

The Law of the EUROPEAN UNION

Teaching Material



THE COMMUNITY SYSTEM
OF JUDICIAL REMEDIES:
ARTICLES 230 AND 232

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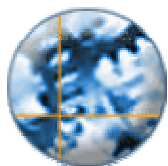
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1 ARTICLE 230 TEC



NOTE AND QUESTIONS

Article 230 (ex 173) and Article 231 (ex 174) provide that certain qualified persons may challenge the validity of Community acts directly in the European Courts and if successful, have those acts declared void.

While the EC Treaty originally provided for review only of acts of the Council and Commission, later amendments also made reviewable joint acts of the Parliament and Council, acts of the European Central Bank and acts of the Parliament that intend to produce legal effects vis-à-vis third parties.

1. Below you will find the old pre-Maastricht, the post-Maastricht and the current (post-Nice) version of Article 230. Compare them when reading the *Comitologie* and *Tschernobyl* case.

Article 230, ex Article 173 (pre-Maastricht)

The Court shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on 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.

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 a 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.

Article 230 (post-Maastricht)

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 or opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on 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 actions brought by the European Parliament, 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 a 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.

Article 230 (as modified by the Treaty of Nice)

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 of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

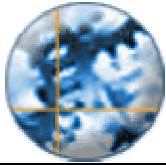
It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application,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

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

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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.

1.1 Case C-376/98: Germany v Parliament and Council



NOTE AND QUESTIONS

By this decision the ECJ for the first time of his case law history annuls a Directive of the Parliament and the Council in an action brought under article 230 (ex 173) TEC.

1. Does the analysis of the Court satisfy you? How would you redraft the Directive to avoid a new risk of annulment? (A new directive on Tobacco advertising and sponsorship has already been adopted; see Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products; Official Journal L 152, 20/06/2003 P. 0016 – 0019)

Federal Republic of Germany v European Parliament and Council of the European Union

Case C-376/98

5 October 2000

Court of Justice

[2000] ECR I-08419

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

On 6 July 1998 the European Parliament and the Council adopted, on the basis of the provisions relating to establishment of the internal market, freedom of establishment and freedom to provide services (Article 57(2) of the EC Treaty (now Article 47(2) EC), Article 66 of the EC Treaty (now Article 55 EC) and Article 100a of the EC Treaty (now Article 95 EC)), a directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. That directive, which lays down a general prohibition of advertising and sponsorship relating to those products, was adopted with a view to eliminating obstacles to the functioning of the internal market deriving from barriers to the movement of products and the freedom to provide services and distortions of competition resulting from differences in the relevant national rules. Two cases came before the Court concerning the validity of that directive: the first was an action for annulment brought by the Federal

Republic of Germany and the second was a request for a preliminary ruling from the High Court of Justice arising from proceedings in the United Kingdom brought by a number of manufacturers of tobacco products (Imperial Tobacco and Others).

The Federal Republic of Germany and the tobacco producers contended, inter alia, first, that the directive was in reality a measure designed to protect public health whose effects on the internal market, if any, were purely incidental and, second, that the directive did not in any event constitute a measure pursuing attainment of the internal market.

Judgement:

[...]

The choice of Articles 100a, 57(2) and 66 of the Treaty as a legal basis and judicial review thereof

76. The Directive is concerned with the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products. The national measures affected are to a large extent inspired by public health policy objectives.
77. The first indent of Article 129(4) of the Treaty excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health.
78. But that provision does not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health. Indeed, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies.
79. Other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty.
80. In this case, the approximation of national laws on the advertising and sponsorship of tobacco products provided for by the Directive was based on Articles 100a, 57(2) and 66 of the Treaty.
81. Article 100a(1) of the Treaty empowers the Council, acting in accordance with the procedure referred to in Article 189b (now, after amendment, Article 251 EC) and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
82. Under Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital. Article 7a of the EC Treaty (now, after amendment, Article 14 EC), which provides for the measures to be taken with a view to establishing the internal market, states in paragraph 2 that that market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.
83. Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be 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.
84. Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result the reform were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance

with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164 of the EC Treaty (now Article 220 EC) of ensuring that the law is observed in the interpretation and application of the Treaty.

85. So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature (see, in particular, *Spain v Council*, cited above, paragraphs 25 to 41, and *Case C-233/94 Germany v Parliament and Council* [1997] ECR I-2405, paragraphs 10 to 21).
86. It is true, as the Court observed in paragraph 35 of its judgment in *Spain v Council*, cited above, that recourse to Article 100a as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.
87. The foregoing considerations apply to interpretation of Article 57(2) of the Treaty, read in conjunction with Article 66 thereof, which expressly refers to measures intended to make it easier for persons to take up and pursue activities by way of services. Those provisions are also intended to confer on the Community legislature specific power to adopt measures intended to improve the functioning of the internal market.
88. Furthermore, provided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured.
89. It is therefore necessary to verify whether, in the light of the foregoing, it was permissible for the Directive to be adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty.

The Directive

90. In the first recital in the preamble to the Directive, the Community legislature notes that differences exist between national laws on the advertising and sponsorship of tobacco products and observes that, as a result of such advertising and sponsorship transcending the borders of the Member States, the differences in question are likely to give rise to barriers to the movement of the products which serve as the media for such activities and the exercise of freedom to provide services in that area, as well as to distortions of competition, thereby impeding the functioning of the internal market.
91. According to the second recital, it is necessary to eliminate such barriers, and, to that end, approximate the rules relating to the advertising and sponsorship of tobacco products, whilst leaving Member States the possibility of introducing, under certain conditions, such requirements as they consider necessary in order to guarantee protection of the health of individuals.
92. Article 3(1) of the Directive prohibits all forms of advertising and sponsorship of tobacco products and Article 3(4) prohibits any free distribution having the purpose or the effect of promoting such products. However, its scope does not extend to communications between professionals in the tobacco trade, advertising in sales outlets or in publications published and printed in third countries which are not principally intended for the Community market (Article 3(5)).
93. The Directive also prohibits the use of the same names both for tobacco products and for other products and services as from 30 July 1998, except for products and services marketed before that date under a name also used for a tobacco product, whose use is authorised under certain conditions (Article 3(2)). With effect from 30 July 2001, tobacco products must not bear the brand name, trade-mark, emblem or other distinctive feature of any other product or service, unless the tobacco product has already been traded under that brand name, trade-mark, emblem or other distinctive feature before that date (Article 3(3)(a)).
94. Pursuant to Article 5, the Directive is not to preclude Member States from laying down, in

accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.

95. It therefore necessary to verify whether the Directive actually contributes to eliminating obstacles to the free movement of goods and to the freedom to provide services, and to removing distortions of competition.

Elimination of obstacles to the free movement of goods and the freedom to provide services

96. It is clear that, as a result of disparities between national laws on the advertising of tobacco products, obstacles to the free movement of goods or the freedom to provide services exist or may well arise.
97. In the case, for example, of periodicals, magazines and newspapers which contain advertising for tobacco products, it is true, as the applicant has demonstrated, that no obstacle exists at present to their importation into Member States which prohibit such advertising. However, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption, it is probable that obstacles to the free movement of press products will arise in the future.
98. In principle, therefore, a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of Article 100a of the Treaty with a view to ensuring the free movement of press products, on the lines of Directive 89/552, Article 13 of which prohibits television advertising of tobacco products in order to promote the free broadcasting of television programmes.
99. However, for numerous types of advertising of tobacco products, the prohibition under Article 3(1) of the Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising. That applies, in particular, to the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned.
100. Admittedly, a measure adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles to exercise of the fundamental freedoms provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented. It is, however, quite clear that the prohibitions mentioned in the previous paragraph do not fall into that category.
101. Moreover, the Directive does not ensure free movement of products which are in conformity with its provisions.
102. Contrary to the contentions of the Parliament and Council, Article 3(2) of the Directive, relating to diversification products, cannot be construed as meaning that, where the conditions laid down in the Directive are fulfilled, products of that kind in which trade is allowed in one Member State may move freely in the other Member States, including those where such products are prohibited.
103. Under Article 5 of the Directive, Member States retain the right to lay down, in accordance with the Treaty, such stricter requirements concerning the advertising or sponsorship of tobacco products as they deem necessary to guarantee the health protection of individuals.
104. Furthermore, the Directive contains no provision ensuring the free movement of products which conform to its provisions, in contrast to other directives allowing Member States to adopt stricter measures for the protection of a general interest (see, in particular, Article 7(1) of Council Directive 90/239/EEC of 17 May 1990 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the maximum tar yield of cigarettes (OJ 1990 L 137, p. 36) and Article 8(1) of Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ 1989 L 359, p. 1)).
105. In those circumstances, it must be held that the Community legislature cannot rely on the need to eliminate obstacles to the free movement of advertising media and the freedom to provide services

in order to adopt the Directive on the basis of Articles 100a, 57(2) and 66 of Treaty.

Elimination of distortion of competition

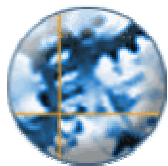
- 106 In examining the lawfulness of a directive adopted on the basis of Article 100a of the Treaty, the Court is required to verify whether the distortion of competition which the measure purports to eliminate is appreciable (Titanium Dioxide, cited above, paragraph 23).
- 107 In the absence of such a requirement, the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle, already referred to in paragraph 83 of this judgment, that the powers of the Community are those specifically conferred on it.
- 108 It is therefore necessary to verify whether the Directive actually contributes to eliminating appreciable distortions of competition.
- 109 First, as regards advertising agencies and producers of advertising media, undertakings established in Member States which impose fewer restrictions on tobacco advertising are unquestionably at an advantage in terms of economies of scale and increase in profits. The effects of such advantages on competition are, however, remote and indirect and do not constitute distortions which could be described as appreciable. They are not comparable to the distortions of competition caused by differences in production costs, such as those which, in particular, prompted the Community legislature to adopt Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonising the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry (OJ 1989 L 201, p. 56).
- 110 It is true that the differences between certain regulations on tobacco advertising may give rise to appreciable distortions of competition. As the Commission and the Finnish and United Kingdom Governments have submitted, the fact that sponsorship is prohibited in some Member States and authorised in others gives rise, in particular, to certain sports events being relocated, with considerable repercussions on the conditions of competition for undertakings associated with such events.
- 111 However, such distortions, which could be a basis for recourse to Article 100a of the Treaty in order to prohibit certain forms of sponsorship, are not such as to justify the use of that legal basis for an outright prohibition of advertising of the kind imposed by the Directive.
- 112 Second, as regards distortions of competition in the market for tobacco products, irrespective of the applicant's contention that such distortions are not covered by the Directive, it is clear that, in that sector, the Directive is likewise not apt to eliminate appreciable distortions of competition.
- 113 Admittedly, as the Commission has stated, producers and sellers of tobacco products are obliged to resort to price competition to influence their market share in Member States which have restrictive legislation. However, that does not constitute a distortion of competition but rather a restriction of forms of competition which applies to all economic operators in those Member States. By imposing a wide-ranging prohibition on the advertising of tobacco products, the Directive would in the future generalise that restriction of forms of competition by limiting, in all the Member States, the means available for economic operators to enter or remain in the market.
- 114 In those circumstances, it must be held that the Community legislature cannot rely on the need to eliminate distortions of competition, either in the advertising sector or in the tobacco products sector, in order to adopt the Directive on the basis of Articles 100a, 57(2) and 66 of the Treaty.
- 115 In view of all the foregoing considerations, a measure such as the directive cannot be adopted on the basis of Articles 100a, 57(2) and 66 of the Treaty.
- 116 In those circumstances, the pleas alleging that Articles 100a, 57(2) and 66 do not constitute an appropriate legal basis for the Directive must be upheld.

- 117 As has been observed in paragraphs 98 and 111 of this judgment, a directive prohibiting certain forms of advertising and sponsorship of tobacco products could have been adopted on the basis of Article 100a of the Treaty. However, given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down by the Directive, partial annulment of the Directive would entail amendment by the Court of provisions of the Directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the Directive partially.
- 118 Since the Court has upheld the pleas alleging that the choice of Articles 100a, 57(2) and 66 as a legal basis was inappropriate, it is unnecessary to consider the other pleas put forward by the applicant. The Directive must be annulled in its entirety.

[...]

2 NATURE OF THE ACT TO BE CHALLENGED

2.1 Case C-395/95: Geotronics



NOTE AND QUESTIONS

With this judgment, the ECJ partly overruled earlier case law in order to adopt a less stringent and more subtle position in relation to its examination of the relationships and contracts in the context of the PHARE and EDF programmes, i.e. the Commission, the beneficiary country and a private firm, the tenderer.

The preceding jurisprudence had consistently affirmed the inadmissibility of actions for annulment brought by excluded tenderers against acts adopted by the Commission.

Geotronics SA v Commission

Case C-395/95 P

22 April 1997

Court of Justice

[1997] ECR I-2271

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

By decision of 10 March 1994, the Commission rejected the tender by Geotronics SA concerning the supply of electronic equipment under the PHARE programme. Although the contract is formally between a private firm and the beneficiary country, de facto it is the Community act which is decisive for the award of the contract. Geotronics brought an action for annulment against this decision. The Court of First Instance dismissed the action as inadmissible since, following the Court's reasoning, the decision of the Commission could not be seen as an act producing binding legal effects of a nature which affected the legal situation of the applicant. Geotronics appealed.

Judgment

- 8 According to Geotronics, the Court of First Instance erred in law in holding that an action under Article 173 of the Treaty would not lie against the decision contained in the letter of 10 March 1994.

Geotronics claims that the contract at issue would undoubtedly have been awarded to it had the Commission not rejected its offer, and that, by determining the outcome of the tender procedure in the way that it did, the contested decision had binding legal effects on it and brought about a distinct change in its legal position.

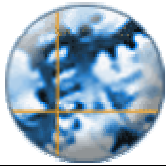
[...]

- 10 Furthermore, the Court has consistently held that an action for annulment under Article 173 of the Treaty will lie only against acts or decisions which have binding legal effects such as to affect the interests of the applicant (see, in particular, Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 9).
- 11 In this case, after describing the different roles allocated to the beneficiary country and the Commission in the procedure for tendering for contracts financed under the PHARE Programme, the Court of First Instance held in paragraph 33 of the contested judgment that, despite the terms used by the Commission, the letter of 10 March 1994 could not be regarded as a decision which produced binding legal effects capable of affecting Geotronics' legal position, with the result that the claim for annulment of that letter had to be rejected as inadmissible.
- 12 Admittedly, it follows from the Court's decisions concerning the award of public contracts financed by the European Development Fund that measures adopted by the Commission's representatives, whether approvals or refusals to approve, endorsements or refusals to endorse, are intended solely to establish whether or not the conditions for Community financing have been met, and are not intended to interfere with the principle that the contracts in question remain national contracts which the beneficiary States alone are responsible for preparing, negotiating and concluding (see, in particular, STS v Commission, paragraph 16). According to that case-law, undertakings which submit tenders for or are awarded the contracts in question have legal relations only with the beneficiary State responsible for the contract and measures adopted by the representatives of the Commission cannot substitute, in relation to them, a Community decision for the decision of the ACP State, which has sole power to conclude and sign that contract (see STS v Commission, paragraph 18; see also CMC and Others v Commission, paragraph 28; Italsolar v Commission, paragraph 22, and Forafrique Burkinabe v Commission, paragraph 23).
- 13 However, the reasoning underlying that case-law could not simply be transposed to the case before the Court of First Instance in order to find that the claim for annulment was inadmissible [...]
- 14 It is clear from paragraph 8 of the contested judgment that by its letter of 10 March 1994 the Commission informed Geotronics that it rejected its tender on the ground that the equipment on offer did not originate in a Member State of the Community or a beneficiary country under the PHARE Programme. Accordingly, the contested decision, which was formally addressed to Geotronics, was taken by the Commission after it had ascertained whether or not that company's tender satisfied the conditions for obtaining Community funding set out in the invitation to tender. Even though that decision formed part of a contractual procedure which was to lead to the conclusion of a national contract, it could be severed from that context inasmuch as, first, it was adopted by the Commission in the exercise of its own powers and, secondly, it was specifically directed at an individual undertaking, which lost any chance of actually being awarded the contract simply because that act was adopted.
- 15 In those circumstances, the Commission's decision to refuse Geotronics the benefit of Community funding in itself had binding legal effects as regards the appellant and could therefore be the subject of an action for annulment.

[...]

3 STANDING TO SUE BEFORE THE COURT: PRIVILEGED AND “SEMI” PRIVILEGED PLAINTIFFS

3.1 Case 302/87: European Parliament v. Council (Comitology)



NOTE AND QUESTIONS

Imagine an “appeal” on the following decisions. What arguments and considerations could be raised to try and persuade the Court to reconsider its position in the Comitology case?

European Parliament v Council of the European Communities

Case 302/87

27 September 1988

Court of Justice

[1988] ECR 5615

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By an application lodged at the Court registry on 2 October 1987, the European Parliament brought an action pursuant to the first paragraph of article 173 of the EEC Treaty for a declaration that Council decision 87/373/EEC of 13 July 1987 (Official Journal 1987, L 197, p. 33) laying down the procedures for the exercise of implementing powers conferred on the Commission was void.
- 2 By that decision, which is based on article 145 of the EEC Treaty as amended by article 10 of the single European act, the Council laid down the procedures which it may require to be observed for the exercise of the powers conferred by it on the Commission for the implementation of the rules laid down by the Council and adopted the provisions governing the composition, the functioning and the role of the committees of the representatives of the member states called upon to act.
- 3 The Council raised an objection of inadmissibility pursuant to article 91 (1) of the rules of procedure of the Court and requested the Court to give a decision on that objection without considering the substance of the case.
- 4 In support of its objection, the Council makes the point that the first paragraph of Article 173 of the Treaty does not expressly provide that the European Parliament may bring an action for annulment. Nor, according to the Council, can the Parliament be recognized as having that capacity on the basis of reasoning founded on the need to ensure the coherence of legal remedies. Intervention

and the action for failure to act which are available to the Parliament, as the Court held in its judgments of 29 October 1980 (in Case 138/79 Roquette Frères v Council ([1980]) ECR 3333 and in Case 139/79 Maïzena GmbH v Council([1980]) ECR 3393) and of 22 May 1985 (in Case 13/83 European Parliament v Council - The "Transport" case - ([1985]) ECR 1513), are wholly separate from the action for annulment.

- 5 The Council also maintains that neither the judgment of 23 April 1986 (in Case 294/83 Parti écologiste "Les Verts" v European Parliament ([1986]) ECR 1339) nor the judgment of 3 July 1986 (in Case 34/86 Council v European Parliament - The "Budget" case - ([1986]) ECR 2155) allow it to be inferred that the Court recognized by implication that the European Parliament has the capacity to bring an action for annulment. The judgment in "Les Verts" was based on the need to ensure that judicial protection was available against all measures intended to produce legal effects vis-à-vis third parties, regardless of which institution adopted the measure. It does not follow from this, according to the Council, that there must be a parallelism between the active and passive participation of the Parliament in proceedings for judicial review of legality. Nor can such parallelism be inferred from the "Budget" judgment since all the measures adopted by the Council in connection with the budgetary procedure are in any event merely preparatory.
- 6 On 20 January 1988 the Court decided to give its decision on the Council's objection without considering the substance of the case.
- 7 Reference is made to the report for the hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.
- 8 It must be observed in limine that the parties have correctly placed the issue between them in the context of the first paragraph of article 173 of the Treaty.
- 9 Article 173 contrasts the right of action of the institutions to which it refers in its first paragraph with the right of action of individuals, be they natural or legal persons, for which the conditions are laid down in its second paragraph. The European Parliament, which is one of the institutions of the Community listed in article 4 of the Treaty, is not a legal person.
- 10 Moreover, it may be observed that the scheme of the second paragraph of article 173 would in any event be inappropriate to an action by the European Parliament for annulment. The applicants referred to in the second paragraph of article 173 must be directly and individually concerned by the actual content of the act which they challenge. However, it is not the content of the act which could adversely affect the European Parliament but a failure to comply with the procedural rules requiring its involvement. Moreover, the second paragraph of article 173 refers only to a limited class of acts, namely those which are individual in their application, whereas the European Parliament seeks recognition of the right to bring actions against acts which have general application.
- 11 It should therefore be considered whether it is possible, by means of an interpretation of the first paragraph of article 173, for the European Parliament to be recognized as having capacity to bring actions for the annulment of acts of the Council or the Commission.
- 12 As is apparent from articles 143 and 144 of the Treaty, the European Parliament is empowered, on the one hand, to exercise political control over the Commission which, pursuant to article 155, is required to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied", and on the other, to censure the Commission, where necessary, if the latter should fail properly to discharge that task. The European Parliament's political control is also exercised by means of the debates that it may organize on specific or general questions, which enable it to pass motions on the policy followed by the Council or the Commission.
- 13 Moreover, irrespective of the budgetary powers conferred on it by the Luxembourg Treaty of 22 April 1970 and the Brussels Treaty of 22 July 1975, and the power of joint decision vested in it regarding accession and association agreements since the adoption of the single European act, the European Parliament is in a position to exercise influence over the content of the legislative measures adopted by the Council, either by means of the opinions which it issues under the consultation procedure or by means of the positions which it adopts under the cooperation

procedure.

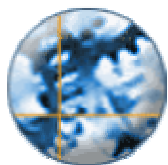
- 14 It should be emphasized that, as is apparent from the first paragraph of article 175 of the Treaty, the European Parliament was vested with the power to obtain a declaration by the Court establishing a failure to act on the part of the Commission or the Council and thus to bring to an end any immobilization of the decision-making machinery which might prevent it from exercising its powers. It is also open to the European Parliament to make its views heard before the Court by intervening in proceedings before it, as is apparent from article 37 of the statute of the Court.
- 15 Contrary to the assertion of the European Parliament, it does not follow that, because it is entitled to have a failure to act established and to intervene in proceedings before the Court, the Parliament must be recognized as having the possibility of bringing actions for annulment.
- 16 There is no necessary link between the action for annulment and the action for failure to act. This follows from the fact that the action for failure to act enables the European Parliament to induce the adoption of measures which cannot in all cases be the subject of an action for annulment. Thus, as is shown by the judgment of 12 July 1988 in case 377/87 *European Parliament v Council* ([1988] ECR, as long as a draft budget has not been presented by the Council, the European Parliament can obtain a judgment establishing the Council's failure to act, whereas the draft budget, which is a preparatory measure, could not be challenged under article 173.
- 17 The argument has also been put forward that, in the absence of any power to bring an action for annulment, the European Parliament would be unable, after calling upon the Council or the Commission to act, in accordance with article 175, to challenge an express refusal to act issued in response to that request. However, that argument is based on a false premise. A refusal to act, however explicit it may be, can be brought before the Court under article 175 since it does not put an end to the failure to act.
- 18 Nor is there any necessary link between the right to intervene and the possibility of bringing an action. On the one hand, according to the second paragraph of article 37 of the statute of the Court of justice of the EEC, the right of individuals to intervene is conditional merely upon "an interest in the result of any case" before the Court, whereas the admissibility of an action for annulment brought by individuals is subject to the condition that they must be the addressees of the measure which they seek to have annulled or at least that the measure should be of direct and individual concern to them. On the other hand, under the first paragraph of article 37, the European Parliament is entitled to intervene in cases such as those concerning the failure by states to fulfil their obligations, whereas the right to bring such cases before the Court is reserved to the Commission and the member states.
- 19 The European Parliament goes on to state that the first paragraph of article 173 reflects a principle of equality between the institutions expressly mentioned in that provision, in the sense that each of them is entitled to bring an action against measures adopted by the other and, conversely, its own measures can be submitted by the other institution for review by the Court. Since it has held that measures of the European Parliament capable of producing legal effects can be the subject of an action for annulment, the Court should, with a view to maintaining the institutional balance, decide that the European Parliament has the capacity to challenge acts of the Council and the Commission.
- 20 In that connection, it must be borne in mind that although the Court held in its judgment of 23 April 1986 (*Parti écologiste "Les Verts" v European Parliament*, cited above) that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects vis-à-vis third parties, it did so because an interpretation excluding such measures from the scope of that action would have produced a result contrary to the system of the Treaty, which was intended to establish a complete system of judicial protection against acts of Community institutions which are capable of having legal effects.
- 21 However, a comparison between article 38 of the ECSC Treaty, which was specifically referred to by the Court in the judgment in "*Les Verts*", and article 33 of the same Treaty shows that, according to the scheme of the treaties, in those cases where provision was made for acts of the European Parliament to be subject to review of their legality, the European Parliament was not thereby

empowered to bring a direct action on its own initiative against acts of other institutions. The European Parliament's argument that there must be a parallelism between the capacity of defendant and the capacity of applicant in proceedings for judicial review must therefore be rejected.

- 22 The European Parliament then claims that the Court recognized by implication in its judgment of 3 July 1986 (Council v European Parliament - the "budget" case - cited above) that it had the capacity to bring an action for annulment.
- 23 It must be observed that the budgetary procedure described in article 203 (4), (5) and (6) of the Treaty is characterized by successive deliberations of the two arms of the budgetary authority in the course of which each of them may, in accordance with the voting conditions laid down in the Treaty, react to the positions taken by the other. Those deliberations constitute measures preparatory to the drawing-up of the budget. As is apparent from the judgment of 3 July 1986 (Council v Parliament - the "budget" case - cited above) the budget does not become legally binding until completion of the procedure, that is to say when the president of the European Parliament, in his capacity as an organ of that institution, declares that the budget has been finally adopted.
- 24 It follows that as far as the approval of the budget is concerned, the only measure which can be declared void emanates from an organ of the European Parliament and must therefore be attributed to that institution itself. Consequently, the European Parliament cannot rely upon the budgetary powers conferred upon it by the Luxembourg and Brussels treaties cited above - powers which, moreover, are not at issue in the present case - in order to obtain recognition of its right to bring actions for the annulment of measures emanating from the Commission and the Council.
- 25 The European Parliament then goes on to state that if it had no power to bring actions for annulment it would not be in a position to defend its prerogatives vis-à-vis the other institutions.
- 26 It must be observed that the European Parliament has, from the outset, been endowed with the power to participate, on a consultative basis, in the legislative process, but that it was not thereby accorded the possibility of bringing actions for annulment. The prerogatives of the European Parliament have been augmented by the Single European Act, which has vested in it a power of joint decision with respect to accession and association agreements and has established a cooperation procedure in certain specified cases, but without any changes having been made to article 173 of the Treaty.
- 27 Apart from the abovementioned rights granted to the European Parliament by article 175, the Treaty provides means for submitting for review by the Court acts of the Council adopted in disregard of the Parliament's prerogatives. Whilst the first paragraph of article 173 grants to all the Member States in general terms the right to bring an action for the annulment of such acts, article 155 of the Treaty confers more specifically on the Commission the responsibility for ensuring that the Parliament's prerogatives are respected and for bringing for that purpose such actions for annulment as might prove to be necessary. Moreover, any natural or legal person may, if the prerogatives of the European Parliament are disregarded, plead an infringement of essential procedural requirements or an infringement of the Treaty in order to obtain the annulment of the measure adopted or, indirectly, a declaration pursuant to article 184 of the Treaty that that measure is inapplicable. Similarly, the illegality of a measure on the ground of breach of the prerogatives of the European Parliament may be raised as an issue before a national Court and the measure in question may be the subject of a reference to the Court for a preliminary ruling as to its validity.
- 28 It follows from all the foregoing considerations that the applicable provisions, as they stand at present, do not enable the Court to recognize the capacity of the European Parliament to bring an action for annulment.
- 29 The objection of inadmissibility must therefore be upheld and the application must be dismissed as inadmissible.

[...]

3.2 Case 70/88: European Parliament v Council (Chernobyl)



NOTE AND QUESTIONS

The Treaty originally conferred institutional standing under Article 230 only to the Council, Commission and Member States (see Article 230 TEC *supra*). These institutions could challenge a reviewable act without demonstrating any particular “interest” in doing so. Shortly after becoming directly elected the Parliament began militating in favour of institutional standing to challenge reviewable acts adopted by other institutions.

Finally, in the Chernobyl case, the ECJ permitted the Parliament to challenge a Council regulation on the ground that the Council had not used Article 95 (ex 100a) and the cooperation procedure in its adoption.

1. In Chernobyl the Court modified its Comitology position. What is the legal rationale of the change? What is the political-legal explanation for the change?
2. The Court relied on Article 230 (ex 164). Does the provision adequately justify giving Parliament standing when it is clearly not mentioned?
3. The Court did not acknowledge overruling its Comitology decision in Chernobyl, although it practically did. And it rarely happens that the ECJ announces that it is overriding its prior judgment. Why would that be?

European Parliament v Council of the European Communities

Case 70/88

May 22, 1990

Court of Justice

[1990] ECR 2041

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By application lodged at the Court registry on 4 march 1988, the European Parliament brought an action under article 146 of the Euratom Treaty and article 173 of the EEC Treaty for the annulment of Council regulation (Euratom) no 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feeding stuffs following a nuclear accident or

any other case of a radiological emergency (Official Journal 1987, L 371, p. 11).

- 2 That regulation, which is based on article 31 of the Euratom Treaty, lays down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs which may be placed on the market following a nuclear accident or any other radiological emergency which could lead or has led to significant radioactive contamination of foodstuffs or feedingstuffs. Foodstuffs or feedingstuffs with a level of contamination in excess of the maximum permitted levels laid down in any measure adopted in accordance with the provisions of the contested regulation may not be placed on the market.
- 3 During the drafting of the contested regulation, the European Parliament, which was consulted by the Council in accordance with article 31 of the Euratom Treaty, stated that it did not agree with the legal basis adopted by the Commission and asked the Commission to submit to it a new proposal based on article 100a of the EEC Treaty. Since the Commission did not comply with that request the Council adopted regulation no 3954/87 on the basis of article 31 of the Euratom Treaty. The Parliament then brought the present action for the annulment of that regulation.
- 4 The Council raised an objection of inadmissibility under the first subparagraph of article 91(1) of the rules of procedure of the Court and asked the Court to rule on that objection without considering the substance of the case.
- 5 In the written procedure, before delivery of the judgment of 27 September 1988 in case 302/87 *European Parliament v Council* ([1988] ECR 5615 ("Comitology")), the Council put forward in support of its objection of inadmissibility arguments which were similar to those which it had put forward in support of its objection of inadmissibility in case 302/87. At the hearing, which took place on 5 October 1989, the Council claimed that the question of the European Parliament's capacity to bring an action for annulment had been clearly decided by the Court in its judgment in case 302/87 and that the present action was therefore inadmissible.
- 6 The European Parliament asked the Court to dismiss the objection. It claimed that a new factor distinguished the present case from case 302/87. According to the Parliament, in order to justify its refusal in that case to recognize the European Parliament's capacity to bring an action for annulment the Court pointed out that it was the responsibility of the Commission under article 155 of the EEC Treaty to ensure that the Parliament's prerogatives were respected and to bring any actions for annulment which might be necessary for that purpose. However, the present case shows that the Commission cannot fulfil that responsibility since it chose a legal basis for its proposal which was different from the legal basis which the Parliament considered appropriate. Consequently, the Parliament cannot rely on the Commission to defend its prerogatives by bringing an action for annulment.
- 7 The European Parliament added that the Council's adoption of the contested measure cannot be regarded as an implied refusal to act which would enable the Parliament to bring an action for failure to act. Moreover, the defence of its prerogatives by actions brought by individuals would be completely fortuitous and therefore ineffective.
- 8 Therefore, according to the Parliament, there is a legal vacuum which the Court must fill by recognizing that the European Parliament has capacity to bring an action for annulment, but only to the extent necessary to safeguard its own prerogatives.
- 9 By order of 13 July 1988, the Commission of the European Communities was granted leave to intervene in support of the defendant's conclusions. Although the Commission concluded that the application should be dismissed on the merits, at the hearing it asked the Court to dismiss the Council's objection of inadmissibility. By order of 18 January 1989, the United Kingdom was granted leave to intervene in support of the defendant. The United Kingdom made no submission with regard to the admissibility of the action.
- 10 Reference is made to the report for the hearing for a fuller account of the facts, the course of the procedure and the submissions and arguments of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.
- 11 It must be observed as a preliminary point that since the contested measure is based on a

provision of the Euratom Treaty, the admissibility of the action for the annulment of that measure must be examined with regard to that Treaty.

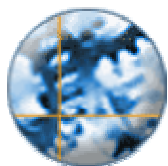
- 12 As is evident from the judgment in case 302/87, cited above, the Parliament does not have the right to bring an action for annulment under article 173 of the EEC Treaty or under article 146 of the Euratom Treaty, which are identical in content.
- 13 First of all, in the first paragraph of article 173 or article 146, the Parliament is not included among the institutions which, like the member states, can bring an action for annulment against any measure of another institution.
- 14 Furthermore, since the Parliament is not a legal person it cannot bring an action before the Court under the second paragraph of the articles in question, the scheme of which would, in any event, be inappropriate to an action for annulment brought by the Parliament.
- 15 In the judgment in case 302/87, after having stated the reasons why the Parliament did not have capacity to bring an action under article 173 of the EEC Treaty, the Court pointed out that various legal remedies were available to ensure that the Parliament's prerogatives were defended. As was observed in that judgment, not only does the Parliament have the right to bring an action for failure to act, but the treaties provide means for submitting for review by the Court acts of the Council or the Commission adopted in disregard of the Parliament's prerogatives.
- 16 However, the circumstances and arguments adduced in the present case show that the various legal remedies provided for both in the Euratom Treaty and in the EEC Treaty, however effective and diverse they may be, may prove to be ineffective or uncertain.
- 17 First, an action for failure to act cannot be used to challenge the legal basis of a measure which has already been adopted.
- 18 Secondly, the submission of a reference for a preliminary ruling on the validity of such an act or the bringing of an action by member states or individuals for the annulment of the act are mere contingencies, and the Parliament cannot be sure that they will materialize.
- 19 Finally, while the Commission is required to ensure that the Parliament's prerogatives are respected, that duty cannot go so far as to oblige it to adopt the Parliament's position and bring an action for annulment which the Commission itself considers unfounded.
- 20 It follows from the foregoing that the existence of those various legal remedies is not sufficient to guarantee, with certainty and in all circumstances, that a measure adopted by the Council or the Commission in disregard of the Parliament's prerogatives will be reviewed.
- 21 Those prerogatives are one of the elements of the institutional balance created by the treaties. The treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.
- 22 Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.
- 23 The Court, which under the treaties has the task of ensuring that in the interpretation and application of the treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.
- 24 In carrying out that task the Court cannot, of course, include the Parliament among the institutions which may bring an action under article 173 of the EEC Treaty or article 146 of the Euratom Treaty without being required to demonstrate an interest in bringing an action.
- 25 However, it is the Court's duty to ensure that the provisions of the treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those

laid down in the treaties, which may be exercised in a certain and effective manner.

- 26 The absence in the treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the treaties establishing the European Communities.
- 27 Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the treaties for actions for annulment brought by the other institutions.
- 28 In accordance with the treaties, the Parliament's prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty.
- 29 In the present case, the Parliament claims that the contested regulation is based on article 31 of the Euratom Treaty, which provides only that the Parliament is to be consulted, whereas it ought to have been based on article 100a of the EEC Treaty, which requires implementation of the procedure for cooperation with the Parliament.
- 30 The Parliament infers from that that the Council's choice of legal basis for the contested regulation led to a breach of its prerogatives by denying it the possibility, which the cooperation procedure offers, of participating in the drafting of the measure more closely and actively than it could in the consultation procedure.
- 31 Since the Parliament claims that its prerogatives were breached as a result of the choice of legal basis for the contested measure, it follows from all the foregoing that the present action is admissible. The Council's objection of inadmissibility must therefore be dismissed and the proceedings must be continued with regard to the substance of the case.

[...]

3.3 Case C-303/94: Parliament v Council (Plant Protection)



NOTE AND QUESTIONS

The Treaty of Maastricht amended Article 230 codifying the Chernobyl approach to parliamentary standing (it also gave “semi-privileged” plaintiff status to the European Central Bank; same was granted to the Court of Auditors by the Amsterdam Treaty).

So the Parliament had “standing to sue for the purpose of protecting [its] prerogatives”. But does an alleged Treaty violation implicate the Parliament’s prerogatives?

The last Treaty amendment relevant for Parliament’s standing to sue under Article 230 was adopted in Nice, when it became, alongside the Council, Commission and Member States, a “privileged plaintiff”. But the case-law on what constituted an infringement of the Parliament’s prerogatives will continue to apply to the Court of Auditors and the ECB.

European Parliament v Council of the European Union

Case C-303/94

18 June 1996

Court of Justice

[1996] ECR I-2943

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By application lodged at the Court Registry on 14 November 1994, the European Parliament applied pursuant to Article 173 of the EC Treaty for annulment of Council Directive 94/43/EC of 27 July 1994 establishing Annex VI to Directive 91/414/EEC concerning the placing of plant protection products on the market (OJ 1994 L 227, p. 31, hereinafter “the contested directive”).
- 2 Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1, hereinafter “the basic directive”), adopted on the basis of Article 43 of the Treaty, is intended to lay down the rules applicable by the Member States in relation to the authorization, marketing, use and control of plant protection products.
- 3 Article 4(1) of that directive requires the Member States to ensure that a plant protection product is not authorized unless certain conditions are fulfilled. One such condition is that, in implementation of the uniform principles laid down in Annex VI, it must be established that the product has no harmful effect on human or animal health, either directly or indirectly, or on groundwater and has no unacceptable influence on the environment, particularly in relation to the contamination of water, including drinking water and groundwater. Article 10(1) of the same directive lays down the rules for

giving effect to the principle of mutual recognition of authorizations granted by the Member States. Finally, Article 18(1) provides: "The Council, acting by a qualified majority on a proposal from the Commission, shall adopt the 'uniform principles' referred to in Annex VI".

- 4 The contested directive, adopted on the basis of the latter provision, establishes the content of Annex VI to the basic directive, which lays down the "uniform principles for evaluation and authorization of plant protection products".
- 5 According to the fifth recital in the preamble to that directive, its provisions on the protection of water "are without prejudice to Member States' obligations under the Directives concerning the protection of water, and in particular Directives 75/440/EEC, 80/68/EEC and 80/778/EEC". The following recitals make it clear that a review of those directives is necessary and that, pending such review, the provisions of the contested directive concerning the protection of water are transitional in nature. In particular, it will be necessary to re-examine the provisions of point 2.5.1.2(b) of Part C of Annex VI as soon as models validated at Community level enable the foreseeable concentration in groundwater after use of plant protection products to be estimated precisely.
- 6 Annex VI, the content of which was established by the contested directive, comprises an introduction (A), a part concerning evaluation of the information notified in support of applications for authorization (B) and, finally, a part devoted to the decision-making process (C).
- 7 In part B, point 2.5.1.2 states that: "Member States shall evaluate the possibility of the plant protection product reaching the groundwater intended to produce drinking water under the proposed conditions of use". If that possibility exists, the Member States must evaluate its consequences having regard to certain information, using a suitable calculation model validated at Community level, or, if no such model exists, basing their evaluation on the results of mobility and persistence-in-soil studies, as provided for in Annexes II and III.
- 8 In part C, point 2.5.1.2 comprises four paragraphs dealing respectively with (a) the conditions to be met for an authorization to be granted, (b) the possibility of issuing a conditional authorization for a limited period of not more than five years, (c) the possibility of issuing a further conditional authorization and, finally, (d) the possibility of introducing at any time appropriate conditions or restrictions having regard to local conditions.
- 15 Claiming that its prerogatives have been infringed, the Parliament puts forward, in support of its application, three pleas in law, alleging that the contested directive has unlawfully modified certain obligations imposed on the Member States by the basic directive, that it unlawfully modified other obligations imposed by Directive 80/778, and, finally, that it contains an inadequate or incorrect statement of the reasons on which it is based.
- 16 The Council, which entertains certain doubts as to the admissibility of the application, considers that the Parliament's arguments should be rejected.

Admissibility

- 17 Pursuant to the third paragraph of Article 173 of the Treaty, the Parliament may bring an action before the Court for the annulment of an act of another institution provided that it does so in order to protect its prerogatives. The Court has held that that condition is satisfied where the Parliament indicates in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed (Case C-316/91 Parliament v Council [1994] ECR I-625, paragraph 13).
- 18 By virtue of those criteria, the action must be declared inadmissible to the extent to which it is founded on infringement of Article 190 of the Treaty. In alleging that the contested provisions are inadequately or incorrectly reasoned for the purposes of that article, the Parliament has failed to provide any relevant indication as to how that infringement, assuming that it has been committed, is such as to impair its own prerogatives (see Case C-156/93 Parliament v Commission [1995] ECR I-2019, paragraph 11).
- 19 On the other hand, the right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament (see Parliament v Council, cited above, paragraph 16) and the

Parliament maintains that certain provisions of the contested directive have modified the obligations imposed on the Member States by the basic directive and by Directive 80/778, which are based respectively on Article 43 and Articles 100 and 235 of the Treaty which provide that the Parliament must be consulted.

- 20 Thus, in so far as it criticizes the fact that the Council adopted those provisions in breach of that obligation, the purpose of the action is to demonstrate that the Parliament's prerogatives have been encroached upon. The action is therefore admissible.

Substance

- 21 The Parliament maintains in particular that Annex VI established by the contested directive, by referring, in B 2.5.1.2 and C 2.5.1.2, only to "groundwater intended for the production of drinking water" and by also allowing the issue of a conditional authorization for a plant protection product whose foreseeable concentration exceeds the maximum permissible concentration, has changed the degree of protection of groundwater laid down by the basic directive. In its view, such a change cannot lawfully be made without following the procedure laid down by Article 43 of the Treaty, under which the latter directive was adopted and which provides for mandatory consultation of the Parliament.
- 22 The Council contends that, although it considered that very detailed criteria should be laid down for groundwater intended for the production of drinking water, it did not consider that harmonization of the criteria to be applied in relation to the effects on other groundwater was necessary. In its view, the mere fact that an implementing directive is not exhaustive cannot render it illegal. Only if it exceeded the limits to which implementation was made subject by the basic directive or if it contradicted the provisions of the latter would the contested directive be illegal.
- 23 As the Court has already held (in particular in Case 46/86 Romkes v. Officier van Justitie for the District of Zwolle [1987] ECR 2671, paragraph 16, and in Parliament v Commission, cited above, paragraph 18, the Council cannot be required to draw up all the details of regulations or directives concerning the common agricultural policy according to the procedure laid down in Article 43 of the Treaty. It is sufficient for the purposes of that provision that the essential elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision, and the provisions implementing the basic regulations or directives may be adopted according to a different procedure, as provided for by those regulations or directives. Nevertheless, an implementing directive such as the contested directive, adopted without consultation of the Parliament, must respect the provisions enacted in the basic directive after consultation of the Parliament.
- 24 In this case, although the basic directive states, in the third recital in its preamble, that the use of plant protection products is one of the most important ways of protecting plants and plant products and of improving agricultural production, it also states, in the fourth recital, that such use may involve risks for humans, animals and the environment, and it seeks, as is apparent from the recitals that follow, to introduce, in view of those risks, uniform rules on the conditions and procedures for authorization of such products.
- 25 According to the ninth recital in the preamble to that directive, those procedures are to ensure a high standard of protection, which, in particular, must prevent the authorization of plant protection products whose risks to health, groundwater and the environment have not been appropriately investigated; moreover, the protection of human and animal health and the environment should take priority over the objective of improving plant production. The tenth recital adds that it is necessary to make sure that the products in question "have... no unacceptable influence on the environment in general and, in particular, no harmful effect on human or animal health or on groundwater".
- 26 The authorization rules are laid down in particular in Article 4(1) of the basic directive which, as pointed out in paragraph 3 of this judgment, requires the Member States to ensure that a plant protection product is not authorized unless certain conditions are fulfilled and refers in that connection to the "uniform principles" mentioned in Annex VI, the content of which must be established by the Council in accordance with the procedure provided for in Article 18.

