Chapter 3
Judicial Review

judicial review for the European Union Project of the ABA Section of Administrative Law and Regulatory Practice. We encourage your comments. Comments are due by **September 1, 2006**.

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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 report, as the co-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 full report.

Executive Summary*

This report concerns 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 report 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 report 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. 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, a major exception: the "direct and individual concern" test of Article 230 is interpreted as imposing strict limitations on standing to seek annulment. A person to whom a "decision" (adjudicative action) is addressed normally has standing, but applicants 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 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.

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.

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

A party who does succeed in bringing an admissible action before the ECJ or its subordinate tribunal, the Court of First Instance (CFI), will confront an elaborate body of principles governing review of the merits of the action. As in American courts, the ECJ and CFI review decisions of the main regulatory body, the Commission, to determine whether the agency 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 fact findings, 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 that 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 ECJ enforces 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 chapter presents a survey of the several forms of proceedings in which the European courts adjudicate issues of Community law. The theory behind the chapter 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 chapters 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).

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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 (or in funeral planning).

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 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 uninterested 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 of the plea of illegality 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, a proposition we will return to 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 phrase 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

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

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."

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

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[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.

[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.

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 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

[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).

[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.

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.

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 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]

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

[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.

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 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

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[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.

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 who 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 non-compliance 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 whole 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; Becker, Case 8/81, 1982 E.C.R. 53.

[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 is protecting legal certainty and more specifically the good faith reliance of private individuals on the validity of their national laws.

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 with the following additional measures.

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.

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

E. CONCLUSION

In summarizing, 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 chapter in our report 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.

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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.

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.

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 chapter discusses primarily issues of *admissibility*, i.e., circumstances in which a party has the right to bring suit. More particularly, the chapter focuses on principles that govern the use of the action for annulment of Community acts by *natural or legal persons*. Such proceedings are governed by the fourth paragraph of Article 230. (Although that treaty provision does not contain internal numbering, this report refers to its subdivisions as though it did; thus, the paragraph just mentioned will be called "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

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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).

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 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.

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

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[28] 5 U.S.C. § 702 (2000).

[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).

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 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

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[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).

[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.

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 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

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[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.

[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).

the Commission's claims, the U.S. producers sought to annul the Commission's decision. The CFI held, however, 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). While 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] As a more general matter, the CFI also indicated that the same reasoning would also apply to a formal Commission decision to commence legal action before the Court of Justice or national courts in the Member States. This holding is reminiscent of American case law holding that an agency's initiation of its own adjudicative proceedings is not a reviewable "final agency action."[41]

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.[42] 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.[43] 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."[44]

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[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]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).

[42]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.

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

[44]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.

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).[45] In the *German Banks* cases,[46] 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 (and appealable) Commission decision.[47] 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.[48] 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.[49] 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.[50] Modeled after the DOJ's business review and FTC's advisory opinion letters, guidance letters are designed to be an

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

[46]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).

[47]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.

[48]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.

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

[50]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.

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 consistent case law of the CFI, the Commission enjoys wide discretion as regards what action (if any) it considers necessary against the Member State.[51] Because the Commission has no obligation to act under Article 86 vis-à-vis private parties, the rejection 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.[52]

However, the CFI has not carried this reasoning as far as the U.S. Supreme Court has. Particularly in the area of competition law, complaints by third parties alleging the infringement of Articles 81 or 82 are relatively frequent and an important tool supplementing the Commission's own investigative efforts to detect infringements. If the Commission rejects a complaint based on one of the Treaty's principal provisions on the competition law obligations of private parties, Articles 81 or 82, the rejection is generally susceptible to judicial review.[53] Indeed, Regulation 773/2004 explicitly requires the Commission to adopt a decision to reject a complaint.[54] This reflects the Court's well established case law that a rejection of a complaint, even if only contained in a letter to the complainant, is appealable under Article 230(4).[55]

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[51]Bilanzbuchhalter v. Commission, Case T-84/94, 1995 E.C.R. II-101, ¶ 27; Vlaamse Televisie Maatschappij v. Commission, Case T-266/97, 1999 E.C.R. II-2329, ¶ 75.

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

[53]Coe Clerici Logistics v. Commission, Case T-52/00, 2003 E.C.R. II-2131. *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.

[54]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.

