ADMISSIBILITY OF ACTIONS FOR ANNULMENT (ARTICLE 230(4) EC)

CONTENTS

A. INTRODUCTION

1. This chapter of our report discusses the Court of First Instance's ("CFI") jurisdiction to hear direct actions brought by natural or legal persons pursuant to Article 230(4) of the EC Treaty ("EC") and, more specifically the admissibility of these actions.

2. In addition, 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) EC, 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. Under Article 230(3) EC, an action may also be brought by the Court of Auditors or the European Central Bank concerning the "*protection of their prerogatives*." Compared with natural and legal persons. the Community's institutions are, in the Court's parlance, "*privileged*" because no specific criteria have to be met in order to render an action admissible, apart from more formal requirements, *e.g.*, that the action be brought during the time-limit prescribed by

Article 230(5) EC. Actions by natural or legal person, however, are subject to relatively strict admissibility standards, as discussed in more detail below.

3. The action for annulment traditionally accounts for a major part of the CFI's workload:[1] Of all new applications brought during the period from 1999 to 2004, a total of 919 applications, or approximately 46%, sought the annulment of acts susceptible to challenge under Article 230.[2] 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.[3] 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*."[4]

4. *Sedes materiae* for the action for annulment of Community acts by natural or legal persons is Article 230(4) EC. However, the analysis of the fourth paragraph of Article 230 requires a brief reading of Article 230 EC as a whole (until its expiration, the Euratom Treaty provided for a similar provision in Articles 33 and 38 ECSC). 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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> *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.*
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> *The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.*

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1 Effective June 1, 2004, actions for annulment and for failure to act brought by a Member State fall also 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)).

2 *See* the Court's Annual Report for the year 2003, p. 237.

3 *See* the Court's Annual Report for the year 2004, p. 198.

4 *See* the Court's Annual Report for the year 2003, p. 113.

> *Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.*
>
> *The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*

1. Scope Of The CFI's Jurisdiction

5. Upon a successful application for annulment, the CFI can only confirm the legality of the challenged act or strike it down. Owing to the principal allocation of powers under the EC Treaty, the CFI cannot substitute the assessment of another European institution with its own judgment. Generally speaking, the CFI is limited to review the legality of the challenged act and may, at most, indicate in the judgment's reasoning the defects of the challenged act, thus providing a certain insight into what changes are required to render the challenged act legal under EC law.[5]

6. One of the more important exceptions to this general principle is laid down in Article 229 EC.[6] Pursuant to Article 229 EC, "*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*." Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty provides, in its Article 31, for such unlimited jurisdiction of the CFI when reviewing Commission decisions imposing fines in cartel cases.[7] According to the CFI, the Court's unlimited jurisdiction in its review of Commission decision imposing fines in competition cases provides for an important counterweight to the combination of the Commission's *judge and jury* powers in this area.[8] However, Article 229 EC does not provide for an autonomous remedy, *e.g.*, in addition to the action for annulment pursuant to Article 230 EC. Rather, according to the CFI, actions under Article 229 EC can only be exercised in actions provided for by

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5 *Henry G. Schermers & Dennis F. Waelbroeck*, Judicial Protection in the European Union, ¶827 (6th ed. 2001).

6 A further exception this rule can be found in Article 231(2) EC, which reads as follows: "*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*."

7 [2003] OJ L 1/1.

8 Joined Cases T-25/95 et al *Cimenteries CBR u.a./Commission*, Slg. 2000, II-491, ¶¶712-723; *Schermers/Waelbroeck*, ¶1173.

the Treaty (*i.e.*, mostly the action for annulment under Article 230 EC) and must meet the relevant criteria.[9]

7. In successful actions against Commission decision imposing fines, the CFI thus may, in its exercise of unlimited jurisdiction in this area, decrease (or increase) fines without necessarily annulling the Commission's decision.[10] The CFI's powers in this area are modelled on the French administrative law principle of "*pleine jurisdiction*" that also exists in the area of damage actions against the Community,[11] as will be discussed in more detail elsewhere in our report. The CFI's case law shows that the Court does not shy away from exercising its unlimited jurisdiction in this area: On several occasions in the past, the CFI substantially reduced fines imposed on companies in competition cases.[12] However, complete annulment of a cartel decision imposing fines appears to be more the exception than the rule.[13]

2. Legal Effect Of A Successful Appeal

8. The action for annulment is aimed at a declaration by the CFI that the relevant Community act is null and void and a party seeking annulment of a Community act is limited to either pleading in favor of partial or complete invalidation of the challenged act. The CFI's judgment is declaratory and has retroactive effect.