- 27 With regard more particularly to the protection of health, groundwater and the environment, Article 4(1)(b) of the basic directive provides that the Member States are not to authorize a plant protection product unless, in accordance with the abovementioned uniform principles, it is established that that product has no harmful effect on human or animal health, either directly or indirectly, or on groundwater and has no unacceptable influence on the environment, particularly in relation to the contamination of water. As is clear from the wording of Article 4(1)(b)(iv) and (v), that obligation relates to both drinking water and groundwater, without limiting the latter to groundwater intended for human consumption.
- 28 So, whilst the basic directive pursues the aim of improving agricultural production through the use of plant protection products, it also requires, taken as a whole, respect for the environment in general, and of groundwater in particular, as an essential precondition for the authorization of such products.
- 29 The contested directive, for its part, states, in the third recital in its preamble, that the uniform principles for evaluation and authorization of plant protection products "have to be laid down for each of the different requirements provided for in Article 4(1)(b), (c), (d) and (e)" of the basic directive. However, in Annex VI, in which those principles are established, points B 2.5.1.2 and C 2.5.1.2, concerning groundwater, refer only to water intended for the production of drinking water. Moreover, although those provisions are, as pointed out in paragraph 5 of this judgment, without prejudice to the obligations deriving in particular from Directive 80/778 and although they also refer expressly to the maximum permissible concentration determined by that directive, they nevertheless allow, under the conditions set out in point C 2.5.1.2 (b) and (c), the issue of a conditional authorization for a plant protection product whose foreseeable concentration exceeds that maximum concentration.
- 30 Contrary to the Council's contention, the fact that the contested directive is merely incomplete on one of the points relating to the principles laid down by the basic directive, and does not thereby go beyond the limits to which the implementation of those principles is subject, is not sufficient to defeat the plea that it is illegal in the light of the basic directive. For that to be the case, it would also be necessary for the implementing directive to comply, as pointed out in paragraph 23 of this judgment, with the provisions enacted in the basic directive after consultation with the European Parliament and for it not to modify the scope of the obligations defined by that directive.
- 31 By not taking account of the effects which plant protection products may have on all groundwater, the contested directive specifically failed to observe one of the essential elements of the matter expressly laid down by the basic directive. As to that it need merely be pointed out that, as indicated in paragraph 25 of this judgment, the latter directive seeks in particular to ensure a high standard of protection so as to preclude any unacceptable influence of the products in question on the environment in general and, in particular, any harmful effect on human or animal health or on groundwater.
- 32 Moreover, the procedure provided for in point C 2.1.5.2 (b) and (c) of the annex to the contested directive allows the issue of a conditional authorization, for a period which may extend to ten years, for plant protection products whose foreseeable concentration in groundwater intended for the production of drinking water exceeds the maximum permissible concentration laid down in a reference provision. Even if those provisions are presented as transitional provisions, they manifestly affect, as the Advocate General pointed out in paragraph 20 of his Opinion, the scope of the principles defined in Article 4(1)(b)(iv) and (v) of the basic directive, according to which a plant protection product must not be authorized unless it is established that it has no harmful effect on human or animal health or on groundwater and that it has no unacceptable influence on the environment, in particular as regards the contamination of water.
- 33 The Parliament's assertion that the contested directive has modified the scope of the obligations imposed on the Member States by the basic directive, without following the legislative procedure prescribed by the Treaty, which calls for it to be consulted, is therefore well founded. The contested measure must accordingly be annulled.

[...]

4 STANDING TO SUE BEFORE THE COURT: PRIVATE APPLICANTS

4.1 Ewa Biernat: The Locus Standi of Private Applicants Under Article 230 (4) EC And the Principle of Judicial Protection in the European Community

Introduction

Every developed legal system must have a mechanism for testing the procedural and substantive legality of measures adopted by its institutions. In the European Community it was of an utmost importance to create a system of control over the acts of the Commission and the Council (and later also the Parliament) given the democratic deficit within the Community and limited supervisory role of the European Parliament. The main burden rests on the European Court of Justice and the Court of First Instance, which are the independent bodies entrusted by the Treaties with the task of upholding the rule of law in the Community. The Treaty on the European Community (EC) provides for a system which may be called a system of judicial review. For reasons of peculiarities of the EC legal order it covers both legislative and administrative acts of the Community institutions¹.

The action for annulment, regulated by Article 230 EC, occupies the central position within this system. It has its origins in annulment proceedings against illegal administrative action, as known to the legal systems of the Member States. Paragraph four of article 230 allows the non-privileged applicant² to challenge directly the allegedly illegal Community act. This is the result of the direct effect which the Community law has with regard not only to Member States but also natural and legal persons³. They can obtain the review of the acts of the Council, the Commission, the European Parliament and the European Central Bank. However, in reality these possibilities have been limited due to very strict requirements concerning the *locus standi* conditions for an action for annulment, which in theory should be a main channel of judicial review open to individuals⁴. These restrictions imposed by the Treaty but also by the severe interpretation of the Court of Justice, represent an important hindrance to access by natural and legal persons to the European court in contrast to the privileged position of Member States and the Community institutions, and are strongly criticized by scholars and members of the judiciary. The main argument brought up by the opponents of the *status quo* with regard to standing of individuals is that such a restrictive approach is against the principle of effective judicial protection and may lead in many cases to the denial of justice. This situation visibly contradicts with the common constitutional values on which the Community is based, the Charter of Fundamental Rights and the European Convention on Human Rights.

The locus standi of individuals under Article 230 (4) and the principle of effective judicial protection are the main concerns of this work. First it will be presented how the restrictive interpretation of the notion of individual concern developed in the case law of the European Court of Justice and then the Court of First Instance. Then it will be discussed how this situation can be assessed in terms of effective judicial protection and the rights to the legal remedy. The following part is devoted to the analysis of the recent reactions of the Community courts to the growing criticism of the standing rules. The last part is devoted to the works of the Convention on the Future of Europe with regard to Article 230 (4).

¹ ALBERTINA ALBORS-LLORENS, *Private parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford 1996, p.7, hereinafter, Albors-Llorens

² Under Article 230 Member States, the European Parliament, The Council and the Commissions are the privileged applicants i.e. they can always bring an action. The Court of Auditors and the European Central Bank are semi-privileged and they only have standing to defend their own prerogatives.

³ See e.g. cases 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 16/64 *Costa v. ENEL* [1964] ECR 585, 39/72 *Commission v. Italy* [1973] ECR-101, 41/74 *Van Duyn v. Home Office* [1974] ECR 1337

⁴ ALBORS-LLORENS, P.8

CHAPTER I: THE NOTION OF 'INDIVIDUAL CONCERN' UNDER ARTICLE 230 (4) IN THE CASE LAW OF ECJ AND CFI

I-1 The requirement of 'individual concern' under the EC Treaty and in the Court's jurisprudence

The rules governing the *locus standi* of non-privileged applicants are to be found in Article 230 (4). This article provides that

Any natural or legal person may, *under the same conditions*⁵, 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.

Their objective is to restrict access to the judicial review in the Court of Justice only to measures which are individual and not general, and in which applicants have personal interest. Review proceedings can only be brought in three types of cases:

- A decision is addressed to the applicant
- A decision is addressed to third parties and applicants claims that it is of 'direct and individual concern' to him or her
- A decision is 'in the form of' a regulation and is of a 'direct and individual concern' to the applicant.

Article 230 does not speak about the possibility of challenging directives by individuals. There is no reason, however, why they could not do it. It has been held that the choice of a legal instrument by the Community institutions does not deprive the applicant of the judicial protection afforded by the Treaties. In the case *Gibraltar v. Council*⁶ we read that:

'[...] the Court has held, since its judgment in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes v Council* [1962] ECR 471, that the term 'decision' used in the second paragraph of Article 173 of the Treaty has the technical meaning employed in Article 189, and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general 'application' or otherwise of the measure in question'.

In case *UEAPME v. Council*⁷ the Court referred to *Gibraltar v. Council* and *ASOCARNE v. Council*⁸ and stated that

'Although Article 173, fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible. [...] In that respect, it must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty. [...] [T]he mere fact that the chosen

⁵ These are the conditions set up in paragraph one of Article 230 which apply to all categories of applicants. To be subject to review the act must be of and EC institution, producing legal effects. The applicant must meet the 2-months deadline (counted from the publication of a measure or its notification to the applicant) and he must invoke one of the grounds for annulment laid down in paragraph 2 (lack of competence, infringement of an essential procedural requirement, infringement of the treaty or any rule relating to its application, misuse of powers)

⁶ Case C-298/89 *Gibraltar v. Council* [1993] ECR I-3605

⁷ Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335

⁸ Case T-99/94 *Asociacion Espanala de Empresas de la carne (ASOCARNE) v. Council* [1994] ECR II-871

form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty’.

An applicant may then argue that a directive was in fact a decision which was of direct and individual concern. It is nevertheless clear that individual wishing to do so will have very small chances to succeed⁹.

Challenging the decisions

Decision addressed to the applicant is relatively the simplest case. For example decisions of the Commission adopted under the Council Regulation 17/62 implementing articles 85 and 86 of the Treaty of 1962¹⁰ are frequently challenged by their addressees (the alleged infringers of competition rules)¹¹.

An individual can challenge a decision addressed to another party only if he or she is directly and individually concerned by the decision. This involves more than only proving some legal interest in the contested measure. Both criteria must be fulfilled, but direct concern is easier to be found. A measure is of direct concern if it affects directly the legal situation of the applicant and leaves no discretion to the addressees 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 rules¹². It must be examined whether there was any discretion on the part of Member State, between the decision and the applicant¹³.

With regard to individual concern, the case *Plaumann v. Commission*¹⁴ was a seminal one. It set the tone of restrictive interpretation for the entire system of the judicial review in the Court of Justice¹⁵. *Plaumann*, German importer of clementines, brought an action against the decision of the Commission addressed to Germany, refusing it authorisation of lowering of the duty on the imports of clementines into the European Community from 13 to 10 %. The Court held that in order to have the right to bring an action for annulment of a decision which is not addressed to them, the defendants must show that they are individually concerned if the 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 [...]’¹⁶.

In the Court’s view the fact that *Plaumann* is affected by the decision as an importer of clementines, so by the reason of his commercial activity, which may at any time be practised by any person, does not distinguish him in the relation to the contested decision as in the case of the addressee.

The test from *Plaumann* has been applied in many later cases. This test is very restrictive and very difficult to meet. The Court requires the applicants to belong to a closed category, membership of which is fixed and ascertainable at the date of the adoption of the contested measure¹⁷. In case *Toepfer v. Commission*¹⁸ an applicant, an importer of cereals, was held to be individually concerned because the

⁹ As it can be seen in the cases cited above.

¹⁰ OJ P 013, 21/02/1962 P. 0204 - 0211

¹¹ JO SHAW, *Law of the European Union*, 3rd ed., Palgrave Law Masters, 2000, p.506, hereinafter Jo Shaw

¹² PAUL CRAIG & GRAINNE DE BURCA, *EU Law. Text, cases and materials*, 3rd ed., Oxford University Press, Oxford 2003, p.518, hereinafter, Craig & de Búrca

¹³ Cases 41-44/70, *NV International Fruit Company v. Commission* [1971] ECR 411, case 62/70 *Bock v. Commission* [1971] ECR 897, case 69/69 *Alcan v. Commission* [1971] ECR 385, et al.

¹⁴ Case 25/62 *Plaumann v. Commission* [1963] ECR 95

¹⁵ JO SHAW, p. 509

¹⁶ *Plaumann v. Commission* at para.107

¹⁷ JO SHAW, p. 508

¹⁸ Cases 106-107/63 *Toepfer v. Commission* [1965] ECR 405

contested decision concerned only those importers, who applied for an import license (refused by the decision) on a particular day. Similarly in the case *Bock v. Commission*¹⁹ the Court found the applicant to be individually concerned :

‘A decision is of individual concern to a person when the factual situation created by the decision differentiates him from all other persons and distinguishes him individually just as in the case of the person addressed. A trader is therefore individually concerned by a decision authorizing a Member State to reject the application for an import license made by the said trader prior to the adoption of the decision if the State makes use of that authorization’.

However in case *Spijker Kwasten v. Commission*²⁰ there was no individual concern because

‘a decision addressed to certain Member States with the purpose of authorizing them not to apply community treatment for a fixed period to imports of products originating in a non – member country and in free circulation in the other Member States is not of individual concern to the only importer of the products in question established in the member states to which the decision is addressed since it concerns the importer merely by virtue of his objective status as an importer in the same manner as any other trader who is, or might be in the future, in the same situation’.

The Court concludes that the contested decision is therefore a measure of general application which has an effect on the categories of persons defined in an abstract manner.

It can be observed from the case law that the Court focuses on the particular areas of EC law, like agriculture and customs. The Commission is strongly involved in administering these fields. It is argued that the Court is reluctant to interpret in a less strict manner the concept of individual concern because of the subject matter of the cases. This would be the way to protect the Commission’s scope for discretionary determinations, particularly under CAP²¹. However, the EU has extended the range of its activities but the approach of ECJ and CFI has not changed²².

Challenging the regulations which are in fact decisions

The wording of Article 230 (4) may indicate that individuals may only challenge regulations which are in essence decisions. The applicant would have to prove that a formally general measure is in fact a bundle of individual measures – decisions, of a direct and individual concern for him. In practice, this appears to be almost impossible. The Court has not always had the same approach to the issue and adopted initially two kinds of tests: closed category test and abstract terminology test²³. The former applies to cases concerning a completed set of past events, e.g. in case *International Fruit Company BV v. Commission*²⁴, a group of importers of apples applied for an import license to the relevant national authorities. They informed the Commission who enacted the regulation laying down the rules for those applications. This regulation was applicable only to those who made import applications in the previous week and therefore the Court found that the measure was a bundle of individual decisions.

The general criterion applied by the Court was however the abstract terminology test, which can be explained on an example of a case *Calpak*²⁵. The applicants, producers of William pears, sought to annul

¹⁹ Case 62/70 *Bock v. Commission* [1971] ECR 897

²⁰ Case 231/82 *Spijker Kwasten v. Commission* [1983] ECR 2559

²¹ PAUL CRAIG, ‘Legality, Standing and Substantial Review in Community Law’, 14 *Oxford Journal of Legal Studies* 1994, p.507

²² Case T-83/92 *Zunis Holdings S.A. v. Commission* [1993] ECR II-1169, case T-117/94 *Associazione Agricoltori della Provincia di Rovigo et al. v. Commission (Po Delta)* [1995] ECR II-455 (confirmed on appeal by ECJ, case C-142/95 P [1996] ECR I-6669

²³ CRAIG & DE BÚRCA, p. 495

²⁴ Cases 41-44/70, *International Fruit Company BV v. Commission*, [1971] ECR 411

²⁵ Cases 789-790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission*, [1980] ECR 1949

a regulation which calculated the production aid on the basis of one marketing year, while the previous regulation used as a basis a three-year period. The applicants claimed that they were a close and definable group, the members of which were known to, or identifiable by, the Commission. However, the Court held that

‘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 limited thereby’.

So even in cases where it was possible to identify the exact, small group of persons affected by the regulation, the actions were dismissed²⁶.

The modern jurisprudence on challenging decisions and regulations

Another important moment is marked by the Court’s judgment in *Codorniu*²⁷. The applicant sought to challenge the regulation which reserved the word ‘crémant’ as a designation for certain sparkling wines produced in some regions of France and Luxembourg. The applicant, a Spanish wine producer, had a trade mark including the word ‘crémant’ for his products, registered since 1924. The Court held that in this case even though the measure was of a general legislative nature which concerned the traders in a general way, it did not prevent it from being of individual concern to the applicant (the reasoning applied previously by the Court in anti-dumping cases, e.g. *Allied Corporation*²⁸ and *Extramet*²⁹, see more *infra*). *Codorniu* was affected by the measure by reference to certain specific attributes, because he has registered his trade mark and used it traditionally before and after the registration. Therefore the reservation of a trade mark for France and Luxembourg interfered with his intellectual property right.

This case signaled that ECJ and CFI may view the things a bit differently. Even if the regulation is a ‘true’ regulation according to the abstract terminology test, an individual may nevertheless be individually concerned by it³⁰. In this respect, this judgment went beyond previous approaches to standing questions. It was remarkable for the Court’s willingness to allow private applicants to challenge true regulations and its unusually liberal approach to the question of individual concern. It seems that the Court intended to give authoritative guidance on the standing of private applicants to challenge Community acts under Article 230 (4)³¹.

Codorniu exemplifies the ‘infringement of rights’ approach to the meaning of individual concern. The applicant was held to be individually concerned because it possessed a trade mark right which would have been overridden by a contested regulation. Another case, *Antillean Rice*³² is an example of a ‘breach of duty’ approach³³. The applicants challenged a decision fixing a minimum import price for certain goods. The CFI held that the measure in question was in fact of a legislative nature, but nonetheless the applicants were individually concerned, because the relevant Article on which the contested decision was based meant that the Commission was under a duty to take account of the negative effects of such a decision introducing safeguard measures on the position of those such as the applicant.

²⁶ Case 101/76 *KSH v. Commission*, [1977] ECR 797, cases 103-9/78 *Beauport v. Council and Commission*, [1979] ECR 17

²⁷ Case C-309/89 *Codorniu SA v. Commission*, [1994] ECR I-1853

²⁸ Cases 239, 275/82 *Allied Corporation v. Commission*, [1984] ECR 1005

²⁹ Case C-358/89 *Extramet Industrie SA v. Council*, [1991] ECR I-2501

³⁰ CRAIG & DE BÚRCA, p. 495

³¹ ANTHONY ARNULL, ‘Private Applicants and the Action for Annulment since *Codorniu*’, 38 CMLR 2001, p.51-2, hereinafter, Private Applicants...

³² Cases T- 480 and 483/93, *Antillean Rice Mills NV. V. Commission*, [1995] ECR II-2305

³³ CRAIG & DE BÚRCA, p. 496

However, the situation of private applicants has not changed significantly after *Codorniu* because the Court will still have applied the *Plaumann* test and the applicants still have to show individual concern. The situation did not change when the applications under Article 230 (4) were passed to the Court of First Instance. In case *Kik v. Council and Commission*³⁴ the applicant tried to challenge the language regime instituted by the Council Regulation establishing the Community trademark and the Community trademark office, which excluded his language (Dutch). The Court did not grant him standing and refused to accept the application of Article 6 of ECHR, even though it has done it in several other occasions. The court stated that Article 6 does not preclude the rules for standing under Article 230 (4). There is a number of other cases where CFI recognized that a regulation may be of an individual concern to a trader but it applied the *Plaumann* test in the same manner as above³⁵.

The case *Greenpeace*³⁶ (which concerned a decision) confirmed that *Codorniu* did not lead to a test for standing based on adverse impact, judged on the facts of the case³⁷. This is an example of a 'pure *Plaumann*' approach³⁸. In this case the Court did not agree that the residents of Canaries, Greenpeace International and some local environmental organizations showed to be individually concerned by the decision addressed to Spain, granting aid under the regional development programme for the building of two power stations in Canary Islands. The applicants specifically invited the CFI to take a liberal approach on the question of admissibility and to accept that standing could derive, not only from purely economic considerations, but also from the concern for the protection of environment. They claimed that in each Member State associations set up for the protection of environment which were sufficiently representative of the interests of their members, or which satisfied certain formalities, were entitled to challenge administrative decisions alleged to breach rules on environmental protection. The CFI, however, refused to take into account the fact that the interests involved were environmental and not economic, so that the principles of *Plaumann* should not apply in their full rigour³⁹. It concluded that the individual applicants were affected by the contested measure in a same way as anyone living, working or visiting the area concerned and that they could not therefore be considered individually concerned. The same was true of the applicant associations since they had been unable to establish any interest of their own distinct that of their members, whose position no was different from that of individual applicants. On appeal to the Court of Justice⁴⁰ Advocate General Cosmas counselled against any modification of the existing case law which would permit environmental associations to be treated as a special case, because otherwise 'natural persons without *locus standi* under the fourth paragraph of article 173 [now 230] of the Treaty could circumvent that procedural impediment by setting up an environmental association. Moreover (...) the number of environmental associations capable of being created is, at least in theory, infinite'⁴¹. The Court declared that the interpretation of the fourth paragraph of Article 173 of the Treaty that the Court of First Instance applied in concluding that the appellants did not have *locus standi* is consonant with the settled case-law of the Court of Justice⁴².

Standing for applicants belonging to specific categories or in cases in particular areas

In particular areas (e.g. anti-dumping, competition, state aids) the Court has treated the rules for standing in a different, more generous way. It is argued that after *Codorniu* the difference is not that big anymore, but nevertheless it still exists⁴³.

³⁴ Case T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717

³⁵ Case T-472/93 *Campo Ebro Industrial SA v. Council* [1995] ECR II-421, case T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201 et al.

³⁶ Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission*, [1995] ECR II-2205

³⁷ ARNULL, *Private Applicants...*, p.31

³⁸ CRAIG & DE BURCA, p. 498

³⁹ JO SHAW, p. 511

⁴⁰ Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) v. Commission*, [1998] ECR I-1651

⁴¹ at I-1689

⁴² Case C-321/95 P at para.27

⁴³ CRAIG & DE BURCA, p. 503

In *Piraiki – Patriaiki*⁴⁴ some of the applicants who sought to challenge the decision permitting France to restrict imports of cotton yarn from Greece were given standing because the Greek Act of Accession required the Commission to take into account, before adopting such a measure, the interests of those who were bound by contractual agreements. Those persons were then differentiated from the others who would also suffer prejudice, but did not belong to the category of persons specified in the Act of Accession. The case *Sofrimport*⁴⁵ was similar because the Court found that the regulation imposing protective measures which restricted the import of Chilean apples to the Community gave some specific protection to the importers whose apples were in transit when the measure was adopted.

In *Les Verts*⁴⁶ the Court granted standing to the French Green Party on the policy grounds: applicants had a good case on merits and there was no obvious alternative route whereby the applicants could enforce the principle of equality in the context of the Parliament's organization of its own business⁴⁷. The applicant, a political party, sought the annulment of two measures adopted by the Parliament on the reimbursement of expenses incurred by parties taking part in the 1984 elections. It argued that the limitation of the Court's jurisdiction only to the acts of the Commission and the Council under Article 164 (now Article 220) gives rise to a denial of justice. The Parliament did not contest the admissibility of the action, accepting that the Court could review also acts of other institutions. The Court agreed with the parties and made a series of significant statements about the nature of the system established by the Treaty and the importance of the judicial review⁴⁸. It began by emphasizing that

'[...]the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty'⁴⁹

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'

and although Article 173 (now 230) only mentioned the acts of the Council and the Commission, the general scheme of the Treaty was to make a direct action available against any measure adopted by the institutions, which was intended to have a legal effect⁵⁰. The reason the Parliament was not expressly mentioned in article 173 was that, in its original form, the Treaty gave it no power to adopt measures intended to have legal effect *vis-à-vis* the third parties⁵¹. The Court concluded that

'An interpretation of Article 173 [now 230] of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in article 164 [now 220] and to its system'⁵².

and admitted that an action for annulment may lie against the measure adopted by the European Parliament. The implications of the judgment in *Les Verts* for private applicants will be discussed below.

In competition law cases the ECJ has also been more liberal with regard to standing. In *Metro*⁵³ an applicant, disappointed with a decision of the Commission addressed to SABA concerning the legality of the distribution system operated by SABA, was granted standing to challenge this decision. The position

⁴⁴ Case 11/82 *Piraiki – Patriaiki v. Commission* [1985] ECR 207

⁴⁵ Case C-152/88 *Sofrimport Sarl v. Commission* [1990] ECR I-2477

⁴⁶ Case 294/83 *Partie Ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339

⁴⁷ JO SHAW, p. 512

⁴⁸ ARNULL, *The European Union and Its Court of Justice*, Oxford EC Law Library, 1999, p.35, hereinafter, *The European Union...*

⁴⁹ *Les Verts*, at para.23

⁵⁰ *ibidem*

⁵¹ ARNULL, *The European Union*, p. 35

⁵² *Les Verts*, at para.25

⁵³ Case 26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977] ECR 1875

of the applicants is often made easier because they are involved in the process and they would normally contest the decisions addressed to them by the Commission⁵⁴.

In the area of state aid the applicants are not afforded the same consideration as in the competition law cases, but the Court has proved to be liberal also here (cases *COFAZ*⁵⁵, *William Cock*⁵⁶, *Phillip Morris Holland*⁵⁷).

In the area of anti-dumping a company which initiated the complaint about dumping, but is unhappy with the resultant regulation may be granted standing as in the case *Timex*⁵⁸, as well as a producers of products which is subject to anti-dumping duty (at least insofar as they were identified in the measure adopted by the Commission or involved in the preliminary investigation), e.g. case *Allied Corporation*⁵⁹, or finally the importer of the product against which the anti-dumping duty has been imposed as in the case *Extramet*⁶⁰. In this case the applicant was the largest importer of the product forming the subject-matter of the anti-dumping measure and at the same time, the end-user of the product (calcium). The only Community producer of calcium refused to supply raw material to the applicant and also claimed that its supplies from outside the EC were being dumped in the EC. As a result of this a dumping duty was imposed and this was this duty which Extramet then sought to have annulled. In an Opinion in this case Advocate General Jacobs made very clear that he considered that the EU system of judicial review needed to be able to offer a substantive investigation of this type of case. The court ruled that

'measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to certain traders who therefore have standing to bring an action for their annulment'⁶¹

Extramet ruling seemed to herald a new era of a more liberal approach the standing of individuals, especially when it was confirmed three years later in *Codorniu*. However, the Court failed to acknowledge that it represented a departure from earlier case law or to explain its implications outside the dumping context.

I-2 Critical analysis of the strict interpretation of the notion of 'individual concern' in Article 230 (4) EC

The Plaumann test

The test for individual concern applied by the Court since *Plaumann* has been strongly criticised because it is a real hurdle in gaining access to the Court, preventing private cases from being heard. The exceptions to the rule are few and casuistic, e.g. retroactive legislative measures, certain procedural rights accorded to a party by virtue of its participation in the formal procedure leading to the adoption of a contested act and protection of previously acquired rights, which the institution has to take into account when adopting an act. The problem arises especially with regard to self-executing acts of general application which have direct legal effects without the adoption of national legal measures (act of transposition) or Community legal measures (act of implementation). Such an act may concern an individual directly and if individual alleges its illegality, he would have to breach the Community law and then appeal against the sanction which the national courts could impose on him by reason of that breach in order to contest the validity of an allegedly illegal measure before the national court. The situation where an individual affected by a Community measure, in order to contest its validity, has to breach the

⁵⁴ JO SHAW, p. 518

⁵⁵ Case 169/84 *COFAZ v. Commission* [1984] ECR 391

⁵⁶ Case C-198/91 *William Cock plc v. Commission* [1993] ECR I-2486

⁵⁷ Case 730/79 *Phillip Morris Holland BV v. Commission* [1980] ECR 2671

⁵⁸ Case 264/82 *Timex Corporation v. Council and Commission* [1985] ECR 849

⁵⁹ *Allied Corporation*, *supra* note 28

⁶⁰ *Extramet*, *supra* note 29

⁶¹ *Extramet*, *supra* note 29 at para. 14

rules invoked by the measure and invoke their legality in the framework of the procedures open to him, is perceived by many as the denial of adequate judicial protection⁶².

The *Plaumann* test can be criticised on both pragmatic and conceptual grounds⁶³. First of all, it is economically unrealistic, because if there is a limited number of firms pursuing certain activity, this is not fortuitous and their number will not grow suddenly. The firms that are established in the market can satisfy its current demand, and if the demand rises rapidly, they will normally import more of the product. Therefore an argument that the activity of importing clementines (as in *Plaumann's* case) can be undertaken by any person and that for this reason the applicant is not individually concerned, is unconvincing⁶⁴. The applicant is most likely never to succeed, except in a very limited category of retrospective cases, because it can always be argued that others may engage in the trade at some moment. Moreover, the applicant in *Plaumann* case was not granted standing because he belonged to an open category of applicants and therefore he was not individually concerned. Open category is the one in which the membership is not fixed at the time of a measure, as opposed to the closed category, the membership of which is fixed, and those who belong to it are individually concerned. This argument is subject to criticism both in practical terms – because it rules out the standing for any applicant, even if there is only a very limited number presently engaged in this trade, on the grounds that others may undertake the trade thereafter, and in conceptual terms – if we regard a category as open merely because others might notionally undertake the trade at issue, then any decision with a future impact would be unchallengeable because the category would be regarded as open⁶⁵.

The rationale behind the Court's approach - critique

The restrictive application of standing rules under Article 230 has long been subject to debate. It seems that the court has been influenced by a number of factors, some connected with the perceived intentions of the authors of the Treaty and some with the Court's own view of the needs of the Community system⁶⁶. Several authors attempted to explain the Court's approach. One of the arguments can be found in the early case *Producteurs de Fruits*⁶⁷ where the Court stated that:

'the system (...) established by the Treaties of Rome lays down more restrictive conditions than does the ECSC Treaty for the admissibility of applications for annulment by private individuals.'

Therefore the answer can be found in the language of the Treaty – Article 230 (4) is based on the assumption that it would not be a good policy to allow private parties to challenge measures such as regulations and decisions addressed to the Member States⁶⁸. However, this consideration seems unconvincing today, when the Community has developed in a way unforeseen by the authors of the Treaty⁶⁹. The question is not whether the Treaty imposes limits on standing, but whether the interpretation of those limits could be considered to be overly restrictive. The judgement in *Codorniu* gave some hope to the applicants, and therefore the idea that the Court's case law in this area is simply an application of the intent of the Treaty, and that it renders further evaluation of the policy issues underlying this case law unnecessary, does not suffice⁷⁰.

⁶² *ibidem*

⁶³ CRAIG & DE BÚRCA, p.489

⁶⁴ *ibidem*

⁶⁵ *ibidem*

⁶⁶ ARNULL, *The European Union...*, p.47

⁶⁷ Case 16/60, *Producteurs de Fruits v. Council*, [1962] ECR-901

⁶⁸ CHRISTOPHER HARDING, 'The Private Interest in Challenging Community Action', (1980) 5 ELRev., p.354, hereinafter, Harding

⁶⁹ *ibidem*

⁷⁰ CRAIG & DE BURCA, p.513

In any case, whatever the intent of the authors of the Treaty, the Community has moved on. There is a need for a control of illegality by and through individual actions, and it is as important in the Community context as in the national legal systems. The Court has proved to be capable of adapting the Treaty articles to meet the current needs of the Community in other areas and it is difficult to see why it would not be able to do the same with regard to Article 230 (4).

Another explanation may be that the Court's ultimate goal is to 'function as a kind of supreme appellate court for the Community' and therefore the apparently restrictive interpretation of Article 230 (4) is a 'part of a far-reaching plan to bring about a modification of the Community's judicial system'⁷¹. However, it is difficult to accept it as a main motivation of the Court, because the restrictive case law was developed in the 60's at the time when the Court was not faced with severe work-load problems⁷². Moreover, it is not convincing that the Court would like to limit the range of applicants who can challenge a measure under Article 230 with the intention of forcing claims through Article 234, when it would have very little control over the range of applicants using the latter Article, or the types of norms challenged thereby (as the individual can for example base his claim on the fact that the norm in question is contrary to a directly applicable Treaty article)⁷³.

Hartley⁷⁴ has proposed another explanation, focusing on the subject matter of the cases involved. Almost all cases in which the Court rejected the claim as inadmissible, concerned challenges to norms made pursuant to Common Agricultural Policy. In this field the Commission and the Council have to make difficult discretionary choices. The Court has accepted that the Community institutions have a considerable degree of choice as to how to balance the objectives which are to be pursued. The choice will not always please all those concerned and therefore countless claims are possible, given the number and scope of decisions and regulations made by the Community in the context of the CAP. The Court wanted to avoid the situation in which it would have to second-guess the discretionary choices made by the other institutions, and in order to do it, it could either adopt a restrictive standard of review (overturn choices made by the original decision-makers only in case of manifest error) or use strict tests of standing to limit the number of such cases heard under Article 230⁷⁵, which engages less of its time. The argument, that the Court did not wish to be overloaded with large number of cases where the applicants seek to challenge the way that the Commission and the Council have exercised their discretion to make policy choices in the CAP is reinforced once one looks at the post-*Codorniu* case law, where the strictest interpretation of the *Plaumann* test of individual concern has been in the CAP cases, or other areas where discretionary choices are being made⁷⁶.

The subject-matter argument helps to explain the more liberal case law in the context of dumping, state aids and competition. First, the procedure in these areas does explicitly or implicitly envisage a role for an individual complainant, who can alert the Commission. The complainant may play a prominent role in the quasi-judicial assessment⁷⁷ of whether the alleged breach has actually occurred. Second, the interests of the Community in these areas can be stated less equivocally and this can be contrasted with the mainline cases in the CAP where there are conflicting claims within the Community.

More recent work critiquing the approach taken by the Court has placed it within a framework of the broad-based challenge which standing poses for modern administrative law⁷⁸. According to Arnall⁷⁹, any modern polity, which purports, like the European Community, to be based on the rule of law, must provide a mechanism for subjecting the activities of its legislative and executive bodies to judicial review. The effectiveness of such a mechanism depends to a large extent on the ease with which it may be used by private applicants. The more relaxed approach to standing rules promotes the proper functioning of the

⁷¹ HJALTE RASMUSSEN, 'Why Is Article 173 Interpreted Against Private Plaintiffs?', (1980) 5 ELRev., p.112

⁷² HARDING

⁷³ CRAIG & DE BÚRCA, p.511

⁷⁴ T.C. HARTLEY, *The Foundations of European Community Law*, Oxford University Press, Oxford 1998, p.333-41, hereinafter, Hartley

⁷⁵ CRAIG & DE BÚRCA, p.514

⁷⁶ See e.g. *Greenpeace International v. Council*, *supra* note 36

⁷⁷ HARTLEY, p.364-9

⁷⁸ JO SHAW, p.520

⁷⁹ ARNULL, *The European Union...*, p.47

democratic process because it facilitates public participation in decision-making. The standing of an individual to challenge the acts affecting him may be considered a fundamental right and therefore an aspect of citizenship⁸⁰. This should be especially relevant in case of the European Union, trying to get closer to citizens. The question of standing cannot be separated from the question of the EU's democratic deficit and consequently the role of the Court in the institutional structure⁸¹.

Standing is also linked to broader questions of participation and intervention in the decision-making process. The greater the participation afforded to parties, when the initial decision was made, the greater the likelihood that such parties should be granted standing to challenge the resulting decision before the Court via the judicial review⁸². Participation is recognized as a way to legitimize the decision. It makes the decision-making more accessible to those affected and enables them to have a direct input into the decision reached. Finally, participation ensures transparency⁸³. In this respect we have to note that the ECJ generally resists the connection between the fact of participation in the making of a legislative measure and standing, with an exception of the areas of dumping, state aids and competition. The participation does not lead to standing where a relevant Treaty Article does not provide for any intervention rights in the making of the original measure. Neither there is any general right to be heard before the adoption of Community legislation, the only obligations to consult are those laid down in the relevant Treaty Article on which the Community act is based⁸⁴. Due to the nature of the link between the standing and participation it is difficult to expect the radical change in the approach to standing in the absence of a form of arrangement for administrative procedures which located the individual more centrally within those processes⁸⁵.

Importantly, the Court has continuously justified its restrictive approach on standing of individuals by reference to what the Court coins the complete system of remedies created by the EC Treaty. The complexity of means for redress available under the Community law has the first time been affirmed in a judgment in *Les Verts*⁸⁶. Accordingly, no Community measure can escape judicial control as to its conformity with the Treaty as a measure may be controlled either through a direct action based on Article 230 (4) or through a preliminary ruling according to Article 234⁸⁷.

The Court argues that the restrictive interpretation of Article 230 (4) does not create a real lacuna in judicial protection since individuals have the possibility to file actions against national application or implementation measures of the Community before the national courts, which have the obligation, according to Article 234 and the courts case law since *Foto-Frost*⁸⁸, to refer questions concerning the validity of EC acts to the ECJ. This way to attack the allegedly illegal Community acts can be very useful for private applicants, given the number of actions lodged before the national courts by private parties. In case of the preliminary ruling procedure, the Court has enlarged the limits of its jurisdiction beyond those established by the provisions of the Treaty, in order to attain a system of judicial protection without any gaps. This contrasts with the Court's approach in the area of actions brought by private parties under Article 230 (4), where the Court has preferred to abide by the restrictive wording of that legal provision⁸⁹. The shortcomings of the Court's approach will be discussed below together with the evaluation of the extent to which the principle of effective judicial protection is in reality ensured in the European Community.

⁸⁰ *ibidem*

⁸¹ C. HARLOW, 'Towards a Theory of Access for the European Court of Justice', (1992) 12 YEL 213, p.?

⁸² CRAIG & DE BURCA, p. 516

⁸³ *ibidem*, p.517

⁸⁴ *ibidem*

⁸⁵ JO SHAW, p.520

⁸⁶ Case 294/83, *Les Verts v. Parliament* [1986] ECR-1339

⁸⁷ DOMINK HANF, 'Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in *Jégo – Quéré*', GLJ vol.3 No.7 1 July 2002

⁸⁸ Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR-4199

⁸⁹ ALBORS-LLORENS, p.182,

CHAPTER II: THE ALTERNATIVE WAYS OF REDRESS FOR INDIVIDUALS – IS THE PRINCIPLE OF EFFECTIVE JUDICIAL PROTECTION ENSURED?

II-1 The principle of effective judicial protection in the European Community

The notion of effective judicial protection

The principles of effective judicial protection and effectiveness of EC law are one of the main notions in the jurisprudence of the European Court of Justice. The Court sees them as fundamental for the legal system of the Community and often uses them as an explanation of its reasoning or as an argument in its judgments. They justify directly or indirectly the principle of primacy and direct effect of EC law, the obligations imposed on the national courts to interpret the law in accordance with EC law and to apply the interim measures not provided by national legal systems, the non-contractual liability of Member States and the obligation to ensure the judicial means of protection of the rights of individuals⁹⁰.

ECJ does not define the notion of effective judicial protection. It states only that this is one of the fundamental principles of the Community legal order, derived from the common constitutional traditions of the Member States and confirmed in the European Convention on the Protection of Human Rights and Fundamental Freedoms. The principle was first enunciated in 1986 in a case *Johnston*⁹¹. On the basis of the case law of the ECJ it can be concluded that this principle means the obligation to protect and safeguard all the rights conferred upon individuals by EC law⁹². The principle of effective judicial protection should be respected both by the institutions of the Member States and of the Community. All the institutions applying EC law should take into account this principle with regard to individuals and the particular role is that of the national courts and the European Court of Justice. ECJ ensures that the institutions of the Community enforce the rights of individuals but it also controls the way in which the Member States fulfil the obligations imposed on them by the Treaty, among others the enforcement of the rights of individuals. However, these are mainly the national courts that are responsible for the protection of the rights of private persons, because they can seize them directly (and they are not able to seize ECJ against the institutions of the Member States).

Double standards in the realization of the principle of effective judicial protection by the European Community?

Despite the fact that the principle of effective judicial protection should be ensured both by the Member States and the institutions of the Community, it can be seen from the case law of the Court, that in reality this applies only to the obligations of the Member States⁹³. In fact the Court has been very strict with Member States' courts whenever they did not comply with the requirement of effective judicial protection. It is therefore striking that the judicial protection of private parties in the EU today appears to be worse than in the judicial systems of the Member States. This means that the more Member States transfer sovereign powers to the Community, the less the guarantees of judicial protection are. Combined with the lack of complete parliamentary control of EC acts, the difficulty of exercising judicial control on these acts

⁹⁰ NINA PÓLTORAK, 'Kto jest związany zasadą efektywnej ochrony prawnej – uwagi na tle orzecznictwa Trybunału Sprawiedliwości w sprawie „Unión de Pequeños Agricultores”, *Kwartalnik Prawa Publicznego* 3/2002, p.187-204 (Who Is Bound With the Principle of Effective Judicial Protection – Some Remarks to The Judgment of the ECJ In the Case *Unión de Pequeños Agricultores*) text available in Polish

⁹¹ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651 at para.18: The principle of effective judicial control laid down in article 6 of Council Directive 76/20, a principle which underlies the constitutional traditions common to the Member States and which is laid down in articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts. The provision contained in article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.

⁹² *ibidem*

⁹³ *ibidem*

puts the action of EC institutions to some extent outside the traditional system of 'checks and balances' characteristic of democratic states⁹⁴.

It can be affirmed that the subjects of EC law enjoy actual judicial protection which allows them to assert their legitimate rights thanks to one of the procedures provided for by the Treaty. Nevertheless, the actual protection is not the same as the effective judicial protection. The latter goes further than the former and presupposes the voluntary and dynamic move, which ensures the effectiveness of the protection and allows the beneficiary of the right to initiate the action, gives him the possibility to institute and carry the proceedings within the coherent system characterized by the respect of justice. This requires an effort and constant attention to interpret the texts in a way which serves best the recognition of this principle⁹⁵.

Individuals enjoy the actual protection of their rights in the Community but the appreciation of the Court, especially with regard to requirements for admissibility of actions, have contributed to the sometimes excessively narrow interpretation of provisions of the Treaty, and therefore some of the judgments seem to be more bold or less innovatory than the others. The details which distinguish between the implications of particular cases, even these which highlight the differences between them, prove that the passage from the actual to effective protection should be ameliorated in the perspective of security and efficiency of law⁹⁶.

The necessity to achieve the effective judicial protection is an objective attributed to the Community judges. This is an obligation imposed by them by the human rights acts which apply in all Member States. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that

In the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing (...) by an independent and impartial tribunal established by law.

Article 13 of the Convention further provides that

Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy, even against public authorities.

