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### Legality, Standing and Substantive Review in Community Law

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# *Legality, Standing and Substantive Review in Community Law*

PAUL CRAIG\*

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## 1 *Introduction*

The circumstances in which an individual can seek the annulment of an act in Community law is a topic which has generated a significant amount of comment within the literature. This literature has sought to analyse the relevant case law of the European Court of Justice, and to consider the policy reasons which may have underpinned the Court's reasoning within this area. The variety of opinion which has been proffered will be considered in due course.

The present article is aimed at contributing to this debate and has three objectives. The first is to analyse the actual reasoning used by the ECJ in the seminal cases on standing within Article 173. It will be argued that this reasoning has not been fully understood, and that this is a prerequisite for further analysis of the policy reasons which have informed the Court's approach. The second objective is to consider the nature of the policy arguments which may have influenced the ECJ's jurisprudence in this area. It will be contended that insufficient attention has been given to the type of subject matter which has been at stake in the leading cases, and that once the nature of this subject matter is appreciated the reluctance of the Court to become embroiled in frequent review actions can be more readily understood. The third of the objectives is aimed at drawing closer links between the Court's approach towards standing, and the standard of substantive review. The latter issue is concerned with the extent to which the Court is willing to accept the decisions made by the Commission and the Council, and the intensity of review which it brings to bear on such matters. It will be argued that there is a thematic connection between the issues of standing and the scope of substantive review which has not been sufficiently noted, and that the realization of this connection can improve our understanding of both topics.

\* Worcester College, Oxford. I am grateful for the comments from Derrick Wyatt on an earlier version of this article.

## 2 Article 173: Standing for Non-Privileged Applicants A Critical Analysis

As is well known, Article 173(2) clearly does not give non-privileged applicants unfettered access to the ECJ. Review proceedings can only be brought in three types of case. The first is straightforward, and is the situation where there is a decision addressed to the applicant. In these circumstances the addressee can challenge the decision before the ECJ. The second situation is that in which there is a decision addressed to another person, and the applicant claims that it is of direct and individual concern to him or her. The third type of case which can arise is that where there is a decision in the form of a regulation, and the applicant claims that it is of direct and individual concern to him or her. Not surprisingly, litigation has been primarily concerned with categories two and three, and it is these which will be considered in turn.

### (a) *Decisions Addressed to Another Person*

The seminal case on this type of situation is the decision in *Plaumann*.<sup>1</sup> In 1961 the German Government requested the Commission to authorize it to suspend the collection of duties on clementines imported from third countries. The Commission refused the request, and addressed its answer to the German Government. The applicant in the case was an importer of clementines, who sought to contest the legality of the Commission's decision. The Court stated that the relevant wording within Article 173(2) justified the 'broadest interpretation', and that the provisions of the Treaty regarding the right of interested parties to bring an action must not 'be interpreted restrictively'.<sup>2</sup> It then adopted the following test to determine whether the applicant was individually concerned by the decision addressed to the German Government.<sup>3</sup> It is useful to set out the test in full.

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.

The test in the *Plaumann* case has been cited in many later cases where an applicant has sought to challenge a decision which has been formally addressed

<sup>1</sup> Case 25/62, *Plaumann & Co v Commission* [1963] ECR 95; [1964] CMLR 29. After the TEU, Article 173(2) has now become Article 173(4).

<sup>2</sup> *Ibid* 106-7.

<sup>3</sup> *Ibid* 107.

to another. Some of these will be considered below. Because the test has proved to be of such importance, it is worth dwelling a little on the essence of the test itself and its application to the facts of the case. By doing so one can understand why private applicants have found it so difficult to succeed under the *Plaumann* formula. The preceding quotation from *Plaumann* can be neatly divided into two parts, the test itself and the application of the test to the facts of the case.

The test itself is encompassed by the first sentence within the paragraph. This serves to emphasize that the applicants who claim to be individually concerned by a decision addressed to another can only do so if they are in some way differentiated from all other persons, and by reason of these distinguishing features singled out in the same way as the initial addressee. The test does, however, recognize that it is perfectly possible for there to be more than one applicant who is individually concerned in the above sense. The application of the test to the facts of the case is contained in the second sentence of the quotation: the applicant in the instant case failed because he practised a commercial activity which could be carried on by any person. The reason for rejecting the claim can be criticized on both pragmatic and conceptual grounds.

In *pragmatic terms* the application of the test can be criticized as being economically unrealistic. If there are, for example, only a very limited number of firms pursuing a certain trade this is not fortuitous, nor is the number of those firms likely to rise overnight. The presently existing range of such firms is established by the ordinary principles of supply and demand: if there are two or three firms in the industry this is because they can satisfy the current market demand. Even if there should be a sudden surge of desire for clementines, the result will normally be that the existing firms will import more of the produce. The argument that the activity of importing clementines can be undertaken by any person, and that therefore the applicant is not individually concerned, is thus unconvincing.

The reasoning of the ECJ is also open to criticism in *conceptual terms*. Put shortly, the reasoning of the Court renders it literally impossible for an applicant *ever* to succeed, except in a very limited category of retrospective cases. This can be demonstrated as follows. The test in the first sentence of the quotation has to be applied at some point in time. There are only three choices. One could ask the relevant question at the time that the determination being challenged was made; one could pose that test at the time of the challenge itself; or one could pose the test at some future, undefined date. Intuitively one would imagine that choices one or two would represent the most appropriate juncture at which to ask the question contained in the first sentence of the *Plaumann* case: was the applicant singled out in the requisite manner at one of these dates. In actual fact the ECJ applied choice three: the applicant failed because the activity of clementine importing could be carried out by anyone at any time. On this reasoning the applicant would fail even if there were only one such importer at the time the challenged decision was made, since it would always be open to the Court to contend that others could enter the industry. On this reasoning no

applicant could ever succeed, subject to the caveat considered below, since it could *always* be argued that others might engage in the trade at some juncture. On this reasoning the ‘possibility’ of *locus standi* for an applicant would be like a mirage in the desert, ever receding and never capable of being grasped. Even if our sole trader were to return to the Court and protest that it was still the only firm affected by the decision, it would still be greeted by the invocation of the same reasoning as on its first foray into the judicial arena. It would still be argued that it had not demonstrated the necessary individuality because others might engage in the activity in question.<sup>4</sup> As Advocate-General Roemer stated in the *Eridania* case, it must be mistaken to take such account of the future effect of a decision, since otherwise it would never be possible to claim individual concern in relation to a measure which had a permanent effect, even though at the time it was made the decision only affected one firm.<sup>5</sup>

The argument advanced in the previous paragraph might be opposed by contending that the applicant in the *Plaumann* case was properly rejected since it was a member of an open rather than closed category of applicants, and hence was not individually concerned. Thus Hartley remarks that since anyone can import fruit, and the measure would apply to anyone who commenced operations after the decision came into effect, the category was an open one and the applicant was not individually concerned by it.<sup>6</sup> Open categories are regarded as those in which the membership is not fixed at the time of the decision; a closed category is one in which it is thus fixed. This reasoning, however, does not serve to dispel the concerns expressed above. Quite the contrary, it reinforces those concerns. There are two problems with this reasoning.

On the one hand, in practical terms, the language of open categories is employed to rule out standing for any applicant, even if there is only a very limited number presently engaged in that trade, on the ground that others might undertake the trade thereafter. If the presence of such notional, future traders is to render the category open, and not determinate at the date when the decision comes into force, then as indicated previously, this ignores the practical economics which determine the number of those who supply a particular commodity.

On the other hand, in conceptual terms, the sense in which a category is said to be open at the time of the contested decision is questionable. To regard any category as open merely because others might notionally undertake the trade in issue is not self evident. The first half of the *Plaumann* quotation, which contains the test itself, is based on the assumption that some people have attributes which distinguish them from others, and that they possess these attributes at the time the contested decision is made. The fact that others might acquire these attributes *later*, by joining that trade, does not, of course, mean that they are presently part

<sup>4</sup> In reality such repeated forays would not be possible since there would be time limit problems.

<sup>5</sup> Cases 10 and 18/68, *Societa 'Eridania' Zuccherifici Nazionali v Commission* [1969] ECR 459, 492. Advocate General Roemer did not believe that the *Plaumann* test intended to limit applicants in this manner, but it is difficult to read the application of the test in the *Plaumann* case itself and in later cases in any other way.

<sup>6</sup> T. C. Hartley, *The Foundations of European Community Law* (2nd ed, 1988), 344–5.

of the same category as those who already do work in that sphere, let alone that somehow they are to be regarded retrospectively as part of the limited group which initially operated in that area.

