Overview of the Mechanisms of Enforcement of Community Law

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A. The specific nature of Community law within the framework of European Union Law: the three-pillar system

The general subject of this publication – *Enforcing Community law before national courts: ten years of Francovich* – provides an opportunity for a profound reflection on the scope and effectiveness of the enforcement mechanisms in the Community legal system on the tenth anniversary of one of the most significant judgments of the European Court of Justice (ECJ).

It is, moreover, a symptom of the maturity of Community Law (nowadays a part of the Law of the European Union) that the issue of the effectiveness of the enforcement mechanisms – especially, judicial remedies – constitutes one of the central concerns not only of scholars but also, and essentially, of those (citizens and companies) that have rights and duties within the framework of the new legal system that has been progressively built up and structured on the basis of the experience of economic, social and political integration that has taken place in Europe over the past fifty years.

Indeed, the analysis of the *Francovich* judgment and of the subsequent case law in respect of the State's non-contractual liability for breach of Community law falls within the scope of a wider reflection on the effectiveness of remedies in the Community legal system. In this connection, what is at stake is the determination of the mechanisms that ought to be established to ensure, in the event of a breach of Community rules, whether the breach is committed by a Member State, an Institution of the Union or a private entity, that the law be re-established and that such rights as may have been offended be subject to adequate reparation.

Thus, without prejudice to the central theme on which our attention is to be focused, the editors believe that it would be of interest – in order to establish the background for the review to be undertaken – if this publication were to begin with a systematised presentation of the mechanisms designed to guarantee the effectiveness of Community Law. This I shall do next, pointing out, here and there, the insufficiencies and the gaps that, from my point of view, still subsist.

Before moving on to the specific review of the said mechanisms, we should, however, define the object of our quest, since Community Law, though falling within the scope of European Union Law, does not exhaust this concept. The fact is that the solutions that the Treaty on

European Union (hereinafter, EU Treaty) and the Treaty establishing the European Community (hereinafter, EC Treaty) provide in the field of judicial review vary depending on the competences of the Union in question.

European Union Law includes three systems of rules that correspond to the so-called "three pillars" of the Union: (1) the Community system, (2) the rules on a common foreign and security policy and (3) the provisions on police and judicial co-operation in criminal matters. Now the question of the control of legality is posed in very different ways in each of these three areas of competence of the European Union.

The two latter areas (the so-called second and third pillars of the Union) are marked by characteristics of a clear intergovernmental bent, with regard to decision-making mechanisms, to the relations between legal systems and to the standing of private entities vis-à-vis the rules of the Treaties and vis-à-vis the acts of the Institutions. These characteristics – arising from the political options of the Member States when drawing up and revising the Treaties – explain that the question of enforcement mechanisms is posed, in both these areas, in terms substantially different from those in which the problem is posed within the scope of the Community system (the so-called first pillar of the Union).

Thus, with regard to the second pillar, the perception that the acts of the institutions of the Union are, in the said area, acts of an essentially political nature means that the EU Treaty enshrines no mechanisms of judicial control, and Article 46 of the EU Treaty clearly shows that the Court of Justice has no jurisdiction over the acts of the Institutions of the European Union within the scope of Title V of the EU Treaty, on the *Common Foreign and Security Policy.*

With regard to the third pillar, corresponding to Title VI of the EU Treaty – on *Police and Judicial Co-operation in Criminal Matters,* as established in the Treaty of Amsterdam – the solution initially adopted in the Maastricht Treaty was identical to that enshrined with regard to the second pillar, that is, absence of any control by the Court of Justice.

It was only with the Treaty of Amsterdam, which came into force on May, 1st, 1999, that judicial control mechanisms came to be introduced in the new Article 35 of the EU Treaty, though it must be noted that these mechanisms of control are accessible only to Member States and to the Commission and not to the other institutions and to private parties.

On the other hand, the fact that Article 34 of the EU Treaty expressly excludes – with regard to the acts of the institutions within the scope of the third pillar – the direct effect of framework decisions (cf. Article 34.2.b) and of decisions (cf. Article 34.2.d) also excludes the possibility of invoking these acts before national courts as an immediate source of rights for individuals and companies. The control exercised by national courts is therefore likewise greatly conditioned given the impossibility of invoking before these courts the direct effect of the legal commands established in the acts adopted by the Union within the scope of the third pillar.

Without prejudice to such criticisms that may be directed at the abovementioned solutions, the fact is that within the scope of European Union Law, outside the Community system (the first pillar), the judicial control mechanisms are either non-existent, as in the case of the second pillar, or are incipient, as in the third pillar.

It is therefore only within the field of the first pillar of the Union – based on the Treaties establishing the European Communities – that we find a sophisticated system of judicial control, accessible not only to Member States and to the institutions of the Union but also to private parties. It is precisely this control system – in which not only the Court of Justice and the Court of the First Instance of the European Communities, but also national courts play an essential role – that is to be the subject of these introductory presentation.

B. The characteristics of the Community legal system: autonomy, unity, direct effect and supremacy

Having determined the object of this paper, it is important – before explaining the different mechanisms used to control legality – to recall very briefly the elements that underpin the Community legal system and its distinct characteristics. Indeed, as we shall see, these characteristics have very important consequences as far as the definition and the development of judicial remedies are concerned.

The first aspect to be emphasised has to do with the autonomy of Community Law with regard both to international law and to the national legal systems. This is a characteristic that has been firmly proclaimed by the case law of the Court of Justice in terms that are so well known that I will make no detailed comment on them. It is, in fact, the starting point, without which it would be impossible to envisage Community Law as a system of coherent rules, with its own logic, structured in the light of achieving the objectives established by Member States in the Treaties.

The proclamation of the autonomy of Community Law is therefore associated with the recognition of its unity as a system of rules submitted to a coherent set of legal principles, which guarantees its unity and distinguishes it from international law and from the various national legal systems.

However, the principle of autonomy is reflected not only in the substantive autonomy of the Community's legal rules; it is also reflected at institutional level, in terms that lead one to consider the Community institutions (and now those of the Union) as a centre of power distinct from the centres of power that exist in each Member State. This autonomy can be seen, in particular, in the establishment of its own decision-making processes, in the specific types of legal acts that can be approved by the said institutions, in the autonomous definition of the legal effects of such acts and in the clear identification of the subjects that are targeted by the respective orders.

At the level of the judicial institutions, too, the principle that governs the relations between the Community legal system and the national legal systems is the principle of autonomy. Though, on the one hand, it ensures the independence of the Community judicial system with regard to the national judiciary, this principle also means that one cannot say that there is any hierarchic subordination of the courts of the Member States with regard to the Community courts, particularly the Court of Justice. Hence the decisive importance of the mechanisms of judicial co-operation enshrined in Article 234 of the EC Treaty (and now, as far as the third pillar is concerned, in Articles 35.1 to 35.4 of the EU Treaty).

The third distinctive aspect to be considered (after autonomy and unity) is the direct effect of Community legal rules. It is well known that, according to the case law of the Court of Justice – since the famous *Van Gend en Loos*[1] judgment – the rules of Community Law (both primary and secondary law) granting rights to private parties, on the condition of these rules being clear, precise and unconditional, produce immediate legal effects on the legal systems of the Member States and can be invoked by individuals and companies before national courts to safeguard the said rights.

This is an essential characteristic of Community law, which means that the national courts are a central element of the system of remedies that ensures due regard for Community law.

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1 Case 26/62, *Van Gend en Loos vs. Nederlandse Administratie Belastingen*, [1963] ECR 1, [1963] CMLR 105.

Fourthly and lastly, a reference must be made to the principle of supremacy of Community law over the national legal systems, unequivocally proclaimed, too, by the case law of the Court of Justice as from the *Costa/Enel* judgment[2].

According to this principle, in the event of a conflict between rules, Community law prevails over national law (whether it came into force before or after the adoption of the Community rule at stake), whatever the nature of the national rules in question[3]. Otherwise, the rules of Community law, both those of primary and those of secondary law, would not be binding in the framework of the national legal systems. Without supremacy, the unity and effectiveness of the Community legal system would be subject to the unilateral action of each Member State, which, for the Court of Justice, would be incompatible with the pursuit of the objectives of integration expressly set out in the EC Treaty and would call into question the notion of a "Community of Law" that lies at the base of the Community system.

The combination of the direct effect with the principle of supremacy leads to consequences of the greatest importance with regard to the exercise of the duties of national courts as "Community jurisdictions". Indeed, according to the Court of Justice, in the event of a conflict of rules, the national judge must apply Community law and, on his own authority, set aside any provision of national law contrary to it, even though it might be of a later date, with no need either to ask for or to await the prior elimination of the latter provisions through legislation or through other constitutional mechanisms[4].

Having recalled, in general terms, the characteristics (autonomy, unity, direct effect and supremacy) that allow Community law to be seen as a legal system distinct from international law and from the law of each Member State, I shall now review the control and sanction mechanisms designed to ensure its effectiveness.

C. Breaches of Community law and the control and sanction mechanisms designed to ensure due regard for the law

On reviewing the control and sanction mechanisms, I propose to establish a distinction in the light of the subject or entity to which the breach of Community rules is attributed, since the remedies available in the legal system vary accordingly. From this standpoint, and bearing in mind the characteristics of the Community legal system to which I referred above, one can make a distinction between the following situations: breaches by private parties (individuals and companies); breaches by EU institutions and breaches by Member States.

I. Breaches by private parties

The first case to be considered has to do with breaches by private parties, either individuals or companies.

Indeed, to the extent that Community law includes rules (both of primary and or secondary law) immediately applicable to the behaviour of private parties, granting rights, certainly, but also imposing duties, any disregard for these duties constitutes a breach of the Community rule at stake, attributable directly to the party at fault.

This is typical of the behaviour by companies in a given market in breach of Community competition rules set out in Articles 81 and 82 of the EC Treaty. It is also true of disregard for

2 Case 6/64, *Flamino Costa vs. ENEL* [1964] ECR 585, [1964] CMLR 425.
3 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, [1972] CMLR 255.
4 Case 106/77 *Simmenthal SpA vs. Ministero delle Finanze* [1976] ECR 1871, [1977] 2 CMLR 1.

the provisions of directly applicable Community regulations such as those that fall within the scope of the common agricultural policy or of the use of financing provided by the structural funds such as the European Social Fund.

In any such case, breach of the Community rule will be attributed to an individual or a legal person, and one must therefore analyse the terms under which the authorities – both at national or at Community level – may react to re-establish the law and, when necessary, to apply sanctions to the transgressor.

II. Breaches by Community institutions

In addition to those breaches by private parties, there are other cases in which the Community institutions themselves act with disregard for Community law.

This can occur either because the Community acted in an area outside its competence or because the institution that undertook a certain act did not have the necessary powers, or did not have due regard for the procedural rules to which it was legally bound, or because a given Community legal act violates hierarchically superior principles or substantive rules.

In all these cases the breach of the law is the result of the behaviour of a Community institution that was illegal.

III. Breaches by Member States

Thirdly and lastly, we must also consider those situations in which the breach of Community law is caused by the behaviour (either act or omission) of a Member State, the concept of State including, for this purpose, any entity that, under the terms of national law, exercises powers of authority.

Within the scope of this third category, we may be confronted with the most diverse situations, from lack of timely adoption of measures to transpose a Community directive to the award of a public works contract in breach of the relevant Community rules, not forgetting approval of national legislation containing provisions materially incompatible with principles or rules of Community law, to mention but a few examples.

D. Control and sanction mechanisms in respect of breaches by private parties

With regard to breaches by private parties, identification of the more relevant control and sanction mechanisms leads me to make a distinction between the three following situations.

I. Sanctions applicable by Community authorities

In the first place, one must consider those cases – which are not the most frequent ones – in which the Community authorities have the competence allowing them not only to directly control observance of Community law by private parties but also to apply sanctions should they find that there has been a breach of EC law.

The most significant example is surely that of the EC Treaty competition rules and the respective rules of application, namely Council Regulation n° 17/62, the aim of which consists of the application of the substantive rules of Articles 81 and 82 of the EC Treaty and Regulation n° 4064/89 governing the control of merger transactions with Community dimension.

In these cases, the Community authorities (specifically, the Commission) are competent to investigate, at their own initiative or in the wake of a complaint, any situation in which there is a suspicion of transgression. These proceedings may culminate, if necessary, with the application of pecuniary sanctions. These are adopted as legally binding decisions, the addressees being those private parties to whom the transgressions are attributed. These decisions are directly applicable within the national legal systems and constitute enforceable decisions under the terms and for the purposes of national procedural law. The private parties addressed by the said decisions are entitled to challenge them before the Court of the First Instance (CFI) under the conditions envisaged in Article 230 of the EC Treaty.

