1994] E.C.R. I-3815, paras 197-201, and the case-law cited therein.

- 3-034 Timeframe. The decisive point is time which the national court takes into account in order to assess the legality of an act in the light of Community law is determined by national law, provided that it does not detract from the principles of equivalence and effectiveness.⁴³

D. RAISING PLEAS DERIVED FROM COMMUNITY LAW OF THE COURT'S OWN MOTION

- 3-035 Principle. The principle of the full effectiveness of Community law does not require the national court to raise applicable Community law in all circumstances of its own motion. The national court has the power to do so if it considers that Community law must be applied,⁴⁴ but it is only where the parties have failed to invoke mandatory rules of Community law having direct effect⁴⁵ that it may be obliged to raise those rules of its own motion.

- 3-036 Bases of the principle. Depending on the case, the Court of Justice has identified different bases for this principle. Where there is an obligation for the national court to raise mandatory rules of law of its own motion by virtue of domestic law, there will be the same obligation to raise Community rules by virtue of the principle of procedural equal treatment. Where domestic law merely confers on national courts a discretion to apply mandatory rules of law of their own motion, the same obligation to raise Community rules remains pursuant to the principle of cooperation laid down in Art.10 of the EC Treaty, which requires national courts to use all the possibilities afforded by national law in order to ensure the legal protection which persons derive from the direct effect of provisions of Community law,⁴⁶ or alternatively pursuant to the duty on the courts, as authorities of the Member States, under the third para. of Art.249 of the EC Treaty to take all the measures necessary to achieve the result prescribed by a directive.⁴⁷ It follows that, in the absence of any Com-

⁴³ ECJ, Case C-52/96 *HY* [2001] E.C.R. I-5553, para.61.

⁴⁴ ECJ, Joined Cases C-37-89/90 *Verheijen and Others* [1991] E.C.R. I-3757, para.13.

⁴⁵ The mandatory (or public policy) nature of a provision of Community law does not depend on criteria stemming from national law, but is determined on the basis of Community law (see SCJ, Case C-324/97 *Eco Swiss China Time* [1999] E.C.R. I-3355, paras 34-39, with a case note by Koumianos [2000] C.M.L.Rev. 459-578). See also Prechal and Schoch, "National Procedures, Public Policy and EC Law: From Van Schijndel to Eco Swiss and Beyond" (2004) E.Rev.Priv.L. 589-611.

⁴⁶ ECJ, Joined Cases C-430 and C-431/93 *Van Schijndel and Van Veen* [1995] E.C.R. I-4705, para.13-14 (case note by Heukels [1995] C.M.L.Rev. 337-353). That judgment has been given a somewhat critical reception; see, inter alia, Hoskins (n.464, *supra*), and Prechal (n.371, *supra*). For an application of the judgment in the French legal system, see Sotgiu and Delacoste, "Intrusions into National Procedural Autonomy: The French Paradigm" (1997) E.L.J. 141-145.

⁴⁷ ECJ, Case C-72/95 *Knauff and Others* [1996] E.C.R. I-5435, paras 54-61, with a case note by Cappelletti (1997-1998) R.W. 60-61. Cf. ECJ, Joined Cases C-240/93 to C-244/93 *Orlando Grupp Editorial and Jahrbuch Editorial* [2000] E.C.R. I-4541, where the national court's power to declare of its own motion that it had no jurisdiction was inferred directly from Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts and from the objectives underlying that directive. See Prechal, "Ambulante werden van onder de bedingen door middel van conformiteits" [2003] N.T.E.R. 104-105; see also Delacoste, "Towards European Procedural Primacy in National Legal Systems" (2003) E.L.J. 599-613.

munity provision governing the matter, there will be a requirement for the national courts to raise provisions of Community law of their own motion only if there exists a requirement or a discretion to raise mandatory rules by virtue of domestic law.⁴⁸ Where national courts are precluded from so doing under national procedural law, there is in principle no requirement for them to do so, provided, however, that this does not cause national procedural law to conflict with Community law. National procedural law must comply with the constraints to which reference has already been made (see 3-035, *supra*),⁴⁹ in particular the requirement that it must not render the exercise of rights conferred by Community law virtually impossible or excessively difficult. In addition, it must not prevent the procedure laid down in Art.234 of the EC Treaty from being followed.⁵⁰ A rule of national procedural law which does not satisfy those conditions must be set aside,⁵¹ with the result that the national court in question may nevertheless be subject to the requirement to raise rules of Community law of its own motion. In this regard, the Court of Justice tests the national procedural rules against Community law having regard to their role in the procedure, its progress and its special features, before the various national authorities. Frequently, the Court also has regard to the basic principles of the domestic legal system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure.⁵² Accordingly, the Court has held that civil courts are not required to abandon the passive role assigned to them by raising a rule of Community law of their own motion.⁵³ In contrast, a rule of the Belgian Income Tax

⁴⁸ ECJ, Joined Cases C-430 and C-431/93 *Van Schijndel and Van Veen* [1995] E.C.R. I-4705, para.15. The Court did not explain exactly why a requirement for national courts to raise of their own motion rules of Community law having direct effect exists only where it is possible to raise mandatory national rules of their own motion. In his Opinion in that case, Advocate General F.G. Jacobs argued that if the view were taken that national procedural rules must always yield to Community law that would unduly subvert established principles underlying the legal systems of the Member States. It could be regarded as infringing the principles of proportionality and subsidiarity. It would also give rise to widespread anomalies, since the effect would be to afford greater protection to rights which are not, by virtue of being Community rights, inherently of greater importance than rights recognised by national law (Opinion of Advocate General F.G. Jacobs, point 27; see also the case note by Heukels, n.477, *supra*, at 349).

⁴⁹ *Van Schijndel and Van Veen*, para.17.

⁵⁰ *Van Schijndel and Van Veen*, para.18, and ECJ, Case 154/73 *Rheinmühlen-Düsseldorf* [1974] E.C.R. 33, paras 2-3, cited therein.

⁵¹ See 3-032, *supra*.

⁵² *Van Schijndel and Van Veen*, para.19. The criterion whereby the Court of Justice also considers the role of the procedural rule under national law seems to go further than the criterion in Case 35/76 *Reze* (see 3-031, *supra*), whereby the Court of Justice considers only the effect of the relevant rule in a particular case; see Hoskins (n.464, *supra*), at 371.

⁵³ *Van Schijndel and Van Veen*, para.22. Community law does not require national courts to raise of their own motion issues concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his or her claim.

Code (Art. 278, second para., in conjunction with Arts 279, second para., and 282) which prevented the national court from inquiring of its own motion into the compatibility of a tax assessment with a provision of Community law in proceedings relating to that assessment unless the taxpayer had raised the relevant provision within a specified time-limit was held by the Court to be contrary to Community law.⁴³

E. EFFECTS OF INFRINGEMENTS OF COMMUNITY LAW

1. Imposition of sanctions

1-037 Division of powers. The division of powers as between the Community and the Member States as regards the imposition of sanctions is a controversial question.⁴⁴ The Community does not have a general power to impose criminal sanctions.⁴⁵ It can, however, impose other types of sanctions.⁴⁶ If it does not do so,⁴⁷ Member States are empowered to enforce compliance with Community law by imposing criminal sanctions or using sanctions available under other branches of the law.⁴⁸

1-038 Power of Member States. The Member States' power to impose penalties or other sanctions for infringement of Community law must, pursuant to Art. 113 of the EC Treaty, be exercised in order to guarantee the full

⁴³ ECJ, Case C-312/95 *Pedergniet* [1997] E.C.R. I-4595 (with a case note by Hinkel, 1997, *supra*). Characteristics and circumstances to which the Court of Justice has regard in finding that such a procedural rule is incompatible with Community law include the fact that the national court is the first judicial authority to have cognizance of the case and to be able to request a preliminary ruling, the fact that another judicial authority in a further hearing was precluded from raising the question of compatibility with Community law of its own motion and the fact that the impossibility for national courts to raise points of Community law of their own motion does not appear to be reasonably justifiable by principles such as the requirement of legal certainty or proper conduct of the procedure.

⁴⁴ For an extensive survey of the relevant doctrine, see Teisberg, "La sanction des infractions au droit communautaire" (1992) *Rev.D.E.* 477-508.

⁴⁵ ECJ, Case 202/80 *Canal* [1981] E.C.R. 2595, para.37; ECJ, Case 185/81 *Coven* [1989] E.C.R. 185, para.19. But see, in the specific field of Community environmental legislation, ECJ Judgment of September 13, 2005, Case C-176/05 *Commission v. Council*, not yet reported; compare Haguenau, "Sanctions pénales des infractions à assurer le respect du droit communautaire" (1993) *R.M.C.* 551, at 559, who argues that the Community has the power to impose criminal sanctions under Arts 10 and 318 of the EC Treaty, and Zuleger, "Der Beitrag des Strafrechts zur europäischen Integration" (1991) *J.Z.* 751-763.

⁴⁶ ECJ, Case C-243/90 *Germany v. Commission* [1992] E.C.R. I-5183; for a commentary, see Stessens, "De bevoegdheid van de Europese Gemeenschap tot het vaststellen van sancties op weg naar een communautaire strafrecht" (1993-1994) *R.W.* 137-151.

⁴⁷ If Community sanctions are imposed, the principle *ne bis in idem* would prevent the imposition of additional national sanctions for the same breach of Community law. Naturally, the position would be different where the same set of measures constituted an infringement of both Community and national law. In such case, penalties and other sanctions could be imposed for the infringement of national law alongside the sanctions provided for by the Community provision itself in respect of the infringement of Community law. See also Blomacelli, "Les principes généraux du droit communautaire applicables en matière pénale" (1981) *R.S.C.D.P.C.* 151-156; de Weert and van der Huler, "EEG-sancties en de bis in idem" (1990) *S.R.W.* 722-733.

⁴⁸ ECJ, Joined Cases C-58, C-75, C-112, C-119, C-125, C-135, C-140, C-141, C-154 and C-157/95 *Götsche and Others* [1996] E.C.R. I-4345, para. 14-15.

effectiveness of that law.⁴⁹ This power constitutes the corollary of the Member States' obligation to impose Community law in their territory.⁵⁰

Effectiveness and equivalence. The obligation to guarantee the full effectiveness of Community law entails that the sanction imposed by a Member State in the event of infringement of a Community provision from which individuals derive rights be such as to guarantee real and effective legal protection and have a real deterrent effect.⁵¹ To that end, not only the imposition, but also the enforcement, of the sanction is important. For example, it would appear not to be in accordance with Community law for an obligation to pay compensation imposed upon a Member State for infringement of a Community provision to be thwarted by a general executive immunity with regard to public goods.

Infringements of Community law must be penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature. Penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive.⁵² When exercising their power to impose sanctions, Member States must comply with Community law and the general principles of law embodied therein.⁵³ Furthermore, control procedures must not be conceived in such a manner as to restrict the freedoms required by the Treaty and must not be accompanied by a penalty which is so disproportionate to

⁴⁹ ECJ, Case 68/83 *Commission v. Greece* [1989] E.C.R. 2965, para.23; ECJ, Case C-325/83 *Henzen* [1993] E.C.R. I-2911, para.17; ECJ, Case C-75/80 *Vandevenne* [1991] E.C.R. I-4372, para.11; ECJ, Case C-352/92 *Commission v. United Kingdom* [1994] E.C.R. I-2435, para.55; ECJ, Case C-383/92 *Commission v. United Kingdom* [1994] E.C.R. I-2479, para.46.

⁵⁰ Temple Lang, "Art. 3 of the Treaty of the EEC: the Emergence of Constitutional Principles in the Case Law of the Court of Justice" (1987) *Foodbarn L.J.* 503, at 515-522.

⁵¹ ECJ, Case 14/83 *Von Colson and Karmann* [1984] E.C.R. 1851, para.23; ECJ, Case 19/83 *Hart* [1984] E.C.R. 1521, paras 22-23 (where a Member State chooses to penalise a breach of the prohibition of discrimination by the award of compensation, the compensation must be adequate in relation to the damage sustained). See also ECJ, Case C-177/88 *Dobler* [1990] E.C.R. I-3941, para. 23-26; ECJ, Case C-271/92 *Marshall* [1993] E.C.R. I-4357, para. 24-25; ECJ, Case C-265/88 *Nunes and de Mello* [1995] E.C.R. I-4543, paras 10-11; ECJ, Case C-334/89 *Commission v. Ireland* [2001] E.C.R. I-7557, para.46.

⁵² ECJ, Case 68/83 *Commission v. Greece* [1989] E.C.R. 2965, para.23 and 24; ECJ, Case C-316/83 *Henzen* [1993] E.C.R. I-2911, para.17; Case C-167/91 *Inspire Art* [2003] E.C.R. I-1535, para.62; ECJ, Case C-230/01 *Pengow Farming Partnership* [2004] E.C.R. I-557, para.36; ECJ, Joined Cases C-357/02, C-391/02 and C-438/02 *Barbulescu and Others* [2005] E.C.R. I-3585, para.55.

⁵³ ECJ, Joined Cases 211 and 302/85 *König* [1986] E.C.R. 1477, para.3; ECJ, Case 3/83 *Wohlfahrt* [1985] E.C.R. 2565, para.19; ECJ, Case C-210/91 *Commission v. Greece* [1992] E.C.R. I-5735, para.15. It may be noted that the penalties imposed by a Member State for non-compliance with formalities lawfully required in order to establish a right conferred by Community law may not be such as to constitute an obstacle to the exercise of that right. Such penalties are disproportionate and contrary to Community law. ECJ, Case C-193/94 *Skene and Chrysanthakopoulos* [1995] E.C.R. I-929, paras 35-36. The sanction imposed may not be contrary to provisions of the ECHR (ECJ, Case C-630/02 *X* [2004] E.C.R. I-651, para. 61-63).

the seriousness of the infringement that it becomes an obstacle to those freedoms.⁴⁸⁶

- 3-040 Example. In the field of criminal or disciplinary proceedings, the Court of Justice subscribes to the Commission's view that "the Member States are required by virtue of Art.5 [now Art.10] of the EEC Treaty to penalise any persons who infringe Community law in the same way as they penalise those who infringe national law".⁴⁸⁷ The Hellenic Republic was charged with having infringed Community law "by omitting to initiate all the criminal or disciplinary proceedings provided for by national law against the perpetrators of the fraud and all those who collaborated in the commission and concealment of it".⁴⁸⁸ This certainly places a restriction on the public prosecutor's freedom in principle to decide whether or not to bring criminal proceedings for breaches of Community law. Yet that freedom does not disappear altogether. The Court of Justice simply held that "the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws",⁴⁸⁹ or, in other words, that the public prosecutor must be able to show the same strictness in respect of breaches of Community law pursued under the criminal law as he or she does in respect of similar breaches of national law. This is consistent with the general obligation for Member States to ensure that "infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive".⁴⁹⁰

2. Claims for damages for an infringement of Community law by Member States

- 3-041 Principle. Community law obliges Member States to provide for the specific "sanction" of a right to reparation where, by their action or failure to act, national authorities infringe Community law (unlawful act or omission) and this results (causal link)⁴⁹¹ in damage to rights which individuals derive from Community law (loss or damage).⁴⁹² The Court of

⁴⁸⁶ ECJ, Case 238/83 *Carati* [1984] E.C.R. 2555, para.17; ECJ, Joined Cases 256/82 and 258/82 *Lesaffre and Carbone* [1984] E.C.R. 377, para.34.

⁴⁸⁷ ECJ, Case 65/86 *Commission v Greece* [1988] E.C.R. 2555, first sentence of para.22.

⁴⁸⁸ *Ibid.*, second sentence of para.22.

⁴⁸⁹ *Ibid.*, para.23.

⁴⁹⁰ *Ibid.*, para.24. See, to the same effect, Case C-116/88 *Hansen* [1993] E.C.R. I-2911, para.17; ECJ, Case C-36/94 *Sieck* [1995] E.C.R. I-3373, para.23; ECJ, Case C-113/99 *De Andrade* [2000] E.C.R. I-1183, para.15.

⁴⁹¹ The causal connection is determined in principle by the national court (see ECJ, Case C-143/97 *Reichberger and Others* [1999] E.C.R. I-3459, paras 32-33).

⁴⁹² ECJ, Joined Cases C-6 and C-9/90 *Francovich and Others* [1991] E.C.R. I-5357. See Voge, "Overheidsaansprakelijkheid wegens schending van het Europees Gemeenschapsrecht" [2003] T.B.H. 713-763.

Justice takes the view that "the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty".⁴⁹³ "A further basis for the obligation of Member States to make good such loss and damage is to be found in (Art. 13) of the Treaty".⁴⁹⁴

The basic conditions "under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage".⁴⁹⁵ This means that those conditions invariably have to be assessed in the light of the particular situation.⁴⁹⁶ In determining those conditions, the Court of Justice has regard to its case-law on the non-contractual liability of the Community. First, this is because the second para. of Art.235 of the EC Treaty refers to the general principles common to the legal systems of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law and, secondly, because the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot differ from those governing the liability of the Community in like circumstances.⁴⁹⁷ Since the judgment in *Bergaderm*⁴⁹⁸ the conditions for the Community to incur liability have been completely aligned with the criteria identified by the Court of Justice for Member States to incur liability:

Conditions. According to the established case-law of the Court of Justice, it appears that a Member State must make good loss or damage sustained by individuals as a result of breaches of Community law attributable to it where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties.⁴⁹⁹

⁴⁹³ *Ibid.*, para.35; ECJ, Case C-630/81 *Evans* [2000] E.C.R. I-14447, para.25.

⁴⁹⁴ *Ibid.*, para.36.

⁴⁹⁵ *Ibid.*, para.36.

⁴⁹⁶ ECJ, Joined Cases C-118, C-179, C-188, C-189 and C-190/94 *Dillenkofer and Others* [1995] E.C.R. I-4343, para.24.

⁴⁹⁷ ECJ, Joined Cases C-45 and C-45/93 *Brasserie du Pêcheur and Factortame (Factortame IV)* [1995] E.C.R. I-1029, paras 59-62 (case note by C.J. van der Grinten [1997] C.M.L.Rev. 535-650). Some commentators would have preferred it if the conditions for liability on the part of the Community had been equated with those for liability on the part of the Member States and not the other way around, while arguing for "clarification" of the interpretation of Art.235 of the EC Treaty in the light of the judgment in *Francovich* (see Caranta, "Judicial Protection against Member States: a New *Jus Conveniens* takes Shape" [1995] C.M.L.Rev. 713-725).

⁴⁹⁸ ECJ, Case C-352/98 *P. Bergaderm and Goupil v Commission* [2000] E.C.R. I-5351.

⁴⁹⁹ ECJ, Joined Cases C-45 and C-48/93 *Brasserie du Pêcheur and Factortame (Factortame IV)* [1995] E.C.R. I-1029, para.51; ECJ, Case C-424/97 *Helm* [2000] E.C.R. I-5123, para.26; ECJ, Case C-424/01 *Zabala* [2003] E.C.R. I-10235, para.51; ECJ, Case C-630/01 *Evans*

As far as the second condition is concerned, namely whether the breach of Community law was sufficiently serious, all the factors which characterise the situation must be taken into account. These factors include, in particular, the clarity and precision of the rule infringed, the measure of discretion left by that rule to the national or Community authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.³³

- 3-043 Margin of discretion. The decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State concerned manifestly and gravely disregarded the limits on its discretion.³⁴ Where an institution of a Member State acts in a matter in which it had only considerably reduced or no discretion at all at the time when it committed the infringement, the mere infringement of Community law may be enough to establish the existence of a sufficiently serious breach.³⁵ Accordingly, failure to take any measure to transpose a directive into national law within the prescribed period in order to achieve the result sought constitutes a sufficiently serious breach of Community law.³⁶ Where conduct has persisted in spite of a preliminary ruling or a judgment of the Court of Justice finding a failure to fulfil obligations from which it appears that that conduct constitutes a breach of Community law, that will also amount to a sufficiently serious breach.³⁷

- 3-044 Transposition of directives. As far as the actual transposition of the provisions of a directive is concerned, a Member State's margin of discretion may be broader, depending on its content. In this way, improper

³³ [2003] E.C.R. I-14447, para. 43. For the question as to whether a directive without direct effect confers "rights" on individuals breach of which may give rise to an obligation to make reparation, see ECJ, Case C-91/92 *Pastini Dori* [1994] E.C.R. I-3515, para. 17; ECJ, Case C-192/94 *LT Comm Rights* [1995] E.C.R. I-1231, para. 22.

³⁴ ECJ, Joined Cases C-48 and C-48/93 *Brasserie du Peillon and Factortame (Factortame IV)* [1996] E.C.R. I-1023, para. 55; ECJ, Case C-424/97 *Helm* [2000] E.C.R. I-9123, para. 24; ECJ, Case C-53/01 *Evans* [2003] E.C.R. I-14447, para. 55.

³⁵ *Factortame IV*, para. 55.

³⁶ For an example, see ECJ, Case C-50/94 *Medley Lomas* [1995] E.C.R. I-1532, para. 18, where the Court of Justice held that the mere infringement of Art. 29 of the EC Treaty by the UK in refusing to grant an export licence constituted a sufficiently serious breach of Community law on the ground that at the time of the infringement the UK had considerably reduced discretion, if any [ibid., para. 12]; see also ECJ, Case C-112/93 *Nordsee Kohlenwerke* [1994] E.C.R. I-1531, para. 102.