A brief consideration of later cases will serve to demonstrate the restrictive nature of the *Plaumann* test. In *Glucoseries Reunies*<sup>7</sup> the applicant was a Belgian company which sought the annulment of a Commission decision authorizing the French Government to levy a duty on imports into France of glucose for a year. The applicant argued that it was the only producer of glucose in Belgium which was in a position to export goods from that country into France, that the total number of glucose producers in the whole Community which would be affected by the decision was only about twelve, and that this position was unlikely to change during the period of the contested decision because of the difficulty of establishing commercial production of the product. The Court none the less rejected the application, and denied standing, relying on the *Plaumann* formula.<sup>8</sup>

More recent applicants have not fared better. In *Piraiiki-Petraiki*<sup>9</sup> the applicants were seven Greek cotton undertakings who sought to challenge a decision authorizing the French Government to impose a quota system on imports into France of yarn from Greece between November 1981 and January 1982. Some of the undertakings had already entered into contracts to export cotton yarn to France, which were to be fulfilled during the quota period and which were for amounts of yarn in excess of that allowed by the quota. The Court quoted the test from the *Plaumann* case. The applicants argued that they fulfilled the conditions set out above since they were the main Greek undertakings which produced and exported cotton yarn to France. They contended that they therefore belonged to a class of traders which were individually identifiable on the basis of criteria having to do with the product in question, the business activities carried on and the length of time during which they have been carried on. They further sought to counter the *Plaumann* type argument, that the activity was one which could be carried on at any time by any person, by emphasizing that the production and export to France of cotton yarn of Greek origin required an industrial and commercial organization which could not be established from one day to the next, and certainly not during the short period of application of the decision in question.<sup>10</sup> The Court responded as follows.<sup>11</sup>

That proposition cannot be accepted. It must first be pointed out that the applicants are affected by the decision at issue only in their capacity as exporters to France of cotton yarn of Greek origin. The decision is not intended to limit the production of those products in any way, nor does it have such a result.

<sup>7</sup> Case 1/64, *Glucoseries Reunies v Commission* [1964] CMLR 596.

<sup>8</sup> See also, Case 38/64, *Getreide-Import Gesellschaft v Commission* [1965] CMLR 276; Case 97/85, *Deutsche Lebensmittelwerke v Commission* [1987] ECR 2265, 2286-7; Case 34/88, *Gevap v Council* [1988] ECR 6265, 6270; Case 191/88, *Co-Frutta SARL v Commission* [1989] ECR 793, 798.

<sup>9</sup> Case 11/82, *A. E. Piraiiki-Petraiki v Commission* [1985] ECR 207; [1985] 2 CMLR 46.

<sup>10</sup> *Ibid* 242.

<sup>11</sup> *Ibid* 243.

As for the exportation of those products to France, that is clearly a commercial activity which can be carried on at any time by any undertaking whatever. It follows that the decision at issue concerns the applicants in the same way as any other trader actually or potentially finding himself in the same position. The mere fact that the applicants export goods to France is not therefore sufficient to establish that they are individually concerned by the contested decision.

As will be seen below, certain of the applicants were given standing, but notwithstanding this fact the decision in the *Piraiiki-Patraiki* case provides a fitting example of the difficulties which applicants face in this area. The applicants contended that they should be regarded as individually concerned, being those firms which would be affected by the quota introduced by the contested decision. Their arguments, to the effect that they were a limited group, and that it was not realistic that their number could plausibly be increased within the relevant time period, were forceful.

In the preceding discussion it was indicated that applicants had been successful in one type of case. The type of case is that in which the decision concerns a completed set of past events. The *Toepfer* decision provides a well known example of this.<sup>12</sup> The applicants were dealers in grain who applied for import licences from the German authorities on 1 October 1963. On that date the levy for the relevant imports was zero. Because of changes in market conditions the German authorities realized that the dealers would make large profits, and therefore rejected their applications until the levy had been increased. The importers were told that their applications would be rejected, and the Commission was asked to confirm this decision. The Commission then raised the levy from 2 October, and on 3 October confirmed the ban with regard to the period from 1–4 October inclusive. The dealers sought to have this decision annulled. They were accorded standing. The Court reasoned that the only persons who were affected by the contested measures were importers who had applied for an import licence during the course of 1 October 1963. The number and identity of these importers had already become fixed and ascertainable before 4 October when the challenged decision was made. For this reason the applicants were deemed to be individually concerned. A similar theme can be perceived in part of the reasoning in the *Piraiiki-Petraiki* case. In that case some of the applicants had made contracts to supply cotton yarn to French buyers prior to the contested decision, which contracts were to be performed during the period covered by the decision. These contracts covered quantities of yarn which were in excess of the quotas set by the Commission decision. The contracts could not, therefore, be carried out, and the affected applicants claimed that this meant that they were individually concerned. This argument was accepted by the Court.<sup>13</sup>

<sup>12</sup> Cases 106 and 107/63, *Alfred Toepfer and Getreide-Import Gesellschaft v Commission* [1965] ECR 405; [1966] CMLR 111.

<sup>13</sup> Above n 9, 244.

(b) *Decisions in the Form of Regulations*

The other type of case which has proven to be problematic is that in which an individual asserts that although the challenged measure is in the form of a regulation, it is in reality a decision which is of direct and individual concern to him or her. Applications of this type have not proven to be notably successful, and the ECJ has not always adopted the same approach to the issue. Two tests can be identified in the case law on this topic: the closed category test, and the abstract terminology test. As will be seen, the latter is, in essence, stricter than the former, and it is this latter test which has been applied more recently by the Court. Let us, however, begin with an example of the closed category approach.

The *CAM* case provides a fitting example.<sup>14</sup> The applicant had obtained on 19 July 1964 an export licence for a certain quantity of barley. Community regulations provided for the payment of export refunds on certain products, including barley. These refunds could either be determined on the day of exportation, or they could be fixed in advance on the day on which the application for an export licence was lodged. However, if the latter course was adopted, then certain modifications in the refund could be made, to take account of the threshold price which was applicable in the month of export. The threshold price for barley was increased in October 1974, and this would have had the effect of increasing the refund to which CAM was entitled. The Commission, however, passed Regulation 2546/74, which in effect denied the benefit of this increase in the refund to those who had applied for an export licence prior to 7 October 1974. CAM sought to annul this regulation. The arguments of the respective parties can be predicted: the Commission contended that the claim should be rejected since the measure was a regulation; the applicant argued that the measure was in reality a decision which was of individual concern to it. The Court found for the applicants on the standing issue. The contested regulation concerned a fixed and known number of cereal exporters, and also the amount of the transactions for which the advance fixing had been requested was also known. Moreover, the determinacy of the group was further clarified by the fact that the refund system was abolished from 26 July 1974, and therefore the category of traders who were affected was limited to those who had sought advance fixing before that date and who still had current export licences on 7 October 1974. Because of these factors the Court was willing to find that the applicants were individually concerned, even though the measure had a legislative function.<sup>15</sup>

The approach which is prevalent in the more recent jurisprudence of the ECJ is, however, the abstract terminology test. This is exemplified in the *Calpak*

<sup>14</sup> Case 100/74, *Société CAM SA v Commission* [1975] ECR 1393. See also, Cases 41–44/70, *International Fruit Company v Commission* [1971] ECR 411.

<sup>15</sup> [1975] ECR 1393, 1402–3.



case.<sup>16</sup> The applicants were producers of Williams pears, and they complained that the calculation of production aid granted to them was void. Under the terms of an earlier regulation, production aid was to be calculated on the basis of the average production over the previous three years, in order to avoid the risk of over production. The applicants alleged that the Commission had in fact abandoned this method of assessing aid, and had based their aid calculation on one marketing year, in which production was atypically low. The applicants also claimed that they were a closed and definable group, the members of which were known to, or identifiable by, the Commission.

The Court began its analysis by noting the important point of principle which underpins this part of Article 173(2). It recognized that the rationale for allowing any challenge to provisions which were in the form of regulations was to prevent the Community institutions from immunizing measures from attack merely by the form in which they were expressed. Thus, if regulations as such could never be challenged by individuals then it would be possible for the Commission and Council to prevent annulment actions by non-privileged applicants by always casting their measures in this form. It was for this reason that the possibility of challenging measures cast in the form of regulations was included in the Treaty. The task of the Court was to look behind the *form* of the act, in order to determine whether by its *nature* or *substance* it really was a regulation as opposed to a disguised decision which was of individual concern to the applicant.<sup>17</sup>

The Court then proceeded to lay down the test which was to be used for distinguishing between real regulations, and those which were regulations in form rather than substance. It stated that Article 189 was to be the benchmark in this respect: was the measure of general application or not? If it was then it would be deemed to be a real regulation. The Court then expanded upon this definition and developed the abstract terminology test.<sup>18</sup>

A provision which limits the granting of production aid for all producers in respect of a particular product to a uniform percentage of the quantity produced by them during a uniform period is by nature a measure of general application within the meaning of Article 189 of the Treaty. In fact the measure applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner. The nature of the measure as a regulation is not called in question by the mere fact that it is possible to determine the number or even identity of the producers to be granted the aid which is limited thereby.

Applying this criterion to the facts of the case, the Court found that the contested measure was a true regulation. The fact that the choice of reference period was particularly important for the applicants, whose production was subject to considerable variation from one marketing year to another as a result

<sup>16</sup> Cases 789 and 790/79, *Calpak SpA and Societa Emiliana Lavorazione Frutta SpA v Commission* [1980] ECR 1949; [1981] 1 CMLR 26. See also, Cases 103-9/78, *Beauport v Council and Commission* [1979] ECR 17; Case 162/78, *Wagner v Commission* [1979] ECR 3467.