II. Sanctions applicable by national authorities

Without prejudice to what we said in the previous section, in all other cases – which constitute the vast majority – in which the Community legal system does not itself enshrine direct control and sanction mechanisms, it is up to the Member States to establish and apply legal mechanisms that ensure due regard for Community law.

I would mention, by way of example, fields of competence such as consumer protection, the environment or taxation, in which the intervention of the Community legislator essentially involves the approval of directives establishing the harmonisation or co-ordination of national legal systems. In these cases, in which Member States are required to bring national legislation into line with the regime enshrined in the Community directives, this requirement also includes the duty of adopting control and sanction mechanisms best suited to ensuring due regard for Community law.

It should be noted, moreover – though this does not always occur – that in some cases, on approving a harmonisation directive, the Community legislator, in addition to defining the substantive principles and rules to be observed by national legislators in bringing the national systems into line, also defines the parameters to be observed in the definition of the system of sanctions designed to punish the breach of the said substantive rules.

In all such cases, in which the Community authorities are not competent to pursue and punish breach of Community Law by private parties (and one should recall here that the general principle governing the definition of the Community's competences, including the definition and application of sanctions, is the principle of competence by attribution), it is up to the national authorities, under the terms set out in national law, to pursue and punish breach of Community Law by private parties.

In this connection, the only requirement arising from Community law, for the Member States (based, from the outset on the general principle enshrined in Article 10 of the EC Treaty), is that the legal mechanisms designed to ensure observance of Community Law shall be as effective as those designed to ensure due regard for national substantive rules.

III. Direct effect as a "sanction" with regard to private parties

A third aspect to be considered – in connection with the analysis of the various mechanisms of enforcement in cases in which the breach of Community rules can be attributed to private parties – has to do with the determination of the conditions in which these rules can be invoked before national courts within the framework of conflicts between private parties. This is the so-called issue of horizontal direct effect.

1. The horizontal direct effect

As we have seen earlier, one of the more remarkable characteristics of Community law is the direct effect of its rules on the legal systems of the Member States. From the standpoint initially enshrined in the said *Van Gend en Loos* ruling, this means that those Community rules that are clear, precise and unconditional and, as a result of their object, can entitle individuals and other private parties to rights, may be invoked by these parties before national courts in litigation opposing them to the national authorities.

This case law orientation, which began by being defined with regard to rules of primary law, has been extended to secondary law, initially with regard to the rules contained in Community regulations and to the legal commands arising from decisions, and later, with regard also to rules adopted by way of directives.

The standpoint that led the Court of Justice to develop the doctrine of direct effect is based in the consideration of the objectives of integration defined by the Member States in the Treaties establishing the European Communities (at the outset, the implementation of a common market ensuring the free movement of persons, goods, services and capital) and in the effectiveness of the legal mechanisms required to achieve these objectives.

To the extent that the rules of Community law (provided they are clear, precise and unconditional) impose on Member States obligations the results of which are certain, any non-compliance with such obligations by the national authorities would have a negative effect on the legal and/or property sphere of citizens and companies, affecting the conditions under which they ought to be able to act, within the scope of the Common Market, should the said obligations have been complied with by the Member States.

Let us take the very simple though very clear example of customs' duties. The EC Treaty imposes on Member States the obligation of eliminating customs' duties on intra-Community trade. This means that private parties are entitled to export and import goods, within the Community, without being required to pay such duties. Any requirement by the customs authorities of a given Member State imposing on a trader importing goods from another Member State the payment of import duties as a condition to be able to trade such goods on the domestic market would be contrary to the EC Treaty rules.

The application of a national legal provision containing such a requirement would not only constitute non-compliance with the State's duty under the terms of the EC Treaty but also breach of the right of the person to carry on his business within the Common Market without being subject to import duties.

The "revolution" of direct effect constitutes a break with the classic paradigm of international law whereby, in a situation such as the one described, the private party would continue to be subject to the application of national legal provisions by national administrative authorities, without prejudice to the international liability of the State towards the other Contracting Parties, that is, towards the other States subscribing to the Treaty.

On the contrary, direct effect of Community rules means that the private parties are not left impotent before the application of national legal provisions by national administrative authorities. In such cases, they are entitled to defend their rights before the competent national judge. That is, the individual or the company may invoke Community law before the national court that, in accordance with national procedural rules, is competent to review the legality of the national act in question. In those circumstances, the duty of national courts, acting as Community courts, is (on the basis of the principles of supremacy and direct effect) to set aside the application of the national legal provisions that are contrary to Community law, thus ensuring the right of the individual or the company seeking relief. In the example just mentioned, this

would mean that the national court would declare the order for payment of import duties as null and void, on grounds of breach of an imperative rule of a higher hierarchic degree.

The question raised in those cases in which the breach of Community law can be attributed to a private party (and not to a national public authority) is to ascertain whether the doctrine of direct effect, which was initially thought only for breaches of EC law by Member States, can be applied in this context. What is at stake here is the so-called horizontal direct effect, involving the question of knowing whether Community rules may be invoked before national courts within the framework of conflicts between private parties, as opposed to vertical direct effect, which occurs in relations between private parties and national authorities.

In its reply to this question the Court has been prudent and we can say it has sought not to deviate from its original reasoning. To what extent it has been able to do so is an issue to reflect upon.

In fact, the Court admitted that Community rules (with the exclusion of rules established by way of directives) can produce a direct effect on relations between private parties – meaning that they can be invoked before national courts to solve conflicts between those parties – only to the extent that such rules, for their object, for their systemic insertion and for the terms in which they are drawn up, are able to impose duties the breach of which by a private party affects the legal and/or property sphere of other private parties.

Let us take as an example the rules of Articles 81 and 82 in the field of anti-trust law. Both Article 81 (which prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings having as their object or effect to prevent, restrict, or distort competition) and Article 82 (which forbids the abusive exploitation of a dominant position) constitute provisions containing rules that target directly the behaviour of companies, imposing limits to their actions within the scope of the common market.

We have seen that the breach of these rules may bring about sanctions by the European Commission in its capacity as competition authority. Furthermore, and within the strict framework of private relations, what is now of interest is the question of whether a breach of such rules by a company can be invoked in court (before a competent national court, particularly within the scope of liability proceedings) by other companies intending to secure damages as a result of such illegal behaviour.

The reply is affirmative, and it is up to the national judge to apply the provisions of the Treaty to the specific case and to verify whether the criteria for the award of damages have been met. This is the so-called horizontal direct effect that is allowed by case law (provided, of course, that the respective premises shall have been fulfilled) both with regard to the rules of the Treaties and with regard to the rules contained in Community regulations. As far as the directives are concerned, this question is posed in a different way, as we shall see next.

2. The limits of horizontal direct effect and the principle of conform interpretation

Directives are characterised by the fact that they are addressed to Member States and for this reason they do not create immediate rights and duties for private parties. According to Article 249 of the EC Treaty, directives are binding on Member States with regard to the result to be achieved, though leaving national authorities the choice of the form and methods. Moreover, the Treaty's characterisation of the directive explains the fact that this is the legal instrument generally employed to harmonise and/or co-ordinate national legislative and regulatory provisions.

Therefore, as a rule, the full legal effects of a directive on national legislation are dependent, in each Member State, on the adoption by the constitutionally competent authorities of the

legal acts required to ensure that national provisions comply with the principles and rules established in the directive. And it is this very operation of bringing the national legal system into line with the norms of the directive (whether it is a simple modification of an existing national regime or the creation of a new regime) that is called implementing the directive into the national legal system.

Should the implementing measures be adopted at the proper time and in the proper manner, the situations to which the directive refers will be governed and disciplined by the national transposing rules. In the event of litigation, the competent national court shall therefore decide through application of national rules and the directive shall be taken into consideration only for interpretation purposes.

The questions raised in this connection, with regard to direct effect, are to ascertain whether (1) in the absence of a timely and correct implementation of a directive (which rules aim at conferring rights to private parties) the private parties can invoke the provisions of the directive; (2) if those parties can invoke those provisions before national courts; and finally (3) if they can do so merely in the framework of relations with public authorities or in private relations as well.

To this set of questions, the Court of Justice – while seeking to have due regard for the limits of the reasoning that was at the base of the formulation of the doctrine of direct effect – has, in its case law, given replies that have progressively extended the effects of the rules of directives that have not been transposed.

Just as occurred with regard to the provisions of the Treaty imposing obligations on Member States, the standpoint of the Court in connection with the issue of direct effect of directives' rules was, on the one hand, that of effectiveness (*effet utile*) of Community law and, on the other, the legal "sanction" of a wrongful behaviour by the State.

By admitting that the rules of directives that have not been transposed (provided they are clear, precise and unconditional) can be invoked by private parties before national courts in conflicts against national authorities, the Court ensures the actual application of Community law, safeguarding its *"effet utile"*, while preventing the State that violated its duty of implementing the directive from evading, by virtue of this very violation, the application of Community law. Direct effect therefore represents, to a certain extent, the legal "sanction" for the breach of the duty to transpose the norms of the directive addressed to the State.

From this standpoint, one can understand that case law has lent the concept of State the widest possible meaning, covering all public bodies of territorial nature[5] and, in general, public services or entities in their capacity as employers[6]. From this same standpoint (that of the protection of private parties with regard to non-compliance by the State), one can also understand that the Court explicitly excludes the possibility of a Member State applying sanctions to an individual for non-compliance with a rule contained in a directive that the State itself did not transpose[7].

It was within the context of this case law that the question was finally raised of ascertaining whether the rules of directives that had not been transposed could be invoked in relations between private parties.

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5 Case 103/88 *Fratelli Costanzo vs. Comune di Milano* [1989] ECR 1839 [1990] 3 CMLR 239.

6 Case C-271/91 *Marshall vs. Southampton and South-West Area Health Authority* (Marshall II) [1993] ECR I-4367, [1993] 3 CMLR 293.

7 Cases 14/86 *Pretore di Salò vs. X* [1987] ECR 2545, 80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969, and C-168/95 *Luciano Arcaro (Criminal Proceedings against)* [1996] ECR I-4705.

The Court provides a negative answer to this question, just as it has always been of the understanding that the State cannot sanction individuals for alleged non-compliance with a directive that has not been transposed[8]. Indeed, a directive can be brought only against the Member States, to which it is addressed, and not against individuals, who are not its addressees. This means that a directive cannot, of itself, create obligations within the legal sphere of an individual or a company and that, consequently, a provision of a directive cannot be invoked, as such, against private parties. This conclusion is valid both within the framework of the relations between national authorities and private parties and within the framework of private relations. According to the Court, recognition of horizontal direct effect would, moreover, lead to the complete elimination of the distinction between regulations and directives[9], which would be contrary to Article 249 of the EC Treaty.

Extending to private relations the case law recognising the direct effect of rules of directives not yet transposed would signify recognising the Community competence to create, by way of directives, obligations with immediate effect within the legal sphere of individuals and companies, whereas under the EC Treaty the Community has this power only in areas in which it is granted the power to adopt regulations[10].

Notwithstanding the orientations referred to above, the truth is that in several specific cases application of the so-called *principle of conform interpretation* has led the Court of Justice to draw legal conclusions, which, as far as their practical consequences are concerned, are very similar to the recognition of horizontal direct effect.

If the national legislator has not transposed a directive, the question is one of ascertaining whether the national judge should apply existing domestic law adopted prior to the directive (which continued in force in the national system) even though its provisions were not entirely suited to the regime of the directive.

According to the Court of Justice, the national judge when interpreting and applying national law – whether its provisions were adopted before or after the Community directive – should do so, to the extent possible, in the light of the wording and purpose of the directive, based on the assumption that the State intended to comply fully with the obligations arising from the directive in question[11].

Thus, by applying national law and in particular the rules of a national law specially approved to provide for the implementation of a directive, national courts should interpret national law in the light of the wording and purpose of the directive, so as to achieve the result intended by Paragraph 3 of Article 249[12]. Moreover, according to the Court of Justice, the principle of conform interpretation is all the more applicable when the Member State in question considers that the existing provisions of its national law are in conformity with the requirements of the directive[13].

In a situation in which a directive has not yet been implemented the case law orientation mentioned above can therefore lead the national judge to formally apply prior national law, though "eliminating" therefrom, by interpretation, those elements that are incompatible with the directive in question. The result thus achieved can, in practical terms, be very similar to the immediate application of the rules contained in the directive.

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8 Case *Kolpinghuis Nijmegen* see above, note 7.

9 Case 152/84 *Marshall vs. Southampton and Southwest Hampshire Area Health Authority* (Marshall I) [1986] ECR 723, [1986] 1 CMLR 688.

10 Case C-91/92, *Faccini Dori vs. Recreb srl* [1994] I-3325.

11 Case C-106/89 *Marleasing SA vs. La Comerciale Internacionale de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305.