On the basis of these articles, the European Court of Human Rights has on several occasions condemned unduly restrictive legal systems in relation to actions for annulment brought by individuals against normative acts. Article 13 ECHR can be considered as a part of the Community legal order in application of Article 6.2 of the Treaty on the European Union (TEU) according to which

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Since fundamental rights are an integral part of the general principles of which the Court ensures observance, an effective review of the legality should also be guaranteed in the Community⁹⁷.

The *ubi ius ibi remediis* principle envisaged in Article 47 of the Charter of Fundamental Rights of the EU also calls for the opening of the conditions on admissibility. Article 47 recognizes that

⁹⁴ HENRY G. SCHERMERS AND DENIS F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer 2001, p.451, hereinafter, SCHERMERS & Waelbroeck

⁹⁵ GEORGES VANDERSANDEN, 'La protection juridictionnelle effective: une justice ouverte et rapide?', in Marianne Dony & Emmanuelle Bribosia (eds.), *L'avenir du système juridictionnelle de l'Union Européenne*, Institut d'Etudes Européennes, Brussels 2002, p.119-154, hereinafter VANDERSANDEN

⁹⁶ *ibidem*

⁹⁷ SCHERMERS AND Waelbroeck, p.450

Everyone whose rights and freedoms guaranteed by the Union are violated has the right to an effective remedy before a tribunal [...].

The notion of 'tribunal' should be interpreted largely to comprise both the national and Community jurisdiction. This makes the requirement of effective judicial protection more difficult to realize because of the autonomy which these systems enjoy, being nevertheless linked together by the principle of subsidiarity. This principle is, as it has been said, an objective to be achieved by the dynamic application of the ways of redress, which takes into consideration the specifics of the Community legal order and the respect of the fundamental rights. The Community jurisdiction has been aware of that and it has aimed to remove the obstacles, existing in the national legal orders with regard to ways of redress or procedural rules, in order to safeguard the rights conferred upon individuals by EC law in an enlarged and – to the extent in which it is possible – unified national procedural area⁹⁸. In its case law the ECJ has affirmed i.a. the right to access to justice, the development of the internal ways of redress (even the creation of the new procedures) of which the best example may be the liability of the Member State in case of violation of EC law⁹⁹, the development of the procedural laws of the Member States in a way which ensures the most complete application of EC law.

The same principle applies when the Community legal order is itself subject to the control of the Court. However, the approach is not the same. From the perspective of the enforced effectiveness of judicial protection the interpretation by the Community courts of the conditions for admissibility of actions brought by individuals under Article 230 (4) seems to be overly restrictive. Many applicants faced almost insurmountable difficulty in proving direct and individual concern and therefore some of them invoked the lack of effective judicial protection. Unfortunately, this argument has been constantly rejected by ECJ and recently by CFI. In an order in case *Molkerei Großbraunshain and Bene Nahrungsmittel v. Commission*¹⁰⁰ CFI stated that it was not

'legally impossible for an applicant to address himself to a national court which could, if appropriate, make a reference to the Court of Justice for a preliminary ruling under Article 177 of the Treaty [now Article 234] on the validity of the regulation'

and declared the action on annulment inadmissible. In an order in another case, *UPA v. Council*¹⁰¹ CFI decided that the applicant

'cannot be regarded as individually concerned by Regulation No 1638/98 by reason of lack of effective legal protection, that is to say, because there are no legal remedies under national law which make it possible, if necessary, to review the legality of the contested Regulation by means of a reference for a preliminary ruling under Article 177 of the Treaty (now Article 234 EC). The principle of equality for all persons subject to Community law in respect of the conditions for access to the Community judicature by means of the action for annulment requires that those conditions do not depend on the particular circumstances of the judicial system of each Member State'.

The same principle was announced by the CFI in its judgment in the case *Salamander and others v. Parliament and Council*¹⁰² :

'[T]he action for annulment brought by the applicants cannot be declared admissible because of the lack of adequate judicial protection which is said to follow from the absence of national remedies which might allow the validity of the directive to be reviewed by means of a reference for a preliminary ruling under Article 177 of the EC Treaty (now Article 234

⁹⁸ VANDERSANDEN, p.123

⁹⁹ Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029

¹⁰⁰ Case T-109/97 *Molkerei Großbraunshain and Bene Nahrungsmittel v. Commission*, [1998] ECR II-3533

¹⁰¹ Case T-173/98, *UPA v. Council*, [1999] ECR II-3357

¹⁰² Cases T-172/98, 175-177/98 *Salamander and others v. Parliament and Council*, [2000] ECR II-2487

EC), since the principle of equality of conditions of access to the Community judicature by means of an action for annulment requires that those conditions do not depend on the particular circumstances of the legal system of each Member State, and from the fact that a reference for a preliminary ruling is less effective than a direct action for annulment, since that circumstance, even if proved, could not entitle the Court of First Instance to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by Articles 173 and 177 of the Treaty and by Article 178 of the EC Treaty (now Article 235 EC) and designed to give the Court of Justice and the Court of First Instance power to review the legality of acts of the institutions’.

In addition the Court finds that it does not appear that the applicants are deprived of all right of recourse against the possible consequences of a directive in question. They may in any event, if they consider themselves to have suffered damage flowing directly from that measure, challenge it in proceedings for non-contractual liability under Article 288 EC.

The recent orders of ECJ are of particular importance here. In joint cases *Area Cova v. Council* and *Area Cova v. Council and Commission*¹⁰³ the applicants dispute the effectiveness of a system of judicial protection requiring individuals first to choose a domestic remedy, coupled with the possibility of a reference for a preliminary ruling as to validity, in order to challenge the application of a Community regulation. Since such a reference is extremely hypothetical and the procedure provided for is very cumbersome, the remedy does not satisfy the requirements of effective judicial protection in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in conjunction with Article 6(2) of the Treaty on European Union. According to applicants, they could be guaranteed such protection only by a direct action brought under Article 230 of the EC Treaty¹⁰⁴. ECJ answered in a way very similar to CFI underlining that

‘it must be stated that the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power to grant interim relief and, where appropriate, to make a reference for a preliminary ruling, as explained in paragraph 85 of the order under appeal, *constitutes the very essence of the Community system of judicial protection*¹⁰⁵. Alongside the possibility, for those who comply with the conditions of admissibility laid down in the Treaty, of challenging a Community measure by bringing an action for annulment before the Community judicature, individuals have access to the legal remedies available in the Member States in order to assert their rights under Community law and the preliminary reference procedure enables effective cooperation to be established for that purpose between the national courts and the Court of Justice’.

According to the Court

‘the circumstance that one of those remedies would not be effective in the present situation, even assuming it to be established, cannot constitute authority for changing, by judicial action, the system of remedies and procedures established by Articles 230, 234 and 235 of the EC Treaty which is designed to give the Community judicature the power to review the legality of acts of the institutions. It cannot in any event allow an action for annulment brought by a natural or legal person who does not satisfy the conditions laid down by the fourth paragraph of Article 230 of the Treaty to be declared admissible’¹⁰⁶.

¹⁰³ Cases C-300/99 *Area Cova and others v. Council* [2001] ECR I-983 and C-301/99 *Area Cova and others v. Council and Commission* [2001] ECR I-1005

¹⁰⁴ *Area Cova*, *supra*, at para. 53

¹⁰⁵ emphasis added

¹⁰⁶ *Area Cova*, *supra* note 103, at para.55

II-2 The shortcomings of the Court's traditional approach: does the EC Treaty provide for a complete system of remedies?

The preliminary ruling procedure under Article 234 EC

The question is whether private parties can really choose between these two procedures or can they only bring proceedings before the national courts, with an objective to have a question about the validity of a Community act raised by these courts, when the procedure under Article 230 (4) is not available for them. Since the decision of the Court in the *TWD Textilwerke*¹⁰⁷ in 1994 the role of the system of preliminary rulings appears more than ever to be an alternative to annulment proceedings rather than a parallel method of review¹⁰⁸. The litigants have been precluded from bringing Article 234 validity proceedings before national courts if they 'without any doubt' would have been entitled to bring Article 230 (4) nullity review within the two month time-limit supplied by that provision. However this is not always clear for private parties to determine if they are among the class of litigants bound to act expeditiously and seek an Article 230 (4) remedy (because of the nature of the test for standing, which has changed over time)¹⁰⁹.

The advantage of the procedure set out in Article 234 is that the conditions for standing are less strict than in annulment proceedings. There are many examples in the case law of the Court where preliminary references from national courts have allowed individuals and undertakings to obtain a ruling on the validity of EC regulations and decisions that they could not possibly have challenged by means of direct action before the ECJ (or CFI), owing to their lack of *locus standi*¹¹⁰. The regulations concerned were general market regulations, and actions by non-privileged applicants would most probably have been declared inadmissible. These regulations infringed the general principles of law or Treaty provisions, or reflected the situations where the Community institutions have exceeded their powers. As the Community is based on the rule of law, they ought to have been reviewed by the Court of Justice¹¹¹.

The advantages for private parties of the Article 234 procedure and the creative role of the Court in this field do not however justify the statement, that this procedure not only provides for a suitable alternative to Article 230 (4) but is the main remedy available to private parties to protect themselves against the action of the EC institutions and therefore the restrictive approach of the Court of Justice to the interpretation of Article 230 (4) has been a deliberate move to divert all applications to Article 234 of the EC Treaty¹¹². Despite of all the advantages it is necessary to identify those situations, in which the proceedings under Article 234 are not a suitable alternative to a direct action, and where the parties may be left without a remedy¹¹³. First, the parties have no guarantee that the national court finds it necessary to refer the question to the Court of Justice and cannot compel the national court to make that reference¹¹⁴. Second, for the applicants to be able to bring proceedings before the national court, with an intention of obtaining the ruling on the validity of a Community measure, there must be a national measure implementing the Community measure. In cases where the EC measure is directly applied to individuals and undertakings, without any intervention by the Member States, the applicants cannot bring proceedings before the national courts and the possibility of a reference to the Court of Justice is ruled out¹¹⁵.

¹⁰⁷ Case C-188/92 *Textilwerke Deggendorf v. Germany*, [1994] ECR I-833

¹⁰⁸ ALBORS-LLORENS, p.185

¹⁰⁹ ANGELA WARD, 'Judicial Architecture at the Cross-Roads: Private Parties and Challenge to EC Measures Post – *Jégo – Quéré*', *The Cambridge Yearbook of European Legal Studies*, vol.4, 2001, p.424, hereinafter, Ward

¹¹⁰ See for instance case 101/76, *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR-797 and case 125/77, *Koninklijke Scholten-Honig NV and others v. Hoofdproduktschaap voor Akkerbouwprodukten*

[1978], ECR-1991, case 97/85, *Deutsche Lebensmittelwerke v. Commission* [1985] ECR-1331 and joint cases 133-136/85 *Walter Rau Lebensmittelwerke and others v Bundesanstalt für landwirtschaftliche Marktordnung*, [1987] ECR-2289

¹¹¹ ALBORS-LLORENS, p.187

¹¹² RASMUSSEN, *supra* note, p.114 and 122-7

¹¹³ ALBORS-LLORENS, p.188

¹¹⁴ Case 93/78, *Mattheus v. Doego* [1978] ECR-2203

¹¹⁵ Case 30/64, *Sgarlata v. Commission*, [1965] ECR-215

Finally, national court cannot declare the EC measure invalid, it can at the most issue an interim order suspending the application in the instant case of the EC measure in question, pending the ruling to the ECJ.

Additional problem arises in the field of new Community competences: a measure adopted under Title IV EC (visas, asylum and immigration) may only be a subject of preliminary ruling by the courts from whose decisions there is no judicial remedy. Therefore the hands of lower courts are tied and if we take into account time to wait for an appeal and time necessary for Article 234 procedure we may see that there is a problem with the compliance of art 68 (1) with article 47 of the Charter and article 6 and 13 of ECHR (fundamental right to effective judicial review)¹¹⁶.

The procedure under Article 234 is alleged to be insufficient in comparison with the review by the CFI under Article 230. It has been recently criticised by the Advocate General Jacobs in his Opinion in case *Union de Pequeños Agricultores*¹¹⁷, which will be discussed in details later.

The action for damages under Article 288 (2) EC

The second action which may be regarded as an alternative to Article 230 (4) is the damages procedure under Article 288 (2). An individual can seek compensation before the CFI for any loss suffered, which was caused by the EC institutions. In cases *Lütticke v. Commission*¹¹⁸ and *Zuckerfabrik Schoeppenstedt v. Council* the Court acknowledged the autonomy of the action for damages. The act which allegedly infringed applicant's rights does not have to be annulled before the action for damages can be brought. However, if the action concerns the regulation, the illegality needs to be of special gravity¹¹⁹. In *Zuckerfabrik Schoeppenstedt* the Court formulated the '*Schoeppenstedt* formula' according to which there is no liability of the Community 'unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred'. The Court has applied this formula in later cases and as it is not easy to meet the test, the action has been successful in very few cases. It seems that the Court has followed a very restrictive approach in the access of non-privileged applicants to the action for annulment and to the action for damages¹²⁰. In the latter case, however, the cases are admitted and examined with regard to merits, but then they are dismissed as unfounded. Moreover, in principle the applicants should first seek redress before Member State courts via the Article 234 validity procedure, but this requirement only applies if such national proceedings would have afforded the applicant with an effective remedy¹²¹. The CFI has recently shed light on the circumstances in which litigants will not be bound to exhaust Member State remedies before instituting Article 288 (2) review¹²², but the precise content of the rule is not yet determined.

When considering whether action for damages can be an alternative to action for annulment, one should not forget that the former has an essentially different purpose¹²³. Although the finding of the illegality of the measure at issue is one of the conditions for a successful action for damages, a private applicant obtains the compensation and not a formal ruling on the validity or legality of the Community act. In special circumstances, when the individual has suffered an economic loss and there are no national implementing measures, which makes an action before national courts impossible, procedure under Article 288 (2) may be a suitable alternative. The advantages of this procedure are that there is no requirement of individual and direct concern and the limitation period is five years (in 230 (4) – 2 months).

¹¹⁶ WARD, p.416

¹¹⁷ Opinion of Advocate General Jacobs, delivered on 21 March 2002 in case C-50/00, *Union de Pequeños Agricultores v. Council* [2002], ECR I-6677

¹¹⁸ Case 4/69, *Lütticke / Commission*, [1971], ECR-325, case 5/71 *Zuckerfabrik Schoeppenstedt v. Council*, [1971] ECR-975

¹¹⁹ ALBORS-LLORENS, p.205

¹²⁰ *ibidem*

¹²¹ Case 281/82, *Unifrex v. Council and Commission* [1984], ECR-1969

¹²² Case T-30/99, *Bocchi Food Trade International v. Commission* (Rec.2001,p.II-943), case T-18/99, *Cordis v. Commission* (Rec.2001,p.II-913), case T-52/99, *T. Port v. Commission* (Rec.2001,p.II-981)

¹²³ *ibidem*

It can be concluded that both on the side of ECJ and CFI there is a tendency to send the applicants back to the national judge, increasing the number of cases decided by him and reinforcing his responsibility, in the name of the 'global' system of community jurisdictional protection. At the same time, in absence of the national means of redress, the Community courts do not provide in return for admissibility of actions on annulment because they claim that they cannot put themselves in the position of the Community legislator. In saying so they entrench themselves behind their own restrictive interpretation of direct and individual concern, which is in essence exceptional in the entirety of national and international administrative jurisdiction and therefore it could – and even should – be changed. It seems that the Community jurisdiction has achieved its limit by rejecting constantly all the arguments in favour of wider opening of direct actions for individuals¹²⁴.

CHAPTER III: A REVOLUTION WHICH HAS NOT YET TAKEN PLACE?

III-1 Recent judgments of CFI in *Jégo-Quéré* and ECJ in *UPA*

Judgment of the Court of First Instance in *Jégo-Quéré* – a revolution in the Community system of judicial protection?

On 3rd of May 2002 the Court of First Instance delivered a judgment in case *Jégo-Quéré & Cie v. Commission*¹²⁵. This judgment was seen by many as revolutionary step with regard to the conditions on admissibility of action on annulment by private parties. As stated in a press release after the judgement, CFI, conscious of the need to ensure effective protection of legal rights for European citizens and businesses, redefined the rules governing individual access to Community courts¹²⁶. In doing so, CFI adopted to a big extent the Opinion delivered by Advocate General Jacobs in case *Unión de Pequeños Agricultores (UPA)* pending at the same time before the ECJ¹²⁷.

Jégo-Quéré & Cie S.A. is a French fishing company operating on a regular basis in the waters south of Ireland. It owns four fishing boats over 30 meters in length and uses nets having a mesh of 80 mm, which have been banned by a new Community regulation¹²⁸. It applied to the Court of First Instance for annulment of two provisions of the regulation in question, which require fishing vessels operating in certain defined zones to use nets having a minimum mesh for beam trawling. The Commission argued that the Court of First Instance should declare the action inadmissible on the basis of lack of individual concern, required under Article 230 (4) EC. Whilst not denying that the contested provisions are of direct concern to *Jégo-Quéré*, it claimed that the applicant is not individually concerned, inasmuch as the rules governing mesh sizes apply equally to all operators fishing in the Celtic Sea and not just to that operator.

CFI first stated that the contested regulation was a measure of general application because its provisions are 'addressed in abstract terms to undefined classes of persons and apply to objectively determined situations'¹²⁹ and not a 'bundle of individual decisions' as argued by the applicant. Second, the Court applied the 'Plaumann test' and found that the applicant is not individually concerned by the regulation according to this test. Neither did it qualify for special rules on standing established in cases *Extramet* and *Codorniu*. For these reasons the Court concluded that the applicant could not be individually concerned within the meaning of Article 230 (4), as interpreted in the case law.

¹²⁴ VANDERSANDEN, p.134

¹²⁵ Case T-177/01 *Jégo-Quéré & Cie v. Commission*, [2002] ECR II-2365

¹²⁶ Court of Justice, Press and Information Division, Press Release No 41/02, <http://www.curia.eu.int/en/actu/communiqués/cp02/aff/cp0241en.htm>

¹²⁷ Case C-50/00 *Unión de Pequeños Agricultores*, [2002] ECR I-6677

¹²⁸ Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture, OJ 1992 L 389, p. 1 (as amended)

¹²⁹ *Jégo-Quéré*, *supra* note 125, at para.23

However, *Jégo-Quéré* argued that if it is not given standing under Article 230 (4), it will be deprived of its right to access to a court, as guaranteed by Articles 6 and 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. The CFI examined different aspects of the right of individuals to access to the Community courts. In this respect, the CFI recalled that the Court of Justice had itself confirmed that access to courts was ‘an essential element of a Community based on the rule of law’¹³⁰. Therefore, CFI deemed it ‘necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting his legal situation, the inadmissibility of the action for annulment would deprive the applicant of the rights to an effective remedy’¹³¹. The Court answered this question in affirmative for three reasons. First, there was no national implementing measure required which meant that the applicant could not make use of the validity procedure under Article 234. CFI cited AG Jacobs at this point:

The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice¹³².

Secondly, CFI did not find action for damages under Article 288 (2) as adequate, because it would not result in the removal of measures attacked by *Jégo-Quéré*. Moreover, this action has a different character – the Court has to establish whether there was a sufficiently serious breach of rules of law intended to confer rights on individuals, while proceedings under Article 230 aim only at the review of the legality of an act. Thirdly, CFI agreed with AG Jacobs that there was

‘no compelling reason to read into that notion [of individual concern] 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’¹³³

CFI decided that neither Article 234 nor 288 (2) guarantee the right to an effective remedy, at least with respect to Community measures of general application directly affecting an applicant’s legal situation. However, the CFI rightly pointed out that in no case could these circumstances result in an action being considered admissible, without being covered by the conditions of Article 230 (4). Consequently, the CFI concluded that the notion of individually concerned must be reconsidered and proposed a new test for ‘individual concern’:

‘[I]n order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard’¹³⁴.

On this basis claim of was declared admissible.

The wording of *Jégo-Quéré* indicates that the CFI deliberately took the possibility to reconsider the notion of individual concern in an attempt to widen the possibilities for individuals to challenge Community measures and thereby further increase the legitimacy and credibility of Community law. This was most probably a carefully prepared step. CFI has always put emphasis on individual procedural guarantees and legal remedies¹³⁵. *Jégo-Quéré* clearly falls in the tendency of the Community Courts to enhance the

¹³⁰ *Jégo-Quéré*, at para.41

¹³¹ *Jégo-Quéré* at para.43

¹³² *Jégo-Quéré* at para.45

¹³³ Opinion of Advocate General Jacobs in *UPA*, *supra* note 117 at para.59

¹³⁴ *Jégo-Quéré*, at para.51

¹³⁵ KRONENBERGER & DEJMEK

protection of procedural and substantial fundamental rights, what has recently been exemplified by the case *Carpenter*¹³⁶.

It is also important to remember that judges of the Court and its Advocates General has for a long time expressed their concern about the restrictive interpretation of the wording of Article 230 (4)¹³⁷. In a report prepared before the Intergovernmental Conference which led to the adoption of the Treaty of Amsterdam, ECJ explicitly addressed the issue whether the right to bring an action for annulment under former Article 173 EC (Article 230), which individuals enjoy only with regard to acts of direct and individual concern to them, could be considered as sufficient to guarantee effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the Community institutions¹³⁸. This was clearly a signal sent by the Court to the Member States that it is aware of a lacuna in the system of judicial protection and yet it is not able to undertake the reform on its own. Unfortunately, Member States did not endorse this initiative and the rules concerning standing were left unchanged after the Treaty of Amsterdam.

The Opinion of Advocate General Jacobs in UPA – why is it possible and desirable to modify the Plaumann test?

The departure from the *Plaumann* formula in *Jégo-Quéré* is particularly clear¹³⁹. The new definition was apparently inspired by the Opinion of Advocate General Jacobs in UPA, which goes somewhat further than the ruling of CFI in *Jégo-Quéré*. In the very outset of this opinion, AG Jacobs underlined that the issue at stake in UPA was whether the notion of individual concern laid down in Article 230 (4) needed to be reconsidered. He expresses the broader sentiment that the Article 230 (4) procedure is manifestly more appropriate for examining the validity of all EC measures of general application than reference proceedings under Article 234, because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations followed by oral observations before the Court. The availability of interim relief under Articles 242 and 243 EC, effective in all Member States, is also a major advantage for individual applicants and for the uniformity of Community law¹⁴⁰. Further, the public is informed of the existence of the action by means of a notice published in the Official Journal and third parties may, if they are able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings interested individuals cannot submit observations under Article 20 of the Statute unless they have intervened in the action before the national court. That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene¹⁴¹.

Most importantly, Advocate General contended that it was

‘manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption’¹⁴².

¹³⁶ Judgment of 11 July 2002, Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR-I-06279: the principle of freedom to provide services laid down in the EC Treaty, read in the light of the fundamental right to respect for family life, precludes a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

¹³⁷ See for example MANCINI & KEELING, ‘Democracy and the European Court of Justice’ 57 (1994) MLR 175, 188.

¹³⁸ Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union, Luxembourg, May 1995, <http://europa.eu.int/en/agenda/igc-home/eu-doc/justice/>

¹³⁹ VINCENT KRONENBERGER & PAULINA DEJMEK, ‘Locus Standi of Individuals before Community Courts Under Article 230 (4) EC: Illusions and Disillusions after the *Jégo-Quéré* (T-177/01) and *Unión de Pequeños Agricultores* (C-50/00) judgments’, ELJ 5/2002, p.257-264, hereinafter, Kronenberger & Dejmek

¹⁴⁰ Opinion of AG Jacobs in UPA, *supra* note 133 at para.46

¹⁴¹ *supra* note 117, at para.47

¹⁴² *supra* note 117, at para. 48

This made the two-month limit supplied by Article 230 (4) preferable to Article 234 validity proceedings, which 'may in principle be questioned before the national courts at any point of time'¹⁴³. The strict criteria for standing for individual applicants under the existing case-law on Article 230 EC make it necessary for such applicants to bring issues of validity before the Court via Article 234 EC, and may thus have the effect of reducing legal certainty.¹⁴⁴

For this reason Advocate General Jacobs prescribed as follows the test for individual concern:

'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'.

Unlike the CFI in *Jégo-Quéré*, Advocate General would not oblige litigants to prove definite and immediate effects. Even the potential for substantial adverse effects would be sufficient to satisfy 'individual concern' under the test prescribed by him. Clearly, Advocate General intended to open the possibility to bring an action under Article 230 (4) to an even larger number of situations than the CFI has done in *Jégo-Quéré*. The usual mechanism for challenging the legality of EC measures of general application would thus shift from national courts and validity review, to the Article 230 (4) nullity procedure¹⁴⁵.

The excellent and exhaustive opinion of Advocate General Jacobs in *UPA* gives several reasons for which the criterion of 'individual concern' should be reconsidered. It is worth underlining what are the most important motives.

The first one relates to the necessity to put an end to the complexity and lack of coherence of the case law developed after *Plaumann*. In the past years, ECJ and CFI have developed what may be called exceptions to the rigidity of the *Plaumann* formula in several situations (see *supra*). However, this is far from being consistent, what can be seen for example in cases involving anti-dumping Community regulations¹⁴⁶.

The second reason is that the Court of Justice has not in the past refrained from interpreting broadly other provisions of Article 230. This was particularly the case in respect of the standing of the European Parliament in action for annulment of acts adopted by the other institutions (*Les Verts*¹⁴⁷). The reasons given by the Court to justify it might also have been thought to justify a relaxed approach to standing of natural and legal persons. This would also help consolidate the rule of law¹⁴⁸. The Court has also recognized that regulations and directives, although they are legislative measures, could also be challenged by private persons. This is an additional sign of a progressive approach to the interpretation of Article 230. Hence, it is not impossible to adopt a wider interpretation of the criterion of 'individual concern' laid down in Article 230.

The judgment of the European Court of Justice in Unión de Pequeños Agricultores – the time is ripe for political action?

The judgment in *Jégo-Quéré* was indirectly overruled by a judgment of ECJ in *UPA* on 25 July 2002. In this case a trade association of small Spanish agricultural businesses, Unión de Pequeños Agricultores,

¹⁴³ *supra* note 117, at para. 48

¹⁴⁴ *supra* note 117, at para. 48

¹⁴⁵ ANGELA WARD, p.432

¹⁴⁶ See more: VINCENT KRONENBERGER & PAULINA DEJMEK

¹⁴⁷ *Les Verts*, *supra* note 46

¹⁴⁸ ANTHONY ARNULL, 'The Action for Annulment: A case of Double Standards?' in D.O'KEEFE & A. BAVASSO (eds), *Judicial review in the European Union*, Kluwer 2000, p.185, hereinafter *The Action for Annulment...*

brought an appeal against the order of 23 November 1999 of the Court of First Instance dismissing its application for partial annulment of a regulation on the common organisation of the market in oils and fats, including the olive oil markets. The Court of First Instance held that application to be manifestly inadmissible on the ground that the members of the association were not individually concerned by the provisions of the regulation at issue. The Court of Justice has made it clear that the issue to be decided in this appeal is whether a person who is not individually concerned by the provisions of a regulation has standing to bring an action for annulment on the sole ground that the right to effective judicial protection requires it, given the alleged absence of any legal remedy before the national courts¹⁴⁹. In case of UPA there was no national implementing measure required which would allow the applicants to initiate the proceeding before the national court in order to make use of the preliminary ruling procedure under article 234. It was not even possible to infringe the national law by the applicants, which could result in bringing an action against them to the national court and consequently, to address ECJ by the national court with a preliminary question. On this basis the applicants argued that the denial of standing under Article 230 (4), coupled with the lack of alternative remedies, is contrary to the principle of effective judicial protection.

The delivery of this judgment was expected to set aside the legal uncertainty raised by the cohabitation of the traditional case law of the Court of Justice on one hand, and the new definition of 'individual concern' initiated by the Court of First Instance in *Jégo-Quéré*¹⁵⁰. It seemed that ECJ had three options: not to change the interpretation of Article 230 (4), change it according to the Opinion of AG Jacobs and CFI's ruling in or *Jégo-Quéré* or allow for an exception to the current interpretation, i.e. grant the standing to those individuals, who do not fulfil the requirements for *locus standi* under the current case law and yet, according to the principle of effective judicial protection, need to be given the standing, because otherwise they would be deprived of the access to justice¹⁵¹. However, ECJ adopted a different approach. Although the judgment involves some hesitations in legal reasoning and may not answer all the questions raised by *Jégo-Quéré*, the full court decided to remain loyal to the *Plaumann* formula¹⁵². The Court made it clear that whatever criticisms can be made to the existing Community system of legal remedies, the Court cannot disregard the wording of Article 230 (4). This is the sole competence of Member States to change this provision. For the time being, if the condition of 'individual concern' is not fulfilled

‘a natural or legal person does not, *under any circumstances*, have standing to bring an action for annulment of a regulation’¹⁵³.

The statement of the Court seems clear but the following consideration might have indicated that there is a hypothetical possibility to departure from the *Plaumann* test, if it were demonstrated, in a particular case, that no effective legal remedy existed under Community law:

‘The European Community is, *however*, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights’¹⁵⁴.

The Court recalled that the possibility to grant individual access to Community Courts when there is no other effective judicial remedy was already indicated in *Greenpeace*¹⁵⁵. In this case the Court refused standing to an association for the protection of the environment against a Community directive because of lack of individual concern, but it considered nevertheless the applicant's argument concerning the lack of judicial remedy.

¹⁴⁹ Court of Justice, Press and Information Division, Press Release No 66/02 <http://www.curia.eu.int/en/actu/communiqués/index.htm>

¹⁵⁰ KRONENBERGER & DEJMEK

¹⁵¹ NINA PÓLTORAK, p.194

¹⁵² KRONENBERGER & DEJMEK

¹⁵³ UPA, *supra* note 127, at para.37 (emphasis added)

¹⁵⁴ UPA, *supra* note 127, at para.38 (emphasis added)

¹⁵⁵ *Les Verts*, *supra* note 36

It should not be concluded, however, that the Court admits that when no effective judicial remedy is available to an individual, an exception to the rigid interpretation of the concept of individual concern could be considered. In an order delivered on 8 August 2002¹⁵⁶ the President of the CFI referred solely to the ECJ's judgment in *UPA* in order to reject an action as inadmissible. The particular emphasis put on paragraph 37 of the *UPA* judgment indicates that *Plaumann* bears no derogation. *Jégo-Quéré* is then clearly overruled and even totally ignored, first by ECJ in *UPA* and then by the President of the CFI¹⁵⁷. This is so even before the European Court of Justice has decided on the appeal brought by the Commission against this judgment on 17 July 2002¹⁵⁸.

The Court recalled that the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts¹⁵⁹. Individuals not eligible for action for annulment should refer to national courts which may make use of the preliminary ruling procedure. 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 protection¹⁶⁰. At one point ECJ agreed with the Opinion of AG Jacobs¹⁶¹:

'[I]t is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available 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 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 measures¹⁶².

It is interesting to examine the way of reasoning of the Court. It avoids asking a question about the effectiveness of alternative ways of redress, considering their proper object. It prefers the generalising approach whereby the effectiveness is ensured starting from a moment when individual has an access to the judge. The principle of effectiveness is realised exclusively through a preliminary ruling procedure. The Court reaches an exactly opposite result than CFI in *Jégo-Quéré* in considering this procedure as a substitute for an action for annulment. CFI evoked the concept of the Community based on the rule of law, where the access to justice is an essential element which must be guaranteed by the complete system of remedies provided for by the Treaty. It should be then considered to what extent an individual disposes of the right to an effective judicial remedy before Community and national courts. If it were to be shown that the protection offered by the national court is not effective enough, the conditions applicable to the admissibility of action for annulment should be moderated to guarantee the completeness of the jurisdictional system¹⁶³.

The ECJ uses contrary premise in its reasoning: it assumes the completeness of the system of remedies in order to achieve the division of jurisdictional competences. This allows the Court to assign to the Member States the exclusive responsibility for guaranteeing the right to effective judicial protection to individuals. The Court departs from the notion of jurisdictional system described in paragraph 23 of a judgment in *Les Verts*¹⁶⁴. The argument of the Community based on the rule of law is invoked solely to affirm that all the acts of the institutions are subject to control with regard to legality. Moreover, the Court can state that if an individual does not have access to the Community jurisdiction, he should be able to

¹⁵⁶ Case T-155/02, *VVG International and others v. Commission* [2002] ECR II-3239

¹⁵⁷ KRONENBERGER & DEJMEK

¹⁵⁸ Case C-263/02 P *Commission v. Jégo-Quéré*

¹⁵⁹ *UPA*, *supra* note 127, at para.40

¹⁶⁰ *UPA*, *supra* note 127, at para.41

¹⁶¹ Opinion of AG Jacobs in *UPA*, *supra* note 117 at para.50-53

¹⁶² *UPA*, *supra* note 127 at para.43

¹⁶³ FREDERIQUE BERROD & FLAVIEN MARIATTE, 'Le pourvoi dans l'affaire Unión de Pequeños Agricultores c/Conseil : le retour de la procession d'Echternach', *Europe (Editions du Juris-Classeur)* Octobre 2002, hereinafter, Berrod & Mariatte, p.7-13

¹⁶⁴ *Les Verts*, *supra* note 36

find the effective protection of his rights before the national court¹⁶⁵. The ruling in *Les Verts* was the first unequivocal affirmation by the Community jurisprudence of the completeness of the system of legal remedies. Thus the Court attaches to it a particular significance and postulates the completeness of the means of redress, stating that the system of legal remedies provided for by the Treaty suffice to guarantee the effectiveness of the protection of individuals under the Community law. It does not, however, verify this effectiveness, but assumes that the jurisdictional system is complete. UPA raised not only the question of the right to access to judge but also of the adequacy of the recourse. In their opinion the Community court was the only suitable one to decide the case, because of the particular situation of the applicants¹⁶⁶. This argument was also raised and developed by the Advocate General. The Court, however, did not decide to examine this issue¹⁶⁷.

Further, ECJ states that

'[A]ccording 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'¹⁶⁸.

ECJ agreed 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 Treaty, but it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force¹⁶⁹. Therefore, according to the principle of sincere cooperation envisaged 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 act¹⁷⁰. By saying that the Court has indirectly admitted that the 'complete system of remedies' has lacunae, which it has never done before¹⁷¹.

The argument of ECJ that it is not possible to amend Article 230 (4) through its interpretation, even if there are functional arguments in favour of this solution, is not convincing. The interpretation suggested by Advocate General Jacobs is not an interpretation *contra legem* and it only requires the change of the current jurisprudence with regard to Article 230 (4). This provision does not define the notion of an act, which concerns an individual 'directly and individually'. This definition is given solely by the case law of ECJ. Neither the interpretation proposed by Advocate General which would encompass all the acts which for certain reasons have or may have adverse effects for individual, nor the definition adopted by Court of First Instance in *Jégo-Quéré*, according to which an act concerns a person individually if it affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him, are not contrary to the wording of Article 230 (4)¹⁷². Admittedly, UPA's proposal to give standing to individual in case of lack of alternative legal remedies may be considered as interference into the wording of Article 230 (4), but at the same time it aims at safeguarding the principle of effective judicial protection. ECJ many times used this principle to justify its judgments which went beyond the wording of a Treaty. Hence, even if it is acknowledged that different that current understanding of Article 230 (4) would modify its content, it is difficult to understand why is ECJ so unwilling to do so. ECJ has itself interpreted EC law extensively or it has created norms which do not have basis in EC legislation. Even in *UPA* ECJ imposed on Member States an obligation not expressed directly in the Community legal

¹⁶⁵ BERROD & MARIATTE

¹⁶⁶ *UPA*, *supra* note 127, at para.26

¹⁶⁷ BERROD & MARIATTE

¹⁶⁸ *UPA*, *supra* note 127 at para.44

¹⁶⁹ *UPA* at para.45

¹⁷⁰ *UPA* at para.42

¹⁷¹ NINA PÓLTORAK, p.196

¹⁷² *ibidem*, p.197

order, when it obliged them to ensure that individuals which do not have standing in action for annulment, have access to national ways of redress allowing for referring the case to ECJ. This is not the same as an obligation to provide national procedures for claims arising out of the Community legal order, because not these claims are here at stake but the way to realize the provision of Article 234 (the possibility to address ECJ by a national court with a request for preliminary ruling). Clearly, there are no grounds for this obligation in Article 234. However, ECJ did not hesitate to enlarge the meaning of Article 234, arguing at the same time that it is not competent to do the same in case of Article 230¹⁷³.

The Court's ruling in *UPA* 'placed the ball squarely back in the court of the governments of the Member States and both judicial and political arms thereof'¹⁷⁴. The main practical consequence of *Jégo-Quéré* and the Opinion of Advocate General Jacobs in *UPA* rests with intensification of pressure on national courts and Member State political actors, to address and resolve the problems with judicial architecture. With regard to the latter, the Court has sent a clear signal that any weaknesses of the current system of challenging the Community acts will not be corrected via case law. They can only be addressed by a Treaty revision. This is an important landmark in EU constitutional jurisprudence, because the ECJ established a clear boundary with respect to its constitutional responsibilities¹⁷⁵.

CHAPTER IV: THE CONVENTION ON THE FUTURE OF EUROPE AND THE POSSIBLE CHANGES TO THE RULES ON LOCUS STANDI OF INDIVIDUALS

IV-1 The proposals of the Working Group on Incorporation of the Charter/ Accession to the ECHR

It is very likely that the European Court of Justice decided the *UPA* case in a way presented above taking into consideration the works carried by the Convention on the Future of Europe. In a momentum such as it is now and in view to the prospective enlargement, the Court took the opportunity to refrain from deciding on an issue so sensitive for it as the standing of private applicants and firmly stated that the change can only be done in a political process.

Working Group II 'Incorporation of the Charter/ Accession to the ECHR' of the Convention on the Future of Europe is currently examining the question whether the current system of judicial remedies for individuals against acts of the institutions needs to be reformed in the light of the fundamental right to effective judicial protection as recognized by case law of the Court of Justice and restated in Article 47 of the Charter of Fundamental Rights. This task has been assigned to the group in its mandate¹⁷⁶ and further developed in a document CONV 116/02 'Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR'¹⁷⁷.

Members of the Working Group II were asked to consider whether article 230 (4) should be amended to extend the conditions of admissibility for direct actions by individuals, and if so, how? Would it be better to allow case law to define the conditions of admissibility, taking into account the right to effective judicial protection? Finally, would it be appropriate to establish a new direct form of legal action to protect the fundamental rights of individuals, along the lines of certain national constitutional procedures?

¹⁷³ *ibidem*

¹⁷⁴ WARD, p.442

¹⁷⁵ *ibidem*

¹⁷⁶ See point 3 of doc. CONV 72/02 of 31 May 2002: 'the Working Group will have to decide whether to amend the fourth paragraph of Article 230 of the EC Treaty in order to extend the scope of direct appeals by individuals to the Court of Justice, or indeed to introduce a new form of appeal for the protection of fundamental rights, or whether it considers it preferable to maintain the existing system and leave it to case law to refine it', <http://register.consilium.eu.int/pdf/en/02/cv00/00072en2.pdf>

¹⁷⁷ CONV 116/02, 18 June 2002, <http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf>

Working Group II presented three possible solutions on the Treaty level in its document 21¹⁷⁸. One is to introduce a special remedy based on alleged violations of fundamental rights, similar to the ones existing in some Member States. The second is to amend Article 230 (4), in order to alleviate the rigidity currently resulting from the condition of 'individual concern'. Finally, the third proposal is to enshrine the obligations of Member States to provide for effective rights of action before their courts. All these proposals were discussed during the meetings of the Working Group and the result of the discussion was presented to the Convention in a Final Report of the Working Group II¹⁷⁹.

Already after the submission of this report, during the plenary discussions in December 2002 and January 2003 some members of the Convention expressed their concern that it was necessary to look seriously at the implications that certain proposals made within the Convention might have for the operation of the Court of Justice. It was also considered important that the Court of Justice and the Court of First Instance be given an opportunity to express their views on matter concerning them which were being discussed within the Convention. The Praesidium therefore thought it advisable to set up a "discussion circle" on the operation of the Court of Justice. This circle should in particular look at matters on which the Convention has not yet adopted fixed positions and could explore amongst others whether the wording of the fourth paragraph of Article 230 EC concerning direct appeals by individuals against general acts of the Institutions should be amended and whether these acts should also encompass acts of agencies or bodies set up by the Union¹⁸⁰. The discussion circle (CERCLE I) chaired by Antonio Vittorino held four meetings and submitted a final report in March 2003. The results of the discussions within the Working Group II and discussion circle I with regard to the proposals of the Working Group concerning Article 230 (4) are presented below in an order which seems the most adequate to the relevance (in terms of support they have within the Convention) of each of the proposals.

Special remedy based on alleged violations of fundamental rights

Constitutional complaint (*Verfassungsbeschwerde, recurso de amparo, skarga konstytucyjna*) is directly linked with the protection of the rights of individuals. Judicial review procedures, initiated by public organs, do not provide individuals with a direct access to the court. Some legal systems make up for this by introducing a separate and special procedure through which an individual, who exhausted all remedies possible in all instances (the complaint has a subsidiary character), can apply directly to the constitutional court. The only basis for a complaint can be an infringement of the constitutional rights and freedoms of a particular applicant. The constitutional complaint in this sense was first introduced in Austria in 1867¹⁸¹.

It has been proposed for some time already to introduce a Community action for the protection of fundamental rights. It would consist of the introduction of a new special action enabling individuals to challenge Community acts, including those of general application (i.e. of legislative or 'regulatory' character) directly before the Court of Justice. The causes of action would however be limited to alleged violations of the applicant's fundamental rights. Models of such an action are to be found in the law of certain Member States, e.g. Germany or Spain, and also in Poland. They will be presented below with special regard to the rules on standing of individuals.

In Germany Article 93 I No. 4a of *Grundgesetz* provides that every citizen is entitled to make a constitutional complaint to the Bundesverfassungsgericht regarding alleged violations of their basic rights or certain rights provided for in *Grundgesetz*, by the action of public authorities. This procedure has proved to be a valuable tool for the protection and assessment of the scope of basic rights and it is taken seriously by citizens. At the same time it can be regarded as having a 'filtering effect' in favour of the

¹⁷⁸ WG II, Working Document 21, 'The question of effective judicial remedies and access of individuals to the European Court of Justice' <http://european-convention.eu.int/docs/wd2/3299.pdf>

¹⁷⁹ Document CONV 354/02, Final Report of Working Group II, 22 October 2002 <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>

¹⁸⁰ CERCLE I CONV 636/03, 25 March 2003 'Framework of proceedings', Annex to the Final report of the discussion circle on the Court of Justice

¹⁸¹ LESZEK GARLICKI, *Polskie prawo konstytucyjne. Zarys wykładu*, 4th ed, Warsaw 2000, p.381

ECHR as the number of complaints to the Court in Strasbourg decrease while the number of complaints filed before the Bundesverfassungsgericht rises¹⁸².

