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**Enforcing Community Law against the Community Institutions**







*"In cases where national authorities are responsible for administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to request those courts to refer questions to the Court for a preliminary ruling'. That right would be compromised if, pending delivery of a judgment of the Court, which ALONE HAS JURISDICTION to declare a Community regulation invalid, individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered inoperative as regards them ."*

*"The combined provisions of Articles 178 & 215 of the Treaty only give jurisdiction to the Court to award compensation for damage caused by the Community institutions or by their servants in the performance of their duties, or in other words for damage capable of giving rise to non-contractual liability on the part of the Community. Damage caused by national institutions, on the other hand, can only give rise to liability on the part of those institutions, and the national courts retain sole jurisdiction to order compensation for such damage. Where, as in this case, the decision adversely affecting the applicant was adopted by a national body acting in order to ensure the implementation of Community rules, it is necessary, in order to establish the jurisdiction of the Court, to determine whether the unlawful conduct alleged in support of the application for compensation is in fact the responsibility of a Community institution and cannot be attributed to the national body."*

## Enforcing Community law against the Community institutions

This Chapter is not concerned with the limited right of access of individuals before the Court of First Instance or the ECJ<sup>4</sup>. Alongside direct actions under Article 230 EC, there are instances where Community law can be challenged indirectly before national courts. This chapter examines the role played by national courts where Community law is alleged to be breached by the Community institutions. Article 234 EC provides for a means to review the validity of Community legislation or action *against a superior norm of Community law*. Examining the role of national courts in challenges to the validity of Community acts includes a study of the conditions to the granting of interim relief pending a preliminary ruling on validity.

The fact that Community policies are for the most part implemented by national authorities places further duties and responsibilities on national courts. Indeed, on occasion, loss can be caused to individuals as a result of concurrent activities on the part of the Community and national authorities. In such cases of concurrent liability, the normal course of action is for the individual to seek redress before domestic courts.



## 7.1 Article 234 as a means of securing a declaration of invalidity of Community legislation

*"References for preliminary rulings on the validity of a measure, like actions for annulment, allow the legality of acts of the Community institutions to be reviewed".*

Article 234 EC provides that the Court of Justice shall have jurisdiction to give preliminary rulings concerning the validity of acts of the institutions of the Community. This, in turn, presupposes that such challenges can be mounted before national courts. In this way, the validity of a regulation<sup>6</sup> fixing total allowable catches for certain fish stocks was challenged in judicial review proceedings in the High Court in the context of the decision of the Department of Agriculture for Northern Ireland allocating to the Northern Ireland Fish Producers' Organisation (NIFPO) its catch quotas for cod and whiting in the Irish sea<sup>7</sup>. The distribution of quotas was challenged as being unlawful inasmuch as the allocation of TAC for the UK in Regulation 3362/94 was itself alleged to be contrary to Community law.

Following references from the UK courts the ECJ was provided with the opportunity to repeat that under Article 234 EC the Court has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the Community institutions, regardless of whether they are directly applicable; furthermore, that the opportunity for individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act actually having been the subject of implementing measures adopted pursuant to national law. The ECJ will declare the reference admissible as long as the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly<sup>8</sup>.

If challenges to the validity of Community legislation can be mounted before national courts, the latter may not themselves rule upon the validity of Community law. Unlike where matters of interpretation are concerned, where a question of validity is raised, *all* national courts and tribunals are under a *duty* to refer the question to the ECJ. In *Foto-Frost v. Hauptzollamt Lubeck-Ost*<sup>9</sup> the ECJ, in effect, rewrote the words of Article 234 EC and held that it was not open to national courts to make a finding of invalidity. Where a challenge to the validity of Community law is mounted, the national court has no discretion; it *must* refer to the ECJ which has exclusive jurisdiction to declare Community acts invalid. The rule in *Foto-Frost* was soon after followed and applied in *Regina v. MAFF and another ex parte FEDESA*<sup>10</sup> in the context of a challenge to the validity of a statutory instrument implementing a directive, even though the directive itself was already the subject of a direct challenge before the ECJ<sup>11</sup>. The requirement on national courts to refer questions of validity to the ECJ places national courts in clear hierarchical subordination.



### 7.1.1. Assessing the validity of Community legislation, against which norms?

The validity of Community legislation or action can only be judged in the light of Community law itself. The grounds on which a Community measure may be annulled under Article 230 EC include lack of competence, infringement of an essential procedural requirement, misuse of power and infringement of the Treaty or any rule of law relating to its application. The latter is of particular relevance, since it is on this ground that litigants may base claims that Community measures or actions are in breach of general principles of law.

Challenges to the validity of Community legislation or action, mostly in the field of the Common Agricultural and Fisheries policy, are rarely successful. This is partially explained by the fact that the ECJ has recognised that implementation by the Council of the Community's agricultural policy often necessitates the evaluation of a complex economic situation. As a result, the Community institutions must be allowed a wide margin of discretion. This discretion is not limited solely to the nature and scope of the measures to be taken but also to the nature of the facts relied upon, as it is open to the Council to rely, if necessary, on general findings. In reviewing the exercise of this discretionary power, the ECJ confines itself to examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion<sup>12</sup>. This background also influences the way in which the ECJ applies the principle of proportionality.

*"To decide whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it. Furthermore, whilst a measure's patent unsuitability for achieving the objective which the competent institution seeks to pursue may affect its legality, the Community institutions must nonetheless be recognised as having a broad discretion in regard to agricultural policy which reflects the responsibilities which the Treaty imposes on them."*<sup>13</sup>

The same approach is adopted in relation to the principle of equality. The prohibition of discrimination laid down in Article 34(2) of the Treaty requires that comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified.

*"The need for different treatment, in appropriate cases, of various classes of the agricultural community is acknowledged in Article 39(2) of the EC Treaty, which provides that in working out the common agricultural policy ... account shall be taken of: (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions"*



In sum, if it is possible in judicial review proceedings against UK regulations implementing a Community instrument to challenge the validity of the Community itself, and base such challenges on *inter alia* infringement of the principles of legal certainty, equality, proportionality, and the objectives of the CAP, violation of Article 253 EC<sup>14</sup> or infringement of an essential procedural requirement, such challenges are rarely successful. In relation to the CAP, the legality of a measure can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue<sup>15</sup>. From the foregoing it can be seen that the approach of the UK courts to the application of the general principles of law is in the main consistent with that of the ECJ. In both sets of courts there is a general deference to the legislature.

