Marc Jaeger, Are the various judicial remedies interconnected?

Caption: Marc Jaeger, a judge at the Court of First Instance since 11 July 1996, examines how different paths for appeal within Community litigation interrelate. His analysis leads him to two conclusions: the pre-eminence of proceedings for annulment, and the autonomy of proceedings for damages, in relation to all the other paths of appeal.

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Are the various judicial remedies interconnected?

Marc Jaeger

Effective judicial control of contested Community acts is one of the essential guarantees of Community law. It reflects a general principle of law enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and in the constitutional traditions common to the Member States (1). The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether measures adopted by them are in conformity with the Treaty (2).

The EC Treaty was therefore intended to establish a complete system of judicial protection against acts of Community institutions which are capable of having legal effects (3). That protection is provided both by the national courts, that is courts of general jurisdiction in respect of Community law, and by the Community judicature, that is the Court of Justice and the Court of First Instance, which holds only conferred powers in this connection.

The EC Treaty provides for three kinds of procedure for judicial review.

The first, reference for a preliminary ruling on interpretation or validity under Article 177 of the Treaty, institutionalises cooperation between the national courts and the Court of Justice. National courts hearing a case which raises doubts as to the interpretation of a provision of the Treaty, or the interpretation and validity of an act of the Community institutions or of the European Central Bank may — or must, where such a question is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law — bring the matter before the Court of Justice under Article 177 of the Treaty so that it may give a ruling thereon.

The second, direct action brought before the Court of Justice by the Member States, the Community institutions or the European Central Bank or before the Court of First Instance by natural or legal persons, includes proceedings for annulment under Article 173 of the Treaty, proceedings for failure to act under Article 175 of the Treaty, actions for damages under Article 178 and the first and second paragraphs of Article 215 of the Treaty, and proceedings for failure to fulfil an obligation under Articles 169 and 170 of the Treaty (4).

Proceedings for annulment: under Article 173 of the Treaty, the Court of Justice has jurisdiction to rule on actions for annulment brought by a Member State, the Council or the Commission against acts adopted jointly by the European Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament intended to produce legal effects vis-à-vis third parties, and under the same conditions to rule on actions brought by the European Parliament and by the European Central Bank for the purpose of protecting their prerogatives. The Court of First Instance has jurisdiction under Article 168a of the Treaty to rule, subject to a right of appeal to the Court of Justice, on actions for annulment brought under the fourth paragraph of Article 173 of the Treaty by a natural or legal person against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Proceedings for failure to act: under Article 175 of the Treaty, the Member States, the Community institutions and the European Central Bank may bring an action before the Court of Justice seeking a declaration that the European Parliament, the Council, the Commission or the European Central Bank has, in infringement of the Treaty, failed to act. Under Article 168a, any natural or legal person may bring an action before the Court of First Instance in accordance with the third paragraph of Article 175.

Actions for damages: under Article 168a, an action may be brought before the Court of First Instance in accordance with Article 178 and the second and third paragraphs of Article 215 seeking an order, in the case of non-contractual liability, that the Community make good any damage caused by its institutions or by its servants, or by the European Central Bank or by its servants, in the performance of their duties.

Proceedings for failure to fulfil an obligation: under Articles 169 and 170 of the Treaty, the Court of Justice has jurisdiction to rule on an action brought by the Commission or by a Member State seeking a declaration that a Member State has failed to fulfil an obligation under the Treaty.

The third kind of procedure is the objection of illegality provided for in Article 184 of the Treaty. Under that provision, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the European Central Bank is at issue, plead the grounds specified in the second paragraph of Article 173 in order to invoke before the Court of Justice or the Court of First Instance the inapplicability of that regulation.

These judicial remedies are, in principle, independent of one another. However, that independence is more apparent than real. There are, in some cases, many and complex links between them. The purpose of this paper is to review some of these links. A brief survey will establish, first, the pre-eminent position occupied by proceedings for annulment compared with the other forms of action. This is clear from the fact that the admissibility of most actions depends on the answer to a preliminary question which, in brief, is this: could the applicant have brought an action for annulment of the act at issue in the case? If so, the action will be declared inadmissible. The admissibility of the action which has been brought therefore depends on the admissibility of a hypothetical action for annulment which the applicant could, in some cases, have brought against the act at issue. The admissibility of this hypothetical action for annulment therefore determines the admissibility of the real action. This applies equally to references for a preliminary ruling on validity, objections of illegality, and proceedings for failure to fulfil an obligation or failure to act (I).

The second point to be addressed is the real independence of actions for damages. They are clearly independent of all other forms of action, be it proceedings for annulment, proceedings for failure to act, proceedings for failure to fulfil an obligation, reference for a preliminary ruling on validity or an objection of illegality. This independence is justified by the need to ensure that the general system of legal remedies is effective (II).

I. The admissibility of a hypothetical action for annulment determines the admissibility of a real action

The inadmissibility of a hypothetical action for annulment is a prerequisite for the admissibility of a reference for a preliminary ruling on validity (A), an objection of illegality (B), proceedings for failure to fulfil an obligation (C) and proceedings for failure to act (D).

A. Reference for a preliminary ruling on validity

It is settled case-law that a decision which has not been challenged by the addressee within the time limit laid down in the fifth paragraph of Article 173 of the Treaty, that is to say within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be, shall become definitive as against him (5) and may no longer be challenged by him in the context of a reference for a preliminary ruling on validity.

Does this apply equally to Community acts other than a decision which is of direct and individual concern to a person? In this connection, it should be pointed out that, in the case of Community directives whose contested provisions are addressed in general terms to Member States and not to natural or legal persons, it is not obvious that an action brought about by a natural or legal person challenging those provisions under Article 173 of the Treaty would have been admissible (6).

