

KITI ES TEISĒS KLAUSIMAI

JUDICIAL PROTECTION IN THE EU*

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Summary

The article consists of five parts. The first part provides an analysis of the „principle of „effective judicial protection and control“. The European Court of Justice developed this principle as „effective judicial control“ or, more broadly, effective judicial protection in its early case law, and has continuously refined and specified it. Court developed the principles of effectiveness (a remedy should not only compensate the victim for a potential loss of or injury to a right, but also deter potential wrongdoers from violating it in the first place) and equivalence (the protection of Community law rights should be equivalent in strength and scope to the protection of similar rights granted under national law). The second part of the article presents a research on cross-border judicial protection with the main attention to the Brussels Convention of 1968 (as amended) and Brussels Regulation 44/2001 specifying its impact on consumer contracts and employment contracts. Indirect protection via the reference procedure is analysed in the third part of the article. Original objectives of the Community law uniformity are explored, as well as the new function of the reference procedure – (indirect) individual rights protection is estimated. The author considers the absence of a constitutional complaint in EU law against legislative acts, discusses the limited scope of direct actions under Community law, distinguishes regulations of direct and individual concern. Finally, in the fifth part of the article, new proposals to extend standing in the Draft Constitution of the EU is evaluated.

* The article is based on § 14 of the book: N. Reich in collaboration with Chr. Goddard and K. Vasiljeva, Understanding EU-Law – Objectives, Principles and Methods of Community Law, Intersentia Antwerp-Oxford-New York, 2003.

1. The principle of „effective judicial protection and control“

1.1. Rights, remedies and procedures

„*Ubi ius – ibi remedium*“ – where there is a right there is a remedy. [1: 501–521] This important principle of any government of law is true for Community law, too. Where Community law grants rights to a person as Union or market citizen, it must assure that these rights can be effectively protected. This is due to its direct effect, especially in the area of fundamental freedoms and competition.

The ECJ developed this principle of „effective judicial control“ or, more broadly, effective judicial protection in its early case law, and has continuously refined and specified it.¹ Many cases are linked to the *effet utile* of Community law, especially its fundamental freedoms. As the Court said in *Heylens*:²

Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right... Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons... (paras 14-15)

The guarantee of these freedoms consists of both a substantive, and a remedial and procedural element. Direct effect is voided of any sense if the beneficiary cannot enforce it by effective remedies, or if procedures necessary for enforcement are unavailable. As a consequence, the Court developed the principles of *effectiveness* and *equivalence*:³

Effectiveness means that a remedy should not only compensate the victim for a potential loss of or injury to a right, but also deter potential wrongdoers from violating it in the first place.

Equivalence means that the protection of Community law rights should be equivalent in strength and scope to the protection of similar rights granted under national law. In other terms: nobody should suffer from a lower standard of protection for the simple reason that the right to be protected has its origin in Community rather than in national law.

Case law has also based these principles on Art. 6 of the European Convention of Human Rights (ECHR). Although this does not have direct effect upon Community law, it must at least be respected as an expression of the common constitutional heritage of the Member States. In *Johnston*,⁴ the Court said:

The requirement of judicial control ... reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Art. 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 ... and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law (para 18).

Art. 6 (2) EU transferred this case law into Union law. A further step was taken by Art. 47 of the European Charter of Fundamental Rights (EChFR) [2] which reads:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal...

Many Community law directives, especially those concerned with preventing discrimination⁵ and those protecting legitimate expectations⁶, contain detailed *obligations de moyens* on effective legal protection. These include rights to compensation, collective interest actions, access to tribunals of law, and the like. Although earlier case law of the ECJ

¹ An excellent overview of the development of the case law is given by Tridimas, *The General Principles of Community Law*, 1999 at 279-290.

² Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, [1987] ECR 4097.

³ For details cf. Tridimas at 279-290.

⁴ Case 222/84 *Marguerite Johnston v Chief Constable of Royal Ulster Constabulary* [1986] ECR 1651.

⁵ Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd.* [1998] ECR I-5199.

⁶ Case C-361/88 *Commission v Germany* [1991] ECR I-2567 concerning environmental protection.

stressed that „the Treaty ... was not intended to create new remedies in the national courts to ensure the observance of Community law other than already laid down by national law,“¹ the notion of practical possibility was later replaced by requirements of adequacy and effectiveness. If Member State law fails to acknowledge the appropriate remedies, courts are obliged to provide for them, as the Court said in *Borelli*²:

Accordingly, it is for the national courts to rule on the lawfulness of the national measure at issue on the same terms on which they review any definitive measure adopted by the same national authority which is capable of adversely affecting third parties and, consequently, to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case (para 13).

Clearly, these general principles and broad *obligations de moyens* are of little help to the individual who complains about an injury to their Community law rights. A system of effective protection needs to answer a number of questions. These have to be resolved by the Court as well as by Member State jurisdictions.

What are the effective remedies to be chosen? Will they consist of granting an injunction, in allowing for compensation, in ordering restitution? [1: 509–521] Are they limited to traditional civil law remedies, or do they do require action under administrative or even criminal law?

What are the procedures to be chosen for effective enforcement of remedies attached to a violation of Community law rights?

Which injuries should be treated by the Community, and which by national jurisdictions? How can they be linked together? How does the duty of co-operation under Art. 10 EC actually work?

How can the principle of effective judicial protection as a right under Community law be harmonized with the „procedural autonomy“ of Member States? The latter has been recognized by the Court in several judgments, for example with regard to the characteristics of civil litigation, where it is up to the parties themselves to present evidence and defend their case.³

1.2. Distribution of responsibilities

In order to understand the Community system of protection of rights, it is useful to follow the distinction developed by the former AG Van Gerven. [1: 526–533] According to him, this protection works in several ways:

If a Community law right is violated, the victim should have an effective remedy against the perpetrator, be it a private person, a Member State or one of its bodies, or the Community institutions themselves. The basic contents of the remedy are shaped by Community law. Unreasonable restrictions on remedies, as for example by unforeseeable limitation periods, must be disappplied by national courts⁴. A judge-made harmonization of remedies is taking place. Inversely, the potential responsibility of the violator is part of a Community system of governance.