9. Regarding Community acts with general application, such as a directive or regulation, a judgment annulling the challenged act has general effect. However, if the CFI annuls a Commission decision, the annulment only has *inter-partes* effect, *i.e.*, the annulment of the decision only takes effect regarding the party having successfully challenged the Commission decision. This includes the complainant as well as any interveners under Article 115 CFI-RP (the rules governing intervention in support of, or against, a party will be discussed elsewhere in our report).

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9 Case T-252/03 *FNICG v Commission* [2004] ECR II-0000.

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

11 *Feddersen*, in: Das Recht der Europäischen Union (26th supplement 2005, Grabitz/Hilf, eds.), nach Art. 83, commentary on Article 31, ¶20.

12 Case T-59/99 *Ventouris Group Enterprises SA/Commission*, [2003] ECR II-[0000], ¶222; Case T-224/00 *Archer Daniels Midland Company/Commission*, [2003] ECR II-2547, ¶380; Joined Cases T-236/01 et al *Tokai Carbon Co. Ltd. u.a./Commission*, [2004] ECR II-[0000], ¶458.

13 Joined Cases T-191/98 et al *Atlantic Container Line u.a./Commission*, [2003] ECR II-[0000], ¶1634.

10. The fact that the Commission may sometimes adopt several decision in a "bundle of decisions," *e.g.*, in practice most frequently in cartel cases, does not change the *inter-partes* effect of judgments declaring a Commission decision null and void. Even if the Commission adopts only one decision, *e.g.*, concerning a specific cartel, the facts relating to the Commission's finding of an infringement and the amounts of fines imposed are different for each company involved. Accordingly, a decision fining several companies in a given cartel case constitutes in fact a "bundle of individual decisions."[14] This means that if a party successfully challenges a Commission decision imposing a fine for its participation in a given cartel, another party having been fined for participation in the same cartel may not benefit automatically from the decision's annulment absent an independent appeal.[15]

11. One of the more recent cartel cases before the CFI is an illustrative example in this connection: In *Vitamins*, the Commission imposed a fine totaling € 855.23 million, so far still the highest total fine ever imposed in a Community competition law proceeding, on certain companies for their participation in the so-called *Vitamins* cartel.[16] Of the several companies involved, Aventis (then Rhone-Poulenc) was the first to cooperate with the Commission under its corporate leniency program and obtained immunity from fines for its participation in the cartel with regard to certain vitamins. Aventis did not appeal the Commission's decision. In a subsequent appeal against the decision brought by BASF, another company involved in the cartel, BASF alleged, *inter alia*, that it should have obtained immunity because it 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 of the CFI-RP 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. In its order, the Court essentially confirmed that the annulment of an act by the Community Courts cannot entail annulment of an act not challenged but alleged to be affected by the same illegality.[17]

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[14] Case T-227/95 AssiDomän Kraft Products u.a./Commission, [1997] ECR II-1185, ¶56-57 (the ECJ annulled the judgment for other reasons in Case C-310/97P Commission/AssiDomän Kraft Products [1999] ECR I-5363).

[15] *See, e.g.*, Joined Cases T-236/01 et al *Tokai u.a./Commission* [2004] ECR II-0000 (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* Case T-45/98 *Krupp Thyssen Stainless GmbH u.a./Commission*, [2001] ECR II-3757, ¶298.

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

[17] Case T-15/02 *BASF Aktiengesellschaft v Commission* [2003] ECR II-213.

B. ACTS SUSCEPTIBLE TO REVIEW

12. Under Article 230(4) EC, the action for annulment is primarily available against formal decisions adopted under Article 249 EC. The wording of Article 230(4) EC makes it clear, however, that the form of a measure is less relevant than its substance when determining whether it is susceptible to review: According to the text of the Treaty, the action for annulment is also admissible if it seeks to annul "*a decision… in the form of a regulation or a decision addressed to another person*."

13. Similarly, under Article 230(4) EC, the CFI examines the substance of the challenged act: According to settled case law, 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,[18] regardless of their formal description as a decision or regulation. While private parties being addressed by an individual decision may always challenge the decision, decisions addressed to third parties and measures of legislative nature, such as a regulation, may only be challenged if additional conditions are met.[19]

1. Measures addressing individual situations

14. The addressee of a decision under Article 249 EC, which is "*binding in its entirety upon those to whom it is addressed*" (Article 249(4) EC), may challenge the legality of that decision before the CFI. In practice, most challenges are brought by addressees of Commission decisions in the are of competition law, *i.e.*, decisions in the area of merger control, restrictive practices (Article 81 EC, including decisions imposing fines on companies having participated in illegal cartels), abuse of dominant positions, or state aid.[20] However, as the decision is the predominant legal instrument for the Commission to carry out its tasks under the EC Treaty, Commission decisions in other areas, *e.g.*, public procurement or access to documents, are also frequently appealed before the CFI.