12 Case 14/83 *Von Colson and Kamann vs. Land Nordrhein-Westfalen* ECR [1984] 1891, [1986] 2 CMLR 430.

13 Case C-334/92 *Wagner Miret* [1993] ECR I-6911.

By way of example, in *Oceano Grupo Editorial SA*, the Court of Justice considered that the principle of conform interpretation required, in particular, the national judge to favour the interpretation of a previous national law allowing the judge to officially refuse to assume a competence granted to him/her by virtue of a contractual clause contrary to the directive in question[14].

The borderline therefore becomes very indistinct, though for the Court, this does not mean the recognition of horizontal direct effect, which would allow the invocation of a rule of a directive by an individual against another[15], but rather a situation in which the national judge, in deciding a case between private parties is bound, in interpreting and applying previous national law, to take into consideration the directive and its rules.

E. Control and sanction mechanisms in respect of breaches by Community institutions

The second major category of control and sanction mechanisms that I shall review, bearing in mind the criterion with which we began, is that of the mechanisms that allow a reaction with regard to breaches of Community legal principles and rules that can be attributed to the institutions of the Community.

I propose the following distinctions: Firstly, one must refer to the procedures provided in the EC Treaty for that purpose, both within the scope of proceedings for judicial review of legality and liability proceedings. Then, one must determine whether the Community judge has the competence to decree interim measures, and under which conditions. Thirdly, I will refer to the problem of the execution of the judgments of Community courts by the institutions. And, lastly, I will cover the issue of the control of legality of Community acts in proceedings before national courts.

I. Remedies before Community Courts

Beginning with the procedures enshrined in the EC Treaty, one must distinguish, as I have said, between proceedings for judicial review of legality and liability proceedings. As far as proceedings for judicial review of legality are concerned we must take into consideration (i) action for annulment (ii) action for failure to act and (iii) plea of illegality. With regard to liability proceedings, the procedure enshrined is (iv) action for damages.

1. Action for annulment

The essential elements of the action for annulment regime are enshrined in Articles 230, 231 and 233 of the EC Treaty. Under the terms of these provisions, the acts adopted jointly by the European Parliament and the Council, the acts of the Council, of the Commission and of the European Central Bank are reviewable by the Court, provided they are not recommendations or opinions[16]; the same applies to the acts of the European Parliament designed to produce legal effects with regard to third parties.

As interpreted by the Court of Justice, Paragraph 1 of Article 230 means that all the acts of the institutions are challengeable regardless of their form, provided that they produce external

14 Case C-240/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

15 Which would eliminate the distinction between regulation and directive.

16 The impossibility of challenging recommendations and opinions is the result of the fact that they are not binding acts and, as far as opinions are concerned, because they are preparatory acts, a part of the formation of other acts that are subject to review.

legal effects, that is, effects that affect third parties. The form of the challenged act is therefore irrelevant; what matters is its material content and the effects arising therefrom[17] – a jurisprudential orientation that ought to be applauded since it ensures the effectiveness of judicial control, with no subordination to criteria of a merely formal nature.

Another important aspect to be considered within the scope of the action for annulment regime concerns the rules applicable to the determination of the legal standing of the applicants.

From this point of view, the Treaty makes a distinction between three categories: (i) privileged applicants, that can challenge any act, include the Member States, the Council, the Commission and – since the entry into form of the Nice Treaty – the European Parliament[18]; (ii) non-privileged institutional applicants, which include the Court of Auditors and the European Central Bank, whose legal standing is gauged by the criterion of the protection of their prerogatives; and lastly (iii) a third category, that of the so-called non-privileged applicants, which includes all private parties (namely, citizens and companies) and other public entities with a legal standing that are not included in either of the other two categories.

A brief comment on this third category. According to Article 230, the so-called non-privileged applicants are entitled to challenge those decisions that are addressed to them and also decisions that, though taken in the form of a regulation or of a decision addressed to another person, concern them directly and individually. The criteria of direct and individual concern are therefore of decisive importance for this purpose.

According to the prætorian construction of the Court of Justice, the first criterion is met in the event that the applicant's legal or property sphere is immediately affected by the act in question. This occurs whenever the production of the legal effects of the contested act are not dependent on the adoption of any other act, either from the Member States or from the Community. We can therefore say that if the challenged act is directly applicable or is able to produce a direct effect, in principle, the criterion of being directly affected, established in Article 230 § 4 of the EC Treaty, will have been met.

With regard to the criterion of individual concern, the problems are more complex and the established case law is restrictive. Indeed, in keeping with the orientation traditionally followed by Community courts, non-privileged applicants are considered to be individually concerned by acts that are not specifically addressed to them only if the challenged acts affect them as a result of certain qualities peculiar to them, or if a *de facto* situation makes them stand apart from others and put them in the same position as an addressee, in relation to the act[19].

It is a fact that the Court of Justice and, more recently, the Court of the First Instance have shown a certain flexibility in the application of this criterion, particularly when considering the elements capable of individualising the applicant in relation to other individuals or entities – even though the challenged act has a normative nature[20] – but the fact is that the general orientation remains very restrictive[21].

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17 Case 22/70 *Commission vs. Council* (ERTA) [1971] ECR 263, [1971] CMLR 335.

18 In *Chernobyl* (Case C-70/88, *European Parliament vs. Council* [1990] ECR I-2041, [1992] 1 CMLR 91), the orientation of which came to be included in the wording of Article 230, the Court of Justice (in an updated interpretation of the EC Treaty) recognised the legal standing of the European Parliament, by virtue of the principle of institutional balance. It should be noted, however, that this standing was only recognised "for the purpose of (the EP) safeguarding its prerogatives" (that is, their competences). The Treaty of Nice has altered this regime, granting the European Parliament the status of privileged appellant, like the Member States, the Council and the Commission.

19 Cases 25/62 *Plaumann & Co. vs. Commission* [1963] ECR 95, [1964] CMLR 29, and C-213/91 *Abertal vs. Commission* [1993] ECR I-3177.

20 Case C-309/89 *Codorniu SA vs. Council* [1994] ECR I-1853, [1995] 2 CMLR 30.

21 Cases T-38/99 to T-50/99 *Sociedade Agrícola dos Arinhos and others vs. Commission*, 2001 ECR II-585, are an example of this restrictive orientation in determining legal standing of non-privileged applicants in annulment actions.

I believe that the present situation is not satisfactory and that a legal system with the characteristics of Community Law – particularly if we bear in mind the implications of the acts of EC institutions for private parties – should be opened up to allow a wider possibility of control through the courts at the initiative of individuals and companies.

I recognise, however, that without an alteration to the wording of Article 230, the Community courts will find it hard to get round the limits of their own case law[22]. In this connection, I submit that the criterion of "characterised interest", as proposed by Prof. Georges Vandersanden[23], would be an adequate solution that would allow the definition of a coherent line of case law, one more open to private parties, without falling into an excess of guarantees that could paralyse the system.

Finally, it should be recalled that:

- the grounds for annulment are the typical grounds of administrative law (lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and misuse of powers);
- the period during which an action for annulment can be lodged is two months, the term to be reckoned under the provisions of Articles 80 and 81, and 101 and 102 of the Rules of Procedure of the Court of Justice and of the Court of First Instance of the European Communities respectively[24]; and
- although the rule is that the annulment produces effects *ex tunc*, the Court of Justice may, with regard to regulations, limit in time the effects of the annulment, indicating which effects of the regulation annulled should be considered subsistent (cf. Article 231 of the EC Treaty).

2. Action for failure to act

The second procedural mechanism to be considered when breaches by institutions are at stake is the so-called action for failure to act, which is covered by Articles 232 and 233 of the EC Treaty. Whereas in the action for annulment what is at stake is control of the legality of the acts of the institutions, the action for failure to act concerns those situations in which the

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22 It should be mentioned that after the Trier Seminar of May 2001, the CFI, in the case *Jégo Quéré vs. Commission*, T-177/01, judgment of 03.05.2002, [2002] ECR II-2365, changed its position regarding legal standing of non-privileged applicants, adopting an interpretation of article 230 EC representing an important evolution towards a more effective judicial protection in EC Law. The CFI, in paragraphs 49 to 51 of that judgment, ruled that *"(49) as Advocate General Jacobs stated in point 59 of his Opinion in Unión de Pequeños Agricultores vs. Council (cited in paragraph 45 above), there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. (50) In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions (paragraph 23 of the judgment in Les Verts vs. Parliament, cited in paragraph 41 above), the strict interpretation, applied until now, of the notion of a person individually concerned according to the fourth paragraph of Article 230 EC, must be reconsidered. (51) In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."* However, a few months later, the ECJ, in the case *Unión de Pequeños Agricultores vs. Council*, C-50/00 P, judgment of 25.7.2002, reaffirmed the restrictive interpretation of its previous case law, apparently, closing the door to an evolution of the case law in line with the orientation adopted by the CFI in *Jego-Quéré* [2002] ECR I-6677.

23 Cf. *G. Vandersanden*, Pour un élargissement du droit des particuliers d'agir en annulation contre les actes autres que les décisions qui leur sont adressées, in CDE, 1995 5–6, p. 535–552.

24 Cf. codified version of the Rules of Procedure of the Court of Justice of the European Communities dated 19/6/1991, as amended up to the end of 2000, published in OJC 34/1 of 1/2/2001, as well as the codified version of the Court of First Instance Rules of Procedure of 2/5/1991, as amended up to the end of 2000, published in OJC 34/1 of 1/2/2001.

institution against which the action is brought is accused of abstention, of a lack of action that breaches its duty to act.

The lodging of an action for failure to act thus assumes that the defendant institution was not only able but also legally bound to act, in a manner such that the alleged abstention is contrary to the Treaty or to a legal rule regarding its application[25]. The action is designed to obtain a court declaration binding on the defendant institution whereby it can be seen that, under the circumstances alleged by the plaintiff, the institution's failure to act is contrary to Community law.

Contrary to Article 230 (action for annulment), Article 232 makes no distinction between institutions with regard to the rules of legal standing. They must all be considered privileged plaintiffs since the Treaty allows them to bring action regardless of the allegation or demonstration of any interest in the action, namely, taking into account the safeguard of their prerogatives. Only in the case of the European Central Bank (which, moreover, is not an institution in the technical and legal meaning of the term – see Article 7 of the EC Treaty) does Article 232 circumscribe the standing for bringing action in the light of the attributions entrusted to it by the Treaty. This would seem to suggest that the ECB can only legitimately apply for a court declaration of illegal omissions that interfere with the pursuit of its duties (which lie, as is well known, in the field of monetary policy and exchange-rate policy).

As far as private parties are concerned, Paragraph 3 of Article 232 stipulates that any natural or legal person may *"... complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion"*.

Given the terms of the said provision, access to an action for failure to act was understood, during a long period and as far as the legal standing of private parties is concerned, even more restrictively than with regard to action for annulment. Indeed, the said paragraph would seem to provide the rule whereby it would be only lawful for private parties to bring action to the extent that what was at stake was the omission of an act directed at the party lodging the action for failure to act. There would thus be no possibility of applying the criteria of direct and individual concern of Article 230, to actions for failure to act in which the plaintiff himself was not the addressee of the act the omission of which is at stake.

This understanding of Article 232 was, however, to be set aside during the last decade by Community courts case law. According to the Court of Justice, a systemic analysis of the remedies provided by the EC Treaty leads to the conclusion that the provisions governing action for annulment and action for failure to act should be interpreted and applied in a parallel manner (like two sides of the same coin, as it were). Therefore, just as Paragraph 4 of Article 230 allows a private party to apply for the annulment of an act of an institution provided that the contested act directly and individually concerns it, even though that party is not the addressee of the said act, so too should Paragraph 3 of Article 232 be interpreted as allowing a private party to bring action for failure to act for the omission of an act that, although the party in question was not its addressee, would affect that party directly and individually[26].

Therefore, a private party with an interest in securing a decision is entitled to bring an action for failure to act against the omission of that decision provided that such a decision concerns that party directly and individually and provided that the institution is bound to act[27].

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25 Case T-32/94 *Tierce Ladbroke vs. Commission* (Ladbroke Racing) [1997] ECR II-1030.
26 Case C-107/91 *ENU vs. Commission* [1993] ECR I-599.
27 Case C-68/95 *T. Port vs. Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065.

The proceedings envisaged in Article 232 are divided into two stages. In the first, the plaintiff bringing the action should address an invitation to act to the institution in question. A period of two months then begins in which the institution must define its position. Should it not do so or should its reply be merely dilatory, the second stage begins, and the plaintiff may bring action against the institution before the ECJ or the CFI, as appropriate, within a new period of two months. Should the court find the omission contrary to EC Law, the defendant institution shall adopt the measures required to enforce the judgment.