³⁷ ECJ, Joined Cases C-175, C-175, C-185, C-189 and C-156/94 *Dillinger and Others* [1996] E.C.R. I-4141. See, also ECJ, Case C-19/95 *Brindley* [1996] E.C.R. I-1255, para. 23. See, with respect to the liability of the Spanish authorities for the incorrect transposition of a directive, Tribunal Supremo (Spanish Supreme Court), Administrative Law Chamber, judgment of June 11, 2003, *Consejo Regulador Dignos* (Case 451/95) with case note by Castillo de la Torre [2004] C.M.L. Rev. 1713-1714.

³⁸ ECJ, Joined Cases C-45 and C-48/93 *Brasserie du Peillon and Factortame (Factortame IV)* [1996] E.C.R. I-1023, para. 57; ECJ, Case C-115/92 *Lory* [2004] E.C.R. I-5551, para. 44.

transposition of a directive may not automatically constitute a sufficiently serious breach and give rise to liability on the part of the State. Accordingly in the British Telecommunications case, the Court of Justice held that the improper transposition of a particular directive into national law did not constitute a sufficiently serious breach of Community law on the ground that the directive at issue was imprecisely worded and was reasonably capable of bearing the interpretation given to it by the UK in good faith and on the basis of arguments which were not entirely devoid of substance and not manifestly contrary to the wording of the directive or its objectives.³⁹

Court decisions. In *Köbler*, the Court of Justice ruled that a Member State may be held liable for a breach of Community law as a result of a decision of a national court adjudicating at last instance only in the exceptional case where the court has manifestly infringed the applicable law.⁴⁰ In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third para. of Art. 234 of the EC Treaty. In any event, an infringement of Community law will be sufficiently serious where the judicial decision concerned was taken in manifest breach of the case-law of the Court of Justice in the relevant matter.⁴¹

³⁹ ECJ, Case C-392/93 *British Telecommunications* [1996] E.C.R. I-1531, para. 61. In ECJ, Joined Cases C-253, C-253, and C-252/94 *Denkavit and Others* [1996] E.C.R. I-5063, paras. 51-54, the Court of Justice held that its case-law did not provide Germany with any interpretation as to how a provision of a particular directive had to be interpreted. Consequently, the erroneous interpretation which Germany had given to it, which had been adopted by almost all the other Member States following discussions within the Council, could not be regarded as a sufficiently serious breach of Community law. In contrast, in *Reichberger* the Court of Justice held that a national implementing provision which limited the time from which a right conferred by a directive entered into effect where the directive conferred no discretion on the Member States in this respect constituted a sufficiently serious breach of Community law [ECJ, Case C-143/97 *Reichberger and Others* [1999] E.C.R. I-1495, para. 51]. See also ECJ, Case C-150/99 *Stockholm Lindpark* [2001] E.C.R. I-483, para. 15.

⁴⁰ ECJ, Case C-214/01 *Köbler* [2003] E.C.R. I-10235, para. 51. See, on this judgment, Gordon, "Stichting van EWR nach Köbler—eine Zwischenbemerkung" [2004] Eu L.R. 55-68; Kraus, "Der erste Köbler-entscheidungsfall vor schiedung von EG-recht in rechtliche sprachen" [2004] N.J.E. 571-575; Koczka, "Responsabilité de l'Etat: une affaire Köbler" [2003] R.D.U.E. 753-755; Breuer, "State liability for judicial wrongs and Community law: the case of Gerhard Köbler v Austria" [2004] E.L.Rev. 243-254; Casson, "Case C-214/01: Gerhard Köbler v Republik Österreich" [2004] C.M.L. Rev. 811-824; Wenzel, "Köbler, CILFIT and Weidmann: We can't go on meeting like this" [2004] C.M.L. Rev. 243-254. For the relationship between Köbler and *Simone & Hein*, see Komárek, "Federal elements in the Community judicial system building tolerance in the Community legal order" [2005] C.M.L. Rev. 3-34.

⁴¹ ECJ, Case C-214/01 *Köbler* [2003] E.C.R. I-10235, para. 51.

3-046 Principle of effectiveness. In the absence of Community rules, the procedural organisation of the legal proceedings is left to national law, but the provisions of national law must not be less favourable for actions for damages for breach of Community law than they are for other actions for damages, or be so framed as to make it "virtually impossible or excessively difficult to obtain reparation".¹¹¹ In addition, traditional concepts applying in some Member States must where appropriate yield to State liability under Community law.¹¹² Accordingly, the principle that the State cannot be held liable for an unlawful act or omission on the part of the legislature, which applies in some Member States' legal systems, cannot restrict the principle of State liability for breaches of Community law. The reason for this is that State liability holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.¹¹³ This applies not only to breaches of Community law by organs of the legislature or the executive,

¹¹¹ ECJ, Joined Cases C-6 and C-590 *Francovich and Others* [1991] E.C.R. I-5357, para.41; ECJ, Case C-6455 *Jordan* [1997] E.C.R. I-4164, para.31; ECJ, Case C-214/01 *Köbler* [2003] E.C.R. I-10139, paras 45-50.

¹¹² See Arts. "Het Franconisch-arrest en zijn toepassing in de Belgische rechtsorde" (1992) T.B.P. 495-510; Belem and Rood, "Franconisch-arrestelijkheid: Schadevergoeding wegens schending van het gemeenschapsrecht" (1992) N.J.E. 250; Bok, "Het Franconisch-arrest en onrechtmatige welgeving naar Nederlands recht" (1993) T.P.R. 50; Belem, "State Liability under Community Law: Shedding More Light on the Francovich Principle" (1995) E.L.Rev. 399-411; Gillians, "Overheidsaansprakelijkheid bij schending van Europees gemeenschapsrecht" (1992-1993) R.W. 377-380; Rodighiero Iglesias, "Reflections on the general principles of Community Law" (1996/97) Cambridge Y.E.L.S. 1-16; Tesson, "Responsabilité des Etats membres pour violation du droit communautaire" (1996) R.M.U.E. 15-34; Vandervanden and Dony, *La responsabilité des Etats membres en cas de violation du droit communautaire* (Bruxelles, Brussels, 1997), 411 pp; van Garven, "Bridging the unbridgeable: Community and National Tort Law after Francovich and Brasserie" (1996) J.C.L.Q. 501-544; Wiatrak, "De Nederlandse recht en onrechtmatigheidsaansprakelijkheid krachtens Francovich en Brasserie du Pêcheur" (1997) S.E.W. 78-90; Dantoch-Cor, "La violation de la norme communautaire et la responsabilité extracontractuelle de l'Etat" (1998) R.T.D.E. 75-91. For actions in damages against the State in English law, see Braintree and Hoskins, *Remedies in E.C. Law*, at 128-148; for damages actions against private parties, see *ibid.*, at 115-127.

¹¹³ ECJ, Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur and Factortame IV* (Factortame IV) [1996] E.C.R. I-1239, paras 32-36, and the Opinion of Advocate General G. Tesauro, at points 35-38. It appears from the same judgment that the Court of Justice considers that the condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, must be set aside in the case of a breach of Community law. The reason for this is that that condition would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the task falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of persons (*ibid.*, para. 71-72). The Court likewise held in *Factortame IV* that any condition that may be imposed by English law on State liability requiring proof of malfeasance in public office must be set aside because such an abuse of power is inconceivable in the case of the legislature and therefore the condition makes it impossible to obtain effective reparation for loss or damage resulting from a breach of Community law (*ibid.*, para. 73).

but also to judicial bodies adjudicating at last instance.¹¹⁴ In addition, the acts of a federated State or a territorial authority with a degree of autonomy and likewise public-law bodies¹¹⁵ may cause the Member State itself, as well as themselves, to incur liability.

In Member States with a federal structure, reparation for damage caused to individuals does not necessarily have to be provided by the federal State (federal authority). It is sufficient that individuals' right to reparation for loss or damage flowing from an infringement of Community law by a federated State is effectively protected. If, however, there is no effective protection, a Member State (federal authority) cannot plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis.¹¹⁶ That is also true for those Member States in which certain legislative or administrative tasks are devolved to territorial bodies with a certain degree of autonomy or to any other public-law body legally distinct from the State.¹¹⁷

Compensation. The amount of the damages must be commensurate with the loss or damage sustained so as to ensure the effective protection of the rights of the injured parties.¹¹⁸ In the case of late implementation of a directive, retroactive and proper application in full of the measures implementing the directive will suffice in principle, unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the directive, with the result that such loss must also be made good.¹¹⁹ Limiting compensation to an upper limit or a prohibition on the national court's granting interest on that basic amount are contrary to Community law in so far as they make it impossible to make reparation in full for the damage sustained.¹²⁰ The national rules may

¹¹⁴ See ECJ, Case C-224/01 *Köbler* [2003] E.C.R. I-10139; the principle of *res judicata* and the principle of the independence of the judiciary do not preclude State liability for breaches of Community law committed by courts adjudicating at last instance (paras 39-50). See also ECJ (order of June 3, 2005), Case C-395/03 *P. Klinger v. Germany*, Council and Commission [2005] E.C.R. I-4967, para.21. See also Blanchet, "L'usage de la théorie de l'acte clair en droit communautaire: une hypothèse de mise en jeu de la responsabilité de l'Etat français du fait de la fonction juridictionnelle" (2001) R.T.D.E. 397-403.

¹¹⁵ ECJ, Case C-424/97 *Hain* [2000] E.C.R. I-5111, para.32.

¹¹⁶ ECJ, Case C-302/97 *Kerck* [1999] E.C.R. I-3595, para. 51-64.

¹¹⁷ ECJ, Case C-424/97 *Hain* [2000] E.C.R. I-5111, para. 50-51.

¹¹⁸ ECJ, Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur and Factortame IV* (Factortame IV) [1996] E.C.R. I-1239, para.62.

¹¹⁹ ECJ, Joined Cases C-54 and C-95/93 *Sanjasi and Others and Bero and Others* [1997] E.C.R. I-3959, para.54; ECJ, Case C-573/93 *Maro and Others* [1997] E.C.R. I-4361, para.41; ECJ, Case C-131/97 *Corbucci and Others* [1999] E.C.R. I-1133, para.53.

¹²⁰ ECJ, Case C-271/97 *Morhal* [1999] E.C.R. I-4567, paras 23-32. To limit compensation to an upper limit may, where the loss or damage exceeds that upper limit, conflict with the requirement for an effective, deterrent sanction. This is also true of the prohibition on

require the injured party to show reasonable diligence in order to avoid the loss or damage or limit its extent.²⁰ The setting of reasonable limitation periods for bringing an action for damages is compatible with the above requirements, provided that it does not make it virtually impossible or excessively difficult to obtain reparation.²¹

3. Claims for damages for an infringement of Community law by individuals

Courage judgment. Individuals who have infringed a Community provision with direct effect may be obliged to make reparation for the loss or damage caused thereby.²² In its judgment in the *Courage* case²³ the Court of Justice held that Community law (and in particular Art.81 of the EC Treaty) precludes a rule of national law under which a party to a contract liable to restrict or distort competition is barred from claiming damages under national law for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract. But national law can deny that right to a party which bears significant responsibility for the distortion of competition. The *Courage* judgment made a first approach, on the basis of the principles of effectiveness and equivalence, to define the contours of claims to damages under national law for breaches of Community law, without giving such claims a direct basis in Community law. However, the Court did state expressly that the practical effect of Art.81 of the EC Treaty would be put at risk "if it were not open to any individual to

adding interest to the basic amount. If amount cannot be taken of the situation of loss, reparation will not be made for the whole of the damage. Consequently, the grant of interest under the applicable national law is essential in order to satisfy the requirement of the full effectiveness of Community law. See Fitzpatrick and Seymour, "Remedies and Effective Judicial Protection in Community Law" (1994) *Mod.L.Rev.* 434-461. See to the same effect ECJ, Joined Cases C-397/98 and C-410/98 *Mellinger-Greif and Others* [2001] E.C.R. I-1717, para. 4. Note that in *Marshall*, the Employment Appeal Tribunal held that the industrial tribunal had wrongly awarded interest on damages for sex discrimination contrary to the Sex Discrimination Act 1975, under s.135A of the Supreme Court Act 1981, as it was not a court of record. On appeal the House of Lords restored the award. The question of jurisdiction to award such interest was subsequently catered for by the Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993/2758).

²⁰ ECJ, Joined Cases C-46 and C-45/92 *Brasserie du Peillon and Factortame (Factortame IV)* [1996] E.C.R. I-1023, paras 64 and 85. However, this rule must be applied having regard to the specific circumstances of the case. In the judgment in *Marshall* (ECJ, Joined Cases C-37/93 and C-40/93 *Mellinger-Greif and Others* [2001] E.C.R. I-1717, para. 10-107), the Court of Justice considered that rejecting or reducing reparation for a financial disadvantage sustained because the claimant had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, would render the exercise of rights conferred on private persons by directly applicable provisions of Community law (in that case Art.43 of the EC Treaty) impossible or excessively difficult.

²¹ ECJ, Case C-251/95 *Palmisani* [1997] E.C.R. I-4023, para. 21.

²² ECJ, Case C-451/99 *Courage and Crehan* [2001] E.C.R. I-6157. See also Opinion of Advocate General W. van Gerven in Case C-428/97 *Seda* [1999] E.C.R. I-4205.

²³ ECJ, Case C-453/99 *Courage and Crehan* [2001] E.C.R. I-6157.

claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".²⁴

4. Withdrawal of a decision of a national administrative body which has become final

Problem. It may appear from a judgment of the Court of Justice that earlier decisions taken by national administrative bodies are based on a wrong interpretation of Community law. The question then arises whether these national administrative bodies are obliged to reopen those decisions which have become definitive.

Kühne & Heitz judgment. The fact is that the interpretation which the Court of Justice gives to a rule of Community law in a preliminary ruling clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force.²⁵ It follows that a rule of Community law interpreted in this way must be applied by an administrative body within the sphere of its competence even to legal relationships which arose or were formed before the Court gave its ruling on the question of interpretation.²⁶ However, it does not follow automatically that an administrative body has to reopen an administrative decision which has become final. On the contrary, the Court, referring to the principle of legal certainty, considers that, in principle, such a body is not required to reopen an administrative decision which has become final.²⁷ However, in very specific circumstances there may be an obligation to reopen a decision. This will be the case in

²⁴ *Ibid.*, para. 25. For an extensive discussion, see Konrad, "New prospects for private enforcement of EC Competition Law: *Courage v Crehan* and the Community right to damages" [2002] *C.M.L.Rev.* 447-457; Konrad, "Die Haftung Privater für Verstöße gegen Gemeinschaftsrecht" (2003) *EuR* 455-513; Misch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot - *Courage* und die Folgen" (2003) *EuR* 615-645; Riet, "The 'Courage' doctrine: encouraging or discouraging compensation for antitrust injuries?" (2003) *C.M.L.Rev.* 23-46.

²⁵ ECJ, Case 6/76 *Demagor Italiana* (1967) E.C.R. 1105, para. 16; ECJ, Case C-52/66 *Deutscher Telekom* [2001] E.C.R. I-749, para. 43; ECJ, Case C-451/00 *Kühne & Heitz* [2004] E.C.R. I-337, para. 31.

²⁶ ECJ, Case C-451/00 *Kühne & Heitz* [2004] E.C.R. I-337, para. 22. See in this judgment, Carnus, "Case C-453, *Kühne & Heitz*" (2005) *C.M.L.Rev.* 175-185; Ueberberger, "Zur Rechtskraft im Gemeinschaftsrecht" (2004) *Z.NRW* 39-104; Poters, "Bestandkraft staatlicher Verwaltungsakte oder Effektivität des Gemeinschaftsrechts?" (2004) *EuR* 535-538; Pecher-Hausgen, "Une administration ne peut invoquer le principe de la force de chose jugée pour refuser de réexaminer une décision dont une interprétation préjudicielle clarifie le statut en conformité avec le droit communautaire" (2004) *R.D.E.U.* 559-567; Jans and De Groot, "Bevoegdheid = verplichting? Enkele opmerkingen over de uitspraak van het Hof van Justitie in de zaak *Kühne & Heitz*" (2004) *N.T.E.R.* 58-122. For the relationship between *Kühne & Heitz* and *Kühne & Heitz*, see Konrad, "Federal elements in the Community judicial system: building coherence in the Community legal order" (2005) *C.M.L.Rev.* 9-34.

²⁷ ECJ, Case C-453/00 *Kühne & Heitz* [2004] E.C.R. I-337, para. 24.

particular where the following three conditions are satisfied: under national law, the administrative body concerned has the power to reopen the decision³⁴; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance which was based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling; and the person concerned complained to the administrative body immediately after becoming aware of the decision of the Court of Justice from which it appears that the national decision is contrary to Community law.³⁵

III. LEGAL PROTECTION IN PROCEEDINGS FOR INTERIM RELIEF

3-051 Two situations. The protracted nature of judicial proceedings may pose a threat to the actual enforcement of the rights conferred upon an individual by Community law. This explains the interest for the full effectiveness of Community law of a system of provisional legal protection which enables a real claim to those rights to be safeguarded by freezing a provision which is allegedly in conflict with (superior) Community law or by granting interim relief provisionally to settle or regulate disputed legal positions or relationships pending a judicial ruling in the main proceedings.³⁶ Two situations need to be distinguished. First, there is the situation where the national court grants interim relief in order to freeze the effect of a national provision which is allegedly in breach of Community law. Secondly, the national court may grant interim relief in order to freeze the implementation of a Community measure which is allegedly in breach of the superior law (and therefore unlawful) or provisionally to settle or regulate disputed legal positions or relationships with reference to a national administrative measure based on a Community act whose validity is under consideration in proceedings for a preliminary ruling.

3-052 Allegedly illegal national measure. As far as the first situation is concerned, the Court of Justice has held, as follows: "Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside

that rule."³⁷ It is only in this way that the "full effectiveness of Community law" can be secured by "the judgment to be given on the existence of the rights claimed under Community law".³⁸

3-053 This means that, where necessary, the national court can derive directly from Community law the power to suspend a provision of national law in interlocutory proceedings.³⁹ The nature of the measure whose suspension is sought is immaterial. Furthermore, Community law embodies no special requirements for the suspension of provisions of national law, although here too the principle applies that there must be equal treatment of suspension on grounds of domestic law and suspension on Community law grounds, together with the principle that the applicable domestic law must not subject the suspension to conditions such as to make it impossible in practice to obtain.

Allegedly illegal Community measure. As far as the second situation is concerned, the Court of Justice has held as follows: "In cases where national authorities are responsible for the administrative application of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling. That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid . . . individuals were not in a position, where certain conditions

³⁴ ECJ, Case C-113/89 *Federations and Unions (Federations)* [1990] E.C.R. I-2433, operative part. After the House of Lords had held that it could not give an interim injunction in judicial review proceedings seeking to set aside an Act of Parliament because courts had no such power under the Supreme Court Act 1981 and an Act of Parliament was presumed valid until declared otherwise (*R v Secretary of State for Transport ex parte Factortame* (no 2) [1990] A.C. 603), the preliminary ruling in *Federations* was considered to give it the power to grant such an injunction (or at least to remove the common law rule that an interim injunction may not be granted against the Crown): see *Brealey and Hoskins, Remedies in E.C. Law*, at 136-107 and 154-155. For the injunctions available under English law to secure the full effectiveness of Community law, see *ibid.*, at 149-164.

³⁵ *ibid.*, para. 21. See also ECJ, Case C-228/89 *Sipos* [2001] E.C.R. I-277, para. 17-22.

³⁶ Bagay, "Omnipotent Courts", in *Carlin and Houkels (eds), Institutional Dynamics of European Integration. Essays in Honour of H.G. Schermers* (Maastricht, Dordrecht, 1994), Vol. II, 253, at 177, and "The Effectiveness of Judicial Protection and the Role of the National Courts", in *Judicial Protection of Rights in the Community Legal Order* (Brussels, 1997), at 129-139; Simon and Bagay, "Le droit communautaire et la suspension provisoire des mesures nationales: Les enjeux de l'affaire *Factortame*" (1990) R.M.C. 391-397; [20] *Janet Factortame a la mer de l'établissement d'une mesure quelque peu indirecte, la compétence du juge national d'ordonner, à titre provisoire, l'application d'une mesure nationale préjudiciable contraire au droit communautaire dans l'attente d'une décision définitive*. [The *Factortame* judgment has the merit of establishing—albeit indirectly—jurisdiction on the part of a national court to set aside, provisionally, the application of a national measure alleged to be contrary to Community law pending a definitive decision]. See also case notes by Lawson (1991) S.E.W. 413-423; Toth (1990) C.M.L.Rev. 573, at 585, and Jelic, "Coopération entre la Cour de justice des Communautés européennes et les juridictions nationales" (1993) 2 I.T.D.E. 4-5.

³⁷ See, by analogy, the question in connection with raising pleas derived from Community law of the court's own motion, 3-016, *supra*.

³⁸ ECJ, Case C-453/00 *Kane & Neale* [2004] E.C.R. I-451, para. 26-28.

