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Chapter 3
Judicial Review

This is the third draft of the chapter on judicial review for the European Union Project of the ABA Section of Administrative Law and Regulatory Practice. We encourage your comments.

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ADMINISTRATIVE LAW OF THE EUROPEAN UNION

JUDICIAL REVIEW

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Prefatory Note

This is an interim draft. It contains extensive coverage of the topic of judicial review, but some segments of the full chapter, as the project reporters envision it, have not yet been completed and are not part of this draft. Headings for the omitted segments appear in the Table of Contents of this draft in their proper places; thus, the Table of Contents provides an accessible guide to the planned coverage and structure of what will become the complete chapter.

Executive Summary*

This chapter addresses the role of judicial review within the administrative law of the European Union. An introductory section explains the basic forms of review proceedings made available under the Treaty of the European Community. It also explains how the European Court of Justice (ECJ) has expanded the force of these remedies through its case law. As the section explains, an inherent feature of the structure of the Union is its heavy reliance on the courts of Member States for enforcement of Community norms. This is inherent in the fact that the Community has a small judiciary, with no courts based at the local level. Nevertheless, the ECJ has rendered a number of decisions that serve to ensure that Community law, including the Court's own interpretations of that law, will be enforceable in the national courts and will be accorded supremacy over local law. Enforcement actions brought by the Commission against Member States, together with the exposure of Member States to possible damage actions, also fortify the authority of Community policy.

The chapter devotes extensive coverage to the action for annulment under Article 230 of the Treaty, which is the primary remedy used by regulated parties that wish to seek judicial redress against actions of the European Commission. Currently these actions are filed and adjudicated in the ECJ's subordinate tribunal—the Court of First Instance (CFI)—with appeals to the ECJ available on issues of law only. An American lawyer would find that, in most respects, the principles governing admissibility (right to sue) in annulment actions resemble the principles that would apply to an Administrative Procedure Act proceeding in a U.S. court.

There is, however, one major difference: the "direct and individual concern" test of Article 230 is interpreted as imposing strict limitations on standing to seek annulment. These limitations apply to actions filed by private persons, but not to those filed by Member States and Community institutions. A person to whom a "decision" (adjudicative action) is addressed normally has standing, but private persons can rarely use annulment to contest a decision that was addressed to a third party. Even more significantly, although there is no per se exclusion for regulations and directives, challenges under Article 230 to most of those acts are effectively off limits to private litigants because of the restrictive "direct and individual concern" test as it has long been construed. Debate over the desirability of these standing rules continues, but for the present, judicial review of many actions must be pursued, if at all, in national courts, notwithstanding the objections that this route to review is much slower than annulment and not necessarily as reliable a means of vindicating Community policy.

Article 232 of the Treaty applies the basic principles of the annulment action to situations in which the Commission or another Community entity has "failed to act." Except for its incorporation of the "direct and individual concern" test of standing, the Article 232 procedure closely resembles American case law on judicial review of administrative inaction. Judicial

*This summary pertains only to those sections of the anticipated chapter that are included in the present draft. When the remaining sections are completed, the summary will be revised accordingly.

relief under this article is limited to situations in which the action sought in the litigation is required by law and well defined.

The Treaty's primary vehicle for raising Community law issues in national court litigation is the preliminary reference procedure of Article 234. This device allows (or in some situations requires) a national court to "refer" an issue of Community law raised in a pending case to the ECJ. The ECJ then makes a ruling that will be binding on the parties when litigation in the national court resumes. The ruling will also have precedential effect in future cases throughout the Community. This process helps to ensure that the ECJ can maintain the authority of Community law in policy areas that the Commission does not directly administer. Many decisions of the ECJ have been devoted to fine-tuning the rules that determine when a national court is obligated to invoke the preliminary reference procedure. Litigants who cannot contest the validity of a regulation through an annulment action, due to standing limitations, can often use the preliminary reference process to challenge the regulation indirectly.

The chapter goes on to describe two additional forms of judicial review that have no close counterparts in American practice. First, Article 226 empowers the Commission to bring a Member State before the ECJ for failure to fulfil Community obligations. Many enforcement cases of this kind are resolved informally, but if necessary the Commission will commence a formal proceeding at the ECJ, which can render declaratory relief. In recent years, the process has been strengthened. Sanctions for noncompliance have become available, as has interim relief as a safeguard against protracted litigation. Second, in 1990 the ECJ created a private damage remedy to deal with the problem of Member States that fail to implement Community directives or that implement them incorrectly. As a result, in that and other contexts, a Member State that commits a serious breach of its Community obligations can be subjected to significant monetary liability in its own national courts.

Finally, the chapter discusses the "plea of illegality" authorized by Article 241. When the validity of a regulation is relevant to the issues raised in a separate case pending in a Community court, Article 241 enables a litigant to ask the court to hold the regulation "inapplicable" to that case. This device resembles the American practice of permitting collateral challenges to rules in enforcement proceedings. Like the preliminary reference proceeding, the plea of illegality serves to ameliorate the stringency of the Treaty's restrictions on annulment (including its standing limitations as well as its tight deadlines for commencement of an annulment action). Indeed, some case law tends to make the plea of illegality available *only* to persons who would not have been able to contest a regulation directly through annulment.

A party who does succeed in bringing an admissible action before the ECJ or CFI will confront an elaborate body of principles governing review of the merits of the action. As in American courts, the European courts review the acts of the Commission (and other Community institutions) to determine whether the institution committed errors of law, fact, procedure, or discretion. Many of the courts' principles of interpretation of legal texts would look familiar to American regulatory lawyers. Moreover, judicial review of the Commission's alleged errors of factfinding or "assessment" (discretionary judgment), particularly in competition cases, has gradually come to resemble modes of analysis observed in American courts. This is especially

true in light of recent precedents, which permit the CFI to apply a kind of scrutiny that resembles "hard look" review in U.S. courts, subject to limited oversight by the ECJ. CFI review of the procedural regularity of Commission decisionmaking is also fairly rigorous.

At the same time, review of the merits in the EU courts displays some significant points of difference from American practice. In particular, the European courts enforce a number of so-called "general principles of law," which are judicially devised doctrines (often "inspired" by analogous principles observed in the national courts of the Member States). Thus, principles such as "proportionality" and "protection of legitimate expectations" comprise a body of legal doctrine that is far more fully developed than one can find in U.S. law. On the other hand, the EU doctrine of "misuse of powers" is narrower and less frequently invoked than its American counterpart, "abuse of discretion." Overall, despite some variations in detail that require careful attention, the overall pattern seems to be one of convergence, as the EU judiciary responds to some of the same pressures that have long influenced American judges: the desire to accord the Commission significant leeway to do its work, while also holding it to minimum standards of fairness, careful investigation, and compliance with the Community legal order.

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I. INTRODUCTION TO THE SYSTEM OF LEGAL REMEDIES IN THE EUROPEAN UNION

This section of our chapter presents a survey of the several forms of proceedings in which the European courts adjudicate issues of Community law. The theory behind the section is that, for the American lawyer who seeks to become acquainted with the EU judicial system for the first time, there may be particular value to a big-picture perspective that explains how the various types of proceedings developed over time and how they relate to each other. This overview will, therefore, complement our discussion in subsequent sections of the particular requirements and attributes of each of the individual types of proceedings.

A. EARLY DEVELOPMENT

The European Court of Justice (ECJ) and the main types of procedures used to bring cases before it were established on the basis of the founding treaties of the European Communities in the 1950s. As will be demonstrated, the system of legal remedies thus created was rather comprehensive from the very beginning, which is somewhat surprising in light of the fact that the EC started with narrowly defined powers and even more narrowly conceived impact in the legal systems of the Member States.

In the context of the European Coal and Steel Community (ECSC), the European Commission—or High Authority as it was called back then—was charged with the management of the coal and steel sector, including such tasks as fixing production quotas and prices for various coal and steel products and producers in the original six Member States,[1] as well as supervision of markets and prevention of anti-competitive conduct.[2] These tasks required a plethora of administrative decisions to be made on a regular basis, many of which would directly affect the way privately owned enterprises could go about their business in the respective sectors of the economy. It was clear that a good number of these decisions would be controversial, and that it would be highly desirable to have an independent review mechanism in order to safeguard the rights of the undertakings[3] and/or their competitors. Such was the background for the creation of the European Court of Justice. Consequently, it mainly had functions of oversight of the High Authority, in particular for annulment of its decisions (Article 33 ECSC) and for its failure to act (Article 35 ECSC).

Even under the ECSC, the Council of Ministers had the authority to adopt certain policy decisions and legislative measures, and the Parliamentary Assembly was consulted in these procedures. It was quite logical, therefore, to provide a remedy for the Member States to call on

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[1] See, in particular, Articles 2, 3, 14, and 58 to 62 of the ECSC Treaty.

[2] Id., Articles 65 and 66.

[3] In common EU parlance, the word "undertaking" refers to a company or other business firm, not to the act of engaging in a project.

the ECJ for a review of the legality of these activities (Article 38 ECSC). This remedy was limited to a review of the legislative authority and formal procedure, however; the Court was not granted the power to review the decisions of the Council and Assembly on substantive terms.

Finally, the ECSC Treaty provided a somewhat unusual and maybe unexpected procedure. Under Article 41 ECSC, the European Court was given the sole authority to decide upon the validity of an act of the High Authority or the Council where this validity was called into question in proceedings before a national court. This power was to be exercised "à titre préjudiciel", i.e. in something like the modern day preliminary reference procedure. Why is this procedure unusual or unexpected? After all, there are a number of European legal systems that know similar kinds of procedures, where the interpretation of certain legal provisions is reserved to certain courts. For example, under German constitutional law, if the legality—or more precisely the constitutionality—of a provision of federal legislation is called into question before any German court, that court may suspend its procedures and present the question of constitutionality to the Federal Constitutional Court (*Bundesverfassungsgericht*) in Karlsruhe, obtain an answer on the validity of the law, and then resume its original proceedings in light of that answer. Similar proceedings are known in other continental European countries. The technique itself was, therefore, not new or unknown. What was new or perhaps unexpected was the inclusion of such a procedure in an international agreement.

On the one hand, the inclusion of a preliminary reference procedure in the ECSC was a recognition of the need of having one central authority for the uniform interpretation of the international agreement. In the absence of such a procedure, the national courts that would be confronted with the question would have to decide on the interpretation and/or validity of European law. Chances were that they would do so with different approaches and different outcomes in different Member States. Differences in scope and meaning of the common European law, in turn, were bound to cause problems among the Member States. For example, if the courts in Germany were to apply a different reading of European law on coal and steel issues than the courts in France did, this could distort competition between the undertakings in the sector and cause discrimination and frustration and ultimately damage the legitimacy of the entire integration project. On the other hand, however, the inclusion of a preliminary reference procedure was also a recognition of the potential of the European rules to be applied by national courts and to have a direct impact on the rights and obligations of undertakings and others in the Member States.

To appreciate the significance of the matter, the reader should remember two things. First of all, the ECSC Treaty already provided a means of defense for undertakings directly affected by decisions of the High Authority or by its failure to act in a given case in Articles 33 and 35. The preliminary reference procedure, therefore, was not about administrative decisions addressed to private undertakings in the Member States; rather, it was about legislative measures on the European level having an impact on the rights and obligations of unnamed individuals, something commonly known as "direct applicability" and "direct effect" in European law and as "self-executing" in the Anglo-American legal systems. Second, the procedure is quite unique and cannot be found in other international agreements. While we would not expect such a procedure in political agreements such as the UN Charter, it might make a lot of sense, for

example, to have a uniform interpretation of WTO law in all member states of that organization. Nevertheless, neither the WTO agreements nor any of the many more limited regional or bilateral free trade agreements provide for a possibility of the national courts to send questions to the WTO Dispute Settlement Body (DSB) or the corresponding regional or bilateral bodies and panels. Quite to the contrary, the expectation is and has always been that these agreements create only rights and obligations between states and not directly for and against individuals. Consequently, it has been thought perfectly sufficient in these legal regimes to include dispute settlement mechanisms only on the intergovernmental level, i.e. where the only parties to have standing are the signatory states themselves. In such systems, any decision by one particular state whether or not to bring a particular claim against another particular state about a particular issue at a particular time is made on the basis of political criteria by the government of the first state and not by some independent judge, let alone some politically insensitive and self-interested private applicant.

Before the procedure under Article 41 ECSC could be thoroughly tested and appreciated, the Member States had already negotiated and ratified more far reaching integration treaties. The Euratom Treaty was still a natural extension of the Coal and Steel Treaty, merely a recognition that, after Hiroshima, control over nuclear fuel and fissile materials would be at least as important for the war making capabilities of a country as coal and steel and, therefore, should also be withdrawn from national authorities for the benefit of securing peace and making war impossible in (Western) Europe. However, the European *Economic* Community Treaty constituted a new level of collaboration or integration among the Member States.

Articles 2 and 3 of the EEC Treaty provided for a wide range of tasks and objectives that had little or nothing to do with the original goal of securing the peace. In particular, the EEC Treaty envisaged the creation of a customs union on the outside and a "common market" on the inside. This common market was to comprise the free movement of goods, services, workers, and capital, as well as the freedom of establishment. The freedoms were to be secured or supported by a common agricultural policy, a common commercial policy, a common transport policy, as well as common rules on competition and various other areas. In short, the EEC set itself ambitious goals that would require a large amount of legislative acts and very few administrative acts, while under the ECSC the proportions had been the other way around.

B. REMEDIES UNDER THE EC TREATY

In light of these ambitious legislative goals, the EEC Treaty provided for the transfer of considerable sovereign powers of the Member States to the Community, and for stronger institutions and clearer procedures. As a corollary of the expanded powers of the Council, Commission, and Parliamentary Assembly, the EEC Treaty also contained a clearer and more comprehensive set of legal remedies in the European Court of Justice. Four procedures, in particular, were at the heart of the new system, which continues to this day.

First, Article 226 ECT (ex Art. 169 EEC), in conjunction with Article 211 alinea 1, puts the Commission in the position of *Guardian of the Treaties* and provides a procedure under

which the Commission can take any Member State to the Court for failure to fulfil an obligation under primary or secondary Community law, i.e. any violation of any provision in the treaties, any regulations, directives, or decisions of the Community, as well as other legally binding rules of Community law, including international agreements of the Community and case-law of the Court of Justice. Hence, the function of Article 226 is to provide a remedy for any violation of the common legal system by *the Member States*.

Second, Article 230 ECT (ex Art. 173 EEC) provides for oversight of the actions of *the institutions* of the Community. In its original language, Article 173 potentially subjected all binding measures of the Council and/or the Commission to judicial review. The Parliamentary Assembly was not included because in the early years of the Community it did not really have the power to adopt externally binding measures. Standing, i.e. the power to bring such cases to the Court, was granted to the Council, the Commission, and the Member States. An interesting variation on this form of review was contained in Article 173(3). That paragraph gave to private individuals, i.e. natural and legal persons outside of the Community institutions, the power to bring a lawsuit 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." As will be seen in the analysis below, the requirement of direct and individual concern is by no means unambiguous.

Third, and far less important, is the procedure under Article 232 ECT (ex Art. 175 EEC), the action against Community institutions for failure to act. This is a logical complement to the action for a declaration of illegality under Article 230, because protection for concerned parties would be incomplete if the institutions could escape judicial oversight in problematic cases by simply not adopting any binding measures at all. Consequently, the provisions for standing and admissibility are also parallel to those of Article 230.

Finally, the EEC Treaty includes in Article 234 (ex Art. 177 EEC) a more sophisticated formula for the preliminary reference procedure first introduced in the ECSC Treaty. In light of the fact that this more sophisticated formula was crafted after a mere four years of operation of the Coal and Steel Treaty, it is probably safe to say that the new language was not based on experience with the less clear language in the earlier Treaty. One of the mysteries of the European integration process that we may never be able to resolve is, therefore, whether the drafters of the EEC Treaty knew what they were doing when they inserted this provision. In its relevant parts, the Article reads as follows:

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of this Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community ...;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

As can be seen quite easily, this procedure presupposes the application of Community law in the Member States and before their courts. We will return to that premise shortly.

C. CASE LAW EXPANSION

The system established within the four corners of these remedies was subsequently expanded in several important ways by the European Court of Justice. In the context of the 1984 elections, the European Parliament adopted a decision about the reimbursement of campaign expenses that favored parties that already held seats in the 1979-84 parliamentary session. The French environmentalist party "Les Verts" had participated for the first time in the 1984 elections and brought a case under Article 173 EEC against the European Parliament claiming unlawful discrimination.[4] As has been pointed out, the Parliament was not listed in Article 173 as a potential applicant or defendant, since it did not have powers to adopt binding decisions when the treaties were first drafted in the 1950s. Thus, the Court could have easily rejected the case brought by Les Verts as inadmissible. This is not what happened, however. Instead, the Court coined the now famous phrases that "the European Economic Community is a Community based on the rule of law" and that "the Treaty established a complete system of legal remedies and procedures" in which any measure adopted by any institution was potentially subject to judicial review.[5] The same spirit had guided the Court already in a number of earlier judgments but was finally spelled out in *Les Verts*.

The other important expansion of the system of legal remedies—and powers of the Community—began in the 1960s in the context of the preliminary reference procedure under Article 234 ECT. In 1959 the Netherlands adopted the Harmonized Tariff System and re-classified various goods under different headings than before. As a consequence, the Dutch authorities began to charge an import duty of 8% on a certain chemical from Germany. Previously, the import duty had been 3%. The shipping company Van Gend en Loos challenged the new duty and claimed that the increase was in violation of the old Article 12 of the EEC Treaty, which stipulated that the Member States of the EC would not charge higher custom duties or introduce new duties on imports from other Member States during the transition to the EEC customs union. The Dutch customs court did not know what to do with the provision in the EEC Treaty and sent a preliminary reference to the European Court of Justice, asking whether Article 12 "has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect."

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[4] Parti écologiste "Les Verts" v European Parliament, Case 294/83, 1986 E.C.R. 1339.

[5] See id. ¶ 23. The text of Article 173 (now Article 230) was subsequently amended to include the Parliament and European Central Bank as a reflection of this decision.

In a strictly dualist state the question would not have arisen, because it would have been obvious that a provision of an international agreement could not possibly have any effects in the national legal order unless such effects were mandated by national implementing legislation. However, the Netherlands had amended their constitution when joining the European Economic Community and had introduced clauses that specifically permitted the transfer of sovereign powers to a (regional) international organization[6] and furthermore stipulated that national "statutory regulations" would not be applied if they were in conflict with an international agreement or with "resolutions" of an "international institution."[7]

The case became famous because the Dutch customs court, consciously or unconsciously, made an important choice: namely, it sent the question about the application of the provision in the EEC Treaty to the European Court of Justice and not to the national constitutional court.[8] It was promptly chastised. First, the Dutch government argued that the only possible procedure to bring a potential violation of Community law before the European Court was the procedure under Article 226, i.e. the complaint of the Commission against a Member State. Secondly, with respect to the potential of a provision contained in an international agreement to create rights for individuals that the courts have to respect, the Dutch government maintained that "so far as the necessary conditions for its direct application are concerned, the EEC Treaty does not differ from a standard international treaty" and that "the question whether under Netherlands constitutional law Article 12 is directly applicable is one of Netherlands law and does not come within the jurisdiction of the Court of Justice." The Belgian and German Governments supported the view that the first question fell within the exclusive jurisdiction of the Dutch courts. The relationship between two treaties or between a treaty and national law was "a typical question of national constitutional law which has nothing to do with the interpretation of an Article of the EEC Treaty." Finally the Dutch Government expressed its concern that if the Court should decide otherwise, this "could call in question the readiness of [the Member States] to cooperate in the future."[9]

Before looking at the response given by the European Court, the two arguments of the Dutch government merit some further analysis. The first argument about the appropriate procedure, if any, is far more important than it may seem at first glance. If only the Commission could bring suspected violations of EU law to the attention of the Court of Justice, the supervisory function of the Court would be limited in two ways. On the one hand, the human and other resources at the Commission are necessarily limited. This makes it not only difficult but

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[6]See Article 93 of the Constitution of the Kingdom of the Netherlands.

[7]Id. Article 94.

[8]This resulted in the judgment of the European Court of Justice in Van Gend & Loos, Case 26/62, 1963 E.C.R. 1.

[9]While the passages in quotation marks are directly quoted from the European Court Reports, the paragraph as such is taken from Frank Emmert, European Union Law—Cases 15 (Kluwer Law International, The Hague, 2000).

quite impossible for the Commission to closely monitor the activities of all kinds of national authorities in an ever growing number of Member States. Therefore, many cases where violations of EU law may have occurred would probably remain unnoticed.[10] On the other hand, Article 226 does not stipulate an obligation on behalf of the Commission to bring to the Court's attention every single case where it "considers that a Member State has failed to fulfil an obligation" under EU law. Rather, the Commission is given a wide margin of discretion whether or not to raise a particular case to the level of litigation in Luxembourg.[11] Such a discretion is unavoidable if the Commission is to be able to pursue the important cases rather than getting bogged down in a potential multitude of unimportant cases. However, such a discretion also means that in every single case, the Commission has to make a decision based on factors other than law—factors such as political opportunity, procedural economy, and personal priority. This is problematic not only because it is subjective, but also because it could become subject to political pressure. By contrast, if individuals can somehow pursue their own causes on the basis of European law, this will turn hundreds of millions of citizens into potential policemen for the proper application of this new European law, and decisions whether or not a claim should be brought will no longer be subject to any kind of control or influence by the respective governments.

In the American legal system, a claim based on federal law will normally be brought in federal court. This is possible because the United States has two tiers of courts, namely the state courts at two or three levels for the application of state law, and the federal courts at three levels for the application of federal law and the federal constitution. This is quite different from the path chosen in the European integration system. In the 1950s, the European Communities were not created as federal systems, let alone federal states. Whether the new European law would be of direct concern to individuals was doubtful. Consequently, the founding Members had no reason to create an entire network of courts to provide easily accessible remedies for individuals in the Member States. At the same time, the founders thought it not entirely impossible that a question of interpretation of the new legal system could arise in proceedings between private individuals or between citizens and national authorities. As a compromise between granting direct access in such cases to the European Court of Justice in Luxembourg—which could potentially flood that Court and would also be inconvenient for litigants from far flung regions of the Community—and the creation of an entire network of "federal" courts across the Member States, the founders decided to enlist the existing national courts for the application of Community law and to grant, in exceptional cases where the national judges were unable to resolve a question, a way of sending questions to the European Court via a preliminary reference. It was, therefore, hardly surprising that the Court in *Van Gend en Loos* rejected the claim that the procedure was inadmissible.

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[10]Conveniently, the Member States also control the size of the different units at the Commission via their budgetary authority and can easily deny the means that would be necessary for the creation of effective monitoring and enforcement units.

[11]See, e.g., Star Fruit Co. v. Commission, Case 247/87, 1989 E.C.R. 291, ¶¶ 11-12.

The second argument by the Dutch government about the direct applicability of the old Article 12 EEC is of even greater importance. In effect, the Dutch were not so much arguing that provisions of EC law could never be directly applicable in the national legal systems. Rather, they wanted the question to be decided by their national constitutional court, if it ever came up. As is well known, governments carefully select only more experienced, older, and usually more conservative judges to sit on their constitutional or supreme courts. Obviously, these kind of judges would approach such an important issue with great care and probably with great reluctance. In effect, this would probably result in a denial of direct applicability, at least for the large majority of cases and scenarios. By contrast, the preliminary reference procedure resembles a Trojan horse by which new ideas can be brought into the national legal systems of the Member States; and the fact that the procedure can be initiated by "any court or tribunal of a Member State," rather than only by the highest national court(s), is tantamount to giving the keys to the gates through which the horse can enter the fortress to every judge in the country, including young and wild ones who have already had EC law as part of their education.

Observant readers will have detected a thinly veiled threat at the end of the submission by the Dutch government. However, the Court was not impressed and held as follows:

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. . . .
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> In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.
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> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. . . .

In subsequent case-law the Court developed this doctrine of direct applicability for all treaty provisions, all regulations, and all decisions, and it stipulated the criteria for direct effect, i.e. the question whether a specific provision in the treaties or in a regulation or decision was sufficiently clear and precise and unconditional and, therefore, suitable to be applied by national authorities for and against private individuals. Furthermore, the Court developed the doctrine of supremacy, pursuant to which the respective provisions of Community law are not only applicable in the national legal orders as part of the law of the land but also have primacy or supremacy over conflicting norms of national law. This began with the famous *Costa v ENEL* decision,[12] which declares supremacy of Treaty provisions over ordinary national legislation and

[12]Case 6/64, 1964 E.C.R. 585.

continued with many other rulings establishing a general supremacy of all Community law over all national law, even provisions contained in the national constitutions.[13]

The constitutional courts of Germany, France, Belgium and Italy struggled for a while with the sweeping claim to supremacy of Community law. At a certain point in time, the German constitutional court (*Bundesverfassungsgericht*) held that "as long as" Community law did not provide for the protection of human rights and fundamental freedoms at a level comparable to the German constitution, i.e. with a comprehensive catalog of human rights and effective enforcement mechanisms, Germany would reserve the right to check Community law and action against the German standards.[14] The European Court responded by developing human rights on a case-by-case basis from "general principles" common to the legal traditions of the Member States.[15] Eventually, the German constitutional court agreed that "as long as" the Community continued to provide protection of human rights and fundamental freedoms on a sufficient level, it would no longer exercise a supervisory function in contradiction to the supremacy of Community law and its uniform application in all Member States.[16]

In this way, the supremacy of Community law and the direct applicability and direct effect of treaty provisions, regulations, and decisions were eventually secured and the Member States have agreed not to apply their own law, whatever its legal source and level, in cases where its application would be incompatible with Community law. However, an important problem remains and is not entirely resolved to this day. This problem relates to the impact of directives of the Community in the national legal orders of the Member States.

D. ENFORCEMENT OF DIRECTIVES

As can be seen quite easily from Article 249 ECT, directives in and of themselves were never intended to become directly applicable in the Member States. Quite to the contrary, directives have to be implemented by the national authorities, usually via national legislation, in order to become effective and to create rights and obligations for national authorities, as well as legal and natural persons in the Member States. Problems appear, however, if the national authorities do not comply with their duty to implement directives completely, correctly, and in a

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[13]See, e.g., Simmenthal, Case 106/77, 1978 E.C.R. 629; Debus, Joined Cases C-13/91 and C-113/91, 1992 E.C.R. I-3617, ¶ 32; Levy, Case C-158/91, 1993 E.C.R. I-4287, ¶ 9; Solred v. Administración General del Estado, Case C-347/96, 1998 E.C.R. I-937, ¶ 30.

[14]This is the so-called "Solange I" Decision of the German Constitutional Court (BVerfG) of 29 May 1975, see the official collection of decisions BVerfGE 27, p. 271 (with "Solange" translating to "as long as").

[15]This case law began with Stauder, Case 29/69, 1969 E.C.R. 419. See also Internationale Handelsgesellschaft, Case 11/70, 1970 E.C.R. 1125; Rutili, Case 36/75, 1975 E.C.R. 1219; Defrenne II, Case 43/75, 1976 E.C.R. 455; Hauer, Case 44/79, 1979 E.C.R. 3727; Elliniki Radio (ERT), Case C-260/89, 1991 E.C.R. I-2925; SPUC v. Grogan, Case C-159/90, 1991 E.C.R. I-4685; and many others.

[16]"Solange II" Decision of 22 October 1986, BVerfGE 73, p. 339.

timely manner. The reasons for incomplete, incorrect, or late implementation may be manifold. A Member State may be merely negligent, unable to push the required legislation through its Parliament fast enough, for example because of upcoming national elections. Or a Member State may be deliberately delaying the impact of new legislation that imposes financial or other burdens on undertakings, for example for higher levels of environmental protection. Finally, a Member State that was outvoted in the adoption procedure of a directive may be unwilling to apply the law, period. In such cases, rights and obligations intended by a given directive are not available by the time stipulated in that directive. As a result, the expectations of employees, consumers and other beneficiaries of Community law are frustrated, undertakings in different Member States have to compete on a playing field that is not level, the spirit of trust and cooperation between the Member States and the institutions of the Community is violated, and the general legitimacy of Community law gets damaged.

The remedy provided by the founders of the Community was the procedure under Article 226 (ex Art. 169) of the Treaty, i.e. the complaint of the Commission against the Member State for failure to fulfil all obligations under Community law. In addition to the shortcomings of the procedure outlined above, it also took several years and eventually only produced a declaratory judgment that the Member State was in breach of its obligations. During all this time, and longer if the Member State did not respond to the declaratory judgment, the national law remained out of step with the requirements imposed by the directive and already applied in the other Member States. If the first Member State ignored the judgment of the Court under Article 226, the Commission could only bring another case before the Court, this time under Article 228, for noncompliance with the first judgment. Article 228, as originally crafted, would eventually result in another declaratory judgment but not in a resolution of the matter, unless the respective Member State, whether because of the naming-and-shaming game of Articles 226 and 228 or not, finally implemented the directive correctly. In light of this unsatisfactory situation, the Court of Justice developed a plethora of subsidiary remedies over the years.

First, the Court held that in a vertical case, where a citizen is claiming rights under a non-implemented directive vis-a-vis state authorities, the latter could not rely on their own failure to implement the said directive.[17] In subsequent case law, the Court applied a very broad interpretation of "state" to the notion of vertical direct effect of directives to include, inter alia, autonomous regional authorities,[18] and even privatized former state enterprises, if they still had certain special and exclusive rights.[19] At the same time, the Court insisted that unimplemented directives could not have horizontal direct effect, i.e. could not be applied to the detriment of

[17]See, e.g., Ratti, Case 148/78, 1979 E.C.R. 1629, ¶¶ 19-22; Becker v, Finanzamt Munster-Innenstadt, Case 8/81, 1982 E.C.R. 53, ¶¶ 17-25.

[18]See Fratelli Costanzo, Case 103/88, 1989 E.C.R. 1839.

[19]See Foster v British Gas, Case C-188/89, 1990 E.C.R. I-3313.

private individuals.[20] In this way, the Court was protecting legal certainty and more specifically the good faith reliance of private individuals on the validity of their national laws.

Yet. by denying the possibility of horizontal direct effect for directives which have not been correctly or completely implemented by the expiry of the respective deadlines, the Court left a particular group of private individuals unprotected, namely those who believed in good faith in the validity or rather applicability of rights and obligations flowing from Community law. This unsatisfactory result was addressed in the following jurisprudence.

First, in 1990 the Court decided a case where national law was ambiguous or did not cover the specific problem addressed by an unimplemented directive at all. The Court held that in such a case, where national law was not in direct contradiction to the requirements under the unimplemented directive, there was an obligation for the judges to do what the legislature had failed to do by interpreting the national law in a way that would fulfil the goals of the directive.[21]

Second, the Member States themselves made some changes to Article 228 by introducing a possibility for the Commission to apply to the Court for the imposition of pecuniary penalties against Member States that failed to comply with Court judgments under Articles 226 and 228 ECT. What is difficult to see, however, is the enforceability of such pecuniary penalties against Member States that had already ignored at least one declaratory judgment of the Court, unless maybe in cases where the respective Member States are net recipients of financial support from the EU budget. Unsurprisingly, there have been very few cases in practice since the reform entered into force in 1993.

Finally, the Court adopted an extremely far reaching decision, *Francovich v. Italy*,[22] pursuant to which Member States who are in breach of their obligations under Community law and thereby cause injury to individuals have to pay damages to these individuals. A typical case of such a breach is the failure to implement a directive by the required deadline. If the directive is, for example, a consumer protection directive, belated or incomplete or incorrect implementation is bound to cause injury to any number of consumers. Since the judgment in *Francovich*, the consumers have at least a possibility to get redress if not restitution. As has been demonstrated, the mere risk of having to compensate individuals for their losses has significantly increased the pressure on Member States to implement directives in the required manner and by the required time.

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[20] See Marshall v. Southampton and South-West Hampshire Area Health Authority, Case 152/84, 1986 E.C.R. 723.

[21] See Marleasing, Case C-106/89, 1990 E.C.R. I-4135. For later developments, see Adeneler v. ELOG, Case C-212/04, 2006 E.C.R. I-6057, ¶¶ 107-24 (discussing *when* the national court's obligation comes into play)" Pfeifer v. Deutsches Rotes Kreuz, Joined Cases C-397/01 to C-403/01, 2004 E.C.R. I-8835, ¶¶ 110-19.

[22] Joined Cases C-6 and C-9/1990, 1991 E.C.R. I-5357.

E. CONCLUSION

In summary, we can say that the European Court of Justice has gone far beyond the legal remedies provided by the founding fathers in the treaties. On the one hand, the Court has stipulated that natural and legal persons in the Member States can rely on provisions of Community law and that Member State authorities and courts must not apply contradictory provisions of national law in such cases. On the other hand, the Court has developed the preliminary reference procedure in such a way that the national courts become the agents of the application of Community law and the European Court merely fulfils the function of providing a uniform interpretation of that law for all courts and authorities in all Member States. Therefore, any natural or legal person who wants to rely on any provision of Community law can do so before the normal courts in the respective Member State, and those courts are obliged and enabled to enforce these Community rights. Finally, in cases where the application of Community law over and above contradictory national law is not done or cannot be done, the applicants may resort to state liability for compensation of their injury.

III. ACTIONS

This section of the Judicial Review chapter surveys the forms of proceedings by which parties may obtain judicial review from the Community courts. Most of these are so-called "direct" actions, meaning that they originate in the courts of the Community itself. In sharp contrast is the preliminary reference proceeding, which reaches the European Court of Justice (ECJ) as an offshoot of a suit that has been commenced originally in a national court. The two types of proceedings are in many ways complementary, but questions continue to be raised about how judicial business should be allocated between them and about the adequacy of the Community's avenues of judicial relief when viewed collectively.

A. THE ACTION FOR ANNULMENT

1. Introduction

Among the "direct" actions that come before the Community judicature, the action for annulment is probably the most important. It accounts for a major part of the workload of the Court of First Instance (CFI). Of all new applications brought during the period from 1999 to 2004, a total of 919 applications, or approximately 46%, sought the annulment of Community acts pursuant to Article 230 of the E.C. Treaty.[23] The CFI does not track the average duration of actions for annulment but groups them together with other actions, such as actions for failure to act or for damages. Taken together, the average duration of these proceedings amounts to almost 23 months.[24] Generally speaking, the duration of actions for annulment before the CFI has increased over the years, owing partly to the ever increasing complexity of cases and the involvement of "*specialized lawyers*."[25]

Article 230 of the Treaty sets forth a framework for the annulment action and provides a logical starting point for analysis. It reads as follows:

> 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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[23] *See* the Court's Annual Report for the year 2003, p. 237.

[24] *See* the Court's Annual Report for the year 2004, p. 198.

[25] *See* the Court's Annual Report for the year 2003, p. 113.

> 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.[26]

By its terms, Article 230 confers jurisdiction on the Court of Justice, and for many years annulment actions were filed in that court from the outset. As just mentioned, however, annulment actions are currently filed as an initial matter in the CFI instead, although an appeal from that court's decision may thereafter be taken to the Court of Justice.[27] Both courts have contributed to the body of precedents that will be summarized in this section.

This section discusses primarily issues of *admissibility*, i.e., circumstances in which a party has the right to bring suit. More particularly, the present section focuses on principles that govern actions brought by *natural or legal persons* for annulment of Community acts. Such proceedings are governed by the fourth paragraph of Article 230. (Although that treaty provision does not contain internal numbering, European lawyers customarily refer to its subdivisions as though it did. Adhering to that usage, our chapter will sometimes refer to the paragraph just mentioned as "Article 230(4).") The other types of annulment actions authorized by the article should be mentioned briefly. An action for annulment can be brought by a Member State, the European Parliament, the Council or the European Commission (the "Commission"), pursuant to Article 230(2). Moreover, under Article 230(3), an action may be brought by the Court of Auditors or the European Central Bank for the purpose of "protecting their prerogatives." Compared with natural and legal persons. the Community's institutions are, in the Court's parlance, "privileged," because they do not need to meet specific criteria in order for their actions to become admissible, apart from more formal requirements, *e.g.*, that the action be brought within the time limit prescribed by Article 230(5). Actions by natural or legal persons, however, are subject to relatively strict admissibility standards, as discussed in more detail below.

In many respects, the annulment action resembles a judicial review action filed in a U.S. court under the Administrative Procedure Act,[28] and most of the doctrinal principles governing admissibility of this action would look reasonably familiar to an American administrative lawyer. There is, however, a major exception to this generalization. The action for annulment is circumscribed by principles of standing to sue that differ markedly from American law and also

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[26]TEC art. 230. Until its expiration, the Euratom Treaty contained a similar provision in Articles 33 and 38 ECSC.

[27]Effective June 1, 2004, actions brought by a Member State for annulment or for failure to act also fall within the jurisdiction of the CFI. See Council Decision 2004/407/EC amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice ([2004] OJ L 132/5, amended by [2004] OJ L194/3).

[28]5 U.S.C. § 702 (2000).

operate as a substantial constraint on the utility of the action. One thrust of these principles is that, while private parties who are addressed by an individual decision may always challenge it through annulment, decisions addressed to third parties and measures of a legislative nature, such as a regulation, may only be challenged if additional—and, in practice, exceptional—conditions are met.[29] As we will discuss, these restrictive standing rules have been a source of continuing controversy, including a widely discussed disagreement between the CFI and ECJ.

2. Acts Susceptible of Review

The initial question in determining the admissibility of an annulment action is whether it challenges a reviewable act. Under Article 230(4), the action for annulment is primarily available against formal decisions adopted under Article 249. However, the form of a measure is less relevant than its substance when the CFI determines whether it is susceptible to review. Indeed, according to the text of the Treaty, the action for annulment is sometimes admissible if it seeks to annul "a decision . . . in the form of a regulation or a decision addressed to another person." More generally, the case law maintains that the CFI's jurisdiction in this area extends to all measures that produce legal effects for the applicant, and are capable of bringing about a distinct change in his legal position.[30] Although, as noted, an action's formal description as a decision or regulation is not dispositive, the following discussion distinguishes, for convenience of exposition, between measures that address individual situations and measures that speak in general terms.

a. Measures addressing individual situations

The paradigmatic example of an action that may be reviewed in an annulment proceeding is a decision under Article 249, which is "binding in its entirety upon those to whom it is addressed." In practice, most challenges are brought by addressees of Commission decisions in the area of competition law. These include decisions in the area of merger control, restrictive practices such as participation in illegal cartels (Article 81), abuse of dominant positions (Article 82), and state aid.[31] However, because the decision is the predominant legal instrument by which the Commission carries out its tasks under the EC Treaty, Commission decisions in other areas, such as public procurement or access to documents, are also frequently appealed before the CFI.

Even though a challenged act may be called a "decision," the CFI examines the substance of the contested act and may conclude that, in fact, a so-called "decision" constitutes a measure

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[29]Henry G. Schermers & Denis F. Waelbroeck, Judicial Protection in the European Union ¶ 639 (6th ed. 2001).

[30]IBM v. Commission, Case 60/81, 1981 E.C.R. 2639, ¶ 9; BEUC and NCC v. Commission, Case T-37/92, 1994 E.C.R. II-285, ¶ 27; ATM v. Commission, Case T-178/94, 1997 E.C.R. II-2529, ¶ 53).

