

# *Fordham International Law Journal*

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*Volume 23, Issue 3*

1999

*Article 4*

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## The Protection of Individual Rights and the Court of First Instance of the European Communities

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# The Protection of Individual Rights and the Court of First Instance of the European Communities

Paolo Mengozzi

## **Abstract**

The creation of the Court of First Instance has contributed on the one hand to the improvement of the functioning of the Court of Justice, and on the other hand, better judicial protection of Union citizens. The latter was accomplished through the legal protection within the framework of creating a true European citizenship.

## ESSAYS

# THE PROTECTION OF INDIVIDUAL RIGHTS AND THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

*Paolo Mengozzi\**

### *I. THE DEVELOPMENT OF COMMUNITY INTEGRATION THAT HAS HELPED CREATE THE COURT OF FIRST INSTANCE AND ITS INTEGRATION IN THE CONTEXT OF THE CREATION OF AN UNION CITIZENSHIP*

The Treaty establishing the European Economic Community,<sup>1</sup> improving the Treaty establishing the European Coal and Steel Community,<sup>2</sup> has emphasized the improvement of the conditions of the people and of the citizens of the European Community (or "Community"). In this regard, it bestowed upon the Court of the Justice of the European Communities (or "Court of Justice"):

- a) the jurisdiction to hear all actions that individuals can bring involving matters that concern them both individually and directly;
- b) the jurisdiction to adjudicate preliminary rulings in matters of Community Law, concerning individuals, referred to the Court of Justice by Member State judges.

It is important to note that the tradition of the original Member States preserving their own sovereignty, both judicially and politically, has been taken into account when establishing these jurisdictions of the Court of Justice.

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1. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

2. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty].

On the one hand, giving the right to challenge the legality of acts adopted by Community Institutions (but not to such acts made by Member States that appear incompatible with Community Law) has been, without a shadow of a doubt, looked upon favorably by the founding Member States, as a measure to ensure the most effective limitations possible of the powers bestowed upon the Commission of the European Communities ("Commission").

On the other hand, the right of Member State judges to refer directly to the Court of Justice for preliminary rulings regarding issues of Community Law somewhat has set aside the need for a right of individuals to appeal directly to the Court of Justice, challenging national judiciary acts that appear incompatible with Community Law.

The work of the Court of Justice has not in itself been sufficient to free the process of European integration, and, consequently, the deferral to the Court of Justice by national judges of Community Law issues, from this tradition of preserving Member State sovereignty. The Court of Justice itself has considered the contributions of Member State judges to be fundamental. The Court of Justice strongly has stated that a true realization of European integration presupposes that national judges apply the norms and the acts through which the Community itself pursues its goals, even when faced with following incompatible norms and acts of the Member States. It took until the middle of the 1980s for these judges finally to accept this essential idea of the Court of Justice. Two phenomena, which are particularly inter-related, have occurred uniquely at that same moment.

#### A. *The First Phenomena*

When Member State judges, after sober reflection, began accepting the theory of the Court of Justice, they began feeling the need frequently to bring more questions of Community Law to the Court of Justice for preliminary interpretation. In 1970, of all possible cases in its various jurisdictions, the court heard seventy-nine such cases. By the end of the 1980s, this annual number had surpassed 400.

#### B. *The Second Phenomena*

The fact that Member State judges have recognized that in-

dividuals can invoke the norms of Community Law, even against following Member State laws, which were incompatible with them, has allowed the Member States to assimilate the idea, advanced by the Court of Justice in the 1960s. This idea is that Community Law constitutes a legal system of a new kind that recognizes as its subject, not only the Member States, but also their citizens, and which, consequently, must be structured in such a way as to service the latter.

The Court of First Instance of the European Communities ("Court of First Instance") was created simultaneously with these two phenomenon. It has been created as an instrument that not only adequately would address the growing caseload of the Court of Justice, but also would respond to the demand, not in any way less important, to improve the legal protection within the framework of creating a true European citizenship that was not launched by accident at that time.<sup>3</sup>

### C. *The Structure and the Jurisdiction of the Court of First Instance*

The Court of First Instance initially has been foreseen by the Single European Act<sup>4</sup> (entered into effect on July 1, 1987), which, by adding to the Treaty establishing the European Community<sup>5</sup> ("EC Treaty") Article 225 (previously Article 168),<sup>6</sup> has given the Council of Europe ("Council") the power to create the

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3. For an extensive bibliography regarding the Court of First Instance, see PAOLO MENGIOZZI, *EUROPEAN COMMUNITY LAW* 60 (2nd Ed., Kluwer International, 1999). See M. MIGLIAZZA, *IL DOPPIO GRADO DI GIURISDIZIONE NEL DIRITTO DELLE COMUNITA EUROPEE* (Milano, 1993); P. BIAVATI & F. CARPI, *DIRRITO PROCESSUALE COMMUNITARIO* (Milano 1994).

4. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 1).

5. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the EEC Treaty, *supra* note 1, as amended by SEA, *supra* note 4. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam, *supra*.

6. Consolidated EC Treaty, *supra* note 5, art. 225, O.J. C 340/3, at 270 (1997), 37 I.L.M. at 124-25 (ex Article 168a).

Court of First Instance. The Council has used this power to adopt its Decision of October 24, 1998. The creation of the Court of First Instance was later "constitutionalized" by the Treaty on European Union that, by modifying the text of Article 168A, solidly inserted this body in the European Communities judicial system and definitively integrated it into the structure of the Court of Justice.

Currently the Court of First Instance is composed of fifteen judges, selected for their political independence and possessing the required abilities to exercise their judicial function. They are nominated, just as the members of the Court of Justice, unanimously by the Member States for a six-year term. The members may have their term renewed after the expiration of their initial term.

The Court of First Instance is made up of chambers composed of three or five members. The Court of First Instance established the criteria according to which the matters before it are divided among the chambers. In cases where the matter is particularly important or has complex fact patterns, the chamber that is in charge of such case may either, of its own accord or at the request of a party, have the matter transferred to a larger chamber or to a plenary session of the entire Court of First Instance. When the latter occurs, the plenary composition of the Court of First Instance decides whether to hear the case after consulting with the parties and the Advocate General.

The jurisdiction of the Court of First Instance has been considerably expanded since its creation. The new text of Article 225 (formerly Article 168A) reserves to the Court of Justice only the jurisdiction to deliver preliminary rulings or report by Member States judges. Through successive decisions in 1988, 1993, and 1994, the Council has conferred upon the Court of First Instance jurisdiction in matters concerning Community Institutions and individuals. It also has given the Court of First Instance jurisdiction over disputes between the Community and its officials, and jurisdiction in recourses for annulment, failure to act, and extracontractual liability formed by natural and legal persons against Community Institutions. In addition, it attributed to the Court of First Instance the jurisdiction to hear controversies regarding rights bestowed by contracts made with individuals by the European Community or its agents. With respect to jurisdiction over fines, staff regulations, and contractual obli-

gations, the Court of First Instance has full jurisdiction. Article 65, Paragraph 3 of Regulation 40/94<sup>7</sup> gives absolute jurisdiction over matters over which the Court of First Instance is asked to rule upon with respect to Community matters. The later expansion of the jurisdiction of the Court of First Instance, with the reservation that the Court of Justice has exclusive jurisdiction over certain matters, is possible based upon the decisions of the Council.

*D. The Court of First Instance's Diminution of the Caseload of the Court of Justice*

How has the creation of the Court of First Instance contributed on the one hand to the improvement of the functioning of the Court of Justice, and on the other hand, to a better judicial protection of Union citizens? Suffice to note that at its creation, even when its powers were reduced in comparison with its powers today, the Court of First Instance took jurisdiction over 151 cases from the 622 cases pending before the Court of Justice.

Today, the reduction of the caseload of the Court of Justice tied to the functioning of the Court of First Instance has become even more pronounced upon the expansion of the Court of First Instance's jurisdiction. In effect, the Court of Justice can now even better concentrate its activities on its more essential tasks, which are to maintain the balance of power in the Community and to guarantee a uniform interpretation of Community Law. The effect that the creation of the Court of First Instance had upon the efficiency of the work of Court of Justice has not been diminished by the fact that it is possible for the decisions of the Court of First Instance to be appealed to the Court of Justice. This is for two reasons:

- first, because the right of appeal to the Court of Justice is limited to: questions of law, procedural defects before the Court of First Instance that in some ways harms the interest of the plaintiff, as well as violations of Community Law by the Court of First Instance;<sup>8</sup> in reality, even though the Court of Justice is called upon to rule upon

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7. Council Regulation No. 40/94, art. 65, O.J. L 11/1, at 18 (1994).