The validity of Community legislation cannot be assessed against national standards, including provisions of national constitutions intended to protect fundamental rights<sup>16</sup>. This is a requirement of primacy. Conflicts between Community legislation and fundamental rights as protected by the national constitution have not yet arisen in the UK, but have caused problems in Germany, raising the prospect of a direct threat to the supremacy of Community law. In the end, the crisis was avoided by the ECJ holding that Community law recognised analogous principles protecting fundamental rights. It is conceivable that with the entry into force of the Human Rights Act 1998, the validity of some Community action or legislation will be challenged in the UK courts, as being incompatible with the Convention. This certainly is likely in the devolution settlement context. Indeed compatibility with both Community obligations and Convention Rights is required<sup>17</sup>. Even if the Union respects fundamental rights and freedoms such as that contained in the Convention<sup>18</sup>, given the real possibility of diverging interpretations between the Luxembourg and Strasbourg Courts<sup>19</sup>, such challenge to the validity of Community law could also be mounted before UK courts. In this way, new challenges to the supremacy of Community law in the UK may arise.

### 7.1.2 The relationship between Articles 234 and 230 EC

The possibility for natural or legal persons to challenge the validity of Community legislation before domestic courts in some ways offsets their restricted access under Article 230 EC. However, this is only true in England, as in Scotland title and interest is construed very restrictively. At the same time, in cases raising complex issues of fact and law, proceedings before national courts present serious disadvantages as an alternative to a direct action. Such limits were outlined in *Extramet*<sup>20</sup>. By virtue of the division of function established under Article 234 EC, the fact-finding power lies principally with the national courts making the reference, but only a full exchange of pleadings as in direct actions is likely to be adequate if all the issues raised are to be properly considered<sup>21</sup>.



For some time, it was unclear whether a natural or legal person could challenge the validity of a Community measure in proceedings under Article 234 EC, where it was open to it to challenge the measure in question directly. This is now resolved. The ECJ has held that the preliminary ruling procedure should not be used as a way to remedy the failure of a natural or legal person to challenge a Community act under Article 230 EC<sup>22</sup>. In *TWD*, the ECJ ruled on the time-barring effects of the expiry of time-limits for bringing a direct action, it held:

*"a national court is bound by a Commission decision adopted under Article 93(2) of the Treaty where, in view of the implementation of that decision by the national authorities, the recipient of the aid to which the implementation measures are addressed brings before it an action in which it pleads the unlawfulness of the Commission's decision and where that recipient of aid, although informed in writing by the Member State of the Commission's decision, did not bring an action against that decision under the second paragraph of Article 173 of the Treaty (now 230), or did not do so within the period prescribed."*

This ruling was strongly influenced by the facts of the case: the applicant was fully aware of the Commission's decision and of the fact that it could undoubtedly have challenged it under Article 230 EC.

*"In such factual and legal circumstances, the definitive nature of the decision taken by the Commission pursuant to Article 93 of the Treaty vis-à-vis the undertaking in receipt of the aid binds the national court by virtue of the principle of legal certainty."*

The fact that *TWD* only laid down limited and well-defined restrictions was confirmed in *Accrington Beef*<sup>23</sup>. In spite of the expiry of the time limits under Article 230 EC the plea of illegality was accepted. The ECJ stressed that where the contested provisions were contained in a Community regulation, it was not obvious that a direct action would have been admissible<sup>24</sup>. Similarly, *Eurotunnel*<sup>25</sup>, the ECJ held that Eurotunnel could challenge the validity of directives<sup>26</sup> in preliminary-ruling proceedings even where it did not challenge those directives by means of an action under Article 230 as it was unclear whether such an action would be admissible. The fact that another national court had already given judgment in separate proceedings, which was argued as a further bar to the admissibility of the reference, was also dismissed as irrelevant.

### 7.1.3 An even more inventive use of Article 234

UK courts have also been the forum for challenges to Community legislation based on lack of competence, with a view to preventing the adoption of undesir-



able national legislation in a field where the Community legislature was also active.

In *Imperial Tobacco*<sup>27</sup>, the High Court referred to the Court of Justice for a preliminary ruling a question on the validity of the Tobacco advertising Directive.<sup>28</sup> The question was raised in connection with proceedings in which Imperial Tobacco and Others<sup>29</sup> sought leave to apply for judicial review of, *inter alia*, the intention and/or obligation on the part of the United Kingdom to give effect to the requirements of the Tobacco Advertising Directive. They also requested that a preliminary ruling be sought from the Court of Justice. It should be noted that the time limit for implementing the Directive had not yet expired, but that the Government had announced its intention to introduce Regulations to implement the Directive before the prescribed final date. The Labour Government was hard pressed to deliver on the promises made in the Manifesto, and used the Community Directive as an alibi to introduce this regulation.

The High Court took the view that it could be just and convenient, in accordance with Order 53, Rule 1(2) of the Rules of the Supreme Court, to grant declaratory relief in order to remove uncertainty. It considered that the case did not concern 'purely abstract questions', but 'future rights in respect of which relief could be granted in *quia timet* proceedings'.

In the main proceedings Imperial Tobacco and Others alleged that the Directive was invalid on six grounds: (i) inadequate legal basis, (ii) infringement of the fundamental right of freedom of expression, (iii) breach of the principle of proportionality, (iv) breach of the principle of subsidiarity, (v) infringement of the obligation to state reasons and (vi) infringement of Article 295 EC and/or infringement of the fundamental right to property.

Before the ECJ, the admissibility of the reference by the High Court was challenged on several grounds. First, it was suggested that the reference should be declared inadmissible because of the hypothetical character of the proceedings. It was also submitted that the reference if declared admissible would open the possibility to evade the conditions for a direct challenge under Article 230 EC through recourse to national proceedings. The ECJ never dealt with the inadmissibility issues, which were however discussed at length by the Advocate General.