These Community-specific remedies should be enforced by legal means, in the very end if necessary by courts of law. Member States, not the Community, have to establish a system of effective procedures. Their procedural autonomy is supplemented by the *effet utile* of Community law, as the Court has clearly shown in *Borelli*.

Community involvement in procedures – a matter for Member States – becomes deeper in cross-border conflicts of a civil and commercial law nature (II) and in cases involving the interpretation and validity of Community law measures (III).

¹ Case C-158/80 Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel [1981] ECR 1805.

² Case C-97/91 Oleificio Borelli SpA v Commission, [1992] I-6313.

³ Cases C-430-432/93 Van Schijndel and Van Veen v Stichting Pensioenfonds [1995] ECR I-4705 at para 21.

⁴ Case C-327/00 Santex SpA v Unità Socio Sanitaria Locale [2003] ECR I-1877.

Procedures allowing direct access to Community jurisdictions – the Court of First Instance (CFI) and, upon appeal, the Court of Justice (ECJ) - are only available in very limited cases, namely where an individual is directly and individually concerned by a Community measure (sub IV).

1.3. Protection against jurisdiction clauses in pre-formulated contracts

Jurisdiction clauses are quite common in standard form contracts, especially those concluded with consumers. They usually impose on the weaker party a jurisdiction away from its place of residence and thereby unilaterally favor the other side, mostly business. EC law has two instruments to cope with them:

- 1) in cross-border litigation, Reg. 44/2001 is applicable. It will be mentioned below.
- 2) in internal relations, this depends on the „procedural autonomy“ of the Member State discussed above, although this is limited by the „Unfair Terms Directive“ 93/13/EC“. [3]

The latter problem was raised in *Oceano*.¹ Several Spanish clients were sued by a book-club company at its place of business but not at their residence, because a jurisdiction clause was inserted in the standard contract form. The Spanish judge was not sure whether he could raise the issue of his territorial incompetence *ex officio* because he regarded the jurisdiction clause to be unfair under Art. 3 (2) of Dir. 93/13 and Nr. 1 lit q) of the so called indicative list of the Annex. The Court gave a somewhat unclear answer:

a jurisdiction clause must be regarded as unfair within the meaning of Art. 3 of the Dir. (93/13) in so far as² it causes contrary to the requirement of good faith, a significant imbalance in the parties rights and obligations existing under the contract to the detriment of the consumer.

The Court insisted on the protective ambit of Dir. 93/13. This means that the judge should be able to raise *ex officio* the potential unfairness of the jurisdiction clause, and that he should apply and interpret his national law in conformity with Community law. However, the Court did not completely condemn the jurisdiction clause, but left this to the national judge, depending on the circumstances of the case. There is, though, great likelihood that such unilateral clauses are unfair because they contradict the principle of effective judicial protection.

2. Cross-border judicial protection

2.1. The Brussels Convention of 1968 as amended

Judicial protection presumes that a party subject to a dispute should be able to bring legal proceedings in a court of law (or other body responsible for resolving legal disputes), knowing that the decision taken by such a body will be recognized and enforced. Sometimes this should be done in a State other than the State where the claimant is established or domiciled. Therefore, questions on jurisdiction, recognition and enforcement of judgments throughout the Community are crucial to ensure effective protection of rights derived from Community law. These also form part of an effective internal market presupposing a „free flow of judgments“, at least in civil and commercial matters.

Within the EU, the above-mentioned questions have been regulated primarily by the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and

¹ Joined cases C-240-244/98 *Oceano Grupo editorial v Rocio Murciano Quintero et al.* [2000] ECR I-4491; comment Stuyck, CMLRev. 2001, 719.

² Micklitz in: Reich/Micklitz, *Europäisches Verbraucherrecht*, para 13.22 insists that the words in italics were not translated in the German version and caused some confusion about the ambit and scope of the judgment.

Commercial Matters[4]. The original EEC Treaty was mostly concerned with the establishment of the Common Market and contained virtually nothing about private international law and jurisdiction, except for Art. 220 EEC (now Art. 293 EC) stating that:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

The only instrument that could be adopted under these provisions was an international treaty. Therefore, the Brussels Convention was adopted as an international law instrument and ratified by all Member States. Many legal scholars characterized the Convention as a success in the process of European integration:

[It was] a well-known success. It went even further than the relevant Treaty provision, because it established a system of direct rules for the jurisdiction of European Member state courts in international cases and did not simply provide for a 'simplification of formalities governing the reciprocal recognition and enforcement of judgments' – thus the expert drafters of the Convention were forerunning the diplomatic drafters of Art. 65 EC by almost 30 years. [5: 55]

As stated above, the Convention provides a set of uniform and directly applicable rules. These form part of the law of every State – member to the Convention. The courts of those States are under an obligation to apply these rules while considering issues on jurisdiction. Moreover, they should give virtually automatic recognition and enforcement of judgments in civil and commercial matters issued in other States – members to the Convention.

Not only is it the national courts of Member states of the European Union that applied the Convention on a regular basis. Indeed, the European Court of Justice has also delivered preliminary rulings on interpreting the Convention. This right was conferred upon the Court by the 1971 Protocol [6], thus promoting a more uniform application and autonomous interpretation of the Convention throughout Member States. A substantial body of case law exists on the Brussels Convention, from references by the original six Contracting States to the ECJ, and more recently from references from other Contracting States. [7: 184] The Court stressed its interpretative role of the Convention in the recent *HWS* case:¹

Only such (autonomous, NR) interpretation (of the concepts of contract and tort in Art. 5 (1) and (3) of the Brussels Convention, NR) is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the Contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued...(para 20)

The principal objectives of the Convention may be traced through the substantial amount of ECJ case law interpreting the Convention. These include:

- 1) determination of international jurisdiction of (national) courts in the European Community;²
- 2) simplification of formalities governing reciprocal enforcement of judgments;³
- 3) procedural provisions for these purposes;⁴
- 4) avoidance of multiplicity of jurisdictions;⁵
- 5) the need to strengthen the legal protection of the rights of defendants;⁶
- 6) protection of socially or economically weaker parties.⁷

¹ Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik (HWS)* [2002] ECR I-7357.