[31]*See, e.g.*, MCI v. Commission, Case T-310/00, 2004 E.C.R. II-03253 (merger control); Archer Daniels Midland Co. v. Commission, Case T-224/00, 2003 E.C.R. II-2597 (Article 81); IMS Health Inc. v. Commission, Case T-184/01, 2001 E.C.R. II-3193 (refusal to license as violation of Article 82).

of general application. In *Dow Agrosciences*,[32] the Parliament and Council adopted a decision establishing a list detailing potentially environmentally unfriendly substances under Directive 2000/60.[33] The CFI held that the act did not constitute a decision for purposes of Article 230(4), because the measure had been adopted in the framework of the co-decision procedure (Article 251). Moreover, the act amended the wording of Directive 2000/60.

Notwithstanding the general principle that decisions are reviewable acts for purposes of Article 230(4), certain types of acts that are individualized in nature are nevertheless not susceptible of review through annulment. These include measures that are (i) confirmatory, (ii) interlocutory or otherwise lacking in immediate legal effect, or (iii) essentially discretionary, such as certain refusals to initiate enforcement proceedings.

(i) *Confirmatory decisions*. A decision merely of a confirmatory nature, *i.e.*, confirming a previous decision that was not appealed during the time limit prescribed in Article 230(5), is not by itself a reviewable act. The ECJ and CFI have developed their case law on this point on several occasions. According to the courts, a measure is confirmatory if it, compared with the previous decision, does not contain "any new factor" and was not preceded by a re-examination of the addressee's situation by the relevant Community institution.[34] If, however, the act responds to a new set of facts (as compared with the facts on which the previous decision was based), the institution's reaction to these new facts can, in principle, constitute an appealable act.[35] American administrative law draws essentially this same distinction.[36]

A decision amending certain grounds of a previous decision, while not modifying its operative part, may be subject to a challenge. As a general matter, only the operative part of a Commission decision produces binding legal effect for the addressee. However, according to the CFI, where an amendment of the grounds of a decision has changed the substance of the decision's operative part, the amendment is a reviewable act. Thus, in *Lagardère*,[37] the CFI had to consider whether the subsequent amendment of an approval decision under the EU Merger

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[32]DOW AgroSciences BV v. Commission, Case T-45/02, 2003 E.C.R. II-1973.

[33]Directive 2000/60 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

[34]Herpels v. Commission, Case 54/77, 1978 E.C.R. 585, ¶ 14; Cortes Jiminez and Others v. Commission, Case T-82/92, 1994 E.C.R.-SC I-A-69 and II-237, ¶ 14.

[35]Buckl and Others v. Commission, Joined Cases C-15/91 and C-108/91, 1992 E.C.R. I-6061, ¶ 22; Salt Union v. Commission, Case T-330/94, 1996 E.C.R. II-1475, ¶ 32.

[36]ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 277, 284 (1987) (agency's denial of motion to reopen is reviewable if motion alleges "new evidence or changed circumstances," but not if the motion merely alleges error on grounds that could have been advanced originally).

[37]Lagardère and Canal+ v. Commission, Case T-251/00, 2002 E.C.R. II-4825.

Regulation[38] affected the legal interests of the parties to the approved transaction. The Commission had authorized a concentration and, as the Commission is required to do in these cases, had also found (and approved) that certain restrictions between the parties were ancillary to the transaction. The operative part of the relevant decision approved the transaction and also stated in general terms, as is customary in cases of this kind, that the decision would "also cover restrictions directly related and necessary to the implementation of the concentration." The grounds of the decision specified which restrictions between the parties, and for what time period, were considered ancillary. A later Commission decision withdrew approval for certain of these restrictions or approved certain restrictions only for a shorter time period. The CFI explained that the subsequent decision had changed the legal situation created by the previous decision; therefore, the action was admissible. This reasoning is also consistent with American administrative law.[39]

(ii) *Lack of immediate legal effect.* The fact that the Commission acts by way of a formal decision does not necessarily mean that individuals or companies concerned by that decision may bring a challenge. In the *Philip Morris* case, the Commission decided to bring a lawsuit before the United States District Court for the Eastern District of New York. The Commission alleged that the U.S. tobacco producers engaged in a system of smuggling of cigarettes into the territory of the Community and based its claims for treble damages, *inter alia*, on the Racketeer Influenced and Corrupt Organizations Act 1970. Although the federal court ultimately rejected the Commission's claims, the U.S. producers sought to annul the Commission's decision. In a 2003 judgment, however, the CFI held that the Commission's decision to commence legal proceedings before a U.S. federal court did not produce the kind of change in their legal position that would satisfy Article 230(4). Although the CFI acknowledged that the commencement of legal proceedings is not without legal effects, it concluded that any change in the companies' legal position would be attributable solely to the court's final judgment, which would definitively determine the obligations of the parties to the dispute.[40] In 2006, the Court of Justice upheld the CFI on essentially the same grounds.[41] As a more general matter, the two courts also indicated that the same reasoning would also apply to a formal Commission decision to commence legal action before a Community court or national courts in the Member States. This conclusion is reminiscent of American case law holding that an agency's initiation of its own adjudicative proceedings is not a reviewable "final agency action."[42]

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[38]Regulation No 139/2004 on the control of concentrations between undertakings, [2004] OJ L24/1.

[39]See *Bhd. of Locomotive Eng'rs*, 482 U.S. at 284 (review is available if agency changes the substance of its order while purporting to clarify it).

[40]Philip Morris Int'l and Others v. Commission, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01, and T-272/01, 2003 E.C.R. II-1, ¶ 79 (appeal pending in Cases C-131/03P and C-146/03).

[41]R.J. Reynolds Tobacco Holdings, Inc. v. Commission, Case C-131/03P, 2006 E.C.R. I-7795, ¶¶ 54-68.

[42]FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980); see Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (reaching a similar result under the doctrine of exhaustion of administrative remedies).

The case law has reached similar conclusions in situations involving informal Commission pronouncements. This is not to say that admissibility necessarily requires a formal decision. In practice, the Community institutions frequently act by way of sending informal letters (*e.g.*, in response to requests by individuals or companies), and their resort to a letter rather than a formal decision cannot deprive an applicant of an otherwise existing right to challenge the position taken in that letter. On the other hand, it is also established that the mere fact that a letter is sent in response to a request from the letter's addressee is in itself insufficient to clear the way for an action seeking annulment.[43] More particularly, legal recourse is not available against purely informal notifications, such as letters stating that a given subject is under consideration, no decision has yet been taken, or simply asking for patience.[44] If the adoption of an act or a decision is subject to an internal procedure involving several stages, only the last step in that procedure will be subject to review: According to the Court, "an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for that final decision."[45]

For example, the CFI followed this line of case law when it held that a decision by a Hearing Officer refusing access to certain information in the Commission's files did not constitute an appealable act for purposes of Article 230(4). Among other functions, the Hearing Officer oversees access to Commission files containing all evidence in a given case after the issuance of a Statement of Objections (*i.e.*, the Commission's administrative complaint prior to a formal decision).[46] In the *German Banks* cases,[47] the Commission alleged that various banks in Germany engaged in a cartel, contrary to Article 81, by fixing the fees applicable to money exchange transactions on the occasion of the introduction of the Euro. The Commission also pursued separate cases along national borders, investigating similar conduct in other Member States such as the Netherlands. However, all investigations but the one relating to Germany were terminated. Prior to the adoption of the Commission's decision against the German banks, some of them sought access to the Commission's files relating to its investigations in other Member States. The CFI held that the Hearing Officer's denial of access was only a preparatory measure in the context of the Commission's procedure that would ultimately result in a formal

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[43]AITEC v. Commission, Case T-277/94, 1996 E.C.R. II-351, ¶ 50; Sveriges Betodlares & Henrikson v. Commission, Case T-5/96, 1996 E.C.R. II-1299, ¶ 26.

[44]Schermers & Waelbroeck, supra note 29, ¶ 679.

[45]Nutral v. Commission, Case C-476/93P, 1995 E.C.R. I-4125, ¶ 29; BEUC & NCC v. Commission, Case T-37/92, 1994 E.C.R. II-285, ¶ 27.

[46]See C.S. Kerse & N. Khan, EC Antitrust Procedure, ¶ 4-014 (5th ed. 2005); Decision on the terms of reference of hearing officers in certain competition proceedings, [2001] OJ L162/21.

[47]Reisebank v. Commission, Case T-216/01, 2003 E.C.R. II-3481; Commerzbank v. Commission, Case T-219/0,1 2003 E.C.R. II-2843; Dresdner Bank v. Commission, Case T-250/01 (2003) (unreported).

(and appealable) Commission decision.[48] The CFI opined that only the final decision would affect the banks' legal situation and that any violation of their rights of defense resulting from the Hearing Officer's ruling could be pursued in an appeal of that final decision.[49] Similarly, a letter sent by the Commission to a complainant explicitly stating that the assessment contained in the letter is of a provisional nature and does not "constitute a final position" of the Commission is not subject to judicial review.[50] All of these holdings are similar to the results that an American court might reach under finality or exhaustion principles.

In a related category are so-called "guidance letters," which are issued to companies by the Commission on novel questions arising under Article 81 and 82. These letters, according to the relevant Notice, are not considered Commission decisions.[51] Modeled after the DOJ's business review and FTC's advisory opinion letters, guidance letters are designed to be an informal Commission assessment of specific competition law questions. It is at least doubtful whether they constitute an appealable act under Article 230(4).

(iii) *Refusals to enforce.* The CFI has taken a fairly nuanced approach to situations in which private parties unsuccessfully ask the Commission to commence enforcement proceedings against a third party, such as in the competition area. When the complaint alleges that a Member State's practices infringe the Treaty's rules on state aid, contrary to competition rules under Article 86, a letter from the Commission rejecting the complaint generally cannot be appealed: Under Article 86, according to the case law, the Commission enjoys wide discretion as regards what action (if any) it considers necessary against the Member State.[52] Because the Commission has no obligation to act under Article 86 at the behest of private parties, the refusal to act cannot sufficiently affect the legal situation of these parties to constitute an appealable act, absent exceptional circumstances. This CFI case law resembles the common stance of American courts, which usually hold that an agency's decision refusing to enforce a regulatory statute is presumptively unreviewable as an exercise of its enforcement discretion.[53]

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[48]Cimenteries CBR and Others v. Commission, Joined Cases T-10/92 to T-12/92 and T-15/92, 1992 E.C.R. II-2667, ¶ 42.

[49]Subsequently, the CFI annulled the Commission's decision in the *German Banks* case ([2001] OJ L15/1) in the first ever judgment by default in competition cases. See, e.g., Bayerische Hypo- und Vereinsbank v. Commission, Case T-56/02, 2004 E.C.R. II-03495. The Commission appealed the CFI's judgment to the ECJ.

[50]Satellimages TV5 v. Commission, Case T-85/99, 2002 E.C.R. II-1425, ¶ 34.

[51]Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] OJ C101/78.

[52]Commission v. T-Mobile Austria, Case C-141/02, 2005 E.C.R. I-1283, ¶¶ 66-70; Bilanzbuchhalter v. Commission, Case T-84/94, 1995 E.C.R. II-101, ¶ 27, appeal dismissed, Bundesverband der Bilanzbuchhalter e.V. v. Commission, Case C-107/95, 1997 E.C.R. I-947; Vlaamse Televisie Maatschappij v. Commission, Case T-266/97, 1999 E.C.R. II-2329, ¶ 75.

[53]Heckler v. Chaney, 470 U.S. 821 (1985).

However, the CFI has not carried this reasoning as far as the U.S. Supreme Court has. Another illustrative situation in the area of competition law offers a noteworthy contrast. Complaints by third parties alleging infringements of Articles 81 and 82—the Treaty's principal provisions on the competition law obligations of private parties—are fairly common and are an important tool supplementing the Commission's own investigative efforts to detect infringements. When the Commission makes a *final* decision to reject a complaint based on Article 81 or 82 (as distinguished from the interlocutory steps discussed just above[54]), the rejection is generally susceptible to judicial review. Indeed, Regulation 773/2004 explicitly requires the Commission to adopt a decision to reject a complaint.[55] Thus, at least in that context, a rejection of a complaint, even if only contained in a letter to the complainant, can be appealed under Article 230(4),[56] although the applicable scope of review is narrow.[57] Parallel opportunities for judicial review do exist in the United States,[58] but they are relatively rare.

b. Measures of general application

According to the wording of Article 230(4), a "decision . . . in the form of a regulation" can be the subject of an annulment action if it is "of direct and individual concern to the [applicant]." This critical phrasing has to be parsed carefully. First, as a definitional matter, the terms "regulation" and "decision" are explained in Article 249: A regulation has "general application" and is "binding in its entirety and directly applicable in all Member States," whereas a "decision" is "binding in its entirety upon those to whom it is addressed." According to the CFI, the decisive criterion for distinguishing between the terms "decision" and "regulation" mentioned in Article 230(4) is "the general application of the measure in question."[59] This pair of terms, therefore, runs directly parallel to the familiar distinction in American administrative law between rulemaking and adjudication (even though a "regulation" in EU parlance must be considered as much a "legislative" act as an "administrative" one). In the U.S., generality of

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[54]See supra note 50 and accompanying text.

[55]Article 7 of Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18. *See also* Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/65.

[56]Syndicat Français de l'Express international v. Commission, Case C-39/93P, 1994 E.C.R. I-2681, ¶¶ 24-33; British-American Tobacco Co. v. Commission, Joined Cases 142/84 and 156/84, 1987 E.C.R. 4487, ¶¶ 11-12.

[57]See infra notes 536-537 and accompanying text.

[58]See *Chaney*, 470 U.S. at 833 (noting that the presumption against judicial review of enforcement discretion "may be rebutted where the substantive statute has provided guidelines for the agency to follow . . . either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue"); see also 2 U.S.C. § 437g(a)(8)(A) (2000) (providing expressly for judicial review of Federal Election Commission's dismissal of a party's complaint).

[59]Confédération nationale des producteurs de fruits et légumes v Council, Joined Cases 16/62 and 17/62, 1962 E.C.R. 471; Gibraltar v Council, Case C-298/89, 1993 E.C.R. I-3605, ¶ 15.

application is the key variable that separates rules from orders under both the due process clause[60] and the Administrative Procedure Act, although the poorly drafted definitional language of the APA tends to obscure this fact.[61]

However, the manner in which the terms "regulation" and "decision" are intended to play out in Article 230(4) is not self-evident, and indeed the European courts' understanding of that relationship has changed over time. The early view was that the phrase "direct and individual concern" was itself intended to capture the distinction between "regulations" and "decisions." Under this view, a court would use the "direct and individual concern" criterion as a means of distinguishing *true* regulations from "decisions in the form of regulations" and, accordingly, would use that distinction in order to take jurisdiction over the latter but not the former.[62] That analysis has not survived, however. Under the modern precedents, the two concepts are no longer coextensive. The courts construe "decision in the form of a regulation" more liberally. As a result, it is now settled that a measure that is plainly "general," and thus a regulation within the meaning of Article 249, can be the kind of *act* that falls within Article 230(4). The applicant must, however, also satisfy the "direct and individual concern" criterion.[63] The latter term has not undergone as much liberalization; thus, it ends up doing most of the work of keeping the scope of Article 230(4) confined within bounds that the Court considers manageable. Our discussion of standing principles, found later in this section, describes the manner in which this constraining effect occurs.

Of course, by referring to decisions in the form of a "regulation," the wording of Article 230(4) at least seems to exclude "directives." Indeed, early case law, primarily of the ECJ, interpreted this wording literally as a bar to actions against directives. More recent precedent, however, suggests that, as a matter of principle, actions are admissible not only against regulations but also against directives.[64] In the CFI's present view, the non-availability of a remedy against a directive (while allowing actions against regulations) would result in a significant gap in the legal protection afforded to natural and legal persons by the Treaty: "The

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[60]United States v. Fla. E.C. Ry., 410 U.S. 224, 244-46 (1973); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

[61]See 5 U.S.C. § 551(4) (2000); Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. 1077 (2004).

[62]Schermers & Waelbroeck, supra note 29, ¶¶ 862-64.

[63]Schmoldt v. Commission, Case T-264/03, 2004 E.C.R. II-1515, ¶¶ 95-96;Schermers & Waelbroeck, supra note 29, ¶¶ 659, 865-67.

[64]UEAPME v. Council, Case T-135/96, 1998 E.C.R. II-2335, ¶ 63; Japan Tobacco and JT International v. Parliament and Council, Case T-223/01, 2002 E.C.R. II-3259, ¶ 28.

Community institutions cannot exclude, merely by the choice of the form of the act in question, the judicial protection afforded to individuals by [Article 230]."[65]

When an applicant challenges an act of general application under Article 230(4), the action may either seek complete or only partial annulment. However, if an action seeks partial annulment of a regulation or directive, settled case law requires that the provision (against which the action is brought) must be severable from the remainder of the act.[66] If partial annulment of an act would have the effect of altering its substance, the action may be inadmissible.[67] This is a much stricter test than the corresponding standard in the United States, where courts do frequently sever portions of statutes and regulations in a manner that profoundly alters their substance.[68]

Finally, it is well established that the action for annulment is available only for challenges to "secondary" Community legislation. "Primary" Community law, such as the EC Treaty, is not susceptible to review under Article 230(4), because it does not constitute an act of a Community institution within the meaning of that provision.[69] For the same reason, the CFI has no jurisdiction to hear challenges to the act of accession of a new Member State.[70] Accordingly, the act concerning the accession of 10 new Member States acceding to the European Union effective May 1, 2004,[71] and the Treaty concerning the accession of the

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[65]Association contre l'horaire d'été (ACHE) v. Parliament and Council, Case T-84/01, 2002 E.C.R. II-99, ¶ 23; *Japan Tobacco*, ¶ 28.

[66]Germany v. Commission, Case C-239/01, 2003 E.C.R. I-10333 (action was admissible because invalidation of challenged provision would have shifted Member States' financial responsibility for implementing a regulation but would not have altered the regulation's substantive requirements); Commission v. Parliament and Council, Case C-378/00, 2003 E.C.R. I-937; Commission v. Council, Case C-29/99, 2002 E.C.R. I-11221.

[67]France and Others v. Commission, Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375 (action was inadmissible because applicants could not challenge conditions attached to Commission's approval of merger without also challenging the merger); see Germany v. Commission, Case C-239/01, 2003 E.C.R. I-10333; Commission v. Council, Case C-29/99, 2002 E.C.R. I-11221.

[68]See, e.g., United States v. Booker, 543 U.S. 220 (2005) ("severing" the mandatory aspect of U.S. Sentencing Guidelines, thus rendering them discretionary); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (invalidating one section of an FCC rule and upholding others).

[69]Roujansky v. Council, Case T-584/93, 1994 E.C.R. II-585, ¶ 15 (aff'd by Roujansky v. Council, Case C-253/94, 1995 E.C.R. I-7, ¶ 11).

[70]Levantina Agricola Industrial SA (LAISA) and CPC España SA v. Council, Joined Cases 31 and 35/86, 1988 E.C.R. 2285.

[71][2003] OJ L236/33.

Republic of Bulgaria and Romania to the European Union, effective January 1, 2007 (or, under certain circumstances, January 1, 2008),[72] is not susceptible to review under Article 230(4).[73]

3. Legal Interest to Bring an Action

Community case law requires that an applicant under Article 230(4) must have a legal interest in bringing the action. Although not expressly prescribed by Article 230(4), this requirement serves to prevent challenges based solely on hypothetical situations and is examined by the CFI on its own motion. The applicant's legal interest must be vested and present at the time the action is brought.[74] Even if the challenge is based on a future situation, the applicant must demonstrate that prejudice to his situation is already certain, justifying bringing the action *pro future*.[75] The annulment of the contested measure "must itself be capable of having legal consequences"[76] or the action must be liable, if successful, to result in "an advantage for the party who has brought it."[77] The "legal interest" requirement seems analogous to case-or-controversy limitations found in many American precedents. Under U.S. law, a person who wishes to challenge administrative action must identify a "judicially cognizable" or "legally protected" injury and cannot simply rely on a generalized interest in seeing the law obeyed. Federal courts often frame this requirement as one of standing;[78] or, in the particular instance of injury that depends too heavily on speculating about future contingencies, the objection may well be framed as one of lack of ripeness.[79]

In a series of cases involving merger control, the CFI has explored the scope of the legal interest requirement in a doctrinal context that American lawyers might regard as raising issues

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[72][2005] OJ L157/11.

[73]Christoph Feddersen, *Parallel Trade in Pharmaceuticals in a Europe of 25: What the 'Specific Mechanism' Achieves and What It Does Not*, 25 European Intellectual Property Review 545, 554 (2003).

[74]Forges de Clabecq v. High Authority, Case 14/63, 1963 E.C.R. 719, 748; Torre and Others v. Commission, Case T-159/98, 2001 E.C.R.-SC I-A-83 and II-395, ¶ 28.

[75]NBV and NVB v. Commission, Case T-138/89, 1992 E.C.R. II-2181, ¶ 33.

[76]AKZO Chemie v. Commission, Case 53/85, 1986 E.C.R. 1965, ¶ 21; Antillean Rice Mills and Others v. Commission, Joined Cases T-480/93 and T-483/93, 1995 E.C.R. II-2305, ¶¶ 59, 60; Euroalliages v. Commission, Case T-188/99, 2001 E.C.R. II-1757, ¶ 26.

[77]Unión de Pequeños Agricultores v. Council, Case C-50/00P, 2002 E.C.R. I-6677, ¶ 21; Parliament v. Richard, Case C-174/99P, 2000 E.C.R. I-6189, ¶ 33 (Parliament has an interest in appealing from adverse CFI decision, because a successful appeal could shield it from damage liability).

[78]Lujan v. Nat'l Wildlife Fed'n, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 752-56 (1984); Bender v. Williamsport Area School Dist., 475 U.S. 534, 543-544 (1986) (school board member had "no personal stake in the outcome of the litigation" and thus lacked standing).

[79]See, e.g., Texas v. United States, 523 U.S. 296 (1998).

of mootness. Under the Merger Regulation, the Commission must be "notified" of planned mergers of Community dimension. In contrast to the U.S. merger control regime (where a transaction is automatically cleared upon expiry of the HSR waiting period), the Commission must either approve or prohibit a notified transaction, rendering a formal decision under Article 249. If the Commission prohibits a transaction (which is clearly the exception to the rule), the parties are barred from implementing "their" merger unless the prohibition decision is annulled on appeal. In practice, parties to a merger usually abandon the transaction after a prohibition decision—typically relying on contractual provisions in the merger agreement that require the Commission's approval as a condition precedent.

In *Gencor*,[80] the CFI had to analyze whether the parties to a merger retained a legal interest in bringing proceedings against the Commission's prohibition decision, although the relevant merger agreement had been abandoned after the challenge was filed. Unsurprisingly, the CFI held that addressees of a decision prohibiting a merger could bring legal proceedings regardless of whether the original agreement providing for the prohibited transaction was still in place. According to the court, the parties pursued a legitimate interest as long as it could be shown that a successful appeal could be the basis for restoration (or damages more generally). The court also added that the necessity for legal review of merger decision requires the conclusion that the parties had the requisite legal interest. In *Kesco*, the CFI affirmed its findings in *Gencor* and clarified that compliance with a Commission prohibition decision could not deprive the parties to the prohibited merger of their interest in seeking annulment of the decision.[81] Thus, the parties to a merger enjoy the requisite legal interest in challenging a prohibition decision if the abandonment of the merger is not merely voluntary but a "direct consequence" of the Commission's decision.

The CFI's findings in *Gencor* and *Kesco* confirmed that merger parties had the requisite interest in challenging prohibition decisions as long as the merger was abandoned following a prohibition decision. But what if the parties to a merger abandoned their transaction prior to any formal prohibition decision? In *MCI*,[82] the CFI had to review the following situation: At a press conference in 2000, the then-Commissioner for Competition announced the Commission's intention to prohibit the proposed merger of WorldCom (which is now MCI) and Sprint. On the following day, the parties sent a letter to the Commission stating that they would "no longer propose to implement the proposed merger." Despite the parties' letter, the Commission adopted a prohibition decision the following day and the parties filed an annulment action. In its judgment, the court was unable to distinguish its findings in *Gencor* and *Kesko* from the situation in *MCI*. In particular, in the court's view, it was irrelevant whether the parties abandoned their merger before or after the Commission's prohibition decision in light of the

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[80]Gencor v. Commission, Case T-102/96, 1999 E.C.R. II-753.

[81]Kesko v. Commission, Case T-22/97, 1999 E.C.R. II-3775, ¶¶ 58-59.

[82]MCI v. Commission, Case T-310/00, 2004 E.C.R. II-03253. Following the judgment in *MCI*, the Commission has issued a notice on the "abandonment of concentrations" (*see* the Commission's note on Art. 6 (1) c 2nd sentence of Regulation 139/2004 (abandonment of concentrations)).

latter's legal consequences for the parties to proceed with the contemplated merger (or any similar transaction). The CFI also found that the abandonment was directly related to the announced Commission intention to adopt a prohibition decision.

In *MCI*, the CFI clarified one important aspect of its *Gencor* and *Kesko* line of case law that is of relevance also for other areas of Community law. In *Gencor* and *Kesko*, the parties abandoned the contemplated transactions *after* filing a challenge with the court. Accordingly, the question arose whether parties, in order to retain a legal interest in challenging a prohibition decision, are required to defer the abandonment until after an action for annulment has been filed. The CFI in *MCI* answered that question in the negative: According to the CFI, the requisite legal interest stems from the obligation to comply with a Commission decision under Article 249(4), which "therefore exists before, and whether or not, an action is brought."[83] All of these rulings are evidently fueled by an awareness that a strict approach to the legal interest requirement could interfere with the court's ability to ensure effective oversight of the political branches—an attitude that is similarly discernible in the American case law on mootness.[84]

4. Standing to Bring an Action

According to the express language of Article 230(4), a person to whom an action is addressed always has standing to commence an annulment action, but nonaddressees have standing only as to matters that are of "direct and individual concern" to them. This treaty language has two discrete components. The first requirement, that the matter be of *direct* concern to the applicant, is somewhat analogous to justiciability notions found in American law, but the second requirement, *individual* concern, is not. On occasion, the case law does not clearly distinguish between these two different criteria, although it would seem to be widely accepted that they are two different legal concepts. The courts' interpretation of these two criteria has been developed in a plethora of cases and is characterized by the courts' efforts to reduce the number of legal actions brought by individuals against acts that may not sufficiently affect these individuals as to justify the right to challenge them.[85]

a. Direct concern

According to the CFI, a measure is of "direct concern" to an applicant seeking its annulment if the measure directly produces effects on the applicant's legal position and the measure is "self-executing," *i.e.*, not subject to discretionary implementation by the addressee of the measure. The Court has synthesized the requirement in the following words: An applicant is

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[83] *MCI*, ¶ 48.

[84] See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189-94 (2000). The familiar "capable of repetition, yet evading review" limitation on mootness is a good illustration of this attitude. See id. at 190-91.

[85] Schermers & Waelbroeck, supra note 29, ¶ 868.

directly concerned by a measure only if its implementation is "purely automatic and resulting from Community rules alone without the application of other intermediate rules."[86]

A few recent cases may be helpful to an understanding of the Court's interpretation. In *DOW AgroSciences*,[87] the CFI had to examine whether the inclusion of certain chemicals on a list detailing potentially environmentally unfriendly substances under Directive 2000/60 [88] directly concerned the applicant, a producer of these chemicals. Under the Directive, the Commission is required to make proposals to the Parliament and Council as to the environmental classification of substances on the list. Inclusion in the list does not give any specific indication about the measures that the Commission will propose. Any specific measure would have to be adopted by the Parliament and the Council following the Commission's proposal. The Court concluded that the mere inclusion in the list did not directly concern the applicant: It did not affect the applicant's legal position, nor did it put the applicant under any obligation.

On the other hand, the CFI held that a third party could be directly concerned by a Commission decision approving a transaction about which it had been notified under the Merger Regulation. In *BaByliss*,[89] a producer of small household appliances challenged the Commission's decision approving, subject to certain conditions, a merger between Moulinex and SEB, two competing producers of household appliances. The CFI noted that the Commission's approval would bring about an immediate "change in the markets concerned, depending solely on the wishes of the parties." Apparently the court's point was that the merger could inflict harmful effects on BaByliss as a competitor (or, more precisely, a potential competitor) in the relevant market, without any further exercise of discretion by a government entity.

The "direct concern" test is at least similar to the analysis found in American cases that have found a lack of standing on the basis of an insufficient causal link between the challenged agency action and the alleged harm to the complaining party.[90] It also bears a resemblance to American cases that have found a contested agency action unripe for review because of the court's uncertainty about the manner in which the action will be implemented by government

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[86]Oleifici Italiani and Fratelli Rubino v. Commission, Case T-54/96, 1998 E.C.R. II-3377, ¶ 56; DSTV v. Commission, Case T-69/99, 2000 E.C.R. II-4039, ¶ 24; Mitteldeutsche Erdöl Raffinerie v. Commission, Case T-9/98, 2001 E.C.R. II-3367, ¶ 47.

[87]DOW AgroSciences BV v. Commission, Case T-45/02, 2003 E.C.R. II-1973, ¶¶ 35-40.

[88]Directive 2000/60 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

[89]BaByliss SA v. Commission, Case T-114/02, 2003 E.C.R. II-1279, ¶ 89. See also Air France v. Commission, Case T-3/93, 1994 E.C.R. II-323, ¶ 80.

[90]Allen v. Wright, 468 U.S. 737, 756-60 (1984); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); cf. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

authorities in the future.[91] A salient difference between the American and EU cases, however, is that the "direct concern" requirement has an explicit textual basis in Article 230(4), and therefore the CFI has often felt free to rely on it without trying to justify it as a matter of first principles. Consequently, many of the cases that invoke the direct concern limitation are conclusory in tone. However, the main idea behind the limitation (over and above the simple desire to hold down the courts' caseload) seems to be that the courts should not entertain an action for annulment under circumstances in which a subsequent act of discretion might eliminate the applicant's problem or at least might fundamentally alter the factual circumstances under which the problem has arisen.

To be sure, an American administrative lawyer might well conclude that the question of whether the Commission's decision is "self-executing" (or "purely automatic") is an overly rigid benchmark for deciding whether the adjudication of a given annulment action would frustrate the purpose just mentioned. Actually, however, the European case law displays more flexibility than one would expect from reading the above-quoted case law language in isolation. The fact of discretionary implementation of a Community measure does not always shield that measure from challenge. The ECJ has allowed annulment actions to go forward where, for example, a Member State has already put into place the regulatory structures that it will use to the applicant's detriment if the Community measure survives,[92] or where the Member State has already announced its intention to rule against the applicant if it has the opportunity.[93] In these situations, the mere theoretical possibility that the Member State could revise its plans has not defeated admissibility. In short, while the EU cases do remain more stringent than the corresponding American judicial decisions, they display at least some traces of pragmatism in evaluating the "directness" of the applicant's "concerns."

b. Individual concern

According to controlling case law of the ECJ, a nonaddressee is "individually concerned" by a measure only if it affects his position "by reason of certain attributes peculiar to him, or by reason of a factual situation which differentiates him from all other persons and distinguishes him individually in the same way as the measure's addressee." In other words, the thrust of the requirement is that an applicant who is affected by a measure in the same way as other persons in his class—as is typically the case when the measure in question is a regulation or directive—lacks standing to bring an annulment action against it. This interpretation stems from the ECJ's judgment in *Plaumann v Commission*[94] and is commonly referred to as the "*Plaumann* formula."

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[91]Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

[92]Piraiki-Patraiki v. Commission, Case 11/82, 1985 E.C.R. 207.

[93]Bock v. Commission, Case 62/70, 1971 E.C.R. 897.

[94]Plaumann v Commission, Case 25/62, 1963 E.C.R. 95.

The *Plaumann* formula is often defended as a means of holding down caseloads and routing litigation through national courts. Nevertheless, the individual concern requirement can render many applicants unable to resort to annulment to challenge a Community act, particularly when the act is a regulation or directive. Where no other recourse is available to such persons, such as an action against an implementing measure under national law, a significant gap in the legal protection afforded by the Treaty may exist. Accordingly, legal commentators widely maintain that the Court's interpretation of the individual concern criterion has been "unduly strict."[95] Moreover, efforts to limit the effects of this jurisprudence have brought about an unclear body of case law that has made it difficult to predict the likelihood of passing the Court's admissibility test under Article 230(4) in a given case.[96]

American law on standing to seek judicial review of agency action has no counterpart to the *Plaumann* formula. Federal courts routinely entertain challenges to administrative rules at the behest of persons who are affected by those measures in exactly the same way as are numerous other similarly situated persons. Indeed, although standing in the United States has in some cases been denied to litigants whose claims were so "generalized" that they might be raised by anybody at all,[97] the dominant tendency in the case law is to discard even that limitation, at least where the harm shared by everyone is tangible and demonstrable.[98] To be sure, decades ago the doctrine of "ripeness" was sometimes interpreted to mean that a federal court should normally not conduct judicial review of a regulation until it is applied in an enforcement proceeding, but the Supreme Court definitively rejected this proposition in 1967.[99] Today's courts usually permit pre-enforcement review of regulations (at least those that have the force of law),[100] and a broad consensus supports that tendency.[101] The surviving ripeness limitations on judicial review are founded on practical considerations such as the amenability or "fitness" of

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[95]Schermers & Waelbroeck, supra note 29, ¶¶ 899-912; see, e.g., Laurence W. Gormley, *Judicial Review: Advice for the Deaf*, 29 Fordham Int'l L.J. 655 (2006); Liz Heffernan, *Effective Judicial Remedies: The Limits of Direct and Indirect Access to the European Community Courts*, 5 L. & Prac. of Int'l Courts & Tribunals 285, 286 n.1 (2006) (collecting authorities).

[96]Christoph Feddersen, *Doch keine individuelle Betroffenheit durch EG-Verordnung*, 13 Europäische Zeitschrift für Wirtschaftsrecht 529, 532 (2002).

[97]See, e.g., Lance v. Coffman, 127 S. Ct. 1194 (2007); DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006); United States v. Richardson, 418 U.S. 166, 176-80 (1974) (no standing to sue to obtain disclosure of CIA's budget).

[98]Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007); FEC v. Akins, 524 U.S. 11, 23-25 (1998).

[99]Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[100]See Ronald M. Levin, *The Story of the* Abbott Labs *Trilogy: The Seeds of the Ripeness Doctrine*, in Administrative Law Stories 431, 474-77 (Peter L. Strauss ed. 2006)

[101]See Recommendation 93-4 of the Admin. Conf. of the U.S., 59 Fed. Reg. 4670, 4671 (1994) ("The Conference believes . . . that preenforcement challenges generally are appropriate where the administrative record provides suficient basis for the court to resolve the issues before it.").

the plaintiff's contentions for immediate judicial resolution and the severity of the plaintiff's need for immediate judicial intervention.[102] These prudential factors are much less confining than the categorical exclusion embodied in the *Plaumann* formula.

This is not to say that the Court's application of the *Plaumann* formula has been easy or straightforward in all situations. In its analysis of whether an applicant's circumstances are sufficiently different from those of any other addressee of a general measure, the ECJ has sometimes considered relevant the specific economic situation of the applicant. For example, in *Extramet*,[103] the ECJ held that the effect of a general measure on the applicant was sufficiently different from its effect on all other affected persons because of the substantial manner in which it affected the company's competitive situation. In that case, a regulation imposed a significant anti-dumping duty on calcium metal, a major product used by Extramet Industrie in its manufacturing process, and Extramet's main competitor was the only Community producer of calcium metal. The ECJ concluded that Extramet was individually concerned. Legal commentators have suggested that the test in *Extramet* amounts to a requirement of a direct effect on the applicant's position and a serious prejudice to its current position resulting from the contested measure.[104] Similarly, in *Coderniu*, the ECJ had to consider whether the owner of a graphic trademark (which it had registered in 1924) was individually concerned by a regulation effectively preventing the owner from enjoying the protection conferred by the trademark. The ECJ held that, since Coderniu had used the trademark for a long time, it could be sufficiently distinguished from all other targets of the regulation and thus was individually concerned.[105] On the other hand, the CFI and ECJ showed a less expansive attitude in the *Greenpeace* case,[106] which held inadmissible an action brought by residents of the Canary Islands to annul the Commission's approval of financing for power plants on the islands. Both courts reasoned that, because the applicants' environmental concerns were the same as might be asserted by other residents, the applicants were not "individually concerned."

In the special case of an association bringing an action, the association can be individually concerned by the contested measure if it has taken part in the decision- (or law-) making procedure that gave rise to it. However, the Court has limited standing to three situations: where the association has been afforded a specific procedural right by Community law; where the contested measure has affected the interests of the association in its own right, such as its interest in maintaining a negotiating position; and where an action brought by

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[102] *Abbott Laboratories*, 387 U.S. at 148-49.

[103] Extramet Industrie v Council, Case C-358/89, 1991 E.C.R. I-2501.

[104] Schermers & Waelbroeck, supra note 29, ¶ 891.

[105] Codorniu v. Council, Case C-309/89, 1994 E.C.R. I-1853.

[106] Stichting Greenpeace Council v. Commission, Case T-585/93, 1995 E.C.R. II-2205, appeal rejected, Case C-321/95P, 1998 E.C.R. I-1651.

individual members of the association would have been admissible.[107] In practice, as in American law,[108] the association's standing usually stands or falls on whether its members would have standing, and thus this body of case law does not go far to expand standing beyond the constraints that *Plaumann* imposes. For example, in the case just mentioned, Greenpeace itself lacked standing, largely for the same reasons that its environmentalist members did.[109]

As these examples indicate, the courts' interpretation of the *Plaumann* formula has been somewhat fact-specific and dependent on case-by-case analysis. The lack of clear-cut rules has been exacerbated by the relationship between the courts' case law on the issue of individual concern and its interpretation of appealable acts under Article 230(4). Now that they have committed themselves to accepting challenges to pure legislative acts under Article 230(4), the question of individual concern has become the key instrument by which the courts strive to avoid opening the "floodgates" to legal actions brought by individuals who may be, though to different degrees, somewhat affected by the legislative act.[110]

c. Recent controversy

A few years ago, for a brief period, a potential revolution in the courts' interpretation of the criterion of "individual concern" appeared to be in the offing. Open challenges to the *Plaumann* formula were voiced in Advocate General Jacobs's opinion in *Unión de Pequeños Agricultores v. Council (UPA)*[111] in March 2002, and two months later in the CFI's judgment in *Jégo-Quéré*.[112] The challenge was shortlived, because the ECJ firmly rejected these positions in its decisions in the same cases. Nevertheless, a description of these cases will highlight the policy debates involved, which the ECJ's judgments have not entirely suppressed.

UPA involved the Community's common agricultural policy—more specifically, its common organization of the market in oils and fats established in 1966. In 1998, the Council adopted a regulation that, in particular, reformed the structure of state aid for smaller producers. UPA, an association of smaller agricultural businesses in Spain, brought an action challenging

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[107]Koen Lenaerts, Dirk Arts & Ignace Maselis, Procedural Law of the European Union ¶ 7-084 (Robert Bray ed. 2d ed. 2006).

[108]See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544 (1996); Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333 (1977).

[109]*Greenpeace* (CFI), ¶¶ 59-65; *Greenpeace* (ECJ), ¶ 29.

[110]For a detailed description of the Court's case law, *see* Schermers & Waelbroeck, supra note 29, ¶¶ 868 et seq.