8. STATUT DE LA COUR CE, art. 51. See *Mario Costacurta v. Commission*, Case C-75/98, [1999] E.C.R. \_\_\_\_\_, ¶ 32; *Smanor SA and Others v. Commission*, Case T-182/97, [1998] E.C.R. II-271, II-282, ¶¶ 27-28.

such appellate cases, the Court of Justice does not have to delve into the type of long and intense analysis that a fact finding procedure requires;

- second, because the number of appeals from the Court of First Instance has not surpassed twenty percent of its total caseload (one must keep in mind that the Court of Justice has affirmed around eighty percent of the cases it hears on appeal from the Court of First Instance).

## II. *VARIOUS ASPECTS OF THE COURT OF FIRST INSTANCE'S EFFORTS TO CONTRIBUTE TO THE LEGAL PROTECTION OF THE RIGHTS OF INDIVIDUALS*

The Court of First Instances' contribution to the legal protection of rights of individuals deserves a closer analysis. One contribution that is immediately obvious is, without a doubt, the fact that the creation of the Court of First Instance has not created a special jurisdiction for separate and independent from the Court of Justice. The Court of First Instance has been created because it was not deemed any more consistent with the modern principles of justice to allow the Court of Justice to exercise the functions for which it was originally created, as judges of first and last instance. Its creation has allowed individuals to benefit:

- on the one hand, two distinct levels of jurisdiction: of a first level in front of the Court of First Instance competent to adjudicate the facts and to resolve legal questions; and on a second level, in front of the Court of Justice competent to review any possible mistakes of law that the Court of First Instance may have made;
- on the other hand, a judge of the Court of First Instance, who working in conjunction with the structure and the mechanics of the Court of Justice, is in a position to play a dynamic, constructive role; and in fact, being aware that its decisions are open to review, a judge easily will take more innovative positions on the law, which can function as a kind of "provocation" that is subject to later review by the Court of Justice.

The operation of the Court of First Instance has been framed around the idea that a single institution, the Court of Justice, houses two separate bodies: the Court of Justice itself,



and the Court of First Instance. The judicial system of the European Community more precisely has specified its function by permitting the existence of suitable "shock absorbers" in order to avoid conflicts of jurisdiction. In this regard, one should here mention the theory that the Court of Justice and the Court of First Instance can be, at the same time, involved with the same type of case—the former in a case brought by a Member State or an Institution of the European Communities, and the latter in a case brought by an individual. Henceforth, that which is foreseen by the Statutes of the Court of Justice and the Rules of Procedure of the Court of First Instance, the Presidents of the two bodies plan together in each actual case from the moment that the recourse is brought in order to adopt a solution that best serves the interests of a fair administration of justice.

The operation and the jurisprudence of the Court of First Instance have had some developments that, even in light of the limited percentage of appeals brought by and the weak percentage of reversals of these appeals by the Court of Justice, can be recognized as characteristic of the jurisdictional system of the European Community in its entirety. These developments include:

- a) the methods of operation;
- b) the protection of the rights of individuals; and
- c) access to justice.

A. *The Method of Operation of the Court of First Instance and the Consolidation in the European Community Legal System of the Member States' Procedural Traditions*

With the exception of Article 44 and the subsequent Articles of the Statutes of the Court of Justice, the method of operation is fixed by the Rules of Procedure of the Court of First Instance. Article 52 of the latter establishes in its first paragraph that after the written proceedings are complete, and prior to the oral proceedings in the case, the *juge rapporteur*—or the Reporting Judge—presents a *rapport préalable*—or the Preliminary Report—to the chambers assigned to the case. In practice, this Preliminary Report is accompanied by the *report d'audience*—or the Report of the Hearing—in which the *juge rapporteur* describes the subject and the means of recourse, the conclusions of the parties

and any intervening parties, along with the arguments advanced by each of them.

The *rapport préalable* differs from the *report d'audience* in that it contains a more thorough analysis of the legal context of the case, the facts of the case, and the legal questions to be resolved. The *rapport d'audience* contributes to the development of the "contradiction." It reveals to the parties before the hearing the manner in which they might express their observations during the hearing, contingent on the manner in which the Court of First Instance has characterized the positions of the parties from the written proceedings. The *rapport préalable*, on the other hand, is addressed solely to the judges of the chamber to whom it is duly distributed sufficiently in advance to provide them with adequate time to study it prior to discussing the case in conference.