The procedure is subject to a number of preconditions before it can be set in motion, in order to avoid its abuse. The complaint is first examined as to its admissibility (*Zulässigkeit*). The act attacked must be of the public authority (Act of State, *Act der öffentlichen Gewalt*), which includes all acts taken by the executive, judiciary, and legislature (administrative acts, court decisions and legislative acts)¹⁸³. The applicant has *locus standi* (*Beschwerdebefugnis*) when his basic right has been infringed directly and immediately by the Act of State, and he must be prejudiced personally by it at the moment of filing the complaint; the possibility of an infringement in the future does not entitle a person to file a *Verfassungsbeschwerde*. The requirement of a direct infringement means that where a statute is the basis of a restriction of the rights of the applicant, the admissibility depends on whether a restriction takes effect by the law itself, or by an implementing administrative act. Statutes rarely affect individuals, but often applicants allege damage as a result of judicial or administrative action based on an allegedly unconstitutional law. The law is therefore reviewed indirectly. In case of infringements caused by administrative acts, the applicant must have been addressed personally¹⁸⁴.

In Spain the constitutional complaint is called an 'individual appeal for protection' (*recurso de amparo*) and its aim is to protect the citizens against violations by any public power of the fundamental rights and public liberties protected at Part I, Chapter II, Articles 15 to 29 of the Spanish Constitution. These rights include i.a. access to justice. According to the Constitution 'any citizen may make a claim to the liberties and rights recognized in Article 13 and the first Section of the Second Chapter (...) through the recourse before the Constitutional Court' (Article 53 (2)) and the Constitutional Court is competent to hear 'appeals against violation of the rights and liberties referred to in Article 53 (2), in the cases and forms to be established by law' (Article 161(1) (b)). The procedure of *amparo* is further regulated by Title III, Articles 41 to 58 LOTC (Organic Law on the Constitutional Tribunal).

The recourse of *amparo* protects all the citizens vis-à-vis the violations of the rights and freedoms referred to in LOTC, resulting from provisions, legal documents or a single substantive behavior of the public authorities of the State, the autonomous Communities and other public bodies of territorial, corporative or institutional nature, as well as their officials or agents. The procedure of *amparo* is reserved solely to those claims which aim at restoring or to preserving the rights and freedoms for which this case was brought.

The infringement of right or freedom of the applicant must result directly and immediately from an act or omission of a public authority.

Article 79 (1) of Polish Constitution provides for a constitutional complaint (*skarga konstytucyjna*) available for everybody, whose constitutional freedoms or rights have been violated. This remedy is not restricted to Polish citizens as 'everybody' means every natural person, and also a legal entity, to the extent to which it can be subject of constitutional rights and freedoms¹⁸⁵. Chapter II of the Constitution contains the catalogue of rights and freedoms, which can be a basis for a complaint, and it must be specified, which right or freedom has been allegedly violated. Generally the Constitutional Tribunal does not accept claims alleging an infringement of general constitutional clauses (i.e. of a state founded on democracy and rule of law), but it may occasionally admit such an action. The complaint may only be filed against a normative act which was a ground for a judgment, against which the applicant appeals. It cannot be brought against an omission of a legislator. The applicant must have a legal interest in bringing an action, which means that there must have been a prejudice on his side.

¹⁸² NIGEL FOSTER & SATISH SULE, *German Legal System and Laws*, 3rd ed, Oxford University Press, 2002, p.242

¹⁸³ *ibidem*

¹⁸⁴ FOSTER & SULE

¹⁸⁵ LECH GARLICKI

Taking into consideration the features of a constitutional complaint, as it exists in the European legal tradition, the following wording of an eventual Community *Verfassungsbeschwerde* has been proposed¹⁸⁶:

Fundamental Rights Complaint

Any natural or legal person may contest a legal act of the Union due to a violation of any of the rights granted to it by the Charter of Fundamental Rights of the Union if no other judicial recourse is available for seeking review of the violation of the fundamental right in question. Specific requirements for the acceptance of a Fundamental Rights Complaint may be provided for.

The advocates of that model argue that it would leave intact the 'normal' system of direct actions as established by Article 230 (4) focusing on individual acts of administrative character, and to add a special remedy of a truly constitutional character¹⁸⁷. Critics however doubt whether it would be possible to draw a clear distinction between grounds of action relating to the protection of fundamental rights and other grounds of action for challenging the Community acts¹⁸⁸. It is hard to identify fundamental rights cases without examining their substance. Such a reform would encourage the applicants to dress up cases as involving fundamental rights in order to take advantage of the more generous standing rules which would then apply¹⁸⁹. Moreover, it would be difficult to determine the court with jurisdiction to take cognisance of a Community *Verfassungsbeschwerde*. With any jurisdiction other than the Court of Justice, there would be a possibility of a conflict of jurisdiction. If, on the other hand, the Court of Justice were to have jurisdiction, the introduction of a new remedy would complicate and lengthen the procedure before it¹⁹⁰.

The Court of Justice itself considers that there is no need to create such a remedy in order to improve the protection of fundamental rights in the European Union. According to the President of the European Court of Justice, Gil Carlos Rodrigues Iglesias, it seems that it is preferable to protect fundamental rights in the framework of existing remedies. If those remedies were found to be inadequate, it would then be appropriate to improve them in relation to the protection of all individual rights, not merely fundamental rights¹⁹¹.

Similarly Advocate General Jacobs found the introduction of a special new remedy both unnecessary and inappropriate because issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g. equal treatment, proportionality, etc) and can and should continue to be dealt with in principle within the habitual framework¹⁹². This does not mean, however, that the existing system of remedies is always adequate, what has been shown by Advocate General in an exhaustive manner in his Opinion in *UPA*.

As a majority of members of the Working Group had reservations about the idea of establishing the special procedure for the protection of fundamental rights, the Group did not recommend it to the Convention in the Final Report¹⁹³.

Enshrining the obligations of Member States to provide for effective judicial remedies before national courts

¹⁸⁶ CERCLE I Working Document 03, Contribution of Prof. Dr. Jürgen Meyer, 'Fundamental Complaint'. (proposal taken from "Freiburger Draft of the European Constitution" by Prof. Dr. Jürgen Schwarze)

¹⁸⁷ WG II, working Document 21, *supra* note at 178

¹⁸⁸ WG II Working Document 19, Hearing of Judge Mr. Vassilios Skouris, 17 September 2002

¹⁸⁹ ARNULL, *The European Union* ..., p.49

¹⁹⁰ WG II Working Document 19, *supra* note at 188

¹⁹¹ Document CONV 572/03, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the "discussion circle" on the Court of Justice on 17 February 2003

¹⁹² WG II Working Document 20, F.G. Jacobs, 'Necessary changes to the system of judicial remedies', note to the WG II presented by group member, Mr. Ben Fayot

¹⁹³ Document CONV 354/02, Final Report of Working Group II

This solution would not enlarge the rights of direct action of individuals before the Community courts. Instead, the new constitutional treaty could contain a provision on the obligation of Member States to provide for remedies by their courts ensuring effective judicial protection for the rights guaranteed by the Union's law. This proposal was also put forward by the European Ombudsman, Jacob Söderman¹⁹⁴. Such a provision would merely codify the existing case law of the European Court of Justice, but while expressed in the constitutional treaty, it would underline the Member States' responsibility in this area (respecting the principle of procedural autonomy) and facilitate such reforms to the national procedural systems as may prove necessary¹⁹⁵. The advocates of this solution hope that both the liberal interpretation by the Court of Article 230 (4) and evolutions in the national procedural systems may over time help eliminate existing lacunae in judicial protection against the Community acts. Moreover, this solution respects the best the principle of subsidiarity. However, it might not necessarily permit to provide effective judicial protection in each individual case where a lacuna becomes manifest.

This solution, which is in accordance with the position adopted and recently reaffirmed by the Court of Justice¹⁹⁶, is supported by a large number of members of the Group. In their opinion the present overall system of remedies, and the 'division of work' between Community and national courts it entails, should not be profoundly altered by a possible reform of Article 230 (4). For this reason some members of a Group strongly support the idea to add to the Treaty a provision on the obligation of Member States with respect to ensuring effective judicial protection¹⁹⁷.

IV-2 Possible amendment of the wording of Article 230 (4) EC

In its Final Report Working Group II did not propose an amendment to Article 230 (4) because there was no consensus among the Group members whether it is necessary to change this provision. Some members supported other ways to improve the judicial protection of individuals (see above) and therefore Group has recommended to the Convention further examination of this issue. Having regard to this, the Convention Secretariat presented a Working Paper with proposals of possible amendments to Article 230 (4) to the Discussion Circle I on the Court of Justice¹⁹⁸. Members of the Circle are asked to consider whether or not amending Article 230 (4) is essential to guaranteeing individuals' rights to effective judicial protection of their rights under the Community legal order. The President of the Court of Justice stated in this connection that 'the Court considers that the current system, which is based on the principle of subsidiarity in that the national courts in particular are responsible for protecting the rights of individuals, satisfies the requirements essential for the effective judicial protection of those rights, including fundamental rights'¹⁹⁹.

In his Opinion in *UPA* Advocate General Jacobs did not consider it essential to amend the Treaty and suggested that the Court interpret Article 230 (4) in such a way as to recognize that an individual is 'individually concerned by a Community measure where the measure is or is likely to be substantially prejudicial to his interests'. The Court of Justice, however, did not accept this interpretation and underlined that 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the rights to effective judicial protection'. This suggests that the changing of the conditions for admissibility of actions of individuals would not appear to be an option at this stage. As it has been mentioned, the President of the Court of First Instance has also made it clear that it is not possible to change the interpretation of Article 230 (4). He admitted that opinion among Members of CFI

¹⁹⁴ Document CONV 221/02, Contribution by Mr Jacob Söderman, European Ombudsman:

"Proposals for Treaty changes", <http://register.consilium.eu.int/pdf/en/02/cv00/00221en2.pdf>

¹⁹⁵ WG II, working Document 21, *supra* note at 178

¹⁹⁶ *UPA*, *supra* note at 127

¹⁹⁷ Final Report of Working Group II, *supra* note at 179

¹⁹⁸ CERCLE I Working Document I, 26 February 2003, 'Access to the Court of Justice for individuals – possible amendments to Article 230, paragraph 4, of the EC Treaty'

<http://european-convention.eu.int/docs/wdcir1/8563.pdf>

¹⁹⁹ Document CONV 572/03, *supra* note at 191

is divided as to whether the judicial protection afforded to individuals under Article 230 is adequate, but in any case the decision as to whether the conditions of admissibility of actions for annulment laid down in the fourth paragraph of Article 230 EC should be made more flexible is, first and foremost, a matter of policy, which it is the responsibility of the constituent authority to settle²⁰⁰. It may be then concluded that both Community Courts have now acknowledged the appropriateness or even the need for Treaty amendment on this point.

The circle has discussed different options with regard to the wording of Article 230 (4) presented by the Working Group II in Working Document 21 (see note 178). A majority of members were in favour of amending the fourth paragraph of Article 230 to read as follows:

‘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, and against [an act of general application][a regulatory act] which is of direct concern to him without entailing implementing measures’.

The addition of words ‘without entailing implementing measures’ would serve to solve the problem of ‘self-executing’ legal acts which under current rules cannot be contested before the CFI and where an individual must first breach the law before he can have access to the Court, whether the act concerned be a legislative or a regulatory one. Private person would then be able to contest before the CFI a regulatory act containing a prohibition, but requiring no implementing measure, if he can demonstrate that the act is of direct concern to him. Further, a majority of members 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 (this point will be developed further below). In addition, deleting the words ‘although in the form of a regulation or a decision addressed to another person’ would merely change the wording and not the scope of Article 230 (4). Members of the circle were also in favour of replacing word ‘decision’ by ‘act’. These amendments reflect the case-law of the Court which in a case *IBM*²⁰¹ held that in principle, it is not a form but a substance of a measure which is important to ascertain whether the measures in question are acts within the meaning of Article 230.

The consequences of the adoption of this proposal amending Article 230 (4) for the private applicants would be as follows - individuals would have standing to challenge:

- Acts addressed to them (e.g. Commission’s decisions in the field of competition law)

Whether this new wording would relax the conditions of admissibility with regard to individual acts (decisions or decisions in form of a regulation), would depend on the interpretation of the notion of ‘individual concern’. If it were to be interpreted according to *Plaumann*, then there would be no change with regard to the current situation

- Acts not addressed to them, but which concern them directly and individually.

Here the difference with the current situation is that this definition encompasses the ‘legislative’ acts which under some circumstances may be of individual and direct concern for the applicant. This possibility is recognized by the Court since *Codorniu* but now it would be explicitly written in the Treaty. Thus, in case of general acts concerning the applicant individually, there would be an extension of the standing with regard to the wording of article 230 (40) but not with regard to case law (*Codorniu*).

- Acts of general application which do not require implementing measures.

²⁰⁰ CERCLE I CONV 575/03, 10 March 2003, Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the “discussion circle” on the Court of Justice on 24 February 2003

²⁰¹ Case 60/81, *IBM v. Commission* [1981] ECR-2639, par.9

In this case there would be a real progress, the gap in the legal system would be removed and the problem of 'self-executing regulations' would be resolved. This would mean the victory of Advocate general Jacobs and the judges of the Court of First Instance ruling in *Jégo-Quéré*. Nevertheless, the requirement of 'direct concern' would still apply which would require interpretation.

As regards the application of Article 230 to the agencies and bodies of the Union, the circle noted that in general the acts setting up the agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by these agencies²⁰². However, the practice for verification of the legality of acts is disparate and for this reason the Commission recommended to the Parliament and the Council to standardize the arrangements by making Article 230 (4) applicable to proceedings contesting acts of all the agencies. The principle of an effective judicial guarantee requires that no contested act of an institution, a body or an agency can escape judicial scrutiny of its legality. It is also impossible to state categorically, when an agency is set up, that it will not perform such acts, even if the Regulation establishing it does not give it power to adopt decisions in the formal sense. A majority of members of the circle recommend that Article 230 TEC be amended so as to cover, in addition to legal acts adopted by the institutions, those of the Union's bodies and agencies. The proceedings instituted against a body or an agency will be admissible only if they have adopted a 'legal act', within the meaning of the case law of the Court; the act establishing the agency might also lay down specific arrangements for the exercise of control of the agency or body in question.

The proposals of the Working Group on Simplification and the amendment of Article 230 (4)

It is important to underline in this place that the issue of the amendment of Article 230 (4) should not be discussed without taking into consideration the Final Report of Working Group IX on Simplification²⁰³, as these two issues are very closely linked. The Group has proposed to reduce the number of legal instruments in the European Union to six, out of which four (Law, Framework Law, Decision and Regulation) would be binding and two (Recommendation and Opinion) would be non-binding. Laws (ex-Regulations) and Framework Laws (ex-Directives) would have a legislative character, while Decisions and Regulations would be 'administrative' or 'regulatory' acts. These instruments would be listed in Article 24 of the Constitutional Treaty²⁰⁴

Currently the clear distinction between laws and administrative acts does not exist in the European Union, due partly to the confusion of legislative and executive powers in the Council and the Commission. Regulations are normally identified as 'Community laws' and some of them are in fact real laws, but others clearly resemble administrative acts. On the other hand decisions, which are by definition individual administrative acts, can sometimes have a very general scope of application, especially in case of decisions addressed to the Member States²⁰⁵. The result of this confusion is that the same remedies are being used to assess the 'constitutionality' of legislative measures and the legality of administrative acts, whereas in the Member States there are separate remedies to control the conformity of laws with the constitution and to protect the individuals against any illegal action of public authorities²⁰⁶. Consequently, the *locus standi* conditions imposed on private parties who wish to challenge both types of acts are very different in national legal systems and under the EC Treaty they merge into one.

Some members of the Circle argued that individuals should not be able to challenge a legislative act before the Court of Justice, even though such a possibility existed in some legal orders²⁰⁷. The President

²⁰² CERCLE I Working Document 09, 10 March 2003, note from Secretariat 'Right of appeal against agencies created by secondary legislation', <http://european-convention.eu.int/docs/wdcir1/8684.pdf>

²⁰³ Document CONV 424/02, 29 November 2002, Final Report of Working Group IX on Simplification, <http://register.consilium.eu.int/pdf/en/02/cv00/00424en2.pdf>

²⁰⁴ See Preliminary draft Constitutional Treaty, <http://register.consilium.eu.int/pdf/en/02/cv00/00369en2.pdf>

²⁰⁵ ALBORS-LLORENS, p.5

²⁰⁶ *ibidem*

²⁰⁷ CERCLE I Working Document I, *supra* note at 198

of the Court of Justice emphasized that if a hierarchy of secondary legislation were to be introduced, as proposed by the Working Group on Simplification, 'it would seem wise to adopt a restrictive approach with regard to actions against legislative acts and allow for a more open approach towards regulatory acts'²⁰⁸. Similarly, the President of the Court of First Instance expressed the desire to draw a distinction between legislative and regulatory acts by allowing the individuals to challenge the latter category of acts. With regard to the possibility of challenging legislative acts, the current conditions should be maintained 'so as not to take a step backwards'²⁰⁹. Thus, in case of legislative acts, the requirement of 'individual and direct concern' would still apply (as it is interpreted after *Codorniu*) and the approach with regard to administrative acts would be more open – the applicant would only have to demonstrate that he is directly concerned.

Conclusions

As Anthony Arnall stated, initially the European Community was conceived by elites for the implementation by elites. There was little concern for accountability or involving the individuals. The main role was assigned to the Commission and the Council which was not required to meet in public or to reveal how its members had voted. Acts adopted by the institutions were only to a limited extent subject to judicial review at the suit of private parties, who were apparently to have no right to challenge regulations or directives, however adverse their effects and doubtful the legality²¹⁰.

Against this background the Court of Justice delivered its famous judgment in *Van Gend en Loos*²¹¹, which in a clearly subversive manner proclaimed that nationals of the Member States are also subjects of the new legal order established by the EEC Treaty. As a consequence the national courts have to ensure the rights conferred by the Treaty on individuals. This direct effect of Treaty provisions was further extended to regulations and directives. In the later case law it is notable that the Court took a broad view of the effect of many substantive provisions of the Treaty (e.g. in the field of four freedoms). Therefore it could have been expected that the Court would take an equally progressive approach to the interpretation of article 230 (4). *Van Gend en Loos* suggested that the Court may interpret the Treaty in order to develop a system of judicial review which would take individuals into account. However, the court adopted an inconsistent approach which prevented the Article's full capacity for ensuring respect for the rule of law from being realized²¹².

The wording of Article 230 (4) imposes limits on the standing of individuals as it requires the applicant to be directly and individually concerned by the contested measure. This requirement, especially in case of individual concern, is very difficult to meet. However, it is the Court of Justice who interprets this provision in a severe manner. It has been shown above how the restrictive interpretation of the rules for standing of individuals developed over time.

It has also been discussed why the Court does not want to change its interpretation. Among many arguments one is especially often invoked and serves to justify Court's unwillingness to relax the conditions for standing. This is the reluctance to add to the Court's already heavy workload. The Court fears that it will not be able to manage the increased number of cases which might be brought if the conditions applicable to private parties were relaxed. However, the problems posed by the Court's workload are notoriously difficult to resolve and equally notoriously unattractive to politicians. It is obvious that the essentially managerial difficulties caused by the Court's workload cannot be used indefinitely as an excuse to tackle other issues which are 'vital to the health and legitimacy of the Union'²¹³. Moreover, the CFI often dismisses as inadmissible proceedings brought under Article 230 (4) but at the same time it

²⁰⁸ Document CONV 572/03, *supra* note at 191

²⁰⁹ Document CONV 575/03, *supra* note at 200

²¹⁰ ARNULL, *The Action For Annulment...*, p.177

²¹¹ *Van Gend en Loos*, *supra* note 3

²¹² ARNULL, *The Action For Annulment...*, p.179

²¹³ *ibidem* p.190

devotes many pages to analyzing the applicant's standing. This does not seem to make sense from the point of view of the proceedings' economy.

The Community is no longer the same as it was in 1960's and 1970's and the argument of keeping with the expectations of the authors of the EEC Treaty or the needs of the infant legal order of the Community is no longer convincing. The European Union after Maastricht Treaty is a different entity than the small Community from the past. The peoples of Member States are no longer ready to leave the governance of Europe in the hands of secretive elites; transparency and accountability have become the order of the day. Therefore it is inconsistent with this change of mood for the Community to uphold outdated and paternalistic view of the rights of individuals to bring annulment proceedings.

A final development which suggests the need to reconsider the case-law on individual concern is the Court's evolving case-law on the principle of effective protection of rights derived from Community law in national courts. Even though this principle was expressed in 1986, in the case of *Johnston*²¹⁴, its implications have only gradually been spelt out in the Court's case-law in the subsequent period²¹⁵. It is now clear from the judgments in *Factortame*²¹⁶ and *Verholen*²¹⁷ that the principle of effective judicial protection may require national courts to review all national legislative measures, to grant interim relief and to grant individuals standing to bring proceedings, even where they would be unable to do so under national law. As it has been pointed out above, this may sometimes be described as a case of double standards because the Court imposes obligations on the Member States not provided explicitly in the Treaty, and itself refrains from enlarging its responsibilities, on the grounds that it cannot go beyond its competences. This explanation is at least dubious, taking into consideration all the areas in which the Court interpreted the law against its literal meaning.

Advocate General Jacobs in his Opinion in *UPA* presented in an exhaustive way the arguments in favour of the reinterpretation of Article 230 (4) and he suggested a new test for standing, based on the adverse effect which the which the contested measure has on individual. Although followed by the CFI in *Jégo-Quéré*, the Opinion was not accepted by the ECJ and for the time being, the locus standi rules with regard to individual concern stay the same.

It follows from above that the only possible change may now happen via the political action. It is the time for Member States to decide what kind of European Union they want to have in future and what position will the individuals have in it. If decision-makers are truly concerned with democracy and the rule of law in the EU, they should not back up and leave the question of challenging the EC acts by private persons aside. The democratic deficit in the EU is a commonly acknowledged fact and Member States should not waste opportunities to enforce the credibility and democracy within the EU.

The gap between the judicial review in the Member States and EU is growing because modern legal systems adopt a very liberal approach to the admissibility of actions of individuals. In the case of legislative measures, natural or legal persons may only challenge them in very special cases (or at all). If such a remedy exists (see *supra* at 45), the right of action is restricted to cases of infringement of the constitutional laws. It should not be forgotten, however, that in the Member States laws are enacted by parliaments who directly express the voice of the citizens and thus have a key role in the legislative process (which is still not the case of the European Parliament). On the contrary, in case of administrative measures, private parties may challenge them in all Member States and generally they enjoy a wide right of action²¹⁸. In Germany the general admissibility conditions prior to judicial review are, at least for constitutional reasons, no high hurdles in the sense that they hinder effective judicial protection of those being infringed in their rights. The applicant must demonstrate a 'legally protected interest' which must be

²¹⁴ *Johnston*, *supra* note 91

²¹⁵ Opinion of AG Jacobs in *UPA*, at para.97

²¹⁶ Case C-213/89 *Factortame I* [1990] ECR I-2433, at 19-22

²¹⁷ Joined Cases C-87/90, C-88/90 and C-89/90, *Verholen*, [1991] ECR I-3757, at 23-24

²¹⁸ ALBORS-LLORENS, p.30

both direct and susceptible to individualization²¹⁹. One may say that, also from the comparative point of view, the filter of general conditions of admissibility is not very dense²²⁰.

Under French law private parties have a wide right of action to challenge administrative acts, but they still have to indicate the certain interest (*intérêt à agir*) – otherwise the intervention would be *actio popularis*, which is not recognized by the French law²²¹. The locus standi requirements can be described as requiring the presence of a direct and individual interest. The admissibility barrier is relatively easy to overcome for French parties in annulment proceedings.

In the United Kingdom the rules about standing in judicial review proceedings are now very generous. Standing has ceased to be a preliminary condition, distinct from the merits of the case. An applicant for judicial review is required to have a 'sufficient interest in the matter' and the House of Lords have interpreted this condition liberally²²². Generally, a direct personal interest will be required, but in some circumstances applicants with a general or public interest will be granted standing where there has been a breach, or failure to carry out statutory or public duties, by the authorities involved²²³.

The abovementioned issue is of a high relevance with regard to the works carried by the European Convention. The concrete proposals have been presented above. Now it is worth noting that the proposals for amendment of the wording of Article 230 (4), however necessary and welcomed, are not very likely to be realized. The equivalent of the current Article 230 is supposed to be in the Part II of the Constitutional Treaty, which has not yet been prepared by the Convention. It is therefore highly improbable that it would be discussed by the Intergovernmental Conference, because the Convention should present the results of its work to the European Council in June 2003. It seems then that again the issue of the amendment of Article 230 (4) will not be resolved.

The more probable is the proposal of the WG on Simplification, namely Article 24 of the Constitutional Treaty providing for new types of legal instruments, because it already exists in the draft of the Treaty and will be discussed by the IGC. If such a new hierarchy of norms applied, then the situation of private applicants would change even without the amendment of Article 230 (4). Currently the members of both Courts are in majority against the possibility of challenging the legislative measures and therefore the restrictive approach is applied. With clear division between the legislative and administrative acts it would be easier to determine, whether the applicant is individually concerned by the measure, as the administrative measures in principle concern the individualised persons.

It can be concluded that the time is definitely ripe for change of the rules on standing of individuals in action for annulment of Community measures. There are broad policy arguments in favour and both Community institutions and the main political players in the Member States have acknowledged it. From the realistic point of view it seems, however, that major change is not likely to happen in the nearest future. Either the wording of Article 230 (4) will stay the same, and it will have to be seen whether the Court is determined not to abandon its approach presented in UPA, or – presuming that the Constitutional Treaty will be adopted by the IGC – the new Article 24 providing for the hierarchy of legislative acts in the EU will have some impact on the admissibility of actions for annulment brought by private parties. The significance and the consequences of this are difficult to assess at this stage and they remain to be seen in future.

²¹⁹ *ibidem* at p.34

²²⁰ HANS-HEINRICH TRUTE & THOMAS GROSS, German report in: Epaminondas Spiliotopoulos (ed) *'Towards a Unified Judicial Protection of Citizens in Europe (?)', Vers une protection juridictionnelle commune des citoyens en Europe(?)'*, European Public Law Series, vol. XII, London 2000, p.191

²²¹ BERNARD PACTEAU, rapport Français, in: Epaminondas Spiliotopoulos (ed), p.291

²²² J. BEATSON & J. MORRISON, British report, in: Epaminondas Spiliotopoulos (ed), p.787

²²³ ALBORS-LLORENS, p.36

4.2 *Joined Cases 67, 68 and 70/85: Van der Kooy*

**Kwekerij Gebroeders van der Kooy BV and others
v**

Commission of the European Communities

Joined Cases 67, 68 and 70/85

2 February 1988

Court of Justice

[1988] ECR 219

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY THREE APPLICATIONS LODGED AT THE COURT REGISTRY ON 15 AND 16 MARCH 1985, KWEKERIJ GEBROEDERS VAN DER KOOY BV, A LIMITED LIABILITY COMPANY WHOSE HEAD OFFICE IS AT ZEVENHUIZEN, AND J.W. VAN VLIET, A MARKET GARDENER RESIDING AT UITHOORN, THE LANDBOUWSCHAP, A BODY GOVERNED BY PUBLIC LAW WHOSE HEAD OFFICE IS IN THE HAGUE, AND THE KINGDOM OF THE NETHERLANDS BROUGHT AN ACTION UNDER THE FIRST AND SECOND PARAGRAPHS OF ARTICLE 173 OF THE EEC TREATY FOR THE ANNULMENT OF COMMISSION DECISION 85/215/EEC OF 13 FEBRUARY 1985 ON THE PREFERENTIAL TARIFF CHARGED TO GLASSHOUSE GROWERS FOR NATURAL GAS IN THE NETHERLANDS (OFFICIAL JOURNAL 1985, L 97, P. 49).
- 2 IN ARTICLE 1 OF THAT DECISION THE COMMISSION STATED THAT "THE AID REPRESENTED BY THE PREFERENTIAL TARIFF FOR NATURAL GAS APPLIED IN THE NETHERLANDS IN RESPECT OF GLASSHOUSE GROWERS FROM 1 OCTOBER 1984 IS INCOMPATIBLE WITH THE COMMON MARKET WITHIN THE MEANING OF ARTICLE 92 OF THE TREATY AND MUST BE DISCONTINUED". ARTICLE 2 OF THE DECISION PROVIDES THAT "THE NETHERLANDS SHALL INFORM THE COMMISSION BEFORE 15 MARCH 1985 OF THE ACTION IT HAS TAKEN TO COMPLY WITH ARTICLE 1".
- 3 IN ITS STATEMENT OF THE REASONS FOR THE DECISION, THE COMMISSION EXPLAINED THAT IN THE NETHERLANDS THE RATES CHARGED TO GLASSHOUSE GROWERS FOR NATURAL GAS ARE THE SUBJECT OF CONTRACTS BETWEEN NV NEDERLANDSE GASUNIE, GRONINGEN, A COMPANY INCORPORATED UNDER PRIVATE LAW 50% OF WHOSE CAPITAL IS HELD DIRECTLY OR INDIRECTLY BY THE NETHERLANDS GOVERNMENT AND THE REMAINDER BY TWO PRIVATE COMPANIES, AND THE LANDBOUWSCHAP, A BODY ESTABLISHED UNDER PUBLIC LAW TO PROTECT THE COMMON INTERESTS OF AGRICULTURAL UNDERTAKINGS, TAKING INTO ACCOUNT THE PUBLIC INTEREST. A FURTHER PARTY TO THESE CONTRACTS IS THE VERENIGING VAN EXPLOITANTEN VAN GASBEDRIJVEN IN NEDERLAND (VEGIN), AN ASSOCIATION OF LOCAL GAS-DISTRIBUTION COMPANIES.
- 4 SINCE 1963 THE TARIFFS THEREBY NEGOTIATED, LIKE ALL THE TARIFFS CHARGED BY GASUNIE, HAVE BY AGREEMENT BEEN SUBJECT TO THE APPROVAL OF THE MINISTER FOR ECONOMIC AFFAIRS.
- 5 AS EARLY AS 1981 THE COMMISSION TOOK THE VIEW THAT THE HORTICULTURAL TARIFF PREVAILING AT THE TIME WAS A PREFERENTIAL TARIFF INASMUCH AS IT PROVIDED EXCEPTIONALLY FAVOURABLE CONDITIONS FOR GROWERS IN THE NETHERLANDS. IT

ACCORDINGLY FOUND, BY DECISION 82/73 OF 15 DECEMBER 1981 (OFFICIAL JOURNAL 1982, L 37, P. 29), THAT THE TARIFF CONSTITUTED AID INCOMPATIBLE WITH ARTICLE 92 OF THE EEC TREATY, AND REQUIRED THE NETHERLANDS TO DISCONTINUE IT.

- 6 FOLLOWING THAT DECISION, WHICH HAD IN THE MEANTIME BEEN CHALLENGED IN THREE ACTIONS FOR ANNULMENT UNDER ARTICLE 173 OF THE EEC TREATY, A NEW TARIFF WAS NEGOTIATED. THAT TARIFF, WHICH RECEIVED THE APPROVAL OF THE COMMISSION, ENTAILED THE ALIGNMENT OF THE HORTICULTURAL TARIFF ON THE INDUSTRIAL TARIFF (SPECIFICALLY, ON THE "D" INDUSTRIAL TARIFF) PLUS A PREMIUM OF 0.5 CENTS/M3. IT ALSO CONTAINED A QUARTERLY REVISION CLAUSE SIMILAR TO THE CLAUSE IN FORCE FOR INDUSTRY, AND WAS APPLIED FROM 1 APRIL 1983 TO 30 SEPTEMBER 1984.
- 7 ON THE ADOPTION OF THE NEW TARIFF DECISION 82/73 WAS REPEALED AND THE ACTIONS BROUGHT AGAINST IT WERE DISCONTINUED.
- 8 ON 28 SEPTEMBER 1984 A NEW TARIFF CONTRACT WAS CONCLUDED BETWEEN GASUNIE, VEGIN AND THE LANDBOUWSCHAP FOR THE PERIOD FROM 1 OCTOBER 1984 TO 1 OCTOBER 1985. UNDER THE NEW TARIFF THE GAS PRICE FOR HORTICULTURE IS EQUIVALENT TO THE AVERAGE 1983 LEVEL, PLUS A FIXED PERCENTAGE OF 10 %. THE CEILING PRICE FOR GAS IS THUS 42.5 CENTS/M3.
- 9 THE COMMISSION OPENED THE PROCEDURE UNDER ARTICLE 93 (2) OF THE EEC TREATY IN RESPECT OF THE NEW TARIFF, WHICH THE NETHERLANDS GOVERNMENT HAD NOTIFIED TO IT BY LETTER OF 4 OCTOBER 1984, AND ULTIMATELY ADOPTED DECISION 85/215, WHICH IS CHALLENGED IN THESE PROCEEDINGS.
- 10 BY APPLICATIONS LODGED AT THE COURT REGISTRY ON 24 APRIL, 25 APRIL AND 21 JUNE 1985 RESPECTIVELY, THE KINGDOM OF DENMARK, THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND APPLIED TO INTERVENE IN THESE PROCEEDINGS IN SUPPORT OF THE COMMISSION'S CONCLUSIONS. BY ORDERS OF 8 MAY, 26 JUNE AND 18 SEPTEMBER 1985 THE COURT GRANTED THEM LEAVE TO INTERVENE.
- 11 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS OF THE CASE, THE COURSE OF THE PROCEDURE AND THE SUBMISSIONS AND ARGUMENTS OF THE PARTIES, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

ADMISSIBILITY

I - CASE 67/85

- 12 THE COMMISSION CONTENDS THAT THE APPLICATION BROUGHT BY VAN DER KOOY BV AND MR VAN VLIET IS NOT ADMISSIBLE UNDER THE SECOND PARAGRAPH OF ARTICLE 173. IT ARGUES THAT THE AID DISALLOWED BY DECISION 85/215 FAVOURS ALL NETHERLANDS GROWERS WHO USE NATURAL GAS TO HEAT THEIR GLASSHOUSES. SINCE THE AID IN QUESTION BENEFITS A VERY BROAD CATEGORY OF BUSINESSES, THE COMMISSION DECISION REQUIRING THAT AID TO BE DISCONTINUED CANNOT BE REGARDED AS BEING OF DIRECT AND INDIVIDUAL CONCERN TO THE APPLICANT GROWERS.
- 13 BY VIRTUE OF THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY, THE ADMISSIBILITY OF AN ACTION BROUGHT BY AN INDIVIDUAL AGAINST A DECISION NOT ADDRESSED TO HIM IS SUBJECT TO THE CONDITION THAT IT MUST BE OF DIRECT AND INDIVIDUAL CONCERN TO THE APPLICANT. SINCE VAN DER KOOY BV AND MR VAN VLIET ARE NOT AMONGST THE PERSONS TO WHOM THE CONTESTED DECISION IS ADDRESSED IT IS NECESSARY TO CONSIDER WHETHER THE DECISION IS NONE THE LESS OF DIRECT AND INDIVIDUAL CONCERN TO THEM.

- 14 AS THE COURT HAS PREVIOUSLY HELD (SEE IN PARTICULAR THE JUDGMENTS OF 15 JULY 1963 IN CASE 25/62 PLAUMANN V COMMISSION ((1963)) ECR 95 AND 14 JULY 1983 IN CASE 231/82 SPIJKER V COMMISSION ((1983)) ECR 2559), PERSONS OTHER THAN THOSE TO WHOM A DECISION IS ADDRESSED MAY CLAIM TO BE INDIVIDUALLY CONCERNED BY THAT DECISION 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 AND IF BY VIRTUE OF THOSE FACTORS IT DISTINGUISHES THEM INDIVIDUALLY JUST AS IN THE CASE OF THE PERSON ADDRESSED.
- 15 THAT IS NOT SO IN THIS CASE. THE CONTESTED DECISION IS OF CONCERN TO THE APPLICANTS SOLELY BY VIRTUE OF THEIR OBJECTIVE CAPACITY AS GROWERS ESTABLISHED IN THE NETHERLANDS AND QUALIFYING FOR THE PREFERENTIAL GAS TARIFF ON THE SAME FOOTING AS ANY OTHER GROWER IN THE SAME CIRCUMSTANCES. WITH REGARD TO THEM, THEREFORE, THE DECISION IS A MEASURE OF GENERAL APPLICATION COVERING SITUATIONS WHICH ARE DETERMINED OBJECTIVELY, AND ENTAILS LEGAL EFFECTS FOR CATEGORIES OF PERSONS ENVISAGED IN A GENERAL AND ABSTRACT MANNER. THUS THE CONTESTED DECISION CANNOT BE REGARDED AS BEING OF INDIVIDUAL CONCERN TO THE APPLICANTS.
- 16 FOR THOSE REASONS, THE APPLICATION IN CASE 67/85 MUST BE DECLARED INADMISSIBLE.

II - CASE 68/85

- 17 THE COMMISSION ALSO RAISES AN OBJECTION OF INADMISSIBILITY WITH REGARD TO THE APPLICATION SUBMITTED BY THE LANDBOUWSCHAP.
- 18 THE COMMISSION MAINTAINS THAT, EVEN ON THE ASSUMPTION THAT THE LANDBOUWSCHAP ACTED AS THE GROWERS' REPRESENTATIVE IN THE TARIFF NEGOTIATIONS WITH GASUNIE, A BODY SET UP TO PROMOTE THE COLLECTIVE INTERESTS OF A CATEGORY OF PERSONS CANNOT BE CONSIDERED TO BE DIRECTLY AND INDIVIDUALLY CONCERNED FOR THE PURPOSES OF THE SECOND PARAGRAPH OF ARTICLE 173 BY A MEASURE AFFECTING THE GENERAL INTERESTS OF THAT CATEGORY (SEE THE JUDGMENTS OF THE COURT OF 18 MARCH 1975 IN CASE 72/74 UNION SYNDICALE V COUNCIL ((1975)) ECR 401 AND 28 MARCH 1982 IN CASE 135/81 GROUPEMENT DES AGENCES DE VOYAGES V COMMISSION ((1982)) ECR 3799).
- 19 THE OBJECTION CANNOT BE UPHELD.
- 20 FIRST OF ALL, CONTRARY TO THE COMMISSION' S ASSERTION, THE LANDBOUWSCHAP ACTS AS THE REPRESENTATIVE OF GROWERS' ORGANIZATIONS IN REGARD TO GAS TARIFFS.
- 21 ALTHOUGH THE LANDBOUWSCHAP CANNOT BE CONSIDERED TO BE DIRECTLY AND INDIVIDUALLY CONCERNED BY DECISION 85/215 AS A RECIPIENT OF THE CONTESTED AID, IT IS NONE THE LESS TRUE THAT, AS THE LANDBOUWSCHAP RIGHTLY ARGUES, ITS POSITION AS NEGOTIATOR OF GAS TARIFFS IN THE INTERESTS OF THE GROWERS IS AFFECTED BY DECISION 85/215.
- 22 FURTHERMORE, IN THAT CAPACITY THE LANDBOUWSCHAP HAS TAKEN AN ACTIVE PART IN THE PROCEDURE UNDER ARTICLE 93 (2) BY SUBMITTING WRITTEN COMMENTS TO THE COMMISSION AND BY KEEPING IN CLOSE CONTACT WITH THE RESPONSIBLE OFFICIALS THROUGHOUT THE PROCEDURE.
- 23 LASTLY, THE LANDBOUWSCHAP IS ONE OF THE PARTIES TO THE CONTRACT WHICH ESTABLISHED THE TARIFF DISALLOWED BY THE COMMISSION, AND IN THAT CAPACITY IS MENTIONED SEVERAL TIMES IN DECISION 85/215. IN THAT CAPACITY IT WAS ALSO OBLIGED, IN ORDER TO GIVE EFFECT TO THE DECISION, TO COMMENCE FRESH TARIFF NEGOTIATIONS WITH GASUNIE AND TO REACH A NEW AGREEMENT.

- 24 IT MUST THEREFORE BE CONCLUDED THAT IN THE CIRCUMSTANCES OF THIS CASE THE LANDBOUWSCHAP WAS ENTITLED TO BRING PROCEEDINGS UNDER THE SECOND PARAGRAPH OF ARTICLE 173 FOR THE ANNULMENT OF COMMISSION DECISION 85/215.
- 25 IT FOLLOWS THAT THE OBJECTION OF INADMISSIBILITY RAISED BY THE COMMISSION IN CASE 68/85 MUST BE REJECTED.

[...]

4.3 Case C-198/91: Cook

William Cook plc v Commission of the European Communities

C-198/91

19 May 1993

Court of Justice

[1993] ECR I-2487

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By application lodged at the Court Registry on 30 July 1991, William Cook plc (hereinafter "Cook") brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of a Commission decision, communicated to the applicant by letter of 29 May 1991, "to raise no objections" to several State aids received by Piezas y Rodajes SA (hereinafter "PYRSA").
- 2 It is apparent from the documents before the Court that, by Decision of 26 May 1987 (see Notice 88/C251/04, OJ 1988 C 251, p. 4), the Commission authorized the general regional aid scheme for Spain, the plan for which had been notified to it by the Spanish Government on 30 January of that year, in accordance with Article 93(3) of the Treaty. The amendments subsequently made to that scheme were approved by a Commission decision on 1 September 1987.
- 3 That aid scheme, authorized under Article 92(3)(a) of the Treaty, provides in particular for the grant of regional aid in the Province of Teruel not exceeding a ceiling of 75% net grant equivalent (NGE).
- 4 In that province, in the municipality of Monreal del Campo, PYRSA has embarked on a PTA 2 788 300 000 investment programme for the construction of a foundry to produce sprockets (a toothed wheel that engages with a chain, used chiefly in the mining industry) and GET parts (used in the construction of earth-moving and excavation equipment).
- 5 It is common ground that the following aids were granted in respect of that investment:
 - a subsidy of PTA 975 905 000 from the Spanish Government;
 - a subsidy of PTA 182 000 000 from the Autonomous Community of Aragon;
 - a subsidy of PTA 2 300 000 from the municipality of Monreal del Campo;
 - a loan guarantee for PTA 490 000 000 from the Autonomous Community of Aragon;
 - interest-rate subsidies on the aforesaid loan, from the Provincial government of Teruel.
- 6 On 14 January 1991 Cook, which produces steel castings and GET parts, submitted a "formal complaint" to the Commission in which it challenged the compatibility of those aids with the common market.
- 7 By letter of 13 March 1991, the Commission informed Cook that the aid of PTA 975 905 000 had been granted by the Spanish Government under the general regional aid scheme and was therefore compatible with Article 92 of the Treaty. That letter referred, so far as the other aids were concerned, to the opening of an investigation with the Spanish authorities.
- 8 Following that investigation, the Commission informed Cook, by letter of 29 May 1991, of its decision "to raise no objections" to the aids granted to PYRSA. Attached to that letter was Decision NN 12/91, which was addressed to the Spanish Government and in which the Commission concluded that those aids fell within the scope of Article 92(3)(a) of the Treaty, according to which aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common

market.