It would, in principle, be conceivable for any natural or legal person who is concerned to protect his rights against a Community act which affects him to be free to choose either to bring an action for the annulment of that Community act or, through an objection of illegality, to request a reference for a preliminary ruling on validity as a defence against a national measure enforcing or transposing that Community act. In practice, it is highly likely that he would, in most cases, opt for a reference for a preliminary ruling on validity. In that

procedure, unlike an action for annulment, there is no obligation to challenge the validity of the act within the time limit of two months laid down in the fifth paragraph of Article 173 of the Treaty or, in the case of natural or legal persons, to prove that the act is of direct and individual concern to them. It is true that the national courts may not themselves declare that Community acts are invalid but must, to that end, refer a question to the Court of Justice for a preliminary ruling on validity (7). They may nevertheless order suspension of enforcement (8) and other interim measures (9). This option therefore has real advantages.

The Court held in its judgment in *Universität Hamburg* (10) that, according to a general principle of law which finds its expression in Article 184 of the Treaty, in proceedings brought under national law against the rejection of his application, the applicant must be able to plead the illegality of the Community act on which the national decision adopted in his regard is based, even though he failed to challenge that Community act directly in the Court of Justice. The Court was at pains to point out that the act of enforcement was the only measure which was directly addressed to the applicant, of which it had necessarily been informed in good time and which it might challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings. The Court added that that statement was sufficient to provide an answer without there being any need to consider the wider issue of the general relationship between Articles 173 and 177 of the Treaty (judgment in *Universität Hamburg*, cited above).

That judgment raises the wider question as to whether the general principle of an objection of illegality might not establish a right to incidental and objective review of the legality of a Community act whenever the effects of that act can be measured only after the expiry of the period of two months in which an action for annulment may be brought. It may be difficult, on the one hand, to measure immediately any adverse effects that a Community act may have and, on the other, in the case of a natural or legal person, to determine whether an action for annulment brought against such an act is admissible if the act is not a decision formally addressed to that person but a measure taken in the form of a regulation and, therefore, whether the act is of direct and individual concern to the person concerned. On the general legal principle of the right to raise an objection of illegality, litigants should be free to choose between challenging the Community act in proceedings for annulment and challenging the national measure enforcing that act with a request for a reference for a preliminary ruling on validity.

In fact, however, that choice is not as open as a cursory reading of the above-mentioned judgment might suggest. Another general principle, the principle of legal certainty, precludes a natural or legal person from pleading before a national court the illegality of a Community act it has failed to challenge before the Court of Justice within the prescribed time limit. Once the period of two months laid down in the fifth paragraph of Article 173 of the Treaty for instituting proceedings has expired, the Community act against which the person concerned could have brought an action for annulment becomes definitive vis-à-vis that person. Thereafter, the validity of that act can no longer be challenged by that person through an objection of illegality in proceedings before a national court. Thus, the Court has held that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93(2) of the Treaty declaring that aid to be unlawful, who could have challenged that decision and who allowed the mandatory time limit laid down in this regard by the fifth paragraph of Article 173 of the Treaty to expire, to call into question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision (11). The alternative remedy of raising an objection of illegality does not, therefore, circumvent the prescribed time limit of two months. The hypothetical case determines the real one.

Based as it is on the concern for legal certainty, this answer to the question of freedom to choose between bringing an action and raising an objection of illegality does not conflict with the judgment in *Universität Hamburg*, cited above, in which the Court took into account, on the one hand, the fact that the national authority's refusal of an application from an individual based on a provision of Community law was the only measure directly addressed to the person concerned, of which it had necessarily been informed in good time and which it might challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings and, on the other, the fact that that individual was precluded from bring a direct action, under Article 173, against the relevant provision of Community law on the basis of which its application had been refused by a measure of a national authority (12). Nor is that answer on the question of

principle inconsistent with the Court's judgment in *Rau* (13), inasmuch as, in that case, the objection of illegality of the Community act was raised in the national court at a time when the litigants had brought an action for annulment (14) under Article 173 within the prescribed time limit of two months. The Community act was not, therefore, definitive vis-à-vis the applicants at the time when they contested its legality before the national court. Similar considerations apply to the Court's judgment in *Atlanta II* (15). In that case, the Community act alleged to be unlawful, a Council regulation, was not yet definitive because an action for annulment was pending before the Court at the time when the applicants, who were legal persons, requested a reference for a preliminary ruling on validity. In those circumstances, the national court could reasonably have doubts as to the validity of the regulation at issue and refer a question on the subject to the Court of Justice under Article 177.

This rule, precluding a litigant from continuing indefinitely to challenge the lawfulness of a Community act, through an objection of illegality, before the national courts, once it is established that he could have challenged the act by bringing an action for annulment before the Court of Justice within the time limit of two months laid down in the fifth paragraph of Article 173 of the Treaty, is justified by the concern to safeguard legal certainty. It is based on the fact that the Community act is definitive and may therefore be enforced against a litigant who could have challenged it in proceedings for annulment but who has allowed the prescribed period of two months to expire. It is consequently necessary to avoid giving the litigant an opportunity to circumvent the fact that the Community act is definitive in his regard by allowing him to plead that it is unlawful, as a defence against a national implementing measure, before a national court.

It may, however, be objected that the national court cannot decide, with certainty, that the Community act is definitive vis-à-vis the applicant without first ascertaining that he could have brought an action for annulment in good time and that he has not done so. That court will thus have to determine the admissibility of a hypothetical action for annulment. This will require it to assess matters of some delicacy, in particular whether the applicant was, or should have been, aware of the existence of the Community act and the fact that it was, or might eventually be, of direct and individual concern to him. While it is relatively easy to determine whether the Community act is of direct and individual concern to the applicant in cases where the act is addressed to the applicant or to a third party who has informed the applicant of its existence, it is difficult to determine in cases where the act was notified in an official publication.