[55]Coe Clerici Logistics v. Commission, Case T-52/00, 2003 E.C..R II-2131; British Coal Corp. v. Commission, Case T-367/94, 1998 E.C.R. II-2103; Kerse & Kahn, supra note 20, ¶ 2-046.

Parallel opportunities for judicial review do exist in the United States,[56] 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."[57] 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 application is the key variable that separates rules from orders under both the due process clause[58] and the Administrative Procedure Act, although the poorly drafted definitional language of the APA tends to obscure this fact.[59]

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 "orders." 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,

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[56]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).

[57]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.

[58]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).

[59]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).

would use that distinction in order to take jurisdiction over the latter but not the former.[60] That analysis has not survived, however. Under the modern precedents, the two concepts are no longer co-extensive. 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.[61] 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.[62] In the Court's 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 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]."[63]

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.[64] If partial annulment of

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

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

[62]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.

[63]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.

[64]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.

an act would have the effect of altering its substance, the action may be inadmissible.[65] 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.[66]

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.[67] For the same reason, the CFI has no jurisdiction to hear challenges to the act of accession of a new Member State.[68] Accordingly, the act concerning the accession of 10 new Member States acceding to the European Union effective May 1, 2004,[69] and the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union, effective January 1, 2007 (or, under certain circumstances, January 1, 2008),[70] is not susceptible to review under Article 230(4).[71]

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

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[65]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.

[66]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).

[67]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).

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

[69][2003] OJ L236/33.

[70][2005] OJ L157/11.

[71]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).

time the action is brought.[72] 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*.[73] The annulment of the contested measure "must itself be capable of having legal consequences"[74] or the action must be liable, if successful, to result in "an advantage for the party who has brought it."[75] 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;[76] 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.[77]

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 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.

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[72]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.

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

[74]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.

[75]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).

[76]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).

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

In *Gencor*,[78] 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.[79] 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*,[80] 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 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,

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

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

[80]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)).

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."[81] 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.[82]

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.[83]

a. Direct concern

According to the Court, 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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[81] *MCI*, ¶ 48.

[82] 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.

[83] 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."[84]

A few recent cases may be helpful to an understanding of the Court's interpretation. In *DOW AgroSciences*,[85] the CFI had to examine whether the inclusion of certain chemicals on a list detailing potentially environmentally unfriendly substances under Directive 2000/60 [86] 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*,[87] 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 somewhat 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.[88] 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

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[84]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.

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

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

[87]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.

[88]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).

government authorities in the future.[89] 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,[90] or where the Member State has already announced its intention to rule against the applicant if it has the opportunity.[91] 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—

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

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

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

lacks standing to bring an annulment action against it. This interpretation stems from the ECJ's judgment in *Plaumann v Commission*[92] and is commonly referred to as the "*Plaumann* formula."

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."[93] 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.[94]

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,[95] recent case law casts even this limitation into doubt.[96] 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.[97] The surviving ripeness limitations on judicial review are founded on practical considerations such as the amenability or "fitness" of the plaintiff's contentions for immediate judicial resolution and the severity of the plaintiff's need for immediate judicial intervention.[98] These prudential factors are much less confining than the categorical exclusion embodied in the *Plaumann* formula.

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

[93]Schermers & Waelbroeck, supra note 29, ¶¶ 899-912.

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

[95]See, e.g., United States v. Richardson, 418 U.S. 166, 176-80 (1974) (no standing to sue for disclosure of CIA's budget).

[96]FEC v. Akins, 524 U.S. 11, 23-25 (1998).

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

[98]Id. at 148-49.

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*,[99] 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.[100] 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.[101] On the other hand, the CFI and ECJ showed a less expansive attitude in the *Greenpeace* case,[102] 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 individual members of the association would have been admissible.[103] In practice, as in

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

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

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

[102]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.

[103]Koen Lenaerts & Dirk Arts, Procedural Law of the European Union 177-78 (Robert Bray ed. 1999).