15. 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 "decision" constitutes a measure of general application. In *Dow Agrosciences*, the Parliament and Council adopted a decision establishing a list detailing potentially environmentally unfriendly substances under

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

19 *Schermers/Waelbroeck*, ¶639.

20 *See, e.g.*, Cases T-310/00 *MCI v Commission* [2004] ECR II-0000 (merger control); T-224/00, *Archer Daniels Midland v Commission* [2003] ECR II-2597 (Article 81 EC); T-184/01 *IMS Health v Commission* [2001] ECR II-[COMPLETE] (Article 82 EC).

Directive 2000/60.[21] The CFI held that the act did not constitute a decision for purposes of Article 230(4) EC because the measure had been adopted in the framework of the co-decision procedure (Article 251 EC). Moreover, the act amended the wording of Directive 2000/60.[22]

16. The CFI has established that a decision merely of a confirmatory nature, *i.e.*, confirming a previous decision that was not appealed during the time-limit pursuant to Article 230(5) EC, is not by itself a reviewable act. The CFI developed its case law on this point on several occasions. According to the Court, 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.[23] If, however, the act responds to a new set of facts (as compared to the facts on which the previous decision was based), the institution's reaction to these new facts could, in principal, constitute an appealable act.[24]

17. A decision amending certain grounds of a previous decision, while not modifying its operative part, may be subject to a challenge.[25] 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.

18. In a more recent case, the CFI had to consider whether the subsequent amendment of an approval decision under the EU Merger Regulation[26] affected the legal interests of the parties to the approved transaction. In *Lagardère*, the Commission had authorized a concentration and, as the Commission is required to do in these case, also assessed (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

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

22 Case T-45/02 *Dow Agrosciences BV et al v Commission* [2003] ECR II-0000.

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

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

25 Case T-251/00 *Lagardère and Canal+ v Commission* [2002] ECR II-0000.

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

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 changed the legal situation created by the previous decision and concluded that the action was admissible.

19. 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 law suit 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. While the federal court ultimately rejected 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 was incapable of producing sufficient legal effects for the applicants as to bring about a distinct challenge of their legal position within the meaning of Article 230(4) EC. While the CFI acknowledged that the commencement of legal proceedings is not without legal effects, it held that these effects concern principally the court before which the action is brought. According to the CFI, it is not the Commission' decision bringing about a distinct change of the companies' legal position but only the court's final judgment definitively determining the obligations of the parties to the dispute.[27] As a more general matter, the CFI also held that this would also apply to a formal Commission decision deciding to commence legal action before the Court of Justice or national courts in the Member States.

20. Legal recourse under Article 230(4) EC may also be available even if no formal decision is issued. In practice, the Community institutions frequently act by way of sending informal letters, *e.g.*, in response to requests by individuals or companies. Certainly, the institutions' choice to send a letter instead of adopting a formal decision cannot deprive an applicant of its right to challenge the position taken in that letter that would otherwise have existed. On the other hand, it is also established that the mere fact that a letter is sent in response to a request made by the letter's addressee is in itself insufficient to clear the way for an action seeking annulment.[28]

21. According to settled case law, legal recourse is not available against purely informal notifications, such as letters stating that a given subject is under consideration, no

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[27] Joined Cases T-377/00, T-379/00, T-380/00, T-260/01, and T-272/01 *Philip Morris International and Others v Commission* [2003] ECR II-1, ¶79 (appeal pending in Cases C-131/03P and C-146/03).

[28] Case T-277/94 AITEC/Commission [1996] ECR II-351, ¶50; Case T-5/96 Sveriges Betodlares & Henrikson/Commission [1996] ECR II-1299, ¶26.

decision has yet been taken, or simply asking for patience.[29] 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.*"[30]