Thus, litigants who request a reference for a preliminary ruling on validity as a plea in the context of proceedings brought before a national court run the risk that their request may be time-barred under the fifth paragraph of Article 173. To guard against that risk, litigants are theoretically obliged to scrutinise every Community act upon publication thereof for provisions which might later adversely affect them and decide whether to bring an action for annulment of the provisions in question, as a precaution (16). Moreover, the procedural structure of proceedings for annulment, which allows scrupulous examination of matters of fact and of law, may provide a more appropriate framework for a review of legality than the Article 177 procedure, where the facts are those submitted in the decision to refer the case.

Furthermore, the objective system of reference for a preliminary ruling on validity, an instrument available to the national court for securing a review of the legality of Community acts, is affected by fact that the national court must take account of the rights conferred on the applicant as an individual which he could and should have asserted by bringing an action for annulment. The fact that the national court cannot grant a request for a reference for a preliminary ruling because the applicant could undoubtedly have brought an action for annulment but failed to do so in good time may lead national supreme courts to repeat the review of Community acts, with particular regard to respect for fundamental rights, in cases where the objection of illegality refers to a right protected under the constitution.

Review of the legality of Community acts through proceedings for annulment appears therefore to take precedence over review through reference for a preliminary ruling on validity. The royal road for challenging the legality of a Community act is therefore to bring proceedings for annulment under Article 173 of the Treaty, either real proceedings in the form of a direct action before the Court of Justice or hypothetical proceedings in the form of an objection of illegality with a request for a reference for a preliminary ruling on validity raised in the national courts, which must then determine whether the party

which has made that request could have directly challenged the Community act at issue in the Court of Justice within the time limit of two months.

The primacy of proceedings for annulment over reference for a preliminary ruling on validity is qualified, however, if the Community act at issue is general in scope and its legality is challenged by a natural or legal person. In that case, the admissibility of proceedings for annulment, real or hypothetical, is subject to very strict conditions requiring proof that the act is of direct and individual concern to the litigant. That is where the reference for a preliminary ruling on validity fully justifies its fundamental purpose in the system for reviewing the legality of Community acts.

The admissibility of the reference for a preliminary ruling on validity therefore depends on the inadmissibility of the hypothetical action for annulment which the applicant could have considered bringing against the Community act the legality of which he is challenging. If that hypothetical action for annulment is admissible, the Community act can no longer be challenged in the national court once the period of two months for instituting proceedings has expired. Thus, the protection against any illegality in Community law afforded by the reference for a preliminary ruling on validity is restricted by considerations arising from the structure of the remedies available under Community law. However, any such restriction is not admitted when it is based on considerations arising from national law and not from Community law. Thus, the Court has held that Community law precludes application of a domestic procedural rule whose effect is to prevent the national court from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period (17). Domestic procedural law, unlike Community law, may not encroach upon the right or duty of the national court to refer a case to the Court of Justice for a preliminary ruling on validity.

B. Objection of illegality raised before the Court of Justice

The admissibility of an objection of illegality within the meaning of Article 184 of the Treaty also depends on the inadmissibility of a hypothetical action brought by the applicant for the annulment of the Community act at issue. The principle is that, just like Article 36 of the ECSC Treaty, Article 184 of the EC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (18), on the understanding that the objection of illegality must be ancillary to an admissible action in the main proceedings.

Once again, there appear to be two reasons for this principle. On the one hand, the need to provide a complete system of legal protection means that an individual must have an opportunity to defend himself against a measure by pleading that the acts which form the legal basis of that measure are unlawful. On the other hand, the requirement of legal certainty means that individuals who may bring an action under Article 173 must not be able to continue indefinitely to challenge Community acts which produce legal effects when they could have challenged those acts by bringing an action for annulment under Article 173 within the prescribed period of two months.

Like national courts when they receive a request for a reference for a preliminary ruling on validity, the Court of Justice, when it is faced with an objection of illegality in the course of proceedings, must first determine whether the litigant availing himself of the option to raise the objection of illegality was entitled to bring an action under Article 173 for the annulment of the act which he claims, in that objection, to be unlawful. In that context, the Member States and the institutions are not subject to the procedural requirement that the act must be of direct and individual concern to them and their right to contest the legality of the act is consequently examined more rigorously than the rights of applicants who are natural or legal persons. These privileged parties are in principle entitled to bring an action for annulment, with the result that their objection of illegality is usually found to be inadmissible. In that connection, they may be held to be at a disadvantage compared with applicants who are natural or legal persons.

The review of legality through an objection of illegality under Article 184 is therefore subordinate to the review of legality through proceedings for annulment, real or hypothetical, under Article 173 of the Treaty.

C. Proceedings for failure to fulfil an obligation

Here, too, the principle of legal certainty appears to explain why a Member State cannot properly plead the unlawfulness of a decision (19) or a directive (20) addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations by failing to implement the decision or to comply with the directive. The requirement of legal certainty is likewise a reason for refusing to allow the illegality of a regulation to be invoked as a defence in an action for failure to fulfil an obligation, even though the wording of Article 184 might not preclude it. The Community act could of necessity have been challenged in an action for annulment brought within the time limit of two months, since any Member State may, pursuant to the second paragraph of Article 173 of the Treaty, bring an action in the Court of Justice for the annulment of a Community act which is intended to have legal effects. Once that time limit has expired, the Community act becomes definitive and can no longer be challenged. Any derogation from that time-bar would call into question the legal meaning of Article 173.

These considerations are similar to the arguments for reviewing the admissibility of requests for a reference for a preliminary ruling on validity submitted in the national courts.