³⁹ De la Sierra, "Provisional court protection in administrative disputes in Europe: the constitutional status of interim measures deriving from the right to effective court protection: A comparative approach" (2004) E.L.J. 42-63; Monod-Jaban, "La protection provisoire devant les juridictions administratives dans l'Union européenne" (2004) R.M.C. 459-474.

are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them".⁴⁰ For this reason, Art. 245 of the EC Treaty does not preclude national courts from "granting interim relief to settle or regulate the disputed legal positions or relationships with reference to a national administrative measure based on a Community regulation which is the subject of a reference for a preliminary ruling on its validity".⁴¹

The question arises as to what is meant by "where certain conditions are satisfied". The Court of Justice has held that "the rules of procedure of the courts are determined by national law and . . . these conditions differ according to the national law governing them, which may jeopardise the uniform application of Community law".⁴² In order to reduce this danger, the Court of Justice has held that suspension of enforcement of national administrative measures based on a Community regulation or the grant of other interim measures "must in all the Member States be subject to conditions which are uniform".⁴³ The Court identifies these "uniform conditions" with "the conditions which must be satisfied for the Court of Justice (itself) to allow an application to it for interim measures".⁴⁴ The parallel between the conditions for the grant of interim relief applicable before the national court and the Court of Justice (and the Court of First Instance) is due to the fact that an assessment of validity via a request for a preliminary ruling and an action for annulment constitutes two aspects of a single system of judicial review of legality. The coherence of the system demands uniformity in the procedural rules for provisional suspension or limitation of enforcement of contested Community measures until such time as the Court of Justice or the Court of First Instance has carried out its review of legality, whether by a preliminary ruling (Court of Justice) or by a judgment on an application for annulment (Court of Justice or Court of First Instance). As a result, the national court must base itself, as far as the substantive conditions for suspension or limitation of enforcement of national administrative measures based on a Community regulation are concerned, on the case-law of the Court of Justice concerning interim

⁴⁰ ECJ, joined Cases C-143/85 and C-52/89 *Zuckerfabrik Südzuckerfabrik and Zuckerfabrik Soest* [1991] E.C.R. I-415, paras 16-17. See Moogin, "Le juge national et les mesures provisoires ordonnées en vertu du droit communautaire", in Christmann (ed.), *Evolution récente du droit judiciaire communautaire*, (European Institute of Public Administration, Maastricht, 1994), Vol. I, 115-131; Sinnave, "Voorlopige maatregelen tegen economische gemeenschaprecht: de bevoegdheden van de nationale rechter in kort geding" (1996-1997) R.W. 115-117.

⁴¹ ECJ, Case C-461/93 *Adams Fruchtveredelungs-Gesellschaft and Others* [1995] E.C.R. I-3761, para 33; see Mehdi, "Le droit communautaire et les pouvoirs du juge national de l'urgence" (1996) R.T.D.E. 77-120.

⁴² *Zuckerfabrik Südzuckerfabrik and Zuckerfabrik Soest*, cited in n.40, para 15.

⁴³ *Adams Fruchtveredelungs-Gesellschaft and Others*, cited in n.41, paras 29 and 33.

⁴⁴ *Zuckerfabrik Südzuckerfabrik and Zuckerfabrik Soest*, cited in n.40, paras 16-17.

measures, and no longer on national law.⁴⁵ National law governs only "the making and examination of the application".⁴⁶

Interim measures may be granted by a national court only if:

- that court entertains serious doubts as to the validity of the Community regulation and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers that question to the Court;⁴⁷
- there is urgency, in that interim relief is necessary to avoid serious and irreparable damage to the party seeking the relief;
- the national court takes due account of the Community interest;
- in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level.⁴⁸

As far as the first requirement is concerned, the Court of Justice has held that "the national court cannot restrict itself to referring the question of the validity of the regulation to the Court for a preliminary ruling, but must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid. The national court must take into account here the extent of the discretion which, having regard to the Court's case-law, the Community institutions must be allowed in the sectors concerned".⁴⁹

The Court has clarified the second requirement as follows: "With regard to the question of urgency, . . . damage invoked by the applicant must be liable to materialise before the Court of Justice has been able to rule on the validity of the contested Community measure. With regard to the nature of that damage, purely financial damage cannot, as the Court has held on

⁴⁵ See Arts 242 and 243 of the EC Treaty; for examples, see ECJ (order of the President of October 25, 1983), Case 191/83 *R. Commission v Belgium* [1983] E.C.R. 3521; with a case note by Watson (1987) C.M.L.Rev. 33; and ECJ (order of July 12, 1990), Case C-195/90 *R. Commission v Germany* [1990] E.C.R. I-3351. Cf. Papar and Van Ginderachter, "La protection en référé" (1989) R.T.D.E. 561-621. See also Joliet-Barraud and Nibou, "Protection juridictionnelle provisoire et droit communautaire" (1992) R.T.D.E. 253-254.

⁴⁶ ECJ, joined Cases C-143/85 and C-52/89 *Zuckerfabrik Südzuckerfabrik and Zuckerfabrik Soest* [1991] E.C.R. I-415, para 16 (with a case note by Schermers (1992) C.M.L.Rev. 133-135, who emphasises that that judgment places the interest of the protection of the individual above the interest of the primacy of Community law).

⁴⁷ *Ibid.*, para 33. See also ECJ, Case C-334/93 *Köster* [1997] E.C.R. I-4517, para 47. These conditions also apply where the interim measures are directed against an authority of an overseas country or territory (OCT): ECJ, Case C-179/93 *Emesa Sugar* [2000] E.C.R. I-673, paras 69-71.

⁴⁸ ECJ, Case C-461/93 *Adams Fruchtveredelungs-Gesellschaft and Others* [1995] E.C.R. I-3761, para 33.

⁴⁹ *Ibid.*, paras 16-17.

numerous occasions, be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it. It must in this connection consider whether immediate enforcement of the measure which is the subject of the application for interim relief would be likely to result in irreparable damage to the applicant which could not be made good if the Community act were to be declared invalid.¹²²

As far as the third requirement is concerned, the Court of Justice has observed that the national court "must first examine whether the Community measure in question would be deprived of all effectiveness if not immediately implemented"¹²³ and, "if suspension of enforcement is liable to involve a financial risk for the Community, the national court must also be in a position to require the applicant to provide adequate guarantees, such as the deposit of money, or other security".¹²⁴ In assessing the Community interest, the national court is free to decide, in accordance with its own rules of procedure, which is the most appropriate way of obtaining all relevant information on the Community act in question.¹²⁵

The fourth requirement signifies that if the Court of Justice has dismissed an action for annulment of the act in question or has held, in the context of a reference for a preliminary ruling on validity, that the reference disclosed nothing to affect the validity of that act, the national court can no longer order interim measures or must revoke any existing measures, unless the grounds of illegality put forward before it differ from the pleas in law or grounds of illegality rejected by the Court in its judgment. The same applies if the Court of First Instance, in a judgment which has become final and binding, has dismissed on the merits an action for annulment of the act or an objection of illegality.¹²⁶

- 3-054 Appeal against a national decision. National procedural rules allowing an appeal to be brought against a decision granting interim measures in the form of suspension of enforcement of a national administrative measure are compatible with Community law, provided that they do not affect the national court's obligation in such a case to make a reference for a preliminary ruling on the validity of the Community act on which the suspended national administrative implementing measure is based and that they do not restrict the right conferred by Art. 234 on every court or tribunal to make a reference to the Court of Justice.¹²⁷

¹²² ECJ, Joined Cases C-243/88 and C-92/89 *Zuckerfabrik Südpfalz-Mannheim and Zuckerfabrik Soest* [1991] E.C.R. I-415, para.29.

¹²³ *Ibid.*, para.21.

¹²⁴ *Ibid.*, para.22.

¹²⁵ ECJ, Case C-334/85 *Edgar* [1997] E.C.R. I-4317, para.46.

¹²⁶ ECJ, Case C-462/85 *Atlanta Fruchthandelsgesellschaft and Others* [1995] E.C.R. I-3761, para.46.

¹²⁷ ECJ, Case C-334/85 *Edgar* [1997] E.C.R. I-4317, para.42-54.

Counterpart of interim relief of the Community judicature. National courts' power to grant interim relief under Community law in the two situations described above (see 3-052 and 3-053, *supra*) is also based on the consideration that the supervision of the legality of Community acts which the Court of Justice carries out in the preliminary ruling procedure needs to retain its full effectiveness.¹²⁸ In both situations, the national court has the power or even a duty to make a reference to the Court of Justice for a preliminary ruling. In the first situation, it may, by referring a question on the interpretation of the applicable provision of Community law, indirectly determine whether the national provision at issue is, as alleged, contrary to Community law. In the second, it is under a duty, if the question concerning the validity of the disputed Community act has not yet been submitted to the Court, to raise that question with the Court itself (see 2-056, *supra*). Consequently, the interim relief granted by national courts in those two situations is the precise counterpart of the interim relief which the Court of Justice or the Court of First Instance grants under Arts 242-243 of the EC Treaty in order to ensure the effectiveness of the judicial supervision which it carries out in direct actions.¹²⁹ The Court of Justice has held, in full accord with its concern to guarantee the coherence of the system of legal protection outlined in the Treaty, that the national courts are not empowered to grant interim relief in situations in which, by virtue of a Community regulation, the existence and scope of traders' rights must be established by a Commission measure which that institution has not yet adopted. This is because the Treaty makes no provision for a reference for a preliminary ruling by which the national court asks the Court of Justice to rule that an institution has failed to act.¹³⁰ The Court of Justice and the Court of First Instance may only make such a ruling in a direct action brought pursuant to Art. 232 of the EC Treaty.¹³¹

¹²⁸ ECJ, Joined Cases C-163/88 and C-92/89 *Zuckerfabrik Südpfalz-Mannheim and Zuckerfabrik Soest* [1991] E.C.R. I-415, para.29.

¹²⁹ For further particulars, see Lecaer, 'The Legal Protection of Private Parties under the EC Treaty: a Coherent and Complete System of Judicial Review', in *Scritti in onore di Giuseppe Federico Mancini* (Giuffrè editore, Milan, 1983), Vol. II, at 591-625.

¹³⁰ ECJ, Case C-64/95 *T. Port v. Commission* [1995] E.C.R. I-6065, paras 51-53.

¹³¹ *Ibid.*, para.24. See, to the same effect, ECJ, Case C-326/88 *Hansen* [1990] E.C.R. I-2511, para.13; ECJ, Case C-353/84 *Nasse* [1995] E.C.R. I-3573, para.23; ECJ, Case C-213/95 *De André* [2000] E.C.R. I-1123, para.19.

XI The Court as a law-maker

1. Methods of interpretation
2. Fundamental doctrines and general principles of community law
3. Precedent

Mandatory Reading

A. Arnall, *The European Union and its Courts of Justice*, Oxford, 2005 Chapter 17.

The normative status of the case law

The profound role played by the Court of Justice in shaping the institutional and substantive development of the European Union should be clear from previous chapters. One factor that enhanced the Court's capacity to play that role was the steady caseload which eventually built up. The Court's response was to develop a body of jurisprudence¹ based on precedent.² This involved two concerns: first, the basic principle of justice, reflecting the Aristotelian principle of equality, that like cases should be treated alike; and second, the requirement of the rule of law that people should be able to plan their affairs on the basis of a reasonable understanding of their legal rights and duties.³ The use of precedent can help judges to overcome the basic indeterminacy of the law, while at the same time offering some protection from accusations of excessive activism, by allowing them to present their decisions as in some sense determined by what was done in the past.⁴ Some benefits have not yet wholly materialised in the Community legal system, for several reasons: relative youth; the existence of important gaps in it; the extremely unstructured quality of many provisions; the increasingly contested nature of the Union/Community's aims and objectives. Some of these factors have been examined in previous chapters. However, the Court's failure to reap the rewards of a rigorously precedent-based jurisprudence is also attributable to another factor: the way in which it has, at least until recently, handled its previous decisions. It is that factor which is the principal focus of the present chapter.

The origins of the Court's judicial style

The decision-making process of the Court and the style of its judgments unsurprisingly reflect its civil law origins. They are particularly reminiscent of the highest French courts, the *Conseil d'Etat* and the *Cour de Cassation*. Judgments of these courts are preceded by an Opinion resembling that of the *Advocate General* in the Court of Justice⁵ and a draft prepared by a judge rapporteur. They are

¹ The term 'case law' generally used in this book is deliberately awkward at this stage of the discussion for reasons that will become apparent.

² See Siont Sweet, *The Judicial Constitution of Europe* (2006), 12.

³ See Hopt, *The Road to Empire* (1944), 54.

⁴ Siont Sweet, above n 2 at 11, 35, 37.

⁵ The author is known at the *Conseil d'Etat* and the *Cour de Cassation* and the *Assemblée législative* in the *Conseil d'Etat*. As noted in ch 1, the latter office is believed to have provided the model for that of the *Advocate General* in the Court of Justice.

collegiate: there are no dissenting or separate opinions. Moreover, by common law standards, they are spectacularly uninformative. Lasser observes that they lack any serious description of the facts, almost never refer to past judicial decisions, and contain absolutely nothing that could be described as serious interpretive or policy analysis.⁶ Grammatically they often take the form of a single sentence.

This model of the judicial role represents a response to judicial abuses in pre-revolutionary France, its purpose is to prevent the judges from trespassing on the lawmaking prerogatives of the legislature.⁷ As Montesquieu famously observed: the judge is merely the mouthpiece of the law.⁸ This conception of the judicial role is reinforced by the style of the judgments of the top French courts, which are designed to give the impression that the court is merely deducing outcomes predetermined by legislative provisions. This is of course a fiction: as Bell and Lasser have shown, a lively debate takes place behind the scenes in the Opinion and the report of the judge rapporteur, in which previous jurisprudence is analysed and underlying policy considerations are fully explored.⁹ The judge rapporteur may even produce more than one draft judgment, each one leading to a different outcome, thereby acknowledging the inherent indeterminacy of the applicable statutory provisions.¹⁰ The cryptic nature of important judicial decisions is softened by the publication, sometimes in the law reports themselves, of commentaries written by eminent and often well-connected academics or even by judges acting in connection with the *Cour de Cassation* in particular that the establishment and maintenance of such a system 'require significant faith in expert, state-sanctioned, mercantile, and elite management in the name of the general interest'.¹¹

It was evident from the outset that the French conception of the judicial role could not simply be transposed to the European Court of Justice, whose members had been educated and trained in a variety of national contexts and whose relationship with the diffuse academic community in the Member States could never be as close. More fundamentally, the Treaty did not reflect the French conception of the judicial role. It was not based on a strict separation of powers or a desire to limit judicial prerogatives, which were significantly broader under the EEC Treaty than was normal in international organisations. The Treaty gave the national courts

¹ Judicial Decisions (2004), 30-1.

² JH 35. See also Bell, Boyton and Whitaker, *Principles of French Law* (1992), 29.

³ See Montesquieu, *De l'esprit des lois* (1748), Livre XI, Chapitre 6: 'Mais les juges de la nation ne sont... que la bouche qui prononce les paroles de la loi; des êtres inanimés qui s'en peuvent rendre sans être ni le législateur, ni le juge.' The English translation is taken from the Opinion of AG Leger in Case C-54/94 *United Kingdom v Council* (1995), ECR I-5155, 5791.

⁴ See Bell, French Legal System (2001), 135-91; Bell, Reflections on the procedure of the Council of State in *Handbook of Public Law* (ed.), *Deutscher Fachschriften-Verlag*, Bonn, 1991, 231-34; Lasser, above n 6 at 59-2. Copies of the Opinion and the report of the judge rapporteur may not be readily available. However, the Opinion and report in cases decided by the Chambers of the Court and the *Assemblée plénière* of the *Cour de Cassation* are now published on that court's website see <http://www.courdecassation.fr>.

⁵ Lasser, above n 6 at 59-2, in relation to the *Cour de Cassation*.

⁶ JH 187.

a crucial role in applying Community law and their relationship with the Court of Justice was quite different from that of the *Conseil d'Etat* and the *Cour de Cassation* with the lower French courts. The purpose of a decision of one of the top French courts is less to give an account of its underlying reasoning than to communicate a rule and its interpretation to the lower courts.¹² Under the preliminary ruling procedure, with its non-hierarchical nature and division of jurisdiction between the national court and the Court of Justice, the latter is compelled to give at least some account of its reasoning in order to explain to the former how to apply its ruling in the facts and to persuade it to do so faithfully. The accession of Ireland and the United Kingdom in 1973 placed further strain on the French model by adding to the interlocution of the Court of Justice coming from the common law tradition used in judgments containing a full exposition of all the legal and policy issues raised in a case. As the Community has developed, the Court of Justice has therefore moved away from the judicial style that characterized its early judgments. That process is likely to continue in response to new influences and pressures.

The evolution of the Court's judicial style

An initial departure from the model of the top French courts was that, from the outset, the Opinions of the Advocates General were published alongside the judgments of the Court in the *European Court Reports*, originally immediately after the judgment, now immediately before reflecting the order in which they are delivered. Moreover, judgments of the Court were initially divided into two parts.¹³ The first part, headed something like 'Facts', 'Issues of fact and of law' or 'Facts and issues' would contain a detailed summary, based on the *Judge Rapporteur's Report* for the Hearing, of the factual background to the case and the arguments of the parties. The second part of the judgment, headed something like 'Law', 'Grounds of judgment' or 'Decision', would contain the Court's ruling on the case along with its supporting reasoning. It was this second part of the judgment that soon assumed a form strongly reminiscent of that of the top French courts: brief and composed of a short number of long sentences, each beginning in the French text with the phrase '*attendu que*' (whereas).¹⁴ For example, the section of the 'grounds of judgment' in *Van Gend en Loos* on the direct effect of Article 12 EEC occupies little more than two sides of the *European Court Reports*¹⁵ and in the French text of the judgment comprises a single sentence. Notwithstanding the syllogistic form of the second part of the judgment, the publication in the law reports of the first part of the judgment and the Advocate General's Opinion constituted a public

¹² See [2005] 30 E.L.R. 446, 443 (review of *Lopes*, above n 6). See also *Stil, Breyer and Whitaker*, above n 7 at 13-14.

¹³ See *Lopes*, *The European Court of Justice Practice and Procedure* (2nd edn, 1994) 45.

¹⁴ This is the phrase used by the *Cour de Cassation*. The *Conseil d'Etat* uses the phrase '*considérant que*' (considering that).

¹⁵ See [1963] E.C.R. I, 11-13.

acknowledgment that, in all except the clearest cases, the dispute had various possible solutions and that finding the best one involved the exercise of discretion by the Court.

Although the use of a small number of long sentences was not reproduced in the English text of the Court's judgments, it prevented the Court from engaging fully with the arguments set out in the first part of its judgments and in the late 1970s the practice was abandoned.¹⁶ In early 1985, the Court decided not to publish systematically the account of the facts and issues set out in the first part of its judgments in order to reduce the translation burden. That decision attracted some criticism,¹⁷ and in late 1985 the Court decided to publish the Report for the Hearing in the law reports, but in 1994, again to reduce the burden of translation, it decided to cease doing so as a matter of routine.¹⁸ Judgments of the Court are accordingly no longer divided into two parts. However, the abandonment of the form based on a limited number of sentences and the demise (albeit protracted) of the published account of the facts and issues had a noticeable effect on the judgments proper. To compensate for the absence of a separate account, the Court began to include in its judgments more detailed descriptions of the facts and the arguments of the parties, freed from the straitjacket of the limited number of sentences, it was able to engage with those arguments in a more overt and direct manner and to draw more elaborate factual distinctions which the growing body of case law was making increasingly necessary. The change in the style of the Court's judgments also opened the way for a change in the way in which it dealt with its own previous decisions.

Precedent and the Court of Justice

Background

The capacity of courts to create law, although widely acknowledged in the common law world,¹⁹ has not generally been accepted in the civil law tradition. That tradition is exemplified by France, where, as we have seen, the judge is conceived almost as an automaton applying mechanically the law laid down by the legislature.

¹⁶ See *Brown and Kennedy, Brown and Jenkins* *The Court of Justice of the European Communities* (2nd edn, 2000) 53.

¹⁷ See e.g. [1985] 30 *J.L.R.* 1-2.

¹⁸ See *Brown and Jenkins*, above n 15 at 20.

¹⁹ See *Dicey's Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1956), Lecture XI of which is entitled 'Judicial Legislation' and the Appendix to which contains an extensive note (at 431-54) on 'Judge-made Law'. In this note, it is suggested (at 443) that the presence of judge-made law is due in part to the doctrine of precedent. See also *Diplock*, 'The courts as legislators' in *Harvey* (ed.), *The Courts and Justice* (1971) 265. Lord Reid once described the suggestion that judges do not make law as a fairy tale: see 'The judge as law maker' [1971-72] 201 *J.M.L.R.* (NS) 12. For the position in the United States, see *Lopes*, above n 6 at 14 and 21. The approach of the US Supreme Court is comparable with that of the House of Lords in *Callaghan*, *Precedent in operation: a comparison of the judicial House of Lords and the US Supreme Court* [2004] P.L. 159.

While it is widely recognised that French judicial decisions have considerable normative significance,²² they do not formally constitute a 'source of law'.²³ A concept which puts into play the traditional French understanding of the separation of powers, of legislative supremacy, and of the judicial role.²⁴ Those understandings are reflected in Article 5 of the French Code Civil,²⁵ which expressly prohibits judges from laying down general rules in their decisions. Previous decisions are therefore hardly ever cited in the judgments of the top courts.²⁶

There is no equivalent of Article 5 of the French Code Civil in the provisions governing the Court of Justice,²⁷ which has recognised for many years that its decisions may have value as precedents in other cases. An early example is *de Caste v Nederlandse Belastingadministratie*.²⁸ In that case, a reference was made by the Dutch *Tariefcommissie*, a Dutch administrative court of last resort subject in principle to the obligation to refer laid down in the third paragraph of Article 177 EEC (later 234 EC). The *Tariefcommissie* was the court which made the reference in *Van Gend en Loos* and the questions referred in *de Caste* were substantially the same, although the proceedings in the latter case had been brought by different claimants.²⁹ While accepting that a national court was entitled to refer questions previously dealt with by the Court at its second time, the Court stated: 'the authority of an interpretation under Article 177 [later 234] already given by the Court may deprive the obligation [imposed by the third paragraph of that article] of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'³⁰ In the *GRIT* case,³¹ the Court extended that dispensation from the obligation of top courts to refer. It stated: 'The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177 [later 234], may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.' These cases made it clear that national courts were entitled to follow previous decisions of the Court, which might have the effect of removing an obligation which would otherwise be imposed by the Treaty. Moreover, the Court has held that a 'manifest breach'³² of its case law by a national authority may render the State concerned liable in damages to an injured party. Such a breach

²² See Lamer, above n 5 at 31-5; Bell, Boyton and Whitaker, above n 7 at 23-8.