All the judges of the chamber are in this manner expected to engage in, during the conference, an active discussion of the facts and the legal questions of the case, solicited by the observations of the *juge rapporteur*. Despite the potential for conflict, the conference occurs in an amicable, closed environment, with the judges remaining non-partisan in relation to their respective nationalities. The judges are expected to have mastered the files of the case. It follows that, in effect, the *rapport préalable* is largely discussed in the chamber, and that for each judge, except for the *juge rapporteur*, they fulfill a sort of double role: each functions not only as a judge, but also as a sort of an Advocate General. In this way, the principle of collegiality is reinforced.

The merits of the operation of the Court of First Instance are not limited to this situation; the fact that all the judges of the chamber know the file in a thorough manner, thanks to the *rapport préalable* and the initial discussion thereof, adds a particular vigor to the hearing. As a result, and as provided for in Article 58 of the Rules of Procedure of the Court of First Instance, the right to question agents, advisors, or lawyers of the parties is not held solely by the *juge rapporteur*, but is equally exercised by the other judges in the chamber. Two types of consequences are produced by this, one after the other in a domino effect.

### 1. The First Consequence

All of the members of the chamber are prepared to pose

specific questions. They ask these questions in such a close succession that they often cause the lawyers to abandon some of their arguments; but, even when the lawyers do not do it and find their arguments rejected, the lawyers sometimes come to see these decisions as irreversible. This method is one of the reasons why only twenty percent of the decisions of the Court of First Instance are appealed. This result is particularly important for a judicial system like that of the European Community, which does not have mechanisms in place for the enforcement of its judgments, but must rely solely on the force of its own persuasion.

## 2. The Second Consequence

The commitment demanded of the judges by the *rapport préalable* and the liveliness of the debate that takes place during the hearing, have made it customary for the judges to deliberate immediately after the hearing. There are no interruptions between the conclusion of this phase of litigation, which ends with the oral proceedings, and the reaching of a judgment by the chambers. The facts provided, either affirmed or denied by the parties, along with the explanations provided by the series of questions posed by the judges assure that the elements of the case are clear in the memories of the judges. This phase of the proceedings is very important within the context of the Community legal system, which does not allow a review of the facts upon an appeal of the judgment to the Court of Justice, which is limited in its review only to questions of law. It follows then that a principle grows stronger in the European Community legal system, which is neither in the Rules of Procedure of the Court of First Instance nor in the Statutes of the Court of Justice, but is recognized in several Member States as a constitutional principle: the principle of the "immediate decision."<sup>9</sup>

Based on the preceding observations, one could claim that the method of operation of the Court of First Instance helps in characterizing the European Community legal system in its entirety, in so much as the system is based on two levels of jurisdic-

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9. The usage established in this manner by the Court of First Instance of the European Communities is all the more important since the Court of Justice of the European Communities had just rightly affirmed that this principle is written neither in the EC Treaty nor in the Statutes, see the judgment of the Court of Justice from December 17, 1998, in *Baustahlgewebe GmbH v. Commission*, Case C-185/94 P, [1999] E.C.R. \_\_\_,

tion and attempts to combine the legal traditions of the Member States, such as the principles of collegiality, *contradictoire*, and "immediate decision."

B. *The Difficulties Encountered in the Operation of the Court of First Instance and the Efforts Being Made To Reduce Them*

One cannot state, however, that the functioning of the Court of First Instance is without fault. There is no doubt that the principle flaw is in the duration of proceedings. A judgment of the Court of Justice of December 17, 1998 dealt with an appeal from a judgment of the Court of First Instance where the complaint of the applicant to the Court of First Instance stated that the Court of First Instance had violated Article 6 of the European Convention on the Safeguarding of Human Rights and Fundamental Liberties (the Convention of Rome of November 4, 1950), which established the principle of a reasonable duration of a proceeding. In the reasoning of its opinion, the Court of Justice highlighted that the proceeding in the Court of First Instance, having resulted in the partial repeal of a decision of the Commission, had lasted from October 20, 1989 to April 6, 1995, and that, in spite of the complexity of the case—eleven cases had been joined—the length of the case still exceeded reasonable time limits. Therefore, the Court of Justice reduced the fine to 50,000 ECU that had been imposed by the Commission upon the applicant, and which the Court of First Instance had already reduced to 3,000,000 ECU. This subsequent reduction to 50,000 ECU by the Court of Justice was ordered in the name of equitable compensation for the excessive length of the proceedings.<sup>10</sup>

I have said that sometimes the decisions of the Court of First Instance can be very "provocative;" this case of the Court of Justice shows that this provocation can go both ways. While compensatory damages of 50,000 ECU is really nothing considering that the original fine was 3,000,000 ECU; nevertheless, it remains that the joining of the Court of First Instance to the Court of Justice has produced a "spark" that has instigated the pursuit of an improvement in the legal protection of individuals.