However, the primacy of proceedings for annulment over proceedings for failure to fulfil an obligation is mitigated in certain respects. Accordingly, a State which has failed to challenge the legality of a Community act on the basis of Article 173 of the Treaty is not entirely precluded from contesting the legality of that act in the context of proceedings against it for failure to fulfil an obligation.

It could do so, first of all, if there were a Treaty provision expressly permitting the Member State to plead illegality as a defence in an action for a declaration that it has failed to fulfil an obligation (21).

It could also do so if the decision at issue was vitiated by an irregularity of such manifest seriousness that it could not be tolerated by the Community legal order (22) or if the measure in question contained such particularly serious and manifest defects that it could be deemed non-existent (23).

It could do so, thirdly, if it was absolutely impossible for it to implement the decision properly (24).

These mitigations, where the real takes precedence over the hypothetical, appear to be explained by the various objectives pursued by Articles 173 and 175, on the one hand, and Articles 169 and 170, on the other. It may, however, appear paradoxical that failure to challenge a Community act in the Court of Justice in good time, under Article 173 of the Treaty, should necessarily mean that natural or legal persons may not subsequently raise an objection of illegality against that act, whereas a State accused of failing to fulfil an obligation may, in certain circumstances, plead that the act is unlawful despite its failure to challenge it earlier. This may appear to be even more paradoxical in that it may be difficult for natural or legal persons to determine with certainty in every case whether and until when they are entitled to bring a direct action for the annulment of a Community act, while the admissibility of actions for annulment brought by the Member States, as privileged applicants, raises none of these questions.

Proceedings for failure to fulfil an obligation also give rise, albeit indirectly, to another kind of hypothetical action for annulment. As the *ultima ratio* to enable the interests of the Community to prevail against the inertia and resistance of States, Articles 169 and 170 are designed to establish that a Member State has failed to fulfil its obligations and to redress the legal situation. The Commission, acting within the very wide discretion conferred on it under Article 169 of the Treaty (25), determines, where appropriate, whether there are grounds for initiating that procedure. If there are, it delivers a reasoned opinion with which the Member State concerned must comply within the period laid down by the Commission, otherwise the latter may bring the matter before the Court of Justice. A natural or legal person may have an interest in obtaining a declaration that a Member State has failed to fulfil its obligations and thus in seeing the Commission initiate

the Article 169 procedure. That person may consequently be tempted to address a request to that effect to the Commission. May that person also challenge a decision refusing its request, under Article 173 of the Treaty? The answer, provided in a substantial body of case-law, is that he may not (26). It is justified on the ground that the purpose of the request, which the natural or legal person has addressed to the Commission and which the Commission has refused, is to obtain a reasoned opinion under Article 169 of the Treaty inviting the Member State to comply with it within the period laid down and thus put an end to the failure to act which has been established. However, as the above-mentioned judgments point out, that opinion could not have formed the subject-matter of proceedings for annulment under Article 173 brought by the natural or legal person who requested it. On the one hand, the reasoned opinion is merely a preliminary stage following which an action may be brought for failure to fulfil an obligation. It is, therefore, only a preparatory act which does not itself produce legal effects and cannot therefore be the subject of an action for annulment. On the other hand, the reasoned opinion is in principle addressed to the Member State concerned and could not therefore be of direct and individual concern to the natural or legal person who requested it. Neither the serious nature of the alleged infringement and the allegedly individual character of the national measure that is held to be a failure by the Member State to fulfil one of its obligations under the Treaty, nor the fact that no effective legal remedies may be available through the national courts constitute elements capable of influencing the legal classification of the reasoned opinion (27).

The procedure is therefore to analyse the admissibility of a real action for annulment brought against a Commission decision refusing to initiate proceedings for failure to fulfil an obligation, by determining the admissibility of a hypothetical action for annulment, that is an action brought against a decision to accept the request, which has in fact been refused, and to initiate proceedings for failure to fulfil an obligation.

This reasoning has been applied to directives or decisions under Article 90 of the Treaty. The effect of hypothetical proceedings for annulment has been greatly mitigated in that provision. It opens an important breach in the principle that an individual may not bring an action for the annulment of a refusal by the Commission to exercise its powers in this area. In its judgment in *Bundesverband der Bilanzbuchhalter* v *Commission* (28), the Court held that the possibility cannot be ruled out that exceptional situations might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3). It should be noted that the Court had already ruled in *Netherlands and Others* v *Commission* (29) that an action for annulment brought by legal persons against a Commission decision addressed to the Netherlands, stating that national provisions were incompatible with Article 90(1) of the EC Treaty in particular, had been declared admissible.

The effect of a hypothetical action for annulment was finally ruled out in a neighbouring area in which the right to a review of legality appears to be fully restored. This was a question of competition in a case where a competitor lodged a complaint under Regulation No 17, in which the Commission failed to examine the alleged malpractices and deferred examination of them to a procedure for failure to fulfil an obligation which it proposed to initiate. However, in that procedure, unlike the procedure governed by Regulation No 17, the plaintiff has no specific rights. The Court of First Instance ruled that the applicants' action was admissible, on the ground that the Commission's decision had produced legal effects in that it affected the applicants' procedural rights and was therefore of direct and individual concern to them (30).

D. Proceedings for failure to act

In order to be fully effective, the system of remedies includes provisions whereby, on the one hand, the adoption of an unlawful act may be penalised through proceedings for annulment, a reference for a preliminary ruling on validity or an objection of illegality and, on the other, unlawfully refraining from exercising a power may be penalised through proceedings for failure to act.

Failure to act, understood as refraining from giving a ruling or taking a position and not in the sense of adopting a measure different from that which the persons concerned would have sought or have actually sought, is not easy to identify where it is a matter of discerning a manifestation of will in an unlawful

omission on the part of a Community institution. The absence of an explicit decision by the institution must be assessed in terms of the nature of the measure which the institution has the power to adopt but refrains from adopting.