[111]Opinion of Advocate General Jacobs, Unión de Pequeños Agricultores v. Council, Case C-50/00, 2002 E.C.R. I-6677 (*UPA*).

[112]Jégo-Quéré et Cie SA v. Commission, Case T-177/01, 2002 E.C.R. II-2365.

the regulation. The CFI concluded that there were no factors that could sufficiently distinguish UPA (or its members) from any other addressee of the regulation. The CFI then turned to UPA's argument that no relevant legal remedies existed under national law in Spain at the time. This made it impossible for the Court of Justice to review the contested regulation by way of a reference proceeding under Article 234. Moreover, this effectively meant that there would be no legal remedy for UPA to challenge the regulation at all unless the action for annulment under Article 230(4) were available. While the CFI acknowledged that this could be a problem, it did not see any need to revisit the *Plaumann* formula and considered the action inadmissible.[113] UPA filed an appeal from this judgment.

In his opinion before the ECJ in this appeal, Advocate General Jacobs suggested a new interpretation for the criterion of "individual concern." He argued that "there is no compelling reason to read into the 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." Thus, according to the Advocate General, the Courts should abandon the *Plaumann* formula and adopt a less strict interpretation, according to which an applicant is individually concerned "where the measure has, or is liable to have, a substantial adverse effect on his interests." Jacobs's main point was that the reference proceeding under Article 234 is incapable of guaranteeing effective judicial protection against Community measures, particularly compared to the action for annulment, for the following reasons: (i) national courts are not competent to declare Community acts invalid; (ii) the outcome of the reference proceeding would ultimately be driven by the ECJ's answers to the referred questions, and thus the national court may not be capable of granting independent and sufficient legal redress; (iii) in the case of measures not requiring implementation through a national act, applicants would have no means of challenging the measure before a national court except by violating it; and (iv) national proceedings that could ultimately result in a reference to the ECJ are not as effective as an action for annulment in light of the costs, delay, and "*inter partes*" effect associated with national proceedings. (It is worth noting that the idea of a broader interpretation of the criterion of individual concern goes back at least to the ECJ's judgment in Extramet.[114] There it was also Advocate General Jacobs who argued that "individual concern" be interpreted broadly.[115])

Two months later, in May 2002, while the *UPA* appeal remained pending before the ECJ, the CFI announced its *Jégo-Quéré* judgment. The Commission regulation involved in that case required a minimum mesh size for use by commercial fishers when harvesting in certain fishing

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[113]Unión de Pequeños Agricultores v. Council, Case T-173/98, 1999 E.C.R. II-3357.

[114]See supra notes 103-104 and accompanying text.

[115]See Opinion of Advocate General Jacobs, Extramet Industrie v. Council, Case C-358/89, 1991 E.C.R. I-2501.

zones.[116] The background to this regulation was the Commission's concern about the rapid depletion of hake in these zones and its intention to avoid catches of juvenile hake. Jégo-Quéré, a fishing company, used to harvest fish with a smaller mesh size and brought an action challenging the regulation. The CFI recognized that under the *Plaumann* formula the action would not be admissible: This was because the challenged regulation affected Jégo-Quéré in "the same way as any other economic operator actually or potentially in the same situation." However, the CFI stated that, if it were to follow the *Plaumann* formula, no legal remedy would be available against the regulation, as it did not require any implementation at national level. In the CFI's view, the applicant would not have any legal remedy available, an outcome that would be contrary to (i) the ECJ's case law on access to courts as one of the essential elements of the rule of law, (ii) the common constitutional traditions of the Member States, and (iii) Articles 6 and 13 of the European Convention on Human Rights. The CFI also declared that other actions provided for in the Treaty, such as the reference proceeding (Article 234) or actions based on non-contractual liability (*i.e.*, damage actions under Article 235), would be incapable of compensating the lack of a direct remedy against the regulation. Accordingly, the "strict interpretation, applied until now, of the notion of a person individually concerned according to Article 230(4), must be reconsidered." The CFI suggested that an applicant is individually concerned if the measure "affects his legal position, in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him."

The ECJ was unmoved by this pair of judicial challenges to its traditional interpretation. In its judgment in *UPA* in July 2002,[117] the ECJ did not see a need to respond in detail to the Advocate General's suggestions, because UPA's appeal was limited to its alleged lack of individual concern in its capacity as association, as distinguished from the standing of its members. However, the ECJ stated that 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" against Community acts.[118] Thus, it made clear, without explicitly saying it, that no significant change in the interpretation of the criterion of "individual concern" could be expected in the near future. An opportunity for the ECJ to state this more clearly arose in 2004, when the Court annulled the CFI's judgment in *Jégo-Quéré*.[119] The Court confirmed explicitly the *Plaumann* formula, and referred back to its judgment in *UPA*. The ECJ restated that it is for the Member States to modify the current system of legal remedies if they deem it necessary to do so. In any event, this should not be done by way of reinterpretation of the ECJ's (or CFI's) jurisdiction. In addition, the ECJ feared that the CFI's proposal was too broad: "Such an interpretation has the effect of removing all meaning from the requirement of individual concern set out in Article 230(4)." Thereafter the CFI declared publicly that it would follow the ECJ's

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[116]Commission Regulation No 1162/2001 establishing measures for the recovery of stock of hake, [2001] OJ L159/4.

[117]Unión de Pequeños Agricultores v. Council, Case C-50/00, 2002 E.C.R. I-6677.

[118]Id. ¶ 41.

[119]Commission v. Jégo-Quéré et Cie SA, Case C-263/02P, 2004 E.C.R. I-3425.

interpretation, and it has applied the *Plaumann* formula in various cases since the ECJ's judgment.[120]

American administrative lawyers often find the ECJ's construction of the Article 230(4) requirement puzzling. Accustomed as they are to thinking of judicial review under the APA as the dominant and normal remedy for administrative errors, they tend to expect that the Community's counterpart to APA review should be allowed to serve a similarly broad function.[121] In *UPA* and *Jégo-Quéré*, however, the ECJ reasoned from quite different premises. The Court did reaffirm its belief that the Treaty provides for a "complete system of remedies." As Part I of this chapter discussed, the Court routinely refers to that proposition as fundamental. However, the Court continued, the annulment action is only one component in this system; it is not designed to serve as a comprehensive remedy for all breaches of Community law. Instead, the Court's vision presupposes that national courts will play a prominent role in the enforcement of Community norms, with the preliminary reference procedure remaining available as a vehicle by which the Court itself can oversee the national courts' implementation of Community law. In short, the Court seems to regard the debate over standing as a controversy about *how* litigants in various circumstances shall be afforded a judicial remedy when they are injured by breaches of Community law, rather than *whether* they should have access to such a remedy.

At least on its face, the Court's premise about the complementarity of the Treaty remedies seems defensible. After all, as its defenders point out, the short time limit within which annulment must be sought—a restriction that applies to "privileged" and "unprivileged" applicants alike, and that has not been nearly as controversial as the Article 230 standing rules—gives at least some support to the idea that annulment was envisioned from the beginning as playing only a limited role in the Treaty's system of legal remedies. Furthermore, the Court's stance harmonizes with the basic constitutional structure of the Treaty—the Community has a small judiciary and necessarily depends heavily on national courts for implementation of its policies.[122] More generally, the Court's suggestion that any expansion of the remedial arsenal must rest with the Member States may be an oblique acknowledgment that the European Community is still not, in all respects, the equivalent of a nation-state; it remains, in important ways, a somewhat uneasy alliance among independent states. It might not be too farfetched to compare the ECJ's perspective to the way in which an American lawyer might think of habeas corpus review in the United States. Although federal courts play a very significant role in monitoring abuses of the states' criminal justice systems through habeas corpus proceedings, Congress and the Supreme Court have worked assiduously to prevent that remedy from eclipsing the role of state courts. To that end, they have imposed a variety of strict and inflexible

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[120]See, e.g., Schmoldt v. Commission, Case T-264/03, 2004 E.C.R. II-1515.

[121]Actually, the Treaty's remedies corresponding to APA review include not only the annulment action (Article 230), but also the action for failure to act (Article 232). However, the same standing rules apply to both. See infra Part III.B.3.

[122]See supra Part I.C.; infra Part III.C.1.

limitations on habeas relief, notwithstanding the serious grievances that applicants for such relief often can cite in their particular cases.[123]

Notwithstanding the habeas analogy, however, most American administrative lawyers would probably find many areas of agreement with European critics of the *Plaumann* formula. In the first place, Advocate General Jacobs's argument that the "complete" system of remedies has proved inadequate in practice seems to have a good deal of force.[124] It is reminiscent of the debates that have led to a virtual consensus in the United States that direct APA review of regulations prior to their implementation provides necessary protection for regulated interests and can often provide useful guidance to agencies as well.[125] A more fundamental problem with the ECJ's reasoning in *UPA* and *Jégo-Quéré* is that it does not explain why applicants who can show that a Community act would affect them in some unique fashion are more deserving of relief than applicants who cannot. Considered as an original proposition, the distinction drawn in the Court's case law seems arbitrary. As one commentator puts it, the "practical and nonsensical result [of the *Plaumann* formula] is that the greater the number of people affected and, consequently, the more widespread the disaffection with a Community measure, the less likely a private challenge."[126] American lawyers would likely agree with this criticism; indeed, a 2007 decision by the U.S. Supreme Court left no doubt about its antipathy to such a notion.[127] It is true, of course, that the ECJ could not have accepted either Advocate General Jacobs's proposal or the CFI's proposal without adopting a decidedly creative interpretation of the phrase "direct *and individual* concern" in Article 230(4). American lawyers may well recall, however, that when the Supreme Court relaxed its standing rules in the early 1970s, it relied on—and continues to adhere to—an equally bold construction of the relevant language of the Administrative Procedure Act.[128]

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[123]See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Schriro v. Landrigan, 127 S. Ct. ___ (2007); Teague v. Lane, 489 U.S. 288 (1989); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 265-74 (2006).

[124]See Heffernan, supra note 95, at 288.

[125]See supra notes 100- 101 and accompanying text. A well-known American scholar has argued, however, that the broad availability of direct review of rules in the United States should be reconsidered, because it causes too much delay in the implementation of regulatory programs. Jerry L. Mashaw, Greed, Chaos, and Governance 177-80 (1997). Whatever the merits of that argument, the notion that the Article 230(4) restrictions on standing might be necessary in order to prevent such "ossification," as American academics would call it, has not been prominent in the debate over standing in the European Community, and the ECJ itself has not relied on that notion.

[126]Heffernan, supra note 95, at 287.

[127]"'To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.'" Massachusetts v. EPA, 127 S.Ct. 1438, 1458 n.24 (2007) (emphasis omitted).

[128]See Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) (construing 5 U.S.C. § 702); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990) (reaffirming *Data Processing* interpretation); Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 San Diego L. Rev. 351, 339 & n.139 (2005) (observing that the statutory text "did not lend itself at all well to" the Court's construction).

Regardless of the intrinsic merits of this debate over standing, the ECJ's failure to heed calls for revision of the *Plaumann* formula may be attributable in part to a lack of support for the idea from the Member States, which have generally not pressed very vigorously for liberalization. Evidently they are basically satisfied with a system in which a relatively large share of legal questions concerning Community law must be routed through their own courts, subject to the preliminary reference procedure, as opposed to being pursued through original litigation in the Community courts. Indeed, the Member States themselves have little stake in any liberalization of the *Plaumann* formula. Their access to tools of political oversight within the Community diminishes their need for judicial assistance. And even when they do wish to resort to annulment proceedings, they do not have to worry about standing, because they are "privileged" applicants who are not constrained by the limitations of Article 230(4).[129] In the absence of general support for change from the Member States, the Court's lack of inclination to depart from the status quo may not be very surprising.

Even though the dispute between the CFI and ECJ on the standing issue would appear to have been resolved for the time being, the impasse has stimulated discussion about other ways in which the promise of a "complete system of legal remedies" might be brought closer to reality. In light of the ECJ's assertion in *UPA* and *Jégo-Quéré* that any progress toward expansion of judicial remedies must rest with Member States, some observers have proposed that the Court should require those States to interpret or even restructure their procedures so as to ensure that persons who lack standing under Article 230(4) to contest a Community act through annulment will be able to contest it in national courts instead.[130] Indeed, the Court did say in each of these cases that, "in accordance with the principle of sincere cooperation laid down in Article 10 EC, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables" such challenges to be maintained.[131] So far, however, the ECJ has not been inclined to interpret this obligation very expansively.[132]

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[129]See supra text following note 27.

[130]See, e.g., Lenaerts et al., supra note 107, ¶¶ 3-007 to -009.

[131]*Jégo-Quéré*, ¶ 32; *UPA*, ¶ 42.

[132]It is clear that, when a Member State authorizes a regulated person to bring a declaratory action in a national court in order to assert the invalidity of a Community act, even before the state has implemented that act, a preliminary reference stemming from such a suit can be admissible in the Court of Justice. The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd., Case C-491/01, 2002 E.C.R. I-11453, ¶ 39. See generally infra Part III.F.2. However, the ECJ has not suggested that Member States *must* provide such declaratory actions. Indeed, in a related context, the Court recently held that a Member State does *not* necessarily have to provide citizens with a "freestanding" declaratory action by which they can challenge a national law that allegedly violates their rights under the Treaty. Unibet (London) Ltd. v. Justitiekansiern, Case C-432/05 (2007). In that case Unibet, the owner of an Internet gambling site, argued that Sweden's restrictions on lotteries violated Article 49 of the Treaty. The Court pointed out that Unibet had viable alternative means available by which it could have contested the Swedish policy. It could have filed a damage action or a request for an administrative waiver, and then sought a preliminary reference in the ensuing court proceedings. On the other hand, the Court remarked that Sweden would *not* have provided Unibet with an adequate opportunity to press its challenge if it had merely

Efforts to ameliorate the constraints of the "individually concerned" criterion have not been confined to the judicial sphere. The language of the draft European Constitution would have relaxed the *Plaumann* formula to some degree. It would have extended Article 230(4) by allowing nonaddressees to bring an annulment action "against a regulatory act which is of direct concern to him or her and does not entail implementing measures." The discussions that led to the drafting of the new language were reportedly conducted in haste, with inadequate time allowed for working through the wide differences of opinion held by various drafters.[133] Perhaps for this reason, the proposed language showed signs of an uneasy compromise and would have raised numerous issues of interpretation.[134] Now, of course, this amendment is apparently stalled indefinitely, along with the rest of the draft Constitution. It does, however, attest to continuing disquiet about the constraints of the *Plaumann* formula. In all probability, one can anticipate much more debate in coming years about the proper role of annulment in ensuring effective legal protection against unwarranted Community acts.[135]

5. Time Limit For Bringing an Action

Pursuant to Article 230(5), the time limit for bringing an action for annulment is two months. The time limit starts with the publication of the measure or its notification to the plaintiff. Alternatively, if the plaintiff becomes aware of the measure otherwise, the day on which he obtains knowledge of the measure is the relevant starting date. The time limit for bringing an appeal is "not subject to the discretion of the parties or the Court."[136] As a consequence, the CFI examines on its own motion whether the action was brought within the

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allowed the company to rely on Community law (and seek preliminary reference) as a defense to a prosecution or administrative penalty action. These functional arguments might be read as a portent of greater flexibility in the future. However, the implication is faint, and in any event *Unibet* is only indirectly relevant to annulment, because Unibet was attacking a national policy, not a Community act.

[133]Heffernan, supra note 95, at 291-94.

[134]See id.; Angela Ward, *The Draft EU Constitution and Private Party Access to Judicial Review of EU Measures*, in 1 European Union Law for the Twenty-First Century 209, 217-18 (Takis Tridimas & Paolisa Nebbia eds. 2004). Among other ambiguities, the new language would have applied only to "regulatory acts," a term that would have been newly introduced by the Constitution. The term referred to "European regulations" and "European decisions," as distinguished from "legislative" acts.

[135]See Luigi Malferrari, *The Functional Representation of the Individual's Interests Before the EC Courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC*, 12 Ind. J. Global Legal Stud. 667, 677-81, 697-706 (2005) (surveying and critiquing the reform proposals discussed in this section). The author, a Référendaire of the CFI, favors relaxing the *Plaumann* formula for the benefit of nonaddressees who "can claim a current or very probable violation of their individual rights entailing irreparable and serious damages." Id. at 706-09.

[136]OPTUC v. Commission, Joined Cases T-142/01 and T-283/01, 2004 E.C.R. II-329, ¶ 30.

prescribed time period, regardless of whether this issue has been raised by the parties before it.[137] If the addressee of a decision does not seek its annulment within the two month time limit, it "becomes definitive as against him."[138]

The two month period is extended by a period of 10 days "on account of distance."[139] Traditionally, the Rules of Procedure provided for different extension periods depending on the plaintiff's location and the distance between that location and the Court's seat in Luxembourg. However, these different periods have been harmonized in recent years, *inter alia*, reflecting a recognition that, in light of modern means of communication, it is not necessary to take account of whether the plaintiff resides in, say, Germany or France. The CFI's and ECJ's Rules of Procedure provide for detailed rules on the calculation of the time-limit.[140]

A measure is published for purposes of Article 230(5) once it has been published in the Official Journal (the Rules of Procedure provide that the time limit starts running on the fourteenth day after publication in the Official Journal). Notification to the plaintiff refers to formal notification pursuant to Article 254(3). In cartel cases, decisions imposing fines are typically notified in advance by sending the decision's operative part in advance by facsimile. However, for purposes of Article 254(3), only the notification of the complete decision starts the two-month time period.[141] If the measure is not published and not notified to the plaintiff, the day on which the plaintiff otherwise obtains knowledge of the measure starts the time period.[142] Under this alternative, however, the plaintiff must have obtained sufficient details about the measure to enable him to fully exercise his rights under Article 230; the mere knowledge that a certain measure has been adopted is certainly not sufficient.

6. Adjudication of the Action

a. Review of the merits

Pursuant to Article 230(2), the grounds on which the CFI or ECJ may annul a Community act include "lack of competence, infringement of an essential procedural

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[137]Collignon v. Commission, Case 4/67, 1967 E.C.R. 365, 372; Belfiore v. Commission, Case 108/79, 1980 E.C.R. 1769, ¶ 3; Moussis v. Commission, Case 227/83, 1984 E.C.R. 3133, ¶ 12; Moritz v. Commission, Case T-29/89, 1990 E.C.R. II-787, ¶ 13.

[138]Commission v. AssiDomän Kraft Products and Others, Case C-310/97P, 1999 E.C.R. I-5363, ¶ 57.

[139]Article 102(2) of the CFI's Rules of Procedure, Article 81(2) of the ECJ's Rules of Procedure.

[140]For the CFI in Chapter 10 of the CFI's Rules of Procedure (Articles 101 et seq.); for the ECJ in Chapter 9 of the ECJ's Rules of Procedure (Articles 80 et seq.).

[141]Das Recht der Europäischen Union (26th supplement 2005, Grabitz/Hilf, eds.), nach Art. 83, Article 31, ¶ 7 (commentary by Christoph T. Feddersen).

[142]Germany v. Council, Case C-122/95, 1998 E.C.R. I-973, ¶ 35.

requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." These grounds are analyzed in Part IV of this chapter and will not be addressed here. Indeed, general discussions of the scope of judicial review of Community acts tend to use the Article 230(2) grounds as a baseline against which the review available in other types of review actions may be measured.

b. The remedial authority of the Community courts

In adjudicating an application for annulment, the CFI must, in general, either confirm the legality of the challenged act or strike it down. Due to the fundamental allocation of powers under the EC Treaty, it may not replace the assessment of another European institution with its own judgment. Generally speaking, the CFI is limited to reviewing the legality of the challenged act and may, at most, indicate in the reasoning of its judgment the defects of the challenged act, thus providing a certain insight into what changes would be required to render the challenged act legal under EC law.[143] This limitation on the court's authority is directly analogous to the well-known *Chenery* doctrine in American administrative law, which prohibits a court from upholding a discretionary agency action except on grounds that the agency itself has endorsed.[144] The court lacks authority to exercise discretionary authority that has been entrusted to the executive branch.

One of the more important exceptions to this general principle is laid down in Article 229 of the Treaty. Under that provision,"regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of this Treaty, may give the Court of Justice unlimited jurisdiction with regard to the penalties provided for in such regulations." One such regulation empowers the CFI to exercise unlimited jurisdiction regarding penalties when it reviews Commission decisions imposing fines in cartel cases.[145] Thus, the CFI may, in this area, decrease (or increase) fines without necessarily annulling the Commission's decision.[146] The CFI's case law shows that the Court does not shy away from exercising its unlimited jurisdiction in this area: On several occasions in the past, the CFI has substantially reduced fines imposed on

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[143]Bo Vesterdorf, *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, 1 Competition Pol'y Int'l 3, 20-21 (Autumn 2005) (article by the President of the CFI); Schermers & Waelbroeck, supra note 29, ¶ 827.

[144]SEC v. Chenery Corp., 332 U.S. 194, 197 (1947) ("If [the grounds invoked by the agency] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.") (summarizing the holding of SEC v. Chenery Corp., 318 U.S. 80, 88 (1943)); see Harold J. Krent, *Ancillary Issues Concerning Agency Explanations*, *in* ABA Sect. of Admin. L. & Reg. Prac., A Guide to Judicial and Political Review of Federal Agencies 197, 197-202 (John F. Duffy & Michael Herz eds. 2005); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. ___ (2007).

[145]See Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty art. 31, [2003] OJ L 1/1.

[146]KNP BT v. Commission, Case C- 238/98 P, 2000 E.C.R. I-9641, ¶ 71; Limburgse Vinyl Maatschappij u.a v. Commission, Joined Cases C-238/99 P et al., 2002 E.C.R. I-8375, ¶ 692.

companies in competition cases.[147] However, complete annulment of a cartel decision imposing fines appears to be more the exception than the rule.[148]

According to the CFI, this grant of unlimited jurisdiction to the court provides for an important counterweight to the Commission's combination of "judge and jury" powers in this area.[149] The CFI's powers in this area are modeled on the French administrative law principle of "*pleine jurisdiction*," which also exists in the area of damage actions against the Community,[150] as is discussed in more detail elsewhere in our chapter. Such review presents a strong contrast with American law, which does not authorize the courts to wield this kind of independent review authority over administrative penalties, except in a few isolated contexts.[151] Note, however, that the European courts do not treat Article 229 as providing for an autonomous remedy, i.e., as an alternative to the action for annulment under Article 230. Rather, according to the CFI, the court's authority under Article 229 can only be exercised in actions elsewhere provided for by the Treaty (*i.e.*, mostly the action for annulment under Article 230) and must meet the relevant criteria for those actions.[152]

Article 231(1) addresses the remedial consequences of a well founded action for annulment: the court "shall declare the act concerned to be void." But the next paragraph, Article 231(2), contains an exception: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive." The latter language indicates that, in exceptional circumstances, the court may "leave the act in existence and rule that the Community must adopt the measures necessary to correct the illegality."[153] Although the courts rarely exercise this option, they occasionally make use of it to prevent discontinuities in the system established by a regulation, particularly where individuals had good reason to rely on the

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[147]Ventouris Group Enterprises SA v. Commission, Case T-59/99, 2003 E.C.R. II-5257, ¶ 222; Archer Daniels Midland Co. v. Commission, Case T-224/00, 2003 E.C.R. II-2547, ¶ 380; Tokai Carbon Co. Ltd. u.a. v. Commission, Joined Cases T-236/01 et al., 2004 E.C.R. II-1181, ¶ 458.

[148]Atlantic Container Line u.a. v. Commission, Joined Cases T-191/98 et al., 2003 E.C.R. II-3275, ¶ 1634.

[149]Cimenteries CBR u.a./Commission, Joined Cases T-25/95 et al., Slg. 2000, II-491, ¶¶ 712-723; Schermers & Waelbroeck, supra note 29, ¶ 1173.

[150]Das Recht der Europäischen Union (26th supplement 2005, Grabitz/Hilf, eds.), nach Art. 83, commentary on Article 31, ¶ 20 (commentary by Christoph T. Feddersen).

[151]See 7 U.S.C. § 2023(a)(15) (2000) (judicial review of penalties imposed on groceries for violations of the food stamp program "shall be a trial de novo by the court").

[152]FNICG v. Commission, Case T-252/03 (2004); cf. Schermers & Waelbroeck, supra note 29, ¶ 1176 (stating that the Article 229 action is theoretically independent, but the courts do not treat it that way).

[153]Schermers & Waelbroeck, supra note 29, ¶¶ 1023-24.

existence of the regulation.[154] In recent years, American courts of appeals, particularly the D.C. Circuit, have exercised a similar power, probably more frequently than their European counterparts, although the lawfulness of this device has not been definitively resolved.[155]

c. Legal effect of a successful appeal

When the ECJ or CFI annuls a Community act that has general application, such as a directive or regulation, the judgment itself has general effect. When the CFI annuls a Commission *decision*, however, the annulment only has *inter-partes* effect. That is, the annulment of the decision is legally effective only as regards the parties who successfully challenged the Commission decision. This includes the complainant as well as any parties who have intervened under Article 115 of the CFI's Rules of Procedure.

The Commission's occasional practice of adopting several decisions in a "bundle of decisions"— a practice that is followed most frequently in cartel cases—does not change the *inter-partes* effect of the judgment declaring a Commission decision null and void. Even if the Commission announces its conclusions concerning a specific cartel in a single decision, the facts relating to the Commission's finding of an infringement and the amounts of fines imposed will differ for each company involved. Accordingly, a decision that fines several companies in a given cartel case constitutes in fact a "bundle of individual decisions."[156] This means that if one party successfully challenges a Commission decision that had imposed a fine because of that party's participation in a given cartel, a second party who was fined for participation in the same cartel will not benefit automatically from the decision's annulment, absent an independent appeal.[157] The United States Supreme Court has reached essentially the same conclusion, applying American principles of claim preclusion.[158]

A recent cartel case before the CFI exemplifies a complementary principle. In a decision stemming from the so-called *Vitamins* cartel, the Commission imposed a fine totaling € 855.23 million—so far the highest total fine ever imposed in a Community competition law

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[154]Id.

[155]Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003). The ABA, on the recommendation of its Section of Administrative Law and Regulatory Practice, has endorsed the lawfulness of this practice and recommended guidelines for the courts' use of the device. For the text of the ABA resolution, see id. at 387-88.

[156]AssiDomän Kraft Products u.a. v. Commission, Case T-227/95, 1997 E.C.R. II-1185, ¶¶ 56-57. (The ECJ annulled the judgment for other reasons in Commission v. AssiDomän Kraft Products, Case C-310/97P, 1999 E.C.R. I-5363, but endorsed the CFI's analysis of the "bundle" issue, id. ¶¶ 18, 39.)

[157]See, e.g., Tokai u.a. v. Commission, Joined Cases T-236/01 et al., 2004 E.C.R. II-1181 (where the CFI did not reduce the fine imposed on VAW Aluminium ("VAW") for its participation in the graphite electrodes cartel, due to the lack of an appeal by VAW); see also Krupp Thyssen Stainless GmbH u.a. v. Commission, Case T-45/98, 2001 E.C.R. II-3757, ¶ 298.

[158]Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

proceeding—on certain companies for their participation in the cartel.[159] Among the several companies involved, Aventis (then Rhone-Poulenc) was the first to cooperate with the Commission under its corporate leniency program. It obtained immunity from fines for its participation in the cartel with regard to certain vitamins. Aventis did not appeal the Commission's decision, but BASF, another company involved in the cartel, did appeal. BASF alleged, *inter alia*, that it should have obtained immunity because it had supplied the Commission with the relevant information prior to Aventis's application under the leniency program. Aventis sought to intervene in the appeal pursuant to Article 115, because it feared that a Court judgment granting BASF's application could have adverse implications for its leniency status. However, the CFI rejected Aventis's application for leave to intervene, noting that any annulment of the fine imposed on BASF could not be used to alter the Aventis fine, which was a separate element in the "bundle" and was now settled due to Aventis's failure to appeal.[160] In short, while (as stated above) the annulment of a decision by the Community Courts will not *benefit* a party who is the subject of a separate decision that is not challenged but is alleged to be affected by a common or closely related error, such annulment does not operate to the *detriment* of that party, either.

7. Technicalities of Lodging an Appeal

Although there are no binding rules on the volume or layout of pleadings, the CFI has issued "Practice Directions" containing important technical details for lodging pleadings and other documents. These Practice Directions are applicable, *inter alia*, to actions for annulment.[161] In particular, they contain detailed suggestions as to the length of pleadings and other formalities. The legal nature of the CFI's Practice Directions is not entirely clear, and there are good arguments that pleadings not complying with the Court's recommendations could not be rejected as inadmissible. However, counsel are well-advised to follow these directions in devising their conduct before the CFI. In practice, the CFI typically insists on compliance and requests parties not observing the Practice Directions to re-submit pleadings that take account of the Court's suggestions.

In addition, in a recent case, the CFI demonstrated that it does not accept overly long pleadings and applications: In its *TACA* judgment, the CFI ordered each party to bear its own costs on the ground that the length of the applicants' written pleadings needlessly added to the costs of the Commission.[162] Typically, under the "winner-takes-it-all" rule, the losing party must bear the costs of the proceedings. Here, although the applications for annulment were partially

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[159] *Vitamins*, Case COMP/E-1/37.512, 2003 OJ L6/1.

[160] BASF Aktiengesellschaft v. Commission, Case T-15/02, 2003 E.C.R. II-213, ¶¶ 31-36.

[161] [2002] OJ C87/48.

[162] Atlantic Container Line and Others v. Commission, Joined Cases T-191/98 and T-212/98 to T-214/98, 2003 E.C.R. II-3275, ¶¶ 1645-47.

successful, the CFI concluded that the length of the applications (each application amounted to some 500 pages, and the annexes included approximately 100 files), coupled with the fact that each application contained a significant number of pleas that were mostly unfounded, amounted to an abuse.

B. FAILURE TO ACT

1. Overview

Article 232 of the EC Treaty provides a procedure by which one can challenge a *failure to act* by the Commission or another Community entity. The text of the Article is as follows:

> 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.
>
> 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.
>
> 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.
>
> 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.

In most respects, the Article 232 action can be understood as simply applying the principles of the annulment action to the specific context of official *inaction*. As the Treaty language shows, the basic approach of the Article is straightforward: The applicant must first "call upon" a Community entity to take the desired action. After two months, if the entity has not "defined its position," the applicant has an additional two months in which to seek judicial relief.

By its nature, Article 232 applies only in very limited circumstances, and efforts to rely on it are rarely successful.[163] It does, however, occupy a distinct niche in the EU's overall system of judicial remedies and is worth knowing about. Presumably, the risk that someone might invoke it exerts at least some restraining influence on Community institutions.

American lawyers will notice that Article 232 bears a resemblance to § 706(1) of the Administrative Procedure Act, which directs a reviewing court in the United States to "compel agency action unlawfully withheld or unreasonably delayed." To a considerable extent, the two provisions are applied in similar fashion, as we will explain. On the other hand, we will also identify some points of divergence between Article 232 and its American counterpart. For one thing, the Article 232 action is subject to the same limitations on standing that characterize the annulment action. Just as these limitations serve to shield most regulations from attack by

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[163] L. Neville Brown & Tom Kennedy, The Court of Justice of the European Community 164 (5th ed. 2000) ("With the exception of the Transport case brought by the European Parliament [discussed infra notes 203-206], no action brought under Article 175 EC [now 232] has to date succeeded, and the remedy has proved ineffective for private litigants."). Although this remark appears to be an overstatment, as various citations in this section will show, it is not much of one.

private applicants in annulment actions, private actors usually cannot use Article 232 to challenge the Council's failure to issue a regulation. On the other hand, the Treaty's assurance that an applicant may go to court only two months after "calling upon" the defendant to take the requested action can be seen as more generous than the APA process. This relatively short waiting period enables the applicant to avoid many of the pitfalls that case law doctrines of finality and exhaustion often place in the path of American litigants.

It is important to recognize that Art. 232 addresses the *failure* to act, and as such is distinguished in Community law from a "negative decision" or *refusal* to act.[164] The American APA draws this same distinction, as the Supreme Court recently pointed out,[165] but courts have not traditionally attached much significance to it. In EU practice the distinction does make a difference, at least formally, because it determines which type of review proceeding the applicant may pursue. When an entity makes clear that it intends to take no action, the proper remedy, if any, is an annulment action under Article 230 to quash the negative decision.[166] The Article 232 remedy is no longer available.[167] Similarly, Article 232 applies only to an alleged failure to take *any* action, as opposed to failing to take the *particular* action desired by the applicant.[168] In practice, applicants often seek relief under both Articles 230 and 232 in the same application, leaving it to the Court to decide which of the two actions, if any, is admissible.[169]

2. Admissibility

By and large, the types of failures to act that may be challenged through the Article 232 procedure can be ascertained by asking whether, if a Community institution were to take the corresponding action, it would be subject to an annulment action. Hartley calls this similarity

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[164]T.C. Hartley, The Foundations of European Community Law 386-88 (5th ed. 2003).

[165]Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) (*SUWA*) (pointing out that the APA's definition of "agency action," 5 U.S.C. §§ 551(13), 701(b)(2) (2000), refers to both the "denial" of tangible action and to a "failure to act," and adding that "[a] 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline.").

[166]For discussion of the availability of annulment in the context of refusals to act, see supra ?. As we discuss below, the scope of review in this context is relatively narrow. See infra notes 536-537 and accompanying text.

[167]Pesqueras Echebastar SA v. Commission, Case C-25/91, 1993 E.C.R. I-1719, ¶ 11; GEMA v. Commission, Case 125/78, 1979 E.C.R. 3173, ¶¶ 14-22; Hartley, supra note 164, at 388; Lenaerts et al., supra note 107, ¶ 8-014; Schermers & Waelbroeck, supra note 29, § 963.

[168]*Pesqueras Echebastar*, ¶ 12; Buckl v. Commission, Cases C-15/91 and C-108/91, 1992 E.C.R. I-6061, ¶¶ 16-17; Lenaerts et al., supra note 107, ¶ 8-014 n.711, Schermers & Waelbroeck, supra note 29, §§ 942, 963.

[169]Schermers & Waelbroeck, supra note 29, § 962.

between the two forms of proceedings "the unity principle."[170] Although the principle is not always reliable, it does provide a useful starting point for analysis. The Court of Justice stated—or perhaps overstated—the principle in *Chevalley v. Commission.*[171] There, a draft law that would have regulated rents on agricultural land was headed toward passage in Italy. Discerning a potential conflict between the Italian measure and Community law, an owner of farm land in Italy asked the Commission for guidance as to how his leases should be worded. The Commission refused to honor this request, and the owner sought judicial relief. The Court was unsure whether Chevalley was pursuing his application under Article 173 (now 230) or Article 175 (now 232) of the Treaty. The Court concluded, however, that it did not have to classify the application as one or the other, because "[t]he concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as *both provisions merely prescribe one and the same method of recourse*."[172] In this instance, however, the Court did not actually have to rely on the unity principle. Chevalley was merely asking for legal advice, and the Commission's unwillingness to provide such advice was not subject to annulment. At the same time, his action under Article 232 was foreclosed by the express language of the third paragraph of that provision: A private person may not complain to the Court under Article 232 about the failure of a Community institution to render a "recommendation or opinion."[173]

Regardless of whether the *Chevalley* language may have been incautious, the Court has continued to mention it in various contexts. As the following section explains, the Court has relied on the "unity principle" to determine issues of standing. Moreover, the Court has striven to maintain parity between the actions for annulment and for failure to act in the context of decisions by the Commission not to reopen a previously decided matter. Thus, in *Eridania*,[174] sugar refiners sought to challenge Italy's grant of aid to their competitors. Their annulment action was rejected because they lacked standing to pursue it. They also sought to rely on Article 175 (now 232) to attack the Commission's refusal to revoke its prior decision. The Court refused to accept the latter tactic, because it "would amount to providing them with a method of recourse parallel to that of Article 173 [now 230], which would not be subject to the conditions laid down by the Treaty." One of the "conditions" that the Court probably had in mind was the two-month time limit that the Treaty imposes on the institution of an annulment action. Since an applicant may not circumvent that limit by belatedly asking the Commission to reconsider and then seeking to annul its refusal to do so,[175] Article 232 may also not be used to allow such

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[170]Hartley, supra note 164, at 386.

[171]Case 15/70, 1970 E.C.R. 975.

[172]Id. ¶ 6 (emphasis added).

[173]For another case holding that a private person may not use Article 232 (ex 175) to challenge the Commission's failure to give advice, see Borromeo v. Commission, Case 6/70, 1970 E.C.R. 819, ¶¶ 6-7.

[174]Società "Eridania" Zuccherifici Nazionali v. Commission, Joined Cases 10 and 18/68, 1969 E.C.R. 459.

[175]See supra note 34 and accompanying text.

circumvention.[176] On the other hand, just as an intervening change of circumstances will sometimes induce the Court to relax the rigors of this prohibition in the annulment context,[177] changed circumstances also sometimes lead the Court to allow flexibility in the use of Article 232 to contest a failure to reexamine a previous decision.[178]

The Court does not always adhere to the "unity principle." In particular, an applicant may sometimes bring an Art. 232 proceeding to force an entity to take a preliminary action that, if taken, would *not* be reviewable under Art. 230. For example, the Court of Justice held in the so-called *Comitology* case that the Council's failure to adopt a budget was redressable under Art. 232, although the budget itself, as a nonbinding document, is not vulnerable to an annulment action.[179] (To be sure, this discrepancy exists only in actions brought by governmental entities. Such "privileged" applicants enjoy relatively broad standing rights under Article 232. Private applicants would be unable to obtain relief under either Article 230 or Article 232, as *Chevalley* illustrates.) Another example is a line of cases holding that an applicant may use Article 232 to elicit a letter in which the Commission "defines its position" by explaining its tentative or preliminary inclination not to bring an enforcement proceeding under EC Article 81.[180] As we noted above, such a letter, upon being issued, is not itself reviewable in an annulment action.[181] In order to invoke annulment, the complaining party must await the final decision—although, if the Commission does not proceed to issue the final decision expeditiously, the applicant may also be able to invoke Article 232 to elicit that decision.[182]

3. Standing

Embedded in the text of Article 232 are restrictive standing principles that resemble those applicable to Article 230. The "Member States and other institutions of the Community" are known as "privileged" applicants and may exercise liberal standing rights. In contrast, no action under Article 232 is available to "[a]ny natural or legal person" (a "non-privileged" applicant)

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[176]See Meroni & Son v. High Authority, Joined Cases 21/61 to 26/61, 1962 E.C.R. 73, 78 (making this point about the time limit explicit).

[177]See supra 35-39 and accompanying text.

[178]Asteris v. Commission, Case 97/86, 1988 E.C.R. 2181 (holding that a new regulation rendered an earlier judgment obsolete and remediable through Art. 175 (now 232)); Hartley, supra note 164, at 396-97.

[179]See European Parliament v. Council (*Comitology*), Case 402/87, 1988 E.C.R. 5615, discussed in Hartley, supra note 164, at 391-92.

[180]Asia Motor France SA v. Commission, Case T-28/90, 1992 E.C.R. II-2285, ¶ 42.

[181]See supra note 50 and accompanying text; see also Guérin Automobiles v. Commission, Case 282/95, 1997 E.C.R. I-1503, ¶¶ 39-42; *Asia Motor*, ¶ 30; Lutticke v. Commission, Case 48/65, 1966 E.C.R. 19.