²³ See Bell, Boyton and Whitaker, *ibid.*, 25-31. ²⁴ Lamer, above n 6 at 163.

²⁵ 'C'est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.'

²⁶ See Bell, Boyton and Whitaker, above n 7 at 31; Lamer, above n 6 at 16-7.

²⁷ Simon, *Le Système Juridique Communautaire* (2nd edn, 1991), 314, suggests that Art 234 EC might have been taken to suggest that the Court was intended merely to be 'the mouthpiece of the law', but acknowledges that this conception of the judicial role would be wholly misleading in the Community context.

²⁸ *Joined Cases 22, 29 and 34/51* [1951] ECR 11.

²⁹ The doctrine of *res judicata* did not therefore apply: *reid Delagrange*, *ibid.* at 42.

³⁰ *ibid.* at 28.

³¹ *Case C-224/91, Kallir* [1993] ECR I-1623 at para 55. See also *Joined Cases C-43/93 and C-48/93, Sison et al. v. P&O and Ferret* [1995] ECR I-1623, para 57.

is therefore treated by the Court as tantamount to an infringement of Community law itself.³³

In *de Caste*, where the reference had already been made, the Court simply referred the national court to the judgment in *Van Gend en Loos*.³⁴ Provision for such cases is now made by Article 104(3) of its Rules of Procedure, which enables the Court to respond to references 'by reasoned order *inter alia* where the question referred 'is identical to a question on which the Court has already ruled' or 'where the answer to such a question may be clearly deduced from existing case-law'. It may also be noted that the Court does not dismiss as inadmissible questions referred by national courts which seem designed to procure general guidance about how to approach a particular issue.³⁵ Indeed, the Court could not function if it was unable to make general pronouncements under Article 234 EC and the national courts were not able to treat its previous decisions as authoritative.³⁶

More generally, the fact that that so many important principles of Community law are to be found in the case law of the Court has led to its lawmaking capacity to be widely acknowledged, even by continental European observers.³⁷ The value of the case law of both Community Courts as precedents was expressly acknowledged by the Member States in Article IV-38(4) of the Constitutional Treaty, according to which it 'shall remain, notwithstanding, the source of interpretation of Union law' and in particular of the comparable provisions of the Constitution. This growing recognition of the normative character of the Court's decisions in particular, together with their ever-increasing volume, has been reflected in the way in which the Court deals with its own decisions in its judgments.

Dealing with previous case law

General

The general position is and always has been, that the Court of Justice is not bound by its previous decisions but that in practice it does not often depart from them. It is

³³ See Komárek, 'Federal elements in the Community judicial system: building coherence in the Community legal order' [2005] 42 CML Rev 9, 15.

³⁴ See also e.g. *Case C-151/89, Shepherd Ltd v. Northern Ireland Council* [1991] ECR I-2587, where the Court repeated its ruling in *Case C-23/89, Quinlan Ltd v. Sealed Air Corp* [1991] ECR I-3659.

³⁵ See e.g. *Case C-151/87, R v. Secretary of State for Employment, ex p. Seymour-Smith and Perez* [1988] ECR I-623; 'objective justification in cases of indirect discrimination under Art 141 EC'; *Case C-73/93, Pannier and Olier* [1995] ECR I-3245 (application of principle of equivalence in national proceedings based on Art 141 EC).

³⁶ On the effect of decisions of the Community Courts in the national courts of the Member States, see further Tech, 'The authority of judgments of the European Court of Justice: binding force and legal effect' [1994] 4 YEL 1. Cf. Komárek, above n 31 at 15-17.

³⁷ See Shapiro, 'The European Court of Justice in Crisis and de Búrca (eds), *The Evolution of EU Law* [1999] at 5, 125 and 125; Dehousse, 'The European Court of Justice (1958-2000): a comparative court in crisis and renewal' (ed.), *Institutional Dynamics of European Integration* (Vol. III) [1994] 165; Chalmers, 'The Court and the Jurisprudence of the Court of Justice des Communautés européennes' [1998] 34 CML Rev 101; Simon, above n 25 at 174-5; Hargrave, *Legal System of the European Community in its context* [1992] 5-3-20.

for this reason that the national courts may rely on decisions of the Court but are not precluded from referring a question merely because the Court has already considered it. However, in accordance with the civilian tradition, the Court for many years rarely referred in its judgments to its previous decisions, even when repeating a phrase verbatim. Perhaps under the influence of the common law, the Court of Justice eventually started to deal more fully with previous cases in its judgments. But the analysis was often superficial and selective by the standards of common law courts. Previous decisions might only be cited by the Court where they supported its argument. Authorities which pointed the other way were sometimes not mentioned at all, sometimes presented as if they supported the line the Court had chosen to take.³⁴

An example is *Familleprur v. Benet Viret*,³⁵ where the Court held that, where a Member State seeks to rely on an overriding (or mandatory) requirement to justify a measure which is liable to obstruct the free movement of goods, it must show that the general principle of respect for fundamental rights has been observed. The Court did not refer to its previous ruling in *Cinéthique v. Fédération Nationale des Cinémas Français*,³⁶ where, rejecting the advice of Advocate General Syros, it had held that national legislation which was justified under the mandatory requirements doctrine was not subject to the general principle of respect for fundamental rights. It seems that *Cinéthique* is no longer good law on this point. The reason is perhaps that the mandatory requirements are now seen by the Court as derogations rather than as removing national legislation from the scope of the Treaty entirely and consequently even that of the general principles of law. To the reader trained in the common law, the Court's failure to explain the effect of *Familleprur* on its earlier decision is understandable.³⁷

As late as 2000, a full Court of eleven judges appeared to modify a fundamental principle of the law relating to the Community's liability in damages without acknowledging the departure its decision represented from previous case law. The case, *Bergaderm and Goupil v. Commission*,³⁸ was an appeal from a decision of a three-judge chamber of the CFI.³⁹ The parties, the CFI and the Court's Advocate General had approached it on the basis that the principle in question remained valid. In its judgment, the Court did not refer to the voluminous case law⁴⁰ in which that principle had been applied. The decision was highly unsatisfactory on several counts. First, the case was decided on the basis of a principle which was not that

³⁴ See further Arnold, 'Owning up to Silobility: precedent and the Court of Justice' (1993) 31 *CMJL Rev.* 247.

³⁵ Case C-368/95 (1997) ECR I-3689, discussed in more detail in ch 11. Cf. Case C-358/97 *Extremis v. Council* (1999) ECR I-2567; Case C-362/97 *Profiplast v. Council* ('Chemicals') (1998) ECR I-5115; Case C-70/98, *Arbust v. Council* ('Chemicals') (1999) ECR I-3241.

³⁶ Joined Cases 80 and 81/84 (1985) ECR 2825.
³⁷ Cf. the line of cases leading to the demise of the rule laid down in Case C-205/90 *Enner* [1991] ECR I-4289, discussed in ch 9. Without actually overruling that case, the Court made it clear that it was confined to wholly exceptional circumstances.

³⁸ Case T-139/95 (1996) ECR II-2807.
³⁹ Beginning with Case 5/71 *Zuckerfabrik Südpfalz v. Council* (1971) ECR 505.

which was understood to apply at the time the material facts occurred. Second, the parties were deprived of the right to be heard on the merits or otherwise of the principle which the Court chose to apply. Third, the Court failed to acknowledge the departure its decision represented from the law as it was previously understood. These defects were only partly cured by the fact that the preferred line did not seem to affect the outcome of the case, the Court concluding by dismissing the appeal.

Overruling

By the time of the decision in *Bergaderm*, however, such a clumsy approach to dealing with previous case law had become unusual. Indeed, since the beginning of the 1990s there had been signs of a growing willingness on the part of the Court to confront the implications of earlier case law. In *HAG II*,⁴¹ the Court for the first time expressly overruled one of its own previous decisions. Following the advice of Advocate General Jacobs, the Court in that case abandoned the much-criticised doctrine of common origin laid down in *HAG I*,⁴² which limited the circumstances in which the owner of a trade mark in one Member State could restrain imports of products legally bearing the mark in another Member State. Advocate General Jacobs stated that, if he were to be followed, 'the Court should in my view make it clear, in the interests of legal certainty, that it is abandoning the doctrine of common origin laid down in *HAG I*'. He went on: 'That the Court should in an appropriate case expressly overrule a earlier decision is I think an inescapable duty, even if the Court has never before expressly done so'. In the Advocate General's view, to depart from *HAG I* without abandoning the doctrine or to seek to rationalise such an outcome on some other ground 'would be a recipe for confusion'. The remarks of Advocate General Jacobs seem to have produced the desired result, for the Court said that it considered it 'necessary to reconsider the interpretation given in [*HAG I*]'.⁴³ The remainder of the judgment made it clear that the doctrine of common origin no longer formed any part of the Community rules on intellectual property, a result subsequently confirmed in the *Ideal Standard* case.⁴⁴

In a subsequent case concerning the scope of Article 28 (ex 30) EC, *Merck and Midpar*,⁴⁵ the Court also departed from previous case law, but it did so less readily. The Court stated that it considered it 'necessary to re-examine and clarify its case-law on this matter' and concluded, 'contrary to what has previously been decided', that certain types of national legislation which might appear to hinder imports were none the less compatible with the Treaty. Unlike *HAG II*, however, the Court did not make clear precisely what it was overruling. The effect of its judgment was therefore to leave the status of several of its previous decisions on the matter unclear. The Court's evident willingness to depart from previous decisions

⁴¹ Case C-10/93 *CNO-Suiker v. HAG GF* (1993) ECR I-3711.

⁴² Case 192/73 *van Zuylen v. HAG* (1974) ECR 731. For an account of the *HAG* saga, see *Konings, Intellectual Property Rights in EU Law* (1993) 161-74.

⁴³ Case C-7/93 *GFT Internationale Holzerbau v. Ideal Standard* (1994) ECR I-2789.
⁴⁴ Joined Cases C-251/95 and C-268/95 (1997) ECR I-6397. See further ch 11.

which were producing effects it considered unsatisfactory was welcome. However, the Court's failure to identify which of its previous decisions were no longer to be treated as authoritative caused great uncertainty. It reflected the continuing pull of its earlier practice and its failure at that stage to develop a robust explanatory method for dealing with important restraints, or changes of direction, in its case law.

The criticism which that aspect in particular of the ruling in *Kock and Mithras* attracted⁴⁰ seemed to produce an effect. In *Coleman-Jarvis*,⁴¹ a social security case,⁴² the Court made it clear that no earlier ruling⁴³ was to be regarded as confined to its facts and that a series of specified later cases based on it were no longer good law. The Court went on to limit the temporal effect of its judgment in order to 'preclude legal situations being called into question which have been definitively settled in accordance with the Court's previous case law, whose scope is limited by this judgment'.⁴⁴ In *Brasserie du Pêcheur*,⁴⁵ a case on the protection conferred by the Equal Treatment Directive on female employees who fell ill as a result of pregnancy,⁴⁶ the Court expressly overruled its ruling in *Lemmon v Foster Supermarkets*.⁴⁷ In its case law on citizenship too⁴⁸ the Court expressly overturned specific decisions⁴⁹ reached before the introduction of that concept which limited the rights enjoyed by nationals of one Member State who were lawfully resident in another.

Reaffirming and distinguishing

By contrast, in *Merck and Others v Primecrown and Others and Beecham and Sandoz*⁵⁰ the Court refused to depart from the rule laid down in a previous case, *Merck v Stephan and Eder*,⁵¹ on the circumstances in which patent rights were to be considered exhausted. Although Advocate General Frenkel had recommended that the earlier case should no longer be applied, he also pointed out that it was 'obvious that the Court should, as a matter of practice, follow its previous case law

⁴⁰ See e.g. Gormley, 'Reconsidering reconsidered? The remarkable judgment in *Kock and Mithras*' (1994) ECLR 61, 68; Reich, 'The "November revolution" of the European Court of Justice: *Kock, King and Auld revisited*' (1994) 31 CML Rev 457, 471.

⁴¹ The case concerned the right of the widow of a migrant worker to rely on the principle of equal treatment laid down in Art 3(1) of Regulation (EEC) 1408/71 on the social security rights of migrants.

⁴² Case 40/75 *Kowalski v Zastawny* (1975) ECR 1659.

⁴³ Para 41. Cf. joined Cases C-267/93 and C-268/93 *Kock and Others v Primecrown and Others and Beecham and Sandoz* [1995] ECR I-4285.

⁴⁴ Case C-314/93 [1995] ECR I-4155.

⁴⁵ See further ch 15.

⁴⁶ Case C-400/93 [1997] ECR I-2757.

⁴⁷ See Case C-123/92 *Catruș v Secretary of State for Health and Pension*, judgment of 23 March 1994; Case C-297/92 *Stier* [1995] 2 CMLR 1.

⁴⁸ In *Colson*, Case 314/83 *Colson v Pêcheur* (1983) ECR 2821 and Case C-278/94 *Camelinckx v Belgium* [1996] ECR I-4007; in *Stier*, Case 297/92 *Stier v Luxembourg* [1995] ECR 3161 and Case 157/93 *Stier v Secretary of State for Health* [1995] ECR 3213.

⁴⁹ See further ch 14.

⁵⁰ *Accia* n. 52. See also Case C-35/96 *Manfredi v Italy* [1998] ECR I-2691, para 22-4.

⁵¹ Case 157/89 [1991] ECR 3063.

except where there are strong reasons for not so doing'.⁵² The Court undertook a detailed examination of the arguments for reconsidering the rule in *Merck v Stephan and Eder*, but concluded that it had struck the right balance in that case between the principle of the free movement of goods and the interests of patentists.

The absence of a doctrine of binding precedent in Community law means that no meaningful distinction can generally be drawn between the *ratio decidendi* of a judgment of the Court and *obiter dicta*.⁵³ The distinction is important in the common law because it is only the *ratio* of a case which is capable of binding other courts in the future. However, in principle everything that is said in a judgment of the Court of Justice expresses the Court's opinion and is therefore capable of having the same persuasive force.⁵⁴ As Bell has said of the French *Conseil d'Etat* 'Apparent *obiter* are there for a definite purpose and do not represent the ramblings of a judicial argument'.⁵⁵ This point may be illustrated by the decision in *Marshall*,⁵⁶ where the Court held that directives were not in themselves capable of imposing obligations on individuals, that is, of producing horizontal direct effect. That decision was reached in proceedings in which the appellant was seeking to enforce a directive against a public authority. It was therefore not strictly necessary for the Court to decide whether directives could be enforced against individuals,⁵⁷ but that *obiter* had no effect on the status of the Court's judgment on that point and it was followed in a number of subsequent cases.⁵⁸

Occasionally, however, the Court seeks to distinguish a case on which a party has sought to rely. In order to perform this exercise, the Court has to establish what the previous case, properly construed, in fact decided. The way in which the Court performs this exercise has become increasingly sophisticated. A good example is *Olivera Oyarzabal*,⁵⁹ which raised the question whether a Member State was entitled, under the public policy proviso contained in Article 39(3) (ex 48(3)) EC, to limit the right of residence of a worker from another Member State to part only of the territory of the first State. In *Ruiz v Marín* for the Interior,⁶⁰ the Court had held

⁵² [1995] ECR I-4285, 4344. Cf. the discussion by AG Jacobs in Case C-50/90 *P. United de Republique Applique v Council* (2000) ECR I-5577, 5705-11, of whether the time was ripe for a departure from the Court's earlier case law on individual concern under Art 230 EC. Both AG Frenkel and AG Jacobs came from common law countries.

⁵³ See further Todd, above n 34 at 36-42. Cf. Koopmans, 'Two decisions in European law' in O'Keefe and Schermers (eds), *Europe in European Law and Jurisprudence* (1992) 1, 22-4; Chalmers, above n 35 at 24.

⁵⁴ See AG Roemer in Case 3/61 *Netherlands v High Authority* [1962] ECR 213, 242. Cf. AG Warner in Case 312/76 *Mezzanin v FNVGM* [1977] ECR 1647, 1661-2.

⁵⁵ *French Legal Culture* (2001) 150; Reflections on the procedure of the Council d'Etat, above n 9 at 231.

⁵⁶ Cf. Case C-216/93 *Worms* [1994] ECR I-163, 170, where AG Jacobs suggested that it would be 'disproportionate' for the Court to address issues of great importance for the Community legal order in a case where they did not need to be decided.

⁵⁷ e.g. Case 80/86 *Kyriakidis v Nymagos* [1987] ECR 3955; Case C-221/83 *Burnard* [1986] ECR I-455; Case C-51/92 *Spain v Denmark* [1994] ECR I-3325; joined Cases C-297/92 to C-403/92 *Stier and Others v Secretary of State for Health* [1995] 2 CMLR 44.

⁵⁸ Case C-100/01 [2002] ECR I-1581. See also Case C-313/99 *GRIFF v Commission* [1999] ECR I-1125; Case C-158/92 *TPWD International Development* [1993] ECR I-213; Case C-194/94 *CMJ Society v Synchro and Synchron* [1995] ECR I-2221.

⁵⁹ Case 26/75 [1975] ECR 1219.

that measures limiting the right of residence to part of the national territory could only be imposed on a worker from another Member State where they could also be applied to the host State's own nationals. In order to give a helpful answer to the referring court, the Court said it was necessary to place the *Rutili* case in context.

Rutili concerned the situation of an Italian national who had lived in France since birth and had been made subject in France to measures restricting his right of residence by reason of his political and trade union activities. He was accused of certain activities which, in essence, consisted of political actions at the time of the legislative elections of March 1957 and the events of May-June 1958, and of participating in a demonstration at the commemoration of 14 July 1966.

The defendant in the main proceedings, by contrast, has been sentenced in France to 18 months' imprisonment and a four-year ban on residence for conspiracy to disturb public order by intimidation or terror. The documents before the Court show that the administrative police measures taken against him, the legality of which forms the subject-matter of the main proceedings, were motivated by the fact that he formed part of an armed and organised group whose activity constitutes a threat to public order in French territory. Prevention of such activity may, moreover, be regarded as falling within the maintenance of public security.

Furthermore, it should be noted that in *Rutili*, the national court had doubted as to whether a particular situation such as that of Mr *Rutili*, who had exercised trade-union rights, allowed the adoption of a measure designed to preserve public order. In this case, by contrast, the referring court starts from the premise that reasons of public order preclude the residence of the migrant worker in question on part of the territory, and that, without the possibility of imposing a measure prohibiting residence in that part of the territory, they could justify a measure prohibiting residence in the whole of the territory.¹⁰

The Court concluded that a migrant worker's right of residence could be limited to part of the territory of the host State where certain conditions were met.¹¹ Thus, the Court acknowledged the persuasive value of *Rutili* but was willing to distinguish it from *Görke Olaschki* on factual grounds, which it set out in the judgment in some detail. It is ironic that the recipient of this extended exercise in judicial reasoning was the French Conseil d'Etat, which mentioned the *Rutili* case before making a reference to the Court,¹² but does not analyse its own case law in its decisions.

A preliminary assessment

These cases reflect increasing sophistication on the part of the Court of Justice in handling its previous case law. The principle that the Court may depart from its previous decisions was never in doubt. However, it now seems to be recognised that such departures require an explanation of the cases affected in order to avoid an unacceptable degree of uncertainty about the new legal position. Where the Court

¹⁰ Para 34-4 of the judgment.

¹¹ See para 45.

¹² See para 16 of the Court's judgment.

declines to reverse a previous decision, it appears to accept that a detailed explanation of its reasoning may be equally necessary. It has also become adept at distinguishing earlier cases which it does not wish simply to overturn. It remains true that the Court does not often depart from its previous decisions. Indeed, members of the Court sometimes say that it has become even more reluctant to do so than it once was.¹³ The main difference is that it is now far less common for the Court to ignore or misrepresent inconvenient earlier authorities. The normative significance of the case law (no longer merely 'jurisprudence') is openly acknowledged in a way which is now closer to that of common law courts than their civil law counterparts. However, as we shall see in the next section, there is one area in particular in which the idea that judicial decisions do not constitute a source of law continues to resound.

Precedent in the Court of First Instance

Because judicial decisions do not constitute a source of law in the civilian tradition, they do not bind lower courts but are persuasive only. This represents a major distinction from the common law doctrine of precedent, under which a court may be required to follow a decision given in a previous case even though, in the absence of precedent, it might have decided the case in hand differently. In the context of the relationship between the Court of Justice and the CFI, it is the civilian tradition which in principle prevails (and is similarly likely to prevail in relations between the CFI and judicial panels established under Article 225a, such as the European Union Civil Service Tribunal).¹⁴

While it was obvious from the outset that the CFI would not regard itself as bound by its own previous decisions, there was initially some doubt about whether it was bound by decisions of the Court of Justice. According to Article 58 of the Statute, one of the grounds on which appeal lies to the Court against decisions of the CFI is 'the infringement of Community law by the Court of First Instance'. It was argued that '[i]f precedents set by the Court are, of course, part of Community law, so that where these are clear and consistent the lower court would regard itself as bound to follow them at risk of its decision being set aside on appeal. Only in the presence of unclear or conflicting decisions of the higher court would it feel free to decide the matter as it thought fit'.¹⁵ It soon became clear, however, that the CFI would treat the Court's case law as no more than persuasive. Indeed, since it

¹³ For a conspicuous effort to depart from precedent, see Case C-359/92 *United Brands v Commission* [1994] ECR I-6577, discussed in ch 3.