Under the third paragraph of Article 175, any natural or legal person may bring an action for failure to act only where an institution of the Community has failed to address to that person any act other than a recommendation or an opinion, while, under the fourth paragraph of Article 173, any natural or legal person may institute proceedings for annulment against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. That difference in wording has been overridden by case-law. Since Articles 173 and 175 merely prescribe one and the same method of recourse (31), it follows that, just as the fourth paragraph of Article 173 allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 175 must be interpreted as also entitling them to bring an action for failure to act against an institution which, they claim, has failed to adopt a measure which would have concerned them in the same way. The possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act. Where the institution expressly refuses to act or adopts a measure different from that which the persons concerned sought or considered to be necessary, the Member State or the trader concerned may seek the annulment of that measure (32). A refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act (33). The admissibility of the action for failure to act depends upon the assessment of the admissibility of the hypothetical action for annulment which the applicant could legitimately have brought against the measure which the institution has failed to adopt.

The concept of a measure capable of giving rise to an action is identical in Articles 173 and 175 (34). In the context of the procedure for failure to fulfil an obligation, the only measures which the Commission may be induced to take are addressed to the Member States. It follows that natural or legal persons cannot invoke the third paragraph of Article 175 in order to seek a declaration that it has declined, in breach of the Treaty, to adopt a measure instituting proceedings against a Member State for failure to fulfil an obligation (35). The reasons for this are to be found, first, in the wide discretion accorded to the Commission, which excludes the right for individuals to require that institution to adopt a specific position (36). Subsequently, a natural or legal person who asks the Commission to initiate a procedure under Article 169 of the EC Treaty is really seeking the adoption of an act which is not of direct concern to him within the meaning of the fourth paragraph of Article 173 and which it could not, therefore, challenge by means of an action for annulment in any event (37). That case-law suggests that, in the case of individuals, the conditions of admissibility for bringing an action for failure to act or an action for annulment are identical in respect of the act at issue. Inadmissibility cannot be altered by the nature of the Community law infringement alleged, even if that infringement concerns a right guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and in Article F of the Treaty on European Union (38).

However, there is no necessary link between the two forms of action (39). If, after being asked to act, the institution adopts an act against which proceedings for annulment are inadmissible, then we are approaching a loophole in the system of judicial action to ensure observance of legality. In its judgment in *Nordgetreide GmbH & Co.* v *Commission*, the Court held that, since the Commission defined its position in a communication, within the time limit fixed by Article 175, the conditions for application of that article are not satisfied. Since the definition by the Commission of its position amounts to a rejection, it must be appraised in the light of the object of the request to which it constitutes a reply. It accordingly sought amendment of a regulation of general scope which would have affected the litigant only in an abstract manner. As a result, the application for annulment was dismissed as inadmissible (40).

Thus, action for failure to act enables the European Parliament to cause acts to be adopted that may not always form the subject-matter of an action for annulment. As the judgment in Case 377/87 *Parliament* v *Council* (41) shows, so long as a draft budget has not been placed before it by the Council, the European Parliament can obtain a declaration that the Council has failed to act, although the draft budget, which is a

preparatory act, could not be contested under Article 173 of the Treaty (42). In certain circumstances, an act which is not in itself open to an action for annulment may nevertheless constitute a 'definition of position' terminating the failure to act if it is the prerequisite for the next step in a procedure which is to culminate in a legal act which is itself open to an action for annulment under the conditions laid down in Article 173 of the Treaty (43).

It has been observed that the procedures under Articles 173 and 175 together provide effective judicial protection of the rights of individuals with whom the institution has entered unilaterally into a financial commitment. In so far as the institution, by refusing payment, disputes a prior commitment or denies its existence, it commits an act which, in view of its legal effects, may give rise to an action for a declaration that the act is void under Article 173 of the Treaty. If, as a result of the action, the refusal to make the payment is declared void, the applicant's right will be established, and it will be for the institution concerned, pursuant to Article 176 of the Treaty, to ensure that the payment which has been unlawfully refused is made. Moreover, if an institution fails to reply to a request for payment, the same result may be obtained by means of Article 175 of the Treaty (44).

In an action based on Article 175, it may therefore be necessary to assess the admissibility of a hypothetical action for annulment before ruling on the admissibility of the action for failure to act. If the principle of legal certainty is invoked to justify the relationship between the various procedures for reviewing legality, care must be taken to ensure that the uncertainties inevitably associated with the theoretical assessment of hypothetical proceedings do not in the end undermine that principle entirely.

II. The effectiveness of the general system of legal remedies depends upon the relative independence of actions for damages

It is settled case-law (45) that the action for damages provided for by Article 178 and the second paragraph of Article 215 of the Treaty, and — in disputes between the Community and its servants — under Article 179 of the Treaty, was intended to be an autonomous form of action with a particular purpose to fulfil within the system of judicial remedies and subject to conditions for its use conceived with a view to its specific purpose (46). The action for damages is clearly independent vis-à-vis proceedings for failure to act (A), proceedings for annulment (B), the objection of illegality (C), proceedings for failure to fulfil an obligation (D) and reference for a preliminary ruling (E).

A. Proceedings for failure to act

The action for damages is clearly independent, first of all, vis-à-vis proceedings for failure to act. Indeed, it would be contrary to the independent nature of this action, as well as to the efficacy of the general system of forms of action created by the Treaty, to regard as a ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175. The action for damages differs from proceedings for failure to act in that its end is not the adoption of a particular measure but compensation for damage caused by an institution in the performance of its duties. The action for damages aims only at the recognition of a right to compensation and as a result to a benefit intended to have effects solely with regard to the applicant (47). Clearly, under Article 176 of the Treaty, the effect of a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned, is that the defendant institution is required to take the necessary measures to comply with the judgment without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise (48).