22. Following this line of case law, the CFI, *e.g.*, established that a decision by the Hearing Officer refusing access to certain information in the Commission's files does not constitute an appealable act for purposes of Article 230(4) EC.[31] The Hearing Officer ensures, *inter alia*, that the rights of defence are respected in competition cases and oversees, *e.g.*, the Commission's procedure governing the access to its files containing all evidence in a given case after a Statement of Objections (*i.e.*, the Commission's administrative complaint prior to a formal decision) is issued.[32] In *German Banks*, the Commission alleged that various banks in Germany engaged in a cartel contrary to Article 81 EC by fixing the fees applicable to money exchange transactions on the occasion of the introduction of the Euro. The Commission pursued separate cases along national borders and investigated similar conduct also in other Member States, *e.g.*, 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 confirmed its case law on this issue and held that the Hearing Officer's decision was only a preparatory measure in the context of the Commission's procedure that would ultimately result in a formal (and appealable) Commission decision.[33] This was because the CFI opined that only the final decision would affect the banks' legal situation and that any violation of their rights of defence resulting from the Hearing Officer's decision could be pursued in an appeal of that

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29 *Henry G. Schermers & Dennis F. Waelbroeck*, ¶679.

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

31 Case T-216/01 *Reisebank v Commission* [2003] ECR II-0000; Case T-219/01 *Commerzbank v Commission* [2003] ECR II-0000; Case T-250/01 *Dresdner Bank v Commission* [2003] ECR II-0000.

32 *See* in more detail *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.

33 Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, ¶42.

decision.[34] 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.[35]

23. Particularly in the area of competition law, complaints by third parties alleging the infringement of Articles 81 or 82 EC 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 Articles 81 or 82 EC, the rejection is generally susceptible to judicial review.[36] Regulation 773/2004 explicitly requires the Commission to adopt a decision to reject a complaint.[37] 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) EC.[38]

24. In practice, a complaint alleging that a certain practice by a Member State is contrary to competition rules may sometimes also be based on Article 86 EC (alleging that the conduct also infringes the Treaty's rules on state aid). However, in this case, a rejection of a complaint notified in a letter generally cannot be appealed: According to the consistent case law of the CFI, under Article 86 EC, the Commission enjoys a wide discretion as regards which action (if any) it considers necessary against a Member State.[39] As the Commission does not have an obligation to act under Article 86 EC vis-à-vis private parties, the rejection to act cannot sufficiently affect the legal situation of these parties to constitute an appealable act bar exceptional circumstances.

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34 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 (Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-0000; Case T-44/02 *Dresdner Bank v Commission* [2004] ECR II-0000; Case T-54/02 *Vereins- und Westbank v Commission* [2004] ECR II-0000; Case T-60/02 *Deutsche Verkehrsbank v Commission* [2004] ECR II-0000; Case T-56/02 *Commerzbank v Commission* [2004] ECR II-0000. The Commission appealed the CFI's judgment to the ECJ).

35 Case T-85/99 *Satellimages TV5 v Commission* [2002] ECR II-1425, ¶34.

36 Case T-52/00 *Coe Clerici Logistics v Commission* [2003] ECR II-0000. *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.

37 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.

38 Case T-52/00 *Coe Clerici Logistics v Commission* [2003] ECR II-0000; Case T-367/94 *British Coal Corporation v Commission* [1998] ECR II-2103; *Kerse/Kahn*, ¶2-046.

39 Case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101, ¶27; Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, ¶75.

25. So-called "guidance letters," issued to companies by the Commission on novel questions arising under Article 81 and 82 EC, are, according to the relevant Notice, not considered Commission decision.[40] These "guidance letters," modeled after the DOJ's business review and FTC's advisory opinion letters, are designed to be an informal Commission assessment of specific competition law questions and it is may be doubtful whether they constitute an appealable act under Article 230(4) EC.

2. Measures Of General Application

26. According to the wording of Article 230(4) EC, private parties may also challenge "*decisions taken in the form of a regulation*." According to Article 249 EC, a regulation has "*general application*" and is "*binding in its entirety and directly applicable in all Member States*." According to the CFI, the decisive criterion for distinguishing between the terms "decision" and "regulation" mentioned in Article 230(4) EC is "*the general application of the measure in question*."[41]

27. While early case law, primarily of the ECJ, interpreted the wording of Article 230(4) EC literally and excluded actions against directives, more recent precedent suggests that, as a matter of principal, actions are admissible not only against regulations but also directives.[42] 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 EC]*."[43]

28. Legal commentators have suggested that the early case law's restrictiveness may have resulted from the Court's narrow interpretation of the requirements in Article 230(4) EC that any natural or legal person be "*directly and individually concerned*" by the challenged act (the specific requirements for standing will be dealt with in more detail below).[44] However, it now seems well established that the action for annulment may also

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40 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.

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

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

43 Case T-84/01 *Association contre l'horaire d'été (ACHE) v Parliament and Council* [2002] ECR II-99, ¶23; Case T-223/01 *Japan Tobacco and JT International v Parliament and Council* [2002] ECR II-3259, ¶28.