American law,[104] 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.[105]

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.[106]

c. Recent controversy

Although a detailed discussion of the policy issues surrounding the individual concern requirement is beyond the scope of our report, we will summarize here some recent developments in this area, in particular since 2002. 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)*[107] in March 2002, and two months later in the CFI's judgment in *Jégo-Quéré*.[108] The challenge was shortlived, because the ECJ firmly rejected these positions in its decisions in the same cases. In one sense, therefore, an awareness of these events may not be strictly necessary to an understanding of the current law. Nevertheless, a description of these cases will highlight the policy concerns involved, which the ECJ's judgments have not entirely suppressed.

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[104]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).

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

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

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

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

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 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.[109] 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.[110] There it was also Advocate General Jacobs who argued that "individual concern" be interpreted broadly.[111])

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[109] *UPA*, Case T-173/98, 1999 E.C.R. II-3357.

[110] See supra notes 99-100 and accompanying text.

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

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 zones.[112] 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 greater 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,[113] 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 effective judicial protection" against Community acts. 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.*[114] 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

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

[113]*UPA*, Case 50/00, 2002 E.C.R. I-6677.

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

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 interpretation, and it has applied the Plaumann formula in various cases since the ECJ's judgment.[115] Even though it would appear that the dispute between the CFI and ECJ on this issue is resolved for the time being, both cases highlight the ongoing struggle for a balanced interpretation of the criterion of individual concern. Further signs of that struggle can be found in language of the draft European Constitution, which 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."[116] Although this amendment is apparently stalled indefinitely, along with the rest of the draft Constitution, it does 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.[117]

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."[118] As a consequence, the CFI examines on its own motion whether the action was brought within the

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

[116]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.

[117]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.

[118]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.[119] If the addressee of a decision does not seek its annulment within the two month time limit, it "becomes definitive as against him."[120]

The two month period is extended by a period of 10 days "on account of distance."[121] 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.[122]

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.[123] 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.[124] 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

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[119]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.

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

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

[122]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.).

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

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

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 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 III of this report and will not be repeated 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.[125] 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.[126] 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.[127] Thus, the CFI may, in this area, decrease (or increase) fines without necessarily annulling the Commission's decision.[128] The

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[125]Schermers & Waelbroeck, supra note 29, ¶ 827.

[126]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).

[127]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.

[128]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.

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 companies in competition cases.[129] However, complete annulment of a cartel decision imposing fines appears to be more the exception than the rule.[130]

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.[131] 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,[132] as is discussed in more detail elsewhere in our report. 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.[133] 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.[134]

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."[135] Although the courts

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[129]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.

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

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

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

[133]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").

[134]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).

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

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 existence of the regulation.[136] 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.[137]

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."[138] 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

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[136]Id.

[137]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.

[138]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.)

appeal.[139] The United States Supreme Court has reached essentially the same conclusion, applying American principles of claim preclusion.[140]

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 proceeding—on certain companies for their participation in the cartel.[141] 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.[142] 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.[143] In particular, they contain detailed suggestions as to the length of pleadings and

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[139]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.

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

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

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

[143][2002] OJ C87/48.

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.[144] 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 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.

[144] 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.

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 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.[145] 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

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[145] 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 ot answering a prescribed question or questions.

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 is happening 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[146] or where the Member State is suing an individual person or entity, as for example in a criminal case.[147] 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,[148] or an employer and an employee.[149] 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

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[146]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.

[147]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.

[148]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.

[149]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).

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[150] because justice delayed by two years—the time it takes on average to get an answer to preliminary references—would be justice denied.[151]

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.

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

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[150]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 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.)

[151]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.

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 prohibited from treating a matter differently just because it raises questions of European law.[152] 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:[153] 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.[154] 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.

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[152]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.

[153]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 154-158.

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

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.[155] 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 decision-making authorities.[156] 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.[157] Nor did the Court accept a reference from an internal dispute settlement body of a bar association.[158] 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.

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

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

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

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

In practice, a number of significant questions have arisen. First, there is the question how the phrase "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" should be interpreted (there being, under Article 234(3), an obligation to refer questions to the European Court in such cases). On the one hand, it has been argued that this obligation should only apply to the highest court in any national legal 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.[159] 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

[159]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.

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 Constitution.[160] 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.[161] 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.

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[160]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.

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

> 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.
>
> 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.[162]

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.[163] 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.[164]

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.[165]

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[162]Id. ¶¶ 16-20.

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

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

[165]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.

(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.

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. [. . .]

(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).[166] 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.[167]

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[166]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.

[167]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.