B. Proceedings for annulment

The action for damages is also, albeit less clearly, independent vis-à-vis proceedings for annulment. The action for damages differs from an action for annulment in particular, in that its purpose is not to set aside a specific measure but to repair the damage caused by an institution (49).

It follows that, in principle, the inadmissibility of a claim for annulment cannot entail the inadmissibility of a

claim for damages for loss allegedly suffered (50). Thus, the Court has held that it would be wrong to dismiss the possibility that acts or conduct on the part of the Commission or its officials and agents might cause damage to third parties. Any person who claims to have been injured by such acts or conduct must therefore have the possibility of bringing an action, if he is able to establish liability (51).

It also follows that the existence of an individual decision which has become definitive cannot constitute an obstacle to the admissibility of an action for damages, which does not, therefore, cancel the legal effects of such a decision. It is possible to imagine a Community act which could be described as wrongful and may therefore give rise to non-contractual liability on the part of the Community although an action for its annulment brought by a natural or legal person had been held to be inadmissible on the ground that it was not of direct and individual concern to the applicant. The act may be wrongful even though it has not been established, in proceedings for annulment, that it is unlawful. The two are not necessarily the same.

In an exception to the principle that the independence of the action for damages has a particular purpose to fulfil within the system of remedies, the Court has held that the inadmissibility of an application for annulment entails the inadmissibility of an action for compensation where a claim for damages is actually aimed at securing withdrawal of an individual decision which has become definitive and thus constitutes an abuse of process (52). The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which has not been annulled (53). The principle of independence ceases to apply where an application for compensation in fact seeks to nullify the effects of allegedly unlawful acts, an application for the annulment of which has been declared inadmissible (54). In that case, the claim for damages constitutes an abuse of process, and the burden of proving such an abuse of process lies on the party pleading it (55). Actions for annulment and for damages are often based on identical factual evidence, with the result that their outcomes are frequently linked. This is of limited bearing, however, and it does not detract from the independence of the action for damages.

On the other hand, in disputes between the Community and its servants, it is settled case-law that claims for compensation for damage must be dismissed in so far as they are seen to have a close link with claims for annulment that have themselves been dismissed (56). The official cannot circumvent through an action for damages the inadmissibility of an application for annulment concerning the same illegality and having the same pecuniary purpose. An action for damages is inadmissible if its sole purpose is to obtain compensation for damage that would not have been suffered if an action for annulment brought by the official in good time had been successful. In this respect, the independence of the action for damages is affected.

The principle of the independence of the action for damages vis-à-vis proceedings for annulment is fully effective inasmuch as officials may opt for an action for annulment, an action for damages, or both, provided that they bring the matter before the Court of First Instance, in accordance with Article 91 of the Staff Regulations of Officials of the European Communities, within three months of the date on which their claim is dismissed. Thus, officials are not obliged to apply first of all for the annulment of the act that forms the ground of their claim for compensation.

Furthermore, in disputes between the Community and its servants, the outcome of actions for damages and for annulment is not linked in cases where the dismissal of an application for annulment is not based on the absence of any illegality but solely on the ground that the act at issue, if it were to be annulled, could not be replaced by an act that was more consistent with Community law. The fact that it cannot be replaced by an act that complies with Community law, while not calling into question the validity of the act at issue, may nevertheless constitute an administrative fault capable of conferring a right to compensation (57).

C. The objection of illegality

On the objection of illegality, the Court has held that an official who fails to contest in due time a decision of the appointing authority affecting him is not permitted to rely on the alleged unlawfulness of that decision in an action for damages (58). The admissibility of the objection of illegality depends on a hypothetical action for annulment. Legal certainty requires that the act adversely affecting the official cannot continue to be challenged indefinitely.

D. Proceedings for failure to fulfil an obligation

As case-law now stands, although actions for failure to fulfil an obligation and for non-contractual damages are, in principle, independent, they are nevertheless not entirely unconnected. The Community's non-contractual liability applies only to damage caused by its institutions or by its servants in the performance of their duties. In the procedure for failure to fulfil an obligation, the Commission has discretion to determine whether or not to commence proceedings. Individuals may not require it to adopt a specific position in that regard. Its decision not to institute such proceedings must therefore be regarded as consistent with the Treaty and, in particular, Articles 155 and 169 thereof, and cannot therefore give rise to non-contractual liability on the part of the Community (59).

The only source of damage is the conduct of the Member State and its servants who misinterpret Community law. However, any such damage falls within the exclusive jurisdiction of the national courts.

E. Reference for a preliminary ruling

The reference for a preliminary ruling and the action for damages are entirely unconnected. On the one hand, a question relating to the application of the second paragraph of Article 215 cannot be determined in proceedings under Article 177 of the Treaty (60). The determination of the Community's liability under the second paragraph of Article 215 falls within the jurisdiction of the Court of Justice and the Court of First Instance as provided for in Article 178 of the Treaty and lies outside that of any national court. The question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts in accordance with the national law of the Member State concerned (61).

Clearly, the Court has no jurisdiction to rule in an action brought under Article 178 of the Treaty on liability arising from the unlawfulness of conduct by a State. Such liability falls within the jurisdiction of national courts which may, if necessary, make use of the procedure under Article 177 of the Treaty (62).