If, during an action for failure to act, the defendant institution acts, then the proceedings come to an end[28], the lawsuit thus having no object[29]. Indeed, in this case, there are two alternatives in accordance with case law: either the act adopted satisfies the plaintiff, in which case the conflict disappears (without prejudice to the recovery of damages suffered in the meantime, to be established in an action for damages); or the act adopted, though it expresses the institution's position, does not satisfy the plaintiff, in which case an action for annulment may be brought, the object of which is the act in question.

3. Plea of illegality

In addition to the two procedural mechanisms just referred to, mention should also be made, within the scope of review of legality proceedings, of the plea of illegality established in Article 241 of the EC Treaty.

Without prejudice to its accessory nature to the other remedies provided in the EC Treaty and to its ability to be invoked by any party under the terms enshrined in the provision indicated above, I consider the plea of illegality particularly important in that it provides private parties with a procedural tool allowing them to put into motion the control of the legality of the Community's normative acts.

As mentioned earlier, non-privileged applicants do not have legal standing, within the scope of Article 230, for bringing actions for annulment against the Community's normative acts (even if, it should be noted, the normative act is not of a legislative nature and lies rather in the field of production of regulations of an administrative nature). Indeed, it is only to the extent that they demonstrate that the challenged act (notwithstanding its form) affects them directly and individually, in the sense that was mentioned earlier – which, strictly speaking, does not render it a true and proper normative act – that these applicants can overcome the barrier of legal standing. If they cannot overcome this obstacle their request will purely and simply be declared non-admissible.

One can thus understand the importance of a provision that allows private parties, particularly in the context of an action for annulment the object of which consists of measures executing a Community normative act, to raise the issue of control of legality of the normative act the execution of which is at stake. This is the case of Article 241, under the terms of which, even after the expiry of the period laid down in Paragraph 5 of Article 230, any party may, in proceedings in which a Community regulation is in issue, plead the grounds specified in Paragraph 2 of Article 230 (lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and misuse of powers) to allege the inapplicability of that regulation.

It should be noted that any declaration of illegality, within the scope of application of Article 241, produces effects only in respect of that specific case, and the act found to be illegal will

28 Case *Ladbroke Racing*, see above, note 23.
29 Case T-28/90 *Asia Motor France et al. vs. Commission*[1992] ECR II-2285.

not be eliminated from the legal system. Thus, if and for as long as the institution that adopted the act in question (or institutions, in the case of acts adopted by joint decision of the European Parliament and the Council of Ministers) does not revoke or alter it, the private parties will have to obtain a judicial declaration of the respective illegality in every specific case of application if they are to obtain protection.

It could well be, in extreme cases, that a Community regulatory act reiteratedly declared illegal by the Community courts could remain in force as a result of lack of action by its author. Should this occur it would surely be incompatible with the values of security and certainty in the application of the law.

In this context, effective protection of these values would recommend that be adopted a system like the one existing namely in Portugal on control of constitutionality by which, following a declaration of illegality of an act by the courts in three specific cases, the Constitutional Court declares it null and void "with general and mandatory effect", which means that, notwithstanding any possible lack of action by the author of the act, that act is eliminated from the law.

Within the scope of Community Law, any provisions declared illegal in three specific cases, on the basis of Article 241, could also warrant being declared illegal by the Court of Justice, with general and mandatory effect. This possibility, by itself, would surely constitute a powerful incentive for the institution whose act (in whole or in part) had been declared illegal to promptly alter or revoke it.

4. Action for damages

In addition to the procedural mechanisms concerning the control of the legality of Community acts, the EC Treaty also establishes another important provision, within the scope of liability proceedings, allowing reparation to be obtained for damages arising from behaviours of the Community: the action for damages, envisaged in Articles 235 and 288 of the EC Treaty. In this connection, proceedings designed to establish the non-contractual liability of the Community are of particular importance.

According to the early days of Community case law, the possibility of bringing an action for damages in respect of the non-contractual liability of the Community was dependent on bringing a prior action for annulment or an action for failure to act[30]. This requirement was a denial of the autonomy of the action for damages, qualifying it as a mechanism of a subsidiary nature. Case law has evolved, however, in terms that are well known, and it does dot seem to me that there is now any doubt as to the autonomy of actions for damages with regard either to the action for annulment[31] or to the action for failure to act[32].

The Community's liability within the scope of Paragraph 2 of Article 288 of the EC Treaty is dependent, however, on a number of requirements. These requirements have to do with: (1) the illegality of the behaviour for which the Community institution in question is condemned; (2) actual damages; and (3) the existence of a causality link between the behaviour of the institution and the alleged damages[33]. The existence of causality, in the meaning of Paragraph 2 of

30 Case 25/62 *Plaumann*, see note 19 above.

31 Case 5/71 *Schöppensted vs. Council* (Zuckerfabrik) [1971] ECR 975.

32 Case 4/69, *Alfons Lutikke vs. Commission* (Lutikke III) [1971] ECR 325.

33 Cases C-308/87 *Grifoni vs. CEEA* [1994] ECR I-341, § 6. C-258/90 & C-259/90 *Pesquerias e Bermeo e Naviera Laida vs. Commission* [1992] ECR I-2901, § 42, and C-146/91 *KYDEP vs. Council and Commission* [1994] ECR I-4199 § 19.

Article 288, is admitted when there is a direct cause/effect relationship between the act of the institution and the invoked damage, a causality that the plaintiff must prove[34].

Without prejudice to these requirements, it should be noted that, in the event that the institution implementing the act that caused the damage had a wide power of appraisal, the existence of liability requires that the transgression be qualified, that is, that it has to be clear and serious[35], and, furthermore, that a superior rule designed to protect individuals shall have been violated[36]. Thus, for example, insufficiency of the reasoning of a regulatory act will not of itself bring about Community liability[37].

The Court of Justice therefore harbours a concept whereby, whenever a normative act is at stake the adoption of which involves complex choices of economic policy, Community liability is subject to severe conditions. Imposition of these conditions is designed to safeguard an ample margin of appraisal by the institutions when, in the general interest, they adopt measures of a normative nature that could affect private interests[38].

With regard to reparation for damages arising from the behaviour of Community institutions within the scope of administrative activity (comparing with the adoption of normative acts) the threshold of the requirements is lower when judging illegality capable of implying Community liability[39].

A final note that should be underlined has to do with those situations in which the question can be raised of the articulation of Community liability with that of the Member States. In fact, it is well known that in many cases the execution of Community policies is dependent on the action of national administrations. The question may therefore frequently be asked, in practice, as to whether the liability should be attributed to the Community or to the State.

Without wishing to go into this issue in depth – an exercise that would go beyond the scope of this paper – I would just say that case law seems to lean towards a necessary articulation between national and Community liability. Therefore, even in those cases in which the infringement is attributable to a Community institution, an action for damages brought before the Community courts will only be admissible if the plaintiff cannot obtain reparation for damages suffered by using the legal mechanisms available under national law. A typical example is that of the repetition of taxes unduly charged. Should national authorities charge taxes on the grounds of invalid Community rules, the reparation of the damages – notwithstanding the fact that the illegal act can be attributed to the Community – should be obtained in the first place through the actions envisaged in national procedural law for the purpose of restitution by the national authorities of the sums improperly charged. The Community will only answer to the extent that such restitution cannot be secured, or to the extent that the damages are not fully compensated through such restitution[40].

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34 Cases 9/60 & 12/60 *Société commerciale Antoine Vloeberghs vs. High Authority* [1961] ECR 197, [1963] CMLR 44, 18/60 *Worms vs. High Authority*, [1962] ECR 195; 36/62 *Société des Aciéries du Temple vs. High Authority*, [1963] 583, 601, 602; Case 241/78, 242/78, 245/78 to 250/78 *DGV et al. vs. Council and Commission* [1981] ECR 2391; C-363/88 and C-364/88 *Finsider et vs. Commission* [1992] ECR I-359 § 25; C-220/91 *Commission vs. Stahlwerke Peine-Salzgitter* [1993] ECR I-2393.

35 Cases T-481/93 & 484/93 *Exporteurs in Levende Varkens et al. vs. Commission* [1995] ECR II-2305, § 81.

36 Case T-390/94 *Aloys Schröder et al. vs.* [1997] ECR II-501, § 64.

37 Case 106/81 *Kind KG vs. EEC* [1982] ECR 2885.

38 Cases 83/76, 94/76, 4/77, 15/77 & 40/77 *HNL et al. vs. the Council* [1978] ECR 1209.

39 Case 145/83 *Adams vs. Commission* [1985] ECR 3539.

40 Case 14/7/67, 5/66, 7/66, 13/66 to 24/66 *Kampfmeyer et al. vs. Commission* [1967] ECR 245.

II. The competence of the Community courts to adopt interim measures

In articulation with the main provisions that we have referred to, the EC Treaty also grants competence to the Community courts to adopt interim measures. In this connection, Article 242 envisages the possibility of suspending the execution of a contested Community act, while Article 243 establishes, in general terms, the competence of Community courts to order such interim measures as may be required.

In accordance with well-established case law, approval of an application for the adoption of interim measures requires that the following conditions be cumulatively met: (1) the existence of *fumus boni juris*, that is, a finding by the court, within the scope of a review of a preliminary nature, of the consistency of the legal grounds on which the plea made by the plaintiff in the principal proceedings is based; (2) the urgency of the adoption of the measures applied for, which means that the court must find that the non-adoption of the requested remedies could lead to an (unfavourable) alteration of the plaintiff's situation; (3) the occurrence of serious, irreparable losses, which is intimately linked to the finding of urgency; and lastly (4) in weighing the relative importance of the interests at stake, to assure that the approval of the application for the adoption of interim measures will not harm the public interest to an extent that cannot be considered acceptable.

As in the case of the Community's non-contractual liability, the concrete application of the jurisprudential guidelines set out above is restrictive, and cases of granting the measures applied for are infrequent.

III. The enforcement of ECJ and CFI decisions: lack of a specific procedure

We have just seen that Community courts are competent, through the various procedural mechanisms reviewed, to control the legality of the behaviour of the Institutions and to determine the Community's liability for damages caused to third parties. For that purpose, both the ECJ and the CFI, within the scope of their respective competence, can annul acts of the Community when they are invalid; can declare the illegality of omissions of the institutions; and may also condemn the Community to the payment of indemnities designed to make good losses caused to third parties.

For the judgments adopted by Community courts in all these cases to be fully effective the institutions in question in each case must promptly take such implementation measures as may be adequate.

As in the case of each of the national legal systems, the question of the execution of judicial decisions is therefore raised. It is a known fact that this issue is particularly acute when, in a conflict between a private party and a public authority, the court decision is favourable to the private party and requires, if legality is to be re-established, that the public authority at stake complies with the judicial decision.

With regard to action for annulment and action for failure to act, the EC Treaty expressly stipulates in Article 233 that *"The Institution or Institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment ..."*.

And, according to Article 244, the judgments of Community courts "*...shall be enforceable under the conditions laid down in Article 256*", which means that court decisions condemning the Community to pay damages are sufficient to bring executive proceedings, the execution being governed by the civil procedure rules prevailing in the State in whose territory the execution takes place.

The latter provision seems to ensure proper control of any non-compliance by the Community with its duty of executing a judgment condemning it to pay an indemnity. It should be noted however that Article 233 contains no provision with regard to the procedure to be adopted to ensure that, in the case on non-compliance by an institution, the judgments annulling an act of an institution or declaring the illegality of an omission will be executed.

In the existing framework, the interested party may react in two ways, which are not mutually exclusive: on the one hand, through an action for failure to act, applying for a court declaration of the illegality of the omission of the institution (omission of measures required to execute a court decision previously adopted) and, on the other, through an action for damages the object of which is reparation for losses arising from the non-adoption of the said execution measures. The two pleas may, moreover, be lodged as part of the same proceedings.

The question is one of ascertaining whether these procedural mechanisms are sufficient to ensure effective control. At first sight one could be tempted to answer in the affirmative. On the one hand, an action for failure to act allows judicial control of the duty of executing the prior court decision and, on the other, the action for damages should ensure reparation of the losses caused by breach of the said obligation.

Nevertheless, I wonder whether, during the present stage of evolution of Community Law, the time is ripe to move forward and to expressly envisage – as is the case in various national legal systems with regard to the execution of judgments by administrative courts – specific "execution of judgment proceedings" that would ensure speedier, more effective control. I wonder particularly, based on the teachings of experience acquired within the scope of national legal systems, whether it would not be worthwhile to adopt mechanisms to hold personally responsible those in charge of the entities whose duty it is to execute the judicial decisions of Community courts. This possibility would surely constitute a powerful incentive to the prompt adoption of adequate execution measures.