<sup>17</sup> *Calpak* [1980] ECR 1949, 1961.

<sup>18</sup> *Loc cit.*

of their own programme of production, was not sufficient to entitle them to an individual remedy.

The same approach is evident in other cases, such as *Moksel*.<sup>19</sup> The Court reiterated the holding that the nature of a measure as a regulation is not called into question by the fact that it may be possible to determine the number or even identity of the traders who were concerned by it. It also expanded on the positive aspect of the definition of a regulation, stating that it must be deduced from the purpose, framework and nature of the measure whether it was indeed a regulation which was of general application.<sup>20</sup>

With the exception of the cases which will be considered below, the abstract terminology test has not proven easy for applicants to satisfy. The test places those who wish to challenge an act which is in the form of a regulation in a difficult position. The nature of this difficulty can be presented as follows.

The purpose of allowing any challenges to acts which are in the form of regulations is, as the ECJ made clear in the *Calpak* case, to prevent the Community institutions from immunizing matters from attack by the form of their classification. Thus, if regulations were never open to challenge the institutions could classify matters in this way, safe in the knowledge that they could never be annulled by private individuals. Article 173(2) seeks to prevent this from happening by permitting a challenge when the regulation is in reality a decision which is of direct and individual concern to the applicant. As the ECJ made clear in the *Calpak* case, this requires the Court to look behind the *form* of the measure, in order to determine whether in *substance* it really is a regulation or not.

The problem with the abstract terminology test is that rather than looking behind form to substance, it comes perilously close to looking behind form to form. The reason resides in the nature of the test. A regulation will be accepted as a true regulation if it applies to 'objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner'. However, it is always possible to draft norms in this manner, and thus to immunize them from attack, more especially as the Court makes clear that knowledge of the number or identity of those affected will not prevent the norm from being regarded as a true regulation. If the Commission wishes, therefore, to ensure that its measures are rendered safe from challenge under Article 173(2), it can frame them as regulations drafted in the abstract and generalized manner described above. Now it is true that the Court expanded on the abstract terminology test in *Moksel*, and made reference to the purpose of the challenged norm, as well as the framework within which it was made, as factors which were of relevance in determining whether the measure was a real regulation or not. These criteria could be used to look behind the form of a measure to its substance. They can, however, also be utilized to reinforce the

<sup>19</sup> Case 45/81, *Alexander Moksel Import-Export GmbH & Co Handels KG v Commission* [1982] ECR 1129.

<sup>20</sup> *Ibid* 1144-5.

conclusions reached from the language in which the measure is expressed: if the contested norm *is* expressed in abstract and generalized norm creating language, this in itself creates the assumption that the *purpose* of the measure is to regulate a general sphere of activity.

The reasons why the Court has been restrictive in its construction of Article 173(2) has been the subject of academic discussion which will be considered below. Before doing so, it is necessary to consider certain types of case in which the ECJ has adopted a more liberal attitude to standing by private parties.

### *3 Article 173: Standing for Non-Privileged Applicants—The More Liberal Case Law*

The ECJ has been more liberal in according standing in four main types of case. These cases will be examined, and this examination will be followed by an analysis of the policy reasons which have informed the Court's jurisprudence in these areas and in the 'mainline' cases considered in the previous section.

#### *(a) Dumping Cases*

One of the areas in which the Court has been more liberal is in the context of dumping. The Community has passed dumping regulations, with the object of preventing those outside the Community from selling goods within the Community at too low a price, to the detriment of traders within the EC. The Community response is to impose an anti-dumping duty on the firm or firms in question. Whether a firm is in fact dumping, and the consequential issues concerns the calculation of its 'normal' production costs and prices of sale, are often very controversial.

Three types of applicant may wish to challenge an anti-dumping duty: the firm which initiated the complaint about dumping, the producers of the product which is subject to the anti-dumping duty, and the importers of the product on which the duty is imposed. In deciding whether to accord standing to such applicants the Court is placed in a difficult position since, as will be seen below, dumping duties must be imposed by regulation, as opposed to decision. If, therefore, the Court holds that the regulation is not in fact a regulation at all, then it is arguable that the Commission had no power to impose the measure; if, however, the Court holds, without more, that it is a true regulation, then this may preclude any challenge by any applicant. This conundrum serves to explain the reasoning of the ECJ in the cases examined below, in which it formally recognizes the measure as a regulation, but then seeks to determine whether the applicant is individually concerned by it.

The *Timex* case provides an example of the first category of applicant: a company which initiated the complaint, but was unhappy with the resultant regulation.<sup>21</sup> The Community had imposed, through the form of a regulation,

<sup>21</sup> Case 264/82, *Timex Corporation v Council and Commission* [1985] ECR 849; [1985] 3 CMLR 550.

an anti-dumping duty on watches from the USSR. It had done so at the instigation of Timex, which had initiated the proceedings, and the duty had explicitly stated that it had taken account of the injury caused to Timex by the dumped imports. However, Timex sought to challenge the regulation, arguing that the duty was too low, and thus that it was still being injured by the imports. An initial issue was whether Timex had standing to challenge the regulation. The Council and Commission argued that Timex was not named in the regulation, and that it was not individually concerned by it, since it affected all watch makers in the Community alike. Timex argued by way of response that the regulation was in reality a decision which was of individual concern to it, since it had initiated the proceedings, and since the duty was fixed with reference to its economic situation.

The Court found that the applicant did have standing. In reaching this conclusion it was influenced by the fact that anti-dumping duties must be imposed by regulation; that Timex had initiated the original procedure; that the contested duty had been made with reference to Timex's situation; and that it was the leading manufacturer in the Community which was affected by the dumped goods. In reaching this conclusion the Court recognized that the challenged measure was of a legislative nature, but stated that it could, none the less, be of individual concern to certain traders.<sup>22</sup>

In the *Timex* case it was the complainant who was accorded standing in order to challenge the level of the anti-dumping duty. The *Allied* case indicates the Court's approach when the applicant is the exporter affected by the relevant duty.<sup>23</sup> Representatives of the European fertilizer industry had complained to the Commission about the import of fertilizer from the United States of America. This led to the imposition of an anti-dumping duty on the relevant products. The applicant companies, who were affected by the regulation, agreed to raise their prices in 1981, but withdrew these undertakings in 1982. The Commission, therefore, reimposed an anti-dumping duty on the products, and it was this regulation which was challenged by the applicants.

The exporters were afforded standing by the ECJ. In reaching this conclusion the Court stressed, in addition to the type of factors considered above, the fact that standing should be granted to those producers or exporters who were either identified in the measures or were concerned by the preliminary investigations. Particular emphasis was placed on the fact that anti-dumping duties can only be imposed after investigations concerning the production and exporting prices of undertakings which have been individually identified.<sup>24</sup>

There is, as stated above, a third category of applicant who may wish to contest the legality of an anti-dumping regulation: this is the importer of the product against which the anti-dumping duty has been imposed. The position

<sup>22</sup> Ibid 566. Cf *Moksel* [1982] ECR 1129, 1144, 'A single provision cannot at one and the same time have the character of a measure of general application and of an individual measure'.

<sup>23</sup> Cases 239/82 and 275/82, *Allied Corporation v Commission* [1984] ECR 1005; [1985] 3 CMLR 572.

<sup>24</sup> Ibid 613.

would appear to be as follows. The mere fact that the importer is an agent for one of the companies affected by the regulation is insufficient. Such an importer must be referred to in the contested measures, in the sense of, for example, the level of the duty being established partly by reference to the resale prices charged by the importer; or the importer may qualify as individually concerned if other matters single it out, such as the fact that it is the most important importer of the product and the ultimate consumer thereof.<sup>25</sup> In rejecting applications by importers under Article 173 in circumstances other than these, the ECJ has been influenced by the fact that importers can make use of Article 177 as a method of contesting a regulation. They are able to raise their objections in a legal action brought against the agency which collects the duty, and the national court can then refer the matter to the ECJ.

### (b) *Competition Cases*

A second area in which the ECJ has been more liberal in its construction of the criteria for standing concerns competition policy, which is regulated by Articles 85 and 86 of the Treaty. Under Article 3(2) of Regulation 17/62, a Member State, or any natural or legal person who claims to have a legitimate interest, can make an application to the Commission, putting forward evidence of a breach of Articles 85 and 86. The Commission is also empowered to investigate matters of its own initiative.

The approach of the ECJ is exemplified by the *Metro* case.<sup>26</sup> Metro argued that the distribution system operated by SABA was in breach of Article 85 of the Treaty. It initiated a complaint under Article 3(2) of Regulation 17/62. The Commission decided that certain aspects of the distribution system were not in fact in breach of Article 85, and it was this decision, addressed to SABA, that Metro sought to annul. The question arose as to whether Metro could claim to be individually concerned by a decision addressed to another.

Metro was accorded standing. Two factors were particularly important in reaching this conclusion. On the one hand, Metro was the firm which was being excluded from the SABA distribution system. On the other hand, it was also the undertaking which had initiated the complaint under Article 3(2)(b) of Regulation 17, which allowed private parties to bring such matters to the Commission's attention.