¹⁴ The civilian tradition is also reflected in the phrase in the body of the Charter of Fundamental Rights of any reference to the case law of the European Court of Human Rights. See in particular Art. 51 of the Charter. That case law is only mentioned in the Charter preamble. See further Lieberg, 'Does the EU Charter of Fundamental Rights threaten the supremacy of Community law?' (2001) 34 *GMJ* Rev 1175, 1175-6.

¹⁵ Brown and Kavanagh above n 16 at 116. See also Syru, (preparing a European Legal Guide (1992) 165-6.

heard its first case in 1959, the CFI's attitude to the case law of the Court has become increasingly robust.

An early case in which the CFI demonstrated its readiness to distinguish inconvenient rulings of the Court of Justice was *BAZF and Others v Commission*,¹² where the applicants sought the annulment of a Commission decision relating to proceedings under Article 21 (ex 85) of the Treaty. One of the grounds put forward by the applicants was that the Commission had infringed the first paragraph of Article 12 of its own Rules of Procedure,¹³ which provided that '[a]cts adopted by the Commission at a meeting or by written procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary'. The Commission sought to rely on the judgment in *Nakajima v Council*,¹⁴ where the Court of Justice said that 'the purpose of the rules of procedure of a Community institution is to organize the internal functioning of its services in the interests of good administration'. According to the Court of Justice, it followed 'that natural or legal persons may not rely on an alleged breach of those rules since they are not intended to ensure protection for individuals'. Notwithstanding the apparently general terms of that ruling, in *BAZF* the CFI took the view that it was limited in scope:

The Court [of First Instance] considers that that judgment must be interpreted as meaning that it is necessary to distinguish between those provisions of an institution's Rules of Procedure whose infringement may not be relied upon by natural and legal persons because they are concerned solely with the internal working arrangements of the institution and cannot affect their legal situation and those whose infringement may be relied upon because, as in the case with Article 12 of the Commission's Rules of Procedure, they create rights and are a factor contributing to legal certainty for such persons.

The CFI went on to find that the contested measure was vitiated by such serious defects that it was to be considered non-existent. The Commission then appealed to the Court of Justice,¹⁵ which set aside the conclusion of the CFI that the measure was non-existent. However, without referring to its decision in *Nakajima*,¹⁶ it declared that '[a]uthentication of acts referred to in the first paragraph of Article 12 of the Commission's Rules of Procedure ... constitutes an essential procedural requirement within the meaning of Article 173 of the EEC Treaty [now Article 238 EC] breach of which gives rise to an action for annulment'.¹⁷ Since the Commission had failed to authenticate the contested decision in accordance with the requirements laid down in its Rules of Procedure, the Court concluded that the decision should be annulled.¹⁸

¹² Joined Cases T-75/89, T-34/89, T-43/89, T-24/89, T-25/89, T-51/89, T-91/89, T-94/89, T-36/89, T-93/89, T-122/89 and T-104/89 (1990) ECR II-311. Cf. Case T-353/84 *Pantani v Commission* [1995] ECR II-521, para 70.

¹³ Cf. English Special Edition, *Series VII—Institutional Questions*, 9, as amended by Commission Decision 75/461, OJ 1975 L 169/42.

¹⁴ Case C-69/89 [1991] ECR I-2549, para 43 and 52.

¹⁵ Case C-137/92 P *Commission v BAZF and Others* [1994] ECR I-4355.

¹⁶ But see the Opinion of AG van Gerven, ECR at 2583-2585.

¹⁷ In a subsequent case the Court cited its ruling in *Nakajima* and *BAZF* as they were consistent see Case C-52/94 *Nakajima v Council* [1995] ECR I-2169, para 33.

¹⁸ Para 76.

Perhaps emboldened by that episode, the CFI subsequently appeared to depart from the decision of the Court of Justice in *Dutch Banks*¹⁹ that Community law did not require the Commission to divulge the contents of its files to the parties in competition cases. In *Solvay v Commission* and *ICI v Commission*, the CFI described access to the file as 'one of the procedural safeguards intended to protect the rights of the defence' and declared that '[r]espect for the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances'.²⁰ Again, in *Korabel v ESC*,²¹ the CFI expressly stated that the case law of the Court of Justice on the effect of a provision of the Staff Regulations 'ought to be reconsidered' and went on to depart from it. Perhaps the most dramatic assertion to date of the CFI's independence was its decision in *Jigo-Qabli v Commission*.²² In an elaborately-reasoned judgment containing copious references to previous decisions, the CFI departed from both its own case law and that of the Court of Justice in laying down a new, more liberal, test for establishing individual concern under the fourth paragraph of Article 230 EC. The CFI's decision was overturned on appeal,²³ but on substantive grounds only: the Court did not question the right of the CFI to depart from previous case law.²⁴

The CFI gave a clear statement of its attitude to the case law of the Court of Justice in *NMB France and Others v Commission*.²⁵ In that case (*NMB I*), the applicants sought the annulment of a series of Commission decisions concerning the refund of anti-dumping duties²⁶ collected on imports of ball-bearings from Singapore which had been fixed at too high a rate. According to the applicants, the method used by the Commission to calculate the amount of the refund was unlawful. A curious feature of the case was that, before the CFI acquired jurisdiction in dumping cases, the applicants had already brought an unsuccessful action before the Court of Justice (*NMB II*)²⁷ for the annulment of Commission decisions on the refund of anti-dumping duties they had paid on the same product from the same origin. The decisions contested in *NMB II* related to different periods but the arguments advanced by the applicants were essentially the same as those previously rejected by the Court.

The Commission argued that the second action constituted an abuse of procedure, in that the applicants were in reality seeking to challenge the judgment

¹⁹ Joined Cases 41 and 61/82 *FBP and FBP v Commission* [1984] ECR I-3, para 25.

²⁰ Case T-34/91 [1995] ECR II-1773, para 59, and Case T-36/91 [1995] ECR II-1847, para 59, respectively. In both cases, the contested decision was annulled. See *Meire* (1995) 35 *EWG Rev* 355.

²¹ Case T-584/93 [1995] ECR II-645, para 92.

²² Case T-17/01 [2002] ECR II-2045. See further at 3.

²³ Case C-163/02 P [2004] ECR I-1425.

²⁴ Cf. Case C-11/03 P *Commission v Jigo-Qabli*, judgment of 15 February 2005, para 34.

²⁵ Case T-262/94 [1995] ECR II-427 (Second Chamber, Extended Composition).

²⁶ Dumping takes place when a product is imported into the Community from a non-member country at a price which is lower than its normal value in that country and the result is cause injury to a Community industry. Dumped products may be the subject of anti-dumping duties.

²⁷ Case C-183/88 *NMB and Others v Commission* [1992] ECR I-1693.

of the Court in *NMB I*. The Commission was supported by a federation representing European bearing manufacturers, which maintained that the second action constituted a 'disguised appeal against the first judgment'.¹³ However, the CFI held that the second action was admissible, declaring:¹⁴

It must be borne in mind at the outset that the Court of First Instance is only bound by the judgments of the Court of Justice, first, in the circumstances laid down in the second paragraph of Article 54 (now 65), of the Statute of the Court of Justice... and, secondly, pursuant to the principle of *res judicata*.

Article 61 of the Statute is concerned with the consequences where an appeal to the Court against a decision of the CFI is upheld. One of the options open to the Court is to refer the case back to the CFI for judgment. When that option is exercised, the second paragraph of Article 61 states that the CFI 'shall be bound by the decision of the Court of Justice on points of law'.¹⁵ In the interests of completeness, the CFI might also have mentioned what is now the second paragraph of Article 54 of the Statute. According to that provision, where the Court finds that an action which has been brought before it falls within the jurisdiction of the CFI, it must refer the action to the CFI, which 'may not decline jurisdiction'. In other words, the CFI is bound by the finding of the Court of Justice that the former has jurisdiction to hear the action.

Neither Article 54 nor Article 61 of the Statute was relevant in the circumstances of *NMB II*, so the CFI went on to consider whether the status of *res judicata*¹⁶ of the judgment of the Court of Justice in *NMB I* rendered the second action inadmissible. The CFI observed: 'It is settled case-law that this can be the case only if the proceedings disposed of by the judgment in [*NMB I*] were between the same parties, had the same purpose and were based on the same submissions as the present case... those conditions necessarily being cumulative'.¹⁷ The CFI pointed out that the second action concerned 'different later decisions relating to other quantities [of ball-bearing] and import periods and reimbursements of different amounts'.¹⁸ It followed that the status of the judgment in *NMB I* as *res judicata* could not affect the admissibility of the second action. The CFI went on to note that, although the complaints put forward in the second action largely coincided with those advanced in *NMB I*, there were none the less significant differences: the international legal context had changed and the Community had adopted a new basic regulation on protection against dumping. The second action could not therefore be considered 'a mere replication'¹⁹ of the first. Moreover, one of the applicants in *NMB II* had not been involved in *NMB I*. It followed, said the CFI, that 'this action is entirely admissible and that the Court of First Instance must therefore examine its merits.'

¹³ Para 26 of the judgment in Case T-162/84.

¹⁴ Para 35.

¹⁵ The same rule now applies when the Court reviews a decision of the CFI given on appeal against a decision of a judicial panel and decides to refer the case back to the CFI (see Statute, Art 52).

¹⁶ On which see Todd, *The Official Encyclopedia of European Community Law* (1987), 494-7.

¹⁷ Para 37 of the judgment in *NMB II* (Case T-251 of the French Code CFI).

¹⁸ Para 38.

¹⁹ Para 39.

In so doing, it should take account simultaneously of the judgment in [*NMB I*] and of the new issues raised by these proceedings.²⁰ After a detailed examination of the grounds put forward by the applicant, the CFI dismissed the action as unfounded.

The judgment in *NMB II* contains express confirmation of the indications given by other cases that the CFI does not consider itself bound by decisions of the Court of Justice except in certain exceptional and clearly defined circumstances. Those decisions are examined by the CFI in some detail in its own judgments, but ultimately they are treated merely as persuasive except where the Statute or the principle of *res judicata* dictates otherwise. The CFI has therefore struck a nice balance between deference to the case law of the Court of Justice and a natural desire to do justice in the cases it is called upon to decide. The creative tension which results from the unwillingness of the CFI to follow without question the decisions of the Court may be regarded as conducive to the healthy development of Community law.

Concluding remarks

The interpretation of the EC Treaty would have made it wholly implausible for the Court of Justice to purport to be merely the mouthpiece of the written law. There was in any event no reason why it should. The authors of the Treaty seemed motivated less by controlling judicial excesses than by ensuring observance of the law. The establishment of the CFI on the same model as the Court and the endorsement of both Courts' case law by the Constitutional Treaty²¹ show that their motivation has not changed, whatever their criticisms of individual cases. Although initially the Court's civil law antecedents were clearly visible in the style of its judgments, the publication in the law reports of the Advocate General's Opinion and a detailed account of the facts and issues based on the report of the Judge Rapporteur laid bare the extent of the discretion enjoyed by the Court and the full extent of its lawmaking role. The abandonment at the end of the 1970s of the practice of drafting the French text of its judgments in the form of a limited number of long sentences proved to be a watershed, because it released the Court from its self-imposed grammatical straitjacket. The consequences began to emerge when, some years later, the translation burden forced the Court to abandon the systematic publication of the facts and issues section of its judgments and later the Report for the Hearing. These developments both enabled and compelled the Court to set out in the main body of its judgments a fuller account of the legal context and arguments and paved the way for greater sophistication in the treatment of previous case law. The increasing volume and complexity of that case law and the diverse legal traditions of the national courts made it imperative for the Court to

²⁰ Para 43. The CFI ordered in joined Cases 311/81 and 31/82 and Case 126/82 *Klacker-Hörs v Commission* (1983) ECR, 1543 and 1557 respectively, para 5.

²¹ See Art 74-108(4).

reaffirm, distinguish and overrule in a transparent manner if the law was to be applied uniformly and it was to avoid being inundated by unnecessary references seeking guidance on apparently inconsistent decisions. The breakthrough came in 1990 in *MAG II*, when for the first time the Court expressly overruled one of its previous decisions. Although it took a while for it to refine its technique, there are now signs that it is beginning to handle its case law in a way that owes more to the common than the civil law tradition.

There is, however, more to a good judgment than assurance in dealing with previous case law. Harman observes that the law's legitimacy requires decisions that are not only consistent with the treatment of similar cases in the past and in accord with the existing legal system. They are also supposed to be rationally grounded in the matter at issue so that all participants can accept them as rational decisions.¹⁴⁰ Judged against that yardstick, the Court's judgments are seriously deficient. This is much less due than it once was to the style in which they are written. It is sometimes suggested that matters would improve if dissenting opinions were permitted, but the benefits of such opinions have, it is submitted, been exaggerated.¹⁴¹ The answer must instead be sought in the appointment of judges of the highest quality, self-restraint by the minority when the formation of judgment is split and continuing efforts to contain the workload of the Court. Hall observes:¹⁴² 'In the final analysis, the French judge is a bureaucrat and the English an advocate. If the Court of Justice were to cast off the mantle of the bureaucrat and assume that of the advocate, it could make a major contribution to both its own legitimacy and that of the Union as a whole.'¹⁴³

¹⁴⁰ *Supra* note 1, at 104 (Policy Form, 1990, 1991).

¹⁴¹ See ch. 1.

¹⁴² *Harman* on the procedure of the Council of the Court, above n 6 at 101.

¹⁴³ See further *Laurel*, above n 6 at the 11 and 12.

XII Future of the Court

1. Impact of enlargement
2. Proposals for the future of the judicial system

Mandatory Reading

A. Arnulf, *The European Union and its Court of Justice*, Oxford, 2005, Chapter 18.

Judging Europe's Judges

Several of the preceding chapters have examined the evolution of the Court's case law over time in particular fields. In this final chapter, that process of evolution takes centre stage and an attempt is made to set it in its wider legal and political context.¹ For the purposes of the discussion, a number of broad phases in the Court's case law are identified. The first runs from the entry into force of the EEC Treaty until the breakdown of the Luxembourg Compromise in the early 1980s. During this phase, the Council was handicapped by the need to reach a consensus before acting and the Court took a number of bold decisions which had the effect of 'constitutionalising' the Community² and achieving some at least of the Treaty's policy objectives notwithstanding the absence of much of the legislation it envisaged. The second phase runs from the transition in the early 1990s to qualified majority voting in the Council until the signature on 7 February 1992 of the TEU. This heralded the start of the third phase. The nature of the TEU and the unprecedented public debate which accompanied its ratification by the Member States produced a fundamental change in the political climate which affected all the institutions of the Community, including the Court of Justice. It will be suggested that the entry into force of the Treaty of Maastricht in February 1993 might in due course be seen as marking the beginning of a fourth phase.

The first phase: from consensus to qualified majority

Making the system work

During the first phase of the Community's existence, the Court was called upon to address a variety of issues which were self-evidently fundamental to the functioning

¹ See further Weiler, *The Constitution of Europe* (1999) (Quintanilla Weiler) chs 2 and 5. See also Lenaerts, 'Some thoughts about the interaction between judges and politicians in the European Community' (1992) 12 YEL 1; Weiler, 'Political, Legal and European Union' in Shaw and Mee (eds), *New Legal Systems of European Union* (1995) 293; Dehousse, 'The European Court of Justice (1998)' ch 4; Dupuis, 'The European Court of Justice' in Craig and de Búrca (eds), *The Evolution of EU Law* (1999) ch 5; de Búrca, 'The European Court of Justice and the evolution of EU Law' in Dehousse and Cappelletti (eds), *The State of the European Union* (2004) ch 3.

² See Weiler, ch 5; Weiler, 'The European Court of Justice: beyond "beyond function" or the legitimacy crisis of European Constitutionalism' in Shaw and Mee (eds), *New Legal Systems of European Union* (1995) 293.

of the Treaty system. Many of these issues were brought before the Court of Justice under the preliminary rulings procedure. That procedure, and the relationship between the Court and the national courts, proved fundamental to the ability of the Court to influence the development of Community law.¹ It was the national courts who brought before the Court of Justice the cases which enabled it to see the problems to which the application of Community law in the Member States gave rise. It was the national courts who applied the answers given by the Court to the questions which had been referred to it. The partnership which the Court of Justice succeeded in forging with the national courts allowed private litigants to exert a powerful influence over the development of Community law and significantly reduced the ability of the Member States to control the process.²

The Court's overriding concern seems to have been to ensure that the Treaty system worked and that the Member States complied with their obligations. Although the Treaty itself contained, in Article 169 (later 226), a procedure for achieving that objective which was in itself quite radical, the Court soon realized that the Treaty's capacity to bind the Member States would be greatly enhanced if it were to confer on individuals rights which the national courts had to uphold. Thus, in a series of cases beginning with *Van Gend en Loos*, the Court held that Treaty provisions which were sufficiently clear and precise were capable of producing that effect, not just against the State and its emanations but also, in appropriate cases, against private parties.³ Moreover, such provisions would take precedence over inconsistent provisions of domestic law. Although not expressly spelled out in the Treaty, these principles of direct effect and primacy were wholly consistent with its spirit and general scheme for without them the uniform application of Community law throughout the Member States, essential to the proper functioning of the common market, could not have been achieved. It was not therefore surprising when the Court made it clear that Community law took precedence regardless of the constitutional status of conflicting norms of national law or the date on which they were adopted. The contrary conclusion would have enabled the Member States to absolve themselves at will from the requirements of the Treaty.

The transition to qualified majority voting which should have taken place at the beginning of 1966 might have led the Court to pass the baton to the Member States. However, the Luxembourg Compromise agreed in January of that year led to the development in the Council of a practice under which measures were not adopted until a consensus had emerged in their support, even where the Treaty permitted them to be adopted by qualified majority vote. That practice hampered the Council's ability to meet the responsibilities cast upon it by the Treaty in two ways. First, the process of finding a consensus was immensely time-consuming; second, it tended to result in a dilution of the proposals put forward by the Commission which

¹ See generally *Knauth, Some Sweet and Bitter*, *ibid.*

² See *Stone Sweet, The Judicial Construction of Europe* (1984).

³ See Case 12/73 *SAT v. SATSA* [1974] ECR 51; Case 43/75 *Defrenne v. S.A. Les Modes* [1976] ECR 455.

were usually required to set the process in motion. Against that background, the Court followed the path on which it had set out into the field of substantive law, with crucial decisions on the scope of the Treaty rules on freedom of movement⁴ and competition.⁵ In addition, the growing importance attached by the Member States to action in the social field provided the context for the Court's decision in *Defrenne II*,⁶ which triggered the development of its far-reaching case law on equal treatment for men and women.⁷

It was during the period in which the practice of consensus became firmly established that the Court gave a decision which emphasised once more the profound consequences the entry into force of the Treaty had produced for the sovereignty of the Member States. This was its judgment in the *ERTA* case,⁸ where the Court addressed a long-running controversy about the extent of the Community's power to enter into international agreements.⁹ In *ERTA* the Court recognized that, even in the absence of express Treaty authority, the Community had exclusive power to conclude such agreements in areas covered by common rules. Subsequent case law¹⁰ built on the foundations laid in *ERTA* so that by the end of the 1970s it was clear that the Community's implied power to enter into international agreements was not confined to areas in which common rules had been laid down. Whenever the Community institutions had the competence to act in order to achieve a particular policy objective in the internal sphere, the Community had the power to enter into international commitments with a view to achieving the same objective notwithstanding the absence of an express provision authorizing it to do so. Initially held communally with the Member States, that power would become exclusive once the Community exercised its competence, whether internally or externally.¹¹

This use of case law was of enormous significance in equipping the Community with the power to achieve the objectives laid down in the Treaty. It provided a striking example of the extent to which, to borrow the language of the Court in *Van Gend en Loos*, the Member States had limited their sovereign rights for the benefit of the Community. To enable it to police the jurisdictional boundary between the Community and the Member States in the field of external relations, the Court took a characteristically broad approach to its own powers. The Treaty

⁴ E.g. Case 27/74 *Reynolds v. Bagnall* [1975] ECR 51; Case 1/74 *Procureur de la République v. Dassonville* [1974] ECR 457; Case 31/74 *van Bockstaele v. Belgium* [1974] ECR 1299; Case 124/78 *Reed v. Buitendijk* [1979] ECR 549. See also 11 and 13.

⁵ E.g. Joined Cases 55 and 56/64 *Consten and Grignani v. Commission* [1966] ECR 399; Case 4/69 *ITL v. Commission* [1971] ECR 419; Case 6/72 *Europemballage and Continental Can v. Commission* [1973] ECR 215; Case 27/76 *United Brands v. Commission* [1976] ECR 207.

⁶ See 12 15. ⁷ Case 12/75 *Commission v. Council* [1975] ECR 151.

⁸ See generally *Easton, External Relations of the European Union* (2004); *Easton and Hillier* (2004); *The General Law of EC External Relations* (2004); *Mindland, Hendry and Hyatt, The External Relations of the European Communities* (1998).

⁹ See in particular Joined Cases 1, 4 and 6/76 *Kramer* [1976] ECR 1239; Opinion 1/76 *Draft Agreement Establishing a European Laying-Up Fund for inland Waterway Vessels* [1977] ECR 703.