Since the *Francovich* judgment (and subsequent case law) is a very significant step towards strengthening the mechanisms of control in respect of breach of Community Law by Member States, I would like to leave you a theme for reflection regarding the symmetrical issue of the reinforcement of the mechanisms of control in respect of breach of Community Law (in this case, breach of the duty to execute a court decision) by the Community Institutions.

IV. The role of national courts and the preliminary ruling mechanism on the validity of Community acts

Without prejudice to the control exercised by Community courts through the procedural mechanisms that I have just detailed, the question of validity of Community acts can also be raised before the courts of Member States within the scope of the proceedings with which they are competent to deal.

Indeed, given the direct effect and the supremacy of Community law over national law, the courts of the Member States are often called upon to apply Community rules, on deciding the conflicts submitted to them for appraisal. Now, in this context, the question may be raised of ascertaining whether a given act of secondary law, or whether a given provision part of an act of secondary law, is or is not in keeping with a Community principle or provision of a higher hierarchic degree (consider, for example, the relationship between the regulations approved by joint decision of the European Parliament and the Council of Ministers and the rules of the Treaties, or the relationship between an execution regulation adopted by the Commission and the basic regulation on which the competence of this institution rests).

Just as one can raise the question of the constitutionality of laws or of the legality of administrative acts and rules in the national legal systems, in the Community's legal system one can raise the question of conformity of the acts of the institutions with the principles and rules of the Treaties or of secondary law of a higher hierarchic degree.

Article 234 of the EC Treaty establishes the procedural framework for the appraisal of the validity of Community acts. This article institutes direct co-operation between national courts and the Court of Justice through a special procedure by which national courts refer to the ECJ questions on the validity of Community acts that are raised on proceedings before them.

It should be noted that, although the terms of Article 234 do not distinguish between the referral for preliminary rulings in respect of validity and the referral for preliminary rulings in respect of interpretation (which would lead to the conclusion that only those national courts whose decisions cannot be appealed according to internal procedural law are obliged to ask for a referral), case law has been consistent since the mid eighties (largely based on considerations regarding the coherence and unity of the Community legal system) stating that Community courts, and in the framework of preliminary rulings the Court of Justice alone, have sole competence to decide as to the validity of the provisions of secondary Community law[41].

Any national judicial body (even though its decisions are subject to appeal at internal level) is therefore obliged to submit the question of appraisal of validity to the Court of Justice through the mechanism of Article 234, whenever the validity of an act or of a provision of Community law raises any doubt. In accordance with the prevailing orientation, national courts are not themselves competent to declare the invalidity of Community acts or provisions.

The decision whereby a national judge refers a question for preliminary ruling to the Court of Justice can take any form admissible by national procedural law, though the fact is that referral for preliminary ruling generally brings about the suspension of the proceedings until such time as the Court of Justice will have decided the question referred for a preliminary ruling.

It should however be underlined that the Court of Justice is not competent to decide neither as to disputes relating to the matters of fact of the proceedings object of referral nor as to differences of opinion relating to the interpretation or application of rules of national law. It is therefore desirable that the decision to ask for a referral for a preliminary ruling should be taken only at a stage of the proceedings before the national court in which the referring judge is in a position to define, even though hypothetically, the factual and legal framework of the issue, and it may be useful for a proper administration of justice that the referral be asked only after hearing both parties[42].

Within the scope of a referral for preliminary ruling the Court of Justice is not competent to judge as to the conformity with the Treaty of a measure of internal law as it must within the scope of infringement actions[43], nor as to the compatibility of a national provision with Community law[44].

I would also underline the fact that, in accordance with the case law of the ECJ, appraisal of the validity of a decision of a Community institution (the Commission's decisions are usually at stake here) cannot be undertaken via the mechanism of Article 234 when the person challenging before the national court the legality of the decision did not bring an action for its annulment in due time, under the terms of Article 230 of the EC Treaty[45].

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41 Case 314/85 *Foto-Frost vs. Hauptzollamt Lübeck-Ost* [1987] ECR 4199.
42 Case 106/77 *Simmenthal*, see above note 4.
43 Case 20/64 *Albatroz* [1965] ECR 41.
44 Case 14/86, *Pretore di Salò vs. X* [1987] ECR 2545.
45 Case C-188/92 *TWD vs. Germany* [1994] I-833.

Should the Court of Justice declare the invalidity of the Community provision referred to it, the legal consequence will be that it is not applicable, though the provision in question will subsist in the Community's legal system. The legal effects of the declaration of invalidity are therefore restricted to the specific case in question, and the court *a quo* must decide the case without applying the provisions declared invalid by the ECJ.

Contrary to what happens in the framework of action for annulment, in this case the provision declared invalid is not eliminated from the Community legal system. For this to occur the institution that adopted the provision would have to revoke or to alter it.

In any case, should the issue again be raised within the scope of another case being heard by a national court and should the institution in question not have accepted the consequences of the judgment declaring the invalidity, the national judge may (for obvious reasons of procedural economy) declare the provision invalid without referring it again for a preliminary ruling.

I would like to go back at this point to my earlier comments in respect of the plea of illegality. In fact, here, too, it might be that a Community provision declared invalid by the Court of Justice within the scope of a referral for a preliminary ruling, and reiteratedly considered inapplicable by the national courts, could remain in force. This would surely be irreconcilable with the values of security and certainty in the application of the law.

In this connection I would like to reiterate the suggestion that a system be adopted that, with regard to a Community provision declared invalid in three specific cases, would grant the Court of Justice the right to declare its invalidity with general mandatory force (*erga omnes* effect).

V. The adoption of interim measures by national courts in the framework of preliminary rulings on the validity of Community acts

As we have just seen, in the event of doubt as to the validity of a Community provision or should they consider a Community provision to be invalid, the national courts should submit the matter to the Court of Justice through the referral mechanism regarding the appraisal of validity of Article 234 of the EC Treaty.

In this context, should the interested parties so request under the terms envisaged in national procedural law, the question might be raised of the application of interim measures, in particular the suspension of the execution of national legal acts adopted on the basis of the allegedly invalid Community provisions (or adopted for the specific purpose of ensuring their execution).

In keeping with the case law of the Court of Justice, should the national judge have doubts as to the validity of the Community act constituting the grounds of the national act, the judge may exceptionally suspend, on a temporary basis, the application of this act or adopt any other measures with regard thereto. The exercise of this right is, however, subject to several conditions[46].

According to case law, these conditions are as follows:

(1) in the first place the national court must refer the question of the validity of the Community legal act to the appraisal of the Court of Justice through the preliminary ruling mechanism of Article 234;

46 Cases C-465/93 *Atlanta Fruchthandelsgesellschaft vs. Bundesamt* [1995] ECR I-3761 and C-143/88 & C-92/89 *Zuckerfabrik Süderdithmarschen and Zockerfabrik Oest* [1991] ECR I-415, [1993] 3 CMLR 1.

(2) secondly, there must be urgency, in the sense that the interim measures are needed to prevent the party requesting them from suffering a serious, irreparable loss;

(3) thirdly, in weighing the interests at stake, the national court must take the interest of the Community into due account; and

(4) fourthly, in its appraisal of all these conditions, the national court must have regard for the decisions taken by the ECJ or the CFI in respect of the legality of the Community act or its appraisal thereof in an order issued in proceedings relating to the adoption of similar interim measures at Community level.

Regard for these conditions is based on the need to ensure uniform application of Community law and to safeguard the sole jurisdiction of the Court of Justice in deciding as to the validity of the acts of Community Institutions[47].

F. Control and sanction mechanisms in respect of breaches by Member States

The third category of infringements to take into consideration (following the analysis of infringements by private parties and by Community institutions) has to do with the possible violation, by Member States, of the obligations arising from the Treaty or from acts adopted on the basis of its provisions.

In fact, as the Court of Justice has underlined in its case law, the granting to the Community by the Member States of the normative powers that arise from the provisions of the EC Treaty implies a limitation (freely assumed by the Member States) to the exercise of their sovereign powers in the approval of legislation by the national legislature.

This limitation means that, in those fields in which the Community institutions take measures based in the provisions of the Treaty, Member States are prevented from acting in a manner contrary to the said measures. This consequence may be imposed either because Community competence is of an exclusive nature (meaning that the adoption of measures by other entities should be considered illegal) or because direct applicability and supremacy of Community law over national law, in those areas in which the jurisdiction is concurrent, prevent Member States from adopting measures contrary to the acts adopted by Community institutions. This is the so-called phenomenon of pre-emption, to which Community doctrine has made abundant reference, importing a concept developed by North American constitutional doctrine.

At procedural level, this duty of regard for common rules, validly adopted by the institutions of the Community, is highlighted by the infringement action mechanism set out in Articles 226 to 228 and 237 of the EC Treaty. This same idea of submission of national authorities to the common rules validly adopted is also seen in the competence of national courts to enforce Community law, if necessary through recourse to the mechanism of judicial co-operation of Article 234. A clear expression of this obligation is also, and particularly expressively, the acceptance by case law of the principle of the State's liability for damages arising from the violation of the obligations imposed on the State by Community Law.

This is what we shall review next, though we shall first make a very brief reference to two other types of mechanism (of a non judicial nature) also designed to ensure regard by the Member States for the obligations arising from the Treaty and from the acts adopted on the grounds thereof. I shall refer, on the one hand, to the control exercised by the Commission over the management of the Community's financial instruments and, on the other, to the control and sanction mechanisms enshrined within the scope of Economic and Monetary Union.

47 Case C-334/95 *Krüger vs. Hauptzollamt Hamburg Jonas* [1997] ECR I-4517.

I. Control mechanisms related to the management of the Community's financial instruments

With regard to the management of the Community's financial instruments, what I want to underline is that the financing granted to member States is subject to the so-called "compatibility rule", under the terms of which Community financing cannot be granted to projects that are not compatible with Community law.

At stake here are the financial interventions of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section[48], of the European Regional Development Fund (ERDF)[49], of the European Social Fund (ESF)[50], of the Financial Instrument for Fisheries Guidance (FIFG)[51], of the European Investment Bank (EIB) and of the Cohesion Fund[52].

The Commission is competent to ensure the effective application of the said rule. To this end, it may refuse to grant financing, it may suspend, reduce or withdraw financing already granted, and it may also demand repayment of sums paid in the meantime (cf. Articles 12 and 39 of Council Regulation (EC) n° 1260/1999 of 21st June 1999 [53], that establishes general provisions on the co-ordination of the various financial instruments, and Article 8 of the Regulation instituting the Cohesion Fund.[54]) [55].

Thus, whenever there is funding by the Community, the Commission, through the application of the rules of management of the Community's financial instruments, is empowered to exercise effective control with a view to ensuring regard for Community rules and policies.

It should be noted that the decisions that the Commission adopts in the exercise of these powers may be subject to judicial review through actions for annulment brought under the terms referred to earlier.

II. Control mechanisms and sanctions applicable within the scope of Economic and Monetary Union (EMU)

The second point that I want to underline, before moving on to the regime of the infringement procedure, has to do with the control and sanction mechanisms enshrined by the EC Treaty in the field of Economic and Monetary Union.

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48 Envisaged in Council Regulation (EC) 1257/1999, of May 17th, published in the OJEC, series L, 160/80 of 26.06.1999.

49 Envisaged in European Parliament and Council Regulation (EC) 1783/1999 of July 12th, published in the OJEC, Series L, of 13.08.1999.

50 Envisaged in European Parliament and Council Regulation (EC) 1784/1999, of July 12th published in the OJEC, Series L, 213/5 of 13.08.1999.

51 Envisaged in Council Regulation (EC), 1263/1999, of June 21st 1999, OJ L161/54 of 26.06.1999.

52 Envisaged in Council Regulation (EC) 1164/94 of May 16th 1994, OJ L130/1, of 25.05.1994, as amended by Council Regulation (EC) 1264/1999 of June 21st OJ L161/57, of 26.06.1999

53 Published in OJ L161 of 26.06.1999.

54 See above, note 52.

55 Under the Terms of Article 12 of Council Regulation (EC) 1260/1999 of June 21st, those transactions that are object of financing by the Structural Funds or by the EIB or of other financing instruments shall have due regard for the provisions of the Treaty and of such acts as are implemented by virtue thereof and should be compatible with Community policies and measures, including those referring to competition rules, to the award of public contracts, to the protection and improvement of the environment, to the elimination of inequalities and to the promotion of equality between men and women. Article 8 of the regulations instituting the Cohesion Fund also stipulates that those projects financed by the Fund should have regard for the Treaty and for the other measures adopted for its execution, as well as for Community policies, including those relating to the protection of the environment, transport, trans-European networks, competition and the award of public contracts.