² Case 14/76 *A. De Bloos, SPRL v Société en comandite par actions Boyer* [1976] ECR 1497.

³ Case 133/78 *Gourdain v Nadler* [1979] ECR 733 at para. 3.

⁴ Case 48/84 *Spitzley v Sommer Exploitation SA* [1985] ECR 787 at para. 21.

⁵ Case 14/76 *supra* note 23.

⁶ Case 125/79 *Denilauver v SNC Couchet Frères* [1980] ECR 1553 at para. 13.

⁷ Case 150/77, *Bertrand v Paul Ott KG* [1978] ECR 1431 at para 21; 201/82 *Gerling Konzern Spezial Kreditversicherungs-AG v Amministrazione del Tesoro dello Stato* [1983] ECR 2503 at para. 17.

The provisions of the Brussels Convention were repeated in the Lugano Convention concluded between the EEC countries and members of the European Free Trade Association. These have been extended to include Poland.

The well-known international law rule *actor sequitur forum rei* is the general principle of jurisdiction of the Brussels Convention.¹ This means that a person should be sued in the court of the place where he is domiciled. This rule may be derogated from and a person may be sued in the courts of other States – parties to the Convention only by virtue of the rules on „special jurisdiction“ stated in the Convention. These rules state that person may also be sued:

- 1) in the courts of the state where the contract obligation was performed (Art. 5 (1),
- 2) where a harmful event has occurred (in matters related to delict) (Art. 5 (3),
- 3) where a branch or agency is situated (in matters related to operations of a branch, Art. 5 (5).

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.² In addition, parties to the contract may enter into an agreement on jurisdiction, subject to provisions of Section 6 of the Convention.

The Convention also determines the rules on „exclusive jurisdiction“. This, contrary to general and special jurisdiction, is linked not to the courts of the State where the party is domiciled but where immovable property is situated, where the company has its seat, or where the public register is kept³. The courts, which have exclusive jurisdiction under the Convention, cannot be excluded from the proceedings by an agreement on jurisdiction.

The Convention also contains some rules on protective jurisdiction, under which economically weaker parties, such as consumers or employees, may sue in the courts of their domicile:

With regard to consumers, the Convention provides for a set of criteria enabling these persons to enjoy protective provisions, but usually limits them to so-called passive consumers. They have been subject to intensive case law concerning „consumer contracts“ in Art. 13 et seq.⁴

With regard to contracts of employment, a special section was added to Art. 5 (1) on the occasion of the accession of Spain and Portugal to the Convention. The Court referred to the place where the work is actually performed by the employee as the place where (active or passive) litigation arising out of the employment contract should take place, including posted workers. If work is done in several places, than the place where the essential part of the worker's duties vis-à-vis his employer are in fact performed is decisive.⁵

Prorogation of jurisdiction by agreement is subject to stricter requirements aimed at the protection of the weaker party.

It should be noted that, despite its success, the Convention had one inherent flaw. That is, with every round of accession, it had to be ratified again by all Member States. This ratification has become ever more time consuming. As an example, Austria, Finland and Sweden acceded to the European Union in 1996. And as late as in July 1999 the Commission pointed out that the „Brussels Convention, as amended following the accession negotiations with Austria, Finland and Sweden, has not yet entered into force for all the Member states as only a minority of them have ratified it.“⁶

¹ Art. 2 of the Convention.

² Art. 2 of the Convention.

³ Art. 16 of the Convention.

⁴ For a recent case C-96/00 Gabriel [2002] ECR I-6367; for details Reich/Micklitz, *Europäisches Verbraucherrecht*, paras 31.2-31.14.

⁵ Cf. Case C-383/95 Petrus Wilhelmus Rutten v Cross Medical Ltd. [1997] ECR I-57; C-437/00 Giulia Pugliese v. Finmeccanica SpA [2003] ECR I-(0000) judgment of 10 April 2003.

⁶ COM (1999) 348 final of 14 July 1999 at 2.1.

2.2. Brussels Regulation 44/2001

2.2.1. Overview

However, such legislation through an international convention remained the only possible way until the Amsterdam Treaty introduced Art. 65 (b) EC, which now contains provisions on:

measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken ... promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

Hence, the private international law and jurisdiction rules in the European Union were brought into the context of the First Pillar. This article was used as a basis for adoption of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (in the following: Reg. 44/2001). [8] The Regulation replaced the Convention as of March 1, 2002, for the 14 states – Members of the EU. Art. 68 of Reg. 44/2001 provides:

[The] Regulation shall, as between the Member States, supersede the Brussels Convention. ... In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

However, the Brussels Convention continues to apply in relations between Denmark and the Member States that are bound by the Regulation¹, and to the territories of the Member States that fall within the territorial scope of the Convention and which are excluded from this Regulation pursuant to Art. 299 of the Treaty.²

Despite the fact that the Convention ceased to regulate relations between most of the Member States, it will remain important for the purpose of uniform interpretation and application of the Regulation, since „[c]ontinuity between the Brussels Convention and this Regulation should be ensured.“³ The case law of the ECJ, interpreting provisions of the Brussels Convention that were transferred unchanged into the Regulation, should remain a valid source for interpreting the provisions of the Regulation. For this reason, the case law of the ECJ⁴ as well as the Official Reports on the Convention⁵ have retained their importance.

2.2.2. Consumer contracts

The Regulation for the most part follows both the structure and the provisions of the Brussels Convention. One of the key changes in the Regulation compared to the Convention is the new approach towards marketing activities in B2C (business to consumer) relations. According to Art. 13 (1) lit. c) of the Convention, the right of the consumer to sue the supplier in the consumer's country of domicile was subject to the existence of advertising or a specific invitation addressed to the consumer. Moreover, the consumer should have taken the necessary steps to conclude the contract in that state. Art. 15 (1) lit c) of Regulation 44/2001 replaced these two conditions with one: the consumer may sue the company if the company:

by any means, directs such activities to that Member State or several States including that Member State.