IV. REVIEW OF THE MERITS

A. INTRODUCTION

This chapter of our report 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. 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 European Union courts entertain, such as actions for annulment, actions for preliminary reference, and damage actions.

Although the discussion in this chapter 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.[168] This chapter 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 Court hears—Article 230 of the E.C. 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, however, the Article 230 criteria are often applied in other contexts as well.[169]

In any event, 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,[170] 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

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[168]Schermers & Waelbroeck, supra note 29, at 6, 8.

[169]Commission v. Council (European Road Transit Authority), Case 22/70, 1971 E.C.R. 263; see Meroni v. High Authority, Case 9/56, 1958 E.C.R. 133 (same criteria used to adjudicate pleas of illegality, although the treaty provision applicable to those pleas appears narrower).

[170]5 U.S.C. § 706.

involved when it annuls a measure."[171] 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 has shaped much of the discourse on judicial review. Some of these principles, derived from Continental legal systems, have now become firmly established, freestanding doctrines in EU practice in their own right, perhaps overshadowing some of the formal grounds.

The topic at hand corresponds roughly to what would in U.S. parlance be termed the "scope of judicial review." However, the concept of deference to administrative authorities, which is central to American thinking, plays a much smaller role in EU jurisprudence. Thus, the inquiry goes primarily to the types of issues that the Court can examine, rather than to the "standards of review" by which those issues are to be resolved. The situation is evolving, however, and recent developments seem to be transforming the system in a manner that makes it resemble the American model more closely.

B. QUESTIONS OF LAW

A wide variety of legal questions can come before the Court of Justice. 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."[172]

Observers agree that, in practice, the Court of Justice frequently takes an aggressive and creative approach to legal interpretation. 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 lawmaking role. That role not only furthers the generalized social value 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.

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[171] T.C. Hartley, The Foundations of European Community Law 414 (5th ed. 2003).

[172] Id. at 419.

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.[173] 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.[174] 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."[175] 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.[176] 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."[177] Another factor militating against literalism is that the Treaty contains numerous open-ended terms and very few express definitions of these terms.[178]

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[173]L. Neville Brown & Tom Kennedy, The Court of Justice of the European Community 321-44 (5th ed. 2000).

[174]Id. at 321.

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

[176]Brown & Kennedy, supra note 173, at 322-23, 327.

[177]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 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").

[178]Brown & Kennedy, supra note 173, at 325.

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.[179] 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[180] or if a broad reading would conflict with the Treaty.[181]

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.[182] Nor does the Court rely very often on parliamentary debates in construing Community legislation.[183] 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.[184] 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.)

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.[185] Regulations are read in a similar fashion.[186] The Court also

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

[180]Id. at 16.

[181]Id. at 20.

[182]Brown & Kennedy, supra note 173, at 330-32; Schermers & Waelbroeck, supra note 29, at 16.

[183]Brown & Kennedy, supra note 173, at 332.

[184]Id. at 333.

[185]Id. at 334-36.

[186]Id. at 336-37.

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.[187]

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.[188] 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.[189] 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."[190] 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*.[191] 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 organised in advance," including the working hours of the staff members.[192] 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

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[187]Id. at 337-39.

[188]Id. at 339-43.

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

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

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

[192]Id. ¶¶ 55-60.

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.[193] 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."[194]

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."[195] According to this view, "[i]n principle, teleological interpretation is of a subsidiary nature."[196] Another treatise, however, indicates that "the dominant approaches of the Court of Justice are the contextual and teleological with increasing resort to the latter."[197] 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[198] 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.[199]

One finds in the literature many pronouncements that a teleological approach cannot override the explicit language of the text.[200] Yet it is acknowledged that the Court does occasionally override "plain" meaning. In one case, for example, the Court held that civil

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[193]Id. ¶¶ 68-72.

[194]Id. ¶¶ 52-54, 67.

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

[196]Id. at 21.

[197]Brown & Kennedy, supra note 173, at 324; see also Brown, supra note 177, 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.").

[198]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).

[199]Brown & Kennedy, supra note 173, at 329-30.

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

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.[201] 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."[202] Some of these principles 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.[203]

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 *Community* law" might be a preferable term to signify those principles that the Court does

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[201] 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.

[202] Hartley, supra note 171, at 135.