[182]See Hartley, supra note 164, at 394.

unless an entity of the Community has "failed to address [the desired action] *to that person*" (emphasis added). The Court has, however, invoked what Hartley calls the "unity principle" in order to soften this constraint to some degree.[183] That is, it has held that the so-called *Plaumann* formula, which is used in annulment cases,[184] also applies to actions by non-privileged entities that bring suit under Article 232. Thus, an applicant may challenge a failure to act under Article 232 if the desired action would be addressed to someone else but would be of "direct and individual concern" to the applicant, in the sense used in the annulment case law.

For example, in *ENU v. Commission*,[185] a uranium producer in Portugal, ENU, was facing financial difficulties because of weak demand. It prevailed on the Commission to direct the Euratom Supply Agency to exercise its right of option on ENU's uranium production. Impatient with the Commission's slow progress in responding to this request, ENU brought suit under a provision of the Euratom Treaty that was identical to Article 232. The Court of Justice held that the action was admissible. Although the Commission decision sought by ENU would in a literal sense have been "addressed to" the supply agency, ENU would uniquely have benefitted from it, and thus the "direct and individual concern" test was satisfied.

The Court applied the same principle to the EC Treaty in the *T. Port* case.[186] That case arose out a 1993 Council regulation that had imposed import quotas on bananas. A trader in bananas applied for a special import license, exceeding the quota, from German agricultural authorities and then from a German administrative court. The latter, unsure of its authority to grant relief on its own, sought guidance from the ECJ through a preliminary ruling. The Court of Justice concluded that the regulation did require the Commission to adopt transitional measures to benefit individual traders that had made arrangements in reliance on the national policies that the regulation displaced. However, the national courts did not have authority to compel the Commission to take action; only the Community courts had that authority. Nevertheless, the Court continued, this did not leave Port without a remedy. The company could institute an action directly against the Commission under Article 175 (now 232) for failure to act, because, even though the desired order might be issued to Germany rather than Port, the company was at least "directly and individually concerned" by it. Citing *Chevalley*,[187] the Court argued that Port must have the same standing as it would have in an annulment case, because the

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[183]Hartley, supra note 164, at 402; see supra note 170 and accompanying text.

[184]See supra § III.A.4.

[185]Empresa Nacional de Urânio SA v. Commission (*ENU*), Case C-107-91, 1993 E.C.R. I-599, ¶¶ 15-18.

[186]T. Port GmbH & Co. v. Bundestanstalt für Landwirtschaft und Ernährung, Case C-68/95, 1996 E.C.R. I-6065.

[187]See supra notes 171-172 and accompanying text.

"possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act."[188]

Even with that case-law modification, however, the standing constraints on non-privileged applicants are quite significant. Many private individuals and companies would have little hope of showing that the Commission's failure to issue a regulation,[189] or to commence an enforcement proceeding against somebody else,[190] is of "direct and individual concern" to them. For example, in *Lord Bethell v. Commission*,[191] the applicant, a member of the British House of Lords and the European Parliament, urged the Commission to take action against what he alleged was an agreement among European airlines to fix prices for passenger fares. The Commission's reply letter referred to the difficulty of this task and outlined possible future steps it might take. Lord Bethell was dissatisfied with this response and filed suit against the Commission. His own interest in the matter was that he was a user of airlines and chairman of the "Freedom of the Skies Campaign," an organization of airline passengers. The Court found that he lacked standing to proceed either through annulment or through an action for failure to act. Although the Court did not spell out its reasoning, the result was predictable, because Lord Bethell's interests were basically the same as those of many other airline passengers—in contrast to the highly individualized interests asserted by the uranium producer in *ENU* and the bananas trader in *T. Port*. The case epitomizes the stringency of the standing rules in the Community courts, compared with those applied by courts in the United States.

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[188] *T. Port,* ¶ 58-59. A later CFI case closely resembled the hypothetical Article 232 action discussed in *T. Port.* An importer of bananas from Somalia, suffering disruptions because of the civil war in that country, sued the Commission for failing to act on Italy's request for relief from the import quota. The CFI held that the applicant, being the sole importer of Somali bananas into Italy, would have been "directly and individually concerned" by the order it sought. Therefore, the importer had standing, and the Commission had erred in failing to act on the request. Camar Srl v. Commission, Joined Cases T-79/96, T-260/97, and T-117/98, 2000 E.C.R. II-2193, ¶¶ 78-85. The Court of Justice later upheld the CFI's judgment on the merits, without reexamining the importers' standing. Commission v. Camar Srl, Case C-312/00 P, 2002 E.C.R..I-11355, ¶¶ 42-50. (However, the Court did reverse the CFI on a related issue. It held that Camar lacked standing to seek annulment of the Commission's refusal to issue a regulation pertaining to importation of bananas in a subsequent year. Id. ¶¶ 69-83.) See also Gestevisión Telecinco SA v. Commission, Case T-95/96, 1998 E.C.R. II-3407, ¶¶ 57-70 (owner of one of Spain's three commercial television stations had standing to sue Commission for failing to take action against Spain's allegedly unlawful aid to its public television stations).

[189] Kuchlenz-Winter v. Council, Case T-167/95, 1996 E.C.R. II-1607; Fédération Nationale des Producteurs de Vins de Table et Vins de Pays v Commission, Case 60/79, 1979 E.C.R. 2429; Granaria BV v. Council, Case 90/78, 1979 E.C.R. 1081.

[190] Ladbroke Racing Ltd. v. Commission, Case T-32/93, 1994 E.C.R. II-1015, ¶¶ 40-43.

[191] Case 246/81, 1982 E.C.R. 2277.

4. Exhaustion and laches

As noted, Article 232 provides that, before going to court, an applicant must "call upon" the defendant to take the requested action and allow two months for it to respond. The purposes of this exhaustion requirement are described as being to fix a date by which the claim has accrued, and also to give the defendant a chance to fix the problem (only the latter applies if the law imposed a specific deadline). Expiration of the two-month period "provides a legal document upon which further action can be based."[192] Although at first this waiting period seems favorable to the defendant, an American lawyer might well view it as quite advantageous to the applicant, because this relatively short period serves to avoid the conceptual difficulties that American courts face in deciding on a case-by-case basis whether a claim of agency inaction has reached sufficient finality to entitle the plaintiff to bring suit.[193]

The EC Treaty prescribes no time period within which an applicant must "call upon" the relevant entity to take action. In an early case arising under the ECSC Treaty, however, the Court ruled that an applicant must take that step within a reasonable time after the Commission's intention to take no action has become clear. The decision in *Netherlands v. Commission*[194] grew out of France's low-interest loans to its iron and steel industry. Various entities, including the Dutch government, complained to the Commission that these payments violated the ECSC Treaty. The Commission, however, notified these parties that it did not consider the payments to be unlawful. A year and a half later, the Netherlands called upon the Commission to reconsider its stance and, upon being rebuffed, went to court to challenge the Commission's failure to act. The Court held that the Netherlands had lost its right to invoke this judicial remedy because of its eighteen-month delay.[195] The Court reasoned that "requirements of legal certainty and of the continuity of Community action" could be inferred from the short time limits that the Treaty did prescribe in the Articles on annulment and failure to act. Thus, it would be "contradictory" to allow an applicant unlimited time to raise a matter with the Commission in the first instance.[196] As U.S. lawyers will note, the Court's "reasonable time" requirement is directly analogous to the

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[192]Schermers & Waelbroeck, supra note 29, § 936.

[193]For an overview of these difficulties, see William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance, *Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 Admin. L. Rev. 979, 987-90 (2004).

[194]Case 59/70, 1971 E.C.R. 639.

[195]Usually, as noted above, a Community institution's explicit refusal to act is deemed a "negative decision" that may be challenged through annulment proceedings (and must be, within two months of its issuance). See supra notes 164-166 and accompanying text. According to prevailing precedent under the ECSC Treaty, however, negative decisions were not considered reviewable acts. Thus, the Netherlands' earlier failure to proceed through annulment did not, in itself, foreclose the State's subsequent suit against the Commission for failing to act. Hartley, supra note 164, at 398 n.42; Schermers & Waelbroeck, supra note 29, § 964.

[196]*Netherlands*, ¶¶ 15-18.

case-law doctrine of laches, an equitable principle that is clearly recognized, though only occasionally invoked, in American administrative law.[197]

The *Netherlands* decision has been criticized on the ground that the reliance interests it protects are minimal: any judicial relief for failure to act would lead only to the launching of Commission proceedings, and a Commission order stemming from them could be made prospective only. Moreover, the critique goes, the case actually retards "legal certainty," because potential requesters may not know when the "reasonable period" has begun to run, nor how long it will last.[198] Nevertheless, commentators appear to assume that the *Netherland*s holding applies to EC Treaty cases and is still good law.[199] Few if any subsequent cases have actually enforced the "reasonable time" requirement through dismissal, but prudent counsel should undoubtedly remain cognizant of it.

5. Disposition of "Failure to Act" Claims

Even in those cases in which the Community Courts do reach the merits of Article 232 claims, they have displayed considerable restraint in their disposition of those claims. In the first place, Article 232 applies only when a failure to act is *unlawful*.[200] This limitation is suggested by the phrasing of the first paragraph of the article, which says that, to be actionable, the failure must be "in infringement of this Treaty." Despite the literal meaning of this language, commentators have assumed that the Court will apply the same principles to any infringement of law, whether or not the Treaty is involved.[201] The *T. Port* case discussed above seems to provide strong evidence that their assumption is correct. There, the Commission's duty to adopt transitional measures for the benefit of importers of bananas stemmed from a regulation, rather than the Treaty, yet the Court apparently took for granted that this duty could be enforced through an action for failure to act.[202]

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[197]See Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967); Apache Survival Coalition v. United States, 21 F.3d 895, 905-14 (9th Cir. 1994); Indep. Bankers Ass'n v. Heimann, 627 F.2d 466, 468 (D.C. Cir. 1980).

[198]Hartley, supra note 164, at 399-400.

[199]Lenaerts et al., supra note 107, at ¶ 8-012; Schermers & Waelbroeck, supra note 29, § 939.

[200]See Star Fruit Co. SA v. Commission, Case 247/87, 1987 E.C.R. 291 (private individual may not use Article 175 (now 232) to force Commission to bring enforcement proceeding under Article 169 against Member State, because such enforcement is discretionary) (also discussed infra note 253); Lenaerts et al., supra note 107, ¶ 8-004 & n.673.

[201]Schermers & Waelbroeck, supra note 29, § 956; Lenaerts et al., supra note 107, at ¶¶ 8-004, 8-017.

[202]See supra note 188. The *Camar Srl* decision discussed in the same note also rested on the same assumption. See id.

Over and above the baseline requirement of a duty to act, the ECJ has also ruled that these duties must be "sufficiently defined to allow the Court to determine whether their adoption, or the failure to adopt them, is lawful." This ruling came in what is probably the Court's best known "failure to act" judgment, *European Parliament v. Council*,[203] also called the *Transport Policy* case. The controversy grew out of Treaty provisions directing the Council to develop a common policy governing the transportation sector within the Community as well as the rights of non-resident carriers within a member state. The policy was to have been created in the 1960s, but by 1982 the job remained unfinished, and Parliament passed a resolution calling upon the Council to fulfill its assignment. In a reply letter to the Parliament, the Council president wrote that it had taken "significant steps" in the development of such a policy but had not completed the task. Parliament then commenced legal action under Article 175 (now 232). In its response, the Council acknowledged that it had not yet created a coherent transport policy but emphasized the complexity of this assignment and the many hurdles it would need to overcome.

In its judgment, the Court observed that "objective difficulties" were irrelevant, because Article 175 "takes no account of" that consideration.[204] Nevertheless, the Council "has a discretion" because "under the system laid down by the Treaty it is for the Council to determine . . . the aims of and means for implementing a common transport policy," including what transportation matters must be harmonized and in what order. Therefore, the absence of a common transport policy, while regrettable, did not "in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article 175."[205] On the other hand, the Court had previously held that the relevant Treaty articles encompassed the removal of discrimination against non-resident providers of transport services. Therefore, the Council's obligation to adopt measures on freedom to provide services was specific enough that its disregard of that obligation constituted an actionable failure to act. The Court directed the Council to take action on the latter subject within a reasonable period.[206]

The limitations on Article 232 that we have just outlined bear a striking resemblance to those articulated in a 2004 Supreme Court decision construing § 706(1) of the Administrative Procedure Act, the U.S. counterpart to Article 232. The Court held in *Norton v. Southern Utah Wilderness Alliance (SUWA)*[207] that § 706(1) may only be used to require an agency to take an action that is legally required, and, moreover, only if that action is "discrete" or particularized. The Court explained the "discreteness" criterion by arguing that "[i]f courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which

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[203]Case 13/83, 1985 E.C.R. 1513, ¶ 36.

[204]Id. ¶ 48.

[205]Id. ¶¶ 49-53.

[206]Id. ¶¶ 64-69.

[207]542 U.S. 55 (2004).

would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management."[208] The ECJ did not commit itself to any such sweeping generalizations in the *Transport* case, but presumably its disposition of the case rests on similar intuitions. The durability of the *SUWA* limitations may be open to doubt, because prior case law in the lower courts had been somewhat more lenient.[209] For the present, however, the American and European systems appear to be headed toward convergence in dealing with inaction claims.

When a Community Court does find an actionable failure to act, the operative provision of the Treaty becomes Article 233: "the institution . . . whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice." The Court may require action but may not specify what the action must be.[210] American law is similar.[211] The European courts also hesitate to put the defendant under a specific deadline, preferring to direct that action be taken within a reasonable time.[212]

An additional, more technical limitation on the utility of the action for failure to act flows out of the provision in Article 232(2) that makes the action admissible only if "the institution concerned has not defined its position." A corollary of that provision is that a defendant can curtail the litigation by "defining its position" even after the court action has been instituted.[213] However, a letter that merely reports that the defendant is working on the problem does not suffice, as the *Transport Policy* case illustrates.[214] Once the defendant has fulfilled the condition of defining its position, the Article 232 action has exhausted its function, but the applicant can

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[208]Id. at 66.

[209]See Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 562-68 (1985) (discussing prior case law, including some cases that had found delay to constitute an abuse of discretion). See generally Araiza, supra note 193; Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657 (2004).

[210]Hartley, supra note 164, at 404; Schermers & Waelbroeck, supra note 29, § 929. As a practical matter, however, the Commission may have little discretion to exercise if the law that was disregarded is highly specific. Id.

[211]*SUWA*, 542 U.S. at 65 ("when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be"); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 622-23 (1944).

[212]*Transport Policy*, ¶ 69; see also UPS Europe SA v. Commission, Case T-127/98, 1999 E.C.R. II-2633 (declaring unlawful under Art. 232 the Commission's four-year failure to enforce or reject a complaint by UPS that objected to Germany's subsidies of a rival delivery service, but declining to put the Commission under a one-month deadline to rectify this failure).

[213]Buckl v. Commission, Cases C-15/91 and C-108/91, 1992 E.C.R. I-6061, ¶¶ 13-18; Lenaerts et al., supra note 107, at ¶¶ 8-003, 8-014; Schermers & Waelbroeck, supra note 29, §§ 943, 963, 966.

[214]*Transport Policy*, ¶¶ 25-26; see also CEVA Santé Animale SA v. Commission, Joined Cases 344/00 and 345/00, 2003 E.C.R. II-29, ¶¶ 78-81.

still pursue its rights through other forms of action in the same case (if those claims were pleaded in the alternative) or in a separate action. As already discussed, annulment may or may not be available at that point. A damages claim may also survive. For example, in *CEVA Santé Animale SA v. Commission*, the applicants sued the Commission for failing to make a timely decision about whether to permit the marketing of veterinary products containing residues of the hormone progesterone. Eventually, the Commission issued a draft regulation, and the CFI held that this act terminated the applicants' claim under Article 232.[215] Nevertheless, the CFI went on to find that the Commission's delay had unfairly injured the applicants' business and rendered the Community liable for monetary compensation.[216]

American courts have not traditionally engaged very often in the European Courts' parsing as between annulment and failure to act, because the APA judicial review structure has usually been considered as creating a single form of review proceeding. The Act defines "failure to act" as a form of "agency action,"[217] and courts have often managed to elide distinctions between action and inaction with relative ease.[218] In the future, however, the constraints of the *SUWA* case may generate more self-consciousness in this regard, bringing American practice closer to the European model.

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[215] *CEVA*, ¶¶ 82-85.

[216] Id. ¶¶ 94-107.

[217] 5 U.S.C. §§ 551(13), 701(b)(2) (2000).

[218] See NAACP v. Secretary of HUD, 817 F.2d 149, 160-61 (1st. Cir. 1987) (Breyer, J.) (holding that a pattern of inaction could be redressed under APA § 706(1), or, alternatively, "set aside" pursuant to § 706(2)).

C. PRELIMINARY REFERENCE

The preliminary reference procedure comes into play when a court in one of the Member States desires or must obtain authoritative guidance on a question of European Community law. Pursuant to Article 234 of the Treaty, the national court requests a ruling from the Court of Justice. That Court renders its ruling and sends the case back to the national court for disposition in accordance with its response. The process is somewhat similar to the certification practice that federal courts in the United States often use in cases that may require an application of the law of a particular state, such as a case arising under the court's diversity of citizenship jurisdiction.[219] If the state has established a certification procedure, the federal court can petition the state's highest court for a ruling on an unsettled or unclear question of state law. The state court provides a decision, and the federal court can then use that ruling as it resolves any remaining questions in the case. However, the Article 234 procedure has a distinctive rationale and mode of operation, which will be explained in this section.

1. The Significance of Preliminary Reference in the System of Legal Remedies

The European Court of Justice is charged with two essential functions by the EC Treaty, in particular its Article 220. First, the Court "shall ensure that in the . . . *application* of this Treaty the law is observed" (emphasis added). Second, the Court has to provide a uniform *interpretation* of Community law. The preliminary reference procedure is of central importance to both of these functions.

Although the Community produces large amounts of legislation, it essentially does not have its own executive to implement these laws. Except for very limited areas where the Community institutions deal directly with natural or legal persons in the Member States (in competition law, anti-dumping and countervailing duty law, and in the relationship with its civil servants), the Community relies on the Member States and their various administrative branches for the application of its law in important areas such as the fundamental freedoms in the internal market, the common agricultural policy, the customs union and external trade law, consumer protection, environmental protection, labor law and social protection, etc. As a result, decisions about the origin, classification, and valuation of imported goods or about the granting of a residence and work permit to a migrant worker are taken by the respective authorities of the

[219] See generally Fiore v. White, 528 U.S. 23 (1999); Arizonans for Official English v. Arizona, 520 U.S. 43, 77-80 (1997); 17A Wright, Miller & Cooper, Federal Practice and Procedure § 4248 (2d ed. 1988). Another arguable American analog is the procedure by which a district court can certify a case for interlocutory appeal to a court of appeals. 28 U.S.C. § 1292(b) (2000). This analogy is weaker, however, because in such a case the appellate court obtains jurisdiction over the entire case and is not limited to answering a prescribed question or questions. Even more analogous, at least in concept, is a provision that allows federal courts of appeals to certify questions of law to the Supreme Court. Id. § 1254(2) (2000). However, this section is obsolete. The Supreme Court disfavors it and has rendered merits decisions under it on only two occasions in the past forty years. 17 Wright, Miller & Cooper, supra, § 4038.

respective Member States who, in turn, have to make these decisions in conformity with Community law.

As has been explained in the introduction to the system of legal remedies under EU law, the European system does not follow the American model for judicial oversight of administrative decisions and other implementing acts of the Member States. Even in cases where Member State authorities are informed decisively or exclusively by Community law when dealing with a given case, legal remedies for the parties concerned are not provided by Community or federal courts. On the one hand, the constitutional order established under the various Community treaties does not contemplate the creation of a network of European courts across the Member States to provide accessible remedies for cases where European law has to be applied. On the other hand, the European Court of Justice in Luxembourg would be too small to handle all of these cases from all over the Community and would also be too far away for many interested parties, in particular where the monetary value of a claim may be small. Instead of providing separate European courts for European law, the treaties enlist the national courts to provide judicial oversight in European law.

Requiring national courts and judges to provide remedies in disputes over European law has several advantages but also some disadvantages. First, these courts are in existence, located all over the Community and, therefore, easily accessible even in remote areas. Second, the national courts and their rules of procedure are well known to the lawyers and other interested parties, which again promotes accessibility and efficiency. Most important, however, is the fact that the national courts also have the necessary means to enforce their judgments and the legitimacy to make such enforcement acceptable. Besides the fact that the European Court of Justice would be unsuitable and unable to handle all cases where European law is at issue, it would also lack the enforcement powers. In that respect it is just another international court, and recognition and enforcement of its judgments in the Member States would be a matter of policy and not of law. Unfortunately, it is one of the defining features of international law that it is applied and respected only most of the time by most of the states and it may safely be assumed that the Member States of the EU would at least sometimes ignore judgments of the European Court of Justice if they are politically or economically costly. Indeed, this happens to an extent with the rulings of the Court in cases under Article 226. By contrast, the national courts do not have this kind of an enforcement problem, since no country can afford to ignore the judgments of its own courts unless it wants to renounce the rule of law.

The disadvantage of having the national judges and courts rule on questions of European law is the risk to quality and uniformity of interpretation and application. First, European law as a new legal order is taught more in some law schools than in others and is understood better by some judges and attorneys than by others. Second, different national legal traditions, different political and economic environments, and different cultural and linguistic frameworks are bound to result in different approaches to the same legal questions in different parts of the Community. Uneven quality and straightforward differences in interpretation of the law, however, would cause confusion about the true content of European law, distort competition among economic operators in different Member States, discriminate between natural and legal persons depending

on the national courts they have to deal with, and generally jeopardize the legitimacy of European law and the European integration process as a whole.

National legal systems deal with the problem of securing high quality and consistent interpretation and application of the law via appeals procedures, where the final word on an issue is spoken with authority over all courts by the one highest court in the country. The European treaties could have chosen a similar model, investing the national courts of first instance with the application of European law, to be overseen by the national courts of appeal and, in a final and third instance, by the European Court of Justice. However, this would in each and every case require no less than two appeals—hence many years of litigation—before a case could get to the European Court. Moreover, it would create the constant need to determine whether a case should be heard by the highest national courts because its focus is in national law or by the European Court because of a focus on European law. Finally, it would not avoid the problem of enforcement of the international judgments of the European Court. Therefore, Article 234 goes a different way altogether. On the one hand, it affords a procedure whereby the national court of first instance can submit a case to the European Court. This can avoid years of delay and it also ensures that even cases with small monetary value for which appeals in the national system are not available can reach the European Court. On the other hand, the procedure in the European Court is an interim procedure and the final judgment is rendered by the national court, with all the legitimacy and enforcement power that comes with it.

Since "any court or tribunal of a Member State" can submit any case before it to the European Court, as long as it raises some question of the interpretation or validity of European law, the European Court, under Article 234, can be called upon to act as a constitutional court to interpret elements of the constitutional structure of the Community, or as an administrative court when it reviews administrative acts of the Community or of the Member States that implement Community law, or as a civil or commercial court for example in matters of consumer protection or corporate law, or as a labor- or social security court, a tax court, and even a criminal court, as has been demonstrated time and again in case-law. Unsurprisingly, the procedures under Article 234 not only account for almost half of all cases being handled by the European Court of Justice. They are also responsible for the most important decisions, since Article 234 cases clearly lead the way when it comes to the judgments that have had the greatest impact on the development of the European legal order.

2. The Three-Stage Procedure

Every procedure under Article 234 begins before a court or tribunal of a Member State. The dispute before the national court can be a vertical dispute in which a natural or legal person is suing administrative authorities (customs, tax, immigration, licensing or any other authorities)

of the Member State[220] or where the Member State is suing an individual person or entity, as for example in a criminal case.[221] However, the dispute before the national court can just as well be a horizontal dispute between two private parties, for example the parties to a sales transaction,[222] or an employer and an employee.[223] Typically, the case concerns a variety of issues under national law as well as one or more questions of European law. The issues that come under European law may be raised as early as the initial brief of the applicant or as late as is permissible for any new legal arguments to be raised by either side. A frequent scenario in which European law issues may surface in cases before national courts concerns the question whether a specific national law that was adopted to implement a European directive, or that otherwise applies in an area (also) regulated by European law, is an adequate reflection of the obligations placed upon the Member State by the European directive and/or is generally compatible with the requirements of European law. Typically, one side to the dispute will claim that its legal position should be assessed differently because of certain rules of European law that are either directly applicable or have some other kind of impact on the application or interpretation of national law.

In such a situation the national judge has essentially three possibilities. 1) Ideally, the national judge will feel comfortable with the rules of European law and will decide the case correctly in light of the applicable mix of national and European law. Ideally, this should end the dispute and justice will have been done. If one of the parties is not satisfied with the outcome, she may bring an appeal claiming, in particular, that European law was incorrectly applied. This would then raise the same three possibilities again before the national court of appeals. 2) If the national judge is not sure how European law has to be understood and in which way it may affect the rights and obligations of the parties to the dispute, she may refer the relevant questions to Luxembourg for a preliminary ruling pursuant to Article 234. 3) Finally, the national judge may go ahead and decide the case herself in spite of not being sure how European law should be interpreted and whether or not it may require a certain outcome of the case. The third option may be a reflection of reluctance on behalf of the national judge to cooperate with the European Court, for example for fear of appearing clumsy or because she wants a particular outcome of the national case anyway, or it may reflect a need to decide the case rapidly[224] because justice

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[220]For an example where the national background was a lawsuit of a company against administrative authorities that prohibited the marketing of a certain product see Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), Case 120/78, 1979 E.C.R. 649.

[221]For an example where the national background was a criminal proceeding against an individual, in this case the director of a company that had marketed products which did not conform to certain national standards, see Ratti, Case 148/78, 1979 E.C.R. 1629.

[222]An example can be found in the national background that led to the judgment of the European Court in Faccini Dori, Case C-91/92, 1994 E.C.R. I-3325.

[223]A classic employment law situation—a claim about gender discrimination—was the national background that led to the judgment of the European Court in Defrenne (II), Case 43/75, 1976 E.C.R. 455).

[224]Two examples from Britain can illustrate the point. In the first case, Judge Brooke of the High Court, Queen´s Bench Division, on 27 July 1994 had to decide the case Regina v. Ministry of Agriculture *ex parte* Portman Agrochemicals. At issue was the approval of a new plant pesticide. The normal approval procedure before the

delayed by two years—the time it takes on average to get an answer to preliminary references—would be justice denied.[225]

If the national judge decides to make a preliminary reference to the European Court, she adopts an interim decision accordingly and suspends the national proceedings until the answer from Luxembourg is obtained. Once the case is received by the European Court, the latter opens a formal procedure much like the one applied in direct cases such as the procedure under Article 230. The President of the Court designates the judge rapporteur, the First Advocate General appoints the advocate general to deal with the case, the parties are invited to submit their observations in a written procedure, the judge rapporteur prepares a report for the oral hearing, the parties get the opportunity to outline their key arguments in the oral hearing, the advocate general delivers his or her opinion, and eventually the judges deliberate in camera and render their conclusions in the form of a judgment.[226]

The judgment of the European Court is sent back to the national court who had made the reference, where the case is now resumed. Usually the parties will get another opportunity to comment on the outcome of the preliminary reference to Luxembourg. Once all relevant arguments have been exchanged, the national judge adopts the final decision in the case, including the decision on costs.

During the first and the third stage of the overall procedure, i.e. the two phases that take place in the national court, the case must be handled as any case before that court. In general, the procedural rules have to be applied without distinction and indeed the national judge is

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Pesticides Safety Directorate takes about 22 months. It is, however, partly determined by Community law. Prior to the beginning of the approval procedure, a dispute arose about the confidential treatment of certain information contained in the application and the interpretation of Directive 91/414 in this respect. Eventually, the applicant decided to forego access to and use of certain data regarding the safety of the pesticide rather than have the question referred to Luxembourg. The Judge made the following statement in the ruling: "Although I do not have complete confidence that I can resolve the issue myself, I am very much influenced by the fact that both [the Ministry] and the applicants wish me to make a decision and to avoid the time and cost involved in obtaining a ruling from Luxembourg. . . . [If] I was to rule . . . the application could be accepted and the 22 months for processing it could start to run. If, on the other hand, I referred an issue to the European Court of Justice, *the whole matter would be indefinitely delayed*." (CMLRep 1994, p. 18, at p. 25, emphasis added). In the second case, Judge Cazelet declared, "[we] are under pressure from the judges of the European Court to decide [matters of the VAT Directive 77/388 ourselves] because they are so overburdened with work." (See Case R. v. Ryan, CMLRep 1994, p. 399.)

[225]Reimer Voss, former president of the finance court in Hamburg, Germany, comments as follows: "[There] is the fact that most courts do not refer even if it is expedient (courts of first instance) or compulsory (courts of last instance) to do so. . . . One reason for this is ignorance of Community law. . . . The other reason is a conscious fear of too much delay by referring to the Court of Justice. This is mainly the case in criminal proceedings and in proceedings before the Employment Tribunals. *Many German judges are put off by the fact that an interlocutory proceeding such as the Article 177 preliminary proceeding extends the length of the proceeding by approximately two years* . . ."; *Voss,* The National Perception of the Court of First Instance and the European Court of Justice, CMLRev 1993, p. 1119-1134 (at p. 1124); emphasis added.

[226]At times, however, the Court may dispense with the oral hearing, the advocate general's opinion, or both.

prohibited from treating a matter differently just because it raises questions of European law.[227] More importantly, the final judgment of the national court has the same effects as any judgment of that court, in particular when it comes to the possibilities of enforcement and/or appeals.

3. "Any Court or Tribunal of a Member State"

According to Article 234, "any court or tribunal of a Member State" is entitled to submit questions concerning the validity and/or interpretation of Community law to the European Court of Justice. As with other terms in European law, the notion of "court or tribunal" is autonomous from national definitions and interpreted by the European Court for and against all Member States. Over the years, the Court has had several opportunities to establish objective criteria that look at the function and position rather than the name of a referring body. Specifically, the Court has established that national dispute settlement bodies have the right to make a preliminary reference if they fulfill the following cumulative criteria:[228] 1) The institution has to be independent from the parties to the dispute; this excludes, for example, the higher administrative authority that reviews decisions of lower authorities in a mandatory procedure under German law (*Widerspruchsverfahren*). 2) The judge or judges have to be independent in the sense that they cannot be removed from office or be otherwise penalized as long as they fulfill their obligations in a lawful manner. 3) The court or tribunal acts on the basis of a legislative mandate rather than party disposition. This excludes, in particular, private arbitration tribunals.[229] 4) The institution is permanent and not ad hoc. 5) The procedural rules are mandatory and not subject to party disposition. 6) The court or tribunal decides on the basis of rules of law and not ex aequo et bono. 7) The decisions of the court or tribunal are binding and enforceable unless appealed to a higher court or tribunal.

On the basis of these criteria, the Court has accepted a reference from the "Appeals Committee for General Medicine," which is established by the professional organisation of Dutch doctors, because its procedure was *mandatory* for a Dutch national whose application to be registered as a general practitioner in the Netherlands was rejected because he had a diploma from Belgium.[230] It also accepted a reference from a federal committee in Germany that handles challenges to public procurement decisions, because it was sufficiently independent from the

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[227]See, for example, the judgment of the European Court in Peterbroeck, Case C-312/93, 1995 E.C.R. I-4599, ¶ 12. Exceptionally, national procedural rules may have to be set aside if they would create an undue burden for the exercise of rights granted by European law or would render such exercise practically impossible (see Factortame (I), Case C-213/89, 1990 E.C.R. I-2433) or if they would de facto deny the right of the national court to refer questions under Article 234 (see Rheinmühlen, Case 166/73, 1974 E.C.R. 33.

[228]Landmark judgments include the decisions in Vaassen-Göbbels, Case 61/65, 1966 E.C.R. 584; Corbiau, Case C-24/92, 1993 E.C.R. I-1277; Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, Case C-393/92 , 1994 E.C.R. I-1477; and Garofalo, Case C-69 to C-79/96, 1997 E.C.R. I-5603, as well as the cases cited infra at notes 229-233.

[229]See, in particular, Nordsee, Case 102/81, 1982 E.C.R. 1095.

[230]Broekmeulen, Case 246/80, 1981 E.C.R. 2311.

decision-making authorities.[231] By contrast, the Court did not accept a reference from a court that acted as an administrative authority in a procedure regarding the listing of a corporation in the company register.[232] Nor did the Court accept a reference from an internal dispute settlement body of a bar association.[233] Finally, the Court would not accept a reference from a court or tribunal of a non-member state, although candidate countries, in particular, are often obliged to apply Community law already in the pre-accession phase, and parties to disputes arising out of such application would sometimes have a legitimate interest in seeking to clarify certain provisions in their association agreements and/or to challenge the validity of certain Commission decisions.

In the overwhelming majority of cases, the qualification of a dispute settlement body of a Member State as a "court or tribunal" within the meaning of Article 234 will be beyond reasonable doubt. However, as the abovementioned examples illustrate, there may be borderline cases that merit an attempt at the Court almost on a trial-and-error basis.

4. Discretion and Obligation to Make a Preliminary Reference

Article 234 distinguishes between courts or tribunals that "may" refer a case (subpara. 2) and those that "shall bring [their] matter before the Court of Justice" (subpara. 3). With the exception of bodies that are not really courts or tribunals of a Member State, any dispute settlement body is always entitled to refer questions to the European Court. This includes even bodies that have already submitted questions in the very same case to the Court, in particular if they have difficulties understanding the Court's answer or if new facts or legal arguments have appeared that need to be taken into account. The line is drawn, however, in cases where a national court is merely not satisfied with a judgment received from the European Court and sends it back for reconsideration; the Court does not provide an appeal against its own judgments.

In practice, a number of significant questions have arisen.[234] First, there is the question of how to interpret the phrase "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law." (Under Article 234(3), entities described by that phrase have an obligation to refer questions to the European Court.) On the one hand, it has been argued that this obligation should only apply to the highest court in any national legal

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[231] Dorsch Consult, Case C-54/96, 1997 E.C.R. I-4961.

[232] Job Centre, Case C-111/94, 1995 E.C.R. I-3361.

[233] Borker, Case 138/80, 1980 E.C.R. 1975.

[234] The questions discussed in this section have arisen in the context of rights of action that Member States themselves have chosen to authorize. The European Court has not yet held that a Member State *must* create a freestanding right to declaratory relief for the purpose of enabling persons to challenge official actions that allegedly violate their rights under Community law. See supra note 132.

system, i.e. the national supreme court against whose decisions there is never a legal remedy (the so-called abstract or institutional approach). However, such an approach has not only never been endorsed by the European Court; it was actually and explicitly rejected. Indeed, it would be contrary to one of the essential goals of the preliminary reference procedure, namely to ensure the correct application of Community law not only in the abstract but for the benefit of each and every individual. Since many of the Member States have restrictions of monetary value and of other kinds regarding the admissibility of first and second appeals, many types of cases never get to their supreme courts and would never become subject to a mandatory reference which alone ensures individual justice in a situation where lower courts may be reluctant to refer.[235] The only palatable approach, therefore, has been the so-called concrete or functional approach, which looks at each case individually to determine whether or not national law offers a regular appeal or similar remedy.

On the other hand, some courts, although they clearly were going to adopt a decision against which there was going to be no remedy under national law, have argued that they were not obliged to make a reference because they did not have a *question* about European law, i.e. that they were capable of rendering a correct interpretation of European law without the help of the European Court. For the most part, this is exactly what European law is aiming at, since the European Court would be hopelessly overburdened if it had to answer each and every question of European law that arises before a national court. However, in some cases, the so-called acte clair doctrine has been abused by national courts that were unwilling to refer a specific issue to the European Court because they anticipated an answer they did not agree with. In particular, the Fifth Senate of the German Federal Finance Court in Munich (*Bundesfinanzhof*), had a period in which it was unwilling to accept the evolving doctrine of vertical direct effect of directives. The problem arose at a time when the European Court had already declared that, in a case between an individual and a Member State authority, the latter could not rely on the Member State's failure to implement a directive on time, completely and correctly; therefore, the directive could itself produce rights to be enforced by the courts in favor of the individual and against the national authorities. The German court declared that it was so clear that directives could never produce any rights directly for and against individuals that there was not even a question worthy of reference to the European Court. This stubborn refusal of cooperation was eventually crushed by the German Constitutional Court (*Bundesverfassungsgericht*), which held that a refusal to make a reference required under Article 234 was a violation of the fundamental right to have one's case heard by the judges determined by law which, in turn, is protected by the German

[235] In an often overlooked passage in its landmark judgment in Costa v ENEL, Case 6/64, 1964 E.C.R. 585, the Court stated as follows: "By the terms of this Article [234], however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them." The "present case" was a submission from a justice of the peace, the very lowliest of all Italian "courts." In light of the fact that the amount in dispute had been less than $10, there was no appeal, and therefore no legal remedy against the decision to be adopted by the Guidice Conciliatore.

Constitution.[236] To the extent that other Member States do not provide a constitutional remedy for such cases, a potential remedy may also be found in a complaint to the European Court of Human Rights for a violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. If the refusal to cooperate becomes persistent and systemic, the European Commission could and should take the respective Member State to the European Court under Article 226.

As for the Court itself, it dealt with the acte clair doctrine in a very restrictive judgment of 1982.[237] It concluded that the circumstances in which a court of last instance could refrain from a reference to Luxembourg, in spite of the fact that a genuine question of interpretation or validity of European law was before it, were limited to the following: 1) where a "materially identical question" has already been subject to a preliminary ruling in a similar case; or 2) where numerous previous decisions of the Court of Justice have clarified the subject matter in question, i.e., there is a body of case-law that answers the point in question although none of the earlier cases presented exactly the same question; or finally 3) where the answer to the question is "so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved." Since the latter was the contention, for example, of the German Federal Finance Court, the European Court added a few criteria for the determination whether or not an answer was really obvious:

> . . . Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.
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> However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.
>
> To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.
>
> It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.
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> Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.[238]

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[236]See Article 101 (1) (ii) of the Federal Constitution (Grundgesetz) and the decisions of the Federal Constitutional Court, Solange II, BVerfGE 73, p. 339 (at p. 366) and of 16 December 1993, 2 BvR 1725/88, published in Neue Juristische Wochenschrift 1994, p. 2017.

[237]See CILFIT v. Ministry of Health, Case 283/81, 1982 E.C.R. 3415.

[238]Id. ¶¶ 16-20.