¹ Recital 21 of the Regulation.

² Recital 22 of the Regulation.

³ Recital 19 of the Regulation.

⁴ For a recent example cf. case C-167/00 Verein für Konsumenteninformation v Karl Heinz Henkel [2002] ECR I-8111 concerning the question on whether Art. 5 (3) is also applicable to injunctions to prevent an illegal act, which the ECJ answered in the affirmative by referring to the amended text in Art. 5(3) of Reg. 44/2001.

⁵ Schlosser Report, [1979] OJ C 59, Jenard Report [1979] OJ C 59; the Evrigenis and Kerameus Report [1986] OJ C 298; Almeida Cruz, Desanes Real, Jenard Report [1990] OJ C 189.

This provision has aroused intense debate with regard to e-commerce, since it may be interpreted in such a way that the mere accessibility of the website of a company situated in one Member State by a consumer domiciled in another Member State may give such consumer the right to sue the company in the consumer's domicile – a result which makes marketing in e-commerce subject to different and diverging jurisdictions. Such a rule may on the other hand encourage the establishment of alternative dispute settlement (ADR) mechanisms, which is one of the aims of the directive on electronic commerce (§ 8 III 2, § 17 II 2). This question will not be developed in the present context. [9: § 31.5; 32.12]

2.2.3. Employment contracts

With regard to employment contracts, a new section 5 contains special rules on jurisdiction.¹ This gives the employee the choice to sue the employer:²

- 1) in the courts of domicile of the employer;
- 2) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so;
- 3) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

On the other hand, an employer may bring proceedings only in the courts of the Member State where the employee is domiciled.³

2.2.4. Other issues

Art. 60 of Reg. 44/2001 provides for an autonomous definition of the seat of legal persons, whereas the Convention had left this issue to be determined by the rules of the court in which jurisdiction is exercised. The Regulation provides three alternative criteria to define domicile of legal persons:

- 1) the statutory seat,
- 2) the central administration, or
- 3) the principal place of business.

These criteria correspond to those listed in the Chapter of the EC Treaty concerned with the right of establishment of companies in the European Community.⁴

Another important change gives an autonomous definition to the place of performance of the contract. Art. 5 (1) lit b) of Reg. 44/2001 provides that in the case of sale of goods this place is the place where the goods were delivered or should have been delivered; and in the case of provision of services – the place where the services were provided or should have been provided. The purpose of this modification is, similarly as described above, „to remedy the shortcomings of applying the rules of private international law of the State whose courts are seized.“ [10: 17] However, problems may still remain for the claimant in proving the place where services, such as consultancy services, should have been provided.

The Regulation has amended the rule on jurisdiction in tort claims. The defendant may be sued not only in the courts of the place where the harmful event has already occurred, but also of the place where it *may occur*. Thus, litigants are given a right to sue for preventive measures via injunctions. This was first recognized in the *Henkel* case concerning cross-border group actions.⁵

¹ Art. 19 of the Regulation.

² Art. 19 of the Regulation.

³ Art. 20 (1) of the Regulation.

⁴ Art. 48 EC.

⁵ Case C-167/00, *supra* note 39 which comes to the same result under the Brussels Convention, thus minimising the changes brought about by Reg. 44/2001.

Art. 6 of Reg. 44/2001 provides that an action may be brought against a defendant in the court of a co-defendant only in cases when the claims are so closely connected that separate proceedings would risk irreconcilable judgments. Thus, the ruling of the ECJ in the *Kalfelis* case¹ was transposed into a legislative provision.

An important innovation is made to Section 7 related to prorogation of jurisdiction. An agreement on jurisdiction may be concluded in electronic form.² However, the restrictive rules on jurisdiction clauses in consumer contracts have not been changed³. The question remains how they can be coordinated with the case law of the ECJ on jurisdiction clauses in standard contract terms (*supra* I 3).

Rules on recognition and enforcement of judgments have been changed so as to make recognition virtually automatic, and simplifying the obtaining of an enforcement declaration. Courts asking for enforcement declarations will no longer be able to raise grounds for non-recognition on their own motion.⁴ However, the claimant still has to comply with national procedure rules in order to obtain a declaration that the judgment is enforceable. Thus, the value of automatic recognition may be reduced.

Legal aid in cross-border disputes

The new Council Directive 2002/82/EC of 27 January 2003 [11] wants to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Art. 3 gives a right to legal aid which „is considered to be appropriate when it guarantees (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings; and (b) legal assistance and representation in court...“ Art. 4 contains a rule protecting Union citizens and third-country nationals residing lawfully in a Member State from discrimination. Art. 5-11 regulate conditions and extent of legal aid, Art. 12-20 the applicable procedures.

It should be mentioned that the Directive, which is based on Art. 61 (c) EC on judicial cooperation in civil matters, is not concerned with „purely internal“ disputes within a Member State. In these cases, EU-citizens can invoke the non-discrimination principle of Art. 12 EC to be treated on the same basis for access to legal aid schemes as nationals.⁵

3. Indirect protection via the reference procedure

3.1. Original objective: uniformity of Community law

The most important element in protecting individual rights and insisting on adequate remedies has been the reference procedure⁶ even though, paradoxically, this does not allow direct access of individuals to European courts. It was originally meant to be an interim procedure by which courts of law of the Member countries could ask the ECJ for preliminary rulings on questions of validity and interpretation of Community law. With the exception of courts against whose decisions there is no remedy under national law - which have an obligation to refer⁷ – the national court has complete discretion whether to use the reference procedure or not. Therefore, it was not individual protection but uniformity of Community law that was the original objective of the reference procedure.

¹ See Case 189/97 *Kalfelis v. Banque Schröder* ECR [1988] 5565.

² Art. 23 of the Regulation.

³ Art. 17 of the Regulation.

⁴ Art. 33 of the Regulation.

⁵ Case C-274/96 criminal proceedings against H.O. Bickel and U. Franz [1998] ECR I-7637 suggests such a reading of the non-discrimination clause.

⁶ Under Art. 234 EC.