The more liberal attitude of the Court in this case is apparent by contrasting it to the approach which is evident in the case law interpreting the *Plaumann* test. If the 'normal' interpretation of individual concern had been adopted then Metro would almost certainly have failed. The decision addressed to SABA would have been held to affect an open category: all those who were self-service wholesalers and who wished to handle the products of SABA. Given the special

<sup>25</sup> *Allied*, para 15; Case C-133/87, *Nashua Corporation v Commission and Council* [1990] 2 CMLR 6; Case C-358/89, *Extramet Industrie v Council* [1991] ECR I-2501; Case C-156/87, *Gestetner Holdings v Council* [1990] ECR I-781; Cf Case C-323/88, *Sermes SA v Directeur Des Services Des Douanes De Strasbourg* [1992] 2 CMLR 632.

<sup>26</sup> Case 26/76, *Metro-SB-Grossmarkte GmbH & Co KG v Commission* [1977] ECR 1875.

circumstances of competition policy, the Court was, however, willing to accord standing to Metro in the instant case.

(c) *State Aid*

The provision of state aid to industry is a matter regulated by the Treaty in Articles 92–94. The principal objective is to prevent the conditions of competition from being distorted, which would be the case if the firms in one state could obtain aid or subsidies from their government. The Commission will investigate instances of state aid in order to determine whether they are compatible with the Treaty, and will address a decision to the relevant state. That state could clearly challenge the decision under Article 173, but the Treaty is less clear on whether a complainant could also do so. Such complainants are not afforded the same recognition as they are in the context of competition proceedings, but the ECJ has shown itself to be liberal in its construction of the standing criteria in this area.

In *COFAZ*<sup>27</sup> three French fertilizer companies complained to the Commission that the Netherlands was granting a preferential tariff for the supply of natural gas to its own Dutch producers of fertilizer. The Commission instituted an investigation under Article 93(2), in which the applicant companies played a full part. The Dutch Government then modified its pricing policy for gas, and the Commission decided that the procedure under Article 93(2) could be halted. The applicants disagreed and sought to have the decision of the Commission annulled. Did they have standing to challenge it? The Court quoted the *Plaumann* test, but stated that where the relevant provisions of the Treaty, or regulations made pursuant thereto, allowed private parties to complain, or apprise the Community institutions of a breach of those provisions, then such parties should have standing to challenge the resultant decision made by the Community.<sup>28</sup> The Court relied explicitly on the analogy with the dumping and competition cases.

(d) *Reinforcing the Democratic Nature of the Community*

The last type of case in which there is evidence of a more lenient approach to standing concerns the institutional structure of the Community itself, and the extent to which this can be perceived as a democratic community open to all parties across the political spectrum. This is exemplified by the *Greens* case.<sup>29</sup> The Parliament had made an allocation of funds to cover the costs incurred by political parties who had participated in the 1984 European elections. The manner of allocating the funds was biased towards those parties which had been represented in Parliament before the election, and less favourable to those seeking representation for the first time. The allocation was challenged by a party in

<sup>27</sup> Case 169/84, *Compagnie Française De L'Azote (COFAZ) SA v Commission* [1986] 3 CMLR 385.

<sup>28</sup> Provided that the grant of the contested state aid would disadvantage the applicants on the relevant market.

<sup>29</sup> Case 294/83, *Parti Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339.

this latter category. It was held that the party was individually concerned by the contested decision. The reasoning of the ECJ is captured in the following extract.<sup>30</sup>

This action concerns a situation which has never before come before the Court. Because they had representatives in the institution, certain political groupings took part in the adoption of a decision which deals both with their own treatment and with that accorded to rival groupings which were not represented. In view of this, and in view of the fact that the contested measure concerns the allocation of public funds for the purpose of preparing for elections and it is alleged that those funds were allocated unequally, it cannot be considered that only groupings which were represented and which were therefore identifiable at the date of the adoption of the contested measure are individually concerned by it.

Such an interpretation would give rise to inequality in the protection afforded by the Court to the various groupings competing in the same elections. Groupings not represented could not prevent the allocation of the appropriations at issue before the beginning of the election campaign because they would be unable to plead the illegality of the basic decision except in support of an action against the individual decisions refusing to reimburse sums greater than those provided for. It would therefore be impossible for them to bring an action for annulment before the Court prior to the decisions or to obtain an order from the Court under Article 185 of the Treaty suspending application of the contested basic decision.

Consequently, it must be concluded that the applicant association, which was in existence at the time when the 1982 Decision was adopted and which was able to present candidates at the 1984 elections, is individually concerned by the contested measures.

#### *4 Article 173: Standing for Non-Privileged Applicants—The Policy Arguments*

It is apparent from the preceding analysis of the case law that applicants, other than those who fall within the categories considered in the previous section, have not readily been accorded standing under Article 173(2). Why the ECJ has adopted a generally restrictive construction of standing is the issue which will be addressed in this section. As will be seen, commentators have given differing answers to this question. Any such answer must fulfil two conditions if it is to be effective as an explanation of the ECJ's jurisprudence in this area.

On the one hand, it must furnish a convincing explanation as to why the Court has been restrictive in the general run of cases.

<sup>30</sup> *Ibid* 1368.

On the other hand, it must provide an acceptable explanation for the Court's greater willingness to allow standing in areas such as dumping, competition and the like.<sup>31</sup>

In the discussion which follows no attempt will be made to survey every possible explanation which has been proffered for the Court's approach. Certain of these hypotheses have been adequately explored within the existing literature.<sup>32</sup> The focus will, rather, be upon particular explanations for the ECJ's jurisprudence which have gained a degree of acceptance within the literature. Analysis of these arguments will be followed by the development of an alternative hypothesis which, it will be argued, provides a more rounded rationale for the case law in this area.

### (a) *The Appellate Court Argument*

Rasmussen addresses the first of the questions outlined above.<sup>33</sup> He considers, and rejects, a number of possible rationales for the Court's restrictive approach under Article 173(2), some of which will be addressed below. Rasmussen then proffers his own preferred explanation.

He argues that the Court has a long-term interest in reshaping the judiciary of the Community to allow itself to act more like a high court of appeals of Community law, with the courts and tribunals of the Member States, and 'any administrative and other Community courts which might be established, acting as courts of first instance'. This interest is said to outweigh the citizen's interest in direct access to the Court. Three types of evidence are adduced by Rasmussen to support his argument.

The first is that the Court has been equally restrictive under other, related provisions of the Treaty, such as Articles 175 and 215. The difficulty of succeeding under these articles is perceived to be part of the same judicial strategy whereby the ECJ seeks to establish itself as an appellate court for the Community.

The second piece of evidence adduced by Rasmussen is the existence of a Court memorandum from 1978, in which the ECJ sought to persuade the Council of the need for changes in the ECJ's structure, through the introduction of a Court of First Instance. The object was to relieve the ECJ itself of certain cases, such as those concerning staff, and more generally to allow it to concentrate on matters of law.

The third strand of the argument draws on the development of direct effect. On this Rasmussen argues that if the restriction of citizen access to the Court under Article 173 was not to be perceived as a denial of justice, by preventing

<sup>31</sup> For general discussion see, A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *CML Rev* 191; J. Dinnage, 'Locus Standi and Article 173 EEC' (1979) 4 *EL Rev* 15; R. M. Greaves, 'Locus Standi under Article 173 when Seeking Annulment of a Regulation' (1986) 11 *EL Rev* 119; C. Harding, 'The Private Interest in Challenging Community Action' (1980) 5 *EL Rev* 354; P. Stein and J. Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context' (1976) 70 *Am J Comp Law* 219.

<sup>32</sup> See, eg, the discussion of certain of the theories by Rasmussen, below n 33.

<sup>33</sup> H. Rasmussen, 'Why is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 *EL Rev* 112, 122-7.



individuals from challenging suspect Community norms, then a different route had to be made available. This was to be found in Article 177. Individuals who were barred from Article 173 had no choice but to use Article 177 instead, and to seek to contest the legality of the Community norm by way of a reference from their national courts. This suited the appellate objectives of the ECJ, since it could function in a more appellate capacity under Article 177; the national court could find the initial facts and execute the ruling given by the ECJ, reducing the workload of the Community Court.

The thesis advanced by Rasmussen is interesting, and may well have played some part in the approach of the Court. There are, however, two difficulties in accepting it as the main motivating force behind the Court's jurisprudence.

First, as Harding has argued,<sup>34</sup> it is hard to explain the early restrictive case law as being based on a desire by the ECJ to assert itself as an appellate court. This case law was developed in the 1960s at a time when the Court was not faced with severe workload problems.