¹⁰ Cf. Art. 1-13G, C.O.

contained a provision, Article 228(1),¹⁴ enabling the Council, the Commission or a Member State to ask the Court for its opinion on whether an international agreement which the Community was proposing to conclude was compatible with the Treaty. If the Court's opinion was adverse, the agreement (unless modified) could only enter into force if the Treaty were amended. The notion of compatibility might have been interpreted as limited to whether or not the substantive provisions of the agreement envisaged were consistent with the Treaty, but the Court took a broader view. In an opinion delivered in late 1975 at the request of the Commission,¹⁵ the Court ruled:

... the fact that the Commission raised the problem of the compatibility of this agreement with the provisions of the Treaty for the purpose of obtaining the opinion of the Court of Justice on the extent of the Community's powers to conclude this agreement envisaged, cannot be sufficient of itself to render the request inadmissible ...

The compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the Institutions of the Community and the substantive rules.

The Court pointed out that, if it were to rule, after the conclusion of an international agreement binding on the Community, that the agreement was incompatible with the Treaty by reason either of its content or the procedure adopted for its conclusion, serious difficulties might arise for all interested parties. It was the purpose of the procedure laid down in Article 228 of the Treaty to avoid such difficulties. The outcome was to give the Court a pivotal role in defining the extent of the Community's power to enter into international agreements and to underline the extent to which the sovereignty of the Member States had been curtailed in the field of external relations. Not only were there some fields in which they had lost the power to enter into international agreements with third countries, but in cases of dispute those fields would be determined by a supra-national Court which evidently attached greater importance to achieving the Treaty's objectives than to preserving the traditional prerogatives of the Member States.

Protecting the rights of individuals

During the initial phase, protecting the rights of individuals seemed to be another of the Court's major preoccupations. Indeed, in *Van Gend en Loos* the Court emphasised that the Treaty was intended to confer upon individuals 'rights which become part of their legal heritage'.¹⁶ Much of the Court's case law during this phase had

¹⁴ The procedure was revised in Art 228(9) [Art 30(6)] EC by the TEU (OJ L 11-22/87) CT.

¹⁵ Opinion 1/75 [Underspending on a Lard Cart Standard] [1975] ECR 1355, 1360. See also Opinion 1/76 'International Agreement on Natural Rubber' [1976] ECR 2371, para 25; Opinion 3/74 'Framework Agreement on Banana' [1974] ECR 1477, para 16-17; Opinion 2/74 'Convention by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' [1974] ECR 1-1759, para 3-5; Opinion 2/73 'Cartagena Protocol on Biotechnology' [1973] ECR 2-5711, para 1-15.

¹⁶ Case 26/62 [1962] ECR 1, 12.

the effect of strengthening the capacity of individuals to benefit from Community law, whether it took the form of rules laid down in the Treaty or in directives, whose capacity to produce vertical direct effect started to emerge at the beginning of the 1970s with the decision in *Godt v Franzmann Steinlein*.¹⁷

However, in most of the cases in which the rights of individuals were upheld by the Court, the Member States were as a corollary required to comply with their own obligations. In cases where individuals sought to claim rights against the institutions of the Community, the Court was less sympathetic. In *Producers de Fruits v Council*,¹⁸ decided towards the end of 1962, the Court was called upon to consider the circumstances in which a natural or legal person could challenge the validity of a Community act which had been called a regulation by the institution which adopted it. The Treaty enabled such an applicant to contest a decision 'in the form of a regulation' and the Court accepted that it was indeed the substance rather than the form of the contested act which was important. However, it went on to define the characteristics of a regulation in a way that was to make it extremely difficult for natural or legal persons to show that a measure carrying that label in fact constituted a decision.¹⁹

In the same vein, *Plaumann v Commission*,²⁰ decided in July 1963. The applicant sought the annulment under Article 173 (later 230) of a Commission decision addressed to the Federal Republic of Germany. The Treaty allowed a natural or legal person to challenge a decision addressed to another person which was of direct and individual concern to the applicant. The Commission argued that a Member State could not constitute 'another person' within the meaning of Article 173. That argument was unconvincing; it was tolerably clear from the text of the Treaty that a natural or legal person was intended to have the capacity to challenge any decision which, while not addressed to him, was of direct and individual concern to him. That was the conclusion reached by the Court, which declared: 'The words and natural meaning of this provision justify the broadest interpretation. Moreover provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively'.²¹ However, on the more difficult question of individual concern, that is precisely what the Court did, ruling that the applicant was not individually concerned because it was only affected by the contested decision 'by reason of a commercial activity which may at any time be practised by any person ...'. The *Producers de Fruits* and *Plaumann* decisions became classic authorities on the right of individuals to bring annulment proceedings under the EC Treaty and had the effect of making it extremely difficult for such an applicant to challenge any Community act other than a decision addressed to him or her.²²

¹⁷ Case 9/70 [1970] ECR 815.

¹⁸ Joined Cases 16 and 17/62 [1962] ECR 471.

¹⁹ See e.g. Joined Cases 189 and 190/79 *Chelone Commission* [1980] ECR 1945.

²⁰ Case 25/62 [1962] ECR 75.

²¹ *Id.* at 126-7.

²² *Plaumann* was cited by the Court in a similar decision in Case C-50/90 *P. Leclaire de Papier Apollinaire v Council* [1992] ECR I-4677, para 35.

The Court's reluctance to allow individuals to challenge the activities of the institutions was also evident in *Zuckerfabrik Südpfalz v Council*,²⁰ decided in late 1971, where the Court addressed the circumstances in which damage resulting from a legislative act of the Community might fix it with liability in damages under the second paragraph of Article 215 (later 288). The Court declared:²¹ "Where legislative action involving measures of economic policy is concerned, the Community does not incur noncontractual liability for damage suffered by individuals as a consequence of that action... unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred." The restrictive nature of the *Schepers* formula made it very difficult for individuals to recover damages for loss caused by legislative acts.²²

The Court's early case law on the action for annulment and the action for damages appears at first sight to be inconsistent with the emphasis placed by the Court on protecting the rights of individuals in *Van Gend en Loos*. How can this discrepancy be explained? It seems likely that the Court was influenced by a variety of factors. In the case of the action for annulment, some of these are mentioned in chapter 3. In the case of the action for damages, it was no doubt mindful of the difficulty of recovering compensation for loss caused by legislative action in the national laws of the Member States.²³ However, the balance of the Court's case law on direct effect and primary makes explanations such as these inadequate. It seems probable that the Court was also motivated by a desire to shield the Community's as yet immature institutions from legal challenge. Allowing Community acts to be challenged or damages to be sought by potentially large numbers of private applicants might have caused serious disruption to a decision-making process which, either *de jure* (before 1956) or *de facto* (after 1956), required the Council to act unanimously. By the time qualified majority voting had become the norm in the early 1960s, a substantial body of case law on both the action for annulment and the action for damages had built up which considerations of legal certainty made it hard to abandon.²⁴

The second phase: from QMV to EU

A reduced role for the Court?

The practice of consensus which developed as a result of the Luxembourg Compromise began to break down in the early 1960s and voting in accordance with

²⁰ Case 5/71 [1971] ECR 975.

²¹ Para 11.

²² See further Atack, *Liability for legislative acts under Article 215(2) EC* in Harrel and McDonald (eds), *The Action for Damages in Community Law* (1997), ch 1. The Court abandoned the *Schepers* formula in Case C-352/91 *P. Bagnato and Corpi v Commission* [1992] ECR I-5281 and aligned the Community's liability in damages with that of the Member States under the principle of State liability.

²³ Especially in the second para of Art 215 (later 288) referred expressly to the general principles common to the law of the Member States. See AG Thomas in Case C-262/96 *Kingdom v Commission* [1997] ECR I-1937, 1258.

²⁴ See further Atack, *The action for annulment: a case of double standards?* in O'Keefe and Thomas (eds), *Judicial Review in European Law* (2000) ch 13.

the Treaty became the normal practice.²⁵ This trend was accelerated by the Single European Act, signed in February 1986, which inserted into the EEC Treaty a new provision²⁶ requiring the Community to 'adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992'. All the Member States understood that this objective would be impossible to achieve if the Council did not take advantage of the new legal bases introduced by the Single European Act which provided for qualified majority voting, particularly Article 160a (later 25). Against that background it might have been thought that the Court would begin to play a less prominent role in the Community's development.²⁷ An activist approach by the Court could no longer be justified on the basis that the Community legislature was not functioning properly. Even changes to the Treaty itself now seemed a practical possibility in suitably pressing cases.

To some extent the Court may be said to have responded to the new climate. In *Marshall*,²⁸ decided between the two dates on which the Single European Act was signed, the Court finally decided that directives did not have horizontal direct effect. It doubtless took account of the hostile reception of some national courts to its case law on the vertical direct effect of directives. However, it may also have been influenced by the importance which directives were to play in the establishment of the internal market and the argument that endowing them with horizontal direct effect would upset the bargain struck by the Member States in the Single European Act. *Marshall* is a leading example of the Court's capacity for restraint, but it came to be overshadowed by the Court's attempts to attenuate the damaging effects the decision had for the uniform application of the law and the rights of individuals, particularly the principle of consistent interpretation first articulated in *von Colson*²⁹ and later developed in *Marleasing*.³⁰

In the field of substantive law too the Court showed greater deference to national sensitivities. In *Reed*,³¹ decided in April 1985, the Court refused to annul an unamended part of a law for the purposes of the rules on the free movement of workers. In *Grieser*,³² decided in late 1985, the Court held that a Member State could require a worker from another Member State to demonstrate competence in a language having constitutional status, even if knowledge of that language was not necessary to enable the worker to do the job she was seeking. In *Griener*,³³ the Court took a restrictive approach to the rules on services in order to avoid addressing the compatibility with the Treaty of national rules prohibiting abortion. In the field of

²⁵ See Dabwood, *Majority voting in the Council in Schwane (ed), Legislative for Europe 1952* (1985), 79.

²⁶ Art 13 (para 1).

²⁷ Cf. Kersch, *The role of law in the development of European integration* (1986) 35 *ECRQ* 525; Mancini, *The ending of a contribution for Europe* (1989) 26 *CMR* 293.

²⁸ Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 321, see ch 7.

²⁹ Case 24/81 *von Colson and Kraemer v Leod Nordre-Hofjens* [1984] ECR 1491.

³⁰ Case C-105/83 [1990] ECR I-4125.

³¹ Case C-373/87 *Grieser v Minister for Education and the City of Dublin Metropolitan Education Committee* [1988] ECR 3567.

³² Case C-155/90 *Society for the Protection of Unborn Children, Ireland v Grogan and Cogan* [1991] ECR I-4651.

competition law the Court seemed more reluctant than previously to articulate 'major new conceptual developments essential'.³⁷

The momentum of the case law

The Single European Act did not, however, contain any indication that the Member States were dissatisfied with the role hitherto played by the Court. On the contrary, the Member States accepted a proposal from the Court itself³⁸ that the Council should be empowered to reinforce judicial protection in the Community by establishing a court of first instance. Moreover, the case law of the Court had by the 1980s developed a certain momentum of its own which did not entirely correspond with developments at the political level. This phenomenon, which underlines the capacity of Community law to develop independently of the wishes of the Member States and the institutions, is clearly illustrated by the fields of equal treatment for men and women and remedies.

Following its decision in *Duffin* II, in 1951 the Court made it clear in *Jenkins v Kingsgate*³⁹ that Article 119 (later 141) of the Treaty was not confined to cases of direct discrimination. In *Griesel*⁴⁰ the following year the Court underlined the breadth of the notion of pay for the purposes of that article. By the late 1980s the Court had started to show some reluctance to subject to close scrutiny claims that indirect discrimination was objectively justified.⁴¹ None the less the Court continued to adopt a robust approach to the material scope of Article 119,⁴² an approach it extended to Directive 76/207.⁴³

The case law on remedies was less nuanced. Mounting frustration, with the lack of Council legislation on the procedural conditions under which Community rights were to be protected in the Member States led the Court in the early 1980s to reduce the deference it had previously shown for the procedural autonomy of the Member States.⁴⁴ The increased vigour with which the Court started to intervene in the circumstances in which Community rights were protected in the national courts culminated in *Pastorelli*,⁴⁵ *Francovich*⁴⁶ and *Smallegange*.⁴⁷ The case law on remedies and that on equal treatment for men and women merged in *Marshall II*,⁴⁸ where the

³⁷ *Garbus, Law and Competition in Towards Single Europe* (1992) 371.

³⁸ See Miller, *The Court of First Instance of the European Communities* (1990) 6; Kennedy, *The current minimum: the establishment of the Court of First Instance* (1993) 34 E.L.R. 7, 13-5.

³⁹ Case 95/82 (1991) E.C.R. 911.

⁴⁰ Case 12/81 *Guilford v British Rail Engineering* [1981] E.C.R. 355.

⁴¹ See e.g. Case 105/82 *Hendrick v Kent's Agricultural Services* [1982] E.C.R. 3159; *See also* *Case 105/82 Hendrick v Kent's Agricultural Services* [1982] E.C.R. 3159; *See also* *Case 105/82 Hendrick v Kent's Agricultural Services* [1982] E.C.R. 3159.

⁴² E.g. Case C-262/82 *Baron* [1990] E.C.R. I-1259.

⁴³ E.g. Case C-177/85 *Duke* [1992] E.C.R. I-3541. *See also* *Case C-177/85 Duke* [1992] E.C.R. I-3541.

⁴⁴ Case C-213/89 [1990] E.C.R. I-3453.

⁴⁵ *Joined Cases C-6/92 and C-9/90 Francovich and D'Amico* [1991] E.C.R. I-5857.

⁴⁶ Case C-203/90 [1991] E.C.R. I-4235.

⁴⁷ Case C-371/91 *Almond v Southampton and South-West Hampshire NHS* [1993] E.C.R. I-3057.

Court held that the Member States were not permitted to set an upper limit to the amount of compensation payable to the victims of discrimination contrary to Directive 76/207.

Making up for lost time

The improvements in the functioning of the decision-making process of the Community and the single market programme, which first saw the light of day in the form of the Commission's White Paper entitled 'Completing the Internal Market' presented to the European Council at the end of June 1985, served to emphasise the lack of progress that had been made hitherto and in particular the failure of the Community and its Member States to establish the common market by the deadline laid down in the original version of the EEC Treaty.⁴⁹ A collective realisation of the need to make up for lost time seems to have galvanised the Member States and the institutions into action and the Court was conscious of the opportunity this presented for it to continue its own efforts to make the Community work.

It was around the mid-1980s that the Court started to make serious use of Article 5 EEC (later 10 EC), requiring the Member States to 'facilitate the achievement of the Community's tasks' and to 'abstain from any measure which could jeopardize the attainment of the objectives of this Treaty'.⁵⁰ Article 5 played an important part in the Court's reasoning in *van Duyn*,⁵¹ where it was held that the obligations it laid down extended to the national courts and required them to interpret their national law in the light of the wording and the purpose of relevant directives.⁵² In the field of competition law too Article 5 was used to reinforce the effectiveness of the Treaty rules. In *Lesaffre v Au Bon Pain*,⁵³ for example, the Court declared:

'While it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of

⁴⁹ This is, 31 December 1993 (the end of the transitional period): see Art 1(7) EEC; Gendley [60], *Kaptein and Van der Meer v Thurnhout* [1990] 2 E.C.R. 1123; *See also* *Case 11/85* [1985] E.C.R. 1123.

⁵⁰ See Tingle-Ling, 'Community constitutional law: Article 5 EEC Treaty' (1990) 27 C.M.L. Rev. 645. For late developments, see by the same author 'The duties of national courts under Community constitutional law' [1997] 23 E.L.R. 3; 'The duties of national authorities under Community constitutional law' (1998) 23 E.L.R. 126; 'The duties of cooperation of national authorities and courts under Article 17 EC: two more reflections' (2001) 28 E.L.R. 14.

⁵¹ Above n 32.

⁵² The Court would later rule in *Case C-105/85 Puyde* [1985] 2 C.M.L.R. 53 that this requirement extended to framework directives adopted under Title VI of the TEU even though that Treaty contained no equivalent to Art 10 (ex 5) EC. The principle of loyal cooperation reflected in this article was applied in the way covered by Title VI. *See also* *Case C-105/85 Puyde* [1985] 2 C.M.L.R. 53.

⁵³ Case 229/81 [1985] E.C.R. I, para 14. *See also* *Case 231/81 G. S. v. Leduc* [1985] E.C.R. 325, para 16.

in implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings...

Even more dramatically, the Court held in *Franzoni*⁵⁴ that Article 5 provided one reason (among others) why Member States were required to make good loss caused by breaches of Community law for which they were responsible. In *Zuercher and Ober*,⁵⁵ the Court even held that the 'principle of sincere cooperation' embodied in Article 5 extended to the Community institutions in their relations with the authorities of the Member States, especially national courts who were seeking to ensure respect for Community law in the national legal systems. The Court proceeded to order the Commission to cooperate with an investigation being carried out by a Dutch judge into an alleged fraud relating to the Community legislation on fisheries. The background to the case was certainly unusual, but in *Delimitis*⁵⁶ the Court used the same reasoning in emphasising the duty of the Commission to cooperate with national courts called upon to apply the Treaty competition rules.

Protecting the institutional balance

The transition to qualified majority voting and the single market programme also focused the Court's attention on an issue which had previously been somewhat neglected, that of the institutional balance. The importance of that issue during this phase of the case law seems to be attributable to a variety of factors. One is the significance of the legal basis chosen for Community acts. While the Council followed the practice of consensus, the legal basis chosen did not have much practical effect on the way in which the Council reached its decisions. The demise of the practice of consensus meant that the legal basis assumed greater importance because it determined the voting procedure which the Council had to follow. The introduction by the Single European Act of the so-called cooperation procedure,⁵⁷ giving the European Parliament greater influence over the content of Community acts where the procedure applied, increased the significance of the legal basis still further, for it became crucial to know not only how the Council was to vote but also the extent to which the Parliament was entitled to take part in the process. These developments were themselves attributable, at least in part, to the first set of direct elections to the Parliament in 1979.

The cooperation procedure reflected the increased status of the Parliament and reduced the discrepancy between its role in the Community's general

⁵⁴ Above n 45 at para 35.

⁵⁵ Case C-2/83 *Jen* (1984) ECR I-3365. Cf. Case 284/85 *Greer v Council* [1986] ECR 5323, para 16; Case C-65/93 *Parliament v Council* (1995) ECR I-643, para 23.

⁵⁶ Case C-214/89 (1991) ECR I-935.

⁵⁷ See Art 149(2) EEC. The procedure is now set out in Art 252 (ex 158a) EC but, since the entry into force of the Treaty of Amsterdam, its importance has diminished. It would be abolished by the Constitutional Treaty.

decision-making process and the important power it had enjoyed in the budgetary field since the mid-1970s.⁵⁸ It seems self-evident that a way would have to be found of subjecting to judicial scrutiny the way in which a more confident Parliament exercised its powers and ensuring respect for the prerogatives it now enjoyed in the institutional architecture of the Community. However, the Member States failed to address the issue in the Single European Act and it fell to the Court to deal with it. In *Les Verts*⁵⁹ the Court held that acts of the Parliament which affected the legal rights of third parties were open to challenge under Article 173 (later 250), notwithstanding the absence of any reference to the Parliament in the text of that article then in force. The acts contested in *Les Verts*, concerning the reimbursement of election expenses, were perhaps of limited importance but an early beneficiary of the ruling was the Council which, with the support of three Member States, successfully challenged the Parliament's exercise of its budgetary powers.⁶⁰ In the subsequent *Chernobyl* case⁶¹ the Court accepted, after some hesitation,⁶² that the Parliament could itself bring unsuccessful proceedings where necessary to ensure respect for its prerogatives. The *Chernobyl* case involved a claim by the Parliament that its right to take part in the legislative process leading to the adoption of a regulation had been unlawfully curtailed through the use by the Council of the wrong legal basis. Had the Court rejected the Parliament's claim, the institution with the most immediate interest in the issue would have been deprived of any direct means of enforcing compliance with the legislative process envisaged by the Treaty, a result which would have been inconsistent with the enhanced status in the process which the Parliament had been given by the Member States.⁶³ The Court was not deterred from addressing the increasingly anomalous position of the European Parliament by the thought that the Member States could be trusted to deal with the matter themselves now that they had shown a willingness to amend the Treaty in appropriate cases. Indeed, the very amendments they had made in the Single European Act might be seen as justifying the bold approach taken by the Court.

The importance attached by the Court to respect for the institutional balance and the completion of the internal market produced a potent combination in the *Timimex Dioxide* case decided in mid-1991.⁶⁴ In that case, the Commission asked the Court to quash a Council directive on the reduction of pollution caused by waste from the titanium dioxide industry. The directive was unanimously adopted by the Council on the basis of a provision introduced by the Single European Act, Article 130a EEC, which entitled the Council, acting unanimously and 'after consulting the European Parliament and the Economic and Social Committee', to take

⁵⁸ See further Gerding, above n 45 at pp 374-83.

⁵⁹ Case 254/83 *Les Verts v European Parliament* (1986) ECR I-1339.

⁶⁰ Case 34/86 *Council v Parliament* [1986] ECR I-2155.

⁶¹ Case C-30/88 *Parliament v Council* (1990) ECR I-2041.

⁶² See Case 322/85 *Parliament v Council (Chernobyl)* [1986] ECR I-5515.

⁶³ Cf. the Court's rejection of the United Kingdom's argument to admit delay in Case C-255/92 *Parliament v Council* (1993) ECR I-4155, para 8-10.