[203] 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).

recognize.[204] 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,[205] 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. 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."[206] 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."[207]

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."[208] 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.[209] 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

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[204]Brown & Kennedy, supra note 65, at 349 (emphasis added).

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

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

[207]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.").

[208]See Brown & Kennedy, supra note 65, at 351 (suggesting this comparison).

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

adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action."[210] 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*,[211] "[t]he United Kingdom had established the system of import licence to prevent milk from diseased cattle entering the country. The issue of 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."[212] Similarly, in *Mignini SpA v. AIMA*,[213] 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.[214]

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.[215] For example, in *Bela-Muhle Josef Bergmann KG v. Grows-Farm GmbH*,[216] 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

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

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

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

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

[214]Thomas, supra note 212, at 81.

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

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

manner, by inducing a reduction in the production of skimmed-milk powder. Thus, the regulation violated the proportionality principle.[217] 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.[218] 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 of its discretion."[219] 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."[220] 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.

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[217]Thomas, supra note 212, at 81.

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

[219]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.

[220]Thomas, supra note 212, at 83-85.

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.[221] 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."[222]

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."[223] 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 in determining the proper size of a penalty.[224] Present research does not make clear the extent, if any, to which the Court of Justice takes a more assertive view than American courts do.

b. 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.[225] 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

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[221]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).

[222]Thomas, supra note 212, at 82.

[223]ABA Blackletter Statement, supra note 210, at 43; Excel Corp. v. USDA, 397 F.3d 1285, 1298-99 (10th Cir. 2005).

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

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

legal relationships governed by Community law remain foreseeable."[226] 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.[227] 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."[228]

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.[229] The second 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.[230] 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.[231]

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[226]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).

[227]Hartley, supra note 171, at 148.

[228]Thomas, supra note 212, 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.

[229]Art. I, § 9, cl. 3.

[230]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).

[231]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).

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*.[232] 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.[233]

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.[234] American law is quite similar.[235]

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.[236] 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.[237] It should be noted that a finding that a Community act defeated legitimate

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

[233]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.

[234]Openbaar Ministerie v. Bout, Case 21/81, 1982 E.C.R. 381, 390; Hartley, supra note 171, at 148.

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

[236]Hartley, supra note 171, at 149.

[237]Thomas, supra note 212, at 44-45.

expectations does not automatically result in annulment of that act. Rather, it sometimes leads only to relief for the affected individual.[238]

A frequently cited example of the legitimate expectations principle is the decision in *Mulder v. Minister van Laudbouw en Visserij*[239] 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.[240] 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.[241]

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."[242] Nevertheless, the two doctrines plainly overlap. In 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

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[238]Brown & Kennedy, supra note 65, 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).

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

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

[241]Brown & Kennedy, supra note 65, at 353-54.

[242]Thomas, supra note 212, at 45-46.

expectations."[243] English writers have also discerned an "affinity" with the law of equitable estoppel.[244] 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.[245] 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.[246] 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.[247]

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.[248]

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*,[249] 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 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."

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

[244]Brown & Kennedy, supra note 65, at 355; see Thomas, supra note 212, at 50.

[245]Thomas, supra note 212, at 53.

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

[247]Thomas, supra note 212, at 54.

[248]Id. at 55.

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

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.[250] 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.[251] 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,[252] 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."[253] For example, in *Comptoir National Technique Agricole SA v. Commission*,[254] 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*,[255] 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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[250]Thomas, supra note 212, at 56-57 (citing, e.g., Hauptzollamt Krefeld v. Maizena GmbH, Case 5/82, 1982 E.C.R. 4601).

[251]OPM v. Richmond, 496 U.S. 414 (1990).

[252]See Thomas, supra note 212, at 56-57.

[253]Id. at 63.

[254]Case 74/74, 1975 E.C.R. 533.

[255]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."[256]

c. 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 report,[257] 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.[258] 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*[259] 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.[260]

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 Human Rights. The Court of Justice does sometimes draw on ECHR case law,[261] but it also

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[256]Thomas, supra note 212, at 46.

[257]See supra notes 14-16 and accompanying text. See also Brown & Kennedy, supra note 65, at 357-60; Hartley, supra note 171, at 135-38.

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

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

[260]Brown & Kennedy, supra note 65, at 359; Hartley, supra note 171, at 142.