Next, there is the question whether a court or tribunal that clearly does not fall within the third subparagraph of Article 234 may exceptionally be required to make a reference to the European Court. This conclusion has been reached in two kinds of scenarios. First, if a national court has doubts about the validity of a provision of Community law and, therefore, does not want to apply this provision, it must make a reference to the European Court.[239] In the absence of a declaration of invalidity by the European Court, each and every national court is bound to apply each and every provision of Community law. Second, national courts, in proceedings for injunctive or preliminary relief, are entitled to suspend the application of a provision of Community law, including an administrative decision of an EU institution, only if they have serious doubts about its validity *and* make a reference to that end to the European Court.[240]

Finally, national judges who are entitled but not obliged to make a reference to the European Court often ask themselves how they should use their discretion and at what point in the national proceedings, if at all, they should refer questions to Luxembourg. In a rather famous judgment of the English Court of Appeal of 1974, Lord Denning, then Master of the Rolls, developed the following "Guidelines" as to the right and duty of making a reference to the European Court of Justice.[241]

> *(1) Guidelines as to whether a decision [by the ECJ] is necessary:*
>
> *(i) The point must be conclusive.*
>
> The English court has to consider whether "a decision on the question is *necessary* to enable it to give *judgment*". That means judgment in the very case which is before the court. The judge must have got to the stage when he says to himself: "This clause of the Treaty is capable of two or more meanings. If it means *this*, I give judgment for the plaintiff. If it means *that*, I give judgment for the defendant." In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgment. . . .
>
> *(ii) Previous ruling.*
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> In some cases, however, it may be found that the same point—or substantially the same point—has already been decided by the European Court in a previous case. In that event it is not necessary for the English court to decide it. It can follow the previous decision without troubling the European Court. But . . . the European Court is not bound by its previous decisions. So if the English court thinks that a previous decision of the European Court may have been wrong—or if there are new factors which ought to be brought to the notice of the European Court—the English court may consider it necessary to submit the point to the European Court. In that event, the European Court will consider the case again. . . .
>
> *(iii) Acte claire.*
>
> In other cases the English court may consider the point reasonably clear and free from doubt. In that event there is no need to interpret the Treaty but only to apply it: and that is the task of the English court. . . .

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[239]See the landmark judgment in Foto Frost, Case 314/85, 1987 E.C.R. 4199.

[240]See Zuckerfabrik Süderdithmarschen, Joined Cases C-143/88 and C-92/89, 1991 E.C.R. I-415.

[241]Excerpts from the case Bulmer v Bollinger [1974] 2 CMLR 91; the present quote is taken from Frank Emmert, European Union Law—Cases, The Hague 2000, p. 158.

(iv) Decide the facts first.
It is to be noted that the word is "necessary". This is much stronger than "desirable" or "convenient". . . . As a general rule you cannot tell whether it is necessary to decide a point until all the facts are ascertained. So in general it is best to decide the facts first.

(2) Guidelines as to the exercise of discretion.
Assuming that the condition about "necessary" is fulfilled, there remains the matter of discretion. . . .

(i) The time to get a ruling.
The length of time which may elapse before a ruling can be obtained from the European Court. This may take months and months. . . . Meanwhile, the whole action in the English court is stayed until the ruling is obtained. This may be very unfortunate, especially in a case where . . . there are . . . reasons for expedition. . . .

(ii) Do not overload the Court.
The importance of not overloading the European Court by references to it. If it were overloaded, it could not get through its work. . . .

(iii) Formulate the question clearly.
. . . It must be a question of *interpretation only* of the Treaty. It must not be mixed up with the facts. It is the task of the national courts to find the facts and apply the Treaty. The European Court must not take that task on themselves. In fairness to them, it is desirable to find the facts and state them clearly before referring the question. . . .

(iv) Difficulty and importance.
. . . Unless the point is really difficult and important, it would seem better for the English judge to decide it himself. For in so doing, much delay and expense will be saved. . . .

(vi) Wishes of the parties.
. . . If both parties want the point referred . . . the English court should have regard to their wishes, but it should not give them undue weight. The English court should hesitate before making a reference against the wishes of one of the parties, seeing the expense and delay which it involves.

5. Validity and Interpretation of Community Law

Article 234 makes a distinction between primary Community law, i.e. the law adopted by the Member States in the form of the treaties and protocols annexed to them, and secondary Community law in the form of the acts of the institutions of the Community, in particular the regulations, directives and decisions adopted by the Council, Parliament, and Commission. While the Court can interpret and also invalidate acts of the institutions, it does not have the power to invalidate primary Community law.

6. Effects of Judgments Under Article 234

The primary effect of the judgment by the European Court of Justice in an Article 234 proceeding is its binding effect in the continuing case before the national court. The ruling by the European Court is purposely called a "judgment" to distinguish it from an amicus brief or a non-binding opinion, like that of the Advocate General. The binding effect is not only upon the court

that made the reference but also for a court of appeals that may get to deal with the same case at a later stage. The only way for the national courts to avoid the application of the law as given by the European Court is to re-submit the case with new facts or legal arguments or to determine that, after all, the questions of European law do not determine the outcome of the case.

Since the European Court does not decide the case at issue but renders a decision on the validity and/or interpretation of Community law in an abstract fashion, albeit with reference to a certain type of factual situation, its judgments have an impact beyond the parties of the original dispute. For example, if the question before the Court was about the direct effect of a certain provision in the Treaty, an affirmative decision has effects erga omnes, i.e. for and against everyone, and not only inter partes. Similarly, if the Court has given a certain broad or narrow reading to a term found in a Community regulation or directive, that interpretation is at the very least indicative of the way the term has to be understood in general. Parties in other disputes can rely on decisions given by the European Court in prior Article 234 proceedings in a similar way as precedents are binding on courts in the Anglo-American legal systems, i.e. a decision will normally stand unless it can be persuasively argued that a difference in the facts requires a difference in the law, or that the law has changed, or that times have changed, or that the original decision was wrong in the first place.

Finally, the decisions of the European Court in Article 234 proceedings are not only binding erga omnes, they are also providing an interpretation of the law that applies retroactively to the point in time when the law was first enacted (ex nunc).[242] Only in exceptional cases may this retroactive effect be limited by the Court itself. The Court may take that step if the (change of) interpretation would cause too much conflict with the principle of legal certainty, and especially if it would impose very large financial burdens.[243]

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[242]See, e.g., Blaizot, Case 24/86, 1988 E.C.R. 379, ¶ 27; Salumi, Joined Cases 66, 127 and 128/79, 1980 E.C.R. 1237, ¶¶ 9-12.

[243]For an example of where the Court has limited the retroactive effects, see Barber, Case C-262/88, 1990 E.C.R. I-1889, ¶¶ 41-45. Via this judgment, the Court extended the principle of equal pay for equal work to private occupational retirement schemes. Britain had argued that retroactive application of the principle would cause "enormous disruption and expense to many occupational schemes which have been funded on the basis of legislation providing for different pensionable ages for men and women." The Court agreed to limit the effects of the judgment to pending cases and future insurance periods.

D. ENFORCEMENT PROCEEDINGS AGAINST MEMBER STATES

1. The Function of the Article 226 Procedure in the EU System of Legal Remedies

According to Article 211, "the Commission shall ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied. . . ." On this basis, the Commission has been called "the Guardian of the Treaties."[244] The procedure provided by Article 226 is the most important instrument by which the Commission fulfils this task. It enables the Commission to bring a Member State before the European Court of Justice for failure to fulfil its obligations towards the Community, the other Member States, and/or any natural or legal person in the internal market.

The Article 226 process will not look particularly familiar to American eyes. For one thing, the United States legal system has no established practice of relying on direct mandates, enforceable in federal court, to instruct the states on how to administer federal programs. Such "commandeering" of state governments for federal ends would elicit significant constitutional objections.[245] When it wants to induce the states to participate in implementing a federal initiative, Congress will normally rely on cooperative programs or on incentives, such as exercises of the spending power, rather than judicial compulsion. Congress does, of course, require states to comply with federal regulatory policies themselves, in areas ranging from voting rights to environmental protection, and courts regularly enforce these obligations. These enforcement actions, which treat states as regulated parties, are typically brought in the name of the United States or one of its agencies.[246] Yet even these judicial actions are usually analyzed in the context of the particular statutes involved, and there is no government-wide framework law that provides a structure for them. Consequently, American lawyers who seek to understand enforcement actions against Member States in the EU may find few good analogies drawn from their own experience.

Although Article 226 speaks only of the Member States' failure "to fulfil an obligation *under this Treaty*" (emphasis added), Article 211 indicates that the tasks and powers of the Commission also include the enforcement of the so-called secondary Community law, i.e. the

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[244]It is difficult - if not impossible - to establish where or by whom this expression was first introduced. Today, however, it is very widespread. See, e.g., *http://en.wikipedia.org/wiki/European_Commission*.

[245]Printz v. United States, 521 U.S. 898 (1997) (no commandeering of state executive officers); New York v. United States, 505 U.S. 144 (1992) (no commandeering of state legislative processes). For discussion of the contrast between the EU and U.S. approaches in this regard, see, e.g., *Printz*, 521 U.S. at 976-78 (Breyer, J., dissenting); Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering,* in The Federal Vision: Legitimacy and Levels of Governance in the US and the EU 213 (Kalypso Nicolaidis & Robert Howse eds. 2001), available at http://ssrn.com/abstract=254147.

[246]See Reno v. Condon, 528 U.S. 141 (2000) (distinguishing the "commandeering" cases where the state was better seen as a regulated party). The states' sovereign immunity is not an obstacle to compliance suits brought by the United States. Alden v. Maine, 527 U.S. 706, 755-56 (1999).

binding measures adopted by the institutions pursuant to the Treaty.[247] Thus, the Commission supervises the application by the Member States of their obligations under

- the European Community Treaty (as amended), and the protocols annexed to it;
- all regulations adopted by the institutions on the basis of powers provided in the ECT;
- all directives adopted by the institutions on the basis of powers provided in the ECT;
- all decisions adopted by the institutions on the basis of powers provided in the ECT;
- international agreements entered into by the EC, to the extent that they may contain obligations to be respected by the Member States;
- judgments of the European Court of Justice, including the Court of First Instance;
- unwritten general principles of Community law, to the extent that they are binding on the Member States, such as the obligation to respect certain human rights and fundamental freedoms, as well as procedural guarantees, in the application of Community law.

By contrast, Article 226 cannot be used for the enforcement of provisions contained in the Treaty on European Union—in particular, in the framework of the Common Foreign and Security Policy and the chapter on Police and Judicial Cooperation in Criminal Matters.[248]

A Member State's failure to fulfil obligations under EC law can take many forms. The most common form is the failure to implement a directive by the deadline stipulated in that directive. Member States have to notify their implementing measures. Hence, the Commission can easily track whether a Member State has remained entirely inactive or has made any obvious mistakes in its implementation of a directive. By contrast, less obvious mistakes may not be detectable by a mere comparison between the European directive and the national implementing measure(s). Such mistakes may become apparent at a later stage, in particular when the new national rules are applied in individual cases.

The Commission and the Court of Justice have consistently held that the duty of the Member States to fulfil their obligations under EC law is not only upon the national legislatures, who are normally called upon to adopt the necessary implementing legislation. This duty is shared by the other branches of the Member States' governments, i.e., the national administrations and the national courts. In addition to non-implementation or incomplete implementation, therefore, another common problem is the erroneous implementation of directives, either in the form of incorrect legislative language, in the form of incompatible application in practice, or in the form of insufficient enforcement.

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[247]This broad reading of Article 226 has long been universally accepted. See, for example, Lenaerts et al., supra note 107, ¶ 5-004 to -005. For what may have been the first forceful presentation, see J. Mertens de Wilmars & I.M. Verougstraete, *Proceedings against Member States for Failure to Fulfil their Obligations*, 7 Common Mkt. L. Rev. 385 (1970).

[248]See TEU Art. 46.

Administrative action or inaction in breach of requirements contained in the treaties themselves, or in regulations or other binding rules of Community law, and even the failure to prevent breaches of EC law by third parties,[249] make up the remaining forms of failure of a Member State to fulfil an obligation under EC law. Again, these may be difficult to detect, in particular if they do not reflect a widespread or general practice but rather a failure in just a few individual cases. However, as we shall see, the Commission has developed several instruments to facilitate the detection of these kinds of problems, including an individual complaints procedure. As a result, it would seem fair to say that the EC system, in spite of its unique supranational character, generally meets the standards of a system governed by the rule of law—a system in which all participants, including the Member States themselves, can rely on their various rights and have to observe their various obligations, and a system in which breaches of the law can usually be brought to an end and losses be compensated.

2. The Three Stages of Article 226 Procedure and Article 228 Enforcement

a. Initiation of proceedings - the informal phase

The procedure under Article 226 can be initiated only by the Commission. That body becomes active if it has reason to believe that a Member State may have failed to fulfil an obligation under EC law. As explained above, a common way in which suspicion may arise is through the failure of a Member State to report the timely and complete implementation of a directive into national law. However, the Commission is not restricted with regard to sources of information on Member State misconduct, and it does not need to demonstrate any kind of self-interest or Community interest in the issue.[250] Information may be obtained from national media, for example in cases in which a Member State grants aid to an undertaking. The Commission also monitors all preliminary references submitted by national courts to the European Court, to see whether they may be based on a Member State's failure to apply EC law correctly. Finally, the Commission obtains information from petitions received by the Ombudsman and/or the European Parliament (Articles 194 and 195), as well as from direct complaints by individuals, undertakings, and non-profit associations.[251] Since the Commission must not disclose the identity of a complainant, this means of bringing a Member State's failure to fulfil its obligations under EC law to the attention of the Commission is very popular and is, at times, even used by other Member States.[252]

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[249]See, e.g., Commission v. France, Case C-265/95, 1997 E.C.R. I-6959 (Coordination Rurale).

[250]This was clarified by the European Court as early as 1974. See Commission v. France, Case 167/73, 1974 E.C.R. 359 (Maritime Labor Code), ¶ 15. For a more recent judgment, see Commission v. Germany, Case C-422/92, 1995 E.C.R. I-1097, ¶ 16.

[251]A form for the facilitation of individual complaints was published in OJ 1989 C 26, p. 6.

[252]The last point explains why the procedure under Article 227, whereby one Member State can take another to the Court of Justice for failure to fulfil obligations under EC law, is very rarely used in practice.

Once the Commission obtains information about a possible breach of the law by a Member State, it approaches the respective national authorities, notifying them of the problem and requesting their comments. If the Commission's information is incomplete, the first contact with the national authorities may simply take the form of a request for additional information. Depending on the complexity of the issues and the obviousness of the breach, the informal exchanges between the Commission and the national authorities may go back and forth several times over a period of months.

Ideally, a case will be resolved during this informal stage of the procedure, either because the Commission obtains additional information demonstrating that there was no breach by the Member State or because the Member State acknowledges the breach and rectifies its national laws or administrative practice.

Depending on the outcome of the informal negotiations, the Commission may decide to open a formal procedure, i.e. to move to the next stage of the procedure. Although the first subparagraph of Article 226 states that the Commission "shall" deliver a reasoned opinion if it considers that a Member State has failed to fulfil EC law obligations, the European Court has consistently held that the Commission has no duty to open a formal procedure even if it has concluded that a Member State is indeed in breach of its obligations under EC law. This interpretation is based on the second subparagraph of Article 226, which makes clear that the Commission is free to decide whether or not it wants to bring a case before the European Court. In particular, an individual complainant has no enforceable right to make the Commission pursue a specific matter. Arguably, this discretion is necessary to protect the Commission from being flooded with issues of minor importance and enables it to focus its limited resources on cases involving systematic, repeated, or otherwise important breaches of Community law. Since the Commission has no obligation to pursue each and every complaint, let alone each and every possible breach by a Member State, a complainant or other interested party also may not enlist the courts' aid by bringing an action against the Commission pursuant to Article 232 for failure to act.[253] If the Commission decides not to pursue an issue, the only way for the complainant to bring the matter before the European Court is through the national courts and the preliminary reference procedure of Article 234.

b. The formal pretrial procedure

If the Commission comes to the conclusion that a Member State may be in breach of its obligations under Community law, and if that Member State has proved unwilling or unable to bring this breach to an end, or the Member State has been uncooperative in the informal procedure, the Commission will send a "letter before action."

This letter contains a summary of the facts, an analysis of the legal context and the alleged breach, explanations about the evidence available to the Commission, a formal notice that the Member State is considered to be in breach of its obligations under Community law, and

[253]This is established case law. See, e.g., Star Fruit v. Commission, Case 247/87, 1989 E.C.R. 291.

a deadline by which the Member State must rectify the breach or submit its observations in defense. In this way, the letter fulfils several important functions. First, it "delimits the subject-matter of the dispute";[254] second, it puts the Member State on notice that it is deemed to be in breach; third, it secures the right of the national authorities to be heard on the matter; and fourth, it sets a deadline by which the problem will have to be resolved. To safeguard these functions, the European Court has been quite strict about any shortcomings of this letter. For example, if the letter is too vague and does not make clear to the national authorities what they are accused of and what they are expected to do, the Commission cannot move on to the third stage and bring the matter before the Court unless it first sends a more specific letter to the Member State. On the one hand, this secures the right of the Member State to be heard before a dispute is brought to the attention of the Court. On the other hand, since the Commission may still not have all relevant information at this stage, the Court allows any shortcomings in the initial letter before action to be remedied by supplementary letters.

If the situation is not remedied to the satisfaction of the Commission, that body may proceed to the next step by sending a "reasoned opinion" to the Member State. In addition to the letter before action, the reasoned opinion not only outlines the facts, the law, and the steps the Member State should take in order to end its breach,[255] but also explains why any observations in defense have failed to persuade the Commission. The reasoned opinion sets a final deadline for the rectification of the situation. This final deadline serves several important functions. First, it notifies the Member State that the time for negotiation is coming to an end and that action before the European Court may be imminent. Second, it fixes the subject-matter of a subsequent lawsuit for and against everybody. Third, if the Member State does not comply with the deadline, it will be found in breach of its obligations under Community law even if it should finally rectify the situation before the end of the Court proceedings.[256] Noncompliance has more than symbolic importance, because a ruling by the Court establishing a failure by a Member State can be used by third parties, in particular private individuals or corporations, in a suit for damages against that Member State.[257]

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[254]Lenaerts et al., supra note 107, ¶ 5-035.

[255]In this respect, the reasoned opinion may be more detailed than the letter(s) before action, but the subject matter and the essential analysis of the law are still limited to the preceding discussion in those letters. Otherwise, the Court may declare the action under Article 226 inadmissible. See, e.g., Commission v. Italy, Case 274/83, 1985 E.C.R. 1077, ¶ 21.

[256]This is established case law. See, e.g., Commission v. Italy, Case 103/84, 1986 E.C.R. 1759.

[257]Since the Commission has the right but not the duty to bring a failure of a Member State before the European Court, a decision not to do so, naturally, does not bar private parties from pursuing damage remedies (discussed in the following section of this chapter). However, in the absence of a ruling from the European Court establishing the breach by the Member State, the private individuals would need to bring forward conclusive evidence of such a breach and to persuade the respective court(s) of it. Although the respective court(s) could send a preliminary reference under Article 234 to the European Court for a ruling as to whether or not the Member State was in breach of obligations owed to the individual plaintiffs, the private claim would obviously be much facilitated and expedited if the Commission, proceeding under Article 226, had already obtained such a decision from the European Court of Justice. For comprehensive treatment of the issue, see Commission v. Germany, Case C-191/95,

c. The procedure and judgment of the Court of Justice

If the alleged breach by the Member State is still not cured by the final deadline stipulated in the reasoned opinion, the Commission may bring the matter before the European Court. This can be achieved by recapitulating the essential parts of the reasoned opinion under a different heading and with the addition of a plea for a declaration that, by such and such acts or omissions, the Member State has failed to fulfil its obligations under such and such provisions of Community law. Alternatively, the Commission may decide to limit the subject-matter or the points of law to fewer incidents or arguments than those outlined in the reasoned opinion.[258] However, any expansion of the subject matter, or any introduction of new or different points of law at this stage, would make the application manifestly inadmissible. The yardstick applied by the Court in this respect is whether or not the Member State was able to exercise its right to be heard about a specific accusation of fact or point of law. Other than in exceptional situations—for example, if a Member State is accused of a series of breaches of a particular rule and has been heard about most but not all of them—the Court will declare the action admissible with respect to the previously cited incidents and not the others. However, even if an action should be declared inadmissible in part or in its entirety, the Commission can always re-open the pretrial procedure, fix the problem, and bring the case back to the Court of Justice.

As has been stated above, the Court will find a breach by a Member State even if the latter rectifies the problem after the expiry of the final deadline set in the reasoned opinion but before the oral hearing at the Court, or indeed before the Court pronounces its judgment. Therefore, a Member State is also unable to bring an Article 226 proceeding to an end by simply admitting the breach before the Court during the pretrial procedure. If the Commission is determined to pursue a certain matter, the only way for the Member State to avoid a judgment by the Court is to rectify the situation by, at the latest, the date of the deadline set in the reasoned opinion.

Over and above the requirements that the informal and formal pretrial procedures must be conducted correctly and that the action must not exceed the scope of the reasoned opinion, the Commission must fulfil the general criteria for the admissibility of actions before the European Court.[259]

After an action is found to be admissible, the Court will enter into an analysis of the merits of the case. In its initial plea and in the ensuing written procedure, the Commission must present sufficient evidence that a breach existed at the time of the deadline stipulated in the reasoned opinion. Discharge of this burden of proof will be easy in cases where a Member State

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1998 E.C.R. I-5449, ¶¶ 44-46, with further references.

[258]See, e.g., Commission v. Italy, Case C-279/94, 1997 E.C.R. I-4743, ¶ 25.

[259]See, in particular, Article 19 of the Statute of the Court of Justice (see Protocol 11 Annexed to the Treaty Establishing the European Community, as amended), as well as Articles 37 and 38 of the Rules of Procedure of the Court of Justice of the European Communities (OJ 1991 L 176, p. 7, as amended).

admits its failure or was obviously late in the transposition of a directive. By contrast, the case may be much more difficult for the Commission if the formal law of a Member State is in compliance with Community requirements and the alleged breach is only found in the interpretation and/or application of the law by the national authorities. To enable the Commission to investigate these kinds of problems, the Member States have a duty of collaboration under Article 10, including a duty to provide information, documents, and other forms of evidence about their implementation of Community law. Failure to cooperate with the Commission may constitute a separate breach of Community law and may be separately actionable under Article 226.[260]

Very few defenses advanced by Member States have so far impressed the Court. In particular, the Court does not accept internal legal or political problems as justification for non-implementation of a directive[261] or for other types of breaches by Member States. Similarly, the Court has rejected the argument that other Member States were also late or in breach of their duty to apply the respective provision of Community law.[262] Furthermore, a Member State cannot claim that, in spite of an inconsistency in its formal legislation, the actual practice of its authorities has been in compliance with Community law.[263] Even arguments that there were problems with the Community rules, for example that the deadline for the implementation of a directive was too short[264] or that a rule was not clear enough to be applied, have usually been rejected, in part because the Member State could have lobbied much earlier for a longer deadline and/or requested an extension or a clarification from the Commission.

In rare cases a Member State has been able to show that the Commission made factual errors in assessing the situation or that the Member State's implementation of Community law in the manner demanded by the Commission was objectively impossible.[265] Another example was a

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[260]This is established case law. See, for example, Commission v. Greece, Case 240/86, 1988 E.C.R. 1835, ¶¶ 23-28.

[261]Accordingly, a Member State cannot claim that it would have been up to its autonomous regions or provinces to implement the directive. See, e.g., Commission v. Germany, Case C-297/95, 1996 E.C.R. I-6739, ¶¶ 8-9. Similarly, the dissolution of the national parliament and early national elections cannot be used to justify delays in the implementation of directives. See, e.g., Commission v. Italy, Case 91/79, 1980 E.C.R. 1099, ¶ 5.

[262]See, e.g., Commission v. Italy, Case 52/75, 1976 E.C.R. 277, ¶ 11.

[263]See, e.g., Commission v. Germany, Case C-361/88, 1991 E.C.R. I-2567 (Air pollution).

[264]See Commission v. Italy, Case 52/75, 1976 E.C.R. 277, ¶¶ 12-13; Commission v. Italy, Case C-240/89, 1990 E.C.R. I-4853, ¶ 5.

[265]Italy raised a force majeure argument, namely the destruction of its vehicle registry database by a bomb attack, in Commission v. Italy, Case 101/84, 1985 E.C.R. 2629. However, the Court still condemned the Member State for failure to fulfil its obligations under Community law, because "an administration showing a normal degree of diligence" would have been able to replace the destroyed equipment and recover or re-collect the relevant date within the time allowed by the Commission. Id. ¶¶ 15-17. In another case, Italy claimed that it was objectively impossible to recover illicitly granted tax credits from over 100,000 recipients. Again, the Court rejected these

claim that the provisions of Community law were ambiguous and that the interpretation adopted by the national authorities in good faith, in the absence of an authoritative interpretation by the European Court, was at least acceptable in light of the letter and spirit of the Community provisions.[266]

If the Member State is unable to justify its failure to fulfil its obligations under Community law, the European Court will rule accordingly, and the procedure comes to an end. Although the judgment of the Court is declaratory in nature, enforcement should not be an issue, because, according to Article 228 (1), "[if] the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court." The Court's judgment itself neither invalidates incompatible provisions of national law nor makes them inapplicable. As with the general obligation to comply with Community law, the obligation "to take the necessary measures" falls upon all branches of the Member State government, including the executive branch and the courts. Depending on the type of breach, it may now be up to the national legislature to adopt the necessary laws for the implementation of a directive, or it may be up to certain administrative agencies or authorities to change their practice, or it may be upo to the national courts to adopt a different interpretation of certain provisions of law.

The Court has repeatedly held that Member States must proceed without undue delay to bring their national laws or practices into line with a judgment under Article 226.[267] Depending on the case at hand, this may require that Member State authorities immediately cease to apply particular provisions of national law, or—if the adoption of national laws is necessary, which inevitably takes some time—that interim relief be provided via administrative acts. In contrast, Articles 226 and 228 do not, in and of themselves, require the Member State to provide compensation for any losses incurred by private individuals, companies, associations, or other parties. Any of these latter persons would have to pursue their claims in separate proceedings, as will be explained in the next section of this chapter.

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administrative difficulties as justifications. See Commission v. Italy, Case C-280/95, 1998 E.C.R. I-259, ¶¶ 13 et seq. Similarly, the recovery of illicit state aid was not considered to be objectively impossible merely because the assets at the undertaking in question no longer possessed a value commensurate with the aid to be recovered. See Commission v. Belgium, Case 52/84, 1986 E.C.R. 89, ¶ 14. See also Commission v. France, Case C-52/95, 1995 E.C.R. 4443.

[266]This defense was implicitly recognized in British Telecom, Case C-392/93, 1996 E.C.R. I-1631, although the case came to Luxembourg via a preliminary reference from a British court, i.e. the procedure under Article 234.

[267]See, e.g., Commission v. France, Joined Cases 24 and 97/80 R, 1980 E.C.R. 1319 (Sheep Meat); Commission v. Italy, Case 131/84, 1985 E.C.R. 3531, ¶ 7; Commission v. France, Case 169/87, 1988 E.C.R. 4093, ¶ 14; Commission v. Greece, Case C-328/90, 1992 E.C.R. I-434, ¶ 6; and Commission v. France, Case C-334/94, 1996 E.C.R. I-1307, ¶ 31.

d. Sanctions for noncompliance

Because the Court's judgments pursuant to Article 226 are declaratory in nature, their implementation depends on voluntary cooperation by the Member States. In contrast with the effects of Article 234 judgments, as to which the final decision in the case is made by the national courts, there are no domestic remedies for enforcement of a judgment adopted under Article 226. The only remedy contemplated originally by the Treaty was a second proceeding for a declaration by the European Court that the Member State had failed to fulfil its obligations under Community law—this time, the obligation, enshrined in Article 228 (1), "to take the necessary measures to comply with the [Article 226] judgment." If the Commission had to resort to this remedy, all it would generate was another declaratory judgment—another instance aimed at naming and shaming the Member State in question. Unsurprisingly, there were indeed occasions on which a Member State was unwilling or unable to terminate a breach of Community law, not only during the pretrial stages, but also during and after the formal and court proceedings contemplated by Article 226. It was never really clear why, if the changes required of the Member State were so costly, either politically or economically, those changes would suddenly materialize merely by virtue of another declaratory judgment stating that the Member State was now also in breach of its obligation to respect and implement the judgments of the Court.

In response to the burgeoning problem of non-implementation of Article 226 judgments, two sanctions were introduced in the early 1990s. The first was a change in the case law of the Court, pursuant to which a Member State found in breach of Community law could now be held liable for any damages inflicted on third parties. This development will be discussed in detail in the next section. The second change, implemented via the Maastricht Treaty,[268] was an amendment to Article 228 itself. Under Article 228 as amended, the Commission, when bringing a case in court against a Member State for non-implementation of an Article 226 judgment, may now also request that the Court require the Member State to pay a lump sum or periodic penalty.

At first, many observers thought that it was hard to see why a Member State that was already unwilling to terminate a breach of Community law, despite a lengthy process of naming and shaming and two judgments by the European Court, would now be willing to pay a penalty for its reluctance. While such a penalty might well be enforceable against a Member State that was a net recipient of support from the Community budget (because all or part of that support could be withheld), it was difficult to see how a penalty could be enforced against any of the wealthier States, which tend to be net contributors to the budget.[269] However, the very first case initiated by the Commission was brought against Germany, the Member State that had

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[268]This Treaty, which entered into force on 1 November 1993, implemented many changes to the European Community Treaties. Inter alia, it created the European Union, introduced the goal of Monetary Union, and set up the second and third pillars of the European Union, i.e. the Common Foreign and Security Policy, as well as the chapter on Police and Judicial Cooperation in Criminal Matters.

[269]Although penalties would theoretically be enforceable pursuant to Articles 244 and 256, the actual enforcement would still have to be effected by the respective national authorities against their own government.

traditionally made the largest net contribution to the budget of the Community. To be sure, the case was carefully selected by the Commission.[270] First, it concerned the non-implementation of an environmental protection directive. Germany traditionally takes pride in its commitments to that area and would, consequently, be rather embarrassed about being found to be in breach of such obligations. Second, the case concerned problems with the implementation of the directive in the autonomous Saarland; thus, the responsibility did not fall upon the federal government of the Member State. Third, the Saarland was at the time governed by the main opposition party, and the local prime minister was in fact the leader of the opposition in the federal parliament, i.e., the main antagonist of the federal chancellor. As soon as the Member State—that is, the federal government of Germany—received the notice that the Commission would request a periodic penalty payment of some 26,400 Euro per additional day of non-implementation,[271] the federal government forwarded the letter to the government of Saarland with a notice that the penalty owed by Germany to the Community would be collected in Saarland. Miraculously, the necessary implementation steps, which had been politically impossible in Saarland for years, were now adopted without further delay, and the case never actually had to be brought before the European Court. As the story shows, however, it may take a rather special political constellation for a large and powerful Member State, which is at the same time a large contributor to the Community budget, to be pushed by the threat of a financial penalty into compliance with an earlier declaratory judgment. Such constellations are obviously rare, and it is not surprising, therefore, that actual judgments imposing penalties on Member States have been few and far between. Indeed, so far there has been only one such judgment, and it was imposed against a poorer Member State, Greece, which is a net beneficiary from the Community budget.[272]

According to the Commission, however, one reason why there are not more judgments is that the threat of a financial penalty does seem to motivate Member States to get their act together. Indeed, between 1997 and the end of 2005, there were a total of 39 cases in which the Commission gave notice to a Member State that it would request a financial penalty for non-implementation of an earlier Article 226 judgment, and in a majority of these cases the issues were resolved without recourse to the Court of Justice.[273] Furthermore, these notices were given

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[270]The case concerned Directive 79/409 on the Conservation of Wild Birds, OJ 1979 L 103, pp. 1-8, as amended. Germany was first condemned for incomplete implementation on 17 September 1987. See Commission v. Germany, Case 412/85, 1987 E.C.R. 3503. A second case brought by the Commission against Germany resulted in a conviction on 3 July 1990 for a different shortcoming in the national implementation of the Directive. See Commission v. Germany, Case C-288/88, 1990 E.C.R. I-2721. A third conviction came on 28 February 1991 for breaches in a certain geographic area. See Commission v. Germany, Case C-57/89, 1991 E.C.R. I-883. In a fourth case, Germany was convicted on 23 March 1993 for non-implementation of the judgment adopted in Case 412/85. See Commission v. Germany, Case C-345/92, 1993 E.C.R. I-1115.

[271]The Commission decision was taken on 29 January 1997 and concerned the non-implementation of the judgment in Commission v. Germany, Case C-288/88, 1990 E.C.R. I-2721. See supra note 270.

[272]See Commission v. Greece, Case C-387/97, 2000 E.C.R. I-5047.

[273]See Commission Staff Working Document, Annex to the 23rd Annual Report from the Commission on Monitoring the Application of Community Law (2005), COM (2006) 416, final, at pp. 8-9.

to a total of ten different Member States, including major net-contributors to the budget, such as Germany, France, and the United Kingdom.[274] In an additional effort to dispel any impression that the enforcement of Community law might be contingent on the financial or budgetary contribution of the Member State in question, the Commission has published the internal guidelines it applies in the calculation of penalties for the different Member States. Those guidelines result in higher penalties for wealthier Member States.[275]

3. Accelerated Proceedings and Interim Relief

When the first cases were initiated by the Commission pursuant to Article 226, as a rule of thumb, the informal procedure, formal pretrial procedure, and court procedure each took about six months, for a total duration of eighteen months until a judgment could be obtained. Today, the same procedure takes more like three times eighteen months, for a total duration of four to six years. This situation tends to encourage a Member State to avoid or at least delay the implementation of Community law. For example, if a new directive on environmental protection requires certain economic operators to install costly equipment to reduce the emissions of their production facilities, the government of one or another Member State may be subject to political lobbying to delay the implementation of these new requirements. Unless controlled in some fashion, the Member State could delay this implementation for about five years before even a declaratory judgment under Article 226 could be adopted. The additional procedure under Article 228 for the imposition of a financial penalty would take at least another year. As long as the Member State adopted the necessary legislation just in time before the penalty could be imposed by the European Court of Justice, the only consequences it would suffer would be a certain loss in credibility and reputation. At the same time, the failure by the Member State to implement the directive at the required time would likely cause some serious damage to the environment. Furthermore, unfair distortions in the internal market would ensue if undertakings in some Member States were subject to the new requirements while their direct competitors in other Member States were not.

Some of these distortions can nowadays be prevented through the rules on Member State liability for breaches of Community law. This remedy will be described in the next section. However, in the abovementioned example, it would be difficult if not impossible for the foreign competitors to quantify the damage they were suffering because of the failure of the first Member State to impose the stricter environmental standards on its undertakings. Therefore, for cases where a potential liability does not work and, consequently, does not motivate a Member State to comply with its obligations under Community law, other remedies have had to be found.

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[274] Id.

[275] For the latest version see Commission Communication, Application of Article 228 of the EC Treaty, SEC (2005) 1658.

Specifically, for scenarios that may cause serious distortions of the internal market, affect the rights of a large number of individuals or undertakings, and/or cannot easily be compensated through Member State liability, the Commission has developed an accelerated procedure. By applying shorter internal turnaround times, by shortening the deadlines for responses of the Member State, and by waiving its own right to a reply or rejoinder before the Court, the Commission is able to save a couple of months overall. However, this may come at the expense of quality, especially in complicated cases in which the Member States does not admit its breach.

Therefore, another remedy may be more important in practice. If the Commission can demonstrate a prima facie breach by the Member State, as well as an urgent need for action in order to prevent significant and irreparable damage, it can apply to the European Court for the adoption of interim measures pursuant to Article 243 in combination with Articles 83 et seq. of the Court's Rules of Procedure. In the most extreme cases, the Court can thus order a Member State to discontinue the application of particular national rules or to begin the application of certain Community rules within a matter of days. Often, however, that process will still take several months, because the application for interim measures can only be brought if proceedings in the main case are already pending before the European Court. Therefore, the pretrial stages of the Article 226 procedure still have to be completed before interim measure can be requested and imposed.[276]

4. Special Enforcement Procedures: Articles 88(2) and 95(9)

Article 88 deals with the supervision of aid granted by the Member States to undertakings. The Commission is charged with this supervision to prevent anti-competitive subsidization by the Member States. Pursuant to Article 88(2), the Commission decides whether a national aid or aid scheme violates Community law. If it does, the Commission requires the termination of the aid and the recovery of any aid already granted by a specified deadline. Should the national authorities not comply with the decision of the Commission, the latter can bring the case directly to the Court of Justice. Essentially, this procedure eliminates the requirement that the Commission must first initiate the informal and the formal pretrial procedures under Article 226. This omission can be justified by the fact that the Commission is already in negotiations with the respective Member State in these kinds of state aid cases and in this way has already safeguarded the right of the Member State to be heard about the accusations before the matter is brought before the Court.

A similar shortcut is provided in Article 95(9) for cases in which a Member State demands a derogation from a measure providing for the harmonization of national laws that have relevance for the exercise of the fundamental freedoms in the internal market.

[276]See, e.g., Order of the Court of 12 July 1990 in the German Road Tax Case, Commission v. Germany, Case C-195/90 R, 1990 E.C.R. I-3351.

5. Some Statistics and Concluding Remarks

As has been explained, the success of the enforcement procedure under Article 226 originally rested on two pillars. First, the initiation of informal proceedings serves as a fact-finding mission for the Community and stimulates self-control on behalf of the Member State. Ideally, mere inquiries by the Commission about a potential problem will be enough to trigger rectification of that problem in a law-abiding Member State. Second, if the Member State is unable or unwilling to fix the problem within a reasonable time, the formal pretrial procedure and in particular the procedure before the Court of Justice have the effect of naming and shaming the Member State and, thus, putting political pressure on the government to end its failure to fulfil its obligations under Community law.

The second pillar has suffered from a number of problems, however. In the absence of significant public interest in a case, the main audience for the naming and shaming is the governments of the other Member States. As with many other aspects of Community life, the functioning of the system depends on a spirit of cooperation and mutual trust. This trust can be damaged if a Member State is exposed as being in breach of its obligations. This effect will be worsened if sooner or later all Member States are exposed in such a way, let alone if this becomes a regular thing. Therefore, excessive use of the procedure under Article 226 is counter-productive because of habituation and also potentially damaging to the legitimacy of the European Court.[277] Furthermore, generous use of Article 226 by the Commission has also contributed to the enormous case-load of the Court and, hence, to the lengthiness of the procedures before it. These points suggest that it might be wise for the Commission to restrict itself to really important cases. On the other hand, this self-restraint would leave injured individuals with the burden to establish on their own the breach of the Member State in question before they can claim damages. A potential solution to this dilemma might be the creation of a procedure where individuals could ask the Commission to become an intervener in important cases for damages before the national courts.

A closer look at the numbers of Article 226 procedures over the years[278] reveals not only the magnitude of the problem of noncompliance and the extent to which issues are resolved at the informal and the formal pretrial stages. It can also tell a story or two about the ethos of compliance in the different Member States.

Since the mid-1990s, the overall number of infringement proceedings initiated by the Commission has been in the magnitude of 2,500-3,000 per year. Somewhere around 1,000-1,200 have been initiated after the receipt of an individual complaint, and somewhere between 1,000-

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[277] See Brown & Kennedy, supra note 163, at 117; Alberto J. Gil Ibáñez, *The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228*, in 68 L. & Contemp. Probs. 135, 140 (Winter 2004) (with further references).

[278] The respective data is mainly taken from the Nineteenth Annual Report on Monitoring the Application of Community Law (2001), COM (2002) 324 final, and from the 23rd Annual Report on Monitoring the Application of Community Law (2005), COM (2006) 416 final.

1,500 have resulted from Member State failure to notify the timely and complete implementation of a directive. The remaining 300 or so have been initiated by the Commission on its own motion.

About one-half of the initiated proceedings, i.e. between about 1,000-1,500, have resulted in a "letter before action," while the other half have been terminated because the Commission was persuaded that the Member State was not in breach after all, or because the Member State terminated the breach, or because the Commission lost interest on other grounds.