According to Article 104 of the EC Treaty, Member States must, within the scope of economic policy, avoid excessive budget deficits[56]. And under the terms of the Stability and Growth Pact[57] Member States are bound to adopt policies that will ensure balanced budgets or budget surpluses in the medium term.

Compliance with these obligations is subject to the control and sanction mechanisms envisaged in the EC Treaty and in the Stability and Growth Pact. Within the scope of these mechanisms the Commission and the Council of Ministers have particularly relevant powers.

The mission of the Commission is to constantly monitor the evolution of the budget situation of Member States, presenting appropriate reports for the purpose. Should the Commission consider that there is a risk that the deficit benchmark will be exceeded, the Commission's reports are submitted to the Economic and Financial Committee for consideration.

Without prejudice to the presentation of the aforesaid reports, if the Commission considers that there might be an excessive budget deficit in a given Member State, it will issue an opinion addressed to the Council of Ministers with its findings regarding the excessive deficit.

Should the Council of Ministers deliberate by qualified majority that there is a case of excessive deficit it will address a recommendation to the Member State in question with a view to the situation being put under control by the State. Should the State persist in not putting an end to the situation the Council may decide – by a two-thirds majority of the votes cast by its members – to apply the following measures:

(i) to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities;

(ii) to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned;

(iii) to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Community[58], until the excessive deficit has, in the view of the Council, been corrected; and

(iv) to impose fines of an appropriate size[59].

It should be noted that, under the terms of Article 104.10 of the EC Treaty, the control mechanisms just described replace (within the specific scope of the control of excessive deficits) the infringement action since the Commission and Member States are not allowed to bring infringement actions the object of which is a finding of the existence of a case of excessive deficit in a given Member State.

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56 Under the terms of the Protocol relating to the procedure applicable in the event of excessive deficit and of the Resolution of the European Council and of the Council of Ministers' Regulations that form part of the Stability and Growth Pact (cf. footnote 57), 3% of the GDP is considered to be the threshold of excessive deficit.

57 The texts that constitute the so-called Stability and Growth Pact are the Resolution of the European Council dated 17.06.1997, on the Stability and Growth Pact, Council Regulation (EC) 1466/97 of 07.07.1997, relating to greater supervision of the budget situations and the supervision and co-ordination of economic policies, and Council Regulation (EC) 1467/97 of 07.07.1997, relating to the acceleration and clarification of the application of the procedure in respect of excessive deficits.

58 Under the terms of Articles 12 and 14 of Council Regulation (EC) 1467/97 of July 7th 1997, the amount of the first deposit includes a fixed component equal to 0.2% of the GDP and a variable component equal to one tenth of the difference between the deficit expressed as a percentage of the previous year's GDP and the benchmark 3% of the GDP. Should the situation be unchanged the following year, the amount of the additional deposit shall be equal to one tenth of the difference between the deficit expressed as a percentage of the previous year's GDP and the benchmark 3% of the GDP. These deposits shall not exceed 0.5% of the GDP. The deposit will be converted into a fine if, two years after the date of the decision to impose the making of the deposit on the Member State, the Council considers that the excess deficit shall not have been corrected.

59 Cfr. footnote 58.

This is not the case in the event of non-compliance by a Member State with the sanction measures adopted by the Council under the terms of Article 104.11. In this case, the Commission, making use of its prerogatives, may bring an infringement action against the Member State in question, based on the finding of breach of the duty of implementing the decision taken by the Council. Likewise, it should be understood that the Member State to which the decision is addressed may challenge the decision under the terms of Article 230. Since the appeal does not have a suspensive effect, the appealing State may apply to the Court of Justice to suspend the execution of the act under the terms of Article 242.

III. Infringement actions against Member States

Without prejudice to the mechanisms that I have just mentioned – which grant the Commission and the Council of Ministers very significant powers of control within the fields referred to – the infringement action is the principal legal mechanism whereby regard by the Member States for the obligations imposed on them by Community Law is submitted to control by the Court of Justice.

The first aspect to be emphasised is that the rules concerning legal standing are of a restrictive nature since, under the terms of Articles 226 and 227, only the Commission and Member States are entitled to bring proceedings against a Member State within the scope of an infringement action.

One can understand the limitations imposed on private parties since they are able to access the mechanisms that national procedural law provides to ascertain the legality of the behaviour of national public authorities (including the appraisal of the legality of this behaviour in the light of Community Law). More debatable, from my point of view, is the fact that private parties are barred from intervening before the Court of Justice to support the Commission's conclusions in infringement actions against Member States, even if these actions are based on complaints lodged by the parties applying for intervention. I submit to you that modification of this rule should be considered.

In practice, an infringement action is rarely brought at the initiative of a Member State[60], and the mechanism in question is therefore generally used by the Commission in its role as "guardian of the Treaties". In a large part of the cases, however, the Commission acts driven by private parties in the wake of complaints that they lodge. According to well-established case law, the Commission has considerable freedom of appraisal with regard to the timelines of bringing infringement action, and it cannot be obliged to make a start to the proceedings envisaged in Article 226[61]. Thus, as a rule, a complainant (be it an individual or a company) cannot use the "weapon" of action for failure to act if the Commission fails to act in the wake of a complaint brought against a Member State for alleged breach of Community Law.

Within the scope of Economic and Monetary Union, there are two aspects that ought to be pointed out:

- the first, as has already been underlined, is that in the field of Paragraphs 1 to 9 of Article 104 of the EC Treaty, regarding the procedure applicable for purposes of control of the budget situation of the Member States, infringement actions cannot be brought to gauge possible disregard by the Member States for the obligations of budget discipline arising from the Treaty (cf. Article 104.10): and
- the second is that the Court of Justice is competent to judge infringement actions brought by the Board of the European Central Bank against the national central banks for possible

60 One of the few examples is *France vs. United Kingdom*, Case 141/78 [1979] ECR 2923, [1980] 1 CMLR 6 in connection with the preservation of fisheries' resources.

61 Case 247/87 *Star Fruit Co. vs. Commission* [1989] ECR 291, [1990] 1 CMLR 733.

non-compliance with the obligations imposed on them by the Treaty and by the Articles of Association of the European Central Banks System (cf. Article 237d of the EC Treaty).

The object of an infringement action is the finding and declaration by the Court of Justice of violation of the obligations incurred by Member States by virtue of the EC Treaty and of the acts adopted in the application thereof.

The process involves two stages: the administrative proceedings and the judicial proceedings. The administrative proceedings stage, in turn, can be broken down into two sub-stages:

- in the first, the Commission, making use of its prerogatives, investigates the alleged infringement, questions the State and invites it to set out its position; at this stage, the Commission, in dialogue with national authorities, seeks to lead the Member State in question to put right the alleged breach without recourse to the mechanisms of judicial proceedings;
- should the State not take steps to bring its behaviour into line with the requirements of the Commission (and provided that the latter shall not have accepted the explanations given by the national authorities), the Institution issues a reasoned opinion addressed to the Member State, specifying the behaviour attributed to the national authorities that it qualifies as a breach, stating the Community rules whose violation is in question, and stipulating a deadline for the State to adopt appropriate measures. Should the State not adopt measures by the deadline stipulated in the reasoned opinion the Commission is then entitled to move on to the judicial proceedings stage, bringing the case before the Court of Justice.

During the judicial proceedings stage the Court examines the admissibility of the case and the alleged breach of Community law. It should be noted that, with regard to the question of admissibility of the case, the Commission may not raise issues before the Court that had not been addressed in the administrative proceedings stage and, in particular, that had not been covered by a reasoned opinion[62].

It must be underlined that the notion of infringement is of an objective nature and is not dependent on the existence of fault. On the other hand, with regard to the procedural strategies of defence used by Member States, the Court has not deemed the following justifications to be admissible:

- difficulties in the national legislative procedure in respect of the abolition of a tax incompatible with Community rules[63];
- difficulties in approving or altering legislation[64];
- difficulties in the actual implementation of a directive owing to a change of government[65];
- alleged infringement by another Member State as grounds for non-compliance by the State against which the action is brought[66];
- alleged illegality of the Community measure the breach of which is in question, provided that, constituting a decided case, it shall not have been contested at the proper time by the State invoking the illegality[67] (such illegality could only be invoked and upheld if the act

62 Case 31/69 *Commission vs. Italy* [1970] ECR 25.
63 Case 48/71 *Commission vs. Italy* [1972] ECR 527.
64 Cases 322/82 *Commission vs. France* [1983] ECR 3689 and 77/69 *Commission vs. Belgium* [1970] ECR 237.
65 Case 136/81 *Commission vs. Italy* [1982] ECR 3547.
66 Case 232/78 *Commission vs. France* [1979] ECR 2729.
67 Cases 156/77 *Commission vs. Belgium* [1978] ECR 1881; 3/59 *Germany vs. High Authority*, Rec.[1960], p. 117 and 226/87 *Commission vs. Greece* [1988] ECR 3611.

involved particularly serious and evident faults that meant that it was qualified as a non-existent act[68]).

Given the binding nature of the judgments of the Court of Justice, the Member State at fault is obliged to execute the Court decision that confirms the infringement alleged by the Commission. Observance of this duty of execution implies the prompt and diligent adoption, at national level[69], of the measures required to re-establish legality. These measures may, depending on the cases, involve the revoking and/or amendment of internal legislation considered incompatible with Community law, or the adoption of national measures the omission of which violates the obligations imposed on the Member State in question by Community law.

IV. The new enforcement procedure of Article 228 of the EC Treaty: the application of financial sanctions to Member States

Until the Treaty of Maastricht came into force the EC Treaty did not provide any specific procedural mechanism designed to ensure compliance by Member States with their duty of executing the ECJ judgments finding a breach of the Treaty by the Member States. It could be said that the system was based on the assumption of diligent, timely execution of judicial decisions by Member States.

Reality was, however, to show that matters were often dealt with quite differently. Unwarranted delay in the adoption of the measures required to restore legality led the Commission (in the absence of other mechanisms of reacting) to take the initiative, in several specific cases, of bringing further infringement actions for the breach of the obligation of executing the earlier judicial decisions.

Nevertheless, without prejudice to the pressure brought to bear by public censure linked to the finding of breach of the duty of executing a court decision, the truth is that the rules of the Treaty did not envisage the possibility of adopting measures of enforcement with regard to the State at fault. As said earlier, the situation changed only with the Treaty of Maastricht.

In effect, Paragraph 2 of Article 228, of the EC Treaty now stipulates that, should the Commission consider that a Member State has not adopted the measures necessary to the execution of a judgment handed down by the Court of Justice, it may, in addition to being entitled to bring further infringement action against the State in question, apply to the Court of Justice during the court proceedings stage of the case to impose on the State a sanction of a financial nature, of a fixed or variable amount depending on the circumstances of each concrete case.

In the absence of precise orientation in the Treaty with regard to the determination of the sanctions to which Article 228 refers, the Commission decided – rightly so – for reasons of legal security, to explain the criteria by which it is governed in lodging applications for the imposition of sanctions for appraisal by the Court of Justice.

The criteria are set out in two communications[70], whereby the Commission explained the parameters that it takes into consideration for the purpose of calculating the value of the sanctions that it requests the Court of Justice to apply:

- seriousness of the infringement;
- consequences of the infringement as far as general and individual interests are concerned;

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68 Case 15/85 *Consorzio Cooperative d'Abruzzo* [1987] ECR 1005.

69 Case C-291/93 *Commission vs. Italy* [1994] ECR I-859.

70 Communication 96/C 242/07, "Communication on the application of Article 171 of the EC Treaty", OJ C242/6, of 21/8/1996, complemented by Communication 97/C 63/02, "Method of Calculation of the Compulsory Pecuniary Sanction envisaged in Article 171 of the EC Treaty" OJ C63/2, of 28/2/1997.

- duration of the infringement; and
- payment capability of the Member State in question.

The financial sanctions are applied by virtue of the judgments handed down by the Court of Justice pursuant to the terms of Article 228, Paragraph 2, of the EC Treaty; in cases of variable sanctions (up to the time the non-compliance ceases), the application of the sanction ceases only when the Member State complies fully with the duty of executing the court decision the non-execution of which is at stake.

Without prejudice to the innovative nature of Article 228, Paragraph 2, referred to above, it should be noted that the Treaty is omissive with regard to the conditions of execution of the judgments imposing sanctions in those cases in which the Member States do not spontaneously pay the sanctions to which they have been condemned by the Court of Justice. Recourse to national execution procedures, as established in national procedural law, seems to be excluded by virtue of the conjunction of the provisions of Article 244, with Article 256, Paragraph 1, and for this reason the question is raised of ascertaining whether Community law contains mechanisms allowing this situation to be dealt with.