Secondly, although the ECJ may well have aspirations to become a 'federal appellate court' for the Community, the contention that this is the prime reason why it has 'closed down' Article 173, with the objective of forcing applicants to proceed via Article 177 instead, is problematic for the following reason. The ECJ clearly wishes to limit the range of applicants who can, in general, challenge decisions or regulations within Article 173. However, under Article 177 references can be made at the behest of a wide range of individuals who are affected by a Community norm, even if the norm is substantively a true regulation. The individual will, in such a case, base the claim on the fact that, for example, the norm in question is contrary to a provision of the Treaty itself, which Treaty article has direct effect and gives the applicant rights which can be utilized through the national courts.<sup>35</sup> The idea, then, that the ECJ intended to limit Article 173, with the intent of forcing claims through Article 177, when it would have very little control over the range of applicants using the latter article, or the types of norm challenged thereby, is not wholly plausible. The 'causality' in this area may well have been otherwise: the ECJ restricted Article 173 for reasons to be considered below, and applicants who sought to challenge Community norms were forced to do so through the mechanism of Article 177.

### (b) *Restrictive Access and the Language of the Treaty*

A different explanation for the ECJ's case law in this area is that it is explicable simply on the ground that the Treaty itself did not countenance any broader grounds of challenge. This is the thesis propounded by Harding.<sup>36</sup>

It has perhaps been easy, amid the welter of technical and difficult discussion of 'direct and individual concern' under Article 173(2), to lose sight of a relatively simple message

<sup>34</sup> C. Harding, 'The Private Interest in Challenging Community Action' (1980) 5 *EL Rev* 354, 355.

<sup>35</sup> See below, 528-30.

<sup>36</sup> Above n 34, 355.

that is forcefully sent out from some of the earlier instances of private challenge of the legality of Community action: that Article 173(2) itself, taken together with Article 189, does not, and was probably never intended to hold out much hope to private plaintiffs in the case of measures not actually addressed to them. From the Treaty, it is unequivocally clear that true regulations cannot be challenged by individuals, that there is a difference between regulations and decisions and that decisions not addressed to the complainant can only be challenged by him if he has a special interest in the matter—that is, he is directly and individually concerned.

The explanation for this stance adopted in the Treaty is said to be twofold. One rationale was that it was felt to be inadvisable to allow individuals to challenge true regulations, or decisions which were addressed to Member States. The other was that Article 173 was deliberately couched in more restrictive terms than Article 33 ECSC, on the ground that the EC Treaty gave wider legislative competence to the Community institutions than did the ECSC Treaty.

On this view it is simply tendentious to contend that the ECJ has been restrictive in its interpretation of standing, insofar as this is based on the assumption that Article 173 should have been construed more liberally.

While it is true that the Treaty clearly imposes limits on the extent to which individuals can contest the legality of matters under Article 173(2), the explanation proffered by Harding is, none the less, contestable. It is, of course, the case that the Treaty does not readily countenance challenges to decisions which are addressed to others; and it is equally true that 'real' regulations are not to be challengeable at all. However, it is equally the case that the Treaty does contemplate some challenges in the former instance; and it is also within the express intent of the Treaty that the ECJ should be able to determine whether a regulation really is a regulation, as opposed to a decision. The crucial issue is, therefore, not whether the Treaty imposes limits on standing, but whether the interpretation of those limits is on the right lines, or whether it could be considered to be overly restrictive, and if the latter, the policy reasons for this degree of restriction. What is apparent from the tests, and their manner of application, in the *Plaumann* type of case, and in the *Calpak* type of case, is that it is virtually impossible for an individual to succeed in any case which does not involve some completed set of past events. The judicial reasoning which is used to reach such conclusions is, as seen above, open to criticism, *even given* the language of Article 173(2) itself. Indeed, the conclusions which are reached may, as the discussion of the abstract terminology test revealed, serve to undermine the rationale for allowing this species of challenge at all. The idea that the Court's jurisprudence in this area is simply an application of the intent of the Treaty, and that this renders further evaluation of the policy issues underlying this case law unnecessary, does not, therefore, suffice.

There is another facet of the species of argument considered within this section which should also be addressed at this juncture. The nature of the argument is as follows. In national legal systems it is not easy for individuals to challenge legislative norms, and therefore we should not be surprised to find that such

challenges are difficult to mount in Community law. The plausibility of this thesis depends upon the manner in which we classify Community norms. It is possible to contend that the Treaty itself is akin to a constitutional document, and that regulations made thereunder are akin to primary legislation and hence that they are difficult to challenge. It is, however, also possible to argue that this characterization is imperfect, and that in reality the Community modes of making further norms should be regarded as *sui generis*. At the very least it is evident that many of the regulations which are made by the Community are more closely analogous in nature and content to secondary legislative norms, to rules made by the administration, or to administrative decisions than they are to primary legislation. The availability of standing in national legal systems with respect to such norms is, in many instances, more liberal than that which prevails in the EC. It is, therefore, necessary to look further for the policy justification for the Court's approach in this area.

(c) *The Nature of the Subject Matter: Discretionary Determinations and the CAP*

An understanding of the Court's reluctance to allow standing to individuals in the mainline cases may be best appreciated by focusing on the nature of the subject matter involved. Hartley has correctly observed that the ECJ appears to be more reluctant to afford standing where the norm which is contested is of a discretionary nature.<sup>37</sup> The reasons for this reluctance can be appreciated by focusing more closely on the subject matter in such cases.

Virtually all the mainstream cases considered above concern challenges to norms which have been made pursuant to the Common Agricultural Policy (CAP).<sup>38</sup> The type of substantive challenge made to these norms is, for example, that there has been a breach of Article 40(3). This Article provides that the common organization of agricultural markets shall be limited to pursuit of the objectives contained in Article 39, and shall exclude discrimination between producers or consumers within the Community. An allegation of a breach of Article 40(3) may well, therefore, require the Court to consider whether Article 39 has itself been breached. Article 39 is the foundational provision of the CAP, and is of a broad discretionary nature. This discretion is manifest in two complementary ways.

On the one hand, the Article sets out a broad range of objectives which the CAP is to advance, which are themselves set at a high level of generality. They include the increase in agricultural productivity, with the object, *inter alia*, of ensuring a fair standard of living for the agricultural community; the stabilization of markets; assuring the availability of supplies; and reasonable prices for consumers.

<sup>37</sup> Above n 6, 354, 359.

<sup>38</sup> For detailed consideration of the CAP see, J. A. Usher, *Legal Aspects of Agriculture in the European Community* (1988); F. Snyder, *Law of the Common Agricultural Policy* (1986), and *New Directions in European Community Law* (1990), ch 4; S. George, *Politics and Policy in the European Community* (2nd ed, 1991), ch 8.

On the other hand, it is apparent that these objectives can clash with each other,<sup>39</sup> and therefore that the Commission and Council when making particular norms will have to make difficult discretionary choices. Whether the resultant choices do discriminate between producers may be contentious, since it may be arguable whether a particular norm is only placing one producer group on the same footing as another, or whether it is advantaging one group at the expense of another, and hence discriminating against the latter.<sup>40</sup> As Wyatt and Dashwood state:<sup>41</sup>

Both the Council and the Commission enjoy wide discretionary powers in fulfilling their functions under the common agricultural policy. The Court has stressed that the Council must be recognised as having a discretionary power in this area which corresponds to the political responsibilities which Articles 40 and 43 impose upon it. In the case of both the Commission and the Council, this discretion extends to assessment of the factual basis of the measures they adopt, as well as to the purpose and scope of those measures. As the court declared in *Ludwigshafener*: 'It should be remembered that, in determining their policy in this area, the competent Community institutions enjoy wide discretionary powers regarding not only establishment of the factual basis of their action, but also definition of the objectives to be pursued, within the framework of the provisions of the Treaty, and the choice of the appropriate means of action.'

It is not surprising that the regulations or decisions which result will not always please all those concerned. The very nature of the choices which have to be made pursuant to Articles 39, 40 and 43, will often mean that there are certain winners and losers from any specific aspect of the regulatory process: certain groups will be content with, for example, the aid or subsidies granted to them, others will feel that they have been harshly treated; in other areas a particular group may feel that the levy imposed upon it has been unduly harsh. Countless claims of this kind are possible, given the plethora of regulations and decisions made by the Community in the context of the CAP.

The ECJ, as is evident from the preceding quotation, does not wish to be placed in a position whereby it is being constantly asked to second guess the discretionary choices made by the other Community institutions. This would swamp the Court with cases of this kind. It would also be inappropriate for the Court simply to substitute its view on the 'correct' balance between the objectives set out in Article 39 for that of the Commission and the Council. Given that this is so, the ECJ has two techniques at its disposal to prevent it being placed in this position.

One approach is to adopt a restrictive standard of review, whereby it will only overturn choices reached by the original decision makers if there is some manifest

<sup>39</sup> See, eg, Case 34/62, *Germany v Commission* [1963] ECR 131; Case 5/67, *Beus v Hauptzollamt Munchen* [1968] ECR 83.

<sup>40</sup> See, eg, Case 8/82, *Wagner* [1983] ECR 271; Case 283/83, *Racke* [1984] ECR 3791.