June 1998

(1) Judgment in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, Opinion of Advocate General Darmon.
(2) Judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23.
(3) Judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 20, Opinion of Advocate General Darmon.
(4) Proceedings for failure to fulfil an obligation may be brought only by the Commission or by Member States.
(5) Judgments in Case 20/65 *Collotti* v *Court of Justice* [1965] ECR English Special Edition 847; Case 156/77 *Commission* v *Belgium* [1978] ECR 1881; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131; and Case C-188/92 *TWD* [1994] ECR I-833, paragraph 13, Opinion of Advocate General Jacobs.
(6) Judgment in Case C-408/95 *Eurotunnel SA and Others* [1997] ECR I-6315, paragraph 29.
(7) Judgment in Case 314/85 *Foto-Frost* [1987] ECR 4199, Opinion of Advocate General Mancini.
(8) Judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Soest* [1991] ECR I-415, Opinion of Advocate General Lenz; and Case C-465/93 *Atlanta* [1995] ECR I-3761, Opinion of Advocate General Elmer.
(9) Judgment in Case C-465/93 *Atlanta* [1995] ECR I-3761, paragraph 30, Opinion of Advocate General Elmer.
(10) Judgment in Case 216/82 *Universität Hamburg* [1983] ECR 2771, Opinion of Advocate General Sir Gordon Slynn.
(11) Judgments in Case C-188/92 *TWD* [1994] ECR I-833, paragraph 17, Opinion of Advocate General Jacobs; and Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 21, Opinion of Advocate General Jacobs.
(12) See paragraph 10 of the judgment in Case 216/82 *Universität Hamburg* [1983] ECR 2771, Opinion of Advocate General Sir Gordon Slynn.
(13) Joined Cases 133/85 to 136/85 [1987] ECR 2289, Opinion of Advocate General Lenz.
(14) See also judgment in Case 97/85 *Deutsche Lebensmittelwerke and Others* v *Commission* [1987] ECR 2265, Opinion of Advocate General Lenz.
(15) Case C-466/93 [1995] ECR I-3799, Opinion of Advocate General Elmer.
(16) Judgment in Case 9/56 *Meroni SpA* v *High Authority of the European Coal and Steel Community* [1958] ECR English Special Edition 133, particularly 140, Opinion of Advocate General Roemer.
(17) Judgment in Case C-312/93 *Peterbroeck* [1995] ECR I-4599, Opinion of Advocate General Jacobs.
(18) Judgment in Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, Opinion of Advocate General Reischl.

(19) Judgments in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, Opinion of Advocate General Roemer; Case 70/72 *Commission* v *Germany* [1973] ECR 813, Opinion of Advocate General Mayras; Case 156/77 *Commission* v *Belgium* [1978] ECR 1881, Opinion of Advocate General Mayras; Case 226/87 *Commission* v *Greece* [1988] ECR 3611, Opinion of Advocate General Mancini; and Case C-188/92 *TWD* [1994] ECR I-833, paragraph 16, Opinion of Advocate General Jacobs.
(20) Judgment in Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, Opinion of Advocate General Gulmann.
(21) Judgment in Case 226/87 *Commission* v *Greece* [1988] ECR 3611, Opinion of Advocate General Mancini.
(22) Judgment in Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraphs 17 and 18, Opinion of Advocate General Lenz.
(23) Judgments in Case 15/85 *Consorzio Cooperativo d'Abruzzo* v *Commission* [1987] ECR 1005, Opinion of Advocate General Mischo; Case 226/87 *Commission* v *Greece* [1988] ECR 3611, Opinion of Advocate General Mancini; and Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, Opinion of Advocate General Gulmann.
(24) Judgments in Case 52/84 *Commission* v *Belgium* [1986] ECR 89, Opinion of Advocate General Lenz; and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 10, Opinion of Advocate General Van Gerven.
(25) Even where it is apparent that there is a manifest infringement of the Treaty and the Commission has no discretion in the matter so that it is obliged to initiate the Article 169 procedure, it is not open to individuals to bring an action for annulment against a refusal by the Commission to initiate proceedings against a Member State (judgment in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraphs 18 and 19, Opinion of Advocate General La Pergola).
(26) Judgments in Case 48/65 *Lütticke* v *Commission* [1966] ECR English Special Edition 19, particularly 27, Opinion of Advocate General Gand; Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 14, Opinion of Advocate General Lenz; Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 9, Opinion of Advocate General Lenz; Order of the Court in Case C-29/92 *Asia Motor France* v *Commission* [1992] ECR I-3935, paragraph 21, Opinion of Advocate General Tesauro; Order of the President of the Court in Case C-97/94 P-R *Schulz* v *Commission* [1994] ECR I-1701, paragraph 14; judgments in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraph 19, Opinion of Advocate General La Pergola; Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 52; Orders of the Court of First Instance in Case T-29/93 *Calvo Alonso-Cortès* v *Commission* [1993] ECR II-1389, paragraph 55; Case T-5/94 *J* v *Commission* [1994] ECR II-391, paragraph 15; Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 12; Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 27; Case T-84/94 *Bundesverband der Bilanzbuchhalter* v *Commission* [1995] ECR II-101, paragraph 23 [that Order was the subject, on appeal, of the judgment cited above dismissing the application] ; Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraph 33; and judgment in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 71.
(27) Order of the Court of First Instance in Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraphs 36 to 39.
(28) Case C-107/95 P [1997] ECR I-947, paragraph 25, Opinion of Advocate General La Pergola.
(29) Joined Cases C-48/90 and C-66/90 [1992] ECR I-565, Opinion of Advocate General Van Gerven.
(30) Judgment in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraphs 51 to 57.
(31) Judgments in Case 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 6, Opinion of Advocate General Dutheillet de Lamothe; and Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59, Opinion of Advocate General Elmer.
(32) Judgments in Case 8/71 *Deutscher Komponistenverband* v *Commission* [1971] ECR 705, Opinion of Advocate General Roemer; Joined Cases 166/86 and 220/86 *Irish Cement Ltd* v *Commission* [1988] ECR 6473, Opinion of Advocate General Darmon; Case C-107/91 *ENU* v *Commission* [1993] ECR I-599, Opinion of Advocate General Gulmann; and Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 61, Opinion of Advocate General Elmer.
(33) Judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 17, Opinion of Advocate General Darmon.
(34) Judgment in Case 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 6, Opinion of Advocate General Dutheillet de Lamothe.
(35) Judgment in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 14, Opinion of Advocate General Lenz; Orders of the Court in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, paragraphs 4 to 6, Opinion of Advocate General Van Gerven; Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraphs 10 to 12, Opinion of Advocate General Jacobs; Case C-247/90 *Emrich* v *Commission* [1990] ECR I-3913, paragraphs 4 to 7, Opinion of Advocate General Van Gerven; and of the Court of First Instance in Case T-5/94 *J* v *Commission* [1994] ECR II-391, paragraph 16; Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 13; Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 31; Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraphs 42 to 45; Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraphs 42 and 43; Case T-117/96 *Intertronic* v *Commission* [1997] ECR II-141 [appeal pending] ; Case T-201/96 *Smanor SA and Others* v *Commission* [1997] ECR II-1081, paragraphs 22 to 25.
(36) Orders of the Court of First Instance in Case T-201/96 *Smanor SA and Others* v *Commission* [1997] ECR II-1081, paragraph 23; Case T-117/96 *Intertronic* v *Commission* [1997] ECR II-141, paragraph 32; Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraph 42; and Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraph 44.
(37) Judgment in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 13, Opinion of Advocate General Lenz; Orders of the Court of First Instance in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 14; Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraph 43; and Case T-201/96 *Smanor SA and Others* v *Commission* [1997] ECR II-1081, paragraph 25.
(38) Order of the Court of First Instance in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 15.
(39) Judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 16, Opinion of Advocate General Darmon.
(40) Judgment in Case 42/71 *Nordgetreide GmbH & Co.* v *Commission* [1972] ECR 105, paragraphs 1 to 6, Opinion of Advocate General Roemer.
(41) Case 377/87 *Parliament* v *Council* [1988] ECR 4017, Opinion of Advocate General Mischo.
(42) Judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 16, Opinion of Advocate General Darmon.