The numbers pertaining to the issuance of reasoned opinions have gone down further. Between 300 and 600 such opinions have been sent to Member States in the respective years, representing between 15 and 25% of the initially opened proceedings. The other cases have been terminated for the same reasons as outlined in the preceding paragraph.

Finally, between about 120 and 180 cases have been brought before the European Court. On average, therefore, 90 to 96% of all initially opened proceedings are consistently resolved before the European Court has to be involved. However, once a case does go to Court, the Commission also prevails in more than 90% of the cases. This pattern, in turn, suggests that in these cases the Member States are mainly playing for time.

If one compares the various Member States,[279] it is interesting to see that none of them is far away from the average when it comes to initially opened proceedings. This similarity is still visible in the numbers of letters before action. However, when it comes to reasoned opinions, let alone referrals to the Court of Justice, some Member States stand out in one direction and some in the other. In particular, the Scandinavian countries (Denmark, Finland, and Sweden), and to a somewhat lesser extent the Netherlands, the United Kingdom, and Ireland, are obviously trying to resolve their problems without undue delay and without burdening the Court of Justice. By contrast, this cannot be said for Belgium, Germany, Greece, Italy, and France. In particular, the French government has not displayed much interest in recent years in bringing its domestic law and practice into compliance with Community law. Conditions seem ripe for attorneys in France to help their government along through a couple of high-profile damage claims.

[279]To date, useful data is available only for the fifteen "old" Member States, (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom). The time since the accession on 1 May 2004 of the ten "new" Member States (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia), has been too short to produce representative data.

E. DAMAGE ACTIONS

In furtherance of its commitment to the rule of law,[280] the European Community provides compensation to an individual or a company that has been injured as a consequence of a breach of Community law by a Community institution or by a Member State. Article 288 of the EC Treaty regulates three types of damage claims for cases of violations by the Community. The European Court has added a fourth type of damage claim, applicable to cases of violations by Member States. This section surveys each of these causes of action.

The Treaty provisions that authorize monetary claims against the Community bear obvious similarities, at least in general outline, to familiar American remedial schemes such as the Tucker Act[281] (applicable to contract claims against the United States) and the Federal Tort Claims Act.[282] The European Court's case law on the liability of Member States, on the other hand, presents strong contrasts with American law, as we will explain below.

1. The Contractual Liability of the Community

Article 288 (1) of the Treaty, the provision on contractual liability, concerns situations in which the Community enters into a private law contract with a natural or legal person, such as a purchase contract, a contract for works or services, or an employment contract.[283] A dispute may arise if either side is dissatisfied with the contractual performance of the other. In one example, a company providing cleaning services for the Commission brought an action claiming that its contract was terminated without the required three months' notice.[284]

Article 288 (1) specifies that "[t]he contractual liability of the Community shall be governed by the law applicable to the contract in question." The presumption is, therefore, that the respective contract contains a choice of law clause—for example, that the contract shall be governed by Belgian law. If this is the case, the chosen national law applies to all questions not otherwise regulated in the contract itself.

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[280]Parti écologiste "Les Verts" v. European Parliament, Case 294/83, 1986 E.C.R. 1339, ¶ 23, discussed supra notes 4-5 and accompanying text.

[281]28 U.S.C. § 1491 (2000).

[282]28 U.S.C. §§ 1346(b), 2674 (2000). The United States has no right of indemnity from its employees for torts covered by the FTCA. United States v. Gilman, 347 U.S. 507 (1954).

[283]See TEC art. 282 (conferring on the Community broad legal capacity, including capacity to acquire or dispose of property and to be a party to legal proceedings).

[284]See Pellegrini v. Commission, Case 23/76, 1976 ECR 1807. This case was brought before the European Court of Justice, which declined jurisdiction.

If the contract itself does not designate a forum, the chosen national law uses its own choice of law principles to determine the court or courts with jurisdiction over the dispute. The question of jurisdiction can be forced by the first mover, i.e. the party that brings suit before a particular court. The first seized court always has to determine initially whether it has jurisdiction over the matter and then which law it should apply.[285] If a second court also acquires jurisdiction (for example, where the defendant in the first case asserts a counterclaim in a different court), this latter court will normally decline to exercise that jurisdiction—at least as long as the first seized court is dealing with the substance of the dispute, and indefinitely if the first seized court adopts a judgment that obtains the force of res judicata.[286]

In the absence of a choice of law clause, the applicable law must be determined by the general rules of private international law. These general rules provide several options as to the applicable law. The most important of these is the rule that the law with the closest connection will apply, such as the law of the country where the characteristic performance under the contract is taking place.

Pursuant to Article 288 (1) and the rules of private international law, cases brought by natural or legal persons against the Community pursuant to a private law contract normally have to be brought before the courts of the Member State whose law is applicable to the contract.[287] The main exception is where the parties have made a specific choice of forum in the contract. In this connection, the parties might chose the national courts of another Member State, the courts of a third country, any national or international arbitration tribunal, as well as the European Court of Justice (as permitted by Article 238).

As provided in Article 236, the European Court—more precisely, the new European Union Civil Service Tribunal—has exclusive jurisdiction over contractual disputes between the Community and its civil servants.

2. The Non-contractual Liability of the Community

Article 288(2) of the Treaty provides for the non-contractual or tort liability of the Community. It renders the Community responsible for "any damage caused by its institutions or by its servants in the performance of their duties." The article looks to "the general principles common to the laws of the Member States" for the determination of the types of injuries that

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[285]While a court may apply the law of another country to the substance of the case, it will always apply its own law to questions of procedure.

[286]This is the principle *lis alibi pendens*. See, e.g., Rolf A. Schütze, Lis Pendens *and Related Actions*, 4 Eur. J.L. Reform 57 (2002); Gerhard Walter, Lis Alibi Pendens *and* Forum Non Conveniens: *From Confrontation via Co-ordination to Collaboration*, 4 Eur. J.L. Reform 69 (2002).

[287]See also TEC art. 240 (courts of Member States may exercise jurisdiction over the Community "[s]ave where jurisdiction is conferred on the Court of Justice by this Treaty").

may be compensated, the types of damages that are available, and any other conditions of liability. Article 235 entrusts the task of establishing these general principles to the European Court of Justice. Since tort liability is important and can potentially raise many different questions, and since the reference in Article 288 (2) is so short and general, the issue has spawned a large body of case law by the European Court.

Four conditions for Community liability have been established. First, the plaintiff has to demonstrate that the institution or person or persons in question acted "in the performance of their duties." Second, the act must have been unlawful.[288] Third, the plaintiff has to provide evidence of the damages incurred, and fourth, there has to be a causal link between the unlawful act and the damages incurred.

a. Action in the performance of Community duties

The term "institution" in Article 288(2) is not limited to the principal institutions listed in Article 7 of the Treaty (Council, Commission, etc.). At least potentially, to the extent they can cause damages to third parties, it includes all units and agencies operating on the basis of powers conferred upon the Community by the Member States via the founding treaties.[289] Similarly, the term "servant" is not limited to permanent employees with life-time appointments under the Staff Regulations. It includes anybody acting on behalf of the Community.[290]

[288]Recently, however, in the context of regulations that restrict access to foreign markets, the CFI has asserted that the Community may become liable for compensation under Article 288 *even without having engaged in unlawful conduct*. Relying on the previously almost forgotten judgment in De Boer Buizen BV v. Council, Case 81/86, 1987 E.C.R. 3677, ¶ 17, it has suggested that the Community may incur liability if it adopts export restrictions that disproportionately burden a specific subclass of undertakings. To be compensable, however, the losses must be "unusual and special" in nature. Beamglow Ltd. v. Parliament, Case T-383/00, 2005 E.C.R. II-5459, ¶¶ 171-74; FIAMM v. Council, 2005 E.C.R. II-5393, ¶¶ 157-60.

[289]See, e.g., Société Générale d´Entreprises Électro-Mécaniques (SGEEM) and Roland Etroy v. European Investment Bank, Case C-370/89, 1992 E.C.R. I-6211, ¶¶ 13-16; Frank Lamberts v. European Ombudsman, Case T-209/00, 2002 E.C.R. II-2210, ¶¶ 49-50.

[290]The term may even include Member State authorities, provided they are acting on instructions from a Community body and did not exercise their own discretion. See Krohn v. Commission, Case 175/84, 1986 E.C.R. 753, ¶¶ 16-23.

Similarly, the term "in the performance of their duties" has been broadly interpreted. It encompasses not only administrative acts of all kinds, including omissions if there would have been a duty to act,[291] but also legislative acts[292] and even judicial acts.[293]

b. Unlawfulness

From early on, the European Court ruled that not every unlawful act gives rise to Community liability. Rather, there has to be a "sufficiently flagrant violation of a superior rule of law for the protection of the individual."[294]

First, the breach has to concern a rule of Community law that is intended to protect individuals, or at least suitable to do so. Over the years, the Court has accepted many rules of primary and secondary Community law as having at least an indirect effect of protecting the individual (though not necessarily exclusively). In particular, the Court has held that general principles of Community law, such as the principle of protection of legitimate expectations, or the right to equality of treatment, or the principle of proportionality, can qualify as superior rules of law for the protection of individuals.[295]

Second, the breach has to be "sufficiently flagrant" or sufficiently serious. In this respect, the Court has applied a strict standard. In particular, if the Community acted by adopting legislative measures "which are the results of choices of economic policy," the mere fact that these choices "adversely affect the interests of [some] individuals" does not mean that a sufficiently serious breach has been committed.[296] Rather, a breach will be sufficiently serious only if the institution or servant "manifestly and gravely disregarded the limits on its

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[291]See Hamill v. Commission, Case 180/87, 1988 E.C.R. 6141; Mulder and Others v. Council and Commission, Joined Cases C-104/89 and C-37/90, 1992 E.C.R. I-3061; Dubois et Fils v. Council and Commission, Case T-113/96, 1998 E.C.R. II-125, ¶ 29.

[292]This was established for the first time in Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities, Case 5/71, 1971 E.C.R. 975, ¶ 11.

[293]So advocated by Martin Gellermann, Commentary on Article 288, in Streinz (ed.), EUV/EGV Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft, 2387, ¶ 16, with further references.

[294]The quote is taken from *Schöppenstedt,* ¶11. The doctrine goes back as far as Kampffmeyer and others v. Commission, Joined Cases 5, 7 and 13-24/66, 1967 E.C.R. 245.

[295]See, e.g., Sofrimport v. Commission, Case C-152/88, 1990 E.C.R. I-2477.

[296]See Bayerische HNL Vermehrungsbetriebe and others v. Commission, Joined Cases 83 and 94/76, 4, 15 and 40/77, 1978 E.C.R. 1209, ¶ 5.

discretion."[297] The broader the discretion available to the institution or servant, the more difficult it will be to establish such a grave breach.

In 1992, in his opinion in *Mulder*,[298] Advocate General Van Gerven proposed additional criteria by which a sufficiently serious breach could be established: i) The breach was serious and unjustifiable, and thus inexcusable. This would the case if the institution or servant knew or was in a position to know about the problem but did not take sufficient measures to deal with it, and was not able to justify the breach on the basis of overriding considerations of public interest or the like. ii) The breach concerned a limited or at least clearly defined group. A group is only clearly defined if every member of that group is known or could be determined at the time when the ruling on compensation is given, i.e., if the group is not open to entry and exit at the time of the breach or subsequently. And iii) the alleged damage went beyond the general economic risk inherent in any commercial activity in the respective sector. This would likely be the case if the damage was unforeseeable by the applicant.

c. Damage

The definition of damage, as developed by the European Court, is again broad. While the damage has to be certain, rather than speculative, the Court has accepted compensation not only for material damage but also for immaterial losses and lost profits. In calculating the compensation to be paid, the Court can reduce the amount to take account of contributory negligence[299] or income from replacement activities.[300] Interest must be added, running from the day of the judgment establishing the obligation to pay compensation for the damage.

d. Causal link

The Court has consistently demanded a direct causal link between the unlawful conduct and the damage to the individual. Such a direct link does not exist if other actions of the Community, the injured party, or third parties have come between the unlawful action and the

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[297]See Commission v. Camar and Tico, Case C-312/00 P, 2002 E.C.R. I-11355, ¶ 54. See also Ireks-Arkady v. Council and Commission, Case 238/78, 1979 E.C.R. 2955; Amylum v. Council and Commission, Joined Cases 116 and 124/77, 1979 E.C.R. 3497.

[298]Opinion of the Advocate General, Mulder and others v. Council and Commission, Joined Cases C-104/89 and C-37/90, 1992 E.C.R. I-3061, ¶¶ 19 et seq.

[299]See Alfredo Grifoni v. European Atomic Energy Community, Case C-308/87, 1990 E.C.R. 1203, ¶¶ 16-17.

[300]See the judgment in Mulder and others v. Council and Commission, Joined Cases C-104/89 and C-37/90, 1992 E.C.R. I-3061, ¶ 33.

damage. In such cases, the causal link would be interrupted.[301] Furthermore, a direct causal link does not exist if the damage would have occurred even if the Community institution or servant had acted in a lawful manner. This would mean that there was no causal link in the first place.

3. The Personal Liability of Community Civil Servants

Article 288 (4) provides that "[t]he personal liability of its servants *towards the Community*" (emphasis added) is governed by Staff Regulations or other conditions of employment. This refers only to claims of recourse by the Community against the employee. The provision is not applicable, therefore, in cases where a personal liability claim is brought by a third party, such as for acts committed by Community civil servants outside of the performance of their duties. Such cases would be subject to the general rules of tort law, in combination, if necessary, with the general rules of private international law.

According to the Staff Regulations, civil servants are liable toward the Community only in cases of intent or gross negligence. Article 236 gives the Court of Justice, i.e. the Civil Service Tribunal, exclusive jurisdiction in these kinds of cases.

4. The *Francovich* Liability of the Member States

The European Treaties do not expressly impose damages liability on the Member States for their breaches of Community law. Indeed, the only remedy originally foreseen for breaches of Community law by the Member States was the enforcement procedure of Article 226, which, as outlined above, can only result in a declaratory judgment against a Member State. We have explained above how the European Court of Justice "invented" supremacy and direct effect of Community law and how it turned Article 234 into the single most important tool to promote the effective application of Community law in the Member States.[302]

Although the Article 234 procedure depends on the collaboration of the national judges, it generally works well, and there have been few complaints that reluctance of national judges to make references to the European Court—or to respect the answers they have obtained—have jeopardized the effective application of Community law in a Member State. The main problem that remained unresolved, therefore, was the effective application of *directives* in the Member States. As is well known, directives are a kind of framework legislation by the Community that needs to be fleshed out and transformed by the legislatures of the Member States. They prescribe

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[301] However, as outlined in note 290 above, the causal link between unlawful conduct of a Community institution and damage to an individual remains intact if the unlawful legislative measure or decision had to be implemented by a national authority, provided that the latter acted purely upon instruction and without exercising its own discretion.

[302] See supra Parts I.C.-D. and III.C.1. See also Joseph H.H. Weiler, The Transformation of Europe, 100 Yale L.J. 2403 (1991).

only particular results to be achieved by the Member States and do not provide complete legislative solutions in and of themselves.[303] As such, directives have never been intended and are usually poorly suited to have direct applicability and direct effect in the Member States, or, as an American lawyer would say, to be self-executing. Therefore, "enforcement" through supremacy and direct effect and the preliminary reference procedure of Article 234 does not work, at least not as nicely as with Treaty articles and regulations.[304]

Unfortunately, the problem of Member States failing to implement Community directives properly is fairly widespread. This problem comes in three main forms: a Member State may be late in the implementation of a directive, may have only partly implemented a directive, or may have implemented a directive incorrectly. Such breaches of Community law by a Member State can be quite troublesome for several reasons. First, although the Commission may begin enforcement proceedings under Article 226, those proceedings may take years and may never produce the desired result.[305] Second, as long as the breach persists, the application of Community law by the Member State in question is incomplete and/or incorrect. For example, if the directive aims at the protection of consumers in particular commercial transactions, the consumers of the respective Member State remain unprotected with respect to those transactions.[306] Third, the breach can also have an impact on the internal market, as it may distort the competitive situation among providers of goods or services in different Member

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[303]See Article 249 (3).

[304]The Court has recognized that directives usually contain at least some provisions that are sufficiently clear and precise, unconditional, and generally suited to be applied by national authorities and courts for and against natural and legal persons. Accordingly, the Court has ruled that directives, even if they do not precisely have direct effect, may have "similar effects" *in vertical relationships* between natural and legal persons and national authorities. Thus the Court denies to Member State authorities the option of relying on their own failure to transpose directives in a timely and proper manner in order to escape their responsibilities under these directives. For a number of more or less persuasive reasons, however, the Court has so far not recognized these similar effects—which de facto amount to direct effects—*in horizontal relationships* between private parties. This is a major factor limiting the effectiveness of directives in the areas of consumer protection, employment law, and the like. For related discussion, see supra notes 17-20 and accompanying text.

[305]It has been argued, therefore, that the European Commission should be concurrently liable for the consequences of Member States' breaches of Community law and that the injured parties should be able to bring not only claims for damages before the national courts against the national authorities, but also claims before the European Court against the Commission. See Constantin Stefanou & Helen Xanthaki, *A Legal and Political Interpretation of Article 215 (2) [new Article 288 (2)] of the Treaty of Rome*, Ashgate Dartmouth 2000. This idea has found little support in practice.

[306]Examples of consumer protection directives include Dir 2001/95 on General Product Safety (OJ 2002 L 11, p. 4); Dir 85/374 on Product Liability (OJ 1985 L 210, p. 29, as amended); Dir 84/450 Concerning Misleading and Comparative Advertising (OJ 1984 L 250, p. 17, as amended); Dir 93/13 on Unfair Terms in Consumer Contracts (OJ 1993 L 95, p. 29); Dir 98/6 on Consumer Protection in the Indication of Prices (OJ 1998 L 80, p. 27); Dir 2005/29 Concerning Unfair Business-to-Consumer Commercial Practices (OJ 2005 L 149, p. 22); Dir 85/577 to Protect the Consumer in Respect of Contracts Negotiated Away From Business Premises (OJ 1985 L 372, p. 31); Dir 97/7 on the Protection of Consumers in Respect of Distance Contracts (OJ 1997 L 144, p. 19, as amended); Dir 87/102 Concerning Consumer Credit (OJ 1987 L 42, p. 48, as amended); and Dir 90/314 on Package Travel (OJ 1990 L 158, p. 59).

States. In our example, undertakings in the recalcitrant Member State will not have to respect the relevant consumer interests and may have a cost advantage over their competitors in neighboring Member States that have duly implemented the directive in question.[307]

The famous *Francovich* case was decided against this background. The European Court received a preliminary reference from an Italian court in early 1990 concerning Directive 80/987,[308] which required Member States to create guarantee funds to ensure that employees who went unpaid during the last months before their employer eventually went bankrupt could get some compensation. Italy should have implemented this directive into national law by 23 October 1983. However, Italy did not implement the directive until much later. In fact, the Commission brought proceedings against Italy under Article 226, and the Court ruled on 2 February 1989 that Italy was in breach of its Community obligations because of its delay in implementing the directive.[309]

In the 1990 case, an Italian company had gone bankrupt after 23 October 1983 but before the directive was eventually implemented into Italian law. Several employees had continued to work for the company during the final months, hoping that the crisis could be averted and their salaries would eventually be paid. However, this did not happen, and after the bankruptcy the banks and other institutional creditors were better secured and took the few remaining assets. The employees were left with nearly nothing. Therefore, the employees brought a law suit against Italy for compensation. Since they relied on the unimplemented directive, respectively their Member State's breach of its obligation to implement this directive, the national court submitted the following question to the European Court for a preliminary reference:

> Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/987—a failure confirmed by a judgment of the Court of Justice—entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided and in any event to claim compensation for the damage sustained in relation to provisions to which that right does not apply?[310]

The European Court responded first of all by saying that the terms of the directive were not suitable to be directly applied against the Member State, because they were not sufficiently clear and precise. The directive left several choices to the Member States as to how the guarantee fund was to be financed. A given Member State might rely solely on contributions from all

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[307]The distortion of the competitive playing field may be even more serious in other cases, such as where environmental protection directives require expensive emission control equipment or where the directives deal with employment law or social security.

[308]Dir 80/897 Relating to the Protection of Employees in the Event of the Insolvency of Their Employer, OJ 1980 L 283, p. 23.

[309]See Commission v. Italy, Case 22/87, 1989 E.C.R. 143.

[310]See Francovich v. Italian Republic, Joined Cases C-6 and 9/90, 1991 E.C.R. I-5357, ¶ 7.

employers, or on contributions from both the employers and the employees, or on public funds. In such a situation, the Court did not consider it adequate to hold the directive directly applicable against the Member State and public money.

However, the Court went on to hold that the employees could claim damages from the Member State for non-implementation of the directive. In its landmark judgment, the European Court ruled that Member States are "required to make good loss and damage to individuals by [their] failure to transpose" the directive in questions.[311] The Court stipulated three conditions for this sort of Member State liability: i) "the result prescribed by the directive should entail the grant of rights to individuals"; ii) the (minimum) scope of the rights should be identifiable by looking at the provisions of the directive; and iii) there should be a causal link between the breach by the Member State and the loss and damage suffered by the individual.[312] Because these conditions were satisfied in the case at hand, the Court ruled that Mr. Francovich and his colleagues should be compensated by the Italian authorities and that they could pursue their claims in the same kind of proceedings as would apply to any other state liability cases in Italy.

The *Francovich* judgment struck the Italian government like lightning, not least because this Member State had been notoriously late with the implementation of many directives. Interestingly enough, the judgment was at first not much noticed in other Member States. However, in 1993, two large German package travel operators went bankrupt.[313] This left countless travelers stranded in various places around the world, where their pre-paid travel and hotel vouchers were suddenly no longer recognized. The evening news in Germany was full of images of desperate families camping in airports and other places for days, without air conditioning, food, or functioning toilets, and without a date certain for the continuation of their travel. Eventually, a couple of lawyers discovered that Germany should have implemented a directive on package travel[314] by 31 December 1992 but had failed to do so. Among the obligations imposed on Member States by the directive was the creation of guarantee funds to compensate prospective travelers who had already paid their tour operator but who were unable to make use of their travel vouchers because of the insolvency of that operator. Subsequently, these lawyers brought thousands of cases against Germany for state liability under the *Francovich* doctrine.[315] This immediately catapulted the *Francovich* judgment to the top of the list of the best known judgments of the European Court. It created a powerful incentive for all Member States to ensure that their implementation record for consumer protection directives was up to date.

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[311]Id. ¶ 46.

[312]Id. ¶ 40.

[313]The better known of the two companies was MP Travel Line.

[314]Dir 90/314 of 13 June 1990 on Package Travel, Package Holidays and Package Tours, OJ 1990 L 158, p. 59.

[315]The leading case that made it to the European Court was Erich Dillenkofer and others v. Federal Republic of Germany, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, 1996 E.C.R. I-4845.

The three conditions for state liability stipulated in *Francovich* were very broad. Unsurprisingly, they had to be fleshed out in subsequent judgments. Advocate General Van Gerven opined that the liability of the Member States should cover not only loss of physical assets, but also loss of (future) income, "moral damage" (including pain and suffering), and compensation for loss of time.[316] In another case, the European Court made clear that any breach of Community law by a Member State—and not only the failure to implement a directive in a timely and correct manner—could give rise to *Frankovich* liability.[317] However, in that same case, the Court also established a parallel between the standards for Community liability under Article 288 (2), as discussed above,[318] and the standards for Member State liability. In particular, the Court held that in areas where the Member States were acting with a wide margin of discretion, liability for any wrongdoing would be incurred only if they "manifestly and gravely disregarded the limits on the exercise of [their] powers".[319] These standards were further explained as follows:

> The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.[320]

Finally, the Court rejected Member State liability in a case in which the relevant rules of Community law were "imprecisely worded," so that the Member State, in good faith, could have followed its own interpretation of these rules without being "manifestly contrary to the wording" of the Community rules and without being in breach of any case-law of the European Court interpreting the Community rules in question.[321]

In summary, it can be said that the *Francovich* liability for breaches of Community law by the Member States has become the Court's most powerful instrument to ensure the effective

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[316]See Opinion of the Advocate General, Marshall v. Southampton and South-West Hampshire Area Health Authority (*Marshall II*), Case C-271/91, 1993 E.C.R. I-4367, pp. I-4381 to I-4399, at p. I-4391.

[317]See Brasserie du Pêcheur v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others (Factortame III), Joined Cases C-46 and C-48/93, 1996 E.C.R. I-1029.

[318]See supra note 297 and accompanying text.

[319]*Brasserie du Pêcheur*, ¶¶ 45, 47.

[320]Id. ¶¶ 56-57.

[321]See The Queen v. H.M. Treasury, ex parte British Telecommunications plc, Case C-392/93, 1996 E.C.R. I-1631, ¶¶ 43-44.

application of Community law, next to the doctrines of supremacy and direct effect and their implementation through the preliminary reference procedure of Article 234. Member States now face effective sanctions, applied by their own courts, and not merely declaratory judgments under Article 226, if they are in breach of their obligations under Community law. After a very expansive interpretation of the Member State liability in the initial phase, the Court has now effectively acknowledged that the Member States should not have to conform to a stricter standard of liability than the Community itself. By endorsing a kind of parity between the standards applied under Article 288 (2) and the *Francovich* doctrine, the Court has somewhat reduced the exposure of the Member States, but this development may also ultimately serve to expand a bit the Court's very restrictive approach regarding the liability of the Community itself.

This regime of liability of Member States for breaches of Community law presents a contrast with American law.[322] In the United States, doctrines of state sovereign immunity pose a significant obstacle to private damage claims against states predicated on alleged violations of federal law. Professor Daniel Meltzer has suggested that one explanation for the EU's greater reliance on monetary liability as a means of controlling Member States is that the Community's other tools of control are less robust than those available to the U.S. federal government. He offers other explanations as well, including a stronger tradition of state liability in civil law systems than in common law systems.[323] On the other hand, Meltzer also identifies some commonalities between the EU and American systems. Notably, the emerging EU principle that both the Community and Member States should be liable only for "sufficiently serious" breaches resembles the American doctrine of official immunity, under which suits against state executive officials require a plaintiff to show that a defendant violated clearly established constitutional principles.[324]

[322]Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 Int'l J. Const. L. 39, 41-48 (2006).

[323]Id. at 60-67.

[324]Id. at 47, 82-83.

F. INDIRECT CHALLENGES AND THE PLEA OF ILLEGALITY

1. The Nature of the Plea of Illegality

The "plea of illegality" is the name commonly given to the procedure described in Article 241 of the EC Treaty:

> 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.

As the language of the Treaty indicates, the thrust of this provision is that a person involved in litigation may call upon the Court to decide the validity of a regulation that is "at issue" in that case. If the Court upholds the challenge, the regulation will continue to exist, but it will be treated as "inapplicable" to that litigant. This procedure serves to ameliorate the stringency of some of the restrictions that attend the Article 230 annulment action, including its limitations on standing, as well as the two-month deadline allowed for the filing of a direct challenge to a regulation, even by persons who do have standing.

It is important to recognize, however, that Article 241 does not provide an independent cause of action in its own right. The Court spelled this point out in *Wöhrmann & Sohn KG v. Commission.*[325] In that case the Commission issued two orders fixing charges on imports of powdered milk into Germany. Ten months after the latter of these orders, the applicants filed suit under Article 184 (now 241) to secure annulment of them. The Court refrained from deciding whether the contested measures were "decisions" or "regulations," because the application suffered from a more fundamental defect—it treated Article 184 as providing the same kind of relief as is afforded under Article 173 (now 230). That understanding was incorrect:

> 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.
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> 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.[326]

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[325] Joined Cases 31/62 and 33/62, 1962 E.C.R. 501.

[326] Id. at 507.

Thus, the litigant who wants to make use of the plea must resort to an otherwise available cause of action. A corollary of this limitation is that, as the text of Article 241 indicates, the validity of the regulation must be "at issue" in the case. This is an important qualification. The Community Courts often rebuff attempts to rely on the plea of illegality by declaring that the regulation that a given litigant wishes to draw into question is not really relevant to the subject matter of the case.[327]

The plea of illegality is similar in substance to what American lawyers would call a collateral challenge to a regulation in an enforcement proceeding. Such challenges are expressly envisioned by the Administrative Procedure Act[328] and are common in U.S. practice. Indeed, until the broad availability of "direct" or "pre-enforcement review" became established in the 1960's.[329] enforcement proceedings were among the most frequently used routes to judicial review of regulations.[330] However, the European plea of illegality does differ in some particulars from its American counterpart, as discussed below.

2. Indirect Challenge through Preliminary Reference

Another means by which a regulated party may be able to obtain indirect judicial review of the validity of a regulation is through the preliminary reference procedure of Article 234. Indeed, the canonical judgment in *Les Verts* described this possibility as an integral feature of the "complete system of legal remedies" envisioned by the Treaty. The Court declared in that case that private persons who cannot sue for annulment of a regulation (because they are not "directly and individually concerned" by it) may nevertheless be able to press their challenge through the national courts instead.[331] The Court confirmed the permissibility of this practice in

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[327]Italy v. Council, Case 32/65, 1966 E.C.R. 389, 414 (in a proceeding brought to challenge regulations that allowed Commission to grant antitrust exemptions, Italy could not also use Article 184 to challenge earlier regulations requiring businesses to provide prior notice of certain contemplated transactions); Alesssandrini Srl v. Commission, Joined Cases T-93/00 and T-46/01, 2003 E.C.R. II-1635 (in a proceeding brought to annul letters that refused to grant discretionary transitional relief from import quotas, importers could not use plea of illegality to challenge regulations that set forth the underlying quotas).

[328]5 U.S.C. § 703 (2000) ("Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to review in civil or criminal proceedings for judicial enforcement.").

[329]See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[330]3 Kenneth Culp Davis, Administrative Law Treatise § 23.07 (1st ed. 1958). Even today, there are some circumstances in which regulations may be contested *only* in proceedings in which they are implemented, due to statutory prohibitions on earlier review, Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000), or case law "ripeness" principles. Nat'l Park Hospitality Ass'n v. Dep't of Interior. 538 U.S. 803 (2003).

[331]Parti écologiste "Les Verts" v. European Parliament, Case 294/83, 1986 E.C.R. 1339, ¶ 23 (discussed supra notes 4-5 and accompanying text); see also The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd., Case C-491/01, 2002 E.C.R. I-11453, ¶ 39 (repeating this rationale as a

Universität Hamburg v. Hauptzollamt Hamburg-Kehrwieder[332] (although the Community act challenged in that case was a decision, not a regulation). In *Hamburg*, the university brought suit against German customs authorities that had denied it permission to import a spectroscope from the United States duty-free. The German action had been based on a decision by the Commission, which had determined that equivalent equipment was available from Community sources. The German court sought a preliminary ruling from the Court of Justice. The Court held that the university had properly pleaded the illegality of the Commission's decision, and the preliminary reference on that issue was permissible. In this case the university would presumably have been "directly and individually concerned" by the Commission decision and in theory could have challenged it directly through annulment. Nevertheless, as the Court pointed out, the university had no right to be notified of that decision. Moreover, the German authorities had not finally denied the import application until well after the time limit for filing an annulment action had run out.

Strictly speaking, this type of use of the preliminary reference procedure is usually not regarded as a species of the plea of illegality.[333] Indeed, *Hamburg* relied not on Article 184 (now 241) but on a "general principle of law which finds its expression in" that article. That distinction meshes with the accepted interpretation of Article 241 itself. Although that provision does not specify *which* courts may entertain a plea of illegality, the Court did say in the above-quoted language from *Wöhrmann* that Article 241 is for use in Community courts only.

Indeed, the two mechanisms operate somewhat differently. Most obviously, the national court does not itself adjudicate the question of the validity of a regulation; rather, if it considers that the argument against the validity of the regulation has substance, it is expected to *refer* that question to the Court of Justice.[334] Moreover, the decision of whether to seek a preliminary ruling is made by the national court. The litigant in that court has no right to insist that it do so.[335] Similarly, if the national court has merely sought a preliminary ruling on the *interpretation* of a regulation, the private litigant may not broaden the referral by asking the Court of Justice to pass upon the *validity* of the provision as well (or instead).[336] Despite these practical differences, however, the use of preliminary reference to contest the validity of a regulation is obviously analogous to the plea of illegality, and writers sometimes analyze them as variations on a single theme.

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justification for reviewing, through preliminary challenge, the validity of a *directive* that prescribed controls on the manufacture, labeling, and sale of tobacco products).

[332]Case 216/82, 1983 E.C.R. 2771, ¶¶ 5-12.

[333]Hartley, supra note 164, at 405 n.2.

[334]Foto Frost, Case 314/85, 1987 E.C.R. 4199; see supra note 239 and accompanying text.

[335]*Wöhrmann*, 1962 E.C.R. at 507.

[336]Hessische Knappschaft v. Maison Singer & Sons, Case 44/65, 1965 E.C.R. 970.

3. The Domain of the Plea of Illegality

The most common situation in which the plea of illegality is used occurs when a private person seeks annulment of a Community decision that was allegedly based on an unlawful regulation. The Court has, however, applied Article 241 broadly. In the first place, the case in which the plea is advanced need not be an annulment proceeding. In principle, the plea apparently may be used in any of the types of judicial proceedings authorized by the Treaty (apart from the preliminary reference proceeding, as just explained).[337] Moreover, a plea of illegality may be used to attack a regulation on any of the grounds that could have been asserted in an annulment action. On that point, the text of Article 241 is explicit.

Most significantly, although Article 241 refers by its terms to a "regulation," the case law establishes that a plea of illegality may also be used to contest the validity of a prior *decision* that is individual in form but is in fact akin to a regulation. This doctrine traces its origins to *Spa Simmenthal v. Commission*.[338] The applicant was a meat importer who had submitted a bid or "tender" to purchase meat from the Italian "intervention agency" under a Community-wide program. His tender was rejected. In his suit to annul that decision, he argued that the Commission had unlawfully opened the bidding to too many competitors. However, important elements of the Commission's bidding system had been enunciated in "notices of invitation to tender," which the Commission had sent to intervention agencies in each of the Member States. In form, these notices were "decisions." The Court concluded, however, that the notices were in reality "general acts which determine in advance and objectively the rights and obligations of the traders."[339] Therefore, the Court reasoned, Simmenthal must be allowed to contest the validity of the notices through a plea of illegality. The Court based its holding on the "general principle" that persons who lack standing to contest general acts that affect their interests must instead have a right to judicial review of such acts when they seek to annul implementing decisions that they do have standing to contest.[340] The Court's holding makes sense as a realistic response to a legal environment in which a "decision" that is addressed "only" to the individual Member States can be practically equivalent to a regulation. The effect, however, has been to expand considerably the domain of the plea of illegality.

Extending *Simmenthal*'s "general principle" a step further, the CFI held in a competition case, *Limburgse Vinyl Maatschappij NV v. Commission*,[341] that the Commission's Rules of Procedure may be drawn into question through the plea of illegality, if an applicant can show that a given rule has a "direct legal connection" with the case at hand. Here again, the Court

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[337]Hartley, supra note 164, at 411; Schermers & Waelbroeck, supra note 29, ¶¶ 976-80.

[338]Case 92/78, 1979 E.C.R. 777.

[339]Id. ¶ 38.

[340]Id. ¶¶ 39-43.

[341]Joined Cases T-305/94 et al., 1999 E.C.R. II-931, ¶¶ 282-89.

noted that the applicant could not have challenged the procedural rules at the time of their promulgation. In this instance, the Commission's competition decision had been authenticated pursuant to the Rules of Procedure, and thus the applicant's challenge to the validity of the authentication rule was admissible. However, the CFI deemed inadmissible a separate challenge to the Commission's rules on subdelegation, because the Commission had not actually adopted its competition decision through an exercise of delegated powers.[342]

4. Standing and the Enforcement of Time Limits

On its face, Article 241 does not contain any standing requirements. Its explicit language extends the benefits of the provision to "any party." However, the Court's indirect challenge cases have formulated a somewhat complex body of decisional law that has had the effect of imposing standing requirements of a sort. These requirements grow out of the Court's efforts to reconcile the time limits of Article 230 with the purposes of the plea of illegality and other indirect challenges.

More particularly, the ECJ has rejected the idea that a person who was directly addressed by name in a decision and who failed to seek annulment within the Treaty's two-month limitations period should get a second chance to attack it later. This is as true for Member States as for private parties.[343] The Court has explained this rule as required by the principle of legal certainty. That is not an entirely satisfactory explanation, because in a sense *any* indirect challenge is in tension with that principle. Nevertheless, the Court's stance is not particularly surprising, because if an addressee of a Commission decision were permitted to attack it by a plea of illegality or other indirect challenge after it had become final, the two-month limit would retain little meaning.[344]

On the other hand, *Simmenthal* demonstrates that the Court does not apply the same logic to persons who are not addressees of a decision and who, under the "direct and individual concern" test of Article 230, could not have contested that decision at the time of its promulgation. The difficult cases, therefore, have been presented by litigants who fall into the intermediate category—those who were not addressees of the indirectly challenged action but who nevertheless *were* "directly and individually concerned" by the action and thus would have had standing to resort to annulment. The Court has struggled with this problem in preliminary reference cases in which individual decisions have been subjected to indirect challenge. A

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[342]Id. ¶¶ 290-93.

[343]National Farmers' Union v. Secretariat General du Gouvernement, Case C-241/01, 2002 E.C.R I-9079, ¶¶ 34-39; Wiljo NV v. Belgische Staat, Case C-178-95, 1997 E.C.R. I-585, ¶¶ 19-24; Commission v. Greece, Case C-183/91, 1993 E.C.R. I-3131; Commission v. Belgium, Case 156/77, 1978 E.C.R. 1881.

[344]Apparently, however, there is an exception for situations in which the indirectly questioned act is "non-existent" or void ab initio. Such acts are viewed as nullities without regard to the two-month time limit. Consorzio Cooperative d'Abruzzo v. Commission, Case 15/85, 1987 E.C.R. 1005; Hartley, supra note 164, at 413.

somewhat uneasy compromise position has gradually emerged. In *TWD Textilwerke Deggendorf*[345] the court denied standing where the litigant undoubtedly knew about the decision and could not have doubted that it had standing to seek annulment. Where, however, the nonaddressee might not have known about the decision or might not have been able to foresee how it would apply to its own situation, the Court has adhered to the teaching of the *Hamburg* case and allowed an indirect challenge to the decision to proceed.[346]

That same compromise solution has prevailed in cases involving regulations that, as viewed by the Court, had such individualized impact that they were the practical equivalent of decisions. In *Nachi Europe*,[347] for example, the Court adhered to the logic of *Deggendorf* and denied standing to contest a regulation through preliminary reference. That regulation—which imposed anti-dumping duties on goods manufactured by the plaintiff's affiliate, Nachi Fujikoshi —was so squarely aimed at Nachi Europe that the company could not have doubted its standing to contest it in an annulment action within two months after it was published. The Court distinguished *Nachi Europe*, however, in a very recent case brought by Roquette Frères, a producer of isoglucose, to contest production quotas assigned to it by the French Minister of Agriculture. The Minister had reduced Roquette's quota by applying a series of six regulations that the Council had issued between 1981 and 2003. Here, as in *Hamburg*, the Court held that Roquette's challenge to the six regulations was admissible, because the company would not have had "undoubted" standing to contest those regulations at the time of their issuance. Even though Roquette was, in fact, the only isoglucose manufacturer in France, it could not have known from the outset whether France might ultimately allocate a portion of its allowable isoglucose production to some new entrant.[348]

The cases discussed in the preceding paragraph are exceptional. In the ordinary case, in which a regulation cannot be construed as a disguised decision, the door to assertion of a plea of illegality or other indirect challenge stands wide open. Indeed, this is the paradigmatic situation envisioned by Article 241, which says quite straightforwardly that a plea of illegality may be asserted against a regulation "[n]otwithstanding the expiry of the [two-month] period laid down in the fifth paragraph of Article 230." On the whole, the Court has read this language at face value—at least when the litigant that asserts the plea of illegality is a private party. Private litigants rarely have standing to contest a regulation directly, and thus the logic of *Simmenthal* has also militated in favor of admissibility.