⁷ Para 3 of Art. 234 EC.

This perspective can be seen by looking at two important decisions of the eighties. In *CILFIT*¹ the ECJ wrote that Art. 177:

does not constitute a means of redress available to the parties (para 9).

The Court insisted that the reference procedure is based on cooperation. The national courts² enjoy full discretion as to whether to refer a case to the ECJ. Where the outcome of a case does not depend on an interpretation of Community law, where there has already been a ruling of the ECJ, or where the meaning of Community law is clear (*acte clair* doctrine), there is no obligation to refer. But the Court made an important qualification: *acte clair* does not depend on the discretion of the *judex a quo*, but it:

must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice (para 16).

This later requirement is of course difficult to fulfill, especially with 15 current and 25 future jurisdictions. The Court added several criteria on when this possibility would theoretically exist, always keeping in mind the peculiarity of Community law and its concepts, the different languages used which have equal force of law, and the context in which Community law must be interpreted. These requirements effectively limit frequent application of the *acte-clair* doctrine and insist on the priority of the ECJ in interpreting Community law.

A similar spirit of „exclusivity“ can be seen in the later *Foto Frost* case³. The preliminary question concerned the power of a national court to invalidate a Community measure. The Court insisted that Member State courts may judge on the validity of a Community act in a positive way, but they:

do not have the power to declare acts of the Community institutions invalid (para 15).

This is due to the „necessary coherence of the system of judicial protection established by the Treaty“, which is based upon a clear division of powers and competences. Later case law has clarified the scope of the reference procedure in the interest of uniformity and coherence of Community law:

Only courts of law, and not (private) arbitration tribunals, may refer a case to the ECJ;⁴ however, if the arbitration award is subject to judicial scrutiny on public policy grounds, the reference procedure is available.⁵

The court must fulfill judicial, not administrative, functions, as in cases concerning the registration of a company or a commercial agent.⁶

The questions put forward must not merely be hypothetical but have a genuine relevance to the case at hand.⁷

In general, the ECJ allows a broad margin of discretion to Member State courts to decide on the relevance, on the questions posed, and on the potential application to the specific case at hand. It is not necessary that the date for implementation of the directive should have lapsed. Indeed, early reference may even be necessary in order to allow adequate judicial protection, which is not possible by a direct action challenging the directive.⁸ The national courts may even ask preliminary questions in cases where the applicable law has not been enacted, in doing so fulfilling a duty of implementation, but

¹ Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, [1982] ECR 3415.

² Including those mentioned in para 3 of Art. 234 EC.

³ Case 314/85 Foto-Frost v HZA Lübeck-Ost [1987] ECR 4199.

⁴ Case 102/81 Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG [1982] ECR 1095.

⁵ Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV. [1999] ECR I-3055.

⁶ Case C-111/94 Job Centre Coop. ARL. [1995] ECR I-3361 at para 11.

⁷ Case 244/80 Pasquale Foglia v Mariella Novello [1981] ECR 3045 at para 16; C-318/00 Bacardi-Martini SARL et al v Newcastle United Football Co [2003] ECR I-905.

⁸ Case C-491/01 The Queen v Secretary of State for Health *ex parte*: British American Tobacco (Investments) Ltd. *et al.* [2002] ECR I-11453 at para 40.

using the same or at least similar terminology in the interest of harmonization of national with Community law.¹

These cases make clear that the Court insists on its final say to interpret and its monopoly to invalidate Community law in the interest of its uniform application. Its decisions in the reference procedure therefore have a *de facto stare decisis* authority. It is only the Court itself (or the Community legislator) that can „overrule“ an interpretation given by the Court.

3.2. The new function of the reference procedure: (indirect) individual rights protection

In the meantime, the second function of the reference procedure has become clearer, owing to limited direct access by individuals to European courts (infra IV). The basic approach, as recognized by the Court, describes a decentralized *three step procedure* of judicial protection of individual rights in the Union:

The first and decisive step is taken by the national court system. This must meet the requirements of effective protection, as defined by the Court. It includes the grant of effective remedies as obligation de moyens.

The Court may – and, in those instances against whose decisions there is no judicial remedy, must – be asked to give a binding ruling on the interpretation or validity of a question of Community law, insofar as it is relevant for the decision of the case; merely „hypothetical“ questions should not be referred to the ECJ.

In a third step, the procedure is turned back to the national judex a quo, which has to apply the Court ruling to the individual case before it; the ECJ is not allowed to decide the particular case, even though it has given such precise rulings in some cases that the national court could not decide otherwise.²

In this decentralized system, it is really the national judge, and not the ECJ or the CFI, which protects Community rights under equal conditions as national rights. The national judge becomes the *European judge*.

These two functions of the reference procedure may conflict in cases where a speedy remedy is sought. If the Court of Justice has exclusive authority to annul a Community act that forms the basis for a Member State measure; a final decision on the validity of the contested Community measure under the reference procedure would now take about 2 years. Thus, no speedy remedy would then be possible.³ On the other hand, if the national court were allowed to set aside the application of the Community measure, this would infringe the division of competences as defined in *Foto Frost*, and the uniformity of Community law, to the unilateral benefit of individual rights protection. In *Zuckerfabrik*⁴, the Court was asked to balance the interests of a party to proceedings in rapid protection against a presumably illegal Community measure violating its rights, with the interests of the Community in coherence and uniform application of EC law under the final responsibility of the ECJ. The Court allowed the national court to suspend enforcement in order to protect individual rights under the following conditions:

The national court must have serious doubts as to the validity of the Community regulation on which the contested administrative measure is based.

The national court must refer the question of validity of the Community regulation at issue to the ECJ.

¹ Cases C-297/88 + 197/89 *Dzodzi v Belgium* [1990] ECR I-3763 at para 36; C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*. [1998] ECR I-7791.

² Cf. as an example case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-1923.

³ An expedited procedure is now available in urgent and exceptional cases under Art. 62a of the Rules of Procedure of the Court.

⁴ Joined cases C-143/88 and 92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415.

The grant of relief must be subject to uniform conditions in all Member States; therefore, a balancing test is required between the Community interest in maintaining the regulation and the individual interest in suspending it.