⁶⁴ Case C-260/89 *Commission v Council* (1991) ECR I-2687.

action to protect the environment.⁴⁵ The Commission saw the directive as a harmonising measure connected with the functioning of the internal market. It had therefore proposed as its legal basis Article 100a EEC, which would then have required the cooperation procedure to be followed.⁴⁶ The Commission, supported by the European Parliament, asked the Court to quash the directive on the ground that it should have been based, not on Article 130c, but on Article 100a.

The Court observed that the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.⁴⁷ These factors included the aim and the content of the measure. The directive in question had two aims which were inextricably linked: the protection of the environment and the elimination of disparities in the conditions of competition. Thus, the directive constituted both a measure relating to the environment for the purposes of Article 130c and a harmonising measure within the meaning of Article 100a. The Court noted that, under Article 130c(2), the objective of environmental protection was to be a component of the Community's other policies and that Article 100a(3) made it clear that that objective could be pursued by means of harmonising measures adopted under Article 100a. It followed that the contested directive should have been based on that provision rather than on Article 130c and it was therefore quashed.

Article 130a EEC suffered from two disadvantages which seem in retrospect to have proved fatal to the Council's case: one was that it marginalised the European Parliament, the other that it required the Council to act unanimously. Although introduced by the Single European Act, the article was in those respects out of keeping with the overall climate which that Act created. After the TCU had altered the climate, however, the Court began to devote greater attention to the limits of the Community's powers under provisions like Article 100a.

The third phase: Maastricht and beyond

Conferred powers, subsidiarity and public opinion

The TCU, which entered into force in November 1993, at one stroke threatened to change nearly everything. The most striking feature of the new Treaty was probably the arrangements it made for the establishment of an economic and monetary union. Less dramatic but more significant for present purposes was the greater precision with which the powers of the Community were enumerated. This had the effect of emphasising the limits to its competence and curbing the Council's right to invoke the default power in Article 235 (ex art 135), which had in the past been applied rather loosely.⁴⁸ The new ethos was reflected in the first paragraph of Article

⁴⁵ See now Art 175 EC. ⁴⁶ See now Art 95 EC. ⁴⁷ Para 13.

⁴⁸ See Ombud, 'The Limits of European Community power' (1992) 21 ELR 175. The use of Art 135 (ex 235) is discussed in Weller at 52-6 and de Barm, above n 1 at 52-3.

3b (later 5) EC, which stated: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' Strictly speaking, that paragraph merely repeated a principle on which the Community had always been based.⁴⁹ Taken together with the enlarged catalogue of specific powers which the Community was given to act, however, the first paragraph of Article 3b seemed to reflect a wish on the part of the Member States to set clearer limits to the Community's capacity to encroach on their prerogatives.

The second paragraph of Article 3b went further, laying down a principle of subsidiarity intended to make the Community legislature consider more closely whether it needed to exercise the powers it possessed. It provided:

in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The third paragraph of Article 3b added that '[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty'. This, of course, was the well known principle of proportionality. In this context it had the effect of limiting the intrusiveness of what the Community was entitled to do even where it had been decided that, although the Community shared competence to act with the Member States, action by the Community would be more effective. As Advocate General Liger explained in *United Kingdom v Council*,⁵⁰ the principles of subsidiarity and proportionality operate 'at two different levels of Community action'. The first determines whether Community action is to be set in motion, whereas the second defines its scope. Hence the question of competence is dissociated from that of its exercise.⁵¹

The justiciability of the principle of subsidiarity was soon called into question.⁵² The Court is clearly competent to decide whether the principle is applicable, that is, whether or not an area falls within the exclusive competence of the Community. This is essentially a question of interpreting the Treaty.⁵³ The Court has also been willing to examine whether the preamble to a Community act contains an adequate explanation of why action by the Community is considered necessary.⁵⁴ The Court initially showed a certain lack of enthusiasm for examining whether the substance

⁴⁹ *Dem. Art. 4(1)* (now T. EC) provides: 'Each institution shall act within the limits of the powers conferred on it by this Treaty'.

⁵⁰ Case C-44/94 [1995] ECR I-5755, 5783, referring to *Correa and van Ypersele*, 'Le principe de subsidiarité est-il contraire à l'article 13 du traité CE' (1994) 30 CDE 1.

⁵¹ See Tuck, 'Subsidiarity justiciability' (1994) 15 ELR 267; Linder, *The EU Principle of Subsidiarity and its Origins* (1993) ch 2.

⁵² The Constitutional Treaty contains a list of the areas in which the Union would have exclusive competence (see Art 1-13).

⁵³ See *United Kingdom v Council*, above n 70 at para 20-4; Case C-710/94 *Germany v Parliament and Council* [1997] ECR I-2405, para 26-4. In the latter case, the Court held that an express reference to the principle of subsidiarity in the preamble to an act was not required. Cf the views of AG Liger, [1997] ECR I-2455, 2462.

of the principle had been respected.¹⁴ However, it confronted the issue in *Netherlands v Parliament and Council*.¹⁵ In that case, the applicant challenged a directive of the European Parliament and the Council on the legal protection of biotechnological inventions. The purpose of the directive was to require the Member States to protect such inventions through their patent laws. The directive laid down which inventions involving plants, animals or the human body could or could not be patented. The applicant maintained that the aim of the directive could perfectly well be achieved by the Member States and that it was not clear from the directive's reasoning that the principle of subsidiarity had been properly taken into account. The Court was not impressed by that argument. The underlying purpose of the directive was to ensure the smooth operation of the internal market by preventing or eliminating differences between the laws and practices of the Member States. That purpose could not be achieved by the Member States acting alone. The scope of the protection accorded by national law to biotechnological inventions has immediate effects on trade in the Community. It was therefore clear that the underlying objective of the directive could be better achieved by the Community. The Court found that the directive contained adequate reasoning on the matter.

The Court took a similar approach in *British American Tobacco (Investments) and Imperial Tobacco*.¹⁶ In that case, a challenge was made to the validity of a directive designed to eliminate the trade barriers caused by differences between national laws on the manufacture, presentation and sale of tobacco products. One of the grounds of the challenge was infringement of the principle of subsidiarity. The Court recognized that the area concerned was not one in which the Community had exclusive competence. However, the directive's objective was not in the view of the Court one that could be sufficiently achieved by the Member States acting individually, as the existing divergences between the relevant national laws showed. Nor did the Court think the directive went beyond what was necessary to achieve its objective. The claim that the principle of subsidiarity had been infringed was therefore rejected.

The argument about subsidiarity in these cases appears to have been rather weak. These were situations where the object of the legislation simply could not have been achieved by the Member States. In cases where the argument is that action by the Member States would merely be less effective than action by the Community, the position is potentially more difficult. The Court is likely to allow the Community legislature a wide discretion in areas which involve policy choices. Where the exercise of that discretion is challenged, the Court may well confine itself to examining

¹⁴ See e.g. *United Kingdom v Council*, above n 73 at para 46-7 and 54-5; *Germany v Parliament and Council*, above n 73 at para 32-8; *CF Case C-415/93 LRBESA and Olen v Bowman and Cohen* [1995] ECR I-1921, para 81.

¹⁵ *Case C-491/01 [2002] ECR I-11453*. See also *Case C-103/01 Commission v Germany* [2003] ECR I-5369; *CF Case C-110/03 The Queen (on the application of Swedish Match) v Secretary of State*, judgment of 14 December 2004; *Case C-434/02 Arnold André v Laurent de Kruif Nijhof*, judgment of 24 December 2004.

¹⁶ *Case C-371/98 [2001] ECR I-7639*.

whether the contested act has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.¹⁷ However, as important as the extent to which the Court is prepared to intervene is the effect produced by the principle of subsidiarity on the approach of the Community legislature. The European Council meeting in Edinburgh in December 1992 agreed on detailed guidelines for the application of the principle¹⁸ which later formed the basis of a protocol annexed to the EC Treaty at Amsterdam. That protocol underlined the political importance in theory attached by the Member States to compliance with the principle of subsidiarity. However, its limited practical effect was to lead to the inclusion in the Constitutional Treaty of further provisions on the subject, as we shall see.

Significant though the technical changes wrought by the TEU were, the effect of the Treaty on public opinion was perhaps of greater importance. The Treaty underwent an exceptionally difficult process of ratification, being rejected by the people of Denmark in a referendum in June 1992 less than six months after it was signed¹⁹ and securing only a narrow majority in a referendum held in France the following September. In Germany²⁰ and the United Kingdom,²¹ challenges to the legality of ratification, albeit ultimately unsuccessful, were brought in the courts. As a result, the Treaty did not enter into force until nearly 21 months after it was signed. The public debate unleashed by the Treaty in the Member States revealed widespread misgivings about the nature of the proposed Union and an unwillingness to entrust its continued governance of Europe to the elites by which it had previously been dominated. This mood of public scepticism created a climate among some specialists in European law in which the legitimacy, not only of new developments but also of well established doctrines, began to be questioned. The body of specialists now includes many lawyers whose expertise lay in some field of national law increasingly affected by Community legislation, often as a result of the single market programme. These lawyers were perhaps more sceptical of doctrine which had come to be taken for granted by those who had been working in the field for longer. As Debusse explained: 'From the standpoint of a national lawyer, European law is often a source of disorientation. It injects into the national legal system rules which are alien to its traditions and which may affect its deeper structure, thereby threatening its coherence.'²²

¹⁷ See para 58 of the judgment in *United Kingdom v Council*, above n 70, in accordance with the principle of proportionality. See also *Case C-344/01 Spain v Commission*, judgment of 9 September 2004, para 21, concerning review of Community action where it enjoys a 'considerable power of discretion' and has to evaluate both a complex situation and the means or scope of the measures to be taken.

¹⁸ See Bull EC 12-1592, I, 15-21.

¹⁹ The result was reversed in a second referendum held on 18 May 1993. See Carls and van Orlé, 'Denmark and the Edinburgh Summit: Maastricht without tears' in O'Keefe and Thornley (eds), *Legal Issues of the Maastricht Treaty* [1994] at 23.

²⁰ See *Germany v European Union Treaty* [1994] 1 CMLR 57, discussed in ch 8.

²¹ See *R v Secretary of State for Foreign and Commonwealth Affairs ex p. Lawton-Magill* [1993] 3 CMLR 101.

²² Above n 1 at 133. See also Weiler, 214-7.

the exclusion of more highly developed mechanisms... adding that a commercial policy understood in that limited sense 'would be destined to become nugatory in the course of time'.¹⁵⁰ Opinion 1/54 attracted criticism,¹⁵¹ but it reflected increased sensitivity on the part of the Court to the desire of Member States to ensure that their national interests were adequately protected in international trade negotiations. The cautious approach of the Court was vindicated at the IGC which resulted in the Treaty of Amsterdam, where a proposal to extend the scope of the common commercial policy to trade in services and trade-related aspects of intellectual property failed to secure the unanimous support of the Member States.¹⁵²

A similarly restrained view of the Community's competence was evident in Opinion 2/54,¹⁵³ where the Court was asked whether accession by the Community to the European Convention on Human Rights would be compatible with the EC Treaty. The Court emphasised that the Community was based on the principle of conferred powers, which had to be respected by the Community in both the internal and the external spheres.¹⁵⁴ No Treaty provision gave the Community instructions or general powers to lay down rules on human rights or to conclude international conventions on the matter. The Commission's suggestion that accession might be based on Article 235 (later 308) was rejected by the Court, which said that this article could not be used as the basis for a step which would have fundamental constitutional implications for the Community and for the Member States. The Court concluded that the Community lacked competence to accede to the Convention. Once again, the Court's Opinion attracted criticism. Once again, a proposal to give the Community competence to accede to the European Convention was put to the IGC which led to the Treaty of Amsterdam. Once again, the proposal failed to secure the unanimous support of the Member States.¹⁵⁵ Once again, the outcome may be seen as a vindication of the restraint shown by the Court.

In *Commission v. Council*,¹⁵⁶ the Court took an equally strict approach to the interpretation of another Machin of the internal market Article 100a (later 95) EC. The case involved a challenge to another directive on waste. As in *Titonium Dioxide*, the Council had based the directive in question on Article 130a (later 175). The Commission, with the support of the European Parliament, maintained that it

¹⁵⁰ Opinion 1/73, 'International Agreement on Natural Rubber' [1973] ECR 2271, para 44.
¹⁵¹ See e.g. Bougeois, 'The EC in the WTO and Advisory Opinion 1/75: an Edinburg perspective' [1995] 31 CML Rev 763.

¹⁵² Indeed it was agreed that the Council should be empowered, acting unanimously to extend the application of Art 135 to international negotiations and agreements on services and intellectual property in so far as they were not already covered by in the post-Amsterdam text of Art 133(3). Art 135 was further amended at Nice. See now Art 133(5) to (7).

¹⁵³ [1954] ECR I-1759. See further ch 15. Cf Case T-306/01 *Alfred A. Heine & Co. v. Council and Commission*, judgment of 21 September 2005; Case T-315/01 *Marin, Ghisla, Kell & Co. v. Council and Commission*, judgment of 21 September 2005.

¹⁵⁴ See also Case C-156/96 *United Kingdom v. Commission* [1998] ECR I-2723; Opinion 2/04 'European Protocol on Biodiversity' [2005] ECR I-9713.

¹⁵⁵ Art 1-5(2) EU would require the Union to accede to the ECHR; see ch 10.

¹⁵⁶ Case C-155/93, [1993] ECR I-935.

should instead have been based on Article 100a. The Court acknowledged that certain provisions of the directive had an effect on the operation of the internal market. This might have seemed enough, in the light of *Titonium Dioxide*, to establish that the directive should indeed have been based on Article 130a. None the less, the Court ruled that the mere fact that the establishment or functioning of the internal market was affected was not sufficient for Article 100a to apply. The Court said that there was no justification for having recourse to that article 'where the measure to be adopted has only the incidental effect of harmonising market conditions within the Community'.¹⁵⁷ In the Court's view, that was so in this case. The main object of the harmonization provided for by the directive was to ensure the effective management of waste in the Community in the interests of environmental protection. Unlike the directive at issue in the *Titonium Dioxide* case, this one had only an incidental effect on competition and trade. It had therefore been validly adopted under Article 130a. The Court's judgment prompted Dashwood to observe, in response to Sir Patrick Atiyah's claim that the Court had a federalising mission, that 'a missionary Court would certainly have grasped the opportunity... of establishing that any measure affecting the internal market, however remotely, fits to be adopted under Article 100a'.¹⁵⁸

The decision in *Commission v. Council* was cited by the applicant in the *Tobacco Advertising* case,¹⁵⁹ which involved a challenge to the validity of a directive approximating the laws of the Member States on the advertising and sponsorship of tobacco products. The directive was based on three articles of the Treaty, one of them being Article 100a. The applicant argued that the directive was not about the establishment and functioning of the internal market but protecting human health. Although the Council had the power to legislate in that field, it was not entitled to harmonize the laws of the Member States.¹⁶⁰ The Court stated that to construe Article 100a as vesting in the Community legislature a general power to regulate the internal market would be contrary to the express wording of other provisions of the Treaty and incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.¹⁶¹ The directive was not apt to ensure the free movement of tobacco products or to eliminate real distortions of competition. Article 100a did not therefore constitute an appropriate legal basis for it. The directive was accordingly quashed.

It was during this phase that coping with its workload, a matter of concern to the Court for many years, became one of its principal preoccupations. The growing

¹⁵⁷ Para 75.

¹⁵⁸ *Atiyah* n 65 at 178.

¹⁵⁹ Case C-376/93 *Germany v. Parliament and Council* [2000] ECR I-2415. Cf Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2003] ECR I-15453; de Búrca, above n 1 at 53-64. See also Case C-212/93 *The Queen (on the application of British United Assurance Co. Ltd.) v. Secretary of State*, judgment of 14 December 2004; Case C-434/02 *Armed Forces of the Netherlands v. Council*, judgment of 14 December 2004; Case T-306/01 *Alfred A. Heine & Co. v. Council and Commission*, judgment of 21 September 2005.

¹⁶⁰ See Art 125(4) (later 157(4)).

¹⁶¹ Para 13 of the judgment.

pressure under which the Court found itself was reflected in the case law requiring national courts to set out clearly the legal and factual context of a case while making a reference for a preliminary ruling¹¹² and the Court's refusal, after the *Edinburg* case,¹¹³ to relax significantly the standing requirements which had to be satisfied by private applicants in annulment proceedings. The same concern was evident in *Kock and Miltner*,¹¹⁴ where the Court said it was necessary to 're-orient and clarify its case-law' on the scope of Article 30 (para 28). EC 'in view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rule whose effect is to limit their commercial freedom'.¹¹⁵

In *Kock and Miltner*, the Court held, overturning unspecified earlier case law, that Article 30 (now 35) EC did not apply to national provisions regulating the circumstances in which a product could be sold as long as domestic and imported products were affected in the same way. Taken together with the developing case law on the principle of conferral discussed above, the Court's decision might have suggested that the very foundations of the internal market were in the process of being reappraised. That, however, would have been incompatible with the TEU, which was intended to 'maintain in full the legal system established and build on it'.¹¹⁶ *Kock and Miltner* seems to have been a response, not so much to the change in climate brought about by the TEU, as to the particular problem posed in some form by the Sunday trading cases, of defining the scope of Article 30 (now 28). The Court in due course began to limit the damage to Article 28 threatened by the judgments by focusing more closely on the question whether a national rule on selling arrangements affected domestic and imported products in the same way, a criterion it became increasingly difficult to satisfy.¹¹⁷ Signs that *Kock and Miltner* was confined essentially to Article 30 and did not reflect any general reduction in the Court's commitment to the importance of freedom of movement were confirmed in *Burman*¹¹⁸ and *Alpina Investments*,¹¹⁹ where the Court rejected attempts to extend the reasoning in *Kock and Miltner* to workers and services respectively. In the field of health care and company law, the rules on services and establishments respectively were applied by the Court in an increasingly intrusive manner.¹²⁰ Overcoming its initial reluctance, the Court also began to explore the potential of the provisions on citizenship of the Union introduced at Maastricht.¹²¹ In the field of competition, the Court continued to develop the law.¹²²

¹¹² See e.g. *Joined Cases C-327 to C-329/93 Thelen/Laumann v Garmy* [1994] ECR I-1593, para 4.

¹¹³ See *Case C-301/89 Edinburg v Garmy* [1994] ECR I-1593, discussed in ch 1.

¹¹⁴ *Joined Cases C-262/91 and C-264/91* [1992] ECR I-4931.

¹¹⁵ Para 24 of the judgment. ¹¹⁶ Art B (para 2) TEU.

¹¹⁷ See e.g. *Joined Cases C-34/93, C-35/93 and C-36/93 EC v De Agostini and TV-Sony* [1994] ECR I-3343; *Case C-354/93 TK-Holdings* [2000] ECR I-151; *Case C-405/93 Central International Aviation* [2001] ECR I-1795.

¹¹⁸ *Case C-314/93* [1995] ECR I-1141, para 35-8. See ch 11.

¹¹⁹ See *Case C-85/93 Idemare Sels v Fédérat Bégon* [1993] ECR I-2681; *Case C-437/93 Bédal and Pirex* [1995] ECR I-7537. See ch 11.

¹²⁰ See e.g. *Joined Cases C-68/94 and C-30/95 Pirelli and Göttsche v Commission* [1995] ECR I-1379; *Case C-57/95 Albany v Stichting Self-Organizing van de Technische Industrie* [1996] ECR I-5751; *Case C-451/95*.

The Court's commitment to preserving the uniform application of the law was evident in its refusal to depart from the case-law establishing the right of national courts to request preliminary rulings in cases where Community law was applicable only because its scope had been enlarged by national law.¹²³ It may also be noted that, notwithstanding the Court's greater respect for the rights of the Member States, in the *Alpina Investments* case¹²⁴ it firmly asserted its jurisdiction to ensure that acts which the Council claimed fell within the scope of the third pillar did not encroach on the powers conferred on the Community by the EC Treaty. As in the pre-Maastricht era, the momentum of the case law also led it to develop principles which might have seemed out of keeping with the prevailing mood. This is clearly illustrated by the Court's decisions on the scope of the principle of State liability which was laid down in the *Franzow* case shortly before the TEU was signed. Moreover, the Court did not shrink from indicating in appropriate cases whether it considered the conditions to which liability under Community law was subject had been met.¹²⁵

A new phase? The Treaty of Nice and beyond

The concern of both Community Courts about their ability to cope with their workload led them to form a far-reaching discussion paper on potential solutions to the problem in the spring of 1999. At around the same time, the Commission set up a Working Group on the future of the Court under the chairmanship of one of its former Presidents, Ole Due. The Due report was published in January 2000 and, together with the Court's discussion paper,¹²⁶ helped form the basis of reforming the Union's judicial architecture on to the agenda of the IGC which came to an end in Nice in December of that year. The Treaty of Nice, signed on 26 February 2001, gave the Council much wider power to modify the Union's judicial architecture with a view to improving the effectiveness of the Court and the CJL. The Treaty of Nice entered into force on 1 February 2003 and seems likely over time to have a major effect on the jurisdiction and working methods of both the Court and the CJL.¹²⁷

The Treaty of Nice also set in train a sequence of developments which could affect the Community Courts in a less direct but potentially more profound way. In

George v Odeon [2001] ECR I-6197; *Case C-306/99 Whiston and Odeon* [2002] ECR I-1577; *Case C-54/02 Augustin Ades* [2003] ECR I-9011.