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[345]Case C-188/92, 1994 E.C.R. I-833.

[346]Atzeni v. Regione Autonoma della Sardegna, Joined Cases 346/03 and C-529/03, 2006 E.C.R. I-1875.

[347]Case 239/99, 2001 E.C.R. I-1197, ¶¶ 28-40.

[348]Roquette Frères v. Ministre de l'Agriculture, Case C-441/05 (2007), ¶¶ 39-48. The Court also said, however, that Roquette's challenge to the six regulations was inadmissible insofar as it depended on an attack upon the "reference period" that had been set by an earlier regulation, issued in 1977. That underlying regulation had assigned a specific quota to Roquette *by name*. Roquette would clearly have had standing to seek annulment of that regulation in 1977 and thus, under *Nachi Europe*, could not question its validity now. Id. ¶¶ 59-60.

For years, however, there was lingering controversy about whether Member States or other governmental institutions could make use of Article 241. The argument against their right to do so was that those entities would indisputably have standing, as "privileged" applicants within the meaning of Article 230, to seek annulment of a regulation within the two month period following its promulgation. In this situation, therefore, the reasoning of *Simmenthal* would arguably militate *against* allowing the institution a second chance. Until recently the Court of Justice had never spoken clearly to the question.[349] In 2003, however, the Court seems to have largely resolved the issue in favor of admissibility. In *Commission v. European Central Bank*,[350] the Commission brought suit to annul the ECB's decision to create an internal auditing body that would operate to the exclusion of the Community's antifraud office. The ECB responded by claiming that the regulation setting up the latter office was ultra vires insofar as it purported to authorize the office to investigate fraud within a Community institution. The Court of Justice held that the ECB's plea was admissible. The Court noted that, in contrast to the situation in *Nachi Europe*, the regulation involved in *European Central Bank* was truly legislative in nature, and no one contended that it was tantamount to a decision.[351] One may assume that cases like *Nachi Europe* will remain exceptional and that the permissive stance of *European Central Bank* will prevail in most instances.

This liberality should not be surprising to American lawyers, because, as already mentioned, a collateral attack on the validity of a regulation is in most situations freely allowed in enforcement proceedings under U.S. law. To be sure, the United States does have several administrative programs in which judicial review of a regulation is confined to a short period following its issuance, such as sixty days.[352] The provisions of these statutes are directly analogous to the time limit in Article 230 of the EC Treaty. When such regulations are challenged during proceedings for judicial enforcement, however, American courts have shown flexibility. Although they take the position that alleged errors in the procedures by which the regulation was issued must be litigated during the sixty-day period or not at all,[353] the courts do not interpret the statutory time limits as foreclosing a regulated person from contesting the substantive validity of the rule in an enforcement proceeding, such as by claiming that the

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[349]In *Italy v. Council*, Case 32/65, 1966 E.C.R. 389, the Court seemed to assume that Italy's plea of illegality was properly before it, but did not discuss the time limit question and disposed of the plea on other grounds. Thus, *Italy* was thought to have left the question open. See Hartley, supra note 164, at 410.

[350]Case C-11/00, 2003 E.C.R. I-7147.

[351]*European Central Bank*, ¶¶ 75-78.

[352]See generally Frederick. Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 Duke L.J. 279; Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L. Rev. 733 (1983).

[353]Indep. Cmty. Bankers of Am. v. Bd. of Govs., 195 F.3d 28, 34 (D.C. Cir. 1999).

agency did not have constitutional or statutory authority to issue the rule.[354] In a few instances the statute containing the time limit on direct review also provides *expressly* that the rule may only be contested through direct review. Yet, even in these cases, the courts have often found ways to afford some room for judicial review at the enforcement stage.[355] An intuition running through all these cases is that when a regulation is promulgated, people are not always able to anticipate how it will play out in their particular situation (if they even know about its existence), and therefore it is unfair to expect them to challenge it at the promulgation stage or not at all.[356] Both European and American courts have evidently been attentive to this intuition.

5. Precedential Effect

As the above-quoted language from *Wöhrmann* indicates,[357] a regulation or other normative act that is "held inapplicable" pursuant to a plea of illegality does not cease to exist. In theory, the only legal effect of the successful Article 241 challenge is that the act is treated as a nullity for purposes of the proceeding in which it has occurred. In the real world, however, its effects reach much further. As we discussed in the section on preliminary reference,[358] the holdings of the Court of Justice generally carry precedential force in roughly the same manner as do judicial decisions in the Anglo-American legal system. More particularly, the Court once remarked in a preliminary reference case that, although a judgment declaring a regulation void is technically binding only on the particular national court that made the reference, "it is sufficient reason for any other national court to regard that act as void."[359] American readers might, therefore, think of the situation that ensues from a successful plea of illegality as similar to the situation that results from a Supreme Court decision that sustains declaratory relief against a federal or state statute. The statute remains on the books, unless the legislature chooses to remove it, and the Court's judgment technically binds only the parties to the suit, but the popular notion that the Court has "struck down" the statute is essentially correct for most practical purposes.

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[354]Id.; Commonwealth Edison Co. v. USNRC, 830 F.2d 610, 164 (7th Cir. 1987); Texas v. United States, 749 F.2d 1144, 1146 (5th Cir. 1985).

[355]See Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (enforcement challenge allowable if issues were not ripe at the time of the rule's promulgation). The Supreme Court made a small but telling gesture in this direction in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

[356]See Recommendation 82-7 of the Admin. Conf. of the U.S., 47 Fed. Reg. 58,208 (1982) (urging Congress to show restraint about precluding judicial review at the enforcement stage).

[357]See supra note 326 and accompanying text.

[358]See supra § III.C.6.

[359]Spa Int'l Chem. Corp. v. Amministrazione delle Finanze dello Stato, Case 66/80, 1981 E.C.R. 1191, ¶¶ 13, 18; see Hartley, supra note 164, at 412.

IV. REVIEW OF THE MERITS

A. INTRODUCTION

This section of our chapter discusses on a general level the principles applied by the European Court of Justice and Court of First Instance in deciding the merits of cases brought before them. The topic at hand corresponds roughly to what would in U.S. parlance be termed the "scope of judicial review." One should think of this discussion as an overview, recognizing that the principles described here have to be considered in the context of the respective types of actions that the Community courts entertain, such as actions for annulment, actions for preliminary reference, and damage actions.

Although the discussion in this section frequently refers for the sake of convenience to the "European Union," its purview is basically limited to the law of the European Community. The Treaty of Maastricht, which formed the European Union, rests on what are commonly known as "three pillars." The first pillar corresponds to the previously recognized European Community; the second pillar refers to a common foreign and defense policy, and the third pillar establishes cooperation regarding border and crime control. Judicial control of the latter two pillars is quite limited.[360] This section focuses on the first pillar, which stems from the E.C. Treaty and is the source of most of the case law of the Court of Justice.

Formally speaking, provisions of the Treaty offer a framework within which judicial review of the merits of an action can proceed. For example, in the case of the action for annulment—the most common type of action the Courts entertain—Article 230 of the Treaty sets forth four grounds of review that may be invoked: (1) lack of competence; (2) infringement of an essential procedural requirement; (3) infringement of the Treaty or any rule of law relating to its application; and (4) misuse of powers. In practice, the Article 230 criteria are often applied in other contexts as well.[361]

Nevertheless, the Treaty standards are only a starting point. As is also true of the corresponding section of the Administrative Procedure Act in the United States,[362] the doctrinal inquiries that actually shape debate in a given case have been defined largely by case law. Indeed, "the European Court does not normally state which of the four formal grounds is involved when it annuls a measure."[363] The creativity of the Court's development of review criteria has been particularly evident in its resort to "general principles of law," a practice that

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[360]Schermers & Waelbroeck, supra note 29, §§ 12, 16.

[361]See id. §§ 1000-01 (no difference between grounds available under Art. 230 (annulment) and Art. 234 (preliminary reference)); Meroni v. High Authority, Case 9/56, 1958 E.C.R. 133 (same grounds available under Art. 230 and Art. 241 (pleas of illegality), although the language of the latter provision appears narrower).

[362]5 U.S.C. § 706.

[363]Hartley, supra note 164, at 414.

has shaped much of the discourse on judicial review. We discuss "general principles of law" at length below.[364] Some of these principles, derived from Continental legal systems, have now become firmly established, freestanding doctrines in EU practice in their own right, far overshadowing some of the formal grounds.

Looking beyond the formally stated grounds of review, therefore, we will organize our discussion around functional categories that American lawyers should find familiar. We will examine the courts' treatment of issues of law, fact, discretion, and procedure. With minor variations that will be noted, these categories correspond directly to those in common use in the Community courts.[365]

B. QUESTIONS OF LAW

A wide variety of legal questions can come before the Court of Justice and CFI. In annulment actions, these questions can be analyzed as arising under the third clause of Art. 230, which authorizes the Court to review any alleged "infringement of the Treaty or any rule of law relating to its application." Such rules of law may be found in Community acts, subsidiary conventions, binding acts taken by representatives of member states, treaties with third countries, or international law, as well as (non-textually based) "general principles of law."[366]

Observers agree that, in practice, the European Community courts frequently take an aggressive and creative approach to legal interpretation. Indeed, Community lawyers apparently have no experience with the American concept—commonly associated with *Chevron U.S.A., Inc. v. NRDC*[367]— that a reviewing court is sometimes required to accept or "defer to" an administrative body's interpretation of a legal norm even if the court would have reached a different interpretation on its own. (As we will discuss later, however, the Community courts do recognize that the Commission sometimes acts within a realm of discretionary authority and that the determinations it reaches within such a realm must be reviewed deferentially.[368])

A partial explanation for the Community's acceptance of this assertiveness by its judicial branch is the public's recognition of the critical importance to the Union of the Court's

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[364] See infra Part IV.B.2.

[365] See Vesterdorf, supra note 143, at 11; Tony Reeves & Ninette Dodoo, *Standards of Proof and Standards of Judicial Review in European Commission Merger Law*, 29 Fordham Int'l L.J. 1034, 1056-57 (2006). Following common EU parlance, these authors refer to errors of "appreciation" or "assessment" to mean one form of what American lawyers would describe as an abuse of discretion.

[366] Hartley, supra note 164, at 419.

[367] 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was . . . the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

[368] See infra Part IV.C.

lawmaking role. That role not only furthers the generalized social interest in ensuring adherence to the rule of law by public and private entities alike, but also promotes uniform application of the rights and obligations prescribed by Community law—an essential precondition for a centralized market. In some ways the Court's role in resolving conflicts resembles the U.S. Supreme Court's function of resolving conflicts among lower courts. The European Union, however, has no counterparts to the federal district courts and courts of appeals. Its law is implemented at the local level by national courts. Thus, much of the responsibility to maintain the uniformity of Community law falls upon the Court of Justice, in the exercise of its preliminary reference jurisdiction.

1. Interpretation of Positive Law

Scholars have identified several styles or methods of interpretation that the Court of Justices uses in interpreting the Treaty, Community legislation, and other legal provisions.[369] These methods include the literal, the historical, the contextual, and the purposive or teleological. They also indicate that these methods do not differ significantly depending on whether the document being construed is the Treaty or Community legislation.[370] All of these methods should look fairly familiar to the American lawyer, although the following discussion will highlight a few divergences between the U.S. and EU approaches.

It has been said that the Court of Justice "attributes most importance to the text of the law itself," and thus literal interpretation "is and remains the main method of interpretation of Community law."[371] However, textualism has inherent limits in the Court's jurisprudence. One reason is that the Treaty and other Community documents are published in all of the different languages of the Community, and all of these published versions are equally authoritative. Thus, multiple translations of a given provision may have different shades of meaning, and this circumstance discourages judges from relying too heavily on subtle nuances suggested by the language of any one translation.[372] In this situation "the Court has more freedom to resort to one of the other methods of interpretation in order to reach the most appropriate rendering of the text. In general, the Court will rely on the interpretation which allows [it] best to achieve the objectives pursued by the decision in question."[373] Another factor militating against literalism is

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[369]Brown & Kennedy, supra note 163, at 321-44.

[370]Id. at 321.

[371]Schermers & Waelbroeck, supra note 29, at 11.

[372]Brown & Kennedy, supra note 163, at 322-23, 327.

[373]Schermers & Waelbroeck, supra note 29, at 13; see L. Neville Brown, *The Linguistic Regime of the European Communities: Some Problems of Law and Language*, 15 Val. U.L. Rev. 319, 341 (1981) ("In the event of a disparity of texts, [the Court of Justice] looks always behind the verbal symbols to the spirit and intention of the provision in dispute. It also leans in favor, as a general rule, of the more liberal version of variant texts."); Lisbeth Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal*

that the Treaty contains numerous open-ended terms and very few express definitions of these terms.[374]

Where the text is deemed to be ambiguous, the Court of Justice commonly turns to contextual considerations. For example, the preambles and introductory articles of the Treaties are sometimes consulted for guidance as to the purposes of the operative language.[375] The Court has apparently not developed as elaborate an array of canons of construction as American courts, but it does seem to adhere to a few such principles, such as the notions that a provision should be narrowly interpreted if it imposes criminal penalties[376] or if a broad reading would conflict with the Treaty.[377]

However, the role of legislative history in EU cases is small if not nonexistent, especially in interpretation of treaties. Generally speaking, the treaties are negotiated in secret, and negotiators generate no written record of their intentions other than the text of the provision itself. The working papers or *travaux préparatoires* are not released. Indeed, the typical treaty is negotiated after hard bargaining among the member states, and an account by any one negotiator would not be considered strongly probative of the expectations of the other parties to the negotiation. There are, to be sure, documents stemming from ratification debates in the various national parliaments, but they are seldom used.[378] Nor does the Court rely very often on parliamentary debates in construing Community legislation.[379] However, in construing regulations or directives, the Court will examine the Commission's initial proposal, changes made during the deliberative process by Parliament and the Council, etc., where documents revealing these matters are available. (The Court also relies with some frequency on the preamble to a regulation in construing the regulation.[380] That practice, however, seems qualitatively different from other kinds of judicial reliance on legislative or administrative history, because a preamble is officially adopted by the issuing authority, and questions about its trustworthiness should be far less troublesome.)

Instruments: The Régime Linguistique in the Court of Justice of the European Communities, 62 Nw. U.L. Rev. 701, 719-31 (1967) (discussing the Court's "practice . . . to consider the plurilingual treaty texts merely as a point of departure").

[374]Brown & Kennedy, supra note 163, at 325.

[375]Schermers & Waelbroeck, supra note 29, at 17.

[376]Id. at 16.

[377]Id. at 20.

[378]Brown & Kennedy, supra note 163, at 330-32; Schermers & Waelbroeck, supra note 29, at 16.

[379]Brown & Kennedy, supra note 163, at 332.

[380]Id. at 333.

The Court relies frequently on arguments that put individual Treaty provisions into the context of other provisions as well as the Treaty as a whole, so that the entire document may be read as a well-integrated scheme.[381] Regulations are read in a similar fashion.[382] The Court also draws freely on analogies to the laws of member states as an aid to interpretation. This interpretive method harmonizes with the Court's jurisprudence on "general principles of law," discussed below, although it is analytically distinct.[383]

Finally, the Court is strongly attracted to arguments that allow ambiguities to be resolved in favor of advancing the purposes that underlie the provision in question.[384] Europeans commonly describe this aspect of the Court's jurisprudence of interpretation as "teleological," although it seems very similar to what American lawyers would call a purposive approach.[385] Schermers and Waelbroeck note that "[t]eleological interpretation is generally used for three purposes: either (1) to promote the objective for which the rule of law was made, or (2) to prevent unacceptable consequences to which a literal interpretation might lead, or (3) to fill gaps which would otherwise exist in the legal order."[386] Another term in common use is "*effet utile*," which connotes a pragmatic emphasis: an interpretation that works, or that promotes the purposes of the contested provision (or another provision), or that avoids contradicting the object and policy of that (or another) provision, is preferred over one that does not.

An illustrative recent example of a teleologically driven decision is *Pfeiffer v. Deutsches Rotes Kreuz*.[387] Ambulance drivers, paramedics, and other members of emergency road crews sued their employer, the German Red Cross, claiming to be entitled to compensation for working overtime. One question in the case was whether an EU directive regulating labor standards applied to these workers. By its terms the directive did not apply "where characteristics peculiar to . . . activities in the civil protection services inevitably conflict with it." The Court of Justice concluded, however, that this exclusion was inapplicable. It had been adopted to facilitate the operation of essential services in a catastrophe "the gravity and scale of which are exceptional [and which] do not lend themselves to planning as regards the working time of teams of emergency workers." Even though the Red Cross did have to "deal with events which, by definition, are unforeseeable," its operations under normal conditions were "capable of being

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[381]Id. at 334-36.

[382]Id. at 336-37.

[383]Id. at 337-39.

[384]Id. at 339-43.

[385]See D. Neil MacCormick & Robert S. Summers, Interpretation and Justification, in Interpreting Statutes: A Comparative Study 511, 514, 518-19 (1991).

[386]Schermers & Waelbroeck, supra note 29, at 21.

[387]Joined Cases C-397/01 to C-403/01, 2004 E.C.R. I-8835.

organised in advance," including the working hours of the staff members.[388] Similarly, although the directive also exempted workers employed in "air, rail, road, sea, inland waterway and lake transport," the incidental "road transport" aspect of the ambulance drivers' jobs did not deprive them of protection. The purpose of this latter exclusion was to accommodate an earlier directive that regulated working time for transportation workers but did not apply to the *Pfeiffer* plaintiffs.[389] A premise of the Court's decision was that, in light of the directive's purpose of protecting the health and safety of workers, "exclusions from its scope . . . must be interpreted restrictively."[390]

The hard question to address is the relative weight that the Court will give to the above methods of interpretation. Opinions vary. As already noted, one treatise argues that literal interpretation "is and remains the main method of interpretation of Community law."[391] According to this view, "[i]n principle, teleological interpretation is of a subsidiary nature."[392] Another treatise, however, indicates that "the dominant approaches of the Court of Justice are the contextual and teleological with increasing resort to the latter."[393] There seems, however, to be general agreement that much may depend on what kind of legal text is involved, even though, in the abstract, the same methods of interpretation apply to all. That is, the fundamental treaties of the Community are regarded as a de facto constitution[394] and are written in spacious terms that plainly invite judicial creativity. On the other hand, where a statutory scheme is detailed, the Court will have relatively little room to construe it narrowly in order to achieve desired policy outcomes; under these circumstances, the Court is more likely to have to reach the issue of whether the statute, once construed in accordance with its evident meaning, is invalid because of conflict with the Treaty.[395]

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[388]Id. ¶¶ 55-60.

[389]Id. ¶¶ 68-72.

[390]Id. ¶¶ 52-54, 67.

[391]Schermers & Waelbroeck, supra note 29, at 11.

[392]Id. at 21.

[393]Brown & Kennedy, supra note 163, at 324; see also Brown, supra note 373, at 721-22 ("The Court of Justice commonly preferes a teleological or schematic interpretation of a provision of Community Law; the wording, of course, is not ignored, but primary importance is not given to '*les termes*.' The Court looks rather to '*l'objet, l'esprit, la nature'* or *'l'economie*' of the text under scrutiny.").

[394]Charles Koch, *Envisioning a Global Legal Culture*, 25 Mich. J. Int'l L. 1, 25 n.104 (2003); see Parti Ècologiste "Les Verts" v. European Parliament, Case 294/83, 1986 E.C.R. 1365, ¶ 23 (referring to EEC Treaty as "the basic constitutional charter" of the Community).

[395]Brown & Kennedy, supra note 163, at 329-30.

One finds in the literature many pronouncements that a teleological approach cannot override the explicit language of the text.[396] Yet it is acknowledged that the Court does occasionally override "plain" meaning. In one case, for example, the Court held that civil servants did not have to resort to an administrative tribunal before appealing to the Court, despite a Staff Regulation that explicitly required exhaustion, because the tribunal had no power to review the decision in question.[397] Apparently, just as in the United States, there are enough contradictory pronouncements in the case law that advocates on both sides of this issue can find plausible precedential support for their positions.

2. General Principles of Law

The European Court has announced and applied a variety of "general principles of law" that have no obvious textual source in the Treaty but that function as a freestanding body of authoritative legal principles. The jurisprudential foundations of this kind of lawmaking have frequently remained obscure. At various times, the Court has explained particular "general principles of law" as being based on various Treaty provisions that arguably contemplate them; or on unwritten norms that supposedly are embedded within the Treaty itself; or on "inspiration" from national legal systems. Realistically, however, as Hartley has observed, "[t]he general principles of law are . . . an independent source of law and there can be little doubt that the Court would have applied them even if none of the Treaty provisions [cited to justify them] had existed."[398] Some of these principles are gleaned from the Court's own in-house comparative legal research. As such, they can be seen as efforts to give effect to the "common denominator" of principles that are observed in the respective member states and thus could be expected to prove acceptable or even welcome to those states. In any event, some legal rules that originally entered the jurisprudence of the Court of Justice as general principles of law have subsequently been codified and now stand on a firmer jurisprudential footing than they did originally.[399]

In light of the Court's propensity to draw "inspiration" from national systems of the Community, its general principles frequently resemble doctrines applied in those systems. The borrowing has been sporadic, however, and one should never take for granted that any given doctrine applied at the national level has in fact found its way into Community law. Indeed, it has been argued that, because the Court of Justice has been quite selective about endorsing principles that are widely observed in European legal systems, the term "general principles of

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[396]Schermers & Waelbroeck, supra note 29, at 21.

[397]Von Wüllerstorff und Urbair v. Commission, Case 7/77, 1978 E.C.R. 769, ¶¶ 6-8, cited in Schermers & Waelbroeck, supra note 29, at 23.

[398]Hartley, supra note 164, at 135.

[399]See, e.g., Treaty Art. 253 (duty to give reasons); Jürgen Schwartze, *Judicial Review of European Administrative Procedure*, 68 L. & Contemp. Prob. 85, 87 n.11 (Wint. 2004) (citing unwritten procedural rights that have been subsequently been recognized in regulations).

Community law" might be a preferable term to signify those principles that the Court does recognize.[400] Although this reasoning seems logical, the following discussion adheres to the more conventional phrase "general principles of law."

Entire volumes have been written about the Community's general principles of law,[401] and the following discussion does not aspire to be comprehensive. Its basic purpose is to summarize and analyze the main general principles that the Court has recognized to date. The Court has not indicated that these principles constitute a closed set. Thus, new ones may well emerge in the future.

a. Fundamental human rights

The Court of Justice arrived in a somewhat oblique fashion at the proposition that fundamental human rights are among the general principles of law that it can enforce. As we have discussed in more detail in an earlier section of this chapter,[402] this development apparently had as much to do with the Court's effort to maintain its authority as with idealism. The Court has strongly maintained that Community law supersedes the laws of member states in the event of a conflict — a proposition that is directly analogous to the thrust of the supremacy clause of the U.S. Constitution.[403] During the 1960s, the German courts, while accepting this proposition as a general matter, resisted it insofar as it implied that Community law could infringe on fundamental human rights such as those guaranteed in the *Grundgesetz*. The European Court of Justice finessed this impending rebellion by ruling in *Stauder v. City of Ulm*[404] and subsequent cases that Community law also would recognize fundamental human rights as among the general principles of law that would inform its decisions. This move ultimately achieved the desired effect. After a period of controversy as to who would have the final say in determining the meaning of these rights, the German Constitutional Court announced in 1986 that it would leave decisions about whether Community actions violated fundamental human rights to the European Court.[405]

Ironically, however, Europe does have a "Supreme Court-level" judicial body that can exercise leadership on human rights issues: the European Court of Human Rights (ECHR), which is based in Strasbourg and is charged with implementing the European Convention on

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[400]Brown & Kennedy, supra note 163, at 349 (emphasis added).

[401]See, e.g., Takis Tridimas, The General Principles of EC Law (1999).

[402]See supra notes 14-16 and accompanying text. See also Brown & Kennedy, supra note 163, at 357-60; Hartley, supra note 164, at 135-38.

[403]See supra notes 12-13 and accompanying text.

[404]Case 29/69, 1969 ECR 419.

[405]Brown & Kennedy, supra note 163, at 359; Hartley, supra note 164, at 142.

Human Rights. The Court of Justice does sometimes draw on ECHR case law,[406] but it also draws "inspiration" from the convention on its own.[407] Because the Court of Justice is not formally charged with responsibility to enforce the convention, its reliance on that document occurs on an informal level.

When it is using its own judgment to determine the scope of human rights, the Court of Justice draws "inspiration" from the legal systems of member states, as well as from international treaties, although the Court does not consider itself bound by any of these sources of authority.[408] The human rights that the Court of Justice determines are within the general principles of Community law are protected against infringement by actions of Community institutions. Member states are also prohibited from infringing these rights, but the prohibition extends only to matters that fall within the scope of Community law, not to matters that would otherwise be left to the individual states.[409]

In practice, the Court has invoked the concept of fundamental human rights most often as a basis for incorporating procedural norms into the administrative process.[410] We discuss this important development below in the section on questions of procedure,[411] and the chapter of this work on Adjudication contains detailed coverage of its scope and impact.[412] Some writers prefer to describe the "right to be heard" as a general principle of law, without reference to the "fundamental human rights" framework, but this choice of labels appears to have little if any practical significance.

Substantive fundamental human rights, on the other hand, tend to be invoked only in very limited contexts. The Court generally does not use the concept to invalidate significant Community legislation—although parties do argue for such results and may thereby induce the Court to decide a case their way on other grounds.

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[406]See Parliament v. Council (Family Reunification), Case 540/03, 2006 E.C.R. I-5769, ¶¶ 54-56; Connolly v. Commission, Case C-274/99 P, 2001 E.C.R. I-01611, ¶¶ 37-39 (upholding freedom of speech for EU officials on the basis of ECHR case law).

[407]See *Parliament v. Council (Family Reunification)*, ¶ 35 et passim; Mannesmannröhren-Werke AG v. Commission, Case T-112/98, 2001 E.C.R. II-729, ¶¶ 59-60 (recognizing qualified right not to answer questions that would admit to liability).

[408]Hartley, supra note 164, at 138-39.

[409]Id. at 146.

[410]See Schwartze, supra note 399, at 88-89 (citing several such applications of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on December 7, 2000).

[411]See infra Part IV.D.

[412]See Adjudication chapter, Part I.C.

b. Proportionality

The Court of Justice borrowed the doctrine of proportionality from the German constitutional principle *Verhältnismässigkeit.* The issue of whether a provision of Community law complies with this principle turns on "whether the means which it employs are suitable for the purpose of achieving the described objective and whether they do not go beyond what is necessary to achieve it."[413] In other words, the question is whether a Community institution resorted to an extravagant means of achieving its objective. The principle of proportionality has recently been codified; thus, its authority no longer rests exclusively on its status as one of the "general principles of law."[414]

The doctrine has no exact counterpart in U.S. law. It does bear at least some resemblance to a strand of American constitutional law under which the government, in order to survive "strict scrutiny," must demonstrate that the provisions of a statute are "narrowly tailored," or, in other words, that the government could not have achieved the same result using a "less restrictive means."[415] It can also be compared with the recent developed American line of cases holding that a federal law cannot be enforced against state governments because it lacks "congruence and proportionality" with the constitutional right that it purports to enforce.[416] An analog in American administrative law is the inquiry into whether an agency abused its discretion. That inquiry has been said to turn in part on whether the agency "failed, without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action."[417] However, this analogy is weakened by the fact that abuse of discretion review usually rests, at least in part, on the agency's failure to *explain* its selection of the more onerous alternative at the time of its action. The agency normally gets a chance to try to rehabilitate its decision by offering a better explanation on remand in light of the court's critique. Proportionality review entails a more assertive judicial role, in which the Court can actually enter judgment on the basis of its own view that the decision under review was excessive in some respect.

A few examples may clarify the operation of the European Court's proportionality doctrine. In *Commission v. United Kingdom*,[418] "[t]he United Kingdom had established the system of import licence to prevent milk from diseased cattle entering the country. The issue of

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[413]United Kingdom v. Council (Working Time Directive), Case C-84/94, 1996 E.C.R. I-5755.

[414]See Treaty on European Union Art. 5 [3b] ("Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.").

[415]See Brown & Kennedy, supra note 163, at 351 (suggesting this comparison).

[416]Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000); City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[417]ABA Section of Administrative Law & Regulatory Practice, A Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 1, 43 (2002).

[418]Case 124/81, 1983 E.C.R. 203.

such licences depended upon administrative discretion and therefore created uncertainty for traders. The European Court held that public health could have been equally served if the authorities had obtained the relevant information by means of declarations signed by importers and, if necessary, accompanied by the appropriate certificates."[419] Similarly, in *Mignini SpA v. AIMA*,[420] subsidies for producers of soya beans had been made contingent on an applicant's possession of on-site storage facilities. The Court of Justice ruled that, although inspection of facilities was necessary to prevent fraud, the requirement that those facilities must be on the applicant's premises was unnecessary and could deter participation in the program. Thus, that condition violated the principle of proportionality.[421]

The Court sometimes invokes proportionality in combination with other general principles of law, such as by remarking that a member state should not interfere *unnecessarily* with fundamental rights.[422] For example, in *Bela-Muhle Josef Bergmann KG v. Grows-Farm GmbH*,[423] a Council regulation sought to reduce surplus stocks of skimmed-milk powder by requiring animal feed producers to purchase substantial quantities of the powder at high prices. The Court of Justice concluded that the Council could have achieved its objective in a different manner, by inducing a reduction in the production of skimmed-milk powder. Thus, the regulation violated the proportionality principle.[424] Moreover, the measure also violated the principle of equality (which will be discussed below), because it unnecessarily imposed a disproportionate economic burden on those producers, as compared with other agricultural sectors. Similarly, in *Mignini*, discussed in the preceding paragraph, the Court found violations of both proportionality and equality norms. The latter principle was involved because the restriction on soya bean producers had not been applied to subsidies for other industries such as oil producers.

At least some of the time, the Court of Justice has indicated that it will apply the doctrine of proportionality with restraint, so that the disproportional nature of a measure must be "manifestly inappropriate" before the Court will intervene.[425] Thus, the cases already described should be compared with other decisions in which the Court of Justice has declined to find a breach of the principle of proportionality because the Commission, in making policy choices, had not committed a "manifest error or misuse of powers," nor "manifestly exceeded the limits

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[419]Robert Thomas, Legitimate Expectations and Proportionality in Administrative Law 82 (2000).

[420]Case 256/90, 1992 E.C.R. I-2651.

[421]Thomas, supra note 419, at 81.

[422]Wachauf v. Bundesmat Für Ernährung und Forstwirtschaft, Case 5/99, 1989 E.C.R. 2609.

[423]Case 114/76, 1977 E.C.R. 1211.

[424]Thomas, supra note 419, at 81.

[425]R. v. Ministry of Agriculture, Fisheries & Food, ex parte Fedesa, Case C-331-88, 1990 E.C.R. I-4023.

of its discretion."[426] By and large, the Court shows more restraint when it reviews acts of EU institutions—particularly when reviewing legislative acts of the Council and Parliament—than when it undertakes to examine whether actions of Member States are in line with their obligations under the Treaty and Community legislation.

Even with this deferential standard of review in place, one could question whether judges have the knowledge, expertise, and legitimacy to engage in the kind of policy determinations that the proportionality doctrine requires. Thomas responds to this critique by arguing that the Court, in applying the doctrine, accepts the ends sought by the political branches and questions only the means chosen to advance those ends. "The Court does not examine the expediency of an administrative purpose, but considers whether it could have been satisfactorily obtained by a better-designed and less-onerous measure." In this sense, "[t]he Court does not seek to impose its own set of values on what the administration ought to be doing."[427] One might be skeptical about the coherence of any effort to separate means from ends in this fashion. Nevertheless, insofar as the Court does accept Thomas's conception of proportionality, that limitation can be expected to constrain the judges of the Court in at least some cases.

In a variant on the above uses of the proportionality doctrine, the Court of Justice sometimes uses the doctrine to overturn penalties that have been imposed on individual enterprises if it believes that these penalties are disproportionate to the gravity of the individual's offense.[428] It has been argued that this kind of use of the proportionality doctrine is, appropriately, relatively intensive, because the Court's decision is individualized and does not require "an overall assessment of the economic situation."[429]

This latter line of authority is directly comparable to a line of American cases in which reviewing courts will sometimes set aside an administrative sanction as "greatly out of proportion to the magnitude of the violation."[430] To be sure, the U.S. Supreme Court has cautioned that this power should be used sparingly, out of respect for the primacy of the agency

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[426]United Kingdom v. Council (Working Time Directive), Case C-84/94, 1996 E.C.R. I-5755; Germany v. Council (Bananas), Case 208/93, 1994 E.C.R. I-4973.

[427]Thomas, supra note 419, at 83-85.

[428]R. v. Intervention Board for Agricultural Produce, ex parte Man, Case 181/84, 1985 E.C.R. 2889 (forfeiture of £1.67 million deposit was a disproportionate penalty for trader that missed by four hours the application deadline for a license to export sugar); Buitoni v. Fonds d'orientation et de régularisation des marchés agricoles, Case 122/78, 1979 E.C.R. 677 (importer of tomato concentrate who had failed to apply promptly for a refund of a security deposit could not, consistently with principles of proportionality, be required to forfeit the deposit, because failure to import at all, a graver offense, would have been punished just as severely).

[429]Thomas, supra note 419, at 82.

[430]ABA Blackletter Statement, supra note 417, at 43; Excel Corp. v. USDA, 397 F.3d 1285, 1298-99 (10th Cir. 2005).

in determining the proper size of a penalty.[431] The Court of Justice seems to take a more assertive view, as one might expect in light of its plenary authority under Article 229 to review penalties.[432]

c. Legal certainty and related doctrines

The Court of Justice has endorsed a variety of doctrines that recognize circumstances in which private entities have acquired a stake in the status quo that a given Community action cannot fairly displace. The term "legal certainty" is sometimes used to refer to this entire group of doctrines.[433] A formula commonly found in the case law is that "the principle of legal certainty . . . requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable."[434] The following discussion examines how this notion plays out in more specific contexts.

i. Retroactivity

The Court has enunciated several doctrines that prohibit or discourage retroactive application of Community acts.[435] More specifically, the principle of legal certainty "has prevented penal statutes having retroactive application and requires that non-penal statutes are generally precluded from taking effect from a point of time before their publication except where the purpose of the measure requires otherwise, and the legitimate expectations of those concerned are respected."[436]

The first of these propositions, pertaining to penal measures, is of course directly comparable to the prohibition on ex post facto laws in the U.S. Constitution.[437] The second

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[431]Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973).

[432]See supra notes 145-152 and accompanying text.

[433]George A. Bermann et al., Cases and Materials on European Union Law 182 (2d ed. 2002 & Supp. 2004).

[434]See, e.g., Ireland v. Commission, Case C-199/03, 2005 E.C.R. I-8027, ¶ 69 (the quoted principle was not infringed, because the governing legislation itself provided for the possibility of future adjustments); Duff v. Minister for Agriculture and Food, Case C-63/93, 1996 E.C.R. I-569, ¶ 20 (quoted principle was not infringed, because the Community did not induce reliance); see also Altmark Trans GmbH, Case C-280/00, 2003 E.C.R. I-7747, ¶¶ 58-59 (holding, on preliminary reference, that Germany may exempt publicly subsidized transit systems from EEC regulation, but the national court must ensure that legal certainty is maintained).

[435]Hartley, supra note 164, at 148.

[436]Thomas, supra note 419, at 45, citing, respectively, R. v. Kent Kirk, Case 63/83, 1984 E.C.R. 2689, and Firma A. Racke v. Hauptzollamt Mainz, Case 98/78, 1979 E.C.R. 69.

[437]Art. I, § 9, cl. 3.

proposition is analogous to a balancing test that American courts have adopted in administrative law cases. Under that test, an administrative agency may sometimes adopt a new policy in an adjudicative case and apply it to parties whose actions predated the announcement of the policy, but only if the public purposes that militate in favor of that choice outweigh the unfairness and hardships that would result from such retroactive application.[438] Of course, U.S. law also imposes a variety of other constraints on retroactivity in legislation and administration, which may prove helpful to understanding analogous principles of European Union law.[439]

An illustration of the application of the second principle by the Court of Justice — albeit an illustration in which the objection to retroactive effect failed — is *Amylum v. Council*.[440] In this case the Court of Justice annulled a regulation that imposed quotas and levies on producers of isoglucose, because the Council had failed to consult with Parliament. The Council then engaged in the required consultation and issued a new regulation, making it retroactive to the period that the old regulation would have covered if it had survived. The Court of Justice upheld the new regulation, concluding that its retroactive coverage was not unfair, because the Council's intentions had been readily foreseeable, and was important to the Council's objective of putting sugar and isoglucose producers on an equal plane. This result may be particularly interesting for American lawyers, because such "curative" regulations (which reinstate, with retroactive effect, an earlier rule that had been struck down) have sometimes elicited highly dubious reactions from jurists in the United States.[441]

Supplementing these substantive safeguards against retroactivity in EU practice is a canon of construction: The Court of Justice has stated that Community legislation and regulations should not be construed as having retroactive effect unless it is clearly intended to have that effect.[442] American law is quite similar.[443]

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[438]SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947); Consolidated Edison Co. v. FERC, 315 F.3d 316, 323 (D.C. Cir. 2003); Retail, Wholesale & Dep't Store Clerks Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972).

[439]See generally Daniel E. Troy, Retroactive Legislation (1998). According to a recently emergent body of cases in the United States, due process precludes the imposition of sanctions on persons who did not have fair notice of a recently adopted administrative policy. See, e.g., Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000); United States v. Chrysler Corp., 158 F.3d 1350 (D.C. Cir. 1998). The foundational case in this line of authority is General Electric Co. v. USEPA, 53 F.3d 1324 (D.C. Cir. 1995).

[440]Case 108/81, 1982 E.C.R. 3107.

[441]See Bowen v. Georgetown University Hospital, 488 U.S. 204, 225 (1988) (Scalia, J., concurring), and the opinion of the court below in the same case, Georgetown Univ. Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The Supreme Court majority in *Georgetown* did not squarely address this issue.

[442]Openbaar Ministerie v. Bout, Case 21/81, 1982 E.C.R. 381, 390; Hartley, supra note 164, at 148.