- 9 That decision is based on two grounds. First, the Commission considers that "PYRSA production is in the 'sprockets' and 'GETs parts' sub-sector for which demand rose in the period 1988-90 and which is not experiencing problems of overcapacity". Secondly, the Commission notes that "the aid is towards an investment programme in a new firm and that the overall intensity of all the aids together is actually below the 50% net grant equivalent ceiling".
- 10 In its application, Cook seeks annulment of the Commission decision communicated to it by letter of 29 May 1991.
- 11 By Order of the President of the Court of 20 November 1991, the Spanish Government was given leave to intervene in support of the Commission's conclusions.
- 12 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Subject-matter and admissibility of the application

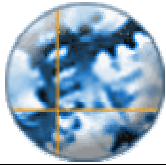
- 13 The letter of 29 May 1991 merely informs Cook of Decision NN 12/91 in which the Commission considered that the aids granted to PYRSA were compatible with the common market.
- 14 In itself, that letter sent for information does not constitute a decision that may be challenged in proceedings for annulment.
- 15 On the other hand, Decision NN 12/91, which is addressed to the Spanish Government, may be the subject of an action for annulment.
- 16 The defendant contended that the latter decision, in so far as it refers to the aid of PTA 975 905 000 granted by the Spanish Government, merely confirms the aforesaid letter of 13 March 1991, in which it was stated that such aid had been granted under the general regional aid scheme approved by the Commission. In response to that argument, Cook pointed out in its reply that the action was not directed against the letter of 13 March 1991 or any subsequent confirmation of that letter.
- 17 It is appropriate, in those circumstances, to consider the action as being directed against Decision NN 12/91 only in so far as that decision relates to aids other than that granted by the Spanish Government.
- 18 Since Cook is not the addressee of the contested decision, the admissibility of the application is subject, according to the second paragraph of Article 173 of the Treaty, to the condition that the applicant is directly and individually concerned by that decision.
- 19 The Commission and the Spanish Government maintain that that condition is not fulfilled and that, consequently, the application is inadmissible.
- 20 The Court has consistently held that persons other than those to whom a decision is addressed may claim to be concerned within the meaning of the second paragraph of Article 173 only 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 (Case 25/62 Plaumann v Commission [1963] ECR 95).
- 21 In order to establish whether those conditions are fulfilled in this case, it is appropriate to bear in mind the aim of the procedures provided for by Article 93(2) and by Article 93(3) of the Treaty.
- 22 As the Court pointed out in its judgment in Case 84/82 (Germany v Commission [1984] ECR 1451, at paragraphs 11 and 13), the preliminary stage of the procedure for reviewing aids under Article 93(3) of the Treaty, which is intended merely to allow the Commission to form a *prima facie* opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 93(2) of the Treaty. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the

Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments.

- 23 Where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court.
- 24 The parties concerned, within the meaning of Article 93(2) of the Treaty, have been defined by the Court as the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (Case 323/82 Intermills v Commission [1984] ECR 3809, at paragraph 16).
- 25 In this case, whilst the Commission and the Spanish Government deny that the distortions of competition resulting from the contested aids are substantial, they do not dispute that Cook, which, like the undertaking in receipt of the aid, produces GET parts, is a party concerned for the purposes of Article 93(2) of the Treaty.
- 26 In that capacity, consequently, Cook must be considered to be directly and individually concerned by Commission Decision NN 12/91. It is therefore entitled to seek the annulment of that decision on the basis of the second paragraph of Article 173 of the Treaty.

[...]

4.4 Case C-309/89: Codorniu



NOTE AND QUESTIONS

In the particular context of anti-dumping proceedings, the Court had already admitted that a "true" regulation as judged by the abstract terminology test might nevertheless be of individual concern to certain applicants. In this case, the Court seems to open the door for a more general use of this approach.

This was the last case decided by the ECJ before jurisdiction in action by non-privileged applicants was transferred to the CFI – since then such cases come before the ECJ on appeal from the CFI. After the Codorniu decision, there were many cases but no major developments until 2002, when UPA was decided (see below)

Codorniu SA v Council of the European Union

Case C-309/89

18 May 1994

Court of Justice

[1994] ECR I-1853

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

*Codorniu is a Spanish company manufacturing and marketing quality sparkling wines and holds the Spanish graphic trade mark Gran Cremant de Codorniu, which it has been using since 1924 to designate one of its quality sparkling wines. However, other Spanish producers also used the term *crémant*. Codorniu challenged a Community regulation stipulating that the term *crémant* should be reserved for sparkling wines of a particular quality coming from France or Luxembourg. In its observations, the Council claimed the inadmissibility of Codorniu's action, since Codorniu was concerned only in its capacity as a producer of quality sparkling wines using the term *crémant*, like any other producer in an identical situation.*

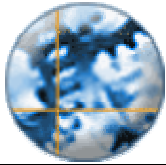
Judgement:

[...]

- 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 the identity of the persons to whom it applies at any given time, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (see most recently the judgment in Case C-298/89 Gibraltar v Council [1993] ECR I-3605, paragraph 17).
- 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 (see the judgment in Case 25/62 Plaumann v Commission [1963] ECR 95).
- 21 Codorniu registered the graphic trade mark "Gran Cremant de Codorniu" in Spain in 1924 and traditionally used that mark both before and after registration. By reserving the right to use the term "crémant" 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.

[...]

4.5 Case T-135/96: UEAPME v Council



NOTE AND QUESTIONS

In this case, the Court of First Instance had to deal with the first legislative act adopted on the basis of Article 3 and 4 of the Agreement on social policy which provides for a specific consultation and negotiation mechanism with management and labour.

Concerning the Court's assessment of the applicant's locus standi, what criterion seems to be the decisive one the Court is referring to? Do you think it to be sufficient and appropriate?

UEAPME v Council of the European Union

T-135/96

17 June 1998

Court of First Instance

[1998] ECR II-2335

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure

The Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises (UEAPME; hereinafter 'the applicant') is a European association which represents and defends at European level the interests of small and medium-sized undertakings (hereinafter 'SMUs').

In June 1996, on the basis of Article 4(2) of the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (hereinafter 'the Agreement'), the Council adopted Directive 96/34/EC on the framework agreement on parental leave concluded by the Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE), the Centre Européen de l'Entreprise Publique (CEEP) and the Confédération Européenne des Syndicats (ETUC) (OJ 1996 L 145, p. 4).

In 1995 the Commission had decided, in accordance with Article 3(2) of the Agreement, to consult management and labour on the possible direction of Community action with regard to reconciling working and family life. The applicant and some of the other representative associations consulted addressed to the Commission a document stating a common position. After several consultations, the UNICE, CEEP

and the ETUC informed the Commission, in accordance with Article 3(4) of the Agreement, of their desire to exercise the option available under Article 4(1) of opening negotiations on parental leave.

UNICE, CEEP and the ETUC agreed on a proposal for a framework agreement, which they submitted to the Commission with the request that it be implemented by a Council decision on a proposal from the Commission, in accordance with Article 4(2) of the Agreement. Meanwhile, by communications of 30 November and 13 December 1995, the applicant informed the Commission of its regret at having been unable to take part in the dialogue between management and labour, submitted its criticisms of the proposed framework agreement and brought an action under Article 173 of the EC Treaty for annulment of Directive 96/34.

Judgement:

- 63 Although Article 173, fourth paragraph, of the Treaty makes no express provision regarding the admissibility of actions brought by legal persons for annulment of a directive, it is clear from the case-law of the Court of Justice that the mere fact that the contested measure is a directive is not sufficient to render such an action inadmissible (see, on that point, Case C-298/89 Gibraltar v Council [1993] ECR I-3605 and the order of the Court of Justice in Asocarne v Council). Thus, in its order in Asocarne v Council, after noting that the contested measure was a directive, the Court of Justice examined the question whether what was really concerned was a decision - albeit adopted in the form of a directive - of direct and individual concern to the applicant within the meaning of Article 173, fourth paragraph, of the Treaty. In that respect, it must be observed that the Community institutions cannot, merely through their choice of legal instrument, deprive individuals of the judicial protection offered by that provision of the Treaty (see the order of the Court of First Instance in Case T-122/96 Federolio v Commission [1997] ECR II-1559, paragraph 50). Furthermore, as regards the present case, Article 4(2), first subparagraph, of the Agreement provides that 'agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission'. That being so, the mere fact that the chosen form of instrument was that of a directive cannot in this case enable the Council to prevent individuals from availing themselves of the remedies accorded to them under the Treaty.
- 64 It is necessary therefore to determine, first, if Directive 96/34 is a legislative measure or whether it must be regarded as a decision adopted in the form of a directive. In order to determine whether or not a measure is of general application, it must be assessed in the light of its character and of the legal effects which it is intended to produce or actually produces (*Alusuisse v Council and Commission*, paragraph 8).
- 65 Article 1 of Directive 96/34 states that 'the purpose of this Directive is to put into effect the annexed framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (Unice, CEEP and the ETUC)'. Paragraphs 1 and 2 of Clause 1 - headed 'Purpose and scope' - of the framework agreement specify, respectively, that 'this agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents' and that 'this agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State'.
- 66 Furthermore, although the applicant criticised the choice of the directive as the formal instrument for implementing the framework agreement on the basis of Article 4(2) of the Agreement, it did not claim that Directive 96/34 failed, as a directive, to satisfy the requirements laid down by Article 189 of the Treaty. It is sufficient to point out that Directive 96/34 is addressed to the Member States (Article 3), which are required to take all necessary measures which will enable them at any time to guarantee the results required by the Directive (Article 2(1)) and that the wording of the framework agreement to which Article 1 refers leaves to the national authorities the choice of form and methods which will enable those results to be achieved.

- 67 Consequently, Directive 96/34 is a legislative measure and does not constitute a decision within the meaning of Article 189 of the Treaty.
- 68 Secondly, it is necessary to determine whether, notwithstanding the legislative character of Directive 96/34, the applicant may be regarded as directly and individually concerned by it.
- 69 It should be borne in mind that, in certain circumstances, even a legislative measure which applies to the economic operators concerned in general may, according to the case-law cited above, be of individual concern to some of them (see, on that point, *Extramet Industrie v Council*, paragraph 13, *Codorniu v Council*, paragraph 19, and *Federolio v Commission*, paragraph 58). However, natural or legal persons can claim to be individually concerned by a measure only if it affects them by reason of certain attributes peculiar to them or by reason of circumstances which differentiate them from all other persons (Case 25/62 *Plaumann v Commission* [1963] ECR 95, at p. 107; Case T-12/93 *CCE de Vittel and Others v Commission* [1995] ECR II-1247, paragraph 36; and *Federolio v Commission*, paragraph 59).
- 70 On that point, the various arguments put forward by the applicant are all based on the premiss that it possesses special rights in the context of the procedural mechanisms established by the Agreement for the adoption of measures falling within its purview, and that those rights have been set at naught.
- 71 In the present case, in order to determine whether the applicant has in fact been affected by Directive 96/34 by reason of certain attributes peculiar to it or by reason of circumstances which differentiate it from all other persons, the particular features of the procedure culminating in the adoption of the directive must be examined, beginning with an analysis of the procedural mechanisms established by the Agreement. It is clear from the provisions of the Agreement that there are two procedures under which the measures necessary to attain its objectives may be adopted.
- 72 Those procedures have in common an initial stage consisting in the Commission's consultation of management and labour in accordance with Article 3(2) and (3) of the Agreement. However, Article 3(3) is silent as to which representatives of management and labour are covered. The Commission accordingly set out in its Communication a number of criteria, which make it possible to identify those representatives of management and labour whose representativity in its view entitles them to be consulted during that initial stage, which is mandatory for all Community initiatives based on the Agreement. On the basis of those criteria, the Commission drew up a list which is set out in Annex 2 to its Communication. At paragraph 24 thereof, the Commission states that this list will be reviewed in the light of experience acquired in that connection. The applicant appears on the list, in its capacity as a cross-industry organisation representing certain categories of workers or undertakings. It is common ground that it was consulted by the Commission in accordance with Article 3(2) and (3) of the Agreement.
- 73 As regards the first procedure, it follows from Article 2 of the Agreement that the Council may - after consulting the Economic and Social Committee, and adhering to the procedure referred to in Article 189c of the Treaty - adopt directives in the fields listed in Article 2(1) of the Agreement, or - acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee - in the areas listed in Article 2(3) of the Agreement. As regards the second procedure, it follows from Article 4 of the Agreement that an agreement concluded at European level between management and labour may be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2 of the Agreement, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The contested measure was adopted pursuant to the latter procedure.
- 74 The course of that procedure, which opens with the consultation stage governed by Article 3(2) and (3) of the Agreement, is as follows. Article 3(4) of the Agreement provides that management and labour may inform the Commission of their wish to initiate the process provided for in Article 4, and that the duration of the procedure must not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it. As mentioned above, Article 4 of

the Agreement also provides that the dialogue between management and labour may lead to agreements which, in the matters covered by Article 2, may be implemented by the Council at the joint request of the signatory parties.

- 75 Thus, neither Article 3(4) nor Article 4 of the Agreement expressly identifies 'management and labour' for the purposes of the negotiations referred to. Nevertheless, the way in which the provisions are structured and the existence of the prior consultation stage suggest that the representatives of management and labour which participate in the negotiations must at the very least have been among those consulted by the Commission. That does not mean to say, however, that all those consulted by the Commission - the representatives of management and labour listed in Annex 2 to the Communication - have the right to take part in the negotiations. The negotiation stage, which may come into being during the consultation stage initiated by the Commission, depends exclusively on the initiative of those representatives of management and labour who wish to launch such negotiations. The representatives of management and labour concerned in the negotiation stage are therefore those who have demonstrated their mutual willingness to initiate the process provided for in Article 4 of the Agreement and to follow it through to its conclusion.
- 76 Paragraph 31 of the Communication, in the section entitled 'From consultation to negotiation', states moreover that 'in their independent negotiations, the social partners are in no way required to restrict themselves to the content of the proposal in preparation within the Commission or merely to making amendments to it, bearing in mind, however, that Community action can clearly not go beyond the areas covered by the Commission's proposal; [t]he social partners concerned will be those who agree to negotiate with each other; [s]uch agreement is entirely in the hands of the different organisations; [h]owever, the Commission takes the view that the provisions regarding small and medium-sized undertakings referred to in Article 2(2) of the Agreement should be borne in mind by organisations which are signatory to an agreement'.
- 77 It is also clear from the wording of the Communication that the list set out in Annex 2 (management and labour organisations considered by the Commission to be representative) is drawn up to meet the organisational requirements only of the consultation stage provided for by Article 3(2) and (3) of the Agreement. The Commission mentions this solely in the section of the Communication dealing with 'Consultation of the social partners' (paragraphs 11 to 28), more specifically in paragraphs 22 to 28, under the heading 'The organisations to be consulted'; it does not refer to it anywhere in the section dealing with the negotiation stage (paragraphs 29 to 36 of the Communication, under the heading 'From consultation to negotiation').
- 78 Consequently, Article 3(2), (3) and (4) and Article 4 of the Agreement do not confer on any representative of management and labour, whatever the interests purportedly represented, a general right to take part in any negotiations entered into in accordance with Article 3(4) of the Agreement, even though it is open to any representative of management and labour which has been consulted pursuant to Article 3(2) and (3) of the Agreement to initiate such negotiations.
- 79 The mere fact that the applicant contacted the Commission on several occasions asking to participate in the negotiations between other representatives of management and labour does not affect that position, since it is the representatives of management and labour concerned, and not the Commission, which have charge of the negotiation stage properly so called.
- 80 Similarly, Article 2(2), first subparagraph, of the Agreement does not confer on the applicant a right to participate in the negotiations referred to in Article 3(4). Although, admittedly, the second sentence of Article 2(2), first subparagraph, of the Agreement states that 'such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings', the subparagraph does not provide that representatives of the SMUs are automatically entitled to participate in any negotiations entered into by management and labour pursuant to Article 3(4) of the Agreement (see, on that point, *CCE de la Société Générale des Grandes Sources and Others v Commission*, paragraph 29). It lays down a substantive obligation, compliance with which is subject to review by the Community judicature at the instance of any interested party which brings the appropriate action, and not exclusively on application for annulment of a measure pursuant to Article 173, fourth paragraph, of the Treaty. Accordingly, no cross-industry organisation representing the SMUs,

whatever its purported level of representativity, can infer from Article 2(2), first subparagraph, of the Agreement a right to participate in such negotiations.

- 81 The Court must also reject the argument put forward by the applicant, especially during the hearing, to the effect that, in accordance with the case-law, certain substantive provisions of Community law must, if they are to be effective, be recognised as having certain procedural implications. The case-law cited by the applicant in that connection does not support the inference - from Article 2(2), first subparagraph, of the Agreement - that it has a right to participate in all negotiations entered into by management and labour on the basis of Article 3(4) of the Agreement. Thus, on the one hand, in its order in Case 792/79 R Camera Care v Commission [1980] ECR 119, the Court of Justice did not find that certain substantive provisions, in the event Articles 85 and 86 of the Treaty, had a procedural implication, but made a determination as to the scope of a provision which conferred there and then a special power on the Commission, namely Article 3(1) of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87). Secondly, in Case C-127/92 Enderby [1993] ECR I-5535, the Court of Justice gave a preliminary ruling on the allocation of the burden of proof in relation to the question as to whether a certain practice in relations between employers and employees constituted discrimination contrary to Article 119 of the Treaty. In that case, the Court of Justice did not, therefore, attribute a procedural right to an individual in the context of a procedure for the adoption of an act by a Community institution, which is the context of the present case.
- 82 It follows from all the foregoing considerations that, having regard to the provisions of the Agreement, the applicant cannot claim to possess either a general right to participate in the negotiation stage of the second procedure provided for by the Agreement or, in the context of this case, an individual right to participate in negotiation of the framework agreement.
- 83 However, that is not sufficient in itself to render the present action inadmissible. In view of the particular features of the procedure which led to the adoption of Directive 96/34 on the basis of Article 4(2) of the Agreement, it is also necessary to determine whether any right of the applicant has been infringed as the result of any failure on the part of either the Council or the Commission to fulfil their obligations under that procedure, given that the applicant's right to judicial protection requires it to be regarded as directly and individually concerned if it is distinguished by reason of specific attributes which are peculiar to it or of factual circumstances which differentiate it from all other persons (see the case-law cited above, paragraph 69).
- 84 In that regard, the Court would point out that, while it is for the management and labour concerned, alone, to initiate and take charge of the negotiation stage, properly so called, of the procedure governed by Article 3(4) and Article 4 of the Agreement (see above, paragraphs 75 and 76), when they conclude an agreement whose implementation at Community level they jointly request by virtue of Article 4(2) thereof, the Council is to act on a proposal from the Commission. Accordingly, the management and labour concerned address their joint request to the Commission which thereupon resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council.
- 85 The Commission must act in conformity with the principles governing its action in the field of social policy, more particularly expressed in Article 3(1) of the Agreement, which states that 'the Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties'. As the applicant and the Commission have rightly pointed out, on regaining the right to take part in the conduct of the procedure, the Commission must, in particular, examine the representativity of the signatories to the agreement in question.
- 86 The Commission also undertook in its Communication to verify the representativity of parties representing management and labour which are signatories to an agreement, before proposing that the Council adopt a decision requiring its implementation at Community level. Accordingly, at paragraph 39 of its Communication, the Commission stated that it 'will prepare proposals for decisions to the Council following consideration of the representative status of the contracting parties, their mandate and the "legality" of each clause in the collective agreement in relation to Community law, and the provisions regarding small and medium-sized undertakings set out in

Article 2(2)'.

- 87 The Council, for its part, is required to verify whether the Commission has fulfilled its obligations under the Agreement because, if that is not the case, the Council runs the risk of ratifying a procedural irregularity capable of vitiating the measure ultimately adopted by it.
- 88 It is proper to stress the importance of the obligation incumbent on the Commission and the Council to verify the representativity of the signatories to an agreement concluded pursuant to Articles 3(4) and 4 of the Agreement, which the Council has been asked to implement at Community level. The participation of the two institutions in question has the effect, at that particular point in the procedure governed by those provisions, of endowing an agreement concluded between management and labour with a Community foundation of a legislative character, without recourse to the classic procedures provided for under the Treaty for the preparation of legislation, which entail the participation of the European Parliament. As the case-law makes clear, the participation of that institution in the Community legislative process reflects at Community level the fundamental democratic principle that the people must share in the exercise of power through a representative assembly (Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 20; Case 138/79 *Roquettes Frères v Council* [1980] ECR 3333, paragraph 33; and Case 139/79 *Maizena v Council* [1980] ECR 3393, paragraph 34). In that regard, it should be noted that, in accordance with that case-law, the democratic legitimacy of measures adopted by the Council pursuant to Article 2 of the Agreement derives from the European Parliament's participation in that first procedure (see above, paragraph 73).
- 89 In contrast, the second procedure, referred to in Articles 3(4) and 4 of the Agreement, does not provide for the participation of the European Parliament. However, the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level. In order to make sure that that requirement is complied with, the Commission and the Council are under a duty to verify that the signatories to the agreement are truly representative.
- 90 This obliges them to ascertain whether, having regard to the content of the agreement in question, the signatories, taken together, are sufficiently representative. Where that degree of representativity is lacking, the Commission and the Council must refuse to implement the agreement at Community level. In such a case, the representatives of management and labour which were consulted by the Commission in accordance with Article 3(2) and (3) of the Agreement, but which were not parties to the agreement, and whose particular representation - again in relation to the content of the agreement - is necessary in order to raise the collective representativity of the signatories to the required level, have the right to prevent the Commission and the Council from implementing the agreement at Community level by means of a legislative instrument. The judicial protection to which the existence of such a right gives rise implies that, where non-signatory representatives with those characteristics bring an action for annulment of the Council measure giving effect to the agreement at Community level on the basis of Article 4(2) of the Agreement, they must be regarded as directly and individually concerned by that measure. It should be added that, on similar grounds, both the Court of Justice and the Court of First Instance have already held an action for annulment of a measure of a legislative nature to be admissible where an overriding provision of law required the body responsible for it to take into account the applicant's particular circumstances (see Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207, paragraphs 11 to 32; Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraphs 11 to 13; and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, paragraphs 67 to 78).
- 91 In the present case, it is first necessary to determine whether the Commission and the Council did indeed verify whether the collective representativity of the signatories to the framework agreement was sufficient. It is clear from the information submitted by the Council that such an examination was in fact carried out. The Council and the Commission have explained in the course of the present proceedings that they examined both the degree of representativity of the signatories and

their representativity with respect to the substantive scope of the framework agreement. The 13th recital in the preamble to Directive 96/34 indicates, moreover, that in drawing up the proposal submitted to the Council in accordance with Article 4(2) of the Agreement, the Commission took into account the representative status of the signatories to the framework agreement. Also, in response to a request from the Court of First Instance made by way of a measure of organisation of procedure, the Council lodged extracts from documents of the Council's social issues group relating to its meetings of 22 February, 5 March and 12 March 1996, which make it clear that the question of the signatories' representativity was discussed within the Council.

- 92 In those circumstances, the applicant's bare assertion that the Commission and the Council failed to examine the question whether the signatories to the framework agreement were representative is not enough to put in issue the reality of the verification carried out by both institutions, given the evidence submitted in that connection by the Council. In any event, the various tables which the Council annexed to its rejoinder and the Commission's study, which served as a basis for the classification of the representatives of management and labour listed in Annex 2 to the Communication - a classification, moreover, which the applicant did not challenge at the time - show at the very least that both institutions kept themselves informed as to the representativity of the management and labour concerned in the present case.
- 93 Secondly, it is necessary to determine whether those institutions' examination of the collective representativity of the signatories to the framework agreement satisfied the requirements in that respect, as described in paragraphs 83 to 90 above.
- 94 The first point to note is that the purpose of the framework agreement was to set out the minimum appropriate requirements for all employment relationships, whatever their form (see above, paragraph 65). If the various signatories to the framework agreement are to satisfy the requirement of sufficient collective representativity, they must therefore be qualified to represent all categories of undertakings and workers at Community level.

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- 95 Secondly, the signatories to the framework agreement are the three bodies listed by the Commission in Annex 2 to the Communication as general cross-industry organisations, as distinct from cross-industry organisations representing certain categories of workers and undertakings, the sub-group in which the applicant was placed.
- 96 At first sight, the Council cannot be criticised for having taken the view, based on the Commission's appraisal, that the signatories to the framework agreement possessed sufficient collective representativity in relation to the content of that agreement, having regard to their cross-industry character and the general nature of their mandate.
- 97 Although the applicant does not deny the cross-industry character of the signatories to the framework agreement, it nevertheless claims that the mandate of those representing undertakings (UNICE and CEEP) is no more general than its own. In that respect, it stresses the fact that it represents many more SMUs, of all sizes, than UNICE and the fact that CEEP represents solely the interests of undertakings governed by public law, which are not so weighty in economic terms as the interests defended by the applicant.
- 98 As regards UNICE, it is common ground that, at the time when the framework agreement was concluded, that body represented undertakings of all sizes in the private sector, which qualified it to represent the SMUs, and that it counted among its members associations of SMUs, many of which were also affiliated to the applicant. The table set out in Annex 2 to the rejoinder (p. 36), to which the applicant made no reference at the hearing, also indicates that the national organisations affiliated to UNICE group together undertakings in the fields of industry, services, commerce, craft and SMUs.
- 99 Nor can the applicant plausibly argue that the fact that it represents a greater number of SMUs than UNICE shows that UNICE does not possess a general mandate. That fact is such as to support, rather than invalidate, the argument that UNICE does have a general mandate - to defend the interests of undertakings of whatever kind - by contrast with the more specific mandate of other

cross-industry organisations, such as the applicant. Similarly, the distinction drawn by the applicant between the interests which it can defend on behalf of the SMUs and those protected by UNICE further illustrates the special nature of the mandate of the applicant, which defends, specifically and exclusively, the interests of one category of undertakings (SMUs) and the generality of the mandate of UNICE, which defends the interests of all undertakings in the private sector, including the SMUs. It follows that, on the facts, it is established that UNICE possessed a general mandate at the time when the framework agreement was concluded.

- 100 So far as concerns CEEP, although undoubtedly denigrating its economic importance, the applicant does not deny that that cross-industry organisation represents at Community level all undertakings in the public sector, regardless of their size. In that respect, the general mandate that CEEP is recognised as possessing in Annex 2 to the Communication and Article 1 of Directive 96/34 cannot call in question the examination concerning sufficient collective representativity which the Council and Commission are required to carry out. Furthermore, by contrast with the applicant's situation, it is clear that if CEEP had not been one of the signatories to the framework agreement, this alone would have fundamentally affected the sufficiency of the collectively representational character of those signatories in view of the contents of that agreement, because then one particular category of undertakings, that of the public sector, would have been wholly without representation.
- 101 It remains to be determined whether, as the applicant suggests, notwithstanding the fact that the cross-industry organisations which concluded the framework agreement had a general mandate, their collective representativity in relation to its content was insufficient. On that point, the applicant maintains that, having regard to the number of SMUs which it represents and to the special consideration reserved for that category of undertakings by Article 2(2), first subparagraph, of the Agreement, the applicant's absence from the negotiations for the framework agreement automatically means that the collective representativity of the signatories responsible for defending the interests of undertakings was insufficient. This is borne out, according to the applicant, by the content of the framework agreement which, contrary to the requirements laid down in Article 2(2) of the Agreement, is particularly detrimental to the interests of the SMUs.
- 102 The applicant's criticisms cannot be accepted. In the first place, they are all based on a single criterion, namely the number of SMUs represented respectively by the applicant and UNICE. Even if that criterion may be taken into consideration when determining whether the collective representativity of the signatories to the framework agreement is sufficient, it cannot be regarded as decisive in relation to the content of that agreement. Since the framework agreement concerns all employment relationships (see above, paragraph 65), it is not so much the status of undertaking which is important, but that of employer. Even though the Council stated that the majority of the applicant's members - representing the craft industries - did not include any employees, the applicant failed to provide any tangible evidence to the contrary, notwithstanding the express requests made by the Court of First Instance at the hearing. On that occasion, the applicant confined itself to quoting various random statistics relating to one or other of the Member States concerned by the Agreement.
- 103 Furthermore, it is clear from the various tables annexed by the applicant to its reply and by the Council to its rejoinder that, among the SMUs represented by the applicant in the 14 Member States concerned by the Agreement (5 565 300 according to the table set out in Annex I to the reply; 4 835 658 according to the table set out in Annex I to the rejoinder, supplemented by the applicant's replies to the written questions put by the Court of First Instance; and 6 600 000 according to the applicant's oral statements at the hearing), a third (2 200 000 out of 6 600 000, according to the applicant at the hearing), perhaps as many as two-thirds (3 217 000 out of 4 835 658, according to the table set out in Annex I to the rejoinder) of those SMUs are also affiliated to one of the organisations represented by UNICE.
- 104 The applicant cannot argue that, by virtue of Article 2(2), first subparagraph, of the Agreement, its level of representativity is so great that its non-participation in the conclusion of an agreement between general cross-industry organisations automatically means that the requirement of sufficient collective representativity was not satisfied. Article 2(2), first subparagraph, of the Agreement is a provision of substantive law, compliance with which can be sought by any

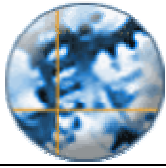
interested party availing itself of the appropriate legal remedy (see above, paragraph 80).

- 105 Lastly, as regards representation of the SMUs' interests, the very wording of the framework agreement makes it clear that the SMUs were not left out of the negotiations leading to its conclusion. Thus, point 12 of the general considerations of the framework agreement provides that 'this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would impede the creation and development of small and medium-sized undertakings'. Similarly, Clause 2.3(f) of the framework agreement states that the Member States and/or management and labour may, in particular, 'authorise special arrangements to meet the operational and organisational requirements of small undertakings'.
- 106 In any event, the criticisms which the applicant directs at the content of the framework agreement, pleading an infringement of Article 2(2) of the Agreement, do not in any way demonstrate that one or other of the provisions of the framework agreement imposes administrative, financial or legal constraints in a way which would hold back the creation and development of SMUs. The purpose of Article 2(2), first subparagraph, of the Agreement is not to prohibit the adoption of measures entailing administrative, financial and legal constraints for the SMUs, but rather to ensure that measures adopted in the social field do not disproportionately affect the creation and development of SMUs by imposing particular administrative, financial and legal constraints. It is also apparent that, in conformity with the nature of the Council measure implementing the framework agreement, the Member States and/or management and labour still enjoy a discretion vis-à-vis the transposition of the minimum requirements adopted in that agreement.
- 107 In the first place, the applicant cannot properly infer from Clause 2.3(e) and (f) of the framework agreement that medium-sized undertakings do not have the option of postponing the granting of parental leave. The wording of Clause 2.3(e) does not support such an inference. Furthermore, the list of reasons justifying the use of that option is not exhaustive, since, under the terms of the framework agreement, that list - which is placed in brackets - is merely illustrative. The applicant's interpretation of Clause 2.3(e) is therefore manifestly unfounded. Moreover, the wording of Clause 2.3(f) of the framework agreement must be read as authorising, in addition, in the case of small undertakings only, the rules concerning the exercise of the right to parental leave to be adjusted, so as to meet their operational and organisational requirements. That additional option does not mean, however, that - as the applicant suggests - medium-sized undertakings are deprived of their right under Clause 2.3(e) to postpone the granting of parental leave for certain reasons.
- 108 Next, although it is common ground that the framework agreement does not allow for exceptional arrangements, by way of derogation from protection against dismissal, in cases where the employer's economic interests are adversely affected by having to maintain the employment contract during and after parental leave, it must be observed that, not only would the very notion of parental leave lose all substance if employers were able to interrupt the contract of employment on the occasion of parental leave, but the applicant has failed to establish - or even to explain to the Court - in what respect the fact that the SMUs are denied that option amounts to the imposition of an administrative, financial and legal constraint which would hold back their creation and development.
- 109 Nor, lastly, do the provisions of the framework agreement relating to the duration of parental leave infringe Article 2(2), first subparagraph, of the Agreement. Clause 2.1 of the framework agreement provides that parental leave is to have a minimum irreducible duration of three months, but it does not prescribe a general and unconditional maximum duration, it being possible to define this at the transposition stage. Thus, Clause 2.1 states that 'this agreement grants, subject to Clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour'. That wording shows, therefore, that Clause 2.1 does not impose administrative, financial or legal constraints in a way which would hold back the creation and development of SMUs, and that a substantial degree of discretion remains vested in those who will be responsible for implementing the framework agreement.

- 110 It follows that the Commission and the Council, acting in conformity with their obligations, in particular those derived from a fundamental democratic principle, properly took the view that the collective representativity of the signatories to the framework agreement was sufficient in relation to that agreement's content for its implementation at Community level by means of a Council legislative measure, pursuant to Article 4(2) of the Agreement. It should be emphasised that this finding, which is confined to the circumstances of the present case, is without prejudice to either the applicant's own representativity as a cross-industry organisation representing specifically and exclusively the interests of SMUs, or, in the case of any other agreement which the Council may be requested to implement on the basis of Article 4(2) of the Agreement, to the question as to whether those representing management and labour who are signatories thereto are sufficiently representative.
- 111 Thus, the applicant has not succeeded in showing that in the present case, having regard to its representativity, it is distinguished from all other organisations of management and labour consulted by the Commission which were not signatories to the framework agreement and that it was accordingly entitled to require the Council to prevent the implementation of the framework agreement at Community level (see above, paragraph 90).
- 112 It follows from all the foregoing considerations that, since the applicant was not affected by Directive 96/34 by reason of certain attributes which are peculiar to it or by reason of a factual situation which differentiates it from all other persons, it cannot in the present case be regarded as individually concerned by that Directive. The action must therefore be declared inadmissible.

[...]

5 ARTICLE 230 IN THE DRAFT CONSTITUTION



NOTE AND QUESTIONS

It is obvious already at first sight that many changes have been made to the text of Article 230 TEC in its new version in the draft Constitution. Are they going in the line of the Court's jurisprudence?

Article III-365

1. The Court of Justice of the European Union shall review the legality of European laws and framework laws, 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.**
2. For the purposes of paragraph 1, the Court of Justice of the European Union shall have jurisdiction in actions brought 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 Constitution or of any rule of law relating to its application, or misuse of powers.
3. The Court of Justice of the European Union shall have jurisdiction under the conditions laid down in paragraphs 1 and 2 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.
4. Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against **an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.**
5. **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 these bodies, offices or agencies intended to produce legal effects in relation to them.**
6. The proceedings provided for in this Article shall be instituted within two months of the publication of the act, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the plaintiff's knowledge, as the case may be.

(Emphasis added)

Paragraph 1

This provision gave rise to lengthy debates within the Convention for the future of Europe. The paragraph contains a potentially important change since it includes the acts of Union agencies and bodies. Following a detailed analysis of the current situation of agencies and bodies as regards verification of the legality of their acts, the Convention noted that in general the acts setting up agencies contain provisions for means of redress before the Court of Justice as regards legal acts adopted by those agencies¹.

A majority of members recommend that Article 230 TEC be amended so as to cover, in addition to legal acts adopted by the institutions, those of Union agencies and bodies since they considered that acts producing legal effects vis-à-vis third parties should not escape judicial scrutiny of their legality. It was emphasised that the act establishing the agency could also lay down specific arrangements for verification of the legality of acts of the agency or body in question (see new paragraph 5).

Paragraph 3

Following requests by several Convention members, the Praesidium proposed the inclusion of the Committee of the Regions, which could be actively entitled to bring actions to protect its prerogatives.

Paragraph 4

The question of access for natural or legal persons to the Court of Justice in relation to acts of general application was again subject of lengthy debates. One on side there were members who considered that the substance of the fourth paragraph of Article 230 must not be amended as it satisfied the essential requirements of effective judicial protection, particularly given that national courts can (or must) refer to the Court of Justice for preliminary rulings on questions relating to the interpretation or assessment of validity of Union law; other members argued that the conditions of admissibility laid down in this paragraph for proceedings by individuals against acts of general application were too restrictive.

The second group, which was in favour of amending the fourth paragraph of Article 230 stressed in particular the fact that, in certain exceptional cases, an individual could be directly concerned by an act of general application without it entailing an internal implementing measure. In such cases, the individual concerned would currently have to infringe the law to have access to the court. They consider that the current conditions of admissibility, which require the measure to be "of direct and individual concern", do not permit control by the Court in this specific case. With this in mind, the Praesidium recommended that the conditions for instituting direct proceedings be opened up.

Members who were in favour of amending the fourth paragraph of Article 230 expressed a preference for the option mentioning "an act of general application". Some members, however, considered that the term "a regulatory act" would be more appropriate, since it would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the "of direct and individual concern" condition remains applicable) while providing for a more open approach to actions against regulatory acts. The Praesidium has adopted the latter approach

¹ See Secretariat working document on the right of redress against acts of agencies of the Union (WD 9).

and proposed that provision be made for actions by natural or legal persons against regulatory acts which are of direct concern to them without entailing implementing measures.

A simplified wording of the fourth paragraph of Article 230 is also proposed, involving the deletion of the words "although in the form of ..." and their replacement by "an act addressed to that person or which is of direct and individual concern to him".

During its discussions the Praesidium also noted a proposal from a number of Convention members for the introduction in this Article of specific redress for the defence of fundamental rights, but it has decided not to take up this idea.

Paragraph 5

See comments on paragraph 1 above.

6 RELATIONSHIP BETWEEN ARTICLE 230 AND OTHER PROCEDURES

6.1 Relationship between Article 230 and Article 241

Article 241 (ex 184) TEC

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, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.

6.1.1 Joined Cases 31 and 33/62: Wöhrmann

Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH

v

Commission of the European Economic Community

Joined Cases 31 and 33/62

14 December 1962

Court of Justice

[1962] ECR 501

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

Before examining the question whether the contested measures are of their nature decisions or regulations, it is necessary to examine whether Article 184 empowers the Court to adjudicate upon the inapplicability of a regulation when this is invoked in proceedings -- as in the present case -- before a national court or tribunal.

Article 184 enables any party, notwithstanding the expiry of the period laid down in the third paragraph of Article 173, to invoke before the Court of Justice, for the purpose of making an application for annulment, the inapplicability of a regulation in proceedings in which it is at issue and to plead the grounds specified in the first paragraph of Article 173.

Because Article 184 does not specify before which court or tribunal the proceedings in which the regulation is at issue must be brought, the applicants conclude that the inapplicability of that regulation may in any event be invoked before the Court of Justice. This would mean that there would exist a method of recourse running concurrently with that available under Article 173.

This is however not the meaning of Article 184. It is clear from the wording and the general scheme of this Article that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect.

More particularly, it is clear from the reference to the time limit laid down in Article 173 that Article 184 is applicable only in the context of proceedings brought before the Court of Justice and that it does not permit the said time limit to be avoided.

The sole object of Article 184 is thus to protect an interested party against the application of an illegal regulation, without thereby in any way calling in issue the regulation itself, which can no longer be challenged because of the expiry of the time limit laid down in Article 173.

It must be stressed that the Treaty clearly defines the respective jurisdictions of the Court of Justice and of national courts or tribunals. In fact, by virtue of both Article 177 and Article 20 of the Protocol on the statute of the Court of Justice of the European Economic Community, the decision to suspend proceedings and to refer a case to this Court is one for the national court or tribunal.

If the parties to an action pending before a national court or tribunal were entitled to make a direct request to this Court for a preliminary ruling, they could compel the national court to suspend proceedings pending a decision of the Court of Justice. Neither the Treaty nor the Protocol, however, imposes such a limitation on the powers of the national court.

Although, therefore, Article 184 does not provide sufficient grounds to enable the Court of Justice to give a decision at the present stage, Article 177 does empower the Court to give a ruling if a national court or tribunal were to refer proceedings instituted before it to the Court.

In the light of all these considerations, the Court must declare that it has no jurisdiction to consider the present applications, both insofar as they seek the annulment of the contested measures and insofar as they seek to have them declared inapplicable. It is unnecessary therefore to decide upon the question of the Court's jurisdiction with regard to the exact nature of the measures of the Commission which are challenged by the applicants.

During the oral procedure the applicants alternatively pleaded Article 173 as ground for their applications. With regard to this it does not appear necessary to examine the admissibility of this change in the legal basis of the requests or the question whether the contested measures are decisions under the second paragraph of Article 173 of the Treaty, since the applicants did not in fact commence their action within the period laid down by the third paragraph of Article 173.

This period must be regarded as having commenced, at the latest, with the publication in the Bundesgesetzblatt of the Federal Republic of Germany on 1 July 1961, of the Ninth Order amending the German Customs Tariff of 1961, or if not then with the publication on 30 December 1961 of the Second Order amending the German Customs Tariff of 1962. It was then at the very latest that the contested measures must have come to the knowledge of the applicants. Their applications, which were made respectively on 4 and 9 October 1962, are therefore inadmissible insofar as they are based on Article 173 since they were made out of time.

The applications are therefore inadmissible in their entirety.

[...]

6.1.2 Case 92/78: Simmenthal

SpA Simmenthal v Commission of the European Communities

Case 92/78

6 March 1979

Court of Justice

[1979] ECR 777

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

34. While the applicant formally challenges Commission Decision No 78/258 it has at the same time criticized, in reliance on Article 184 of the EEC Treaty, certain aspects of the "linking" system in the form in which it has been implemented pursuant to the new Article 14 of Regulation No 805/68, by Regulation No 2900/77 and No 2901/77 and also by the notices of invitations to tender of 13 January 1978.
35. Article 184 reads: "Notwithstanding the expiry of the period laid down in the third paragraph of Article 173, any party may, in proceedings in which a regulation of the Council or the Commission is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation".
36. There is no doubt that this provision enables the applicant to challenge indirectly 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.
37. 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".
38. 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.
39. As the Court in its judgment of 12 June 1958 in Case 15/57, *Compagnie des Hauts Fourneaux de Chasse v. high Authority of the European Coal and Steel Community* [1957 and 1958] ECR 211, and in its judgment of 13 June 1956 in Case 9/56, *Merloni & Co., Industrie Metallurgische S.p.A. v. High Authority of the European Coal and Steel Community* [1957 and 1958] ECR 133, has already held in connection with Article 36 of the ECSC 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

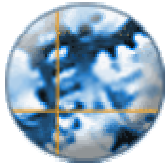
action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void.

40. 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.
41. This wide interpretation of Article 184 derives from the need to provide those persons who are precluded by the second paragraph of Article 173 from instituting proceedings directly in respect of general acts with the benefit of a judicial review of them at the time when they are affected by implementing decisions which are of direct and individual concern to them.
42. The notices of invitations to tender of 13 January 1978 in respect of which the applicant was unable to initiate proceedings are a case in point, seeing that only the decision taken in consequence of the tender which it had submitted in answer to a specific invitation to tender could be of direct and individual concern to it.
43. There are therefore good grounds for declaring 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.