#### 7.1.4.1 The preliminary ruling is not a procedure to give advisory opinion

The European Parliament, in its observations, argued that the application was general or hypothetical in nature, as it related to a national implementing act which had not yet come into force and which was not, therefore, amenable to judicial review; further, that it was only possible to address the validity of a directive in national proceedings when this question arose as a collateral issue. The EP also referred to the obligation of the national court, in determining the need for a preliminary ruling in order to enable it to give judgment, to have regard to the fact that the ECJ does not deliver advisory opinions on general or



hypothetical questions. The EP further pointed out that the admissibility of a reference in the context of not too dissimilar national proceedings in *Bosman*, could be distinguished as that case

*"concerned a perceived imminent threat to established, directly effective, legal rights flowing from the Treaty, where the threat emanated from a private party, rather than the expectation that a Member State would fulfil its Treaty obligations."*

The Advocate General agreed that in *Bosman*, the main action only related to a declaratory remedy, had a preventive aim, and was based on hypotheses which were, by their nature, uncertain. Yet, for him the crucial factor was that such actions were permitted under national law. This meant that the questions submitted by the national court met an objective need for the purpose of settling disputes properly brought before it. The reference for a preliminary ruling was, therefore, admissible.

So the determining factor to decide the admissibility of the reference is whether, as a matter of national law, an action of the type in question is actionable – an issue for the national court to determine. As a result, Advocate General Fenelly recommended that, while the proceedings in *Imperial Tobacco* also related to an anticipated danger to the *future* exercise of rights by the applicant tobacco companies, the admissibility of the reference was dictated by the fact that a remedy would be available in national law:

*"the national court's assessment of the possibility of granting a declaratory remedy must be presumed to be a correct statement of national law."*

For the Advocate General, Member States by virtue of their duty to comply with their Treaty obligations are required to bring into force the necessary measures to implement the Tobacco Advertising Directive by the deadline set and may do so earlier. This gives a concrete character to the threat to the interests of the applicants in the main proceedings. He concluded that :

*"there is no reason for the Court to question the national court's determination of the need for a preliminary ruling on the question referred in order to enable it to deliver judgment. "*

#### 7.1.4 The relationship between 230 and 234 needs clarified once more

The EP also suggested that the possibility of a challenge to unimplemented Community acts of a general nature in national courts, resulting in a request for a preliminary ruling, might fall outside the system of judicial protection laid down by the Treaty because it would circumvent the requirement that the contested act be of direct and individual concern in the case of a direct action brought by an individual.



As for the submission that a reference for a preliminary ruling on validity should not permit evasion of the rules regarding standing laid down in Article 230 EC, the Advocate General recognised that the Court had, indeed, ruled out the possibility of evasion, through a reference for a preliminary ruling on the validity of a Community measure, of the time-limit for initiating annulment proceedings under that provision by parties who could, 'without any doubt, have instituted such proceedings'. However it felt that there was no need

*"to extend the scope of that exceptional ruling so that persons who are neither the addressees of nor directly and individually concerned by a Community measure of general application would not be able to challenge its validity before the national courts".*

The Advocate General recalled that in *Universität Hamburg v. Hauptzollamt Hamburg-Kehrwieder*, the ECJ had decided that a decision of a national authority was the only measure which the applicant in the main proceedings in that case could challenge in the courts 'without encountering any difficulty in demonstrating its interest in bringing proceedings, and stated that '[a]ccording to a general principle of law which finds its expression in Article 184 of the EEC Treaty (now Article 241 EC), in proceedings brought under national law against the rejection of his application the applicant must be able to plead the illegality of the Commission's decision on which the national decision adopted in his regard is based. The AG also quoted from *Les Verts v. Parliament*,

*"[w]here implementation is a matter for the national authorities, [natural or legal] persons may plead the invalidity of GENERAL measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."*

Article 234 EC forms part of 'a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions and thus protects '[n]atural and legal persons ... against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty.' (now Article 230 EC)

For the Advocate General, *Imperial Tobacco* was not a case of a direct challenge to the Tobacco Advertising Directive, although its validity is central to the outcome of the national proceedings.

*"The applicant tobacco companies seek to restrain the competent members of the United Kingdom Government from executing their stated intention of implementing the Directive by regulations adopted under section 2(2) of the European Communities Act, 1972. It would appear that their entitlement to do this by means of delegated legislation turns on the validity of the Directive. Thus, the validity of the Directive directly affects and is collateral to a question of United Kingdom constitutional law,*



*viz. the vires of the respondents in the main proceedings to adopt the envisaged regulations.*

Hopefully this area of law is now clear.

### 7.1.5 The need for interim protection

The delay in obtaining a preliminary ruling from the ECJ underlines the growing importance of interim protection. The ECJ has developed a fully-fledged system of interim protection at national level<sup>30</sup>. Pending a preliminary ruling from the ECJ on the validity of a regulation, national courts are entitled to order suspension of enforcement of a national administrative measure based on that regulation. They also have the power to order interim measures which create a new legal position for the benefit of the person seeking legal protection.

In *Zuckerfabrik*<sup>31</sup>, the Court considered the question for the first time: the case concerned an application for suspension of the enforcement of a national measure based on a Community regulation<sup>32</sup>, the validity of which was challenged.

In *Atlanta*<sup>33</sup>, the applicant sought an order similar to that of specific performance, and the ECJ was asked whether national judges had any power to take positive interim measures which would create a new legal regime for the litigant<sup>34</sup>. The question arose in proceedings between German importers of bananas, 'the Atlanta companies', and the Federal Office of Food and Forestry on the allocation of import quotas for third-country bananas. This case belonged to a series of actions before the ECJ and the German courts concerning the common organisation of the market in bananas<sup>35</sup> and a common import regime replacing the various national arrangements whereby, in trade with third countries, imports of bananas would be subject to a Community levy. The Regulation under challenge discontinued the annual duty-free import quota for bananas enjoyed by Germany. Both the action for annulment of the Regulation<sup>36</sup> and the application for interim relief<sup>37</sup> brought by the German Government failed. The Atlanta companies, importers of third-country bananas, were allocated by the German authorities – in application of the regulation – provisional import quotas for third-country bananas. They challenged the quota on the ground that the Regulation limited their freedom to import. They also sought interim relief in the form of an order to grant additional import licences for third-country bananas over and above the number already allocated, pending the ECJ ruling on the question of validity. The German court ordered the administration provisionally to grant the applicants additional import licences<sup>38</sup> and at the same time, it asked the ECJ whether a distinction ought to be drawn, with respect to the requirements for making an interim order, between an interim order intended to preserve the *status quo* and one intended to create a new legal regime. As the German court pointed out, the granting of additional import licences called into question the uniform application of the Regulation in all the Member States. As



to whether the grant of positive measures would, as such, have radical consequences for the Community legal order the ECJ held:

*"The consequences of the interim measure, whatever it may be, for the Community legal order must be assessed as part of the balancing exercise between the Community interest and the interests of the individual"<sup>39</sup>.*

## 7.1.6 The principle of interim protection

Interim protection requires that national courts should have the power to grant interim remedies. Given that under Article 230 EC, the Court has the power to order interim suspension of the contested act<sup>40</sup> and to prescribe any necessary interim measure<sup>41</sup>, the interim legal protection which national courts must be in a position to afford individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure or the grant of positive interim measures. Furthermore,

*"the interim legal protection which the national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure adopted on the basis of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit"<sup>42</sup>.*

Where the compatibility of national legislation with Community law was challenged<sup>43</sup>, the ECJ held that the national court which had referred questions of interpretation for a preliminary ruling in order to enable it to decide that issue of compatibility had to be able to grant interim relief and to suspend the application of the disputed national legislation until such time as it could deliver its judgment on the basis of the interpretation given in accordance with Article 234 EC. Community law is a single system. Even if Community law is formulated at Community level and applied at national level, individuals are entitled to a coherent and consistent system of judicial protection both at national and Community level.

*"The interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself"<sup>44</sup>.*

Pending the outcome of a ruling by the ECJ, interim relief may be granted by UK courts to protect Community rights, whether these have been breached following the adoption of a UK statute said to be in conflict with Community



law, or whether they have been breached following the application by UK administrative authorities of an allegedly invalid Community act.

In the context of requests for interpretation, the national court is asked to suspend the application of a piece of domestic legislation allegedly in conflict with Community law. By contrast, in proceedings where validity is at issue, the national judge is asked to suspend the application of the Community act the validity of which is contested, thereby questioning the presumption of validity attached to Community legislation. It has been said that, whilst in the first instance interim protection ensures the immediate supremacy of Community law, in the latter primacy is set aside and suspended, albeit provisionally, insofar as interim protection calls into question the presumption of validity attached to a Community regulation.

*"The judicial protection of individuals relying on Community law goes as far as allowing a national court to suspend temporarily the application of Community law. That judgment places the protection of the individual in the foreground, even in front of the question of priority."*<sup>45</sup>

It is suggested that in reality, primacy is not set aside, but upheld. In both sets of circumstances, primacy is safeguarded. This is because the validity of Community legislation or action can only be assessed against a superior Community norm. In this way challenges to the validity of Community legislation are only concerned with upholding the primacy of Community law.

#### 7.1.6.1 The conditions for the grant of interim relief: national or Community conditions?

When they apply Community law, national judges are part of the Community judicial architecture. However, in most cases, given the absence of Community rules, this national and/or Community judge has to apply the domestic rules. As these differ from one jurisdiction to another, the uniform application of Community law is jeopardised.

Given that the right to interim protection is based on Community law, national judges asked the ECJ whether specific Community rules existed which ought to be applied in preference to their own domestic rules governing the granting of interim protection.

In sum, the question put to the ECJ is whether national courts are obliged to apply domestic rules governing interim protection in order to prevent irreparable damage or if there are Community rules which should be applied, a question which the House of Lords had already referred in *Factortame*, but which had remained unanswered until the *Zuckerfabrik* and *Atlanta* judgments.

The ECJ considered that suspension of enforcement of administrative measures based on a Community regulation, whilst governed by national procedural law, in particular as regards the making and examination of the



application, should in all Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned<sup>46</sup>. Further, since the power of national courts to order interim relief corresponds to the jurisdiction reserved to the ECJ by Article 243 EC in the context of actions brought under Article 230 EC, national courts may grant such relief only on the same conditions as apply when the ECJ deals with an application for interim measures<sup>47</sup>.

A national court can order interim relief, if four conditions are met. First, it must entertain serious doubts as to the validity of the Community act and state them in its decision; secondly, if the validity of the contested act is not already before the ECJ, it must make a reference; thirdly there must be urgency, in that the interim relief is necessary in order to avoid serious and irreparable damage being caused to the party seeking the relief; and finally due account must be taken of the Community interest. The ECJ did not rule out the possibility for the national court to require a cross-undertaking in damages:

*"if the grant of interim relief represents a financial risk for the Community, the national court must be able to require the applicant to provide adequate guarantees, such as the deposit of money or other security"*<sup>48</sup>.

In *Zuckerfabrik* the ECJ had already set out the conditions governing suspension of enforcement of a national administrative measure adopted in implementation of a Community regulation. In *Atlanta*, the ECJ confirmed that the same conditions were applicable where a national court orders a positive measure rendering the regulation whose validity is challenged provisionally inapplicable. Moreover, the powers of national courts to grant such relief was limited further. The ECJ stressed how the primary duty of national courts called upon to apply Community law is to ensure that full effect is given to Community law "regulations should not be set aside without proper guarantees"<sup>49</sup>. The need and importance of upholding the validity of the Community regulation<sup>50</sup> is to be regarded by national courts as their primary duty.

Serious doubts must exist as to the validity of the Community regulation on which the contested administrative measure is based. Only the possibility of a finding of invalidity can justify the grant of interim relief. The national court cannot restrict itself to referring the question of the validity of the regulation to the ECJ; it must set out, when making the interim order, the reasons for which it considers that the Court should find the regulation to be invalid<sup>51</sup>. This requirement is puzzling given the ECJ insistence that a finding that a regulation is invalid is a matter reserved exclusively to itself. When setting out these reasons the national court must pay due regard "to the extent of the discretion which the Community institutions must be allowed in the sectors concerned"<sup>52</sup>.

Taking account of the Community interest has been further clarified. The national court must examine whether the Community act in question would be deprived of all effectiveness if not immediately implemented and it must have



regard to the damage which the interim measure may cause the legal regime established by that regulation for the Community as a whole<sup>53</sup>. In practice, the national judge must consider the cumulative effect which would arise if a large number of national courts were also to adopt interim measures for similar reasons. Whether national courts could assess such a "legal domino effect"<sup>54</sup> remains to be seen. Interim protection is intended to protect a special situation of the plaintiff; accordingly the national judge must balance the Community interests against that of the applicant by considering "those special features of the applicant's situation which distinguish him from the other operators concerned"<sup>55</sup>. Again it is not certain the national judge is best placed to weigh the need for individual protection against the Community interest.