¹²³ See *Case C-36/93 Lauer-Sirey v Institut des Belvédères/Ondersnogen/Laumann* 2 [1997] ECR I-4151; *Case C-131/95 City v Hogeveen/Facchini and Jérome* [1997] ECR I-4291; *Case C-305/99 SAG v Farnsworth/Dr Compagnie de la Haye* [2001] ECR I-1, discussed in ch 4.

¹²⁴ *Case C-473/96 Compagnie v Garmy* [1998] ECR I-2743. See ch 3.

¹²⁵ See e.g. *Joined Cases C-46/92 and C-48/92 Société des Produits de Malt et Farine* [1993] ECR I-1558; *Case C-4/94 The Queen v AGF/AGF v Hodge Lines* [1996] ECR I-2353. See ch 5.

¹²⁶ The Court's discussion paper and the Due Report are reproduced in Dashwood and Johnston [2001], *The Future of the Judicial System of the European Union* (2001), 111 and 145 respectively.

¹²⁷ See ch 5.

a declaration adopted by the IGC at Nice,¹²² the Member States called for a deeper and wider debate about the future of the European Union and recognized 'the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States'. They envisaged that a new IGC would be convened in 2004 in order to make any changes to the Treaty deemed necessary. At the meeting of the European Council in Laeken in December 2001, the European Council set up a Convention on the Future of Europe¹²³ to pave the way for the forthcoming IGC by considering the key issues raised by the future development of the Union. The Convention began its work in February 2002. In the summer of 2003, the President of the Convention submitted to the President of the European Council the product of the Convention's deliberations: a draft Treaty establishing a Constitution for Europe.¹²⁴ The IGC opened ahead of schedule in the autumn of 2003 and culminated in the signing by the Member States on 29 October 2004 of the Treaty establishing a Constitution for Europe.¹²⁵ It was hoped that the new Treaty, which was to replace the TEU and the EC Treaty, would enter into force on 1 November 2006¹²⁶ following ratification by all the Member States.¹²⁷

The Court of Justice played something of a bit part in the proceedings of the Convention on the Future of Europe. The Court's low profile in the Convention's deliberations was attributable mainly to the restricting of its provisions on the Community's judicial architecture effected by the Treaty of Nice, which entered into force while the Convention was sitting. The Nice provisions on the Union Courts were incorporated largely unchanged in the draft Constitutional Treaty,¹²⁸ and in the Constitutional Treaty itself.¹²⁹ If the Treaty enters into force, its immediate effect on the Court would therefore be relatively limited.¹³⁰ Be that as it may, the Treaty would consolidate the Court's position as a ancient constitutional court for Europe.

¹²² Declaration No 23.

¹²³ Modelled on the body which drew up the United Nations Charter of Fundamental Rights, the Convention on the Future of Europe comprised a chairman (Valéry Giscard d'Estaing, a former French President), two Vice-Chairmen (one representative of each Head of State or Government, two members of each national parliament, 15 members of the European Parliament) and two representatives of the Commission. The three candidate countries were represented in the same way as existing Member States, although formally they were not entitled to block any consensus which might emerge among the latter. See the Laeken Declaration on the Future of the European Union (Presidency Conclusions, Annex I).

¹²⁴ See OJ 2004 C 311.

¹²⁵ See Art IV-44(3) CT.

¹²⁶ See Art 43 TEU; Art IV-44(3) CT. Cf. Declaration No 30 adopted by the IGC when signing the Constitutional Treaty.

¹²⁷ See generally Arnall, 'A constitutional court for Europe?', (2004) 6 CYELS 1; Tridimas, 'The European Court of Justice and the new constitution: a supreme court for the Union?' in Tridimas and Nollath (eds), *EU Law for the Twenty-First Century* (2004) ch 3; House of Lords EU Committee, 'The future role of the European Court of Justice' (Session 2003-04, 5th Report, HL 47).

¹²⁸ See Arts 10-355, 10-356, 10-358, 10-359, 10-364 and 10-361.

¹²⁹ See generally Arnall, 'From bit part to starring role? The Court of Justice and Europe's Constitutional Treaty' (2005) 34 YEL 1; Chalmers, 'The dynamics of judicial authority and the Constitutional Treaty' in Weiler and Eeckhout (eds), *Reinventing the EU: Conclusions in a Critical Perspective* (Jean Monnet Working Paper 31/04, <http://www.jeanmonnetprogram.org/papers/04/040325.htm>), p. 1.

While the Court of Justice is not at present a specialized constitutional court of the type found in some Member States, it has been endowed by the Treaties with certain constitutional functions and has developed through its case law many principles of a constitutional character.¹³¹ The Court has even described the EC Treaty as 'the constitutional charter of a Community based on the rule of law'.¹³² As the judicial architecture envisaged at Nice begins to take shape, the constitutional nature of the Court's work is likely to be reinforced. Article 225 EC¹³³ seems to conceive of the CFI as evolving into a court of general jurisdiction—indeed, the Constitutional Treaty calls it the General Court—dealing not only with direct actions brought by natural and legal persons but also with some direct actions brought by institutions and Member States¹³⁴ and routine preliminary rulings as well as appeals from judicial panels.¹³⁵ The work of the Court of Justice will comprise mainly the cases which are most likely to raise constitutional questions in the broad sense:¹³⁶ as explained in chapter 5 these are (i) the most important direct actions brought by Member States and institutions; (ii) the most important cases referred by national courts; (iii) appeals from decisions of the CFI which the Court of Justice will itself have selected on the basis of criteria which are likely to include the difficulty and importance of the case;¹³⁷ (iv) applications for review of CFI decisions where the unity or consistency of Union law is in issue; and (v) applications for an opinion on the compatibility with the Treaty of proposed international agreements.

If the Constitutional Treaty were to enter into force, the Court's main functions would continue to be to ensure that the institutions act within the limits of their powers, and that the Member States comply with their obligations, as well as to offer guidance to national courts on the interpretation and application of the Treaty. However, the need for the Court of Justice to focus more sharply on constitutional questions could increase as a result of three features of the Constitutional Treaty.¹³⁸ The first is the more detailed provisions on the competences of the Union¹³⁹ and the importance the Treaty attaches to the principles of conferral, subsidiarity and proportionality.¹⁴⁰ The second is the attempt to equip the Union with a hierarchy of legal instruments governing policies in appropriate acts and procedures.¹⁴¹ The

¹³¹ See Jacobs, 'Is the Court of Justice of the European Communities a constitutional court?' in Cappelletti and G. Passa (eds), *Constitutional Adjudication in European Community and National Law* (1993) ch 4.

¹³² Opinion 1/91 *European Economic Area* (1991) ECR I-6079, para 21. See also Case 254/81 *Les Affaire* (1986) ECR I-3335, para 23.

¹³³ In substance reproduced in the Constitutional Treaty in Art 258.

¹³⁴ A limited category of direct actions brought by Member States was transferred from the Court to the CFI with effect from 1 June 2004; see Art 51 of the Statute of the CFI.

¹³⁵ The first such panel, the European Union Civil Service Tribunal, was established in November 2004; see Art 5 of the Constitutional Treaty and judicial panel's specialized court; see Art 258.

¹³⁶ Cf. COM(2001) 662 final, 2-4.

¹³⁷ See Art 225(1), (2) and (3), which each stipulate that appeal or review is only permissible 'under the conditions and within the limits laid down by the Statute'.

¹³⁸ Cf. Craig, House of Lords EU Committee, 'The Future Role of the European Court of Justice' (Session 2003-04, 5th Report, HL 47, Minutes of Evidence, 1).

¹³⁹ See Art 1-11.

¹⁴⁰ See Part 2, Title V, Chapter I.

¹⁴¹ See Part 1, Title III.

laid in the incorporation in Part II of the Constitutional Treaty of the Union's Charter of Fundamental Rights.¹⁴⁷ Each of these features seems likely to result in closer scrutiny by the Court of the validity of Union acts, although the Court will be mindful of the enhanced democratic legitimacy which the authors of the Treaty seem to have envisaged that at least some such acts should enjoy.¹⁴⁸

There is some evidence elsewhere in the Constitutional Treaty of the traditional reluctance of governments to expose their actions to judicial scrutiny. In infringement proceedings, the Commission would only be given a limited right to ask in its initial application for a penalty to be imposed on the defendant State.¹⁴⁹ There would only be a limited relaxation in the standing rules applicable to subsequent actions brought by private parties.¹⁵⁰ The provisions on the CJEP would largely remain outside the jurisdiction of the Court.¹⁵¹ None the less, the provisions concerned merely did to extend the Court's jurisdiction as far as might have been considered desirable. The Member States made no attempt in the Constitutional Treaty to reduce the Court's powers and even went as far as to endorse its existing core law,¹⁵² a telling tribute to the contribution it has hitherto made to the development of the Union.

An alternative ending

It would be convenient to finish this book at that point. Unfortunately an alternative ending is necessary.¹⁵³ This is because the people of France and the Netherlands, in referendums held in those countries on 29 May and 2 June 2005 respectively, rejected the Constitutional Treaty thereby placing a large question mark over its future. In a declaration issued at the meeting of the European Council on 16 and 17 June 2005, the Member States recognised 'the need for us to reflect together on this situation'. They agreed to review the matter in the first half of 2006 and decide how to proceed. At the time of writing, the 'period of reflection' launched by the Member States is still under way, but there is a real possibility that the Constitutional Treaty will have to be abandoned, at least in its present form. What implications, if any, would the demise of the Treaty have for the Court?

The repercussions for the Court of abandoning the Treaty could be relatively limited. The *droit communautaire* would remain in force and the case-law might continue to develop normally a process which could produce results similar to some of those envisaged by the authors of the Constitutional Treaty. The Court was not deterred by the negative results of the French and Dutch referendums from ruling shortly thereafter in the *Pupils case*¹⁵⁴ that the principle of consistent interpretation

developed in the context of EC directives, also applied to framework decisions adopted under Title VI of the TEU. Advocate General Kokott, whose Opinion was followed by the Court, referred to the development of the Union since Maastricht and in charge with the Community under the Constitutional Treaty.¹⁵⁵ The Court did not itself refer to that Treaty. However, it will have been fully aware that, by emphasising the parallels between framework decisions and directives and between Article 226 EC and Article 35 TEU,¹⁵⁶ thereby minimising apparent differences between the first and third pillars of the Union, its judgment went with the grain of the Constitutional Treaty.

The same might be said of the Court's decision in another case concerning a framework decision adopted under Title VI of the TEU, *Commission v Council*.¹⁵⁷ The framework decision in question¹⁵⁸ laid down a number of environmental offences in respect of which the Member States were required to impose criminal penalties. Based on Articles 29, 31(e) and 34(2)(g) of the pre-Nice version of the TEU, the contested measure was adopted by unanimous vote of the Council on the initiative of a Member State (Denmark). In annulment proceedings brought under Art 35 TEU, the Commission argued that the correct legal basis for such a measure was Article 175(1) EC, which entitled the Council, acting in accordance with the co-decision procedure and after consulting the Economic and Social Committee and the Committee of the Regions, to give effect to the Community's environmental policy. The essential question was whether the Community had the power under Article 175 to require the Member States to impose criminal penalties in respect of the conduct covered by the contested framework decision.

The Court noted that the aim of that measure was the protection of the environment, which was 'one of the essential objectives of the Community'.¹⁵⁹ Although criminal law and procedure in principle fell outside the competence of the Community, that did not

prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which lay down on environmental protection are fully effective.¹⁶⁰

It was apparent from the framework decision that the Council considered criminal penalties essential to combat serious threats to the environment. It should therefore have been adopted under Article 175 EC and was accordingly annulled.

The Court's decision prevented the adoption by the Council, without democratic oversight by the European Parliament, of a measure requiring the imposition of

¹⁴⁷ See ex 10.

¹⁴⁸ Cf Art 1-34 on legislative acts and Art 1-35 on the principle of representative democracy.

¹⁴⁹ See Art 113-162(3), discussed in ch 2.

¹⁵⁰ See Art 113-176, discussed in Art 113 at 21-23.

¹⁵¹ Cf Fowler, *The French Directive Haven* (1995).

¹⁵² Cf C-125/02 (2005) 2 CMLR 61. See also 4 and 7.

¹⁵³ See Art 113-165(4), discussed in ch 2.

¹⁵⁴ See Art 113-176(4).

¹⁵⁵ No, para 33 of the Opinion.

¹⁵⁶ See para 19 and 25 of the judgment.

¹⁵⁷ Case C-176/03, judgment of 11 September 2005.

¹⁵⁸ Framework Decision 2003/46/JHA on the protection of the environment through criminal law.

¹⁵⁹ Para 41.

¹⁶⁰ Para 41.

criminal sanctions. It also established that the competence of the Community under the EC Treaty, where the Parliament's prerogatives are more extensive than under the TEU, included the power to provide for criminal sanctions where necessary to achieve the Community's policy objectives. Moreover, the Commission has the power to bring infringement proceedings against Member States which fail properly to implement Community law, a power it also has under the TEU. As the Commission pointed out in a press release issued on the day the case was decided:¹¹¹ 'The judgment therefore facilitates enforcement of Community law while, at the same time, strengthening the democratic oversight in the EU legislative process. Like *Papine*, the decision in *Commission v. Czech* was consistent with the tenor of the Constitutional Treaty, which would abolish the distinction between the first and the third pillars. Measures dealing with criminal matters¹¹² would be subjected to the so-called Community method, with extensive use of co-decision and full oversight¹¹³ by the Court of Justice. The intergovernmental model enshrined in Title VI of the TEU, with the strictures it offers for the Member States, would therefore disappear.

It would probably be a mistake, however, to read too much into these cases when speculating about the Court's likely response to the failure of the Constitutional Treaty. There was never much doubt that, as the Court held in *Papine*, the case law on the admissibility of references under Article 234 EC applied equally to references under Article 35 TEU. The Member States' decision at Amsterdam to use the language of Article 249 EC in describing framework decisions, but expressly to rule out direct effect, strongly implied that such measures would possess all the other attributes of directives. The decision in *Commission v. Council* was consistent with the Court's long-established policy of ensuring that the Community's powers are adequate to enable its policy objectives to be achieved and its preference for the Community method. The Constitutional Treaty probably made little difference to the outcome in either case.

The possibility cannot be excluded, however, that the abandonment of the Constitutional Treaty might affect the development of the case law. Until now, the Court has accepted the Union Treaties as a legitimate expression of the sovereign will of the Member States and gone its best to make them work. This has led it to be fairly harsh with Member States who fail to comply with their legal obligations and to treat the institutions more leniently as they seek to advance the Union's objectives. But it now seems that significant sections of European public opinion are at least ambivalent about the direction the Treaty project has taken. If so, this might have implications for the Court's attitude to the way in which the other institutions exercise their powers.

Moreover, the failure of the Constitutional Treaty would not mean that it would not be cited before the Court in support of arguments that the present legal position should either be altered or left as it is. Faced with such arguments, the Court

might find it difficult to avoid being influenced by the Treaty. There are several aspects which might conceivably be affected by it even after its demise. One is the status of the doctrine of primacy. It might be argued that the failure of a Treaty that sought for the first time to provide expressly for that doctrine should lead to its reappraisal. That argument is unlikely to commend itself to the Court, but it could conceivably encourage more national courts to challenge the Court's authority. The Union has lived with such challenges for many years and they remain the potential to provoke a crisis. That danger has so far been avoided through the exercise of mutual respect and restraint. While there does not seem to be any immediate threat to the current *status quo*,¹¹⁴ the more often such challenges are issued the greater the likelihood that one of them will have practical repercussions.

While the theoretical answer to the primary question is likely to remain clear, other issues might prove more problematic. An example is the status of the Charter of Fundamental Rights. At the moment, the Charter is not formally binding and the Court does not rely on it. It has been included in the Constitutional Treaty as Part II. If that Treaty were to enter into force, the Charter would therefore become legally binding. Should the Treaty fail, it might be argued that the Court should none the less treat the fact that it was signed by all the Member States as a green light to rely on the Charter expressly in some form, perhaps as an authoritative statement of the scope of the general principle of fundamental rights. Alternatively, the Treaty's failure might be regarded as a rejection of the notion of a binding Charter.

Another potentially thorny issue is the effect of the standing rules applicable in infringement proceedings brought by private parties. In the *UPA* case, the Court famously said that, if these rules were to be relaxed, that could only be done by changing the Treaty. If the Constitutional Treaty fails, should the Court continue to regard the current rules as fixed or rather as open to further relaxation through interpretation? If the latter, should the Court consider itself constrained by the scope of the relaxation included in the Constitutional Treaty or at liberty to go further? If the European Court of Human Rights were to find that too strict an interpretation of the standing rules in a particular case meant that the protection afforded to the applicant's rights under the ECHR was manifestly deficient,¹¹⁵ the Court would presumably adjust its case law accordingly. It is perhaps more doubtful whether it would extend the benefit of any adjustment to cases which did not involve a claim that ECHR rights had been infringed.

A third such issue is the application of the principle of subsidiarity. As we have seen, notwithstanding the political importance attached to that principle, all the institutions, including the Court, have in practice found it difficult to apply. The Constitutional Treaty makes a further attempt to reinforce it. In particular, Article 5 of Protocol No 2 on the application of the principles of subsidiarity and proportionality provides:

¹¹¹ See *Smith* Ch II.

¹¹² See *Barthelme/Henrich/Trommer v. Council, American Friends v. Council* (Application no. 45036/98), Judgment of 50 June 2005 (ECJHR), discussed in Ch II.

¹¹³ IP/2005/1136.

¹¹⁴ See *Annex III-270 to II-277 CT*.

¹¹⁵ But see *Ann II-377 CT*.

Draft European legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a European framework law (similar to an EC directive), of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft European legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

It might be argued that the failure of the Treaty should not prevent those requirements, which evidently enjoy the support of the Member States, from being applied by the Court when considering the application of the principle of subsidiarity laid down in Article 5 EC. This, it could be said, would have the advantage of enhancing the Court's ability to perform the counter-majoritarian role demanded of it by the growth in qualified majority voting.¹⁵⁴

Whatever the ultimate fate of the Constitutional Treaty, the very difficulty it has encountered in securing national ratification could itself have implications for the Court. An early consequence of the French referendum was its influence on the negotiations over the Union's Financial Perspective for 2007-13.¹⁵⁵ The Financial Perspective, 'a multi-annual spending plan that translates into financial terms the Union's policy priorities',¹⁵⁶ was due to be agreed by the European Council at its June 2005 meeting where the ratification crisis would also be discussed. In an apparent attempt to divert attention from his failure to persuade a majority of French voters to support the Treaty, France's President Chirac redoubled his support for a Commission proposal that the British budget rebate should be abolished. The rebate was introduced in 1954 to reduce the United Kingdom's excessive net contribution to the Community budget resulting from its low share of spending under the Common Agricultural Policy.¹⁵⁷ The Commission's proposal would have replaced the rebate with a so-called 'Generalised Convergence Mechanism'. This would have limited the budget contributions of all Member States but reduced significantly the size of the British rebate.¹⁵⁸ The United Kingdom Government

responded by offering for the first time to give up the rebate, but only on condition that the budget was fundamentally reformed and the amount spent on agriculture, of which France was a significant beneficiary, reduced. The United Kingdom position was set out by the Prime Minister, Tony Blair, in a speech to the European Parliament on 23 June 2005 shortly before the start of the British Presidency of the Union during the second half of that year.¹⁵⁹ He saw the negative votes on the Constitutional Treaty in two of the Union's founding members as a reflection of discontent with the Union's policy preoccupations. The solution to the ensuing crisis, he argued, lay in a reappraisal of the Union's policy agenda so feasible it to tackle its economic malaise and prosper in a globalised world economy. Blair's view was that the budget should reflect what he saw as the needs of the modern Union.

The existential debate triggered by the June 2005 breakdown in negotiations over the Financial Perspective for 2007-13 was conspicuously avoided by the Convention on the Future of Europe. It is fraught with dangers and could easily founder. But it also offers the prospect of a Union whose priorities reflect more closely than the Constitutional Treaty what Schäfer calls the 'authentic preferences' of citizens.¹⁶⁰ Such an outcome would have profound repercussions for the Court as it sought to balance competing interests.

¹⁵⁴ The text of the speech is available on the 10 Downing Street website, <http://www.number10.gov.uk/output/Page774.asp>. Cf. 'United for Europe', an article by the Presidents of Austria, Finland, Germany, Italy, Latvia, Poland and Portugal published in newspapers in each of those countries on 15 July 2005. The text of the article is available on the website of the President of Finland, <http://www.sak.fi/>.

¹⁵⁵ See 'Economic Integration, democracy and the welfare state' [1997] 4 JEP 13, 19; *Converging in Europe: Economic and Democratic* (1999) 6.

¹⁵⁶ Cf. Baro, above n 71 at 107-8.

¹⁵⁷ See House of Lords European Union Committee, 'Future Funding of the European Union' (5th Report, Session 2004-05, HL Paper 52) and 'The Future Funding of the Common Agricultural Policy' (2nd Report, Session 2005-06, HL Paper 7).

¹⁵⁸ See European Commission, 'Questions and answers: Financial Framework 2007-2013' http://ec.europa.eu/economy_finance/questions_and_answers_en.htm#question.

¹⁵⁹ See Dec 2005/157 on the system of the European Communities' own resources, Arts 4 and 5. Adoption of this decision requires the unanimous agreement of the Council and approval by the Member States in accordance with their respective constitutional requirements (Art 225 EC).

¹⁶⁰ See further House of Lords European Union Committee, 'Future Funding of the European Union' (5th Report, Session 2004-05, HL Paper 52) ch 2.