[...]

6.2 Relationship between Article 230 and Article 226

6.2.1 Case 226/87: Public Sector Insurance



NOTE AND QUESTIONS

This case expands the relational matrix. It involves a relationship between 169-171 and 173. It is with this in mind that one should read it.

Commission of the European Communities v Hellenic Republic

Case 226/87

30 June 1988

Court of Justice

[1988] ECR 3611

- 1 By an application lodged at the Court Registry on 20 July 1987, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to take within the prescribed time-limit the measures necessary to comply with Commission Decision 85/276 of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks (Official Journal 1985, L 152, p. 25), the Hellenic Republic has failed to fulfil its obligations under the EEC Treaty.
- 2 Article 13 of Greek Law No 1256/82 of 28 to 31 May 1982 provides that all public property, including the assets of Greek public undertakings, must be insured exclusively with Greek public sector insurance companies and requires the staff of State-owned banks to recommend to their customers that they take out insurance with an insurance company owned and controlled by the public banking sector.
- 3 By decision of 24 April 1985, adopted under Article 90 (3) of the Treaty, the Commission declared those legislative provisions incompatible with Article 90 (1) of the Treaty read in conjunction with Article 52, Article 53, the second paragraph of Article 5 and Article 3 (f) of the Treaty. Article 2 of that decision, of which the Greek Government was notified by letter of 30 May 1985, required Greece to inform the Commission within two months of the date of notification of the decision of the measures it had taken to comply therewith.
- 4 The Commission received no information within the prescribed time-limit; it therefore sent a reminder to the Greek Government, which informed it, by letter of 29 October 1985, that Article 13 of Law No 1256/82 was to be amended in the near future.

- 5 The legislation was not amended, and on 8 April 1986 the Commission initiated the procedure provided for under Article 169 of the Treaty by calling upon the Hellenic Republic to submit its observations.
- 6 There was then an exchange of correspondence during which the Greek authorities simply announced the imminent submission to Parliament of a draft law intended to adapt the existing legislation in order to comply with the Commission Decision of 24 April 1985.
- 7 Finally, after delivering a reasoned opinion to the Greek Government on 17 February 1987, to which no reply was received, the Commission brought this action.
- 8 Reference is made to the Report for the Hearing for a fuller account of the national legislation, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 9 In support of its application, the Commission claims that the Hellenic Republic was required to comply with its decision of 24 April 1985 and cannot, in these proceedings, contend that it was unlawful.
- 10 For its part, the Greek Government contends that, in reality, the abovementioned Commission decision must be regarded as a mere opinion. The fact that it did not contest that decision in the manner provided for in Article 173 cannot be regarded as an admission that it is binding and valid. The Greek Government is therefore entitled to contest the lawfulness of that alleged decision in these proceedings. It contends that, contrary to what is stated in the decision, Article 13 of Law No 1256/82 is not contrary to the Treaty.
- 11 Under Article 90 (3) of the EEC Treaty, "the Commission shall ensure the application of the provisions of this article and shall, where necessary, address appropriate directives or decisions to Member States". It can be seen from the judgment of the Court of 6 July 1982 (Joined Cases 188 to 190/80 France, Italy and United Kingdom v Commission ((1982)) ECR 2545) that although the powers thus conferred on the Commission operate in a specific field of application and under conditions defined by reference to the particular objective of that article, that does not prevent the "directives" and "decisions" referred to in that provision of the Treaty from falling within the general category of directives and decisions referred to in Article 189.
- 12 Consequently, the Commission decision of 24 April 1985 was, by virtue of the fourth paragraph of Article 189, "binding in its entirety" upon the Hellenic Republic, to which it was addressed. The latter was therefore required to comply with the provisions of the decision unless and until it obtained from the Court of Justice either an order suspending its operation or its annulment. It is common ground that in this case the Greek Government did not apply to the Court for such measures or obtain them subsequently from it.
- 13 The Hellenic Republic cannot in any event plead the unlawfulness of the decision of 24 April 1985 as a ground for arguing that it has not failed to fulfil its obligations.
- 14 The system of remedies set up by the Treaty distinguishes between the remedies provided for in Articles 169 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, or the failure to adopt such measures. Those remedies have different objectives and are subject to different rules. 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.

- 15 The Hellenic Republic argued at the hearing that in this case, in order to meet a fundamental requirement of the Community legal order, the Court should none the less, by way of exception, exercise its power of judicial review in regard to the decision of 24 April 1985. That decision, it says, infringes the fundamental principle of the division of powers between the Community and the Member States and therefore lacks any legal basis in the Community legal order.
- 16 That objection could be upheld only if the measure at issue contained such particularly serious and manifest defects that it could be deemed non-existent (judgment of 26 February 1987 in Case 15/85 *Consorzio Cooperative d' Abruzzo v Commission* ((1987)) ECR 1005). However, the arguments put forward by the Hellenic Republic contain no precise factor of such a kind as to permit the Commission's decision to be so described. Indeed, it itself considered that the decision of 24 April 1985 was not non-existent when it stated, throughout the pre-litigation stage, that it intended to comply with that decision.
- 17 It follows from all the foregoing that the Commission's application must be upheld, and it is not necessary to rule on the lawfulness of the contested decision.

[...]

6.3 Relationship between Article 230 and Article 234

6.3.1 Case C-188/92: TWD

TWD Textilwerke Deggendorf GmbH v Germany

Case C-188/92

9 March 1994

Court of Justice

[1994] ECR I-833

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 18 march 1992, which was received at the Court on 12 may 1992, the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (higher administrative Court for North Rhine-Westphalia, Federal Republic of Germany) referred to the Court for a preliminary ruling under article 177 of the EEC Treaty two questions on the definitive nature of Commission decision 86/509/EEC of 21 may 1986, on aid granted by the Federal Republic of Germany and the land of Bavaria to a producer of polyamide and polyester yarn situated in DEGGENDORF (Official Journal 1986 I 300, p. 34), vis-à-vis the recipient of the aid to which it relates, after the expiry of the time-limit prescribed by the third paragraph of article 173 of the EEC Treaty for bringing an action, and on the validity of that decision.
- 2 Those questions were raised in the course of proceedings between the German undertaking TWD TEXTILWERKE DEGGENDORF GmbH (hereinafter "TWD") and the German minister for economic affairs. From 1981 to 1983 that undertaking, a manufacturer of polyamide and polyester yarn, received from the Federal Republic of Germany, under the regional aid program run jointly by the Federal government and the Länder and under the Bavarian regional aid program, aid including a subsidy of dm 6.12 million. That subsidy was granted on the basis of certificates issued by decisions of the Federal minister for economic affairs taken pursuant to article 2 of the German law on investment grants.
- 3 In 1985 the Commission, not having been notified by the Federal Republic of Germany of any of those measures, initiated the procedure under the first paragraph of article 93(2) of the EEC Treaty, as a result of which it adopted the abovementioned decision 86/509. By that decision, addressed to the Federal Republic of Germany, the Commission declared that the aid granted to a producer of polyamide and polyester yarn situated in DEGGENDORF - which was in fact TWD - had been granted in contravention of article 93(3) of the Treaty and was consequently unlawful. It declared that that aid was also incompatible with the common market by virtue of article 92 of the EEC Treaty. It accordingly requested the Federal Republic of Germany to recover the aid.
- 4 By letter of 1 September 1986 the Federal minister for economic affairs forwarded to TWD for information a copy of decision 86/509 and pointed out that it could bring an action against that decision under article 173 of the Treaty. Neither the Federal Republic of Germany nor TWD challenged the decision before the Court of justice.
- 5 By decision of 19 march 1987 the Federal minister for economic affairs revoked the certificates issued under article 2 of the law on investment grants, which were the legal basis of the Federal aid, on the ground that they were unlawful and were to be returned in accordance with the decision of the Commission.

- 6 On 16 April 1987 TWD appealed against that decision to the Verwaltungsgericht (administrative Court) Cologne, which dismissed its application by judgment of 21 December 1989.
- 7 TWD appealed against that judgment to the Oberverwaltungsgericht für das Land Nordrhein-Westfalen on 21 February 1990. It argued in particular that the investment grants obtained from 1981 to 1983 were partially compatible with the common market so that Commission decision 86/509 was at least partially unlawful. In the view of TWD, the unlawfulness of the decision could be pleaded even after the expiry of the time-limit laid down in the third paragraph of article 173 of the Treaty.
- 8 It is in that context that the national Court referred the following questions to the Court:

"1. is a national Court bound by a decision of the EEC Commission adopted pursuant to article 93(2) of the EEC Treaty when hearing an appeal regarding the implementation of that decision by the national authorities brought by the recipient of the aid and addressee of the implementation measures on the ground that the decision of the EEC Commission is unlawful in circumstances where the recipient of the aid did not institute proceedings under the second paragraph of article 173 of the EEC Treaty, or did not do so in good time, even though it was informed of the Commission's decision in writing by the member state?

2. in the event that the answer to question 1 is in the negative: is Commission decision 86/509/EEC of 21 May 1986 (Official Journal I 300, p. 34) entirely or partly invalid because, contrary to the view of the Commission, the aid granted is entirely or partially compatible with the common market?"
- 9 In its order for reference the national Court notes that the question whether the application before it is well founded depends on the validity of the abovementioned decision of the Commission but that the question of validity arises only if the national Court were able to consider the unlawfulness of the decision, notwithstanding the expiry of the time-limit laid down in the third paragraph of article 173 of the Treaty. The second question is therefore submitted only in the event that the first question, which is preliminary in nature, is answered in the negative.

The first question

- 10 The issue before the national Court is whether or not, in the factual and legal circumstances of the main proceedings, the applicant is time-barred from pleading the unlawfulness of the Commission's decision in support of an action brought against the administrative act by which the national authority, in implementation of the Commission's decision, revoked the certificates which formed the legal basis for the aid which it had received.
- 11 The national Court emphasizes that the Commission's decision was not challenged by the applicant in the main proceedings, the recipient of the aid with which the decision was concerned, although a copy of that decision had been sent to it by the Federal ministry of economic affairs and that ministry had explicitly informed it that it could bring an action against that decision before the Court of justice.
- 12 The question submitted to the Court must be answered in the light of those circumstances.
- 13 It is settled law that a decision which has not been challenged by the addressee within the time-limit laid down by article 173 of the Treaty becomes definitive as against him (see in the first place the judgment in case 20/65 *Collati v Court of justice* [1965] ECR 847).
- 14 The undertaking in receipt of individual aid which is the subject-matter of a Commission decision adopted on the basis of article 93 of the Treaty has the right to bring an action for annulment under the second paragraph of article 173 of the Treaty even if the decision is addressed to a member state (judgment in case 730/79 *Philip Morris v Commission* [1980] ECR 2671). By virtue of the third paragraph of that article, the expiry of the time-limit laid down in that provision has the same time-barring effect vis-à-vis such an undertaking as it does vis-à-vis the member state which is the addressee of the decision.
- 15 It is settled law that a member state may no longer call in question the validity of a decision addressed to it on the basis of article 93(2) of the Treaty once the time-limit laid down in the third paragraph of article 173 of the Treaty has expired (see the judgments in case 156/77 *Commission v*

Belgium [1978] ECR 1881 and case C-183/91 Commission v Greece [1993] ECR I-3131).

- 16 That case-law, according to which it is impossible for a member state which is the addressee of a decision taken under the first paragraph of article 93(2) of the Treaty to call in question the validity of the decision in the proceedings for non-compliance provided for in the second paragraph of that provision, is based in particular on the consideration that the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community measures which involve legal effects from being called in question indefinitely.
- 17 It follows from the same requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national Courts in an action brought against the measures taken by the national authorities for implementing that decision.
- 18 To accept that in such circumstances the person concerned could challenge the implementation of the decision in proceedings before the national Court on the ground that the decision was unlawful would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired.
- 19 It is true that in its judgment in joined cases 133 to 136/85 *Rau v BALM* [1987] ECR 2289, on which the French government relies in its observations, the Court held that the possibility of bringing a direct action under the second paragraph of article 173 of the EEC Treaty against a decision adopted by a Community institution did 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 was unlawful.
- 20 However, as is clear from the report for the hearing in those cases, each of the plaintiffs in the main proceedings had brought an action before the Court of justice for the annulment of the decision in question. The Court did not therefore rule, and did not have to rule, in that judgment on the time-barring effects of the expiry of time-limits. It is precisely that issue with which the question referred by the national Court in this case is concerned.
- 21 This case is also distinguishable from case 216/82 *Universität Hamburg v Hauptzollamt Hamburg-Kehrwieder* [1983] ECR 2771.
- 22 In the judgment in that case the Court held that a plaintiff whose application for duty-free admission had been rejected by a decision of a national authority taken on the basis of a decision of the Commission addressed to all the Member States had to be able to plead, in proceedings brought under national law against the rejection of his application, the illegality of the Commission's decision on which the national decision adopted in his regard was based.
- 23 In that judgment the Court took into account the fact that the rejection of the application by the national authority was the only measure directly addressed to the person concerned of which it had necessarily been informed in good time and which it could challenge in the Courts without encountering any difficulty in demonstrating its interest in bringing proceedings. It held that in those circumstances the possibility of pleading the unlawfulness of the Commission's decision derived from a general principle of law which found its expression in article 184 of the EEC Treaty, namely the principle which confers 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 those acts by which it was thus affected without having been in a position to ask that they be declared void (see the judgment in case 92/78 *Simmenthal v Commission* [1979] ECR 777).
- 24 In the present case, it is common ground that the applicant in the main proceedings was fully aware of the Commission's decision and of the fact that it could without any doubt have challenged it under article 173 of the Treaty.
- 25 It follows from the foregoing that, in factual and legal circumstances such as those of the main

proceedings in this case, the definitive nature of the decision taken by the Commission pursuant to article 93 of the Treaty vis-à-vis the undertaking in receipt of the aid binds the national Court by virtue of the principle of legal certainty.

- 26 The reply to be given to the first question must therefore be that the national Court is bound by a Commission decision adopted under article 93(2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of article 173 of the Treaty, or did not do so within the period prescribed.

The second question

- 27 Since the second question was submitted by the national Court only in the event that the first question is answered in the negative, there is no need to reply to it.

[...]

6.3.2 Case C-241/95: Intervention Board

R v Intervention Board for Agricultural Produce

Case C-241/95

12 December 1996

Court of Justice

[1997] 1 CMLR 675

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By order of 20 June 1995, received at the Court on 10 July 1995, the High Court of Justice (Queen's Bench Division) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the validity of Articles 1(2) and 2(2) of Commission Regulation (EC) No 214/94 of 31 January 1994 laying down detailed rules for the application of Council Regulation (EC) No 130/94 with regard to the import arrangements for frozen beef falling within CN code 0202 and products falling within CN code 0206 29 91 (OJ 1994 L 27, p. 46).
- 2 The questions were raised in proceedings between Accrington Beef Co. Ltd and Others (the applicants in the main action, hereinafter 'the applicants') and the Intervention Board for Agricultural Produce ('the Intervention Board'), the authority responsible in the United Kingdom for administration of the common agricultural policy, concerning the conditions of eligibility for the Community tariff quota opened for certain kinds of frozen beef and other products by Article 1 of Council Regulation (EC) No 130/94 opening and providing for the administration of a Community tariff quota for frozen meat of bovine animals falling within CN code 0202 and products falling within CN code 0206 29 91 (1994) (OJ 1994 L 22, p. 3).
- 3 The quota was fixed at 53 000 tonnes, expressed in weight of boned or boneless meat. The Common Customs Tariff and the levy applicable to the quota are 20% and 0% respectively.
- 4 Article 2 of Regulation No 130/94 provides that the quota is to be divided into two parts [...]
- 5 Detailed rules for application of the regulation, in particular for allocating the quantities available between traditional importers and newcomers, are to be adopted pursuant to Article 4 by the Commission in accordance with the procedure laid down in Article 27 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187), which involves consultation of a management committee.
- 6 In accordance with that procedure the Commission adopted Regulation No 214/94, Article 1(1) and (2) of which restates the criteria for allocation of the two parts of the quota referred to in Article 2 of Regulation No 130/94 and provides that the second part is to be reserved for operators who can furnish proof of having 'imported at least 50 tonnes in 1992 and 80 tonnes in 1993 of beef not subject to the quota' or 'exported at least 110 tonnes in 1992 and 150 tonnes in 1993 of beef to third countries'.
- 7 The export thresholds fixed for the 1994 quota were higher than those set for the 1992 and 1993 quotas, which were 110 tonnes for each of the two reference years [see Commission Regulation (EEC) No 3701/91 of 18 December 1991 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3667/91 for frozen meat of bovine

animals covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1991 L 350, p. 34) and Commission Regulation (EEC) No 3771/92 of 22 December 1992 laying down detailed rules for the application of the import arrangements provided for in Council Regulation (EEC) No 3392/92 for frozen beef covered by CN code 0202 and products covered by CN code 0206 29 91 (OJ 1992 L 383, p. 36)].

- 8 It is provided in Article 1(3) and (4) and Article 3(3), third subparagraph, of Regulation No 214/94 that 'the 42 400 tonnes shall be allocated between the various (traditional) importers in proportion to their imports during the reference years' whereas 'the 10 600 tonnes shall be allocated in proportion to the quantities applied for by eligible (newcomers)' with a maximum of 50 tonnes per application. However, pursuant to Article 4(2), second subparagraph, lots are to be drawn if the number of applications is so high that otherwise each operator would be allocated less than 5 tonnes of the quota.
- 9 Article 2(2) of Regulation No 214/94 provides in addition that companies arising from mergers where each constituent has the rights reserved to traditional importers pursuant to Article 1(1) are to enjoy the same rights as the companies from which they are formed. In an information note addressed to all the Member States on 5 February 1992 the Commission stated with regard to the corresponding article in Regulation No 3701/91 that those provisions did not apply to applications made by newcomers.
- 10 The 27 applicant companies are meat producers, wholesalers and traders based in Lancashire. All of them belong to the Slinger group except Red Rose Meat Packers Ltd, which is controlled by the Slinger family.
- 11 In 1994, 13 of them qualified for the traditional quota and were allocated 2 508 kg each, by virtue of their imports of newcomers' quota beef in 1993. By contrast, the applications of the 27 companies for newcomers' quota in 1994 were all rejected by the Intervention Board, by letters of 8 March and 5 May 1994, on the ground that they did not fulfil the tonnage requirements laid down by Regulation No 214/94; in particular, they had not exported at least 150 tonnes of beef in 1993. They were also informed by the Intervention Board, by letter of 11 February 1994 referring to the Commission's information note of 5 February 1992 mentioned above, that they were not entitled to add together their individual results in order to qualify for newcomers' quota.
- 12 In the High Court the applicants challenged the validity of Article 1(2) of Regulation No 214/94 fixing the reference quantities for eligibility for the newcomers' quota, in particular with regard to exports, and of Article 2(2) of the regulation in so far as it deprived companies arising from mergers of the right to add together the results achieved by each separately so as to qualify for the same quota in 1994.
- 13 The High Court decided that it had no jurisdiction to rule unassisted on the validity of those provisions and that it was necessary to refer the following questions to the Court of Justice for a preliminary ruling:
 - `1. Is Article 1(2) of Commission Regulation (EC) No 214/94 invalid and contrary to EC law to the extent that it required operators seeking to qualify for 1994 quota referred to in that sub-article on the basis of their past beef exports to have exported at least 150 tonnes in the previous year, rather than 110 tonnes as had been required in 1993? In particular, is Article 1(2) invalid and contrary to EC law as:
 - (a) exceeding the powers conferred upon the Commission by Council Regulation No 130/94;
 - (b) infringing the principle of proportionality;
 - (c) infringing the principle of legitimate expectations;
 - (d) infringing the duty to give adequate reasons pursuant to Article 190 of the EC Treaty; and/or
 - (e) having been adopted without proper consultation of the Beef Management Committee, contrary to Article 4 of Regulation No 130/94 and Article 27 of Regulation No 805/68?
 - 2. Is Article 2(2) of Commission Regulation (EC) No 214/94 invalid and contrary to EC law, to the

extent that it excludes companies arising from mergers where each part has rights pursuant to Article 1(2) of that regulation from the opportunity to cumulate their past trading performance? In particular, does Article 2(2) violate:

(a) the principle of non-discrimination, in so far as companies deriving their rights from Article 1(1) of that regulation can merge and cumulate their past trading performance for the purpose of obtaining quota, whereas companies deriving their rights from Article 1(2) cannot; and/or

(b) the guarantee referred to in the second recital to Council Regulation (EC) No 130/94 of continuing access to quota by all interested operators within the Community?'

Admissibility of the plea of illegality

- 14 The Government of the United Kingdom raises the question whether in the light of the judgment in Case C-188/92 TWD Textilwerke Deggendorf v Germany [1994] ECR I-833 the applicants' indirect challenge before the High Court of Articles 1(2) and 2(2) of Commission Regulation No 214/94 is out of time because they failed to bring an action for annulment of those provisions within the time-limit provided for in Article 173 of the EC Treaty, as they were entitled to.
- 15 It is sufficient, on that point, to note that, since the contested provisions are contained in a Community regulation and are addressed in general terms to categories of persons defined in the abstract and to situations determined objectively, it is not obvious that an action by the applicants challenging that regulation under Article 173 of the Treaty would have been admissible.
- 16 The reference to TWD (Textilwerke Deggendorf), which concerned a company which was undoubtedly entitled, and which had been informed that it was entitled, to bring an action for annulment of the Community act whose validity it was indirectly challenging before a national court, is therefore irrelevant.

The first question

- 17 The first question asks the Court to rule on the validity of Article 1(2) of Regulation No 214/94 in so far as it reserves the newcomers' part of the quota to applicants who can prove that they exported to third countries at least 110 tonnes of beef in 1992 and 150 tonnes in 1993.

[...]

6.3.3 Case C-178/95: Wiljo

Wiljo NV v Belgische Staat

Case C-178/95

30 January 1997

Court of Justice

[1997] 1 CMLR 627

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

Regulation 1101/89 was intended to reduce structural overcapacity in inland waterway transport. It introduced a scrapping scheme which applied to cargo-carrying vessels and pusher craft. Under Article 3(1) of the Regulation, each Member State whose inland waterways were linked to those of another Member State and the tonnage of whose fleet exceeded 100,000 tonnes was to set up a Scrapping Fund. To prevent reductions in capacity from being cancelled out by new vessels being brought into service, Article 8(1)(a) of the Regulation provided that, for a stated period, the bringing into service on inland waterways of a new vessel was to be conditional upon the owner of the new vessel either scrapping equivalent capacity without receiving scrapping premium (the "old-for-new" rule) or, if he did not scrap a vessel, upon his paying a special contribution into the Scrapping Fund. Article 8(3)(c), however, provided that the Commission could exempt "specialised vessels" from this rule. By a note of 7 December 1990 the Commission stated that the "old-for-new" rule did not need to apply to vessels "the technical characteristics of which are so specific that, if those vessels are added to the fleet capacity. ... that will not jeopardise the objective of the Community rules". W submitted to the Commission an application under Article 8(3)(c) to exempt the bringing into service of a bunkering vessel, the Smaragd, which W claimed would be used exclusively for the bunkering of sea-going vessels. The Commission, by letter of 6 May 1993, refused to grant the exemption since it believed the Smaragd to be similar to conventional tanker vessels and that it would therefore add to the capacity of the fleet which was subject to the Regulation. The Commission informed the authority managing the Belgian Scrapping Fund of its decision. W did not seek annulment of the Commission's decision and the time-limit for such a challenge under Article 173 EC expired. In October 1993 the Belgian authorities demanded from W a special contribution to the Scrapping Fund in respect of the Smaragd. On 6 April 1995 W brought an action in the Rechtbank van Koophandel challenging that demand, arguing that it was not liable to make the special contribution. The Rechtbank van Koophandel referred several questions concerning the interpretation of the Regulation to the Court of Justice. The Commission claimed that there was no need for the Court to rule on those questions, since they called into question the validity of the Commission's decision. It was argued that it was not possible to challenge a decision once the time-limit prescribed by Article 173 had expired, even by means of an action against the national authorities responsible for implementing that decision.

Judgement

[...]

15. According to the Commission, there is no need to rule on the questions or at least some of the questions referred to the Court because they call in question, directly or indirectly, the validity of its

decision of 6 May 1993. The owner of a vessel intended to be used on inland waterways whose application for an exemption under Article 8(3)(c) of the Regulation has been rejected by the Commission may no longer call in question the validity of that rejection in an action brought against a national measure implementing that decision once the time-limit prescribed by Article 173 EC for applying for its annulment has expired. The Commission refers, in particular, to the judgment in Case C-188/92, *TWD TEXTILWERKE DEGGENDORF v GERMANY* ([1994] I ECR 833). Wiljo contests that view. It maintains that the national authorities have primary responsibility for administering the Fund and that it was therefore reasonable for it to assume that the Commission's decision could be challenged in proceedings against those authorities before the national courts, particularly in view of the Commission's statement, in its letter of 6 May 1993, that a copy of the decision was to be sent to the Belgian authorities.

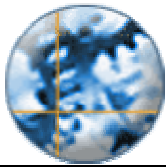
17. Wiljo refers here to the judgment in Joined Cases 133-136/85, *RAU LEBENSMITTELWERKE AND OTHERS v BALM*, ([1987] ECR 2289) in which the Court ruled that the possibility of bringing a direct action under Article 173 of the Treaty against a decision of a Community institution does not preclude the possibility of bringing an action before 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.
18. Lastly, Wiljo observes that the judgment in *TWD TEXTILWERKE DEGGENDORF*, was delivered after the time-limit for bringing an action for annulment of the Commission's decision of 6 May 1993 had expired.
19. It is settled law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see, in particular, Case 20/65, *COLLOTTI v EUROPEAN COURT OF JUSTICE* ([1965] ECR 847), Case 156/77, *EC COMMISSION v BELGIUM* ([1978] ECR 1881) and Case C-183/91, *EC COMMISSION v GREECE* ([1993] I ECR 3131, paras [9]-[10])). Such a rule is based in particular on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely.
20. This rule, which applies to the addressees of a decision, such as Wiljo, was reiterated in the judgment in *TWD TEXTILWERKE DEGGENDORF*, in which the Court held that the principle established in the cases referred to above could, in certain circumstances, also apply to a recipient of State aid forming the subject-matter of a Commission decision addressed directly to the Member State alone in which the recipient was established.
21. In essence, the Court held that a recipient of aid could not plead the invalidity of a decision, addressed by the Commission to a Member State, notified by that State to the recipient and ordering that Member State to recover the aid granted to the recipient, in proceedings brought before the national courts against the implementing decision taken by the authorities of that State where the recipient of the aid had failed to apply under Article 173 of the Treaty for annulment of the Commission's decision and where he could undoubtedly have done so. To find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumed, by virtue of the principle of legal certainty, once the time-limit laid down by Article 173 for bringing proceedings had expired.
22. As regards the argument based on the judgment in *RAU LEBENSMITTELWERKE AND OTHERS*, it is sufficient to recall that it was rejected by the Court in paragraph [20] of its judgment in *TWD TEXTILWERKE DEGGENDORF* on the ground that it was clear from the Report for the Hearing in *RAU* that each of the plaintiffs in the main proceedings had brought an action before the Court of Justice for annulment of the decision in question and that the Court did not therefore rule, and did not have to rule, in that judgment on the time-barring effect of the expiry of the period in which proceedings had to be brought.
23. In the present case, it is not disputed that Article 8(3)(c) of the Regulation gives the Commission sole power to exempt specialised vessels, that Wiljo requested it to adopt a decision pursuant to that provision, that Wiljo did not apply under Article 173 of the Treaty for annulment of the

Commission's decision of 6 May 1993 which was addressed to it, even though it could undoubtedly have done so, and that it has instead brought proceedings before the national court challenging the implementation of the Commission's decision by the Belgian authorities.

24. It follows from all those considerations that, by virtue of the principle of legal certainty, the national court is bound by the Commission's decision of 6 May 1993 addressed to Wiljo, according to which the Smaragd is not a specialised vessel within the meaning of Article 8(3)(c) of the Regulation.
25. It is therefore necessary to examine whether the sole purpose of the questions referred to this Court is to enable the national court to resolve the question of the validity of the Commission's decision of 6 May 1993, or whether those questions also relate to the interpretation of the provisions defining the scope of the Regulation.
26. Wiljo maintains that at least the first and third questions must be treated as concerning the definition of the scope of the Regulation and not the validity of the Commission's decision. It contends that a vessel such as the Smaragd is not covered by the Regulation, so that the decision of the Belgian authorities demanding payment of the special contribution to the Scrapping Fund is contrary to the Regulation and that such a challenge to the legality of the decision of the Belgian authorities must be determined by the national courts, which for that purpose may refer questions to this Court for a preliminary ruling on the interpretation of the Regulation.
27. That argument cannot be accepted. As the Advocate General observes in points 14 and 15 of his Opinion, all of the national court's questions must be construed as relating exclusively, either directly or indirectly, to the validity of the Commission's decision of 6 May 1993.
28. As is clear from the order for reference, Wiljo maintained before the Rechtbank van Koophandel, first, that the Smaragd was used solely for the bunkering of sea-going vessels and was not comparable with an ordinary tanker vessel so that the Commission's decision was incompatible with the general aim of the Regulation, and, second, that it did not contain any proper technical analysis of the vessel's characteristics and equipment. Clearly, therefore, Wiljo is contesting before the national court the validity of the Commission's decision, on the ground that it is contrary to the Regulation. This is confirmed by a reading of Wiljo's application to the Rechtbank van Koophandel, in which it refers expressly to Article 8(3)(c) of the Regulation and submits that, for the reasons stated, the Commission's decision cannot be considered valid.
29. Thus it is clear that the national court's questions, which are identical to those set out by Wiljo in its application, are in fact designed to enable that court to appraise that argument and to rule on the validity of the Commission's finding, arrived at in its decision, that the Smaragd did not qualify as a specialised vessel within the meaning of Article 8(3)(c).
30. In those circumstances, to alter the substance of the questions referred for a preliminary ruling in the way proposed by Wiljo would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the EC Statute of the Court, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties (see, in particular, Joined Cases 141-143/81, *HOLDIJK AND OTHERS* ([1982] ECR 1299, [1983] 2 CMLR 3819, para [6].) and the order in Case C-191/96 (Not yet reported.)).
31. The answer to the questions referred to the Court must therefore be that, where a Commission decision has been addressed to the owner of a vessel, finding that his vessel is not a specialised vessel within the meaning of Article 8(3)(c) of the Regulation, and the addressee has not brought an action under the fourth paragraph of Article 173 of the Treaty against the decision within the time-limit prescribed, that decision is binding on the national court.

[...]

6.3.4 Case C-408/95: Eurotunnel



NOTE AND QUESTIONS

When reading this case, please recall the provisions regarding the participation of the European Parliament in the legislative process (see Unit 1-2).

Eurotunnel SA and Others v SeaFrance

Case C-408/95

11 November 1997

Court of Justice

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By judgment of 27 November 1995, received at the Court on 29 December 1995, the Tribunal de Commerce (Commercial Court), Paris, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the validity of the transitional arrangements for tax-free shops under Article 28k of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter 'the Sixth Directive'), as inserted by Article 1(22) of Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1), and under Article 28 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1).
2. Those questions were raised in proceedings brought by the French companies Eurotunnel SA and France Manche SA and the English companies Eurotunnel plc and The Channel Tunnel Group Ltd, the joint operators of the Channel Tunnel railway link (hereinafter 'Eurotunnel'), against SeaFrance, a cross-Channel maritime transport company.
3. The object of Directive 91/680 is to ensure that the conditions necessary for the elimination of fiscal frontiers within the Community as regards supplies of goods and services are implemented as from 1 January 1993.
4. Directive 91/680 was amended by Council Directive 94/4/EC of 14 February 1994 amending Directives 69/169/EEC and 77/388/EEC and increasing the level of allowances for travellers from third countries and the limits on tax-free purchases in intra-Community travel (OJ 1994 L 60, p. 14). Directive 94/4 increased the allowance for intra-Community travellers from ECU 23 to ECU 90, while the allowance for travellers from third countries was raised to ECU 175.
5. According to the 13th recital in the preamble to Directive 91/680,

'advantage must be taken of the transitional period of taxation of intra-Community trade to take measures necessary to deal with both the social repercussions in the sectors affected and the regional difficulties, in frontier regions in particular, that might follow the abolition of the imposition of tax on imports and of the remission of tax on exports in trade between Member States; ... Member States should therefore be authorized, for a period ending on 30 June 1999, to exempt supplies of goods carried out within specified limits by duty-free shops in the context of air and sea travel between Member States'.

6. Article 28k of that directive provides:

'The following provisions shall apply until 30 June 1999:

1. Member States may exempt supplies by tax-free shops of goods to be carried away in the personal luggage of travellers taking intra-Community flights or sea crossings to other Member States. For the purposes of this Article:

(a) "tax-free shop" shall mean any establishment situated within an airport or port which fulfils the conditions laid down by the competent public authorities pursuant, in particular, to paragraph 5;

(b) "traveller to another Member State" shall mean any passenger holding a transport document for air or sea travel stating that the immediate destination is an airport or port situated in another Member State;

(c) "intra-Community flight or sea crossing" shall mean any transport, by air or sea, starting within the territory of the country as defined in Article 3, where the actual place of arrival is situated within another Member State.

Supplies of goods effected by tax-free shops shall include supplies of goods effected on board aircraft or vessels during intra-Community passenger transport.

This exemption shall also apply to supplies of goods effected by tax-free shops in either of two Channel Tunnel terminals, for passengers holding valid tickets for the journey between those two terminals.

...'

7. The object of Directive 92/12 is to ensure that the conditions applicable to the movement of goods subject to excise duty within the internal market without fiscal frontiers are implemented as from 1 January 1993.
8. The 23rd recital in the preamble to Directive 92/12 is drafted in terms virtually identical to those of the 13th recital in the preamble to Directive 91/680. The same is true of the drafting of Article 28 of Directive 92/12 and Article 1(22) of Directive 91/680 inserting the new Article 28k in the Sixth Directive (hereinafter 'Articles 28 and 28k').
9. By Law No 92-677 of 17 July 1992 implementing Directives 91/680 and 92/12 (Journal Officiel de la République Française (JORF) of 19 July 1992, p. 9700), the French Republic made use of the possibility of granting exemptions provided for in Articles 28 and 28k, reproducing those provisions word for word. Until 30 June 1999 it exempts supplies by tax-free shops situated within an airport, port or Channel Tunnel terminal from value added tax (Article 17 II of Law No 92-677) and excise duty (Article 59 of Law No 92-677), within the limits laid down by Articles 28 and 28k. Decree No 93-1139 of 30 September 1993 (JORF of 3 October 1993, p. 13769) was adopted pursuant to Articles 17 and 59 of Law No 92-677.
10. It appears from the national court's judgment that Eurotunnel's case is that, since 22 December 1994, SeaFrance has been guilty of unfair competition by selling goods free of tax and excise duty on board its vessels, thus enabling it to offset transport charges at below cost prices. Since it considered that such a practice proceeded from the authorization in both Article 28k of the Sixth Directive, as inserted by Article 1(22) of Directive 91/680, and Article 28 of Directive 92/12, Eurotunnel challenged the validity of those provisions before the Tribunal de Commerce, which considered it appropriate to make a reference to the Court.
11. Before putting its questions the national court first granted leave to the International Duty Free

Confederation (hereinafter 'IDFC'), the Airport Operators Association ('AOA'), Bretagne Angleterre Irlande SA ('BAI') and the Passenger Shipping Association Ltd ('PSA') to intervene in support of the form of order sought by SeaFrance.

12. The national court then noted that the sale at a loss of services, as opposed to goods, was not prohibited in France. It therefore considered that in its action alleging unfair competition, it was open to Eurotunnel only to contest the validity of the Council directives on which SeaFrance relied in offering goods for sale tax-free.
13. The court observed, finally, that Eurotunnel had also made an application to the High Court of Justice on 30 June 1994 for leave to apply for judicial review of the lawfulness of the measures by which the United Kingdom had transposed Articles 28 and 28k.
14. It appears from the documents in the main proceedings that, by judgment of 17 February 1995, the High Court dismissed Eurotunnel's application principally on the grounds, first, that Eurotunnel had not made its application for leave promptly and, second, that if leave were granted substantial hardship would be caused not only to the objectors but also to many other persons in the United Kingdom and throughout the Community. Eurotunnel did not appeal against that decision of the High Court. However, the High Court allowed Eurotunnel to make a fresh application concerning the sale of tax-free goods during short trips known as 'booze cruises', which in Eurotunnel's view did not constitute genuine intra-Community journeys. Eurotunnel did not take up that possibility.
15. In those circumstances the Tribunal de Commerce, Paris, stayed proceedings and referred the following questions to the Court for a preliminary ruling:
 - '1. Given the fact that Eurotunnel has not brought an action pursuant to Article 173 for the annulment of those parts of Council Directives 91/680 and 92/12 relating to taxation (value added tax and excise duty) on cross-Channel links and that an application brought by Eurotunnel in the High Court of Justice was dismissed by decision of 17 February 1995, will an application for their annulment brought by Eurotunnel lie pursuant to Article 177 of the Treaty?
 2. If so, did the Council adopt those directives lawfully?In the alternative, does Directive 94/4 cover a possible annulment of those two directives?
 3. In the event of annulment, must the fact that SNAT (Société Nouvelle d'Armement Transmanche) SA applied the fiscal laws adopted pursuant to those directives be imputed to it as a fault? If so, as from what date was the fault committed?'
16. By those three questions the Tribunal de Commerce seeks to know, essentially, whether Eurotunnel may challenge the validity of Articles 28 and 28k in the context of a preliminary ruling procedure, even though it has not brought an action for annulment pursuant to Article 173 of the EC Treaty against those provisions. If so, it asks whether those provisions were lawfully adopted by the Council. Finally, if they are invalid, the Court is asked to state the consequences of a declaration of invalidity of Articles 28 and 28k with respect to SeaFrance.

Admissibility of the questions

17. The first point to be addressed is the argument of SeaFrance and the interveners in the main proceedings that the questions are inadmissible and that the Court should therefore not answer them. They claim that the proceedings in the national court are artificial and that the questions referred are of no relevance to the decision in those proceedings.
18. They contend, as does the French Government, that SeaFrance cannot incur liability, even in the event of a declaration that the Community directives are invalid, since it merely complied with national laws and regulations adopted pursuant to those directives. Only the Council, as author of Articles 28 and 28k, could on any view incur liability. In the absence of any fault on the part of SeaFrance, the action alleging unfair competition pending in the national court is devoid of purpose and the questions referred are therefore immaterial. SeaFrance and the interveners submit, finally, that in any event the real subject-matter of Eurotunnel's action relates to the validity of Articles 28 and 28k, not to any award of damages against SeaFrance.

19. It is to be remembered that when a question on the validity of a measure adopted by the Community institutions is raised before a national court, it is for that court to decide whether a decision on the matter is necessary to enable it to give judgment and consequently whether it should request the Court to rule on that question. Accordingly, where the national court's questions relate to the validity of a provision of Community law, the Court is obliged in principle to give a ruling.
20. However, the Court has observed that, in order to determine whether it has jurisdiction, it is necessary to examine the circumstances in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (see, in particular, Case C-412/93 *Leclerc-Siplec v TF1 Publicité and M6 Publicité* [1995] ECR I-179, paragraph 12).
21. It is with that function in mind that the Court has taken the view that it is unable to rule on a question referred by a national court where it is manifest that the interpretation or the assessment of the validity of Community law sought by that court bears no relation to the true nature of the main action or its purpose, or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 61, and C-105/94 *Celestini v Saar-Sektkellerei Faber* [1997] ECR I-2971, paragraph 22).
22. With respect to the true nature of the main proceedings, it is to be observed that Eurotunnel is asking the national court to find that SeaFrance is guilty of unfair competition by exercising its right under national rules to sell goods tax-free on its cross-Channel services even though those national rules are based on Community directives — which, in Eurotunnel's view, are unlawful. SeaFrance, on the other hand, contests all Eurotunnel's arguments before the national court. It is thus apparent that there is in fact a genuine dispute between the parties to the main proceedings.
23. With respect to the argument that the questions referred are of no relevance to the decision to be given in the main proceedings, it is indeed the case that the national court has not provided enough information to enable the Court to see clearly what effect any declaration that Articles 28 and 28k were unlawful might have on the outcome of the action alleging unfair competition, in particular on Eurotunnel's claim for damages against SeaFrance.
24. However, it is sufficient for present purposes that if the directives were unlawful the national court could, at the very least, order SeaFrance to refrain in future from effecting tax-free sales, as Eurotunnel requests.
25. It follows from all the foregoing that the Court must answer the questions.

Question 1

26. By its first question the national court essentially asks whether a natural or legal person, such as Eurotunnel, may challenge before a national court the validity of provisions in directives, such as Articles 28 and 28k, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 of the Treaty and even though a court of another Member State has already given judgment in separate proceedings.
27. With respect to the first part of the question, the national court is uncertain whether, in the light of Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833, Eurotunnel may, by the plea of illegality, challenge before that court the validity of Articles 28 and 28k, when it did not bring an action for annulment of those provisions within the time-limit provided for in Article 173 of the Treaty.
28. It should be noted that the judgment in *TWD Textilwerke Deggendorf* concerned a company which, unquestionably, was entitled and had been informed that it was entitled to bring an action for annulment of the Community act whose validity it was challenging by a plea of illegality before a national court.

29. On this point, in the case of Community directives whose contested provisions are addressed in general terms to Member States and not to natural or legal persons, it is not obvious that an action by Eurotunnel challenging Articles 28 and 28k under Article 173 of the Treaty would have been admissible (see, with respect to a regulation, Case C-241/95 R v Intervention Board for Agricultural Produce, ex parte Accrington Beef and Others [1996] I-6699, paragraph 15).
30. In any event, Eurotunnel cannot be directly concerned by Articles 28 and 28k. The exemption arrangements introduced by those provisions constitute no more than an option open to Member States. It follows that Articles 28 and 28k are not directly applicable to the operators concerned, namely passenger transporters and travellers.
31. With respect to the second part of the question, suffice it to state that it is not for this Court, in the procedure provided for in Article 177 of the Treaty, to assess the need for a preliminary ruling by reference to the judgment, on a similar question, given in separate proceedings by a court of another Member State.
32. The answer to Question 1 must therefore be that a natural or legal person may challenge before a national court the validity of provisions in directives, such as Articles 28 and 28k, even though that person has not brought an action for annulment of those provisions pursuant to Article 173 of the Treaty and even though a court of another Member State has already given judgment in separate proceedings.