The Court also clarified the meaning of urgency.

*"The damage relied on by the applicant must be such as to materialise before the Court of Justice has been able to rule on the validity of the contested Community act."*<sup>56</sup>

The national court must consider whether immediate enforcement of the contested measure would be likely to result in irreversible damage to the applicant which could not be made good if the Community act were to be declared invalid. Purely financial damage cannot be regarded in principle as irreparable.

## 7.2 Concurrent liability issues

This section analyses the role of national courts in dealing with claims arising out of concurrent liability<sup>57</sup>. Cases of joint and several liability ought to be distinguished from more straightforward matters such as claims for recovery of sums unduly paid over, or claims for subsidies withheld, both of which ought to be claimed from the relevant national authority responsible for such payments or collection of money<sup>58</sup>.

### 7.2.1. Why do concurrent liability issues arise?

Community law and policies are implemented principally by national administrations. National agencies, particularly in the fields of the Common Agricultural Policy and Fisheries, are responsible for applying Community regulations or decisions. This involves *inter alia*, carrying out inspection checks, making compulsory slaughter orders, collecting levies, making compensation payments, giving subsidies, and granting import/export licences. It is also incumbent upon national agencies to recover sums lost as a result of irregularities or negligence. Sometimes, national administering of Community measures causes damage to individuals. This may be so because even where national authorities act within the framework of Community law, they may themselves have committed some



wrongful action for which they may be held liable; such is the case where the national administration misapplied the Community rule, misunderstood the Community instructions, or went beyond the margin of discretion recognised by the Community authorising measures.

The fact that on occasion, the Community authorities have approved the national scheme putting into operation *wrongly* the relevant Community policy, might lead individuals or even national administrations to regard the Community authorities as the true author of the conduct causing the damage. Damage may also be caused by the national administration applying an invalid Community regulation or following unlawful Commission instructions; in such circumstances, although carried out by national administrations, the wrongful conduct can in fact be attributed to the Community institutions. Sometimes damage is caused by national authorities implementing badly a Community act which is itself unlawful; in such cases, given that both the Community and the Member States have acted unlawfully, are they jointly and severally liable for damages caused to individuals, and which courts are competent to hear the action for damages?

#### 7.2.2 The nature of the problem: national and Community institutions are 'accountable under different legal orders'<sup>59</sup>

On the one hand, an individual or a company cannot bring an action for damages against the Community in national courts; the appropriate forum for this type of action is the Court of First Instance<sup>60</sup>, which alone has jurisdiction, to the exclusion of national courts, in actions brought by natural or legal persons based on Articles 235 and 288 (2) EC relating to compensation for damage caused by the Community institutions. On the other hand, an individual or a company cannot bring an action for damages against a Member State before the Court of First Instance; only national courts are competent to hear such claim, since co-operation between Community and national authorities cannot make the Community responsible for reviewing the legality of administrative acts of Member States applying Community law. Yet, an individual or a company may suffer damages as a result of joint action. Is there any forum where they can bring their claims? And if so, what is the appropriate forum? Must the Member State be sued before national court for its share of the damages and the Commission before the CFI for its share? Is the action against the Community only accessible after all national rights of action have been exhausted? And if so, how is this compatible with the principle of effective judicial protection? When national and Community administrations are jointly involved in actions resulting in damages caused to individuals, it may be difficult to decide whether the alleged illegality on which to found the action emanates from the Community institution or must be attributed to the national body. In the complex system where Community and national administrations are so intertwined, the division



of jurisdiction between the Community judiciary and national courts constitutes a serious obstacle to the effective judicial protection of individuals.

### 7.2.3 The solutions

The principles which can be derived from the case law of the ECJ<sup>61</sup> will now be discussed. It is important to note that these principles were developed largely prior to the establishment of the principle of State liability for breach of Community law. The ECJ insistence on the need to base the liability of the Member States for breach of Community law on the same principles as the liability of the Community institutions might presage a change of approach<sup>62</sup> to the issue of concurrent liability, and maybe the straightforward application of principles of joint and several liability, the option considered as the most desirable<sup>63</sup>.

An action based on non-contractual liability of the Community institutions has a "subsidiary nature"<sup>64</sup> *vis-à-vis* the remedies available under national law. Thus, in principle, the recommended course of action is to claim compensation from the implementing national authority in a claim before the relevant national court, and if necessary, to remind the national court it has a duty to refer the question of the validity of the Community measure under Article 234 EC. However, where it is not possible for an individual to obtain redress before national courts, an application under Articles 235 and 288 EC may be declared admissible.

The ECJ is not competent to examine under Article 288 EC the validity of decisions taken by national agencies implementing Community policies<sup>65</sup>. Claims for payment of amounts allegedly due, but withheld, fall within the exclusive jurisdiction of national courts<sup>66</sup>. Yet it may be that payment was withheld because the Community regulation providing for such payments has been unlawfully withdrawn. In the absence of a Community provision authorising the national bodies to pay the amount claimed, an application under Articles 235 and 288 EC will be admissible. Indeed, in such cases, even if the applicants had succeeded in convincing the national court of the invalidity of the Community measures which had caused them damage, they still could not have obtained from the national administration the benefit to which they claimed to be entitled without the prior intervention of the Community legislature<sup>67</sup>.

Equally, where an applicant is seeking to benefit from an advantage unlawfully refused to him by a provision of secondary Community law, an action to establish liability will be declared admissible in so far as the applicant would have been unable to secure the advantage which he seeks by instituting proceedings before the national courts, such is the case when the national administration has merely followed express instructions from the Community institutions.<sup>68</sup>

Claims for recovery of sums levied under invalid Community measures must be brought before the national courts against the national body which levied the charge, even where authorities have merely and correctly applied



Community rules, and/or even though the sum in question may have been paid into EU funds.