[443]Landgraf v. USI Film Products, 511 U.S. 244 (1994); *Georgetown University Hospital*, 488 U.S. at 208 (opinion of the Court).

ii. Legitimate expectations

The Court of Justice has established the principle that the "legitimate expectations" of the individual must be respected in the absence of an overriding public interest.[444] This doctrine is drawn from the German principle called *Vertrauensschutz*, or "protection of trust." As that name suggests, the principle rests primarily on the ideal that trust in the legal order must be respected.[445] It should be noted that a finding that a Community act defeated legitimate expectations does not automatically result in annulment of that act. Rather, it sometimes leads only to relief for the affected individual.[446]

A frequently cited example of the legitimate expectations principle is the decision in *Mulder v. Minister van Laudbouw en Visserij*.[447] The applicant was a farmer who was threatened with having to pay a "super-levy" on his milk production in 1984, because he was unable to point to a "reference quantity" of milk that he had produced in 1983. But the reason he had no reference quantity for 1983 was that he had foregone milk production in that year in order to cooperate with a moratorium sponsored by the Community itself. The Court of Justice concluded that he could legitimately have expected to be able to resume milk production without having his participation in the prior program used against him. Another frequently mentioned illustration is the *Staff Salaries* case.[448] The Council, which was responsible for setting salaries for staff members of the Commission, reached a negotiated agreement with the employees for pay levels that were to last three years. When the Council departed from that agreement after only nine months, the Court of Justice found that the legitimate expectations of the employees had not been honored.[449]

One commentator asserts that the legitimate expectations doctrine is technically different from the principle of legal certainty (by which he means the retroactivity principle discussed in the preceding subsection). "Legal certainty is an objective value which places substantive limits on Community acts, whereas legitimate expectations arise as a result of administrative conduct and operate only in the context of a specific relationship between an individual, or a specific class of people, and the administration."[450] Nevertheless, the two doctrines plainly overlap. In

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[444]Hartley, supra note 164, at 149.

[445]Thomas, supra note 419, at 44-45.

[446]Brown & Kennedy, supra note 163, at 184. American courts have reached similar conclusions in analogous circumstances. Marrie v. SEC, 374 F.3d 1196 (D.C. Cir. 2004); McDonald v. Watt, 653 F.2d 1035, 1041-46 (5th Cir. 1981).

[447]Case 120/86, 1988 E.C.R. 2321.

[448]Commission v. Council, Case 81/72, 1973 E.C.R. 575.

[449]Brown & Kennedy, supra note 163, at 353-54.

[450]Thomas, supra note 419, at 45-46.

cases where either might plausibly be invoked, legitimate expectations seems to be more widely applied, perhaps because it is more familiar to the Court and counsel.

The legitimate expectations doctrine has no close analog in U.S. law. American lawyers might notice a resemblance to the law of regulatory takings, which turns in part on whether the government has interfered with a property owner's " reasonable investment-backed expectations."[451] English writers have also discerned an "affinity" with the law of equitable estoppel.[452] Actually, however, as discussed below, the doctrine diverges significantly from the path that a straightforward application of estoppel would suggest.

The Court of Justice has identified a number of limitations that circumscribe the legitimate expectations doctrine, including the following:

First, the expectation must have been *induced* by a Community institution. Expectations that have merely "arisen as a result of the individual's subjective hopes" do not qualify for protection.[453] Thus, in a case arising from the same factual setting as *Mulder*, an applicant was denied relief, because his lack of a reference quantity was attributable not to his participation in an earlier Community program, but instead to his own ill-advised decision to lease his farm to tenants who mismanaged the property.[454] This limitation seems logical, because the fundamental purpose of the legitimate expectations doctrine is to uphold trust in public institutions. However, the constraint does not seem to be a strong one. An applicant can sometimes meet this burden by demonstrating that a Community entity was aware of and acquiesced in the applicant's conduct for a lengthy period, or waited too long to commence enforcement action.[455]

Second, the applicant's expectation must have been reasonable. A change of government policy that a prudent business person would have foreseen is unlikely to qualify.[456]

Third, the claimed frustration of expectations must not have resulted from an effort by the applicant to exploit a weakness in Community policy for his own gain. In *EVGF v. Mackprang*,[457] a grain dealer bought wheat in France with the intention of reselling it to a price support agency in Germany, where prices were more generous because of currency exchange rates. The Commission's action forbidding such transactions was issued while the dealer's grain

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[451]Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

[452]Brown & Kennedy, supra note 163, at 355; see Thomas, supra note 419, at 50.

[453]Thomas, supra note 419, at 53.

[454]Kuhn v. Landwirtschaftskammer Weser-Ems, Case C-177/90, 1992 E.C.R. I-35.

[455]Thomas, supra note 419, at 54.

[456]Id. at 55.

[457]Case 2/75, 1975 E.C.R. 607.

was already in transit. Nevertheless, his losses resulting from the ban were not compensable, because his expectation of making a profit through speculation was not "legitimate."

Fourth, the doctrine does not protect an expectation that was induced by a public authority if its position was actually beyond the legal power of the authority.[458] This proposition is directly comparable to U.S. law holding that the United States can never, or virtually never, be estopped by the conduct of its agents.[459] The strict position of the Court of Justice may be justified by the rationale that member states, which the Community has limited power to control, should not be able to undermine Community policy by misdescribing it to their citizens. This stance can, however, be contrasted with the more lenient view taken by German and Dutch authorities,[460] as well as by some of the states of the United States, which hold that public entities should be subject to the same kinds of principles of "apparent authority" that would apply to private entities.

Fifth, and crucially, even a reasonable expectation that meets all the foregoing criteria can be overridden by the public interest. Thus, while the legitimate expectations doctrine requires the Court to engage in detailed consideration and balancing of individual and collective interests, the applicant's burden is not easily carried. "It is clear that if the public interest would be undermined by extending protection to the expectation then it must be overridden. . . . The purpose of the review exercised by the European Court is not to substitute its view of the desired public interest for that of the administrator, but to determine whether the disappointment of an expectation was indispensable for the attainment of that objective."[461] For example, in *Comptoir National Technique Agricole SA v. Commission*,[462] the Commission granted a trader an export license for colza seeds. While the trader's deliveries were in progress, however, the Commission abolished a system of payments that was designed to offset the impact of currency fluctuations. The Court of Justice ruled that the Commission should have adopted transition measures to protect the trader's reasonable expectation that the payments would remain available. On the other hand, in *Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*,[463] the Commission imposed a temporary suspension of imports of Chilean apples, making no provision for transition measures to protect traders with goods in transit. The Court ruled that the traders' reasonable expectations had to be overridden, because any transition measures would have undermined the effectiveness of the suspension. In short, a claim based on legitimate

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[458]Thomas, supra note 419, at 56-57 (citing, e.g., Hauptzollamt Krefeld v. Maizena GmbH, Case 5/82, 1982 E.C.R. 4601).

[459]OPM v. Richmond, 496 U.S. 414 (1990).

[460]See Thomas, supra note 419, at 56-57.

[461]Id. at 63.

[462]Case 74/74, 1975 E.C.R. 533.

[463]Case 112/80, 1981 E.C.R. 1095.

expectations "will prevail only if there is a clear case of unreasonable treatment and the administration grossly misjudged the protection of the individual's expectations."[464]

d. Equality

"Several provisions of the EC Treaty, and many provisions of Community legislation, prohibit specific forms of discrimination. . . . However, the Court of Justice has taken the view that, beyond those specific provisions, the guarantee of equal treatment or the prohibition of discrimination, is a general principle of law that must be observed in the whole field of Community law."[465] An example is *Bela-Muhle*, a case discussed above, in which the Court found that a regulation on skimmed-milk powder operated in a discriminatory fashion.[466] On the whole, the Court of Justice does not appear to have made broad use of the equality principle — at least in comparison with the multitude of equal protection cases in U.S. law. It is, therefore, difficult to generalize on a concrete level about the scope of this principle within the European Community. Nevertheless, the multitude of general pronouncements in the legal environment would leave plenty of room for growth if the Court should become so inclined.[467]

e. Legality

The foregoing discussion has examined general principles of law that, where enforced, operate as constraints on the authority of Community institutions, but judicially prescribed principles that operate for the benefit of such institutions are not unknown. An example of the latter is the so-called "principle of legality." This relatively obscure principle has been described as signifying that "no person may rely, or support his claim, on an unlawful act committed in favour of another."[468] The principle comes into play when, for example, Party A contends that his fine should be reduced because of the unlawful level at which Party B's fine was set. Relying on the principle of legality, the courts have refused to entertain such an argument—

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[464]Thomas, supra note 419, at 46.

[465]Brown & Kennedy, supra note 163, at 352-53, citing Frilli v. Belgium, Case 1/72, 1972 E.C.R. 457.

[466]See supra notes 423-424 and accompanying text.

[467]For an overview of the equality jurisprudence, see Christopher McCrudden & Haris Kounouros, *Human Rights and European Equality Law*, in Equality Law for an Enlarged Europe: Understanding the Article 13 Directives (Helen Meenan ed., forthcoming 2007) (also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899682).

[468]Williams v. Court of Auditors, Case 134/84, 1985 E.C.R. 2225, ¶ 14.

regardless of whether A's position is that he deserves equal treatment with B,[469] or, instead, that B got off too easily by comparison with himself.[470]

Another reference to the principle of legality occurred in *P&O European Ferries*.[471] In that case, the Commission initially approved a transaction in which Spain agreed to pay a subsidy to P&O, a ferry service. Later, however, the CFI annulled that decision and found that the subsidy was an unlawful form of state aid. The Commission then directed P&O to repay the sums it had received. P&O contended that it should be able to retain the money because of its reliance on the Commission's earlier decision. It invoked the doctrines of legitimate expectations and legal certainty. But the CFI disagreed, because, even if P&O's reliance had been reasonable, "Article 230 balances the principle of legality, intended to prevent unlawful acts from giving rise to effects in the common market, and the principle of legal certainty. . . ."[472] In this context, the principle of legality serves to bolster the more general objective of maintaining rule-of-law values, as well as regulation in the Community interest. Indeed, the Court could probably have reached the same result in any of these cases without having to clothe it in a rarely-invoked "principle." If nothing else, however, this line of authority provides further confirmation of the great flexibility that the "general principles of law" jurisprudence affords to the Community courts.

3. Competence

As noted earlier, Article 230 of the E.C. Treaty empowers the Court to review Community acts not only for "infringement of this Treaty or of any rule of law relating to its application," but also for "lack of competence." This language raises the question of how, if at all, the two standards differ from each other.

In this context, "competence" refers to "legal power to adopt an act."[473] It corresponds to the American concept of a tribunal's acting beyond its jurisdiction. An inquiry into competence may be directed to determining whether an action went beyond the sphere of activity that the Community can regulate at all, and also whether the particular institution that took the action had

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[469]Id.

[470]E.g., Tokai Carbon & Others, T-236/01, 2004 E.C.R. II-1181, ¶ 316; SCA Holding Ltd. v. Commission, Case T-327/94, 1998 E.C.R. II-1373, ¶ 160.

[471]P&O European Ferries (Vizcaya) SA v. Commission, Joined Cases T-116/01 and T-118/01, 2003 E.C.R. II-2957.

[472]Id. ¶¶ 204-09. For a similar American holding, see Heckler v. Cmty. Health Servs., 467 U.S. 51 (1984).

[473]Hartley, supra note 164, at 415.

competence to do so.[474] A question of whether an institution improperly delegated its powers to another body can also raise a question of competence.[475] Another function of the competence inquiry is to determine whether the specific provision of law that an institution claims as authority for its action is broad enough to authorize the action.[476]

Analytically, this use of the concept of "competence" seems scarcely different from an ordinary question of whether the Commission violated a treaty provision or other law.[477] (Indeed, efforts in American administrative law to distinguish between "jurisdictional" issues and other legal issues have not proved very enduring.) One point of distinction in EU law is that an apparent error that goes to competence should be raised by the Court on its own motion, unlike other legal errors, which are waived if not raised by the applicant.[478] On the whole, however, relatively few cases focus on the notion of competence as an issue that requires separate analysis in its own right, and practitioners should be wary of ascribing too much importance to that notion.

C. QUESTIONS OF FACT AND DISCRETION

1. The Emergence of Judicial Restraint

The Treaty provisions that authorize judicial review, such as Art. 230, do not list errors of factfinding as a basis for review. This does not mean that challengers cannot rely on such alleged errors as a basis for contesting administrative decisions. Rather, it means that they will have to show that the error resulted in a violation of law or a misuse of powers.[479] American lawyers will find this reasoning understandable if they think about the role of factual controversies in American constitutional law, as opposed to garden-variety administrative law cases.

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[474]Bermann et al., supra note 433, at 155-56, citing France v. Commission, Case C-327/91, 1994 E.C.R. I-3641 (Commission lacked competence to approve antitrust agreement unilaterally, because approval by Council and Parliament were required).

[475]See Brown & Kennedy, supra note 163, at 158, citing Meroni & Son v. High Authority, Joined Cases 21/61 to 26/61, 1962 E.C.R. 73 (High Authority could not delegate to a subordinate body its power to impose levies on scrap iron); see generally Lenaerts et al., supra note 107, ¶¶ 7-129 to 7-134 (surveying limits on delegation in EU).

[476]Germany v. Parliament & Council, Case C-376/98, 2000 E.C.R. I-8419 (directive regulating tobacco advertising and sponsorship cannot be justified on the basis of Commission's authority to harmonize market conditions among the states).

[477]Lenaerts et al., supra note 107, ¶ 7-017.

[478]Id. ¶ 7-122.

[479]Id. ¶ 7-153; Hartley, supra note 164, at 426, 429.

Formally speaking, there is no rule of judicial deference on fact issues. The Court—meaning the Court of Justice during the Community's initial years, but now the CFI in most cases—can make its own factual determinations and is not limited to reviewing a legislative or administrative record. Interestingly, however, the Court of Justice long ago developed a policy of "restraint"—actually self-restraint—as a prudential matter, causing its jurisprudence to shift in the direction of American-style thinking. This came about because in a series of cases the Court found itself faced with a number of propositions relevant to legality that were arguably "factual," but that were actually what would in U.S. terminology be called "legislative facts" or even "ultimate facts." That is to say, they were characterizations of reality that entailed a strong element of policy determination, such as "economic difficulties" or "serious disturbances" to a market.[480] If the Court of Justice were to second-guess the Council or Commission on such matters, it would in effect be making policy judgments on matters as to which the political institutions have greater expertise and political legitimacy.

Thus, after a period of time in the 1960s in which the Court of Justice actually pressed its factfinding powers to the limits of its logic, by exercising independent judgment on matters such as these,[481] the Court decided that such supersession of the political institutions of the Community would not do. The Court's decisions indicated that it would not displace the Commission's findings on such policy-laden fact issues unless they were clearly wrong.[482] In this indirect fashion, the Court in substance worked its way toward a regime in which its review of policy determinations, and of factual findings that are incident to those determinations, would be less intense than its review of recognizably "legal" issues. For example, in *Kali & Salz*,[483] a prominent merger law decision, the Court declared:

> [T]he basic provisions of the [Merger] Regulation, . . . confer on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, review by the Community judicature of the exercise of that discretion, which is essential for defining the rules on concentrations, must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

As the quote from *Kali & Salz* suggests, the Court often referred to "a certain discretion," or to the "assessments" made by the Commission, to signify the exercise of policy judgment. Another common formulation was that "even though a discretion has been conferred on the Commission in the matter at issue, the Court is required to verify whether or not it . . . has committed manifest

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[480]Hartley, supra note 164, at 426.

[481]Id. at 427-28.

[482]Id. at 428-29, citing, e.g., Westzucker GmbH v. Einfuhr und Vorratsstelle fur Zücker, Case 57/72, 1973 E.C.R. 321.

[483]France v. Commission (Kali & Salz), Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375, ¶¶ 223-24.

errors in its assessment of the facts. . . ."[484] The "manifest error" doctrine seemed to confirm that the judicial branch of the Community would engage in little or no second-guessing of factual and policy determinations as a basis for discerning supposed errors of law.[485]

A curious aspect of this institutional history is that Art. 33 of the ECSC Treaty actually did embody a deferential review posture like the one under discussion:

> The Court may not . . . examine the evaluation of the situation, resulting from economic facts or circumstances, in the light of which the High Authority took its decisions or made its recommendations, save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty or any rule of law relating to its application.

No such formula was included in the EC Treaty. As observers have noted, however, the case law developments just mentioned effectively brought the Court of Justice around to approximately the same point as Art. 33 had prescribed.[486]

These developments in the EU, it has been suggested,[487] have brought Community law into rough conformity with the American model represented by the famous Supreme Court case of *Chevron U.S.A., Inc. v. NRDC*.[488] Under the so-called two-step inquiry prescribed in that case, a court reviewing an agency's interpretation of a statute it administers should first ask whether the interpretation conflicts with the clear meaning of the statute, and if it does not, should then ask whether the agency's interpretation was at least reasonable. The comparison between *Chevron* and European cases like *Kali & Salz* does have some force. The comparison seems most apt in relation to the second *Chevron* step. In practice, as has often been noted, the *Chevron* "reasonableness" inquiry tends to implicate agency policy determinations, not just strictly "legal" determinations; accordingly, the courts have conducted that inquiry in a manner that has converged toward, if it does not entirely overlap, the deferential "arbitrary and capricious" review standard.[489] On the other hand, however, as we noted earlier, the approach of Community courts to the threshold issue of legality is quite different from that of the first *Chevron* step.[490] When the ECJ or CFI concludes that the Commission possesses a "certain

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[484]EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission, Case 187/85, 1988 E.C.R. 4155, ¶ 6.

[485]Vesterdorf, supra note 143, at 9-11. For a compilation of cases recognizing the deferential "manifest error" standard of review, in both competition law and other contexts, see Lenaerts et al., supra note 107, ¶ 7-154.

[486]Bermann et al., supra note 433, at 171; Hartley, supra note 164, at 429.

[487]Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 Stan. J.L. Bus. & Fin. 327, 345-46 & n.73 (2006).

[488]467 U.S. 837 (1984).

[489]ABA Blackletter Statement, supra note 417, at 38.

[490]See supra note 367 and accompanying text.

discretion," it typically does so on the basis of an independent examination of the Treaty or other provisions that have empowered the Commission to act. It does not, as an American court might, *infer* that the Commission has discretion simply because that body has been vested with authority to administer a program, or because it finds that the provision being interpreted lacks a "clear" meaning. Still, the ECJ has never directly addressed the relationship between *Chevron* and its own jurisprudence. If and when it does, comparisons between those two bodies of law may come into sharper focus.

2. A New Era of Intrusive Review?

The above description of the "manifest error" standard would have been widely accepted up until a few years ago, but today it is decidedly incomplete. The evolving law in this area is too new to have been discussed in the treatises, but it has been the subject of much discussion among practitioners. They observe that the pendulum has recently been swinging sharply in the direction of more active judicial review.[491] Indeed, the emerging model is not unlike the kind of "hard look" review that American courts routinely provide in regulatory cases. This development seems attributable in part to the advent of the Court of First Instance as the primary reviewer of factual controversies, especially in annulment cases. Apparently the ECJ, viewing itself as primarily a constitutional court, was not prepared to devote as much attention to reviewing records in administrative cases as the CFI is now willing to do. Indeed, this was one of the reasons for the creation of the CFI in the first place.[492] Practitioners frequently observe that the CFI brings a high level of meticulousness to its scrutiny of the record. As a result, they themselves need to spend much more time preparing their cases for consideration by that court than had been necessary when the ECJ was in charge of that function. Their reaction recalls the similar experience of American regulators and lawyers a generation ago, at the dawn of the "hard look" era.[493]

The changed dynamic has been most evident in competition law cases, for a variety of reasons. The case law in that practice area is particularly well developed, giving the CFI a relatively firm foothold for taking stands against the Commission. Moreover, the affected private interests—such as businesses that want broader freedom to complete mergers—are often highly influential litigants that are prepared to mount vigorous challenges to Commission rulings. In addition, the advent in 2001 of the "fast track" procedure for expediting appeals to the CFI[494] has made judicial review a more realistic option for aggrieved parties than was true in

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[491] See, e.g., Reeves & Dodoo, supra note 365, at 1055-61.

[492] Vesterdorf, supra note 143, at 13-14 ("the CFI was created in part because there was the need for a court of first instance to review comprehensively and rigorously the factually complex decisions that the Commission adopts in the field of competition.").

[493] See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 60 (1975).

[494] See CFI Rules of Procedure, Art. 76a.

the past.[495] In any event, the trend toward intrusive review reached its fullest expression to date in *Commission v. Tetra Laval BV*,[496] a merger case decided by the Court of Justice in 2005. An extended analysis of *Tetra Laval* is therefore in order.

The background for this development is a trio of merger cases decided by the Court of First Instance (CFI) in 2002. (As discussed more fully below, the CFI now serves as the point of entry for judicial review of the Commission's merger decisions and as the primary reviewer of factual controversies in such judicial review proceedings.) The *Tetra Laval* case itself concerned a proposed merger between two producers of containers for liquid food products such as milk and juices. Tetra was a dominant firm in the market for cartons. It planned to acquire Sidel, a significant but not dominant firm that manufactured "stretch blow moulding" machines, which are used to produce plastic jugs. The Commission prohibited the merger, contending that Tetra's dominant position in the carton market would enable it to engage in "leveraging," by tying sales of plastics packaging equipment to sales of cartons, and also by pressuring its customers that might be tempted to switch to plastics to choose Sidel products, so that Sidel would be able to acquire a dominant position in the plastic containers market. In addition, the Commission thought that the merger would fortify Tetra's dominance in the cartons market. As a matter of competition law, this case was a significant test of the legality of a "conglomerate merger."

Tetra initiated an annulment action, and in 2002 the CFI invalidated the Commission's order, concluding that the Commission had committed "a manifest error of assessment in prohibiting the modified merger on the basis of the evidence relied on."[497] At around the same time, the CFI also handed down two similar decisions in merger cases. In *Airtours*, the court ruled that the Commission's opposition to a merger among tour operators "is vitiated by a series of errors of assessment as to [fundamental] factors."[498] And in *Schneider Electric*, which concerned a merger involving distributors of electrical equipment, the CFI discerned a variety of analytical errors that "deprive[d] of probative value the economic assessment of the impact of the concentration which forms the basis for the [Commission's] declaration of incompatibility."[499] These three decisions in 2002 were among the first cases in which the CFI had annulled Commission prohibitions in merger cases under the merger control regulation. Thus, the Commission's appeal in the *Tetra Laval* proceeding effectively became a major test of the viability of the new level of intrusiveness that the CFI had begun to display.

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[495]See Fisher, supra note 487, at 345 n.71.

[496]Case C-12/03, 2005 E.C.R. I-987; see, e.g., Reeves & Dodoo, supra note 365, at 1061-66. For a more detailed summary of the particulars of this important case than is possible here, see Ivo Van Bael & Jean-François Bellis, *Court of Justice upholds Tetra Laval/Sidel judgment*, European Competition Law, April 2005, at 1.

[497]Case T-5/02, 2002 E.C.R. II-4381, ¶ 366.

[498]Airtours Plc v. Commission, Case T-342/99, 2002 E.C.R. II-2585, ¶ 294.

[499]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, ¶ 411.

In its decision, the Court of Justice made a variety of pronouncements that favored each side in the dispute, but in the last analysis it upheld the CFI's approach. The Court reaffirmed the applicability of the "manifest error" standard of review in merger cases, acknowledging that the provisions of the Regulation on competition law "confer on the Commission a certain discretion, especially with respect to assessments of an economic nature."[500] Nevertheless, the Court continued, "the Community Courts [must not only] establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."[501] In this instance, the Court said, the CFI had performed its functions properly, because it had "explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence."[502]

A look at the way in which the Court applied these broadly stated propositions to particular areas in dispute provides further perspective. Tetra had presented two affirmative defenses to negate the Commission's position that the merger would result in leveraging. It argued that such anticompetitive tendencies were not likely to be forthcoming because (a) the leveraging tactics that the Commission feared, such as loyalty rebates and predatory pricing, were already illegal under Art. 82 of the Treaty, and (b) Tetra had offered to enter into certain "behavioral commitments"—namely, to keep its Tetra and Sidel operations separate for ten years and to refrain from making joint offers for both operations' products. The CFI had rejected both defenses. The Court of Justice sided with the Commission on the former issue. Although the Commission did have to consider the likelihood of leveraging, including various incentives and disincentives to engage in it,[503] the CFI had been wrong to demand a detailed explication of "the extent to which those incentives would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue."[504] To require the Commission to conduct such an inquiry for each proposed merger would call for too much speculation and would defeat the protective purpose of the Regulation.[505]

Regarding the second affirmative defense, however, the Court of Justice sided with the CFI. The Commission had been too quick to discount the possible significance of Tetra's

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[500] *Tetra Laval*, ¶ 38 (citing France v. Commission (Kali & Salz), Joined Cases C-68/94 and C-30/95, 1998 E.C.R. I-1375, ¶¶ 223-24).

[501] Id. ¶ 39.

[502] Id. ¶ 48.

[503] Id. ¶ 74.

[504] Id. ¶ 56 (quoting ¶ 159 of the CFI's decision below).

[505] Id. ¶¶ 75-78.

proposed behavioral commitments. Indeed, the Court said, the agency had basically refused on principle to take them seriously.[506]

The juxtaposition of these two holdings highlights some uncertainties about the Court's approval of the CFI's newfound intrusive review. The Court's distinction between the two Commission rulings seems thin indeed. The Court seems to be saying that a failure to give *any* consideration to an affirmative defense is a "manifest error of assessment," but detailed analysis is not required. But the two passages in the Commission's decision are not actually very different. In each instance, the Commission briefly alluded to Tetra's argument; such brevity was sufficient for purposes of one defense, but not for the other. Perhaps they can be reconciled on the basis of competition law—i.e., as an indication that the Court regards the illegality defense as inherently weak under antitrust principles, so that the Commission need not say very much in order to reject it. Nevertheless, it seems fair to conclude that, although the Court has certainly endorsed the general thrust of the CFI's intrusive review of the facts and reasoning underlying the Commission's merger decisions (and potentially other kinds of cases, although that has not happened yet), the Commission's exposure to reversal in any specific situation may remain difficult to predict for a long time to come. In some areas, for example, the applicable law may be so openended that it could be difficult for the CFI to identify any factual issues on which the Commission's decision would necessarily depend.

After the CFI's decisions in 2002, it was widely reported that the President of the Commission had ordered his agency to upgrade the quality of its written decisions in order to try to avoid similar embarrassments in the future. It seems likely that the CFI's substantial vindication in the Court of Justice—at least in its overall approach, though not in all applications of it—will fortify that intention. How much analysis will prove to be enough is bound to remain uncertain, however, both because of the current newness of this jurisprudence and because of the inherent ambiguities in the manifest error test. Opportunities for credible challenges to future Commission decisions on factual grounds thus seem plentiful, although one must assume that the Court will at some point disavow the most sweeping implications of the opinion and revert to deference.

3. Review by the Court of Justice of CFI Fact Findings

Because of a jurisdictional limitation, the Court of Justice was not in a good position to speak at much length in *Tetra Laval* about the manner in which the CFI should perform its factual review function. Under the Treaty, the Court of Justice may review CFI decisions only for errors of law.[507] In that respect, the Court's function seems similar to that of the courts of cassation or revision in several continental nations. Indeed, in several passages in *Tetra Laval*, the Court of Justice rejected various of the Commission's assaults on the CFI's annulment

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[506] Id. ¶¶ 85-89.

[507] Treaty Art. 225; John Deere v. Commission, Case C-7/95, 1998 E.C.R. I-3111, ¶¶ 21-22.

decision, declaring that it would not consider attacks on the CFI's evaluation of the evidence.[508] Thus, the Court of Justice made clear that the probing of the factual premises of Commission merger decisions is basically a job for the CFI, not itself.

This division of responsibility is somewhat analogous to the American practice. The Supreme Court seldom grants certiorari to review the factual controversies presented on judicial review of agency action, because "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."[509] However, that analogy is imperfect, because the Supreme Court's avoidance of reviewing the factual underpinnings of agency action is basically a matter of self-restraint. The Court does not regard these matters as beyond its jurisdiction, and, indeed, it does occasionally take up such controversies. A closer analogy in American law is the present arrangement for review of veterans benefit claims, in which the Court of Veterans Appeals reviews decisions of the Department of Veterans Appeals on all controversies, including substantial evidence review of fact findings, and further appeal to the Federal Circuit is limited to legal issues.[510]

One should not conclude, however, that the Court of Justice intends to remain aloof from controversies that have a substantial factual component—what in American parlance are sometimes called "mixed questions of law and fact." In *Tetra Laval*, the Court responded to several such controversies by initially considering objections that could be characterized as implicating an issue of law. For example, the Court rejected the Commission's claim that Tetra's dominance in the cartons market was sufficient by itself to show that the elimination of Sidel as a potential competitor would strengthen Tetra's position in that market. Instead, the Court said, the CFI had properly concluded that the risks of such increased dominance must be determined in light of evidence about the probable reactions of Tetra's competitors.[511] Only then did the Court add that the CFI's assessment of the evidence regarding the effect of the merger on carton prices was not subject to review by the Court of Justice.[512] Similarly, the Court indicated in *Tetra Laval* that its limited review function does not keep it from satisfying itself that the CFI, in assessing the facts, took full account of the Commission's arguments[513] and applied the correct standard of review.[514]

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[508] *Tetra Laval,* ¶¶ 47-48, 104, 131.

[509] Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[510] 38 U.S.C. § 7292 (2000).

[511] *Tetra Laval*, ¶¶ 125-30.

[512] Id. ¶¶ 131-32.

[513] Id. ¶ 102.

[514] Id. ¶¶ 131-32.

American lawyers know from their own domestic experience that the dividing line between law and fact can be highly malleable.[515] Through imaginative use of the ambiguities inherent in that distinction, a court can often decide the issues that it wants to resolve (treating them as "legal") , while also avoiding issues about which it prefers not to take direct responsibility (treating them as "factual"). To judge from *Tetra Laval*, the Court of Justice is well aware of the leeway available to it in this regard.[516]

D. QUESTIONS OF PROCEDURE

A decision by the European Commission, like an action by an American administrative agency, can be challenged and invalidated for procedural error. The Court of Justice enforces procedural norms derived from various sources. Some are codified in the Treaty itself, such as the duty to provide reasons for an administrative decision.[517] A claim of procedural error can also be based on the Commission's Rules of Procedure.[518] Indeed, the claim does not necessarily have to rest on positive law at all. In *Transocean Marine Paint Ass'n v. Commission*,[519] the Court annulled an action because of the Commission's failure to allow the addressee of the action to be heard in opposition to it. The right to be heard was considered to be among the "general principles of law." The Court reached this conclusion by borrowing from the English principle of natural justice, which is functionally comparable to the American concept of the due process right to be heard.

In his recent article on judicial review of European administrative procedure, Schwartze provides a catalogue of the various "rights of defense" that the Court of Justice has recognized, including the right to be heard, the right of access to information in the Commission's files, the right to a statement of reasons for administrative action, the right to receive a decision within a reasonable time, and a limited attorney-client privilege.[520] This chapter will not canvass these

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[515]See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 23-29 (1985).

[516]See also Commission v. Camar Srl and Tico Srl, Case 312/00 P, 2002 E.C.R. I-11355, ¶ 69 ("while it is true that . . . the Court of First Instance has, in principle, sole jurisdiction to find and appraise the facts, the Court of Justice nevertheless has jurisdiction to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them").

[517]E.C. Treaty Art. 253.

[518]United Kingdom v. Council, Case 68/86, 1988 E.C.R. 855 (adoption of a measure without a hearing, over a member state's objection, resulted in annulment, because a Rule of Procedure required unanimity).

[519]Case 17/74, 1974 E.C.R. 1063.

[520]Id. at 91-94.

procedural requirements in detail, as they are explored comprehensively in the Adjudication chapter of this work.[521]

The Commission's obligation to explain its decision warrants further comment, however, because of its distinctive relationship to the process of judicial review. Findings and reasons are essential if the Court is to perform its function of determining whether the Commission infringed any rule of law or misused its powers.[522] This is not to say that the explanation must be expressed in full at the time of the challenged action. The prohibition in American practice on judicial consideration of "post hoc rationalizations" is applied less firmly in the Court of Justice. Because judicial deference to the administrative agency plays a smaller role in European practice, the Court of Justice is not categorically prohibited from relying on counsel's explanations or from reading between the lines of a Commission decision. Nevertheless, the basic reasons for a decision must be spelled out in the Commission's own opinion.[523]

A possible divergence between EU practice and American practice can be seen in the language of Art. 230, which authorizes the Court to grant annulment if the Commission has infringed "an essential procedural requirement." Lenaerts and his co-authors have read this language to imply that the Court will distinguish between essential and non-essential requirements on a categorical basis, i.e., in terms of whether the failure to follow the procedure in question would *in general* be important to the fairness of the proceeding: "An essential procedural requirement is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may influence the content of the measure; essential procedural requirements enable the legality of an act to be reviewed or may express a fundamental institutional rule."[524] Hartley suggests, however, that in practice the Court's inquiry is more contextual than this. He notes that in the *Tariff Preferences* case[525] "the Court held that failure to refer to a precise provision of the Treaty is not necessarily an infringement of an essential procedural requirement if it is possible to determine from other parts of the measure what its legal basis is. Where, however, the parties and the Council would otherwise be uncertain as to its precise legal basis, an explicit reference is . . . 'indispensable.'"[526] Schwartze appears to agree with this contextual approach and cites considerable case authority to support it. He generalizes that "[w]hether an infringement is essential or unessential depends on the impact that failure to

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[521]See Adjudication chapter, Part I.D.

[522]Société Francaise des Biscuits Delacre SA v. Commission, Case 350/88, 1990 E.C.R. I-395, ¶ 15; Schwartze, supra note 399, at 93.

[523]Michel v. Parliament, Case 195/80, 1981 E.C.R. 2861, ¶ 22 ("a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court"); see Italy v. Commission, Cases 15/98 and 105/99, 2000 E.C.R. I-8855, ¶ 65.

[524]Lenaerts et al., supra note 107, ¶ 7-135.

[525]Commission v. Council, Case 45/86, 1987 E.C.R. 1493.

[526]Hartley, *supra* note 164, at 417.

respect the requirements has on the ultimate administrative outcome or on individual rights."[527] This amounts to saying that the word "essential" in Art. 230 really means "material." So construed, the qualifier seems analogous to the American principle of harmless error.

As in the instance of factual issues, the Court of First Instance has been particularly aggressive in enforcing procedural rights such as the reasons requirement, the right to be heard, and the right of access to information. This assertiveness is important from a practice standpoint. A case may be easier to win in the CFI on procedure than on substance. The above discussion of *Tetra Laval* illustrates the critical importance of Commission findings. Another illustration of this point occurred in *Schneider Electric*, one of the other cases in 2002 in which the CFI rejected a Commission merger decision. An important factor in that case was the CFI's determination that the Commission had not given Schneider an adequate disclosure of its position and an adequate opportunity to put on a defense.[528]

E. MISUSE OF POWERS

The concept of "misuse of powers" is derived from the French concept of *détournement de pouvoir*. It refers to "the exercise of a power for a reason other than that for which it was granted."[529] It is considered "subjective" because it turns on the actual intentions of the authority that exercised the power — although these intentions are commonly established through circumstantial evidence rather than overt declarations by the authority.[530]

It should be apparent to American readers that misuse of powers is, roughly speaking, a counterpart to the concept of "abuse of discretion" in U.S. administrative law. Indeed, one object of attention in American practice is whether an agency acted on the basis of "relevant factors."[531] However, the two doctrines diverge insofar as U.S. law focuses in almost all cases on the agency's *stated* reasons for taking action. These reasons are accepted at face value unless the challenger makes a "strong showing of bad faith or improper behavior"[532]—a showing that is almost never successfully made or even attempted. Thus, the American abuse of discretion test bears a closer resemblance to the EU concept of proportionality, discussed above, because proportionality is directed at the objective discrepancy between what an authority purports to be

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[527]Schwartze, supra note 399, at 97-98 & nn. 63-65.

[528]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, ¶¶ 453-62.

[529]Hartley, supra note 164, at 420.

[530]Id. at 420-21.

[531]Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[532]Id. at 420.

trying to achieve and what it actually did, rather than at allegedly undisclosed motives.[533] But even that analogy is imperfect, because, as noted above, American-style abuse of discretion review turns on the agency's *contemporaneously stated* reasoning, whereas proportionality review in the Court of Justice is not similarly confined.

Hartley notes that the Court of Justice will not find a misuse of powers if the authority had an incorrect purpose but would inevitably have taken the same action if pursuing the correct purpose.[534] Overall, he reports, misuse of powers "is only rarely established in practice."[535] The wide applicability of other grounds of review, as discussed above, may help to account for this fact.

F. REVIEW OF COMMISSION INACTION

Special considerations come into play when the Commission declines to take action on a matter such as an alleged infringement of competition law. The law in this area is developing rapidly at the Court of First Instance level. Three types of situations should be distinguished. The first involves a "failure to act," where the applicant is unable to get a definitive answer from the Commission at all. This situation has been fully discussed above in Part III.B. The second occurs when the Commission explicitly declines to conduct an investigation. Under these circumstances, the CFI's review is not perfunctory, but it is shaped by an understanding that the Commission has to set priorities among numerous possible areas of inquiry.[536] The review goes largely to whether the Commission "has given a proper statement of reasons for closing the file on the complaint on the basis of its power to 'apply different degrees of priority in dealing with the examination of alleged infringements brought to its notice', on the one hand, and in the light of the Community interest in the case as a priority criterion, on the other."[537] American courts would conduct a similar inquiry in response to situations in which it reviews an agency's exercises in priority-setting.[538] (Ironically, however, most of the European cases involve refusals to render *decisions* rather than *regulations*, because of standing limitations that prevent the latter from being challenged in an annulment action. In the United States the situation is the opposite.

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[533]See Hartley, supra note 164, at 421 (contrasting proportionality with misuse of powers).

[534]Id. at 422, citing Fédéchar v. High Authority, Case 8/55, 1956 E.C.R. 292.

[535]Id. at 420.

[536]Automec Srl. v. Commission, Case T-24/90, 1992 E.C.R II-2223, ¶ 77.

[537]Id. ¶ 81; see Bermann et al., supra note 433, at 151-52 (discussing subsequent cases); Hartley, supra note 164, at 393.

[538]Massachusetts v. EPA, 127 S. Ct. 1438, 1459-63 (2007); American Horse Protection Ass'n v. USDA, 812 F.2d 1 (D.C. Cir. 1987); Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 545-49 (ABA Sect. of Admin. L. & Reg. Prac., 4th ed. 2006). In both of the cases just cited, the court declared that the scope of its review was "narrow" but nevertheless found sufficient grounds for reversing the agency.

Most of the American cases involve refusals to conduct rulemaking, because an agency's decision not to conduct enforcement proceedings in an individual case is presumptively unreviewable.[539])

The third situation arises when the Commission investigates a matter, conducts a full proceeding, and then decides to take no action. In this situation, the Commission "is under a duty to set out in its decision the facts and considerations on which that conclusion is based." Then, "judicial review should involve verifying whether the facts have been accurately stated and whether there has been any manifest error in assessing the facts or a misuse of powers or any errors of law."[540] In short, the scope of review in this situation is more like what it would be if the Commission had acted affirmatively, because resource limitations are no longer pertinent to the issue. American law would draw essentially the same distinction.[541]

[539]Heckler v. Chaney, 470 U.S. 821 (1985).

[540]Asia Motor France SA v. Commission, Case T-387/94, 1996 E.C.R. II-961, ¶ 46.

[541]Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L Rev. 689, 769-70 (1990); Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin. L. Rev. 239, 288 (1986); Lubbers, supra note 538, at 553-555.