<sup>41</sup> *The Substantive Law of the EEC* (2nd ed, 1987), 300-1. The decision referred to in the quotation is, Cases 197-200, 243, 245, 247/80, *Ludwigshafener Walzmuhle Erling KG v Council* [1981] ECR 3211.

error. Challenges are possible on the basis that the norm is disproportionate, or that it is discriminatory, but the Court will not lightly nullify the discretionary choice which has been made. This approach is evident in the following extract from Wyatt and Dashwood:<sup>42</sup>

The Court has held that where the Commission is charged with evaluation of a complex economic situation, it enjoys a wide measure of discretion, and that in reviewing the legality of such discretion, the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the administration has clearly exceeded the bounds of its discretion.

The technique of limiting the standard of review has been particularly evident in the Court's jurisprudence under Article 177 of the Treaty in cases where individuals have sought to challenge Community norms through preliminary rulings. In these instances the Court cannot readily restrict access through controlling standing criteria, and it has responded by articulating a limited standard of review. This approach will be considered more fully below.

The other approach is to employ very strict tests of standing, as a mechanism to limit the number of cases of this type that the Court hears pursuant to Article 173. The advantage of this second approach over the first is that it is far less demanding upon the Court's time. The first technique of limited review still requires the Court to hear the entire substance of the case, even if it is ultimately held that the applicant has failed to show the required level of error to justify nullifying the challenged norm. If the applicant is excluded at the standing level, then an in-depth analysis of the substantive claim is obviated.

The very strict requirements for standing in the mainline cases may, therefore, be explained to a significant degree by the desire of the Court not to become enmeshed in large numbers of cases in which applicants seek to challenge the way that the Commission and Council have exercised their discretion to make policy choices pursuant to the CAP.

(d) *The Nature of the Subject Matter: Quasi-Judicial Determinations and the More Liberal Case Law*

What explanation can then be proffered for the more liberal stance of the ECJ, in the context of dumping, state aids and competition? Two features of this case law serve to distinguish it from the mainline cases considered above.

One feature is that the *procedure* in these areas does explicitly or implicitly envisage a role for the individual complainant, who can alert the Commission to the breach of the relevant area of Community law. Moreover, as is evident from the cases on this topic, the complainant may then play a prominent role in the assessment of whether the alleged breach has actually occurred.

<sup>42</sup> Above n 18, 301. For a discussion of the way in which the Court limits the intensity of its review in such instances, see below, 530-5.

The nature of this assessment has been properly described as quasi-judicial.<sup>43</sup>

The other distinguishing feature relates to the *substantive* nature of the subject matter in these cases. A common feature in the areas where the ECJ has been more liberal is that the nature of the subject matter is such that the interests of the Community can be stated more unequivocally. State aids can be taken as an example. The provision of such aid is contrary to the Community's interest, since it places the recipient firms at a competitive advantage as compared to firms in other countries. The Court is, therefore, likely to be receptive to an argument, such as that put in the *COFAZ* case, that the Commission has been mistaken in thinking that the transgressing state has corrected its past illegal behaviour. A similar point can be made about dumping. The Community has a clear interest in ensuring that goods from outside the Community are not sold therein at too low a price. The Court is, therefore, once again likely to be willing to listen to an argument, put forward in a case such as *Timex*, that the Commission has set the dumping duty too low, with the consequence that firms within the Community are still being harmed. This is particularly so when the applicant firm is well placed to make an assessment of the pricing and cost issues which are involved.<sup>44</sup>

The situation in these areas can be contrasted with that in the mainline cases on the CAP. In the mainline cases the paradigm is one in which there are conflicting claims *within* the Community. Discretionary choices will be made, pursuant to Articles 39, 40 and 43, and it may not be possible to satisfy all those affected by the choice on every occasion. For the reasons stated above, the ECJ is reluctant to become engaged in an extensive process of second guessing the precise nature of the discretionary choice made in a particular instance.

The rationale for the more liberal approach in the *Greens* case must be sought on yet other grounds. The most likely explanation is that the Court wished to emphasize the fact that the Community was open to all shades of political party, and in that sense representative of European opinion. It did not wish to be seen supporting a regime in which those presently represented within the Parliament could weight the financial system in their own favour. To borrow from the language of Ely, the Court was willing to use its own power to ensure that the democratic system was not used by the 'ins' to exclude or prejudice the 'outs'.<sup>45</sup>

<sup>43</sup> Hartley, above n 6, 354-9.

<sup>44</sup> The rationale for allowing the firms on which the dumping duty is imposed to have standing is obviously different. The explanation here is probably a combination of two connected ideas. The first is that while the dumping duty must, as seen above, be imposed by regulation, it is in reality often closer to a decision addressed to specific firms. The second is that the whole issue of the existence of dumping, and the calculation of the costing and pricing factors, is very controversial. To allow the affected firms to contest the regulation may well, therefore, be a political judgment on the part of the Court.

<sup>45</sup> J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

## 5 Article 177: Preliminary Rulings as a Mechanism for Contesting the Legality of Community Measures

### (a) *The Rationale for Using Article 177*

Article 177(1)(b) of the EC Treaty allows national courts to refer to the ECJ questions concerning the 'validity and interpretation of acts of the institutions of the Community'. This provision has assumed an increased importance for private applicants in the light of the Court's narrow construction of the standing criteria under Article 173. Often a reference under Article 177 is the only mechanism by which such parties can contest the legality of Community norms. How then do preliminary rulings function in this context, and what is the relationship with more direct forms of attack under Article 173? Harding provides a succinct summary of the reasons why individuals wish to use Article 177.<sup>46</sup>

It should perhaps be borne in mind at this point why a request for a ruling under Article 177(b) is likely to take place in certain kinds of case rather than a direct action. It is not for reasons of procedural advantage: the direct action will prove speedier and is procedurally more favourable to the private party. But a direct claim may not be a feasible course for a number of reasons. Firstly, the time limit (two months) may well have passed before the alleged illegality or indeed the private party's wish or need to litigate has become apparent. In the second place, the individual may lack *locus standi*: he may not challenge true regulations or directives and may only attack decisions disguised as regulations or addressed to other persons if directly and individually concerned, which itself presents an insurmountable hurdle in many cases. There is, finally, a related point. It would be misleading to picture the private plaintiff as a disinterested legal watchdog, alert to identify as soon as may be any possibly illegal Community activity. In practice, the individual's interest is likely to arise when his own activities are affected by Community action—usually through the instrumentality of Member State authorities and not necessarily very soon after the inception of the Community measure. If the individual's interest is seen in this light, then Article 177(b) appears as an equally if not more natural avenue of review than Article 173. Consequently, in a period of more intensive Community activity which is likely to provoke enquiries into the legality of the action taken, it would not be surprising to discover a sharp increase in the number of applications under Article 177(b).

### (b) *The Mechanism for Testing Community Legality via the National Courts*

How then does an individual who is unable to raise a matter directly under Article 173 actually do so under Article 177? Who are the parties to the action in the national court from which the reference to the ECJ is then made? The

<sup>46</sup> 'The Impact of Article 177 of the EEC Treaty on the Review of Community Action' (1981) 1 *YEL* 93, 96. It should be noted as a qualification to the point being made by Harding that Article 177 actions are often given a speedier hearing by the ECJ than are other actions. This does not, however, undermine the general point which Harding makes, given that Article 177 actions will, in any event, have to proceed through national courts as well.

answer is that this varies depending upon the fact situation which is in issue. However, a common type of situation would be as follows. A regulation is made pursuant to the Common Agricultural Policy which cannot be contested under Article 173, either because the applicant lacks standing, or because he or she is outside the time limit. Regulations of this nature will normally be applied at a national level by a national intervention agency, which will be responsible for collecting the appropriate levies, applying the rules concerning security deposits and the like, which are demanded by the relevant Community norms. This provides the factual setting for the Article 177 action. The national intervention agency will apply the regulation passed by the Community institutions. This may, for example, require in certain circumstances the forfeiture of a deposit which has been given by a trader. The trader believes that this forfeiture, and the regulation on which it is based, are contrary to Community law. The allegation may be that there has been a breach of general principles of Community law, such as proportionality or legitimate expectations; or the allegation may be that there has been a breach of the Treaty itself, in the sense that the regulation is in violation of the principle of non-discrimination contained in Article 40(3) of the Treaty. If the security is forfeited the trader may then institute judicial review proceedings in the national courts claiming that the regulation is invalid for one of the reasons adumbrated above. It will then be for the national court to decide whether to refer the matter to the ECJ under Article 177(b). In other instances the matter may arise somewhat differently. Thus, if a regulation contains a demand for a levy which the trader believes to be in breach of Community law for one of the reasons set out above, then the trader's strategy might be to resist payment, be sued by the national agency, and then raise the alleged invalidity of the regulation on which the demand is based by way of defence. Once again, it would then be for the national court to decide whether to refer the matter to the ECJ.

Brief examples can be given of these strategies at work. In *R v Intervention Board, ex p Man (Sugar) Ltd*<sup>47</sup> Man, a sugar trader, submitted to the intervention board a tender for the export of sugar to non-member countries. Security sums had to be lodged. The relevant Community legislation provided that the export licences had to be applied for by a certain time. Man was four hours late in his application owing to internal staff difficulties. The security deposit was forfeited by the intervention board. This was a sizeable sum—£1,670,370. Man, therefore, brought judicial review proceedings in the national court and argued that the forfeiture was disproportionate and hence that the relevant regulation was invalid. This was referred to the ECJ, and the Court held that the particular article in the regulation was invalid, in so far as it demanded forfeiture of the entire deposit for late licence application. The *ICC* case<sup>48</sup> provides a further example of the same type of situation. In that case the grant of certain Community aid was

<sup>47</sup> Case 181/84, [1985] ECR 2889.