*"Only national courts have jurisdiction to entertain actions for recovery of amounts wrongfully charged by national administrations on the basis of Community rules subsequently declared invalid"<sup>69</sup>.*

#### 7.2.4 Exhaustion of national remedies.

It is recognised in the case-law of the Court that there may be concurrent liability on the part of a Member State and on the part of a Community institution<sup>70</sup>. In its judgment in *Kampffmeyer*, the ECJ, after recognising the liability in principle of a Community institution, went on to request the applicants to await the outcome of national proceedings concerning the possible liability of the Member State in question in order "to avoid the applicants being insufficiently or excessively compensated". The ECJ held that the national court should decide matters first of all, allowing the ECJ to postpone judgment until it knew how much compensation had been awarded at national level. Therefore in the majority of cases, actions should be brought first against the Member State in the national courts<sup>71</sup>, according to a principle of the exhaustion of effective national remedies, and then brought before the CFI. This principle of exhaustion of national remedies has been the subject of much criticism, mainly based on the fact that, in most instances of concurrent liability, the Community institution should in fact bear the primary responsibility as it acts as the senior or authorising partner with a supervisory role. Criticisms have also been made in terms of fair and sound administration of justice<sup>72</sup>.

The principle of exhaustion of national remedies has been set aside where national rights of action are not capable of resulting in compensation for the damage allegedly suffered<sup>73</sup>, and where the measures which originally caused the damage are measures adopted by a national authority pursuant to express instructions from the Community institutions, or invalid Community provision.

*"An established body of the case-law of the Court of Justice shows that the action for damages, pursuant to Articles 178 and 215 of the Treaty, was set up as an independent action, having its own particular place in the system of means of redress and subject to conditions for its use formulated in the light of its specific purpose. It must nevertheless be viewed in the context of the entire system established by the Treaty for the judicial protection of the individual. When an individual considers that he has been injured by the application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities. That court may, or even must, as provided for in Article 177, refer the question of the validity of the Community measure in dispute to the Court of Justice. However, the existence of such a*



*means of redress will be capable of ensuring the effective protection of the individuals concerned only if it may result in making good the alleged damage.*<sup>74</sup>

Still, it might not be straightforward to ascertain whether the initiation of proceedings before a national court would enable the applicant to obtain a 'satisfactory outcome' and to whom liability is to be attributed where the individual act which gave rise to the damage suffered, is taken pursuant to national general rules, adopted following approval by the Community authorities.

### 7.2.5 A case study: Is any level liable?

An illustration of the issues involved in such cases and of the hurdles faced by litigants in such circumstances is provided by the case of *Cato*<sup>75</sup>. In *Cato*, the individual decision which gave rise to the damage was not taken on the express order of the Commission, but on the basis of a national scheme allegedly wrongly approved by the Community authorities as being in accordance with a Community provision.

Mr Cato brought an action for non-contractual liability of the Community requesting compensation for the damage resulting from the non-payment, in respect of his fishing vessel, of the final cessation premium provided for under Community legislation<sup>76</sup>. Under Directive 83/515 Member States were required to take the necessary measures to ensure that vessels for which final cessation premiums have been paid were permanently barred from fishing in Community waters, and to forward information to the Commission. On the basis of the information provided, the Commission had to examine whether the measures proposed fulfilled the conditions for financial contributions from the Community. The UK Government submitted to the Commission the draft measures which it intended to adopt in implementation of the Directive. The Commission then adopted a decision<sup>77</sup> concluding that the conditions for financial contributions from the Community were fulfilled. In view of the decision, the UK Ministers introduced a system of decommissioning grants payable to the owners of fishing vessels permanently withdrawn from operation within the fishing industries<sup>78</sup>. Grants were made on the basis of an application specifying the means by which the permanent withdrawal was to be effected.

Mr Cato, a fisherman, sold his fishing vessel to a couple for use as a houseboat. In the contract of sale, the purchasers stated that they were aware that the vendor had applied for a decommissioning grant and that, should the vessel once more be used for fishing in Community waters under the flag of a Member State, the new owner of the vessel might be obliged to repay the amount of the grant. Mr Cato tendered his application for a decommissioning grant the amount of £ 22 144. His vessel was struck off the register of fishing vessels. The vessel was then resold to two Irish nationals, who had expressed an interest in the vessel's engine. The purchasers declared in the contract of sale that they were aware that the vessel was to receive a decommissioning grant and that they



might be required to repay the amount of that grant if the vessel was once again used for fishing within Community waters under the flag of a Member State. Notwithstanding that declaration, they subsequently requested the Irish authorities to register the vessel as a fishing vessel. The latter, having been informed by their British counterparts that the decommissioning grant had not yet been paid, registered the vessel and issued a fishing licence. In the light of those developments, the British Minister, who had waited for proof of the final use to which the vessel had been put, rejected Mr Cato's application for a grant. An application for judicial review of that decision was refused on the grounds, first, that the application had been made after the expiration of the limitation period of three months; secondly, that the applicant was in any case not entitled to the grant as the Minister was not satisfied that the vessel had been withdrawn from all activity in the fishing industry. Mr Cato brought a second private law action against the Minister which was dismissed by the High Court, and the judgment was affirmed by the Court of Appeal. The House of Lords refused leave to appeal.

All national remedies were exhausted. Mr Cato then brought a claim for damages against the Commission, alleging that the damage was the consequence of the Commission decision approving the UK scheme. The ECJ rejected this claim. It considered that no relevant connection existed between the Commission's conduct and the individual decision taken by the national authorities. The non-payment of the decommissioning grant was in substance a claim for payment of amounts allegedly due, which ought to have been brought before the national courts. The ECJ also found that, in approving the UK scheme, the Commission did not act unlawfully in such a way as to entail liability on the part of the Community.

*"the object of the Directive is to encourage temporary or permanent reduction of production capacity in the fisheries sector. In order to attain that objective, the Directive authorises Member States to introduce a system of financial aid for measures reducing such capacity and provides for financial contributions by the Community to the aid thus granted under the conditions set out in the Directive. It follows that the Directive leaves it to Member States to choose whether or not to introduce such an aid scheme and to determine its form and details, provided that the latter are not at variance with the objectives of the Directive."*<sup>79</sup>

The argument that the UK Scheme imposed an impossible evidential burden, since no one can prove that a vessel intended to be used for other purposes will not, prior to its destruction, be used once again in the unforeseeable future for fishing within Community waters, was rejected. The ECJ held that:

*"the fact that the actual conduct of the United Kingdom authorities in the course of events may not be entirely free of blame cannot, no matter how regrettable, be attributed to the Commission in the exercise of its power of prior verification"*<sup>80</sup>.