The national court must take due account of ECJ case law.¹

However, the national court is not empowered to order positive measures that only a Community institution may take.²

It is the reference procedure through which the „great developments“ of Community law - such as direct effect, supremacy, proportionality, state liability for infringement of Community rights - have been transformed from an imperfect and incomplete legal order to a coherent system of judicial protection and control. This simple fact shows its inherent potential for the protection of individual rights, even though the individual is in fact denied an independent right of standing. According to Advocate General P. Léger, a violation of the duty to refer may therefore provoke state liability if the breach has been sufficiently serious and a causal link can be shown between the violation of the duty to refer and the damage.³ In its *Köbler*-judgment of 30 September 2003⁴, the Court found Member States liable for wrong applications of Community law by their highest courts depending on certain factors including

...in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third para of Art. 234 EC. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter...

3.3. Protection against directives

It is not yet clear how the *Zuckerfabrik* doctrine functions in cases involving protection against directives. Under Community law, directives may take vertical direct effect against the State in favor of individuals, but may not impose obligations upon individuals.⁵ However, directives may be used for interpretation purposes, thereby indirectly extending existing obligations, or even imposing new ones. Yet from a formal point of view, only the implementing state measures will have a mandatory effect on the individual. On the other hand, the Member State is bound by Community law to enforce a directive under the conditions set out therein, in order to avoid state liability under the governance rules. [9: 305–310] The mere existence of a directive to be implemented within a specified time frame will have a certain anticipatory effect on the legal position of the individual, on their business strategies, opportunities, and operational planning. Does the individual or undertaking fearing an infringement of its supposed rights by a foreseeable implementation of a directive have a remedy against the directive itself, or does it have to wait until an implementing measure (such as administrative or criminal proceedings) is directed against it, only then contesting the validity of the directive under the conditions of *Foto Frost* via a reference procedure?

Since, as we shall see, the individual has no direct access to Community jurisdiction for the protection of its rights, even if they have a fundamental rights quality, it is up to the national courts to allow for adequate protection before implementation of the directive. The

¹ Case C 465/93 Atlanta Fruchthandels-gesellschaft et al v Bundesamt für Ernährung und Forstwirtschaft [1995] ECR I-3761 at para 46.

² Case C-68/95 T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung [1996] ECR I-6065.

³ Cf. opinion of AG Leger of 8.4.2003 in case C-224/01 G. Köbler v. Republic of Austria.

⁴ Case C-224/01 [2003] ECR I-0000 at paras 55-56.

⁵ This is discussed in greater detail in Reich et al Fn + at pp. 18-21.

English courts have construed preventive action against the threat of an implementing measure if the national legislator or regulator had no choice of action.¹ A similar remedy does not exist in other jurisdictions.

It can be argued that the national courts are under a requirement to extend standing under their obligation to provide effective remedies. Their „procedural autonomy“ is subject to the principle of effective judicial protection and control. This includes the creation of new remedies which so far had not existed under national law. [1: 522–526]

4. Limited direct access to European jurisdictions: Art. 230 (4) EC

4.1. Absence of a constitutional complaint in EU law against legislative acts

Such a distribution of responsibilities as described explains why specific Community law procedures are only available if individuals are *directly and individually* concerned by Community measures.² The wording seems to exclude any protection against legislative measures of the Community, be they regulations or directives. The individual has to seek protection of its alleged rights before national courts. In matters of Community law these act, as we have seen, as Community courts and may potentially have to refer a case to the ECJ via the reference procedure.

This is true even in cases where the individual claims a violation of fundamental rights. For Community law, unlike many Member State laws, has not yet developed a constitutional complaint system against legislative measures. In this way, it is far behind the standard of European human rights law and the constitutional traditions common to many Member States (with the exception of some countries, such as the UK, France, and Sweden). Art. 46 lit. d) EU allows protection of fundamental rights under Art. 6 (2) EU against actions of Community institutions only „insofar as the Court has jurisdiction“.

The Charter of Fundamental Rights of the EU has not changed this distribution of competences. It does not establish any new powers or tasks for the Community or the Union, nor does it modify the powers and tasks defined by the Treaties.³ This amounts to a refusal to grant new judicial remedies against violations of the Charter.

4.2. The limited scope of direct actions under Community law

Art. 230 (4) EC – as the basic norm for direct actions of individuals – distinguishes three types of Community measures that may be contested before Community jurisdictions. These are now the Court of First Instance, with possible appeal to the ECJ:

- 1) a decision addressed to a (natural or legal) person;
- 2) a decision not addressed to that person but to another person and which is of direct and individual concern to that person;
- 3) a decision in the form of a regulation being of direct and individual concern to another person.

This *numerus clausus* of Community measures against which direct action by an individual is possible has a number of ambiguities. These have given rise to an abundant and somewhat conflicting case law.⁴ As a starting point it should be kept in mind that direct action under Community law has the character of *an administrative law remedy*. It seems

¹ Case C-74/99 *The Queen v Secretary of State for Health and others, ex parte Imperial Tobacco Ltd and Others* [2000] ECR I-8599 re tobacco litigation.

² Per Art. 230 (4) EC.

³ According to Art. 51 Charter.

⁴ For details cf. Arnull, *Private applicants and the action for annulment since Codorniu*, CMLRev 2001, 7; Reich, in: Micklitz/Reich, *Public Interest Litigation*, 1996 at 12-16.

completely to exclude actions against general, namely legislative, measures. Only under the qualified circumstances of direct and individual concern may a regulation - which according to the wording of the Treaty must be regarded in substance as a decision – be challenged. Directives seem to be completely excluded from Community jurisdiction.¹ A brief look at Court practice will be concerned with whether individual, or also group or general interest actions, are allowed under Community law.

4.3. Regulations of direct and individual concern

Regulations under Community law are hybrid measures. According to Art. 249 (2) EC they have „general application“ and are „directly applicable“. General application seems to indicate their legislative character, thereby excluding individual concern, even if they are able to directly confer rights and impose obligations on individuals.