Question 2

33. Eurotunnel submits that the national court's second question relates not only to whether the Parliament was properly consulted but also to whether all the other grounds of invalidity put forward in the originating application are such as to affect the validity of Articles 28 and 28k. Those other pleas relate to failure to state reasons, breach of Articles 7a, 92, 93 and 99 of the EC Treaty, misuse of power by the Council and breach of the principles of protection of legitimate expectations, legal certainty, proportionality and equal treatment.
34. In this respect, the reasoning of the judgment making the reference and the wording of the second question make it clear that the only grounds of invalidity raised by the national court relate to the possibility that the procedure whereby Articles 28 and 28k were adopted may have been irregular by reason of the alleged lack of a proposal from the Commission and failure to consult the Parliament again. That is further confirmed by the alternative question put by the national court as to how the lawfulness of Articles 28 and 28k may be affected by the fact that the rights of the Parliament were duly respected in the adoption of Directive 94/4.

The lack of a proposal from the Commission

35. Eurotunnel and the Parliament submit that Articles 28 and 28k were not the subject of a proposal of the Commission, contrary to Article 99 of the EEC Treaty.
36. The Council argues that the amendments it made to the proposals for Directives 91/680 and 92/12 remained within the scope of those directives as defined in the original proposals from the Commission.
37. As to that point, by virtue of its power to amend under, at that time, Article 149(1) of the EEC Treaty (now Article 189a(1) of the EC Treaty), the Council could amend the proposal from the Commission provided it acted unanimously, that requirement being imposed in any case by the legal basis of those two directives, namely Article 99 of the Treaty.
38. Moreover, the maintenance for a limited period of the system of exemption from value added tax and excise duty of supplies of goods by tax-free shops, notwithstanding the Commission's opposition to that maintenance in the context of intra-Community travel, falls fully within the scope of Directives 91/680 and 92/12, which are intended to ensure that the conditions necessary for the movement of goods and services subject to value added tax or excise duty within an internal market without fiscal frontiers are implemented as from 1 January 1993.
39. Consequently, to the extent that the Council's amendments to the proposals for Directives 91/680 and 92/12 remained within the scope of those directives as defined in the original proposals from

the Commission, the Council did not exceed its power to make amendments under Article 149 of the Treaty.

The requirement for the Parliament to be consulted again

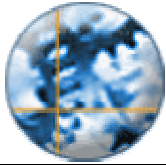
40. Eurotunnel and the Parliament submit that Articles 28 and 28k as adopted make substantial changes to the Commission's proposals which do not correspond to what the Parliament wished.
41. With respect to Article 28k of the Sixth Directive, the Parliament submits that the amendments introduced by the Council involve substantial changes, both quantitatively and qualitatively, compared to the texts submitted to it for consultation. Furthermore, it claims that it never proposed such derogating arrangements.
42. With respect to Article 28 of Directive 92/12, the Parliament submits that the version finally adopted by the Council diverges from the sense of its amendments Nos 25 and 38, in that, first, the date is different (the amendment provided for a date of 31 December 1995, the directive 30 June 1999) and, second, the amendment does not expressly mention the Channel Tunnel, but only 'ports' and 'airports'.
43. SeaFrance, IDFC, AOA, BAI, the Spanish and French Governments, the Council and the Commission submit that the adoption of Directives 91/680 and 92/12 was not tainted by any procedural defect. The differences between the text on which the Parliament gave its opinion and that definitively adopted were not essential, and the two directives, taken as a whole, remained substantially identical to the Commission's original proposals which were submitted to the Parliament.
44. In any event, SeaFrance, IDFC, AOA, BAI and the Spanish and French Governments and the Council consider that there was no need for fresh consultation, in that the amendments to the directives corresponded to the Parliament's wish to maintain the system of tax-free shops. The Parliament thus did not have to be consulted again.
45. It is to be remembered that due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement, breach of which renders the measure concerned void. Effective participation of the Parliament in the Community's legislative process, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. This function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, in particular, Case C-392/95 Parliament v Council [1997] ECR I-3213, paragraph 14).
46. It is settled law that the requirement to consult the European Parliament in the legislative procedure, in the cases provided for by the Treaty, means that it must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself (Parliament v Council, cited above, paragraph 15).
47. With respect, first, to Article 28k of the Sixth Directive, that provision derives from the Commission's original proposal of 7 August 1987 (OJ 1987 C 252, p. 2), amended on two occasions on 17 May 1990 (OJ 1990 C 176, p. 8) and 2 May 1991 (OJ 1991 C 131, p. 3). In its original proposal submitted to the Parliament, which was not amended on this point by the two other proposals, the Commission proposed that Council Directive 69/169/EEC of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (I), p. 232) should cease to apply on 31 December 1992 in respect of intra-Community trade relations.
48. According to the explanatory statement in the report of the Parliament's Committee on Economic and Monetary Affairs and Industrial Policy on the proposal for a directive amending the Sixth Directive (Fuchs Report, A3-0271/90), presented on 7 November 1990, the situation of the businesses and employees engaged in tax-free sales had to be considered in order to determine whether specific measures were necessary.

49. The Parliament, on 20 November 1990, proposed amendments Nos 6 and 31, reading respectively as follows:
- 'Whereas the transitional period must be used to take measures to offset the social repercussions in the professions concerned and to prevent regional problems arising, notably in intra-Community frontier regions, as a result of the abolition of fiscal frontiers' (recital 4f);
- 'Whereas the economic and social implications of the completion of the internal market for tax-free sales will be determined through a report undertaken by the Commission and presented to the Council and the European Parliament' (recital 4g).
50. In its amended proposal of 2 May 1991, the Commission proposed the addition of the following ninth recital:
- 'Whereas the transitional period must be used to take measures to offset the social repercussions in the occupations concerned and to prevent regional problems arising, notably in trans-frontier regions, from the abolition of tax frontiers'.
51. With respect, finally, to the procedure by which Article 28 of Directive 92/12 was adopted, the Commission's proposal, presented on 27 September 1990 (OJ 1990 C 322, p. 1), did not contain any provision relating to the possibility for travellers within the Community to purchase goods free of excise duty.
52. It appears from the explanatory statement in the report of the Parliament's Committee on Economic and Monetary Affairs and Industrial Policy on the proposal for an 'excise duty' directive (Patterson Report, A3-0137/91), presented on 27 May 1991, that since no report was available on the situation of the businesses and employees engaged in tax-free sales, the amendment adopted then was without prejudice to the final formulation.
53. The Parliament proposed on 12 June 1991 that Article 18 should be amended by adding the following wording:
- 'The provisions of this directive shall not in any way affect existing agreements on the sale of products subject to excise duty in duty-free shops at ports and airports, and on board aircraft in flight or vessels at sea up to 31 December 1995.'
54. The Commission made the last amendments to its proposal on 24 January 1992 (OJ 1992 C 45, p. 10), but without taking the Parliament's proposal into account.
55. It must therefore be considered whether the amendments referred to by Eurotunnel and the Parliament go to the essence of the measures considered as a whole.
56. The purpose of the Commission's proposals for Directives 91/680 and 92/12 presented to the Parliament was to adjust the systems of value added tax and excise duty to the existence of an internal market, defined as an area without internal frontiers.
57. The object of Articles 28 and 28k is to permit a pre-existing system to be maintained if the Member States so wish. Those articles must therefore be interpreted as optional exceptions of limited scope. The possibility of tax-free sales is reserved for certain categories of traders and is limited in extent (ECU 90) and time (30 June 1999).
58. It follows that the changes made by Articles 28 and 28k are not such as to affect the intrinsic tenor of the provisions introduced by Directives 91/680 and 92/12 and thus cannot be classed as changes in the essence of the measures.
59. In any event, the Parliament not only had an opportunity to express its opinion on the question of tax-free sales, it recommended that they should be maintained.
60. Thus in its opinion on Directive 91/680 the Parliament had proposed amendments Nos 6 and 31, which are entirely compatible with the tenor of the final text of the directive. That text recommended that advantage should be taken of the transitional period to take into consideration the social repercussions and the regional difficulties which might follow, especially in trans-frontier regions, from the abolition of fiscal frontiers.

61. In its opinion on Directive 92/12, the Parliament expressly proposed that the derogating arrangements in force for sales free of excise duty should temporarily be maintained until 31 December 1995.
62. Consequently, by deciding to maintain tax-free sales until 30 June 1999 in order to deal with the social repercussions in that sector, the Council responded in substance to the wishes of the Parliament.
63. In those circumstances, it was not necessary for the Parliament to be consulted again on Articles 28 and 28k.
64. It follows from all the foregoing that consideration of the questions raised has not disclosed any factor of such a kind as to affect the validity of Articles 28 or 28k.
65. In view of that answer, there is no need to answer the second part of Question 2 on the subsequent adoption of Directive 94/4, nor is there any need to answer Question 3.

[...]

6.3.5 Case C-321/95: Greenpeace Council v Commission



NOTE AND QUESTIONS

In this controversial case, the Court confirmed the CFI's refusal to grant the association Greenpeace standing in order to challenge a Commission decision. While the AG was at least considering that an environmental legal interest could justify an approach different from the traditional one as known since Plaumann, the Court adhered to the classical principle of "direct and individual concern".

1. Is the legal vacuum-argument put forward by Greenpeace a valid one?
2. Do you agree with the Court that national proceedings, eventually including an Article 234 procedure, substitute for a direct action under Article 230 (4) of the EC-Treaty?
3. What do you think that the Court's approach towards claims based on "environmental interest" should be?
4. Could one compare the role of the Commission in this case to the Court's judgment in *Geotronics*?

6.3.5.1 Opinion of AG Cosmas

[...]

- 74 I think it useful to point out that, as is apparent from the documents in the case-file and from the submissions on behalf of the parties at the hearing before the Court, certain of the appellants sought to prevent the construction works in question by seeking the appropriate remedies before the competent national courts. Those proceedings are still pending. On the other hand, there is no question pending before the Court of Justice submitted for a preliminary ruling by a Spanish court on the issue of the legality of the relevant Commission decision to continue financing of the works on the Canary Islands. Nor do I see in what way the issue of the legality of that decision could be raised in the context of national proceedings. Those proceedings can concern only the lawfulness of the administrative authorizations granted for construction of the electricity-generating power stations, or of the environmental impact assessment. But, even if any such supplementary issue could, exceptionally, be raised, (...) the protection likely to be afforded by the national court would certainly not be as far-reaching and comprehensive as that which would have been secured by the appellants, had their action before the Court of First Instance been successful. The judgment of the national court could not extend to cover the issue of legality of the financing per se or, a fortiori, lead to the setting aside of the Commission decision to continue financing.

[...]

6.3.5.2 Judgement of the Court of Justice

Stichting Greenpeace Council (Greenpeace International) and Others
v
Commission of the European Communities

Case C 231/95 P

2 April 1998

Court of Justice

[1998] ECR I-1651

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

Greenpeace International appeals against an order by which the CFI dismissed the action brought by several environmental associations and individuals, pursuant to Article 173 (4) of the EC-Treaty, for annulment of the Commission Decision to pay to the Spanish Government, in addition to amounts initially granted, ECU 12 000 000 to cover expenditure incurred in the construction of two electricity-power stations by Unelco (Union Electrica de Canarias SA) in the Canary Islands.

The Commission granted the financial assistance according to Article 7 of Council Regulation NO 2052/88 on the tasks on the Structural Funds which provides: "Measures financed by the Funds or receiving assistance from the EIB or another existing financial instrument shall be in keeping with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning.... environmental protection."

Some of the applicants of the first proceedings informed the Commission – before the disbursement - that the works carried out on Gran Canaria were unlawful because Unelco had failed to undertake an environmental impact assessment study in accordance with Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

The Commission refused to provide the applicants in the CFI proceedings with detailed information regarding the financing, but confirmed that a total of ECU 40 000 000 had already been disbursed to the Spanish Government.

Judgment

[...]

- 6 As to the pleas raised by the Commission in support of its objection of inadmissibility, the Court of First Instance stated, at paragraph 46, that it was first necessary to examine whether the applicants had locus standi to bring an action, before considering whether the act which they were challenging constituted a decision within the meaning of Article 173 of the EC Treaty.

- 7 As regards, first, the locus standi of the applicants who are private individuals, the Court of First Instance, in paragraph 48, referred first to the settled case-law of the Court of Justice according to which persons other than the addressees may claim that a decision is of direct concern to them only if that decision 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 (Case 25/62 Plaumann v Commission [1963] ECR 95, Case 231/82 Spijker v Commission [1983] ECR 2559, Case 97/85 Deutsche Lebensmittelwerke and Others v Commission [1987] ECR 2265, Case C-198/91 Cook v Commission [1993] ECR I-2487, Case C-225/91 Matra v Commission [1993] ECR I-3203, Case T-2/93 Air France v Commission [1994] ECR II-323 and Case T-465/93 Consorzio Gruppo di Azione Locale 'Murgia Messapica' v Commission [1994] ECR II-361).
- 8 The Court of First Instance then decided to examine, at paragraph 49, the applicants' argument that the Court should not be constrained by the limits imposed by that case-law and should concentrate on the sole fact that third-party applicants had suffered or would potentially suffer loss or detriment from the harmful environmental effects arising out of unlawful conduct on the part of the Community institutions.
- 9 In that regard, the Court of First Instance held, at paragraph 50, that whilst the settled case-law of the Court of Justice concerned essentially cases involving economic interests, the essential criterion which it applied (namely, a combination of circumstances sufficient for the third-party applicant to be able to claim to be affected by the contested decision in a manner which differentiated him from all other persons) remained applicable whatever the nature, economic or otherwise, of the applicants' interests which were affected.
- 10 The Court of First Instance accordingly held, at paragraph 51, that the criterion proposed by the applicants for appraising their locus standi, namely the existence of harm suffered or to be suffered, was not in itself sufficient to confer locus standi on an applicant; this was because such harm might affect, in a general abstract way, a large number of persons who could not be determined in advance in such a way as to distinguish them individually just like the addressee of a decision, as required under the case-law cited above. The Court of First Instance added that, in view of the conditions laid down in the fourth paragraph of Article 173 of the Treaty, that conclusion could not be affected by the practice of national courts whereby locus standi might depend merely on applicants having a 'sufficient' interest.
- 11 The Court of First Instance therefore concluded, at paragraph 52, that the applicants' argument that the question of their locus standi in this case should be determined in the light of criteria other than those already laid down in the case-law could not be accepted, and went on to hold, at paragraph 53, that their locus standi had to be assessed in the light of the criteria laid down in that case-law.
- 12 In this regard, the Court of First Instance stated first of all, at paragraphs 54 and 55, that the objective status of 'local resident', 'fisherman' or 'farmer' or of persons concerned by the impact which the building of two power stations might have on local tourism, on the health of Canary Island residents and on the environment, relied on by the applicants, did not differ from that of all the people living or pursuing an activity in the areas concerned and that the applicants thus could not be affected by the contested decision otherwise than in the same manner as any other local resident, fisherman, farmer or tourist who was, or might be in the future, in the same situation.
- 13 Finally, at paragraph 56, the Court of First Instance held that the fact that certain of the applicants had submitted a complaint to the Commission could not confer locus standi under Article 173 of the Treaty, since no specific procedures were provided for whereby individuals might be associated with the adoption, implementation and monitoring of decisions taken in the field of financial assistance granted by the ERDF. The Court of Justice had held that, although a person who asked an institution not to take a decision in respect of him, but to open an inquiry with regard to third parties, might be considered to have an indirect interest, such a person was nevertheless not in the precise legal position of the actual or potential addressee of a measure which might be annulled under Article 173 of the Treaty (Case 246/81 Lord Bethell v Commission [1982] ECR 2277).
- 14 Second, as regards the locus standi of the applicant associations, the Court of First Instance

recalled, at paragraph 59, that it had consistently been held that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by a measure affecting the general interests of that category, and was therefore not entitled to bring an action for annulment where its members could not do so individually (Joined Cases 19/62 to 22/62 *Fédération Nationale de la Boucherie en Gros et du Commerce en Gros des Viandes and Others v Council* [1962] ECR 491; Case 72/74 *Union Syndicale - Service Public Européen and Others v Council* [1975] ECR 401; Case 60/79 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays v Commission* [1979] ECR 2429; Case 282/85 *DEFI v Commission* [1986] ECR 2469; Case 117/86 *UFADE v Council and Commission* [1986] ECR 3255, paragraph 12; and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others v Commission* [1995] ECR II-1971, paragraphs 58 and 59). Since the Court of First Instance had held that the applicants who were private individuals could not be considered to be individually concerned by the contested decision, it therefore concluded, at paragraph 60, that the members of the applicant associations, as local residents of Gran Canaria and Tenerife, likewise could not be considered to be individually concerned.

- 15 The Court of First Instance went on to observe, at paragraph 59, that 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 of the Treaty, might justify treating as admissible an action brought by an association whose members were not directly and individually concerned by the contested measure (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125).
- 16 However, at paragraph 62 of its judgment, the Court of First Instance came to the conclusion that the exchange of correspondence and the discussions which Greenpeace had with the Commission concerning the financing of the project for the construction of two power stations in the Canary Islands did not constitute special circumstances of that kind since 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 basic Decision C (91) 440 and/or of the contested decision.
- 17 In their appeal the appellants submit that, in determining whether they were individually concerned by the contested decision within the meaning of Article 173 of the Treaty, the Court of First Instance erred in its interpretation and application of that provision and that, by applying the case-law developed by the Court of Justice in relation to economic issues and economic rights, according to which an individual must belong to a 'closed class' in order to be individually concerned by a Community act, the Court of First Instance failed to take account of the nature and specific character of the environmental interests underpinning their action.
- 18 In particular, the appellants argue, first, that the approach adopted by the Court of First Instance creates a legal vacuum in ensuring compliance with Community environmental legislation, since in this area the interests are, by their very nature, common and shared, and the rights relating to those interests are liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants satisfying the criteria adopted by the Court of First Instance.
- 19 Nor can that legal vacuum be filled by the possibility of bringing proceedings before the national courts. According to the appellants, such proceedings have in fact been brought in the present case, but they concern the Spanish authorities' failure to comply with their obligations under Council Directive 85/337/EEC, and not the legality of the Commission measure, that is to say the lawfulness under Community law of the Commission's disbursement of structural funds on the ground that that disbursement is in violation of an obligation for protecting the environment.
- 20 Second, the appellants submit that the Court of First Instance was wrong to take the view, at paragraph 51 of the contested order, that reference to national laws on locus standi was irrelevant for the purposes of Article 173. The solution adopted by the Court of First Instance appears to conflict with that required by national judicial decisions and legislation as well as by developments in international law. According to the appellants, it is clear from the 'Final Report on Access to Justice (1992)', prepared by the ÖKO-Institut for the Commission, which describes the position

concerning locus standi on environmental issues, that, if they had been required to bring proceedings before a court of a Member State, actions brought by some or all of the applicants would have been declared admissible. The appellants add that the abovementioned developments have been influenced by American law, the Supreme Court holding in 1972 in *Sierra Club v Morton* 405 U.S. 727, 31 Led 2d 636 (1972), at p. 643 that: 'Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.'

- 21 Third, the appellants submit that the approach adopted by the Court of First Instance in the contested order is at odds with both the case-law of the Court of Justice and declarations of the Community institutions and governments of the Member States on environmental matters. As regards case-law, they rely on the holding that environmental protection is 'one of the Community's essential objectives' (judgments in Case 240/83 *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées* [1985] ECR 531, paragraph 13, and Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8) and submit that Community environmental legislation can create rights and obligations for individuals (judgments in Case C-131/88 *Commission v Germany* [1991] ECR I-825, paragraph 7, and Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraphs 15 and 16). Furthermore, in the present case, the appellants submit that their arguments relating to individual concern are based essentially on their individual rights conferred by Directive 85/337, Articles 6(2) and 8 of which provide for participation in the environmental impact assessment procedure in relation to certain projects (judgment in Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 37 to 40), and that they are singled out by virtue of those rights which are recognised and protected in Commission Decision C (91) 440.
- 22 The appellants go on to refer to the Fifth Environmental Action Programme (OJ 1993 C 138, p. 1), to principle 10 of the Rio Declaration, ratified by the Community at the United Nations Conference of 1992 on Environment and Development, to Agenda 21, adopted at the same conference, to the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, and to the system of administrative review introduced by the World Bank to allow review of its acts where they have negative effects on the environment (World Bank, Resolution No 93-10, Resolution No IDA93-6, 22 September 1993, paragraph 12).
- 23 Fourth, the appellants propose a different interpretation of the fourth paragraph of Article 173 of the Treaty. In order to determine whether a particular applicant is individually concerned by a Community act involving violations of Community environmental obligations, that applicant should be required to demonstrate that:
 - (a) he has personally suffered (or is likely personally to suffer) some actual or threatened detriment as a result of the allegedly illegal conduct of the Community institution concerned, such as a violation of his environmental rights or interference with his environmental interests;
 - (b) the detriment can be traced to the act challenged; and
 - (c) the detriment is capable of being redressed by a favourable judgment.
- 24 The appellants contend that they satisfy those three conditions. As regards the first condition, they state that they submitted statements describing the detriment which they have suffered as a result of the Commission's acts. As regards the second condition, they point out that, by disbursing to the Kingdom of Spain the funds granted under Decision C (91) 440 for the construction of projects carried out in breach of Community environmental law, the Commission directly contributed to the detriment caused to their interests since the Spanish authorities had no discretion as to the use to which those funds were to be put. As regards the third condition, the appellants consider that, if the Court of First Instance had annulled the contested decision, the Commission would not have continued to finance work on construction of the power stations which would then have probably been suspended until completion of the environmental impact procedure.
- 25 The appellants submit further that environmental associations should be recognised as having locus standi where their objectives concern chiefly environmental protection and one or more of

their members are individually concerned by the contested Community decision, but also where, independently, their primary objective is environmental protection and they can demonstrate a specific interest in the question at issue.

- 26 Referring to the judgment in *Plaumann v Commission*, cited above, the appellants conclude that Article 173 must not be interpreted restrictively; its wording does not expressly require an approach based on the idea of a 'closed class', as affirmed in the case-law of the Court of Justice and the Court of First Instance (judgments in *Case 11/82 Piraiki-Patraiki and Others v Commission* [1985] ECR 207; *Case C-358/89 Extramet Industrie v Council* [1991] ECR I-2501; *Case C-309/89 Codorniu v Council* [1994] ECR I-1853; and *Joined Cases T-480/93 and T-483/93 Antillean Rice Mills and Others v Commission* [1995] ECR II-2305). Rather, it must be interpreted in such a way as to safeguard fundamental environmental interests and protect individual environmental rights effectively (judgments in *Procureur de la République v Association de Défense des Brûleurs d'Huiles Usagées*, cited above, paragraph 13; *Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraphs 13 to 21; and *Case 222/86 UNECTEF v Heylens and Others* [1987] ECR 4097, paragraph 14).

FINDINGS OF THE COURT

- 27 The interpretation of the fourth paragraph of Article 173 of the Treaty that the Court of First Instance applied in concluding that the appellants did not have *locus standi* is consonant with the settled case-law of the Court of Justice.
- 28 As far as natural persons are concerned, it follows from the case-law, cited at both paragraph 48 of the contested order and at paragraph 7 of this judgment, that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.
- 29 The same applies to associations which claim to have *locus standi* on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.
- 30 In appraising the appellants' arguments purporting to demonstrate that the case-law of the Court of Justice, as applied by the Court of First Instance, takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should be emphasised that it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.
- 31 In those circumstances, the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly.
- 32 As regards the appellants' argument that application of the Court's case-law would mean that, in the present case, the rights which they derive from Directive 85/337 would have no effective judicial protection at all, it must be noted that, as is clear from the file, Greenpeace brought proceedings before the national courts challenging the administrative authorisations issued to Unelco concerning the construction of those power stations. TEA and CIC also lodged appeals against CUMAC's declaration of environmental impact relating to the two construction projects (see paragraphs 6 and 7 of the contested order, reproduced at paragraph 2 of this judgment).
- 33 Although the subject-matter of those proceedings and of the action brought before the Court of First Instance is different, both actions are based on the same rights afforded to individuals by Directive 85/337, so that in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under Article 177 of the Treaty.
- 34 The Court of First Instance did not therefore err in law in determining the question of the appellants' *locus standi* in the light of the criteria developed by the Court of Justice in the case-law set out at paragraph 7 of this judgment.

[...]

6.3.6 The “UPA & Jégo-Quére Saga”

6.3.6.1 Opinion of AG Jacobs in Case C-50/00 P: UPA

Unión de Pequeños Agricultores v Council of the European Union

C-50/00 P

21 March 2002

AG Opinion

[2002] ECR Page I-6677

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

A trade association of small Spanish agricultural businesses, Unión de Pequeños Agricultores, brought an appeal against the order of 23 November 1999 of the Court of First Instance dismissing its application for partial annulment of a regulation on the common organisation of the market in oils and fats, including the olive oil markets. The Court of First Instance held that application to be manifestly inadmissible on the ground that the members of the association were not individually concerned by the provisions of the regulation at issue.

Opinion

(Footnotes omitted)

[...]

2. The fourth paragraph of Article 230 EC provides that '[a]ny natural or legal person may ... 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. While the focus of that provision is on review of decisions, the Court of Justice has acknowledged, rightly in my view, that regulations can also be challenged in proceedings instigated by individual applicants where they are of individual concern to the applicant, and that the test for establishing individual concern is in substance the same in the case of decisions and regulations. The notion of individual concern has, however, been interpreted strictly in the case-law. Applicants will be regarded as individually concerned by a measure only if it affects their legal position 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. (4) It may be noted that this aspect of the case-law has been much criticised both by members of the Court of Justice in their individual capacities (5) and by commentators (6) and is often regarded as creating a serious gap in the system of judicial remedies established by the EC Treaty.
3. The present appeal, which the Court has decided to hear in plenary session with a view to reconsidering its case-law on individual concern, raises an important question of principle: namely whether a natural or legal person ('individual) who is directly but not individually concerned by the

provisions of a regulation within the meaning of the fourth paragraph of Article 230 EC as interpreted in the case-law should none the less be granted locus standi where that individual would otherwise be denied effective judicial protection owing to the difficulty of challenging the regulation indirectly through proceedings in national courts or whether locus standi under the fourth paragraph of Article 230 EC falls to be determined independently of the availability of such an indirect challenge.

4. I will argue that locus standi must indeed be determined independently and that moreover the only solution which provides adequate judicial protection is to change the case-law on individual concern.

[...]

Is the assumption correct that the preliminary ruling procedure provides full and effective judicial protection against general Community measures?

36. At the hearing, UPA stated that it does not ask the Court of Justice to change its case-law on the interpretation of the fourth paragraph of Article 230 EC. However, implicit in its arguments is a strong criticism of the case-law, since it is alleged that it may lead to a denial of justice unless exceptions are made to it in specific instances.
37. I agree with UPA that the case-law on the locus standi of individual applicants is problematic. As I shall suggest below, the fact that an individual cannot (in most cases) challenge directly a measure which adversely affects him, if it is a measure of general application, seems unacceptable for, essentially, two reasons. First, the fourth paragraph of Article 230 EC must be interpreted in such a way that it complies with the principle of effective judicial protection. Proceedings before national courts do not, however, always provide effective judicial protection of individual applicants and may, in some cases, provide no legal protection whatsoever. Second, the Court's case-law on the interpretation of the fourth paragraph of Article 230 EC encourages individual applicants to bring issues of validity of Community measures indirectly before the Court of Justice via the national courts. Proceedings brought directly before the Court of First Instance are however more appropriate for determining issues of validity than proceedings before the Court of Justice pursuant to Article 234 EC, and less liable to cause legal uncertainty for individuals and the Community institutions. In addition to those points, it may be argued that the Court's restrictive attitude towards individual applicants is anomalous in the light of its case-law on other aspects of judicial review and recent developments in the administrative laws of the Member States.

Proceedings before national courts may not provide effective judicial protection of individual applicants

38. 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. (29)
39. 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. (30) Moreover, the Charter of fundamental rights of the European Union, (31) while itself not legally binding, proclaims a generally recognised principle in stating 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.
40. In my view, proceedings before national courts are not, however, capable of guaranteeing that individuals seeking to challenge the validity of Community measures are granted fully effective judicial protection.
41. It may be recalled, first of all, that the national courts are not competent to declare measures of Community law invalid. (32) In a case concerning the validity of a Community measure, the competence of the national court is limited to assessing whether the applicant's arguments raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice. It seems to me, therefore, artificial to argue that the national courts are the correct forum for such cases. The strictly limited competence of national courts in cases

concerning the validity of Community measures may be contrasted with the important role which they play in cases concerning the interpretation, application and enforcement of Community law. In such cases, the national courts may, as the Commission stated at the hearing, be described as the ordinary courts of Community law. That description is, however, not appropriate for cases which do not involve questions of interpretation, but raise only issues of the validity of Community measures, since in such cases the national courts do not have power to decide what is at issue.

42. Second, the principle of effective judicial protection requires that applicants have access to a court which is competent to grant remedies capable of protecting them against the effects of unlawful measures. Access to the Court of Justice via Article 234 EC is however not a remedy available to individual applicants as a matter of right. National courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of Article 234 EC, appeals within the national judicial systems are liable to entail long delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty. (33) National courts - even at the highest level - might also err in their preliminary assessment of the validity of general Community measures and decline to refer questions of validity to the Court of Justice on that basis. Moreover, where a reference is made, it is in principle for the national court to formulate the questions to be answered by the Court of Justice. Individual applicants might thus find their claims redefined by the questions referred. Questions formulated by national courts might, for example, limit the range of Community measures which an applicant has sought to challenge or the grounds of invalidity on which he has sought to rely.
43. Third, it may be difficult, and in some cases perhaps impossible, for individual applicants to challenge Community measures which - as appears to be the case for the contested regulation - do not require any acts of implementation by national authorities. In that situation, there may be no measure which is capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure might, in some instances, be able to bring the validity of a Community measure before the national courts by violating the rules laid down by the measures and rely on the invalidity of those rules as a defence in criminal or civil proceedings directed against him does not offer the individual an adequate means of judicial protection. Individuals clearly cannot be required to breach the law in order to gain access to justice.
44. Finally, compared to a direct action before the Court of First Instance, proceedings before the national courts present serious disadvantages for individual applicants. Proceedings in the national courts, with the additional stage of a reference under Article 234 EC, are likely to involve substantial extra delays and costs. The potential for delay inherent in proceedings brought before domestic courts, with the possibility of appeals within the national system, makes it likely that interim measures will be necessary in many cases. However, although national courts have jurisdiction to suspend a national measure based on a Community measure or otherwise to grant interim relief pending a ruling from the Court of Justice, (34) the exercise of that jurisdiction is subject to a number of conditions and is - despite the Court's attempts to provide guidance as to the application of those conditions - to some extent dependent on the discretion of national courts. In any event, interim measures awarded by a national court would be confined to the Member State in question, and applicants might therefore have to bring proceedings in more than one Member State. That would, given the possibility of conflicting decisions by courts in different Member States, prejudice the uniform application of Community law, and in extreme cases could totally subvert it.

Proceedings before the Court of First Instance under Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC

45. I consider, moreover, that proceedings before the Court of First Instance under Article 230 EC are generally more appropriate for determining issues of validity than reference proceedings under Article 234 EC.
46. The procedure is more appropriate because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations followed by oral observations before the Court. The availability of interim relief under Articles 242 and 243 EC, effective in all Member States, is also a major advantage for individual applicants and for the uniformity of

Community law.

47. Moreover, where a direct action is brought, the public is informed of the existence of the action by means of a notice published in the Official Journal and third parties may, if they are able to establish a sufficient interest, intervene in accordance with Article 37 of the Statute of the Court. In reference proceedings interested individuals cannot submit observations under Article 20 of the Statute unless they have intervened in the action before the national court. That may be difficult, for although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene.
48. Of even greater importance is the point that it is manifestly desirable for reasons of legal certainty that challenges to the validity of Community acts be brought as soon as possible after their adoption. While direct actions must be brought within the time-limit of two months laid down in the fifth paragraph of Article 230 EC, the validity of Community measures may, in principle, be questioned before the national courts at any point in time. (35) The strict criteria for standing for individual applicants under the existing case-law on Article 230 EC make it necessary for such applicants to bring issues of validity before the Court via Article 234 EC, and may thus have the effect of reducing legal certainty.

[...]

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 230 EC. 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 230 EC 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 to 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.

Advantages of the suggested interpretation of the notion of individual concern

61. A development along those lines of the case-law on the interpretation of Article 230 EC would have several very substantial advantages.
62. First, if one rejects the solutions advanced by UPA and by the Council and Commission - and there are very strong reasons for doing so - it seems the only way to avoid what may in some cases be a total lack of judicial protection - a *déni 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, (36) 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 Court of First Instance.
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 234 EC. That would, as

explained above, be beneficial for legal certainty and the uniform application of Community law. It may be noted in that regard that the TWD case-law (37) - according to which an individual cannot challenge a measure via Article 234 EC where, although there was no doubt about his standing under the fourth paragraph of Article 230 EC, he omitted to take action within the time-limit laid down in the fifth paragraph of that Article - would, in my view, not normally extend to general measures. Individuals who were adversely affected by general measures would therefore not be precluded by that case-law from challenging such measures before national courts. None the less, if the notion of individual concern were interpreted in the way I have suggested, and standing for individuals accordingly liberalised, it may be expected that many challenges would be brought by way of direct action before the Court of First Instance.

66. A point of equal, or even greater, importance is that the interpretation of Article 230 EC which I propose would 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 undue 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 (38) than by the application of strict rules on admissibility which have the effect of 'blindly excluding applicants without consideration of the merits of the arguments they put forward.
67. Finally, the suggested interpretation of the notion of individual concern would remove a number of anomalies in the Court's case-law on judicial review. The most important anomalies arise from the fact that the Court has adopted different approaches to the notion of individual concern and to other provisions of Article 173 of the EEC Treaty (now, after amendment, Article 230 EC).
68. Thus, the Court has taken a generous view of the types of acts which are susceptible to review. Under the first paragraph of Article 173 of the EEC Treaty, the Court was originally competent to review 'acts of the Council and the Commission other than recommendations and opinions. Article 189 of the EEC Treaty (now Article 249 EC) defined binding Community acts as regulations, directives and decisions. It might have been thought, on the basis of those provisions, that the Court was only competent to review regulations, directives and decisions adopted by the Council or the Commission. However, in ERTA (39) the Court was willing to review the legality of Council proceedings regarding the negotiation and conclusion by the Member States of an agreement on the working conditions of the crews of vehicles engaged in international road transport (40) on the ground, essentially, that the purpose of the procedure for judicial review laid down in Article 173 of the EEC Treaty - which is to ensure observance of the law in the interpretation and application of the Treaty - would not be fulfilled unless it was possible to challenge all measures, whatever their nature or form, which are intended to have legal effects. (41) In *Les Verts* (42) the Court was asked to review two measures, adopted by the European Parliament, on the reimbursement of expenses incurred by parties taking part in the 1984 elections. In declaring that action admissible, it held that while 'Article 173 refers only to acts of the Council and the Commission ... an interpretation of [that provision] which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary to both the spirit of the Treaty as expressed in Article 164 [now Article 220 EC] and to its system. (43)
69. When deciding which institutions are entitled to bring proceedings for annulment under the Treaty, the Court has not adopted a strict reading of the Treaty text either. Prior to the entry into force of the Treaty on European Union, the first paragraph of Article 173 of the EEC Treaty provided that the Court had jurisdiction 'in actions brought by a Member State, the Council or the Commission. The absence of any reference to the European Parliament in that provision did not, however, prevent the Court from holding in *Chernobyl* (44) that 'an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives, (45) for while '[t]he absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, ... it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties. (46)

70. Similarly, when considering on what grounds the validity of Community measures adopted may be challenged, the Court held that although Article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought on grounds of 'infringement of this Treaty or of any rule of law relating to its application, 'the need for a complete and consistent review of legality require[d] that provision to be construed as not depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the EEC Treaty, a submission concerning the infringement of a rule of the EAEC or ECSC Treaties. (47)
71. The restrictive attitude towards individual applicants which the Court has adopted in the context of the fourth paragraph of Article 230 EC - and which it has, despite the extension of the powers of the Community by successive Treaty amendments, declined to reconsider - appears difficult to justify in the light of the cases decided under the other paragraphs of Article 173 of the EEC Treaty, where the Court has adopted a generous and dynamic interpretation of the Treaty, or even a position contrary to the text, to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.
72. A further anomaly in this area arises from the fact that under Community law there are no restrictions on the standing of individuals to bring actions for damages under Articles 235 EC and 288 EC. The class of individuals capable of seeking damages for loss caused by Community measures is thus unlimited. In the context of the strict standing rules applied under the fourth paragraph of Article 230 EC, that seems paradoxical since damages actions will often involve, or effectively involve, challenges to the legality of general Community measures. Thus the Court of First Instance already has jurisdiction to review the legality of general measures in claims for damages (or on a plea of illegality under Article 241 EC) at the suit of an unlimited class of individuals.

Objections to the suggested interpretation of the notion of individual concern

73. What, then, are the objections to the suggestion that an individual applicant 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? According to the Council and the Commission a broader interpretation of the notion of individual concern than that adopted in the Court's existing case-law would be contrary to the fourth paragraph of Article 230 EC and result in a flood of additional challenges to Community acts.
74. I am not convinced by those arguments.
75. First, it may be acknowledged that the wording of Article 230 EC sets certain limits which must be respected. All individual applicants do not have standing to challenge all Community acts. However, I do not accept the proposition that the wording of the fourth paragraph of Article 230 EC excludes the Court from re-considering its case-law on individual concern. It is clear, and cannot be stressed too strongly, that the notion of individual concern is capable of carrying a number of different interpretations, and that when choosing between those interpretations the Court may take account of the purpose of Article 230 EC and the principle of effective judicial protection for individual applicants. (48) In any event, the Court's case-law in other areas (49) acknowledges that an evolutionary interpretation of Article 230 EC is needed in order to fill procedural gaps in the system of remedies laid down by the Treaty and ensure that the scope of judicial protection is extended in response to the growth in the powers of the Community institutions. While that case-law acknowledges that it may even be necessary to depart from the wording of the Treaty to provide effective judicial protection, the Court is not required to take such a step in the present case, since the interpretation I propose is wholly compatible with the wording of the Treaty.
76. Second, the wording of the second paragraph of Article 173 of the EEC Treaty (now the fourth paragraph of Article 230 EC) differs from, and is more restrictive than, the wording of Article 33 of the ECSC Treaty. It has been argued that that difference reflects the Treaty draftsmen's intention to break away from the liberal case-law on standing which had developed under the ECSC Treaty since its entry into force in 1952, (50) and to impose strict limits on the scope of locus standi under the EEC Treaty, (51) in order to prevent numerous challenges by individual applicants from undermining legislation laboriously adopted by unanimity in the Council of Ministers. (52)

77. There was, in my view, never much force in that argument. (53) To insulate potentially unlawful measures from judicial scrutiny can rarely, if ever, be justified on grounds of administrative or legislative efficiency. That is true in particular where limitations on standing may lead to a complete denial of justice for particular individuals. Arguments drawn from a comparison of the ECSC and the EEC Treaties are, moreover, much less persuasive today than when the Court was first called upon to determine the meaning of individual concern. (54) The second paragraph of Article 173 of the EEC Treaty has been renumbered but never amended substantively since the Treaty came into force on 1 January 1958. Inferences drawn from the historical background of a provision of that age cannot be allowed to freeze the interpretation of the notion of individual concern. That point is underlined by the fact that the reasons which, allegedly, motivated the Treaty draftsmen to limit individual standing under the EEC Treaty are, in any event, of limited relevance today. On the one hand, the European Community is now firmly established and its legislative process, to a large extent based on the adoption of measures by majority voting in the Council of Ministers and the European Parliament, is sufficiently robust to withstand judicial scrutiny at the instigation of individuals. On the other hand, Community law now affects the interests of individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action.
78. It may also be noted that although the European Communities originate in a set of Treaties concluded by the Member States in the context of public international law, the Community legal order has developed in such a way that it would no longer be accurate to describe it as a system of intergovernmental cooperation, nor would it be appropriate to describe the Court of Justice as an international tribunal. The fact that individual applicants have traditionally not, or only exceptionally, been given standing to appear before international judicial bodies is therefore of no relevance for the interpretation to be given to the fourth paragraph of Article 230 EC in the present day.
79. Third, I am not convinced that a relaxation of the requirements for individual concern would result in a deluge of cases which would overwhelm the judicial machinery. There is no record of that having happened in those legal systems, inside and outside the European Union, which have in recent years progressively relaxed their requirements for standing. (55) The instigation of proceedings by an individual pursuant to Article 230 EC is moreover subject to a number of conditions. In addition to individual concern, applicants are required to show direct concern, and actions must be brought within a time-limit of two months. While those conditions have played only a limited role in the case-law in the past, their importance would almost certainly increase in response to a relaxation of the requirement of individual concern. It may be thought that a relaxation of the requirements for standing would therefore result in an increase in the number of applications under the fourth paragraph of Article 230 EC which, though appreciable, would not be insuperable.
80. An increase in the case-load need not undermine the Community judiciary's ability to carry out its task and deliver speedy justice. A large proportion of the increase would presumably consist of challenges by different individuals and associations to the same Community measures. Such cases could be dealt with, without any significant additional drain on the resources of the Court of First Instance, by joinder of cases or by selecting test cases. Where challenges were manifestly unfounded in substance, the Court of First Instance could, under Article 111 of its Rules of Procedure, dismiss them by reasoned order. Given the complexity of the present case-law on standing, and the detailed reasoning contained in the orders of the Court of First Instance in particular on issues of individual concern, it would hardly require considerable extra effort to dismiss such applications on substantive grounds.
81. Furthermore, the efficiency of the Courts' case-handling could, if necessary, be increased by procedural and jurisdictional reforms. Certain amendments to the Rules of Procedure of the Court of First Instance, aimed at expediting proceedings, have already been introduced. (56) The Treaty of Nice (57) lays down a more flexible procedure for amendment of the Rules of Procedure of the Court of First Instance and the Court of Justice. (58) More importantly, the amendments to the Treaty proposed by the Treaty of Nice also envisage the creation of judicial panels to determine proceedings brought in specific areas (59) - such as staff complaints and, perhaps, trade marks. Moreover it will remain possible, if necessary, to increase the number of judges and staff at the Court of First Instance.

[...]

102. It may be helpful to summarise the reasons for that view, as follows:

(1) The Court's fundamental assumption that the possibility for an individual applicant to trigger a reference for a preliminary ruling provides full and effective judicial protection against general measures is open to serious objections:

- under the preliminary ruling procedure the 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 no right of access to the Court of Justice; on the other hand, the national court cannot itself grant the desired remedy to declare the general measure in issue invalid;
- there may be a denial of justice in cases where it is difficult or impossible for an applicant to challenge a general measure indirectly (e.g. where there are no challengeable implementing measures or where the applicant would have to break the law in order to be able to challenge ensuing sanctions);
- legal certainty pleads 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 on validity under Article 234 EC present a number of procedural disadvantages in comparison to direct challenges under Article 230 EC 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) Those objections cannot be overcome by granting standing by way of exception in 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 to a further loss of legal certainty.