Even if one agrees with the Court of Justice that the proceedings before the Court of First Instance had surpassed a rea-

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10. *Id.* ¶¶ 26-48.

sonable time limit,<sup>11</sup> some of the difficulties encountered by the Court of First Instance are worth noting. The determination of the facts, which are normally very complex, requires detailed attention and thorough work. In addition, each document of the file must be translated, but Translation Services has been overwhelmed because of a constant increase in the number of cases, and the need for new employees has been met in a far from satisfactory manner.

The effort to surmount all of these difficulties is nevertheless intense and growing. One means utilized is the application of Article 111 of the Rules of Procedure of the Court of First Instance. It suffices to recall the contents of Article 111:

Where it is clear that the Court of First Instance has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, by reasoned order, after hearing the Advocate-General and without taking further steps in the proceedings, give a decision on the action.<sup>12</sup>

The results of the efforts accomplished so far are not negligible. The statistical data indicates to us that in 1998, the number of cases that were decided surpassed the number of cases that were brought, and that the total number of cases pending is shrinking. The number of cases decided was 319, compared to the 215 cases brought. The number of pending cases was reduced from 1106 in 1997 to 1002 in 1998; this number can be reduced to 500 if one takes into account that several of the pending cases have been joined or have been suspended. In any case, the efforts must be intensified.

### C. *The Expanding Jurisdiction from the Creation of the European Community Trademark*

The European Community has created a number of specialized bodies, often called "offices," charged with particular missions. The Office of the Harmonization of the Internal Market ("OHIM") is among them and was created by Regulation No.

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11. The Court of Justice noted that, between the closing of the written proceedings and the opening of the oral proceedings, 30 months had passed, and that, between the closure of the oral proceedings and the pronouncement of the judgment, 22 additional months had passed.

12. STATUT DE LA COUR CE, art. 111.

40/94 of December 20, 1994. It is located in Alicante, Spain and has as its mission to implement the European Community Trademark, which the same Regulation had created.

By the end of October 1998, this office had received 93,000 registration applications. If an application for a trademark is rejected, then the applicant has the right to challenge this rejection, in certain instances, to the "Board of Appeals," whose members are independent. The aforementioned Regulation anticipates a right of appeal to the Court of First Instance from decisions of this appellate office. Nine appeals have already been introduced to the Court of First Instance. It is reasonable to expect that in the future, around 800 appeals per year could be brought before the Court of First Instance.

D. *Some Examples of the Contributions that the Jurisprudence of the Court of First Instance Has Brought in Order To Improve the Protection of the Rights of Individuals in the Area of Competition Law*

As it has already been remarked upon, the two other aspects of the contribution of the Court of First Instance in the pursuit of the goal of the creation of a European Citizenship are the protection of individual rights and access to justice. The Court of First Instance has made a notable effort to contribute to the protection of individual rights through its jurisprudence in the area of competition law, an area where the Court of First Instance hears its most important and most difficult cases. In the greatest sense, this sector covers the prohibition of illegal agreements or abuse of a dominant position covered by Articles 81 and 82<sup>13</sup> (previously Articles 85 and 86) of the EC Treaty, the control of Member State aid to undertakings, the monitoring of mergers, and commercial defense of the European Community against dumping and subsidies from importation from non-Member State countries.

The problems in this area are very delicate. It is a matter of assuring that the activities of individuals and Member State public administrations do not interfere with the Community public interest and of guaranteeing in the common market a situation of competition that puts competitors on equal footing with re-

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13. Consolidated EC Treaty, *supra* note 5, art 81-82, O.J. C 340/3, at 208-09 (1997), 37 I.L.M. at 93-94 (ex Article 85-86).

spect to free movement of goods. To this end, European Community Law confers upon the Commission the mission to oversee that the market remains competitive, a mission that can be accomplished thanks to their ability to investigate and to impose fines.

Concerning the undertakings subject to the application of Articles 81 and 82, these powers are governed by Regulations 17/62<sup>14</sup> and 99/63,<sup>15</sup> which recognize an individual's ability to contribute to the execution of the Commission's functions by bringing a formal complaint or by furnishing observations during the administrative proceedings. The future of large undertakings and their employees may depend on the decisions issued by the Commission.