44 *Schermers/Waelbroeck*, ¶1173.

seek the annulment of a directive, even though the text of Article 230(4) EC does not mention this expressly. Finally, Commission decisions with general application (as opposed to a Commission decision specifically addressed to one individual) may be attacked in the action for annulment.[45]

29. When challenging acts of general application under Article 230(4) EC, 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) is severable from the remainder of the act.[46] If partial annulment of an act would have the effect of altering its substance, the action may be inadmissible.[47]

30. It is well established that the action for annulment is available only for the challenge of "secondary" Community legislation. "Primary" Community law, *e.g.*, the EC Treaty, is not susceptible to review under Article 230(4) EC because it does not constitute an act of a Community institution within the meaning of that provision.[48] For the same reason, the CFI has no jurisdiction to hear challenges of the act of accession of a new Member State.[49] Accordingly, the act concerning the accession of 10 new Member States acceding to the European Union effective May 1, 2004,[50] or 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),[51] is not susceptible to review under Article 230(4).[52]

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45 Case T-264/03 *Schmoldt and Others v Commission* [2004] ECR II-0000.

46 See Case C-29/99 *Commission v. Council* 2002 ECR I-11221; Case C-378/00 *Commission v. Parliament and Council* 2003 ECR I-937; and Case C-239/01 *Germany v. Commission* 2003 ECR I-10333.

47 See Joined Cases C-68/94 and C-30/95 *France and Others v. Commission* 1998 ECR I-1375; See Case C-29/99 *Commission v. Council* 2002 ECR I-11221; and Case C-239/01 *Germany v. Commission* 2003 ECR I-10333.

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

49 Joined Cases 31 and 35/86 *Levantina Agricola Industrial SA (LAISA) and CPC España SA v Council* [1988] ECR 2285.

50 [2003] OJ L236/33.

51 [2005] OJ L157/11.

52 *Feddersen*, 12 European Intellectual Property Review [2003] 545, 554.

C. LEGAL INTEREST TO BRING AN ACTION

31. Settled case law requires that an applicant under Article 230(4) EC has a legal interest in bringing the action. Although not expressly required by Article 230(4) EC, this requirement seeks to prevent challenges solely based on future or hypothetical situations and is examined by the CFI on its own motion. The applicant's legal interest must be vested and present at the time the action is brought.[53] Even if the challenge is based on a future situation, the applicant must demonstrate that the prejudice to his situation is already certain, justifying bringing the action *pro future*.[54] The annulment of the contested measure "*must itself be capable of having legal consequences*"[55] or the action must be liable, if successful, to result in "*an advantage for the party who has brought it*."[56]

32. Recently, the CFI has had the opportunity to clarify the requirement that a legal interest be present in particular in the area of merger control. Under the Merger Regulation, the Commission examines notified mergers of Community dimension. Contrary to the U.S. merger control regime (where a transaction is automatically cleared upon expiry of the HSR waiting period), the Commission approves, or prohibits, a notified transaction in a formal decision under Article 249 EC. 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 based on contractual provisions in the merger agreement requiring the Commission's approval as a condition precedent).

33. In *Gencor*,[57] 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

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53 Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 719, 748; and Case T-158/98 *Torre and Others* v *Commission* [2001] ECR-SC I-A-83 and II-395, ¶28.

54 Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, ¶33.

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

56 Case C-174/99P *Parliament* v *Richard* [2000] ECR I-6189, ¶33, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, ¶21.

57 Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753.

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 of legal review of merger decision would require 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.[58] 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.

34. 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* (formerly WorldCom), 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 (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. 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 a 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.[59]

35. In *MCI*, the CFI clarified one important aspect of its *Gencor* and *Kesko* line of case law that is of relevance also for other areas of Community law. In *Gencor* and *Kesko*, the parties abandoned the contemplated transactions after filing a challenge with the Court. Accordingly, the question arose whether parties, in order to retain a legal interest in challenging a prohibition decision, are required to defer the abandonment until after an action for annulment has been filed. The CFI in *MCI* answered that question in the negative: According to the CFI, the requisite legal interest stems from the obligation to comply with Commission decisions under Article 249(4) EC which "*therefore exists before, and whether or not, an action is brought*."[60]

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58 Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, ¶¶58-59.

59 Case T-310/00 *MCI v Commission* [2004] ECR II-0000. 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)).

60 Case T-310/00 *MCI v Commission* [2004] ECR II-0000, ¶48.

D. STANDING TO BRING AN ACTION

36. Pursuant to Article 230(4) EC, an action by a private or legal person of an act other than a decision specifically addressed to it is only admissible if the challenged act is "*of direct and individual concern*." The interpretation of these two criteria has been developed by the Courts 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.[61] 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.