<sup>48</sup> Case 66/80, [1981] ECR 1191.



made dependent on proof that the recipient of the aid had purchased a certain quantity of skimmed-milk powder held by an intervention agency. Compliance with this obligation was enforced by the deposit of a security which was forfeit if the skimmed-milk was not in fact bought. The applicant received the aid, deposited the security, but did not buy the milk, and hence the agency refused to release the deposit. In an earlier case the ECJ had held that the regulation was invalid, because the price at which the milk powder was to be bought was disproportionately high. The applicant, therefore, took the view that the deposit could not be forfeited, since it only served to ensure compliance with an obligation which was itself invalid. The Italian court made a reference to the ECJ, asking whether the judgment in the earlier case, holding the regulation to be invalid was also of relevance in subsequent litigation involving the same issue, albeit that it arose from a different national court. The response of the ECJ was to hold that the national court could rely on the previous ruling on the issue.<sup>49</sup>

### 6 *The Intensity of Review*

Once the applicant has established standing, and has also overcome the other hurdles such as time limits for the bringing of an action, he or she will still have to show the existence of some reason for the act of the Community to be annulled, or declared invalid. Four grounds are specified in Article 173 EC: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or any rule of law relating to its application; and misuse of power. General analysis of these grounds of review can be found within established works.<sup>50</sup> The objective of the present discussion is to focus attention on the standard or intensity of the review, and to link this with the preceding consideration of standing.

Anyone familiar with public law systems will be aware that to focus on the heads of review alone is to consider only half of the relevant enquiry. The intensity of the judicial review is also of considerable importance in determining the reality of judicial control over the administration. How far will the Court go in reassessing decisions made by the Commission and Council? To what extent will the Court be ready to accept determinations made by the institutions relating to the balancing of competing aims within the Community's objectives, and will the ECJ's attitude differ from one area to another?

Article 33 of the ECSC Treaty contains certain explicit dictates on the matter. It provides that the Court may not examine the evaluation of the situation resulting from economic facts or circumstances in the light of which the High Authority made its decisions or recommendations, except where the High Authority is alleged to have misused its powers or has manifestly failed to observe the provisions of the Treaty or any rule of law relating to its application. Although

<sup>49</sup> Difficult questions can arise concerning the precise nature of the norms which can be challenged through Article 177. For consideration of this issue, see Hartley, above n 6, 398-404.

<sup>50</sup> See, eg, Hartley, above n 6, ch 15.

the Article only applies to the evaluation of economic facts, the Court has shown a similar restraint in other instances where the Community institutions possess particular expertise or knowledge.<sup>51</sup>

There is no provision in the EC Treaty which explicitly performs the same function as Article 33 of the ECSC. However, the intensity of review has, not surprisingly, also been an issue under the EC Treaty. Many of the cases in which applicants seek to have Community acts annulled or declared illegal concern determinations made pursuant to the Common Agricultural Policy. The question of the intensity of the Court's review of the impugned Community act has arisen at a number of different levels.

First, it has arisen in the context of a challenge to the very choice of objective to be pursued, and the appropriate means by which this should be done. We have already seen that the foundational provisions of the Treaty in this area, Articles 39, 40 and 43, contain a number of objectives which are set out at a relatively high level of generality.<sup>52</sup> This necessitates the making of discretionary choices by the Commission and the Council. In evaluating the chosen option the Court has held that the competent Community institutions enjoy wide discretionary power as to, *inter alia*, the definition of the objectives to be pursued and the choice of the appropriate means of action.<sup>53</sup> A similar recognition of the discretion of the Community institutions is to be found in the *Balkan-Import-Export* case, in which the Court stated that<sup>54</sup>

... Article 39 of the EEC Treaty sets out various objectives of the common agricultural policy. In pursuing these objectives, the Community Institutions must secure the permanent harmonization made necessary by any conflict between these aims taken individually and, where necessary, allow any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made.

The *Biovilac* case provides a further good illustration of the same theme.<sup>55</sup> In that case the applicant argued that Community regulations on skimmed-milk powder were illegal for a number of reasons, one of which was that they disregarded the object of stabilizing markets set out in Article 39(1)(c). The Court rejected the claim. It stated that even if the object of stabilizing markets and that of ensuring a fair return to the agricultural community (enshrined in Article 39(1)(b)) were only partially reconciled by the contested regulations, it could not be said that these were illegal as being in breach of Article 39: the legality of such measures could only be affected if they were *manifestly unsuitable* for achieving the aim pursued. More recent case law of the Court has continued

<sup>51</sup> Ibid 425-7.

<sup>52</sup> See, above 524-6.

<sup>53</sup> Cases 197-200, 243, 245, & 247/80, *Ludwigschafener Walzmühle Erling KG v Council and Commission* [1981] ECR 3211.

<sup>54</sup> Case 5/73, *Balkan-Import-Export GmbH v Hauptzollamt Berlin Pachtshof* [1973] ECR 1091, 1112.

<sup>55</sup> Case 59/83, *SA Biovilac NV v European Economic Community* [1984] ECR 4057.

to stress the same theme. This is exemplified by *Wuidart*.<sup>56</sup> The case concerned a challenge to certain regulations which imposed additional levies on milk. The Member States were given alternative methods for implementing the levy, and it was argued, *inter alia*, that the two methods could lead to discrimination between producer groups which was contrary to Article 40(3). The Court emphasized that the prohibition on discrimination contained in that article was merely a specific enunciation of a more general principle of equality contained in the Treaty. However, the Court also emphasized that in matters concerning the CAP the 'Community legislature has a broad discretion which corresponds to the political responsibilities imposed on it by Articles 40 and 43 of the Treaty'.<sup>57</sup>

More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.<sup>58</sup>

A *second*, related context in which the intensity of review can arise concerns the interpretation of regulations or decisions made pursuant to the CAP. These may often contain terms which premise Community action on the basis that there are 'serious disturbances' on the relevant market, or where 'economic difficulties' could be caused by a certain change in prices, or currency values. There is no doubt that, as a matter of principle, the Court could undertake an extensive re-evaluation of the factual and legal issues, in order to determine whether such circumstances exist, and that on occasion it has engaged in quite close scrutiny of the data.<sup>59</sup> To adopt this approach on a broad scale would, however, be time consuming; it would encourage applicants to ask the Court to second guess evaluations made by the Community institutions; and it would involve intensive review of measures which are often adopted under severe time constraints, or in situations where there is an urgent need for measures to combat a temporary problem in the market. The relevance of these factors for a less intensive species of review is evident in the reasoning of Lord Mackenzie Stuart, who considers the problems posed for the Community institutions and the Court by the currency fluctuations of the 1970s.<sup>60</sup> His Lordship points out that during this period 'the Court has had to consider the actions of the Community institutions taken, of necessity, at speed against a background of rapidly changing pressures, when almost every aspect has been under fire from those whose interests have been affected'.

What do these instances demonstrate? First, I think, that the Court has had and is having to deal with a series of cases—I could extend the list many times without

<sup>56</sup> Cases C-267 and 285/88, *Gustave Wuidart v Laiterie Cooperative Eupenoise, a Cooperative Society* [1990]-I ECR 435.

<sup>57</sup> *Ibid* 481.

<sup>58</sup> *Loc cit*.

<sup>59</sup> See, eg, Cases 106 and 107/63, *Toepfer* [1965] ECR 405.

<sup>60</sup> Lord Mackenzie Stuart, *The European Communities and the Rule of Law* (1977), 91.

difficulty—arising in circumstances not only never envisaged by the Treaty of Rome but in circumstances running counter to one of its basic premises. Secondly, they show that the Court appreciates that in moments of economic stress when contingency measures have to be taken the Community authorities must be allowed some lee-way. That with hindsight it may appear that the measures chosen were not necessarily the best is not sufficient to annul what has been done. Even so, and this is the third and most important point, ‘the law’ must be applied to protect the administered if, no doubt with the best motives imaginable, the Council or Commission, as the case may be, has failed to protect their legitimate interest . . .<sup>61</sup>

The predominant approach of the Court has, therefore, not been one of complete substitution of judgment, or of a complete rehearing of issues of fact or mixed fact and law. At least not within the context of cases arising from the CAP, which accounts for many of the actions brought against the Community under either Article 173 or Article 177.