The case law of the Court was thus concerned with singling out those regulations that are of individual concern to persons directly subjected to them. The formula which had been developed by the famous *Plaumann* case of 1963² demands that the measure in question affects natural or legal persons:

by reason of certain attributes which are peculiar to them or by reason of legal or factual 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.

The Court seems to use a test based on *equal treatment*. That is, in normal circumstances, a measure of legislative character, like a regulation, treats all potential addressees similarly. Since everybody in the sense of „*quivis ex populo*“ is concerned, nobody is entitled to contest the measure because of its general applicability. However, there may be cases - due to legal or factual circumstances - where one individual is singled out from the general public. Then this individual – and only that individual - is entitled to direct action. It is not important whether the legislative measure poses a particular hardship on him. Later case law was concerned with defining certain types of situations where this individual concern could be established under equality criteria:

*EC law may require that the effects of a measure to certain persons be particularly taken into account. That is, even if the measure is of general character in the form of a regulation, it is still of individual concern to those persons whom Community law aims to protect, such as importers or exporters of agricultural products forming a „closed class“.*³

A Community regulation is only adopted after certain persons or groups have had their right to a hearing, in particular in anti-dumping proceedings, but these rights have been violated.⁴

Certain factual situations are of specific concern to individuals, for example to independent importers of products that have to pay a particular anti-dumping tariff,⁵ or to the proprietor of a graphic trade mark taken away by a Community regulation.⁶

It appears from this overview that Community courts enjoy a certain amount of discretion whether to admit an action or not, a fact that makes any prediction as to the admissibility of an action difficult. Such legal insecurity violates the principle of effective judicial protection.

The situation is particularly unsatisfactory with regard to group actions, which Community law prescribes the Member States to accept in several areas such as non-

¹ Under Art. 230 (4) EC.

² Case 25/62 *Plaumann & Co. v Commission* [1963] ECR 95.

³ Case 11/82 *SA Piraiki-Patraiki and others v Commission*[1985] 207; C-152/88 *Sofrimport SARL v Commission* [1990] ECR I-2477; C-451/98 *Antillean Rice Mills NV v Council* [2001] ECR I-8949; for further details Arnall at 31-41.

⁴ Case 264/82 *Timex Corporation v Council and Commission* [1985] ECR 849.

⁵ Case C-358/89 *Extramet Industrie SA v Council* [1991] ECR I-2501.

⁶ Case C-309/89 *Codorniú v Council* [1994] ECR I-1853.

discrimination, but does not seem to be willing to allow its own plaintiffs. The Court has repeatedly insisted that for a group action to be admissible it is not sufficient that the members of the group are individually concerned:¹

... moreover one cannot accept the principle that an association, in its capacity as the representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category. Such a principle would result in the grouping, under the heading of a single legal person, of the interests properly attributed to the members of a category, who have been affected as individuals by genuine regulations, and would derogate from the system of the treaty which allows applications for annulment by private individuals only of decisions which have been addressed to them or of acts which affect them in a similar matter.

Only if the group itself (for example, a producers' or consumers' association) is individually concerned does it have a right to action.² This may be the case if their „procedural participation right“ has been violated. [9: 15] But in general the Court has been hostile to group actions.³

Community jurisdictions have discussed whether standing should be extended in particular by having regard to fundamental rights developments. In its *Jégo-Quéré* judgment of 3.5.2002,⁴ the Court of First Instance referred to Art. 47 of the ECHR, which grants the right to an effective legal remedy. As discussed above, the existing system of Community law remedies, in particular the reference procedure, does not allow an effective remedy. The same is true of the potentiality of the injured individual to receive compensation⁵. Therefore, the requirement of „individual concern“ should be widened to cases where a Community law provision directly curtails rights or imposes obligations (para 51 of judgment).

In his opinion of 21 March 2002⁶ on *Union de pequeños agricultores* (UPA), concerning a group action of an association of small agricultural producers challenging a regulation which substantially reduced their production quotas of olive oil, AG Jacobs critically analyzed existing case law and proposed a more open and flexible solution to the criteria of „individual concern“. He argued for the constitutional importance of effective judicial protection and on the evolution of Community law in the direction of governance and democratic legitimacy. He also referred to prior case law of the ECJ, acknowledging an evolutionary interpretation of Art. 230 (4) EC. The criteria proposed by him suggest that an:

applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect (italics NR) on his interest (paras 60, 102).

However, it must be doubted whether the new criterion of *substantiality* instead of equality is of much help to Community courts and their parties in determining admissibility of an action. Only after having reviewed the substance of a case will one know whether or not a party is substantially concerned by a Community regulation. Substantiality can thereby only be determined *ex post*, not *ex ante*.

In its decision of 25 July 2002, the Court was not convinced of the new criteria proposed by AG Jacobs. It insisted on the one hand on the right of effective judicial protection, but on the other hand made the Member States responsible for granting it (para 41). Member States, in their duty of loyal co-operation under Art. 10 EC are:

required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the

¹ Case 16 + 17/62 Confédération nationale des producteurs de fruits et légumes and others v Council [1962] 471 at 477.

² Under Art. 230 (4) EC.

³ Case 246/81 Nicholas William, Lord Bethell, v Commission [1982] 2277; C-321/95P Stichting Greenpeace Council (Greenpeace International) and Others v Commission [1998] I-1651; for a broader discussion cf. the contributions of Reich, Micklitz, Dausen, Gormley, Weatherill, Wenig, Nettesheim, Krämer, Betlem and Christianos, in: Micklitz/Reich *passim*.

⁴ Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-2365; the case is on appeal before the ECJ.

⁵ Under Art. 288 (2) EC.

⁶ Case C-50/00P *Unión de pequeños agricultores v Council* [2002] ECR I-6677.

courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act (para 42).

The Court no more and no less requires Member States to institute a quasi-constitutional complaint mechanism against Community legislative acts, always keeping in mind that the final decision as to illegality remains within Community jurisdiction. Within such a system of judicial control, the Court will review the constitutionality of a Community measure.¹

The Court found no justification for extending standing beyond existing case law. It referred this question to the Member States as „Masters of the Treaty“. In turn, they are only entitled to reform the system currently in force by amending the Treaty.