(43) Judgments in Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, paragraph 25; and Case T-105/96 *Pharos SA* v *Commission* [1998] ECR II-285, paragraph 43.
(44) Judgment in Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraph 6, Opinion of Advocate General VerLoren van Themaat.
(45) Judgments in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6, Opinion of Advocate General Dutheillet de Lamothe; Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3, Opinion of Advocate General Roemer; Case 153/73 *Holtz and Willemsen* v *Council and Commission* [1974] ECR 675, paragraph 3, Opinion of Advocate General Reischl; Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 7, Opinion of Advocate General Capotorti; Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017, paragraph 7, Opinion of Advocate General Capotorti; Joined Cases 261/78 and 262/78 *Interquell and Others* v *Council and Commission* [1979] ECR 3045, paragraph 7, Opinion of Advocate General Capotorti; Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 32, Opinion of Advocate General Mancini; Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 14, Opinion of Advocate General Lenz; Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraph 15, Opinion of Advocate General Gulmann [1993] ECR I-1751 to I-1754, points 16 to 22; Order of the Court in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraph 14, Opinion of Advocate General Gulmann; Order of the Court of First Instance in Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 38; judgments in Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 31; Case T-514/93 *Cobrecaf* v *Commission* [1995] ECR II-621, paragraph 58; Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795, paragraph 38; Case T-485/93 *Dreyfus* v *Commission* [1996] ECR II-1101, paragraph 67; Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 64.
(46) Judgment in Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 64.
(47) Judgment in Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, Opinion of Advocate General Reischl.
(48) Judgment in Case T-105/96 *Pharos SA* v *Commission* [1998] ECR II-285, paragraph 41.
(49) Judgment in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 14, Opinion of Advocate General Lenz.
(50) Judgment in Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 64.
(51) Judgment in Case 118/83 *CRC* v *Commission* [1985] ECR 2325, paragraph 31, Opinion of Advocate General VerLoren van Themaat; Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795, paragraph 38; Case T-485/93 *Dreyfus* v *Commission* [1996] ECR II-1101, paragraph 67; and Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 66.
(52) Order of the Court in Joined Cases C-199/94-P and C-200/94-P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraphs 27 to 29, Opinion of Advocate General Lenz; judgment in Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 65.
(53) Judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR English Special Edition 95, particularly 108, Opinion of Advocate General Roemer.
(54) Order of the Court of First Instance in Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 38.
(55) Judgment in Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 65.
(56) Judgment in Case T-150/94 *Vela Palacios* v *ESC* [1996] ECR II-877, paragraph 48.
(57) Judgment in Case T-150/94 *Vela Palacios* v *ESC* [1996] ECR II-877, paragraph 52.
(58) Judgment in Case 401/85 *Schina* v *Commission* [1987] ECR 3911, paragraph 9, Opinion of Advocate General Da Cruz Vilaça.
(59) Order of the Court in Case C-29/92 *Asia Motor France* v *Commission* [1992] ECR I-3935, paragraphs 13 to 15, Opinion of Advocate General Tesauro; Orders of the Court of First Instance in Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 34; and Case T-201/96 *Smanor SA and Others* v *Commission* [1997] ECR II-1081, paragraphs 30 and 31; and judgment in Case T-571/93 *Lefebvre* v *Commission* [1995] ECR II-2379, paragraphs 60 and 61.
(60) Judgment in Case 101/78 *Granaria* [1979] ECR 623, paragraph 10, Opinion of Advocate General Capotorti.
(61) Judgment in Case 101/78 *Granaria* [1979] ECR 623, paragraphs 13 and 14, Opinion of Advocate General Capotorti.
(62) Order of the Court in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraph 14, Opinion of Advocate General Jacobs.