1. Direct Concern

37. According to the Court, a measure is of direct concern to the 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 synthesized the requirement in the following words: An applicant is 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*."[62] Three more recent cases may be helpful to understand the Court's interpretation:

38. In *Dow Agrosciences*, the CFI had to examine whether the inclusion of certain chemicals in a list detailing potentially environmentally unfriendly substances under Directive 2000/60 directly concerned the applicant, a producer of these chemicals.[63] Under the Directive, the list includes the substances in regard to which the Commission is required to make proposals to the Parliament and Council as to their environmental classification. Inclusion in the list does not give any specific indication about the measures that will be proposed by the Commission. Any specific measure will only 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 affect the applicant: It explained that further implementing measures would have to be adopted in order to have the requisite direct concern to the applicant.[64]

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61 *Schermers/Waelbroeck*, ¶868.

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

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

64 Case T-45/02 *Dow Agrosciences BV et al v Commission* [2003] ECR II-0000.

39. In *Sony Computer Entertainment Europe*, the CFI examined whether a regulation modifying the tariff classification under the Common Customs Tariff of Sony's PlayStation 2 would be of direct concern to its producer. The relevant regulation provided for a higher tariff rate applicable to PlayStation 2 consoles and, while generally describing the products covered by the new tariff treatment, contained an "*apparatus on which the logo PlayStation II was clearly visible*." Under settled case law, as a general matter, individuals may not challenge tariff classification because they concern all products of the type described, regardless of their individual characteristics and origin.[65] However, in this case, the CFI opined that the regulation "*in effect invalidates*" the previous (beneficial) tariff treatment because the higher tariff treatment would be applied by all customs authorities three months after the regulation's entry into force.[66]

40. Finally, in the area of merger control, the CFI held that a third party could be directly concerned by Commission decisions approving transactions notified under the Merger Regulation. In *BayBliss*, a producer of small household appliances challenged the Commission's decision approving, subject to certain conditions, of Moulinex and SEB, two competing producers of household appliances. The CFI held that, as the Commission's approval would bring about an immediate "*change in the markets concerned, depending solely on the wishes of the parties*."[67]

2. Individual Concern

41. An applicant is individually concerned by a measure not addressed to him if it affects the applicant's 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*." The CFI applies this formula, commonly referred to as the "*Plaumann Formula*" (after the Court's judgment in *Plaumann v Commission*)[68] to all measures that are not addressed to the applicant, regardless of their characterization as decision, regulation, or directive.

42. The analysis of whether factors exist that sufficiently distinguish the applicant from any other addressee of the general measure, the ECJ has sometimes considered relevant the specific economic situation of the applicant. For example, in *Extramet*, the ECJ held that

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65 Case 40/84 *Casteels v Commission* [1985] ECR 667, ¶10; Case T-49/00 *Iposea v Commission* [2001] ECR II-163, ¶11.

66 Case T-243/01 *Sony Computer Entertainment Europe Ltd v Commission* [2003] ECR II-0000, ¶62.

67 Case T-114/02 *BayBliss SA v Commission* [2003] ECR II-0000, ¶89. *See* also Case T-3/93 *Air France v Commission* [1994] ECR II-323, ¶80.

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

a general measure may affect the applicant in a sufficiently different way than all of its other addressees if it affects a company's competitive situation in a substantial manner.[69] In that case, a regulation imposed a significant anti-dumping duty on a major product used by Extramet Industrie in a production process and the ECJ considered that Extramet was individually concerned. Legal commentators have suggested that the test in *Extramet* would require a direct effect on the applicant's position and a serious prejudice to its current position resulting from the contested measure. Similarly, in *Coderniu*, the ECJ had to consider whether the beneficiary of a graphic trademark (which was registered in 1924) was individually concerned by a regulation effectively preventing the beneficiary from enjoying the protection conferred by the trademark. The ECJ held that, since Coderniu was the beneficiary of the trademark for a long time, it could be sufficiently distinguished from all other addressees of the regulation and concluded that it was individually concerned.[70]

43. In the special case of an association bringing an action, the association is individually concerned by the contested measure if it has taken part in the decision-(or law-) making procedure. The Court has distinguished three possible situations in the past: the association may be afforded a specific procedural right by Community law, the association was affected in its own right, *e.g.*, because a negotiating position may be affected by the contested measure, and where it simply "pools" the interests of individual members (or associations) that individually would be directly concerned.