The ECJ considered that the Commission's power of verification is intended solely to determine whether the schemes proposed by Member States for reducing production capacity satisfy the conditions for financial contributions from the Community laid down in the directive. A decision adopted by the Commission pursuant to this power of verification, and approving a national scheme in conformity with the objectives of the directive, cannot be regarded as unlawful and hence as entailing liability on the part of the Community.

So Mr Cato had no claims against the Community institutions. Did he have another claim actionable in the national courts? Even if Mr Cato had secured judicial review, the UK courts would have been led to verify the compatibility of the scheme with the Directive and therefore with the Commission decision which approved the scheme. Pursuant to *Foto-Frost* these issues would have had to be referred to the ECJ. Such a reference however, would serve no purpose other than delaying the assessment that the national court will have to make of the conduct of the national authorities. As established above, for the ECJ the approval of the Scheme by the Commission only constitutes a declaration of compatibility with the objectives of the Common fisheries policies, and leaves the national authorities responsible for their administration of the scheme. This is unsatisfactory. In many ways, this is attributable to a real confusion as to who holds Executive responsibilities in the Community system<sup>81</sup>. A clarification of who holds the primary Executive responsibilities between the Community and national levels is required. If national courts are truly Community courts, there is no reason why they should not be able to control executive action according to the same standards.

### 7.3 Conclusion

Community institutions are principally controlled by the ECJ. Still, given that Community law is largely applied and administered at national level, national courts may hear claims that a Community act is unlawful. A challenge to the validity of Community legislation can be mounted indirectly in the national courts. It involves a plea that the national administrative act is unlawful and cannot be applied because it is based on a parent Community act which is invalid. However, the power to declare a Community act invalid is reserved to the ECJ. Accordingly, a national court seized with such a claim must ask for a preliminary ruling and, having referred the question of validity of the Community act, may in *exceptional circumstances* grant interim protection in the form of suspension of the national implementing measure or an order for specific performance.

Often, damages are caused to individuals as a result of joint action by the Community and national authorities. In most instances, claims for compensation for unlawful action are best brought before national courts, which must



refer matters to the ECJ if they have any doubts as to the validity of the Community action.



## Endnotes

- <sup>1</sup> Cases C-143/88 & C-92/89 *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe* [1991] ECR I-415, para. 16.
- <sup>2</sup> Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH e.a.* [1995] ECR I-3761, para. 20.
- <sup>3</sup> Case 175/84 *Krohn* [1986] ECR 753, paras. 18 & 19.
- <sup>4</sup> Since 1993, the Court of First Instance has jurisdiction to hear and determine at first instance *any* action brought by a natural or legal person against an act of a Community institution; Decision 94/149 OJ 1994, L66/29.
- <sup>5</sup> Case 314/85 *Foto-Frost v. Hauptzollamt Luebeck-Ost* [1987] ECR 4199.
- <sup>6</sup> Regulation 3362/94, OJ 1994, L 363/1.
- <sup>7</sup> Case C-4/96 *NIFPO and Northern Ireland Fisherman's v. Department of Agriculture for Northern Ireland* [1998] ECR I-681.
- <sup>8</sup> Case C-74/99 *R v. Secretary of State for Health ex parte BAT & Imperial Tobacco* [2000] ECR I-8599; Case C-491/01 *R v. Secretary of State for Health ex parte BAT & Imperial Tobacco* [2002] ECR I-11453.
- <sup>9</sup> Case 314/85 *op. cit.* para. 20; and Cases C-143/88 & C-92/89 *op. cit.*
- <sup>10</sup> [1988] 3 CMLR 207. For another application see *R v. Searle and others* [1995] 3 CMLR 196.
- <sup>11</sup> In Case 68/86 *United Kingdom v. Council* [1988] ECR 855.
- <sup>12</sup> Case C-4/96 *op. cit.* para. 57 Case C-122/94 *Commission v. Council* [1996] ECR I-881, para. 18.
- <sup>13</sup> Case C-4/96 *op. cit.*
- <sup>14</sup> Statement of reasons on which the measures is based.
- <sup>15</sup> Case 265/87 *Schraeder* [1989] ECR 2237, paras 21 & 22.
- <sup>16</sup> Case 11/70 *Internationale Handelsgesellschaft GmbH v. Einfuhr-und Vorratsstelle fur Getreide and Futtermittel* [1970] ECR 1125.
- <sup>17</sup> Section 29 (2) (d) and section 57 (2) of the Scotland Act 1998.
- <sup>18</sup> Article 8 TEU.
- <sup>19</sup> R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention of Human Rights in Strasbourg and Luxembourg" in R. Lawson & M. de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (Kluwer, 1994) p. 219 at 252.
- <sup>20</sup> Case C-358/89 *Extramet v. Council* [1991] ECR I-2501.
- <sup>21</sup> A. G. Jacobs in *Extramet v. Council* and again in Case C-188/92 *TWD Textilwerke Deggendorf GmbH* [1994] ECR I-833.
- <sup>22</sup> Case C-188/92 *op. cit.*
- <sup>23</sup> Case C-241/95. *R v. Intervention Board for Agricultural Produce, ex parte Accrington Beef Co. Ltd and Others* [1996] ECR I-6699.
- <sup>24</sup> Para. 14.
- <sup>25</sup> Case C-408/95 *Eurotunnel SA and Others v. SeaFrance*. [1997] ECR I-6315.
- <sup>26</sup> Directive 91/680 supplementing the common system of VAT amending Directive 77/388 with a view to the abolition of fiscal frontiers and Article 28 of Directive 92/12 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.
- <sup>27</sup> Case C-74/99 [2000] ECR I-8599.
- <sup>28</sup> Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998, L 213).