Brief examples can be given of the ECJ’s approach in this area. In the *CNTA* case, considered above, the applicant complained of the withdrawal of monetary compensatory amounts (mca’s), and also contested the criteria on which such sums should be given. Mca’s can be given to compensate for certain exchange rate movements, in circumstances where those movements might otherwise disturb trade in agricultural products. The Court held that the Commission possessed a large degree of discretion in determining whether alterations in monetary values as a result of exchange rate movements might lead to such disturbances in trade, and therefore, whether mca’s were warranted. In reaching this conclusion, the Court also held that the Commission could properly take account of broader economic factors, and was not confined to considering only monetary values.<sup>62</sup> A similar approach can be perceived in the *Deuka* case.<sup>63</sup> The applicant sought, through Article 177, to test the legality of a particular regulation under which premiums payable on wheat were modified. It was argued that this was illegal, on the ground that the basic regulation on these matters only permitted adjustments ‘where the balance of the market in cereals is likely to be disturbed’. The Court rejected the claim. It stated that the Commission had a ‘significant freedom of evaluation’ in deciding on both the existence of a disturbance, and the method of dealing with it. The Court then stated:<sup>64</sup>

When examining the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority, but must restrict themselves to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power.

This approach was confirmed, albeit with some modification, in the *Racke*

<sup>61</sup> Ibid 96.

<sup>62</sup> Case 74/74, *CNTA v Commission* [1975] ECR 533.

<sup>63</sup> Case 78/74, *Deuka, Deutsche Kraftfutter GmbH, B. J. Stolp v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1975] ECR 421.

<sup>64</sup> Ibid 432. See also, Case 57/72, *Westzucker GmbH v Einfuhr-und Vorratsstelle fur Zucker* [1973] ECR 321.

case.<sup>65</sup> Once again the case arose through Article 177. Once again the applicant claimed that certain particular regulations, this time on monetary compensatory amounts, were in violation of the more basic regulation governing the area. The latter only permitted such mca's to be granted or charged where changes in the exchange rates of currencies could bring about disturbances to trade in agricultural products. The respective roles of the Commission and the Court were clearly delineated by the ECJ: it was for the Commission to decide on the existence of a risk of disturbance to trade, and in this evaluation of a complex economic situation it possessed a wide discretion.<sup>66</sup>

In reviewing the legality of the exercise of such discretion, the Court must examine whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.

The *third* context in which the question of the intensity of review can arise concerns the application of principles such as legitimate expectations, proportionality and non-discrimination. It is quite clear that these principles can be used in the context of the CAP to strike down regulations or decisions.<sup>67</sup> It is also clear that the Court will not readily find that these principles have been broken in the agricultural sphere, from which many of the cases concerned with the legality of Community action arise. This is apparent from both the primary and secondary literature. For example, in the *Merkur* case the applicant complained that the Commission had failed to fix compensatory payments for certain products in line with a basic regulation on this issue, and that this constituted discrimination since others in a similar position had received such payments. The Court rejected the claim. It was influenced by the fact that the basic Community regulation was an emergency measure, and that the rules for its implementation to particular product categories had to be devised within a very short space of time. It then stated:<sup>68</sup>

Since the assessment which the Commission had to make was perforce an overall one, the possibility that some of the decisions it made might subsequently appear to be debatable on economic grounds or subject to modification would not in itself be sufficient to prove the existence of a violation of the principle of non-discrimination, once it was established that the considerations adopted by it were not manifestly erroneous.

The same approach is evident in more recent case law of the ECJ. In *Fedesa*<sup>69</sup> the applicants challenged a Council Directive which prohibited the use in livestock farming of certain substances which had a hormonal action. The challenge was based on a number of grounds, including breach of the principles

<sup>65</sup> Case 98/78, *Firma A. Racke v Hauptzollamt Mainz* [1979] ECR 69.

<sup>66</sup> *Ibid* 81.

<sup>67</sup> Wyatt and Dashwood, above n 41, 302-5.

<sup>68</sup> Case 43/72, *Merkur GmbH v Commission* [1973] ECR 1055, 1074.

<sup>69</sup> Case C-331/88, *R v The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex p Fedesa* [1990] ECR I-4023.

of legal certainty, legitimate expectations and proportionality. The breach of the first two of these principles was based on the argument that the banned substances were not in fact harmful, and that the Council had not adduced objective scientific evidence to substantiate their action. The Court responded by stating that in the sphere of the CAP its role was limited to examining whether the 'measure in question is vitiated by a manifest error or misuse of powers, or whether the authority in question has manifestly exceeded the limits of its discretion'.<sup>70</sup> It declined to engage in a detailed scrutiny of the evidence which lay behind the challenged Directive. The same theme is echoed in its judgment on proportionality. The reasoning of the ECJ on this issue serves to make clear that the principle of proportionality can itself be applied more or less intensively. The Court stressed that the Community institutions must pursue their policy by the least onerous means, and that the disadvantages caused must not be disproportionate to the aims of the measure. It then continued as follows:<sup>71</sup>

However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

Space precludes any detailed analysis of the application of these principles in the agricultural sphere. However, the secondary literature further attests to the difficulty of utilizing such principles successfully. Thus, Vajda comments that the Court's reluctance to involve itself in economic policy considerations makes it hesitant to question the Commission's exercise of discretion on the grounds of proportionality, unless the contested charge was really disproportionate.<sup>72</sup> Sharpston is equally clear on the difficulties which face applicants who wish to plead legitimate expectations. Relatively few such cases succeed in the agricultural sphere, and the 'general rule appears to be that the European Court will usually be prepared to back the Council and/or the Commission and to hold that they are entitled to have a fairly wide margin of manoeuvre in market management, even where the chosen scheme has been subjected to fairly heavy criticism'.<sup>73</sup>

## 7 Conclusion

The preceding analysis has attempted to draw together three of the important issues which arise in the context of the review of the legality of Community action: the legal criteria which are employed to determine who has standing to

<sup>70</sup> Ibid 4061.

<sup>71</sup> Ibid 4063. See also, Case C-8/89, *Vincenzo Zardi v Consorzio agrario provinciale di Ferrara* [1990] ECR I-2515, 2532-3.

<sup>72</sup> C. Vajda, 'Some Aspects of Judicial Review within the Common Agricultural Policy—Part II' (1979) 4 *EL Rev* 341, 347-8.

<sup>73</sup> E. Sharpston, 'Legitimate Expectations and Economic Reality' (1990) 15 *EL Rev* 103, 108.

contest such action; the policy reasons which have influenced the Court in this respect; and the scope of review which is undertaken if the ECJ proceeds to the substance of the case. These issues are interrelated and any general analysis of this topic should be aware of these connections.

It has been seen that the legal criteria which have been employed to determine the limits of standing in the mainline cases are restrictive, in the sense that it is extremely difficult for applicants to pass the tests in either the *Plaumann* or *Calpak* type of case under Article 173. Various policy explanations have been advanced to explain this stance. It is, however, suggested that the nature of the subject matter provides the best rationale for the Court's approach, and also serves to distinguish the mainline cases from those in other areas, such as dumping, competition and state aids, where the ECJ has been more willing to proceed to the substance of the case. Applicants who wish to contest the legality of decisions or regulations within the agricultural sphere have resorted to Article 177 actions. Because of the nature of the action under Article 177, a request for a ruling made by the national court, the ECJ has not, with some limited exceptions, been able to exclude such applicants on the grounds of standing or reasoning analogous thereto. It has, however, made it patently clear that it will not lightly overturn a Community agricultural norm, and the standard of substantive review is limited in the manner discussed above. Thus, even if the Court were to be more liberal in according standing under Article 173, it is unlikely that many would succeed on the substance of the case, unless the ECJ were also to alter the intensity of its substantive review.

The actual tests for standing in the mainline cases, and the manner in which they have been applied, can certainly be criticized, as has been done above. Having said that, there are clearly sound reasons for the Court not to be drawn into a continual second guessing of the plethora of agricultural norms which emerge continuously from the Commission and the Council. In order to avoid this the Court has principally used strict standing criteria under Article 173, and limited substantive review under Article 177. It might of course be contended that the Court should be more liberal with respect to standing, and hear the substance of the case, even if ultimately the claim fails because the applicant cannot show the manifest error etc required as the test for substantive review. The reason for continuing to utilize the standing hurdle is that it obviates the need for any enquiry into the substance of the case, and thereby saves judicial time and resources.<sup>74</sup>

In assessing this general approach by the Community Court it should be borne in mind that it is common in other public law systems for the courts to be relatively non-interventionist with respect to economic norms made by government or governmental agencies. Whether this manifests itself in restrictive standing

<sup>74</sup> See above, 525-6.

criteria, or in limited substantive review, or both, may well vary from system to system.<sup>75</sup>

It is, of course, the case that differing considerations may well apply in other areas, in which the Court may be more willing to grant standing and to engage in more intensive review. The breadth of subject matter covered by Community law renders this diversity of judicial approach highly likely. Any assessment of Community law must always be evaluated against the backdrop of the substantive issues involved before the Court. In this way a richer understanding can be gained of the Court's decisions concerning review of legality, whether these relate to procedural or substantive aspects of the topic.

<sup>75</sup> This can be apparent in both constitutional and administrative law. Constitutional scrutiny of economic norms tends to be less intensive than the scrutiny accorded to cases which involve more traditional civil liberties. Having said that, it is of course still possible for commentators to differ as to the precise nature or extent of the substantive scrutiny which they believe ought to be available in respect of economic regulation.