(3) Nor can those 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 resolves all the problems set out above: applicants are granted a true right of direct access to a court which can grant a remedy, cases 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 EC 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 over-loading the Court of First Instance seem exaggerated since the time-limit in Article 230(5) EC and the requirement of direct concern will prevent an insuperable 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 time is now ripe for change. In particular:

- the case-law in many borderline cases is not stable, and has been in any event relaxed 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, make 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 courts makes it increasingly difficult to justify narrow restrictions on standing before the Community Courts.

103. For all of those reasons I conclude that an individual should be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC 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.

[...]

6.3.6.2 Judgement of the Court of First Instance in Case T-177/01: Jégo-Quéré

Jégo-Quéré & Cie SA v Commission of the European Communities

Case T-177/01

3 May 2002

Court of First Instance

[2002] ECR II-02365

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of facts and procedure

Jégo-Quéré et Cie S.A. is a French fishing company operating on a regular basis in the waters south of Ireland. It owns four fishing boats over 30 metres in length and uses nets having a mesh of 80 mm, which have been banned by a new Community regulation. It applied to the CFI for annulment of two provisions of the regulation in question, which require fishing vessels operating in certain defined zones to use nets having a minimum mesh for beam trawling.

The Commission argued that the CFI should declare the action inadmissible. According to the EC Treaty, "Any natural or legal person may ... 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". Whilst not denying that the contested provisions are of direct concern to Jégo-Quéré, it claimed that the applicant is not individually concerned, inasmuch as the rules governing mesh sizes apply equally to all operators fishing in the Celtic Sea and not just to that operator.

The Commission argued that, on the basis of the criteria previously developed by the case-law of the Community courts, the CFI was bound to find that the applicant could not be regarded as individually concerned within the meaning of the EC Treaty and that the action should therefore be dismissed as inadmissible.

Decision

[...]

- 23 Jégo-Quéré is seeking annulment of Articles 3(d) and 5 of the regulation. Those provisions require fishing vessels operating in certain defined areas to use nets of a minimum mesh size for the different techniques employed when fishing with nets. Contrary to the applicant's arguments, those provisions are addressed in abstract terms to undefined classes of persons and apply to objectively determined situations (see, in particular, the judgment of the Court of Justice in Case C-213/91 Abertal and Others v Commission [1993] ECR I-3177, paragraph 19, and the order of the Court of First Instance in Case T-183/94 Cantina cooperativa fra produttori vitivinicoli di Torre di Mosto and Others v Commission [1995] ECR II-1941, paragraph 51).
- 24 Consequently, the contested provisions are, by their nature, of general application.

- 25 It is, however, necessary to consider whether, notwithstanding their general scope, the contested provisions may nevertheless be regarded as being of direct and individual concern to the applicant. According to settled case-law, the fact that a provision is of general application does not prevent it from being of direct and individual concern to some of the economic operators whom it affects (judgments of the Court of Justice in Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraphs 13 and 14, Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, and Case C-451/98 *Antillean Rice Mills v Council* [2001] ECR I-8949, paragraph 46; judgment of the Court of First Instance of 6 December 2001 in Case T-43/98 *Emesa Sugar v Council* [2001] ECR II-0000, paragraph 47).
- 26 It must be concluded that the criterion of direct concern is fulfilled in the present case. For a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (Case C-386/96 *P Dreyfus v Commission* [1998] I-2309, paragraph 43, and the case-law cited therein, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-255/99 *Comafica and Dole Fresh Fruit Europe v Commission* [2001] ECR II-1975, paragraph 96). As it is, in order to produce their effects vis-à-vis the applicant, the contested provisions do not require the adoption of any additional measures, at either Community or national level.
- 27 Next, as regards the question whether the applicant is individually concerned within the meaning of the fourth paragraph of Article 230 EC, it should be recalled that, according to settled-case law dating back to the judgment of the Court of Justice in Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, for natural and legal persons to be regarded as individually concerned by a measure not addressed to them, it must affect their position 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.
- 28 It is therefore necessary to consider whether, in the light of that case-law, the applicant may be regarded as individually concerned by the contested provisions.
- 29 The applicant states, first of all, that it is the only operator fishing for whiting in the waters south of Ireland with vessels over 30 metres in length, and that the application of the contested provisions has greatly reduced its catches.
- 30 However, that fact is not such as to differentiate the applicant within the meaning of the case-law referred to in paragraph 27 above, since the contested provisions are of concern to it only in its objective capacity as an entity which fishes for whiting using a certain fishing technique in a specific area, in the same way as any other economic operator actually or potentially in the same situation (see, to that effect, paragraph 20 of the judgment in *Abertal and Others*, cited in paragraph 23 above, and paragraph 65 of the judgment in *ACAV and Others*, cited in paragraph 14 above).
- 31 Next, the applicant claims that it is apparent from Article 33 EC that the Commission was legally bound to consider its particular position before adopting the contested provisions.
- 32 The fact that, by virtue of specific provisions, the Commission is under a duty to take account of the consequences for the situation of certain individuals of a measure which it envisages adopting may be such as to distinguish those persons individually (paragraphs 21 and 28 of the judgment in *Piraki-Patraiki*, cited in paragraph 16 above; Case C-152/99 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 11; Case C-390/95 *P Antillean Rice Mills and Others v Commission* [1999] ECR I-769, paragraphs 25 to 30; Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, paragraph 67; and Case T-47/00 *Rica Foods v Commission* [2002] ECR II-0000, paragraph 41).
- 33 It must however be observed that Article 33 EC, which sets out the objectives of the common agricultural policy and the principles on which it is based, does not impose on the Commission any obligation, when adopting measures falling within that sphere, to take account of the particular situation of individual undertakings such as the applicant.

- 34 The applicant further refers to meetings which took place between it and the Commission during the course of the procedure leading up to the adoption of the regulation.
- 35 However, the fact that a person is involved in some way or other in the procedure leading to the adoption of a Community measure is capable of distinguishing that person individually in relation to the measure in question only if the applicable Community legislation grants him certain procedural guarantees (paragraph 55 of the judgment in *Rica Foods v Commission*, cited in paragraph 32 above).
- 36 In the present case, no provision of Community legislation required the Commission, for the purposes of adopting the regulation, to follow a procedure during which the applicant would have been entitled to assert any rights, including the right to be heard (see, to that effect, *Joined Cases T-38/99 to T-50/99 Sociedade Agrícola dos Arinhos and Others v Commission* [2001] ECR II-585, paragraph 48).
- 37 Moreover, the applicant has produced no evidence to show that the contested provisions affect it by reason of a special situation of the type identified by the Court of Justice in the cases culminating in the judgments cited in paragraph 25 above, namely *Extramet Industrie v Council*, paragraph 17, and *Codorniu v Council*, paragraphs 21 and 22.
- 38 Consequently, it follows that the applicant cannot be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law.
- 39 However, the applicant asserts that, were its action to be dismissed as inadmissible, it would be denied any legal remedy enabling it to challenge the legality of the contested provisions. Since the regulation does not provide for the adoption of any implementing measures by the Member States, the applicant maintains that, in the present case, it would have no right of action before the national courts.
- 40 The Commission, on the other hand, takes the view that the applicant is not denied access to the courts, since it can bring an action for non-contractual liability pursuant to Article 235 EC and the second paragraph of Article 288 EC.
- 41 In that regard, it should be borne in mind that the Court of Justice itself has confirmed that access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty, inasmuch as 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 (*Case 294/83 Les Verts v European Parliament* [1986] ECR 1339, paragraph 23). The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (*Case 222/84 Johnston* [1986] ECR 1651, paragraph 18).
- 42 In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1).
- 43 It is therefore necessary to consider whether, in a case such as this, where an individual applicant is contesting the lawfulness of provisions of general application directly affecting its legal situation, the inadmissibility of the action for annulment would deprive the applicant of the right to an effective remedy.
- 44 In that regard, it should be recalled that, apart from an action for annulment, there exist two other procedural routes by which an individual may be able to bring a case before the Community judicature - which alone have jurisdiction for this purpose - in order to obtain a ruling that a Community measure is unlawful, namely proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC and an action based on the non-contractual liability of the Community, as provided for in Article 235 EC and the second paragraph of Article 288 EC.

- 45 However, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC, it should be noted that, in a case such as the present, there are no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice (see point 43 of the Opinion of Advocate General Jacobs delivered on 21 March 2002 in Case C-50/00 P *Unión de Pequeños Agricultores v Council*, not yet published in the European Court Reports).
- 46 The procedural route of an action for damages based on the non-contractual liability of the Community does not, in a case such as the present, provide a solution that satisfactorily protects the interests of the individual affected. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to criteria of admissibility and substance which are different from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application, such as the provisions contested in the present case, is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals (see Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraphs 41 to 43; Case T-155/99 *Dieckmann & Hansen v Commission* [2001] ECR II-0000, paragraphs 42 and 43; see also, as regards an insufficiently serious infringement, Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraphs 18 and 19, and, for a case in which the rule invoked was not intended to confer rights on individuals, paragraph 43 of the judgment of 6 December 2001 in Case T-196/99 *Area Cova and Others v Council and Commission* [2001] ECR II-0000).
- 47 On the basis of the foregoing, the inevitable conclusion must be that the procedures provided for in, on the one hand, Article 234 EC and, on the other hand, Article 235 EC and the second paragraph of Article 288 EC can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.
- 48 It is true that such a circumstance cannot constitute authority for changing the system of remedies and procedures established by the Treaty, which is designed to give the Community judicature the power to review the legality of acts of the institutions. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by the fourth paragraph of Article 230 EC to be declared admissible (see the order of the President of the Court of Justice of 12 October 2000 in Case C-300/00 P(R) *Federación de Cofradías de Pescadores and Others v Council* [2000] ECR I-8797, paragraph 37).
- 49 However, as Advocate General Jacobs stated in point 59 of his Opinion in *Unión de Pequeños Agricultores v Council* (cited in paragraph 45 above), there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.
- 50 In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions (paragraph 23 of the judgment in *Les Verts v Parliament*, cited in paragraph 41 above), the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered.

- 51 In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.
- 52 In the present case, obligations are indeed imposed on Jégo-Quéré by the contested provisions. The applicant, whose vessels are covered by the scope of the regulation, carries on fishing operations in one of the areas in which, by virtue of the contested provisions, such operations are subjected to detailed obligations governing the mesh size of the nets to be used.
- 53 It follows that the contested provisions are of individual concern to the applicant.
- 54 Since those provisions are also of direct concern to the applicant (see paragraph 26 above), the objection of inadmissibility raised by the Commission must be dismissed and an order made for the action to proceed.

[...]

6.3.6.3 Judgement of the Court of Justice in Case C-50/00 P: UPA

Unión de Pequeños Agricultores v Council of the European Union

C-50/00

25 July 2002

Court of Justice

[2002] ECR Page I-6677

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

- 25 By its four pleas in law, which it is appropriate to examine together, the appellant claims essentially that the dismissal of its application as inadmissible, in so far as it is based on the reasoning set out in paragraphs 61 to 64 of the contested order, infringes its right to effective judicial protection for the defence of its own interests or those of its members.
- 26 According to the appellant, the disputed provisions of the contested regulation, which abolish the intervention scheme, consumption aid and aid to small producers, do not require any national implementing legislation and do not occasion the taking of any measures by the Spanish authorities. Consequently, the appellant cannot, under the Spanish legal system, seek annulment of a national measure relating to the disputed provisions. A reference for a preliminary ruling to assess their validity is therefore precluded. Furthermore, the appellant or its members cannot even infringe such provisions so as to be in a position to challenge the validity of any sanction that might, if appropriate, be imposed on them.
- 27 The appellant contends that the contested order has infringed a fundamental right which forms part of the Community legal order in that it failed to examine whether, given the circumstances of the case, the fact of declaring inadmissible the application for partial annulment of the contested regulation does not lead to disregard for the effectiveness of the appellant's right to judicial protection.
- 28 The appellant submits that the right to effective judicial protection requires a specific examination of the particular circumstances of the case. A right cannot be truly effective unless consideration is given to its effectiveness in practice. In reality, such an examination necessarily entails an inquiry into whether, in the particular case, there is an alternative legal remedy. In that regard, the appellant refers to paragraphs 32 and 33 of the judgment in Case C-321/95 P Greenpeace Council and Others v Commission [1998] ECR I-1651, which, in its submission, confirms that where there is no legal remedy under national law an application for annulment under the fourth paragraph of Article 173 of the Treaty must be held admissible.
- 29 The Council and the Commission contend in substance that the appeal is, in any event, manifestly unfounded since there is no provision in the fourth paragraph of Article 173 of the Treaty to the effect that the lack of access to a judicial remedy under national law constitutes a criterion or a circumstance such as to justify the admissibility of a direct action for annulment brought by a natural or legal person against a Community measure of general application. The only relevant test is whether the applicant is directly and individually concerned by the contested measure. The appeal does not address the question whether the appellant is individually and directly concerned

but refers solely to the analysis of the Court of First Instance of the arguments put forward on the subject of effective judicial protection.

- 30 The Council and the Commission recall in addition that the Treaty has established a complete system of legal remedies designed to enable the Court to review the legality or validity of acts of the institutions and, in particular, of acts of general application. Admittedly, according to the Commission, a Member State which makes it excessively difficult, or even impossible, to submit a question for a preliminary ruling infringes the fundamental right to effective judicial protection and thereby fails to fulfil its duty of sincere cooperation laid down in Article 5 of the Treaty. However, even in that case, such infringement cannot be overcome by straining the meaning of the fourth paragraph of Article 173 of the Treaty. Instead, infringement proceedings should be brought against the Member State in question, in accordance with Article 226 EC.
- 31 The Commission states, furthermore, that it does not understand how the appellant can assert that Spanish law does not provide any judicial remedy against the contested regulation. It observes that the regulation is a binding measure which directly produces rights and obligations on the part of individuals, so that any infringement of its provisions may be invoked before the national courts. In Spanish law, as no doubt in other legal systems of the Member States, the administrative authorities are required to take decisions on applications made by the persons concerned. If, beyond a certain time-limit, the competent authorities have failed to adopt a position on those applications, such silence is treated as a negative response or, on the contrary, a positive response in certain cases, which enables proceedings to be brought where the applicant in question is not satisfied with the response given. Once judicial proceedings have been initiated, there is nothing to prevent that individual from invoking all the rules of Community law and requesting, where appropriate, a reference for a preliminary ruling under Article 234 EC on the interpretation or validity of the contested measure.

Findings of the Court

- 32 As a preliminary point, it should be noted that the appellant has not challenged the finding of the Court of First Instance, in paragraph 44 of the contested order, to the effect that the contested regulation is of general application. Nor has it challenged the finding, in paragraph 56 of that order, that the specific interests of the appellant were not affected by the contested regulation or the finding, in paragraph 50 of that order, that its members are not affected by the contested regulation by reason of certain attributes which are peculiar to them or by reason of factual circumstances in which they are differentiated from all other persons.
- 33 In those circumstances, it is necessary to examine whether the appellant, as representative of the interests of its members, can none the less have standing, in conformity with the fourth paragraph of Article 173 of the Treaty, to bring an action for annulment of the contested regulation on the sole ground that, in the alleged absence of any legal remedy before the national courts, the right to effective judicial protection requires it.
- 34 It should be recalled that, according to the second and third paragraphs of Article 173 of the Treaty, the Court is to have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds 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 or, when it is for the purpose of protecting their prerogatives, by the European Parliament, by the Court of Auditors and by the European Central Bank. Under the fourth paragraph of Article 173, '[a]ny 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 a decision addressed to another person, is of direct and individual concern to the former.'
- 35 Thus, under Article 173 of the Treaty, a regulation, as a measure of general application, cannot be challenged by natural or legal persons other than the institutions, the European Central Bank and the Member States (see, to that effect, Case 92/78 Simmenthal v Commission [1979] ECR 777, paragraph 40).
- 36 However, a measure of general application such as a regulation can, in certain circumstances, be of individual concern to certain natural or legal persons and is thus in the nature of a decision in

their regard (see, in particular, Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, and Case C-41/99 *P. Sadam Zuccherifici and Others v Council* [2001] ECR I-4239, paragraph 27). That is so 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 (see, in particular, Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107, and Case C-452/98 *Nederlandse Antillen v Council* [2001] ECR I-8973, paragraph 60).

- 37 If that condition is not fulfilled, a natural or legal person does not, under any circumstances, have standing to bring an action for annulment of a regulation (see, in that regard, the order in *CNPAAP v Council*, cited above, paragraph 38).
- 38 The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.
- 39 Individuals are therefore 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 enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-424/99 *Commission v Austria* [2001] ECR I-9285, paragraph 45).
- 40 By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts v Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, 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 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity.
- 41 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.
- 42 In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, 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.
- 43 As the Advocate General has pointed out in paragraphs 50 to 53 of his Opinion, it is not acceptable to adopt an interpretation of the system of remedies, such as that favoured by the appellant, to the effect that a direct action for annulment before the Community Court will be available 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 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 (see, for example, *Joined Cases 67/85, 68/85 and 70/85*

Van der Kooy v Commission [1988] ECR 219, paragraph 14; Extramet Industrie v Council, paragraph 13, and Codorniu v Council, paragraph 19), 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 of general application different from that 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.
- 46 In the light of the foregoing, the Court finds that the Court of First Instance did not err in law when it declared the appellant's application inadmissible without examining whether, in the particular case, there was a remedy before a national court enabling the validity of the contested regulation to be examined.
- 47 The appeal must therefore be dismissed.

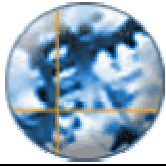
[...]

6.3.6.4 Opinion of AG Jacobs in Case C-263/02 P: Commission v Jégo-Quéré

This case was groundbreaking when the CFI decided that individuals could bring actions for annulment against measures of general application, thereby opening up the scope of judicial review by the Community Courts. The CFI based its judgment in part on the Opinion of Advocate General Jacobs in a case which was then awaiting judgment, Case C-50/00 UPA. The Commission appealed against the decision of the CFI, giving rise to the present Case C-263/02 P: Commission v Jégo-Quéré.

However, when the ECJ ruled in UPA, it stated that such actions were not admissible and that only a change to the Treaty could result in individuals being able to seek annulment of measures of general application. The Advocate General for this appeal was again Advocate General Jacobs, and again in his Opinion, presented on 10 July 2003, he sticks to his original views expressed in his Opinion in UPA and does not, as some suggested would happen, follow the line taken by the Court in its judgment in that case.

7 ARTICLE 232 TEC



NOTE AND QUESTIONS

A remedy for a wrongful failure to act is provided by Article 232 TEC, which reads as follows:

Article 232 (ex 175)

- (1) Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.
- (2) The action shall 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.
- (3) Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.
- (4) The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.

This provision bears a strong resemblance to Article 230 TEC. What are the differences between the two Articles?

7.1 Case 64/82: Tradax

Tradax Graanhandel BV v Commission of the European Communities

Case 64/82

15 March 1984

Court of Justice

[1984] ECR 1359

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 BY AN APPLICATION LODGED AT THE COURT REGISTRY ON 15 FEBRUARY 1982 TRADAX GRAANHANDEL BV BROUGHT AN ACTION SEEKING PRIMARILY A DECLARATION PURSUANT TO THE THIRD PARAGRAPH OF ARTICLE 175 OF THE EEC TREATY THAT THE COMMISSION HAD, IN BREACH OF THE TREATY AND DESPITE HAVING BEEN REQUESTED BY A LETTER OF 24 NOVEMBER 1981 SO TO DO, FAILED TO PROVIDE THE APPLICANT WITH THE DATA ON WHICH IT BASED ITS CALCULATION OF THE LEVIES APPLICABLE TO MAIZE IMPORTS FOR THE PERIOD 28 TO 31 OCTOBER 1980 INCLUSIVE.
- 2 IN THE ALTERNATIVE THE ACTION SEEKS TO HAVE DECLARED VOID, PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 173 OF THE TREATY, THE COMMISSION ' S LETTER OF 14 DECEMBER 1981 SIGNED BY MR WILLIAMSON, AT THAT TIME DEPUTY DIRECTOR GENERAL FOR AGRICULTURE, IN WHICH THE COMMISSION, IN REPLY TO TRADAX ' S LETTER OF 24 NOVEMBER 1981, INFORMED IT THAT CIF PRICES HAD BEEN DETERMINED IN STRICT COMPLIANCE WITH THE PROVISIONS APPLICABLE.
- 3 FINALLY, WHATEVER THE RESULT OF THOSE TWO CLAIMS, THE ACTION SEEKS DAMAGES PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 215 OF THE EEC TREATY, IN THE AMOUNT OF ONE FLORIN, IN COMPENSATION FOR DAMAGE CAUSED TO THE APPLICANT BY THE COMMISSION ' S REFUSAL TO SUPPLY IT WITH THE REQUESTED DATA ON WHICH THE CALCULATION WAS BASED.

FACTS OF THE DISPUTE

- 4 ARTICLE 13 (1) OF REGULATION NO 2727/75 OF THE COUNCIL OF 29 OCTOBER 1975 ON THE COMMON ORGANIZATION OF THE MARKET IN CEREALS (OFFICIAL JOURNAL L 281, P. 1) WHICH REPLACED REGULATION NO 120/67 OF 13 JUNE 1967 (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1967, P. 33) PROVIDES FOR A LEVY TO BE CHARGED ON THE IMPORT OF CERTAIN PRODUCTS LISTED IN ARTICLE 1, EQUAL FOR EACH PRODUCT TO THE THRESHOLD PRICE LESS THE CIF PRICE. ARTICLE 1(2) AND (3) CONTAINS PROVISIONS REGARDING THE CALCULATION OF THE CIF PRICES. PARAGRAPH (4) GIVES THE COMMISSION THE POWER TO ADOPT DETAILED RULES FOR THE APPLICATION OF THAT ARTICLE IN ACCORDANCE WITH THE SO-CALLED MANAGEMENT COMMITTEE PROCEDURE. FINALLY, PARAGRAPH (5) PROVIDES THAT THE COMMISSION IS TO FIX THE LEVIES MENTIONED IN THAT ARTICLE.
- 5 PURSUANT TO ARTICLE 13(4) OF REGULATION NO 120/67, WHICH IS IDENTICAL IN WORDING TO ARTICLE 13(4) OF REGULATION NO 2727/75, ON 23 JUNE 1967 THE COMMISSION ADOPTED REGULATION NO 156/67 ON THE METHOD OF DETERMINING CIF PRICES AND LEVIES FOR CEREALS, FLOUR, GROATS AND MEAL (OFFICIAL JOURNAL, ENGLISH SPECIAL EDITION 1967, P. 111). THAT REGULATION REMAINED APPLICABLE,

WITH SOME AMENDMENTS, AFTER THE ENTRY INTO FORCE OF REGULATION NO 2727/75. THE BASIC RULE LAID DOWN IN ARTICLE 1(1) OF THE REGULATION IS THAT "WHEN FIXING THE CIF PRICES. .. THE COMMISSION SHALL TAKE INTO ACCOUNT ALL OFFERS MADE ON THE WORLD MARKET OF WHICH IT HAS KNOWLEDGE THROUGH MEMBER STATES OR BY ITS OWN MEANS AND THE QUOTATIONS OF THE MAIN INTERNATIONAL COMMERCIAL EXCHANGES. (THE COMMISSION) SHALL FIX THE CIF PRICES ON THE BASIS OF THE MOST FAVOURABLE PURCHASING OPPORTUNITIES OF WHICH IT HAS KNOWLEDGE. ..." ARTICLE 1(2) ALLOWS THE COMMISSION TO EXCLUDE CERTAIN OFFERS, FOR EXAMPLE THOSE WHICH REFER ONLY TO A SMALL QUANTITY UNREPRESENTATIVE OF THE MARKET OR WHERE THE TREND OF PRICES IN GENERAL OR THE INFORMATION AVAILABLE MAKES IT PROBABLE THAT THE PRICES IN QUESTION ARE NOT REPRESENTATIVE OF THE MARKET.

- 6 EXERCISING THE POWER CONFERRED UPON IT BY ARTICLE 13 (5) OF REGULATION NO 2727/75 THE COMMISSION BY VARIOUS REGULATIONS, NAMELY REGULATIONS NOS 2746/80 OF 28 OCTOBER 1980 (OFFICIAL JOURNAL L 284, P. 15), 2763/80 OF 29 OCTOBER 1980 (OFFICIAL JOURNAL L 287, P. 3), 2780/80 OF 30 OCTOBER 1980 (OFFICIAL JOURNAL L 288, P. 1) AND 2799/80 OF 31 OCTOBER 1980 (OFFICIAL JOURNAL L 292, P. 1), FIXED THE IMPORT LEVIES APPLICABLE IN PARTICULAR TO CEREALS FOR THE PERIOD 28 TO 31 OCTOBER 1980 INCLUSIVE. THE RECITALS IN THE PREAMBLES TO THE VARIOUS REGULATIONS REFER TO THE APPLICATION OF THE RULES ON OFFER PRICES AND QUOTATIONS LAID DOWN IN COMMISSION REGULATION NO 2035/80 OF 31 JULY 1980 (OFFICIAL JOURNAL L 200, P. 1). IN ITS RECITALS, THAT REGULATION ITSELF REFERS TO EVEN MORE DETAILED RULES FOR THE CALCULATION OF LEVIES.
- 7 TRADAX GRAANHANDEL BV WAS DISSATISFIED WITH THE WAY IN WHICH THE COMMISSION HAD FIXED THE CIF PRICES ON THE BASIS OF WHICH LEVIES ON CEREALS HAD BEEN CALCULATED FOR THAT PERIOD, AND IN A LETTER OF 12 OCTOBER 1981 IT ASKED THE COMMISSION TO INDICATE THE PRECISE DATA WHICH IT HAD TAKEN INTO ACCOUNT IN FIXING THE CIF PRICES BETWEEN 28 AND 31 OCTOBER INCLUSIVE AND TO ALLOW IT TO INSPECT AT THE COMMISSION ' S PREMISES THE DOCUMENTS USED IN CALCULATING THOSE PRICES, BUT DID NOT STATE THAT IT HAD IMPORTED MAIZE DURING THAT PERIOD AND HAD PAID IMPORT LEVIES WHICH IT CONSIDERED CLEARLY TOO HIGH, OR THAT IT HAD INSTITUTED, OR INTENDED TO INSTITUTE, AN ACTION IN A NATIONAL COURT WITH REFERENCE TO THE FIXING OF THE LEVIES.
- 8 TRADAX RECEIVED NO REPLY TO THAT LETTER, AND BY LETTER OF 24 NOVEMBER 1981 IT CALLED UPON THE COMMISSION PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 175 OF THE EEC TREATY TO DEFINE ITS POSITION ON THE REQUEST WHICH IT HAD MADE, ADDING THAT ITS REQUEST WAS IN ACCORDANCE WITH THE CASE-LAW OF THE COURT AS SET OUT IN THE JUDGMENT OF 1 DECEMBER 1965 CASE 16/65, (SCHWARZE, (1965) ECR 877).
- 9 BY LETTER OF 14 DECEMBER 1981 THE DEPUTY DIRECTOR GENERAL FOR AGRICULTURE, REFERRING TO THE LETTERS OF 12 OCTOBER AND 24 NOVEMBER 1981, STATED IN REPLY THAT THE CIF PRICES FOR 28, 29, 30 AND 31 OCTOBER 1980 HAD BEEN "DETERMINED IN STRICT COMPLIANCE WITH THE PROVISIONS APPLICABLE".
- 10 TRADAX CONSIDERED THAT AN INADEQUATE REPLY, AND ON 15 FEBRUARY 1982 BROUGHT AN ACTION BASED, AS IS STATED ABOVE, ON ARTICLES 175, 173 AND 215 OF THE EEC TREATY.

ADMISSIBILITY

- 11 THE COMMISSION DISPUTES THE ADMISSIBILITY OF EACH OF THE CLAIMS. IN REGARD TO THE ALLEGED FAILURE TO ACT IT STATES THAT THE CLAIM IS INADMISSIBLE INTER ALIA BECAUSE NO RULE OF LAW REQUIRED IT IN SUCH CIRCUMSTANCES TO PROVIDE THE INFORMATION REQUESTED. THE CLAIM THAT THE LETTER OF 14 DECEMBER 1981 SHOULD BE DECLARED VOID SHOULD BE DISMISSED IN PARTICULAR BECAUSE THE

LETTER DOES NOT MEET THE CONDITIONS NECESSARY FOR IT TO BE CONSIDERED A DECISION WITHIN THE MEANING OF ARTICLE 173 OF THE EEC TREATY. FINALLY, WITH REFERENCE TO THE CLAIM BASED ON ARTICLE 215 OF THE TREATY, ONE OF THE REASONS FOR ITS INADMISSIBILITY IS THE FACT THAT THE APPLICANT HAS NOT ESTABLISHED THE EXISTENCE OF A MANIFEST AND SERIOUS WRONGFUL ACT OR OMISSION OR A SUFFICIENTLY SERIOUS BREACH OF A SUPERIOR RULE OF LAW.

- 12 IN VIEW OF THE CLOSE RELATIONSHIP BETWEEN THE QUESTION OF ADMISSIBILITY OF THE VARIOUS CLAIMS AND THE SUBSTANCE OF THE ACTION, IT IS APPROPRIATE TO PROCEED DIRECTLY TO CONSIDERATION OF THE SUBSTANCE OF THE CASE.

SUBSTANCE

- 13 IN SUPPORT OF THE ACTION BASED ON ARTICLES 175, 173 AND 215 OF THE EEC TREATY THE APPLICANT ARGUES THAT ACCORDING TO THE PRINCIPLES OF GOOD ADMINISTRATION, OF LEGALITY AND OF THE PROTECTION OF THE RIGHTS OF THOSE CONCERNED, OF LEGAL CERTAINTY AND OF THE PROTECTION OF LEGITIMATE EXPECTATION THE COMMISSION WAS OBLIGED TO PROVIDE IT WITH THE INFORMATION REQUESTED. IN FAILING OR REFUSING TO DEFINE ITS POSITION ON THE REQUEST FOR COMMUNICATION OF THE PRECISE DATA WHICH IT HAD USED IN FIXING THE CIF PRICES FOR THE PERIOD IN QUESTION THE COMMISSION BREACHED THOSE PRINCIPLES AND COMMITTED A WRONGFUL ACT OR OMISSION.
- 14 IN ACCORDANCE WITH THE PRINCIPLE OF GOOD ADMINISTRATION WHICH IS COMMON TO THE LAWS OF THE MEMBER STATES AND IS THEREFORE PART OF COMMUNITY LAW, THE APPLICANT SAYS THAT PERSONS CONCERNED HAVE A RIGHT TO INFORMATION OR AT LEAST A RIGHT OF ACCESS TO ADMINISTRATIVE DOCUMENTS WHICH AFFECT THEM. THE PRINCIPLES OF LEGALITY AND OF THE PROTECTION OF THE RIGHTS OF THOSE CONCERNED REQUIRE THE ADMINISTRATION TO REPLY TO LEGITIMATE REQUESTS MADE TO IT AND, WITH A VIEW TO PROTECTION BY THE COURTS OF THE INTERESTS OF THE UNDERTAKING CONCERNED, TO PLACE AT ITS DISPOSAL ALL THE TECHNICAL DATA ON WHICH IT HAS RELIED. THE APPLICANT REFERS TO THE JUDGMENT OF 1 DECEMBER 1965 REFERRED TO ABOVE. FINALLY, THE PRINCIPLES OF LEGAL CERTAINTY AND OF THE PROTECTION OF LEGITIMATE EXPECTATION IMPLY THAT PERSONS CONCERNED SHOULD HAVE THE OPPORTUNITY OF CHECKING THAT THE ADMINISTRATION HAS MADE NO ERRORS OF FACT OR OF LAW IN ADOPTING DECISIONS WHICH AFFECT THEM AND HENCE OF OBTAINING THE INFORMATION NECESSARY FOR THAT PURPOSE.
- 15 THE COMMISSION ARGUES THAT THE LETTER OF 14 DECEMBER 1981 DID NOT AMOUNT TO A DECISION REFUSING TO PROVIDE THE INFORMATION REQUESTED BY THE APPLICANT. THE LETTER LEFT OPEN THE QUESTION WHETHER THE COMMISSION WOULD COMPLY WITH THE APPLICANT'S REQUEST, AND LEFT THE APPLICANT ENTIRELY AT LIBERTY TO RAISE THE MATTER IN GREATER DETAIL.
- 16 THE COMMISSION MAINTAINS THAT NO OBLIGATION, BE IT GENERAL OR LIMITED TO THE SPECIAL CIRCUMSTANCES OF THIS CASE, TO PROVIDE SUCH INFORMATION CAN BE DEDUCED FROM THE RULES ON THE FIXING OF CEREAL LEVIES, THE PRINCIPLES RELIED ON BY THE APPLICANT OR THE CASE-LAW OF THE COURT. THE ABSENCE OF ANY REFERENCE IN THE REGULATIONS CONCERNED TO SUCH AN OBLIGATION IS DELIBERATE. IT REFLECTS THE CONCERN OF THE COMMUNITY LEGISLATURE FOR THE GENERAL OBLIGATION OF PROFESSIONAL SECRECY BY WHICH THE COMMUNITY IS BOUND IN THIS AREA, AN OBLIGATION DESIGNED TO PROTECT THE BUSINESS SECRETS OF UNDERTAKINGS. FURTHERMORE, REGARD BEING HAD TO THE NUMBER OF TASKS TO BE PERFORMED BY THE COMMISSION IN THIS AREA AND THE VERY LIMITED TIME AVAILABLE TO IT FOR THEIR ACCOMPLISHMENT, THE IMPOSITION OF SUCH AN OBLIGATION WOULD MAKE THE FULFILMENT OF ITS DUTIES PARTICULARLY DIFFICULT.
- 17 THE COMMISSION SUBMITS THAT THE PRINCIPLE OF GOOD ADMINISTRATION DOES NOT APPLY IN AREAS IN WHICH THE COMMISSION ACTS NOT AS AN ADMINISTRATION,

ADOPTING MEASURES OF MANAGEMENT, BUT AS A LEGISLATURE, MAKING LAW. TO LAY A GENERAL OBLIGATION OF THAT KIND ON THE COMMISSION WOULD MOREOVER PREVENT ALL PROPER MANAGEMENT. THE PRINCIPLES OF LEGAL CERTAINTY AND OF THE PROTECTION OF LEGITIMATE EXPECTATION HAVE NO BEARING IN THIS CASE BECAUSE THE APPLICANT HAS NOT SHOWN IN WHAT WAY THE ACTION OR INACTION OF THE COMMISSION COULD HAVE HARMED A "LEGALLY ESTABLISHED POSITION".

- 18 FINALLY, WITH REGARD TO THE PRINCIPLES OF LEGALITY AND OF PROTECTION OF THE RIGHTS OF INTERESTED PARTIES, THE COMMISSION EMPHASIZES THAT THE COURT'S JUDGMENT OF 1 DECEMBER 1965 (CASE 16/65, SCHWARZE, (1965) ECR 877), RELIED ON BY THE APPLICANT, DOES NOT IMPLY THE EXISTENCE OF A GENERAL DUTY FOR THE COMMISSION TO DIVULGE DATA USED IN CALCULATING LEVIES, BECAUSE THE COURT, IN GIVING A DECISION ON THE NECESSARY DEGREE OF DETAIL IN THE STATEMENT OF THE REASONS ON WHICH A MEASURE FIXING FREE-AT-FRONTIER PRICES WAS BASED, HELD THAT THE ADMINISTRATION WAS ENTITLED TO "CONFINE ITSELF TO SETTING OUT IN A GENERAL FORM THE ESSENTIAL FACTORS TO AND THE PROCEDURE WHICH FORMED THE BACKGROUND TO ITS EVALUATION OF THE FACTS, WITHOUT ITS BEING NECESSARY TO SPECIFY THE FACTS THEMSELVES", AND THAT "THE NEED TO PROTECT THE PARTIES TO WHOM THE DECISION IS ADDRESSED AND NATIONALS OF MEMBER STATES AFFECTED BY THE DECISION, AS ALSO THE NEED FOR PROPER JUDICIAL REVIEW, IS SUFFICIENTLY MET AS LONG AS THE COMMISSION. .. PUTS AT THE DISPOSAL OF THE PARTIES THE TECHNICAL DATA USED BY IT IN FIXING THE FREE-AT-FRONTIER PRICES WHENEVER THE DECISION IS CHALLENGED BEFORE A COURT HAVING THE APPROPRIATE JURISDICTION".
- 19 THE COMMISSION ARGUES THAT OBSERVATION OF THE PRINCIPLES OF LEGALITY AND OF PROTECTION OF THE RIGHTS OF INTERESTED PARTIES REQUIRES ONLY THAT IN CERTAIN WELL-DEFINED CIRCUMSTANCES, AND IN PARTICULAR WHEN THE DISPUTE HAS ALREADY BEEN SUBMITTED TO A COURT HAVING THE APPROPRIATE JURISDICTION, THE INFORMATION BE PROVIDED IN ORDER THAT PROPER JUDICIAL REVIEW MAY BE CARRIED OUT. IT NOTES IN THIS RESPECT THAT THE APPLICANT DID NOT MENTION THE EXISTENCE OF SUCH CIRCUMSTANCES IN ITS LETTER OF 12 OCTOBER 1981 OR IN THAT OF 24 NOVEMBER 1981.
- 20 THE FIRST QUESTION TO BE RESOLVED IS WHETHER THE LETTER OF 14 DECEMBER SIGNED BY MR WILLIAMSON MUST BE REGARDED AS THE DEFINITION BY THE COMMISSION OF ITS POSITION IN RESPONSE TO THE DEMAND SET OUT IN THE LETTER OF 24 NOVEMBER 1981. THE COMMISSION ' S ARGUMENT TO THE EFFECT THAT THE REPLY SHOULD BE TREATED AS AN INVITATION TO REVERT TO THE REQUEST CANNOT BE ACCEPTED. IN THIS RESPECT IT CANNOT BE DENIED THAT, IN RESPONSE TO A REQUEST FOR ACCESS TO THE FIGURES ON WHICH THE CIF PRICES WERE BASED AND FOR PERMISSION TO CONSULT AT THE COMMISSION ' S PREMISES THE DOCUMENTS USED, A REPLY RESTRICTED TO THE STATEMENT THAT THE CIF PRICES HAD BEEN DETERMINED IN STRICT COMPLIANCE WITH THE PROVISIONS APPLICABLE AMOUNTED TO A REFUSAL.
- 21 IT IS THEREFORE NECESSARY TO CONSIDER WHETHER THE REFUSAL WAS JUSTIFIED OR WHETHER, ON THE CONTRARY, THE COMMISSION WAS OBLIGED TO FURNISH THE APPLICANT WITH THE DATA REQUESTED AND TO ALLOW IT TO EXAMINE THE RELEVANT DOCUMENTS AT THE COMMISSION ' S PREMISES. IT SHOULD FIRST BE EMPHASIZED THAT, AS THE COMMISSION RIGHTLY NOTES, IN ITS JUDGMENT OF 1 DECEMBER 1965 REFERRED TO ABOVE THE COURT FOUND THAT, IN THE STATEMENT OF THE REASONS ON WHICH A MEASURE FIXING FREE-AT-FRONTIER PRICES IS BASED, THE ADMINISTRATION IS ENTITLED TO CONFINE ITSELF TO SETTING OUT IN A GENERAL FORM THE ESSENTIAL FACTORS AND THE PROCEDURE WHICH FORMED THE BACKGROUND TO ITS EVALUATION OF THE FACTS, WITHOUT ITS BEING NECESSARY TO SPECIFY THE FACTS THEMSELVES. WHEN THE FIXING OF FREE-AT-FRONTIER PRICES MUST BE EFFECTED WITHIN A SHORT TIME, TO REQUIRE THE ADMINISTRATION TO SET

OUT IN DETAIL, IN THE STATEMENT OF THE REASONS ON WHICH THE MEASURE IS BASED, ALL THE DATA ON WHICH THE CALCULATION WAS BASED WOULD GO BEYOND WHAT MAY REASONABLY BE DEMANDED. THE COURT THEREFORE HELD THAT THE NEED TO PROTECT PERSONS CONCERNED AND THE NEED FOR PROPER JUDICIAL REVIEW WOULD BE MET IF THE COMMISSION PUT AT THE DISPOSAL OF THE PARTIES THE TECHNICAL DATA USED BY IT IN FIXING THE FREE-AT-FRONTIER PRICES WHENEVER THAT DECISION WAS CHALLENGED BEFORE A COURT HAVING JURISDICTION IN THE MATTER.

- 22 IT SHOULD HOWEVER BE POINTED OUT THAT IT WOULD BE CONSISTENT WITH GOOD ADMINISTRATION FOR THE COMMISSION PERIODICALLY TO PUBLISH FOR THE INFORMATION OF THE TRADERS CONCERNED THE MAIN DATA TAKEN INTO ACCOUNT IN FIXING CIF PRICES. SUCH AN ARRANGEMENT FOR THE SUPPLY OF PERIODIC INFORMATION DOES NOT HOWEVER INCLUDE A DUTY TO REPLY TO INDIVIDUAL REQUESTS SUCH AS THAT MADE BY THE APPLICANT OR TO ALLOW INSPECTION AT THE COMMISSION ' S PREMISES OF ALL THE DATA WHICH IT HAS ASSEMBLED.
- 23 IN THOSE CIRCUMSTANCES IT CANNOT BE HELD THAT THE COMMISSION IS UNDER A GENERAL DUTY TO PROVIDE ANY TRADER WHO SO REQUESTS WITH THE DATA ON WHICH THE CALCULATION OF THE CIF PRICES WAS BASED.
- 24 SIMILARLY, IT CANNOT BE STATED THAT THE PRINCIPLES OF LEGAL CERTAINTY AND OF THE PROTECTION OF LEGITIMATE EXPECTATION MAY ENTAIL THE RIGHT FOR ANY PERSON CONCERNED, AS THE APPLICANT CLAIMS, TO BE ENABLED TO CHECK WHETHER THE LEGISLATION IN FORCE HAS BEEN CORRECTLY APPLIED. SUCH A REVIEW WOULD BE WITHIN THE JURISDICTION OF ANY COURT CALLED UPON TO APPLY THE REGULATIONS.
- 25 IT FOLLOWS FROM THE CONSIDERATIONS SET OUT ABOVE THAT THE COMMISSION HAD IN THE PRESENT CASE NO DUTY TO PROVIDE, AT THE APPLICANT ' S REQUEST, THE DATA ON THE BASIS OF WHICH THE CIF PRICES WERE FIXED.
- 26 ALL THE CLAIMS MADE BY THE APPLICANT MUST THEREFORE BE DISMISSED.
- 27 THE APPLICATION MUST THEREFORE BE DISMISSED IN ITS ENTIRETY.

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