[261]See 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).

draws "inspiration" from the convention on its own.[262] 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 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.[263] 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.[264]

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.[265] This line of argument may not be very different from simply declaring the procedural right to be one of the "general principles of law." Substantive invocations of fundamental human rights tend to be confined to isolated, minor cases. The Court generally does not use the concept to invalidate significant Community legislation—although parties do argue for such a result and may thereby induce the Court to decide a case their way on other grounds.

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."[266] An example is *Bela-Muhle*, a case discussed above, in which the Court

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[262]See 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).

[263]Hartley, supra note 171, at 138-39.

[264]Id. at 146.

[265]See Schwartze, supra note 203, at 88-89 (citing several such applications of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on December 7, 2000).

[266]Brown & Kennedy, supra note 65, at 352-53, citing Frilli v. Belgium, Case 1/72, 1972 E.C.R. 457.

found that a regulation on skimmed-milk powder operated in a discriminatory fashion.[267] On the whole, however, 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 about the scope of this principle within the European Community.

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," which essentially means that a party may not seek to capitalize for his own benefit on an allegedly unlawful act by a governing authority. 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—regardless of whether A's position is that he deserves equal treatment with B,[268] or, instead, that B got off too easily by comparison with himself.[269]

Another use of the principle of legality occurred in *P&O European Ferries*.[270] In that case, the Commission initially approved a transaction in which Spain agreed to pay a subsidy to a 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. . . ."[271] 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.

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[267]See supra notes 216-217 and accompanying text.

[268]Williams v. Court of Auditors, Case 134/84, 1985 E.C.R. 2225, ¶ 14.

[269]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.

[270]P&O European Ferries (Vizcaya) SA v. Commission, Joined Cases T-116/01 and T-118/01, 2003 E.C.R. II-2957.

[271]Id. ¶¶ 204-09.

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."[272] 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 competence to do so.[273] A question of whether an institution improperly delegated its powers to another body can also raise a question of competence.[274] 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.[275]

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.[276] (Indeed, efforts in American administrative law to distinguish between "jurisdictional" issues and other legal issues have not proved very enduring.) However, 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.[277]

C. QUESTIONS OF FACT AND DISCRETION

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[272]Hartley, supra note 171, at 415.

[273]Bermann et al., supra note 225, 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).

[274]See Brown & Kennedy, supra note 173, citing *Meroni*, (High Authority could not delegate to a subordinate body its power to impose levies on scrap iron); see generally Lenaerts & Arts, supra note 103, at 187-89 (surveying limits on delegation in EU).

[275]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).

[276]Lenaerts & Arts, supra note 103, at 186.

[277]Id. at 184.

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 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.[278] American lawyers will find this reasoning relatively understandable if they think about the role of factual controversies in American constitutional law, as opposed to garden-variety administrative law cases.

Formally speaking, there is no rule of judicial deference on fact issues. The Court can make its own factual determinations and is not limited to reviewing a legislative or administrative record. Interestingly, however, the Court of Justice has 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.[279] 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,[280] 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.[281] 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. A common formulation was that "even though a discretion has been conferred on the Commission in the matter at issue, the Court

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[278]Lenaerts & Arts, supra note 103, at 197; Hartley, supra note 171, at 426, 429.

[279]Hartley, supra note 171, at 426.

[280]Id. at 427-28.

[281]Id. at 428-29, citing, e.g., Westzucker GmbH v. Einfuhr und Vorratsstelle fur Zücker, Case 57/72, 1973 E.C.R. 321; Lenaerts & Arts, supra note 103, at 198.

is required to verify whether or not it . . . has committed manifest errors in its assessment of the facts. . . ."[282] 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.

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.[283]

2. A New Era of Intrusive Review?

The above understanding of the "manifest error" standard may still be the law in many areas of Community judicial review practice. At least in the area of competition law, however, the pendulum has recently swung sharply in the direction of more active judicial review—indeed, review that is not unlike the kind of "hard look" review that American courts routinely provide in regulatory cases. This development is crystalized in *Commission v. Tetra Laval BV*,[284] decided by the Court of Justice in 2005. 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. An extended analysis of *Tetra Laval* is therefore in order.[285]

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

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[282]EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission, Case 187/85, 1988 E.C.R. 4155, ¶ 6.