- <sup>29</sup> Imperial Tobacco Limited, Gallaher Limited, Rothmans (UK) Limited and British American Tobacco Investments Limited or their subsidiaries.
- <sup>30</sup> E. Sharpston, "Interim relief in the national courts" in Lonbay & Biondi (eds) *Remedies for breach of EC Law* (Wiley 1995) *op. cit.* pp. 47-54.
- <sup>31</sup> Cases C-143/88 & C 92/89 *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe* [1991] ECR I-415.
- <sup>32</sup> Regulation 1914/87 OJ 1987, L183/5 introducing a special elimination levy in the sugar sector.
- <sup>33</sup> C-465/93 *Atlanta Fruchthandels-gesellschaft mbH e.a.* [1995] ECR I-3761.
- <sup>34</sup> R. Medhi, "Le droit communautaire et les pouvoirs du juge national de l'urgence" (1996) 32 RTDE pp. 77-100.
- <sup>35</sup> Regulation 404/93, OJ 1993, L 47/1.
- <sup>36</sup> Case C-280/93 *Germany v. Council* [1994] ECR I-4973.
- <sup>37</sup> Case C-280/93R *Germany v. Council* [1993] ECR I-3667.
- <sup>38</sup> Subject to conditions destined to ensure that if the applicants lost their case, the additional quotas allocated to them could be set off against the quotas entitlement for the following year.
- <sup>39</sup> *Atlanta* para. 29.
- <sup>40</sup> Article 240 EC Treaty.
- <sup>41</sup> Article 243 EC Treaty.
- <sup>42</sup> *Atlanta* para. 28.
- <sup>43</sup> Case C-213/89 *The Queen v. Secretary of State for Transport, ex parte Factortame and others* [1990] ECR I-2433.
- <sup>44</sup> *Zuckerfabrik*, para. 20, *Atlanta* para. 24.
- <sup>45</sup> Opinion of Leger in Case C-5/94 *R v. MAFF ex parte Hedley Lomas* [1996] ECR I-2553 Para 62.
- <sup>46</sup> Case C-143/88 and C-92/89 paras. 25 & 26.
- <sup>47</sup> *Atlanta* para. 39.
- <sup>48</sup> *Atlanta* para. 45, *Zuckerfabrik*, para. 32.
- <sup>49</sup> *Zuckerfabrik* para. 30; *Atlanta* para. 42.
- <sup>50</sup> E. Sharpston, "Interim relief in the national courts" in Lonbay & Biondi (eds) *op. cit.* pp. 47-54.
- <sup>51</sup> Para. 36.
- <sup>52</sup> Para. 37.
- <sup>53</sup> Para. 44.
- <sup>54</sup> *Bebr op. cit.* at 802.
- <sup>55</sup> Para. 44.
- <sup>56</sup> Para. 41.
- <sup>57</sup> C. Harding, "The Choice of Court Problem in cases of Non-Contractual Liability under EEC Law" (1979) 16 CMLRev 389, W. Wils, "Concurrent Liability of the Community and the Member States" (1992) 191.
- <sup>58</sup> C. Harding & A. Sherlock, *European Community law: Text and materials* (Longman 1995) pp. 285-290; and Advocate General Warner in Case 126/76 *Dietz v. Commission* [1977] ECR 2431.
- <sup>59</sup> C. Harding & A. Sherlock, *European Community law: Text and materials* (Longman 1995) pp. 285-290 at 289.
- <sup>60</sup> Article 168A and Council Decision 88/591, OJ 1988, L319/1; as amended by Decision 93/350, OJ 1993, L144/21 and by Decision 94/149, OJ 1994, L66/29. Most of the cases discussed in the next section were decided by the ECJ prior to the transfer of jurisdiction.
- <sup>61</sup> The cases discussed were all decided before the transfer of jurisdiction of such actions to the CFI.
- <sup>62</sup> J. Shaw, *Law of the European Union* (2nd edition, MacMillan 1996), at 364.



- <sup>63</sup> See Harding *op. cit.* and Wils *op. cit.*
- <sup>64</sup> A. G. Darmon in Case C-55/90 *Cato v. Commission* [1992] ECR I-2533; J. Rideau and J.-L. Charrier, *Code de procédures européennes*, (Litec 1990), p. 183-186.
- <sup>65</sup> Case 12/79 *Wagner v. Commission* [1979] ECR 3657.
- <sup>66</sup> Case 133/79 *Sucrimex and Westzucker v. Commission* [1980] ECR 1299.
- <sup>67</sup> Case 90/78 *Granaria v. Council and Commission* [1979] ECR 1081.
- <sup>68</sup> Case 175/84 *Krohn v. Commission* [1986] ECR 753 and also Case 5/71 *Zuckerfabrik Schoeppenstedt v. Council* [1971] ECR 975; judgment in Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement v. Commission* [1972] ECR 391; Case 7/74 *CNTA v. Commission* [1975] ECR 533.
- <sup>69</sup> Case 96/71 *Haegeman v. Commission* [1972] ECR 1005; Case 20/88 *Roquette* [1989] ECR 1533; Case C-282/90 *Vreugdenhil v. Commission* [1992] ECR I-1937.
- <sup>70</sup> Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and Others v. Commission* [1967] ECR 245.
- <sup>71</sup> P. Oliver, "Joint liability of the Community and of the Member States" in Heukels & McDonnell (eds) *The action for damages in Community law* (Kluwer 1997).
- <sup>72</sup> Harding & Sherlock *op. cit.* at 289.
- <sup>73</sup> J. Boulouis and R.-M. Chevallier, *Grands Arrêts de la Cour de Justice des Communautés européennes*, Vol. 1, Fifth Edition 1991, p. 412 *et seq.* and Krohn para. 27.
- <sup>74</sup> Case 281/82 *Unifrex v. Commission and Council* [1984] ECR 1969, para 11.
- <sup>75</sup> Case C-55/90 *Cato v. Commission* [1992] ECR I-2533.
- <sup>76</sup> In order to encourage a reduction of production capacity in the fisheries sector, Directive 83/515 authorises Member States to introduce a system of financial aid for measures reducing such capacity and provides for financial contributions by the Community to the aid thus granted.
- <sup>77</sup> Decision 84/17 concerning the implementation by the UK of certain measures to adjust capacity in the fisheries sector pursuant to Council Directive 83/515, OJ1984, L18/39.
- <sup>78</sup> The Fishing Vessels (Financial Assistance) Scheme 1983 S.I. 1983 No 1883.
- <sup>79</sup> Paras 21 & 22.
- <sup>80</sup> Para. 2.
- <sup>81</sup> J. Jorda, *Le Pouvoir Exécutif de l'Union européenne* (Aix-en Provence, Presses universitaires d'Aix-Marseille, 2001).