44. These examples indicate that the Courts' interpretation of the Plaumann Formula was very fact specific and appeared to require a case-by-case analysis. The lack of clear-cut rules was exacerbated by the fact that the Courts' case law on the issue of individual concern was, and is, directly linked with its interpretation of appealable acts under Article 230(4) EC. Indeed, with accepting challenges of pure legislative acts under Article 230(4) EC, the question of individual concern is of paramount importance to avoid opening a "floodgate" of legal actions by individuals who may be, though to different degrees, somewhat affected by the legislative act.[71] Efforts to limit the effects of this jurisprudence brought about a case law that sometimes lacked a sufficient degree of clarity and interpreted the criterion of individual concern, in the words of legal commentators, "*unduly strict*."[72] This made it difficult to predict the likelihood of passing the Court's admissibility test under Article 230(4) EC.[73] In addition, there is a

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69 Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501. *See* also *Schermers/Waelbroeck*, ¶891.

70 Case C-309/89 *Codorniu v Council* [1994] ECR I-1853.

71 For a detailed description of the Court's case law, *see Schermers/Waelbroeck*, ¶¶868 et seq.

72 *Schermers/Waelbroeck*, ¶¶899.

73 *Feddersen*, Europäische Zeitschrift für Wirtschaftsrecht 2002, 532.

concern that in certain situations applicants might be unable to challenge an act, particularly a regulation or directive: If the action under Article 230(4) EC was inadmissible and no other recourse available, *e.g.*, under national law against implementing measures, a significant gap in the legal protection afforded by the Treaty could exist. While a detailed discussion of these issues is beyond the scope of our report, the following focuses on the more recent developments in this area in particular since 2002.

45. What seemed to be a revolution in the interpretation of the criterion of "individual concern" started with Advocate General *Jacobs's* opinion in *Unión de Pequeños Agricultores* in March 2002. In his opinion, the Advocate General openly challenged the *Plaumann Formula* and explained 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*."[74] Following the Advocate General's opinion, the CFI ruled in May 2002 in its *Jégo-Quéré* judgment and departed for the first time from the formula established in Plaumann and decided that an application that otherwise would have been inadmissible was admissible after all.[75] However, in light of the Commission's appeal against the judgment, the CFI stayed the proceedings pending the appeal before the ECJ.

46. In July 2002, in *Unión de Pequeños Agricultores*, the ECJ appeared to confirm the test in *Plaumann* without responding to the Advocate General's opinion en detail. Finally, upon the Commission's appeal of the CFI's judgment in *Jégo-Quéré*, and after a further opinion of Advocate General *Jacobs* (without advocating a departure from the Plaumann Formula), the CFI's judgment was annulled in 2004.[76] The CFI declared publicly that it would follow the ECJ's interpretation and has applied the Plaumann Formula in various cases since the ECJ's judgment. 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. It also sheds some light on the "real" issue behind the discussion: what level of legal remedies is required to ensure effective legal protection against Community acts.

47. *Unión de Pequeños Agricultores* 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 reforming the structure in particular of state aid for smaller producers. *Unión de Pequeños Agricultores*, an association of smaller agricultural businesses in Spain brought an action challenging the regulation. The

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74 Case C-50/00 *Unión de Pequeños Agricultores/Council* [2002] ECR I-0000.

75 Case T-177/01 *Jégo Quéré et CIE SA./Commission* [2002] ECR II-0000.

76 Case C-263/02P *Commission v Jégo-Quéré* [2004] ECR I-0000.

CFI held that there were no factors that could sufficiently distinguish *Unión de Pequeños Agricultores* (or its members) from any other addressee of the regulation. Finally, the CFI considered the argument brought forward by *Unión de Pequeños Agricultores* that no legal remedies existed under national law in Spain at the time. This made it impossible to review the contested regulation by way of a reference proceeding under Article 234 EC. Moreover, this effectively meant that there was no legal remedy for *Unión de Pequeños Agricultores* to challenge the regulation at all, unless the action for annulment under Article 230(4) EC would be 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.

48. *Unión de Pequeños Agricultores* appealed the CFI's judgment but only concerning the lack of individual concern of *Unión de Pequeños Agricultores* in its capacity as association. The appeal did not concern the CFI's findings that *Unión de Pequeños Agricultores* was not individually concerned in light of the lack of individual concern on the part of its members.