[283]Bermann, supra note 225, at 171; Hartley, supra note 171, at 429.

[284]Case C-12/03, 2005 E.C.R. I-987.

[285]For a readable summary of this important case, in greater detail 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.

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."[286] 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."[287] 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."[288] 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.

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."[289] Nevertheless, the Court continued, "the Community Courts [must not only] establish whether the evidence relied

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[286]Case T-5/02, 2002 E.C.R. II-4381, ¶ 366.

[287]Airtours Plc v. Commission, Case T-342/99, 2002 E.C.R. II-2585, ¶ 294.

[288]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, ¶ 411.

[289]*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).

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."[290] 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."[291]

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,[292] 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."[293] 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.[294]

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 proposed behavioral commitments. Indeed, the Court said, the agency had basically refused on principle to take them seriously.[295]

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

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[290]Id. ¶ 39.

[291]Id. ¶ 48.

[292]Id. ¶ 74.

[293]Id. ¶ 56 (quoting ¶ 159 of the CFI's decision below).

[294]Id. ¶¶ 75-78.

[295]Id. ¶¶ 85-89.

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.[296] 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 decision, declaring that it would not consider attacks on the CFI's evaluation of the evidence.[297]

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[296] Treaty Art. 225; John Deere v. Commission, Case C-7/95, 1998 E.C.R. I-3111, ¶¶ 21-22.

[297] *Tetra Laval,* ¶¶ 47-48, 104, 131.

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."[298] 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.[299]

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.[300] 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.[301] 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[302] and applied the correct standard of review.[303]

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[298]Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[299]38 U.S.C. § 7292.

[300]*Tetra Laval*, ¶¶ 125-30.

[301]Id. ¶¶ 131-32.

[302]Id. ¶ 102.

[303]Id. ¶¶ 131-32.

American lawyers know from their own domestic experience that the dividing line between law and fact can be highly malleable.[304] 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.

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.[305] A claim of procedural error can also be based on the Commission's Rules of Procedure.[306] Indeed, the claim does not necessarily have to rest on positive law at all. In *Transocean Marine Paint Ass'n v. Commission*,[307] 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.

A possible divergence from 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 Arts 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."[308] Hartley suggests, however, that in practice the Court's inquiry is more contextual than this. He notes that in the *Tariff Preferences*

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[304]See Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 23-29 (1985).

[305]E.C. Treaty Art. 253.

[306]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).

[307]Case 17/74, 1974 E.C.R. 1063.

[308]Lenaerts & Arts, supra note 103, at 189.

case[309] "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.'"[310] 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 respect the requirements has on the ultimate administrative outcome or on individual rights."[311] 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.

In his recent article on judicial review of European administrative procedure, Schwartze also 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.[312] This chapter will not review these procedural requirements in detail, as they will be examined in detail in other reports in the Section's EU project.

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.[313] 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.[314]

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[309]Commission v. Council, Case 45/86, 1987 E.C.R. 1493.

[310]Hartley, *supra* note 171, at 417.

[311]Schwartze, supra note 203, at 97-98 & nn. 63-65.

[312]Id. at 91-94.

[313]Société Francaise des Biscuits Delacre SA v. Commission, Case 350/88, 1990 E.C.R. I-395, ¶ 15; Schwartze, supra note 203, at 93.

[314]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.

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.[315]

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."[316] 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.[317]

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."[318] 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"[319]—a burden that is almost never carried 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 trying to achieve and what it actually did, rather than at allegedly undisclosed motives.[320] But even that analogy is imperfect, because, as noted above, American-style abuse of discretion

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[315]Schneider Electric SA v. Commission, Case T-310/01, 2002 E.C.R. II-4071, ¶¶ 453-62.

[316]Hartley, supra note 171, at 420.

[317]Id. at 420-21.

[318]Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

[319]Id. at 420.

[320]See Hartley, supra note 171, at 421 (contrasting proportionality with misuse of powers).

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.[321] Overall, he reports, misuse of powers "is only rarely established in practice."[322] The wide applicability of other grounds of review, as discussed above, may help to account for this fact.

[321]Id. at 422, citing Fédéchar v. High Authority, Case 8/55, 1956 E.C.R. 292.

[322]Id. at 420.