In the absence of specific rules, the only apparent alternative, at present, would appear to be for the Commission to bring a new infringement action, the object, this time, being the finding of non-compliance with the duty of execution of the ECJ judgment imposing the sanction. But the truth is that the merely declarative nature of the judgment finding this non-compliance does not allow the problem to be truly solved. Thus, while these introductory remarks are not the right place to go into the issue in greater depth, the question that I put to you for consideration is that of ascertaining whether, in a situation such as the one described, it would not be admissible for the Commission to lodge an application with the Court of Justice on the grounds of Article 243 for the adoption of an interim measure whereby the Court would authorise the Commission to withhold the transfer from the Community budget to the national budget of sums corresponding to credits of the Member State at fault, up to the limit of the unpaid sanction and up to such time as it is actually paid. This is still an unanswered question that is surely worth pondering.

The first case of a financial sanction imposed on a Member State on the grounds of Article 228, Paragraph 2, of the EC Treaty took place during 2000 in a case brought by the European Commission against the Hellenic Republic[71], for non-execution of a prior judgment of the Court of Justice in the field of environmental policy[72]. On the basis of the foregoing criteria the Commission applied to the Court of Justice to impose a daily fine of € 24,000, the Court having levied a compulsory fine of € 20,000 for each day's delay in the adoption of the measures necessary to comply with the judgment.

Despite these shortcomings, too much emphasis cannot be given to the importance of the mechanism of Article 228, Paragraph 2, to ensure actual compliance with the decisions of the Court and to what it represents in the evolution of Community law as the expression of the will of Member States directed at the creation of a system of relations between sovereign States based primarily on the supremacy of law.

V. Interim measures in the framework of infringement actions against Member States

Despite the doubts initially raised in respect of the scope of the competences of the Court of Justice in the field of infringement action – especially with regard to the possibility, in interim

71 Case C-240/98 *Commission vs. Greece* [2000] ECR I-5047.
72 Case C-45/91 *Commission vs. Greece* [1992] ECR I-2509.

measures, of the Court ordering States to adopt a given behaviour when, in the final decision, their competence is restricted to a judicial declaration of non-compliance – it is now clear that the Commission may apply to the Court for the imposition of interim measures under the terms of Article 243 of the EC Treaty and of Article 83 of the ECJ Rules of Procedure[73] within the scope of an infringement action.

By way of example, I would call to mind the *Commission vs. United Kingdom*[74] case in which, by ruling of the President of the Court of Justice[75], interim measures were applied the object of which was the suspension of Article 14.1, Indents a) to c), in conjunction with Paragraphs 2 and 7 of the said article of the Merchant Shipping Act 1988.

The adoption of interim measures can be of particular importance when their approval constitutes the sole mechanism of preventing an irreversible breach of Community law by a Member State. Consider, for example, the award and execution of a public works contract under conditions that violate applicable Community rules.

For the application for the adoption of interim measures to go ahead, case law stipulates that the following requirements be met:

- *fumus boni juris*;
- serious, irreparable loss;
- adequacy of the intended remedy; and
- ponderation of all interests at stake, especially the interest of the Community vis-à-vis the interest of the Member State.

The ruling of the President of the Court of Justice regarding interim measures may be given, in cases of exceptional urgency, before the Member State shall have expressed its views; the ruling may later be modified or revoked and its effect ceases when the final decision is taken.

VI. Remedies before national courts and references for preliminary rulings

Without prejudice to the importance of the remedies just referred to, particularly with regard to infringement actions, we have seen that the direct effect and the supremacy of Community law render national courts – as regards those cases in which the breach of Community law can be attributed to the Member States – central parts of the system of remedies to which private parties can have access.

In fact, conflicts opposing private parties to national authorities involving the application of Community rules are settled by the courts of Member States in accordance with national procedural rules. In this context, national courts are called upon to interpret and to apply Community provisions, controlling the conformity of national law with Community law.

To avoid the risk of rupture of the unity of the Community legal system as a result of divergent interpretations of Community rules by the Member States' courts, the EC Treaty instituted the mechanism of referral for preliminary ruling, which is governed by Article 234. In the absence of relations of hierarchic subordination between national courts and the Court of Justice, this referral is the procedural mechanism that allows the establishment of the necessary articulation between both jurisdictions.

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73 See Court of Justice of the European Communities Regulation of June 19th 1991, OJ L 176 of 4/7/1991, p. 7, with amendments, OJ L 383 of 29/12/1992, p. 117, with alterations dated February 21st 1995, published in the OJ L 44 of 28/02/1995, p. 61, of March 11th 1997, published in the OJ L 103 of 19/4/1997, p. 1, with amendments, OJ L 351 of 23/12/1997, p. 72, of May 18th 2000, published in the OJ L 122 of 24/5/2000, p. 43, and of November 28th 2000, published in the OJ L 322 of 19/12/2000, p. 1.

74 Case C-246/89 *Commission vs. United Kingdom* [1991] ECR I-4585.

75 Case C-246/89R *Commission vs. United Kingdom* [1989] ECR 3124.

In accordance with Paragraph 2 of Article 234, national courts[76] are entitled to submit to the Court of Justice for appraisal all questions connected with the interpretation of Community law (primary and secondary) considered relevant to the judgment of litigation submitted to them for appraisal. Under the terms of Paragraph 3, if the question is raised by a national court against the decisions of which there is be no appeal, the referral of the question to the Court of Justice is mandatory.

The scope of the obligation of referral has been explained by case law, particularly by the *CILFIT* [77]judgment, under the terms of which, should the same legal question have been the object of interpretation by the Court of Justice, or if the Court has already expressed an opinion thereon, even though within the scope of other procedural mechanisms (such as an action for annulment or an infringement action), in terms such that the interpretation of the Community provision in question has been clarified, the national court is not bound to referral for a preliminary ruling – on condition, naturally, that it has due regard for the jurisprudential guidelines set out by the Court of Justice. In this same *CILFIT* judgment, the Court of Justice also admitted, though in very restricted terms, the ability to invoke the *acte claire* doctrine as a factor of exclusion of the obligation of referral.

The Court of Justice answers questions submitted to it for appraisal by national courts through interpretative judgments, which are binding on the *a quo* court. Furthermore, these judgments establish jurisprudential orientations for which the national courts in general (that is, all courts of all Member States) should have due regard, without prejudice to the faculty of resubmitting the same legal question to the Court of Justice for reappraisal, should they deem that this is desirable.

As a result – and without expressing an opinion as to the controversy regarding the interpretation of Article 234 Paragraph 3 – the objective of the regime provided in this article is to avoid the consolidation, in national law, of case law orientations in contradiction with the interpretation and application of Community law made by the Court of Justice, so as to ensure the consistency and coherence of Community law.

It should be noted that the Court of Justice is neither competent within the scope of Article 234 to interpret national law nor to expressly give its opinion on the compatibility of national law with Community law. Its competence is restricted to the interpretation of Community provisions. The truth is, however, that the Court of Justice, in its replies to the questions posed by national courts, takes into consideration the circumstances of each specific case. This often means that the replies that it gives to national judges concerning the interpretation of Community law implicitly (and some times quite explicitly) contain the reply to the question underlying the compatibility with Community law of the national provisions that are at stake in the case being heard by the court *a quo*.

Therefore, Article 234 – in addition to its relevance with regard to the interpretation of Community provisions – in practice, through articulation of the competences of national courts with the competence of the Court of Justice, is of the greatest importance for the purpose of controlling the compatibility of national law with Community law.

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76 Stems from established case law that the question of ascertaining whether the entity making the referral has the nature of a jurisdictional body, in the meaning of Article 234 of the EC Treaty, should be appraised solely in the light of Community law. And that, in appraising this question, the Court of Justice takes into account a number of elements, such as the legal origin of the body, its permanent nature, the binding nature of its jurisdiction, the adversary nature of the procedure, the application by the body in question of legal rules, and its independence (see, in particular, *Dorsch*, case C-54/96 [1997] ECR I-4961, § 23, and *Köllensperger & Atzwanger*, case C-103/97, p.I-551, § 17).

77 See, judgment of 6th October 1982, case 283/81[1982] ECR-3415.

1. Direct effect as a "sanction" vis-à-vis Member States

The importance to private parties of the mechanism of Article 234 is, moreover, clear to see if we take into consideration the fact that it was in response to referrals for preliminary ruling by courts of the Member States that the Court of Justice stated and clarified fundamental principles of Community law, such as the supremacy of Community law over national law or the direct effect of Community rules.

It was indeed within the scope of conflicts between private parties (companies in particular) and administrative authorities of the Member States that the question was raised of the ability to invoke the provisions of Community Law before national courts. And it was within the scope of the free movement of goods provisions that the problem began to be raised with regard to articles of the Treaty, such as (then) Article 12, which required Member States to comply with precise obligations within clearly defined time limits.

It was cases of non-compliance with such obligations, reflected in the adoption of internal measures contrary to the EC Treaty rules, that led the question of breach by national authorities of the duties imposed by Community Law to be raised before national courts, to the extent that such violation was negatively reflected in the legal sphere of private parties (e.g., preventing intra-Community trade or rendering it more expensive, in breach of the rules concerning free movement of goods).

Going beyond the internationalist perspective, in accordance with which, generally speaking, rules contained in treaties affect only relations between States, the Court of Justice recognised that the duties imposed on Member States by the EC Treaty (or by the acts adopted by the EU institutions on the basis thereof) could create rights in the sphere of private parties, and that the effective protection of these rights (and therefore of the actual effect – *effet utile* – of Community law) meant that the rules of Community law that were clear, precise and unconditional could be invoked before national courts.

According to the said case law, the Treaty created a new legal system (the subjects of which are not just the Member States but also their nationals), which is integrated into the legal systems of the Member States and is enforced by the Member States' courts.

For the Court of Justice, the safeguard of the effect of Community law means that the States, when they infringe their duties under Community law, cannot deny private parties the exercise of the rights that are granted to them by Community provisions.

Under the circumstances that I have just mentioned, the recognition of direct effect of Community rules, that is, the ability of private parties to invoke these rules before national courts (in conflicts against national authorities) "punishes" breaches of Community law by Member States, providing private parties with an effective mechanisms of protecting their rights.

2. The interplay between national courts and the ECJ in the framework of references for preliminary rulings on interpretation

According to the case law of the Court of Justice, national courts, which are in charge of the application of the provisions of Community law, within the scope of their competences, have the duty to ensure the full effect of said provisions and to enforce the rights granted to private parties[78].

In this context, as underlined above, the referral mechanism is essential for ensuring the coherence of the Community system, and we must clarify the manner in which the competences

78 Cases106/77 *Simmenthal*, see above, note 4, and C-213/89 *R. vs. Secretary of State for Transport* (Factortame I) [1990] ECR I-2433, [1990] 3 CMLR 1.

of the Court of Justice articulate with those of national courts. The Court of Justice, within the framework of Article 234, is not competent to interpret the law of the Member States[79].

Where the questions submitted by national judges involve interpretation of a provision of Community law, the duty of the Court of Justice is, in principle, to decide[80]. However, national judges must explain the reasons for which a reply to the questions is relevant to the solution of the conflict[81]. The spirit of co-operation that should preside over the referral for preliminary ruling also implies that national judges must take into account the mission entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States, and not to provide opinions on general or hypothetical questions[82].

It is in keeping with this mission that the Court of Justice considers that it cannot express an opinion in certain circumstances, namely when it is asked to interpret acts not yet adopted by Community institutions[83], when the case before the referring judge has ended[84], or when the question of interpretation raised by the national court has no relation with the object of the conflict in the principal case[85]. If the Court concludes that the question is not manifestly pertinent to the solution of the case, it will not express an opinion regarding the referrals for preliminary ruling[86]. The Court also reserves the right not to reply to a request for interpretation as a referral for a preliminary ruling in the event that the reference to the provisions to be interpreted is clearly wrong[87].

It should also be noted that the Court of Justice has agreed to withdraw a referral from the record of cases pending in the event that the national court that submitted it unequivocally declares that it wishes to withdraw it[88]. On the other hand, the Court of Justice withdraws a case from the records on taking cognigance of the fact that a higher jurisdictional body of the Member State, deciding in an appeal, has cancelled the ruling proffered by the lower court that referred the question for a preliminary ruling[89].

In conclusion, it should be borne in mind at all times that the procedure envisaged in Article 234 is an instrument of co-operation between the Court of Justice and national courts[90]. The fact is that the national judge, who has direct knowledge of the facts of the case, is the entity that is in the best position to judge whether, prior to taking his own decision, a reply is required to a referral on the interpretation of Community Law[91]. For the Court of Justice to be able to provide a completely useful reply, national judges must, prior to making use of the referral mechanism, decide as to the matter of fact and solve those problems that are raised within the strict scope of the interpretation and application of national law[92].