49. In its opinion before the ECJ hearing the appeal, Advocate General Jacobs suggested a new interpretation for the criterion of "individual concern." 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 is that the reference proceeding under Article 234 EC 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, applicants would have no other choice but to violate the measure because, in the absence of a national act implementing the measure, there would be no challenge possible before national courts, and (iv) national proceedings which 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 their "*inter partes*" effect associated with national proceedings. In conclusion: In the absence of any other legal recourse, the reference proceeding alone does not provide for sufficient legal protection against Community acts and thus the scope of Article 230(4) EC needs to be broadened. It is interesting to note that the idea of a broader interpretation of the criterion of individual concern goes back at least to the ECJ's judgment in Extramet: There it was also Advocate General Jacobs who argued that "individual concern" be interpreted broadly.[77]

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[77] *See* the Advocate General's opinion in Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501.

50. In its judgment, the ECJ confirmed essentially the Plaumann Formula, without, however, responding to the Advocate General's suggestions. For procedural reasons, as the appeal was limited to the alleged lack of individual concern of *Unión de Pequeños Agricultores* in its capacity as association, the ECJ, in a strict sense, did not even see a need to respond in detail. 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. Another opportunity for the ECJ to state this more clearly should soon arise.

51. In *Jégo-Quéré*, a Commission regulation required a minimum mesh size for use by commercial fishers when harvesting in certain fishing zones.[78] 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 applied the Plaumann Formula and concluded that 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 considered 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 which 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 held that other actions provided for in the Treaty, such as the reference proceeding (Article 234 EC) or actions based on non-contractual liability (*i.e.*, damage actions, Article 235 EC), 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) EC, 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*."

52. On appeal, the ECJ rejected this proposal, confirmed explicitly the Plaumann Formula and referred to its judgment in *Unión de Pequeños Agricultores*. The ECJ restated that it is for the Member States to modify the current system of legal remedies if they deem it necessary to do so. In any event, this should not be done by way of the ECJ's (or CFI's) jurisdiction. In addition, the ECJ feared that the CFI's proposal was too broad: "*Such an*

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

interpretation has the effect of removing all meaning from the requirement of individual concern set out in Article 230(4) EC."

E. TIME-LIMIT TO BRING AN ACTION

53. Pursuant to Article 230(5) EC, 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*."[79] As a consequence, the CFI examines on its own motion whether the action was brought within the prescribed time period, regardless of whether this issue has been raised by the parties before it.[80] If the addressee of a decision does not seek its annulment within the two month time limit, it "*becomes definitive as against him.*"[81]

54. The two month period is extended by a period of 10 days "*on account of distance*."[82] 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 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.[83]

55. A measure is published for purposes of Article 230(5) EC once it has been published in the Official Journal (the Rules of Procedure that the time limit starts running on the 14th day after publication in the Official Journal). Notification to the plaintiff refers to formal notification pursuant to Article 254(3) EC. 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) EC it is only the notification of the complete decision that starts the two month time-period.[84] Only if the measure is not

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79 Joined Cases T-142/01 and T-283/01 *OPTUC v Commission* [2004] ECR II-0000, ¶30.

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

81 Case C-310/97P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, ¶57.

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

83 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.).

84 *Feddersen*, in: Das Recht der Europäischen Union (26th supplement 2005, Grabitz/Hilf, eds.), nach Art. 83, commentary on Article 31, ¶7.

published and not notified to the plaintiff, the day on which the plaintiff obtains otherwise knowledge of the measure starts the time period.[85] Under this alternative, however, the plaintiff must have obtained sufficient details about the measure that enable him to fully exercise his rights under Article 230, the mere knowledge that a certain measure has been adopted is certainly not sufficient.

F. TECHNICALITIES OF LODGING AN APPEAL

56. Although there are no binding rules on the volume or lay-out of pleadings, the CFI has issued "Practice Directions" containing important technical details for lodging pleadings and other documents, applicable *inter alia*, for actions for annulment.[86] These Practice Directions contain detailed suggestions, in particular, as to the length of pleadings and other formalities. The legal nature of the CFI's Practice Directions is not entirely clear and there are good arguments that pleadings not complying with the Court's recommendations could not be rejected as inadmissible. However, counsel is 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.

57. In addition, in a recent case, the CFI has 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 (typically, under the "winner-takes-it-all" rule, the losing party must bear the costs of the proceedings, under Article [COMPLETE]).[87] Although the applications for annulment were partially successful, the CFI considered that the length of the applications (each application amounted to some 500 pages and annexes included approximately 100 files) coupled with the fact that each application contained a significant number of please which were mostly unfounded amounted to an abuse.

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85 Case C-122/95 *Germany v Council* [1998] ECR I-973, ¶35.

86 [2002] OJ C87/48.

87 Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-0000.