The judgment of the Court can be seen as an attempt to put the responsibility for effective judicial protection back to the Member States. They - not the Community - have to extend their judicial mechanisms. Direct action will remain as before a mainly administrative remedy. The quasi-constitutional remedy against legislative acts is to be provided by Member States within the framework of the reference procedure.

Unfortunately, however, this shifting back of responsibilities does not settle the main problem posed by the Court in its insistence on division of responsibilities between Community and Member State courts, and its exclusive power to annul Community acts. That is, Member State courts are competent to decide on Community law only indirectly via implementing Community measures, and not directly via allowing an action against a Community regulation or decision, as has been correctly pointed out by AG Jacobs.² In cases where a regulation or decision with substantial effects on third persons is self-executing and does not require additional Member State implementation measures, judicial protection is in effect denied, contrary to the principles declared by the Court.

5. New proposals to extend standing in the Draft Constitution

The Draft Treaty Establishing a Constitution for Europe of 18 July 2003[12] has proposed an Art. III-270 (4) which will read:

Any natural or legal person may, under the same conditions, institute proceedings against an act addresses to that person or which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures (italics NR)*.

This amendment will solve the problem left by the *UPA* case where a regulation or some other Community act did not need implementing measures and therefore could not be attacked before a national court. The decisive criteria will be *direct* concern; individual concern is not necessary any more. The amendment does however not install an individual complaint against violations of the Charter by EU institutions or Member States in implementing EU Law. [13: 613–619].

Directives are not mentioned among the acts to be challenged under Art. 230 (4). Therefore, by *argumentum e contrario* the Court has persistently held that there is no direct action against them.³ As has been held by the Court of First Instance and upheld on appeal by the ECJ:

[T]he justification for that exclusion (of directives from judicial review - NR) lies in the fact that, in the case of directives, the judicial protection of individuals is duly and sufficiently assured by the national courts, which review the transposition of directives into the domestic law of the various Member States.

¹ According to Art. 46 lit. d) EU.

² Paras 41-48 of his opinion.

³ Case T-99/94 Asociación Española de Empresas de la Carne v Council [1994] ECR II-871, upheld on appeal Case C-10/95P [1995] ECR I-4149.

Furthermore, even supposing that it were possible – contrary to the wording of the fourth paragraph of Art. 173 of the Treaty – to treat directives as regulations in order to allow proceedings against a decision ‘in the form of’ a directive, the directive at issue neither constitutes a „disguised“ decision nor contains any specific provision which has the character of an individual decision. On the contrary, it is a normative measure of general application (paras 17-18).

This rather formal argument could be supported by the fact that directives do not allow for a direct imposition of duties upon individuals. Therefore, they cannot be of „direct concern“ to them. As a result, it not necessary to question their „individual“ concern.

However, this argument can be challenged from two directions:

- 1) certain directives leave to Member States such a narrow margin of discretion that they impose *de facto* obligations upon individuals even before enactment of implementing measures;
- 2) individuals have to adopt their business plans and legal action in expectation of implementation.

Other directives may in reality be disguised decisions¹ just like regulations, and therefore fulfill the criteria of direct and individual concern.

In the actions brought by tobacco manufacturers and advertisers against Dir. 98/43,² the CFI was not convinced of their direct and individual concern. It insisted on a formal reading of direct effect, which by definition is not possible with regard to imposing obligations upon individuals. Again it is left to the Member States to provide for adequate remedies. The individual injured by a measure implementing a (potentially illegal) directive may claim compensation as a remedy of last resort.³ However, such a conclusion is not satisfactory, because it does not take into account the preventive effect of judicial protection, and gives a remedy only when „it is too late“.⁴



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¹ In the sense of Art. 230 (4) EC.

² For details cf. Reich, FS Winter, 2003, 152.

³ Case T-172, 175-177/98 Salamander AG, Una Film "City Revue" GmbH, Alma Media Group Advertising SA & Co. Partnership, Panel Two and Four Advertising SA & Co., Rythmos Outdoor Advertising SA, Media Center Advertising SA, Zino Davidoff SA and Davidoff & Cie SA v European Parliament and Council [2000] ECR II-2487 at para 78.

⁴ Cf. the critique by Arnulf at 50; Nettesheim, Juristenzeitung 2002, 928 at 934.

12. The Draft Treaty Establishing a Constitution for Europe of 18 July 2003, [2003] OJ C 169.
13. Meyer J. / Hölscheit S. Die Europäische Verfassung des Europäischen Konvents, EuZW 2003, 613 at 619.



Teisė į teisminę gynybą Europos Sąjungoje

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SANTRAUKA

Šis straipsnis sudaro penki skyriai. Pirmajame pateikiama teisės į tinkamą teisminę gynybą ir kontrolę analizė. Europos Teisingumo Teismas išplėtojo tinkamą teisminę kontrolę (angl. „effective judicial control“) arba, platesniu požiūriu, tinkamą teisminę gynybą pačioje ankstyvojoje ETT bylų praktikoje, o vėliau šią praktiką tikslino ir tobulino. Teismas įtvirtino efektyvumo ir lygiateisiškumo principus. Antroji straipsnio dalis pristato teisės į tinkamą teisminę gynybą tarptautinio bylinėjimosi kontekste klausimus sutelkiant dėmesį į 1968 m. Briuselio konvenciją ir Briuselio reglamentą 44/2001. Bendrijos teisės tikslai tiriami per vienodinimo prizmę. Autorius aptaria konstitucinio skundo, siekiant nustatyti ES teisės aktų prieštaravimą Konstitucijai, būtinumą ES teisėje. Diskutuojami tiesioginių veiksnių pagal Bendrijos teisę ribojimai, atskiriami bendrojo ir individualaus pobūdžio reglamentai. Paskutinėje, penktojoje, straipsnio dalyje autorius pateikia siūlymus, kaip būtų galima išplėsti žmogaus teisės į tinkamą teisminę gynybą užtikrinimą būsimosiose ES konstitucinėse sutartyje.