79 Case 24/64 *Dingemans* [1964] ECR 647.
80 Case C-231/89 *Gmurzynska vs. Oberfinanzdirektion Köln* [1990] ECR I-4003.
81 Case 244/80 *Foglia vs. Novello* [1981] ECR 3045.
82 Case 149/82 *Robards* [1983] ECR 171.
83 Case 93/78 *Mattheus vs. Duego* [1978] ECR 2203.
84 Case 338/85 *Pardini* [1988] ECR 2041.
85 Case 126/80 *Salonia* [1981] ECR 1563.
86 Case C-343/90 *Lourenço Dias vs. Director of the Oporto Customs* [1992] ECR I-4673.
87 Case 13/68 *Salgoil vs. Italian Ministry for Foreign Trade* [1973] ECR 453.
88 Case 127/73 *BRT/SABAM* [1974] ECR 51.
89 Case 821/79 *Benyahia*.
90 Cases 16/65 *Schwarze* [1965] ECR 877 and C-147/91 *Ferrer Laderer* [1992] ECR I-4097.
91 Case 83/78 *Pigs Marketing Board [1978] ECR 2347*, and Case C-186/90 *Durighello* [1991] I-5773.
92 Case 36/80 (and addendum 71/80) *Irish Creamery Suppliers Association* [1981] ECR 735.

3. The competence of national courts to adopt interim measures in the framework of references for preliminary rulings on interpretation

Still in connection with the competences of national courts concerning the referral for preliminary rulings established in Article 234, the question has been raised of ascertaining whether the courts of the Member States are competent to approve interim measures – particularly for the purpose of suspending the execution of national legal acts for alleged breach of Community rules – pending the reply of the Court of Justice to referrals for interpretation.

The question that is specifically raised is to ascertain whether, within the scope of legal action being heard by a national court and pending the reply to the referral by the Court of Justice, the judge of the case may temporarily suspend the execution of national acts that he/she may *prima facie* deem to be contrary to Community law, even if the national procedural rules do not envisage the possibility of the adoption of interim measures.

In *Factortame*[93] – in which it was called upon by the House of Lords in respect of the very interpretation of Article 234 of the EC Treaty itself – the Court of Justice gave an affirmative reply to this question, having considered that the system instituted by the said Article 234 would be called into question if the national jurisdictional body, on suspending the proceedings until receiving a reply from the Court of Justice to the referral for a preliminary ruling considered necessary to be able to take a decision, could not ensure the effectiveness of Community law by adopting interim measures until such time as it were in a position to give its final judgment.

The Court of Justice thus considers that, regardless of the provisions of national procedural law, the national judge is competent, on the grounds of Article 234 of the EC Treaty itself, to approve interim measures pending the replies to the referrals for preliminary ruling.

The solution thus adopted takes into consideration, on the one hand, that clarification of doubts raised as to the interpretation of Community law is the sole competence of the Court of Justice and, on the other, that the interpretation and application of national law is the competence of national courts, the latter – based on the orientations established by the Court of Justice – being charged with deciding as to the compatibility of national law with Community rules in those cases submitted to them for judgment.

Taking these premisses into consideration, the application of the principles of direct effect and of supremacy of Community law over national law, in conjunction with the principle of loyal co-operation, the latter established in Article 10 of the EC Treaty, means that the national judge must set aside the application of national provisions (including those of a legislative nature) that prevent the effectiveness of Community law[94], even through the approval of interim measures, provided, naturally, that the respective assumptions have been met (*fumus boni juris*, *periculum in mora*, and ponderation of the interests at stake).

Otherwise, the effectiveness (*effet utile*) of Community Law, especially the effectiveness of the rights that it grants to private parties, would be called into question and would be left without effective protection during the period between the referral to the Court of Justice for interpretation by the national court and the final decision taken by the Court in the case brought before it for judgment.

93 See above, note 78.

94 Case 106/77 *Simmenthal*, see above, note 4.

VII. Liability of Member States for damages to private parties caused by breach of Community law

To conclude my comments, I would like to recall the central theme of this publication concerning the liability of Member States for damages to private parties caused by breach of Community law. I will restrict myself to a few comments since the issue will be gone into in depth in other constributions.

The problem is particularly acute in those cases in which a breach of Community Law is attributable to a Member State but in which the direct effect of Community rules cannot be invoked before national courts by the parties injured.

This could come about for reasons of at least two kinds: either because (i), although it is designed to grant rights to private parties, the Community rule at stake is not clear, precise and unconditional and, consequently, requires the adoption of execution measures at national level to render the said rights operational (and the State either does not adopt such measures or adopts measures incompatible with the Community regime), or (ii) because the question is posed, within the framework of private relations, in relation to the violation of rights contained in the rules of directives not yet transposed. The truth is that the case law of the Court of Justice refuses recognition of horizontal direct effect of such rules (that is, it does not accept that the rules of directives not transposed may be applied directly to relations between private parties).

On the other hand, there are cases in which, notwithstanding the direct effect of Community rules, the ability to invoke these rules before the national courts does not, by itself, allow reparation of damage that has already been caused.

In such cases, the question is one of ascertaining whether, and under what conditions, reparation can be obtained for damages caused by breach of Community law by the State.

The issue of the State's non-contractual liability for damages resulting from breach of Community law is therefore raised.

1. Recognition of the principle of State liability for breaches of Community law in the ECJ case law

In this context one should underline, in the first place, the fact that the principle of the liability of Member States for damages arising from a breach of Community law is not expressly enshrined in the EC Treaty. Its affirmation within the scope of Community law stems from the case law of the Court of Justice.

This case law is based on the recognition of a general principle of liability of public powers (within certain limits and under certain conditions) for damages that may be caused to private parties by their actions. One can see the application of this general principle, at national level, in the mechanisms concerning the non-contractual liability of the State and other public entities and, at Community level, in the regime of the Community's liability enshrined in Articles 235 and 288 of the EC Treaty.

Recognition of the State's liability for damages arising from a breach of Community law stems, in terms of reasoning, from the general principle just referred to, that is, the principle of the liability of public powers for damages that their action may cause to private parties. It would be hard to understand that recognition be given to the State's liability for damages that could be caused by breach of rules and principles of national law and to the Community's liability for damages that could be caused by breach of rules and principles of Community

law, but that the State's liability for damages that could be caused by breach of rules and principles of Community law was not recognised.

It would not be compatible with the notion of a Community of Law (nor with the notion of Rule of Law that underpins it) that the Member States and the Community were liable, respectively, for breach of national law and for breach of Community law, but that Member States were not answerable for damages caused by their actions in violation of the obligations imposed on them by Community law. And this is true both in cases of positive measures, such as the approval and execution of national legislation that does not have due regard for Community law, and in cases of omission, such as non-transposal of directives designed to grant rights to private parties.

In addition to the systemic relation that exists, at the level of principles, between the recognition of the State's liability for breach of national law, the recognition of the Community's liability for breach of Community law and the recognition of the State's liability for breach of Community law, there is also the question of unity of Community law with regard to the definition of the conditions and criteria to which recognition of the obligation to grant damages is submitted when what is at stake is damages arising from breach of Community law. The referral to the law of the Member States with regard to the definition of such conditions and criteria would inevitably lead to disparate solutions that would affect the coherence of Community law.

For this reason, the Court of Justice sought to define, within the scope of Community law, a coherent set of criteria and conditions for the specific purpose of application of the principle of the liability of Member States for damages resulting from breach of Community law. For that purpose, it took its inspiration from its own case law regarding the Community's non-contractual liability when what is at stake is damages stemming from acts or omissions that can be attributed to its institutions or agents.

The path has been a long one and only recently, during the closing decade of the 20th century, starting with *Francovich*[95], did the Court of Justice announce with a certain precision the said criteria and conditions. In addition to an analysis of the evolution of case law and of the systematisation of the guidelines arising therefrom, one must ponder, on evoking the tenth anniversary of *Francovich*, whether the solutions adopted are satisfactory and whether the system is operational. That is, whether, in addition to the abstract proclamation of the principles, of itself of the utmost importance, the concrete conditions (substantive and procedural) governing the exercise of the rights recognised as far as private parties are concerned ensure effective protection.

It should be recalled that, in the early sixties, in the *Humblet* judgment[96], an orientation was established whereby whenever the Court of Justice found that a legislative or administrative act adopted by the authorities of a Member State was incompatible with Community law, the State in question would be bound not only to withdraw the measure in question but also to make good such illegal effects as may have been caused.

2. Conditions and criteria governing the application of the principle of State liability for breaches of Community law

Without prejudice to this general orientation, it was only at the beginning of the nineties that case law was to expressly accommodate the principle of the State's liability for breach of Community law under the terms created by the said *Francovich* judgment. In this judgment,

95 Cases C-6/90 and C-9/90 *Andrea Francovich and Bonifaci vs. Republic of Italy* [1991] ECR I-5357.
96 Case 6/60 *Humblet vs. Belgium* [1960] ECR 559.

the Court recognised that the full effectiveness of Community rules would be called into question and the protection of the rights recognised by these rules would be weakened if private parties were not able to obtain reparation in the event of injury of their rights as a result of breach of Community law by a Member State.

Based on the *Francovich* case law, the Court of Justice defined in subsequent judgments, particularly in *Brasserie du Pêcheur*, the conditions governing recognition of the liability of the member States in the event of a breach of Community law. These conditions are as follows: (i) that the legal rule that is breached should grant rights to individuals; (ii) that the breach of the Community rule should be sufficiently well characterised; and (iii) that there should be a relation of cause and effect between the violation of the State's obligation and the damage suffered by the injured person.

The quantum of the indemnity, in turn, must be proportional to the damage suffered, that is, it must be able to ensure effective protection of the rights of the injured persons. The appraisal of all these conditions by the national judge must take into account all the specific circumstances of each specific case[97]. It should therefore be emphasised that the Court has already admitted that retroactive application, in national law, of the measures of execution the omission of which was at stake, should be sufficient to ensure adequate reparation, unless the injured parties demonstrate the existence of complementary losses suffered by them as a result of being unable to benefit in a timely manner from the pecuniary advantages granted by the directive, for which reparation should also be made.[98]

The second requirement – that the breach of the Community rule should be sufficiently well characterised – was explained in greater detail in *Brasserie du Pêcheur*[99], in which the Court considered that the condition was met in the event of clear and serious violation of the limits imposed on the power of appraisal of the Member State in question.

In a later judgment[100], the Court of Justice nevertheless admitted that the simple breach of a Community rule could constitute a "sufficiently characterised violation" in the sense referred to above, provided that the Member State in question did not have, at the time of the infringement, sufficient discretionary room for manoeuvre or had only little scope for appraisal. Nevertheless, the private party should adopt every measure within its grasp to avoid the loss or to limit it, including recourse to those mechanisms of internal law at its disposal.

In the event of the three conditions mentioned above being met, the private party is entitled to secure reparation for the loss caused, based directly on Community law.

It should be noted, however, that to ensure this right one must resort to national procedural mechanisms, and the courts of the Member States must ensure due regard for two "minimum" conditions: that in the matter of reparation of damages caused by breach of Community law the national legal mechanisms are no less favourable than in case of reparation of damage caused by breach of national law (principle of equivalence) and that national procedural mechanisms are not organised in a manner such that they render reparation either practically impossible or excessively difficult (principle of effectiveness).[101]

Within these very broad limits, various solutions are established in the various systems of national law with regard to the procedural regimes applicable in the field of non-contractual

97 Cases T-178/94, T-179/94, T-188/94, T-189/94 and T-190/94 *Dillenkofer et al* [1996] ECR I-4845, § 20.

98 Cases C-94/95 and C-95/95 *Bonifaci & Berto vs. Instituo Nazionale della Previdenzia Sociale* [1997] ECR I-3969, § 53 and C-373/95 *Maso & Gazetta vs. IPNS* [1997] I-4051 § 41.

99 Cases C-46/93 *Brasserie du Pêcheur SA vs. Federal Republic of Germany* and C-48/93 *R. vs. Secretary of State Transport* ex parte *Factortame Ltd et al.* (Factortame III) [1996] ECR 1029, [1996] 1 CMLR 889.

100 Case C-5/94 *R. vs. Ministry of Agriculture, Fisheries and Food*, ex parte *Hedley Lomas* [1996] ECR I-2553, § 28.

101 Case C-261/95 *Palmisani vs. INPS* [1997] ECR I-4025, § 27.

liability of public entities. This disparity of regimes, while understandable in the light of the differing historical evolution of national legal systems, poses the challenge of the future construction of a minimum standard that will grant substantially similar remedies to all citizens of the Union as far as the behaviour of the various Member States is concerned.