Its function being "extensive and general," the Commission has the power to "take all necessary measures in order to accomplish the mission with which it has been entrusted, including defining its priorities," according to the criteria such as that of "the Community interest." The evaluation of the existence of the Community interest implies that there is a discretionary power on the part of the Commission that excludes, for the head of administrative proceedings, the right to obtain a decision with regard to the existence of an alleged infraction.<sup>16</sup>

Even if in such matters one must grant the Commission such a discretionary power, and consequently deny the individual a right to obtain such a decision from the institution, the Court of First Instance has stated that the Commission has, in all cases, a series of obligations with respect to the applicants and the other interested parties. It is fitting then to mention some of the more interesting decisions of the Court of First Instance that relate to this point.

In the case where the complaint can be dismissed through a simple communication, the Court of First Instance has defined that the right of the individual to obtain a stance implies a right that they may also present their observations and, after this, a

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14. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

15. Council Regulation No. 99/63, 127 J.O. 2268 (1963), O.J. Eng. Spec. Ed. 1963-64, at 47.

16. This reflects the judgment of the Court of First Instance from September 18, 1992, in *Automec srl v. Commission*, Case T-24/90, [1992] E.C.R. II-2223, II-2241, ¶¶ 75-77.

right to get a final decision, which could be later contested before the Court of First Instance.<sup>17</sup> This last right particularly is guaranteed by the broad interpretation that the Court of First Instance has given to Article 232 (formerly Article 175),<sup>18</sup> as will be expounded upon below. On the other hand, when the Commission receives a complaint and decides to investigate the complaint, it must act—except when the evidence provided is merely circumstantial—with the required care, seriousness, and due diligence, in order to be able to consider clearly the elements of fact and of the law brought to its evaluation.<sup>19</sup>

More specifically, concerning the protection of the rights of individuals who have been harmed, the Court of First Instance has developed punctually the findings of the Court of Justice. These findings accord to the protection of the right of individuals and constitutes a fundamental principle of Community Law that must be safeguarded even if the rules concerning the procedure do not take them into consideration.<sup>20</sup> It affirmed that the respect of these rights implies the ability for the addressee of an investigation to have access to the file of the Commission, to find out the evidence—both concrete and circumstantial—against him, and to make useful observations in his defense on the conclusions reached by the Commission based upon this evidence.<sup>21</sup>

### 1. The Limitations Placed on the Commission in the Exercise of Its Power To Impose Sanctions

Regarding the exercise of its power to impose sanctions, the Court of First Instance has confirmed that it is desirable that undertakings—in order to be able to understand fully the action against them—have detailed knowledge of the method by which the Commission computed the sanctions imposed upon them for violations of Community Competition Law, without their be-

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17. This reflects the judgment of the Court of First Instance from June 27, 1995, in *Guérin Automobiles v. Commission*, Case T-186/84, [1995] E.C.R. II-1753, II-1769, ¶ 34.

18. Consolidated EC Treaty, *supra* note 5, art 232, O.J. C 340/3, at 273 (1997), 37 I.L.M. at 126 (ex Article 175).

19. This reflects the judgment of the Court of First Instance from June 29, 1993, in *Asia Motor France v. Commission*, Case T-7/92, [1993] E.C.R. II-671, II-684, ¶ 36.

20. This reflects the judgment of the Court of Justice from February 13, 1979, in *Hoffman-La Roche & Co. v. Commission*, Case 85/76, [1979] E.C.R. 461.

21. This reflects the judgment of the Court of First Instance from June 29, 1995, in *Solvay v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, II-1802, ¶ 59.



ing obligated to place a formal complaint in a judicial proceeding to receive such information.<sup>22</sup> In this regard, the Court of First Instance also has stated that, although the method of calculating fines is chosen by the Commission, it is necessary that the concerned party, and if need be the Court of First Instance, is able to check the methods used and the steps taken by the Commission in calculating these fines to ensure that they are free from error and consistent with the spirit and principles applicable to fines.<sup>23</sup>

In another case concerning fines, the Court of First Instance recently has overturned a decision made by the Commission to fine a company where in calculating the penalty the Commission deemed the concerned undertaking "recidivist" because of a previous infraction committed by a sister company. The Court of First Instance affirmed that the notion of recidivism, as it is understood in a number of Member States' legal systems, implies that a person has committed a new infraction after previously having been penalized for similar infractions. The Court of First Instance has in this way shown that it is necessary to consider the principle of individual responsibility, present in many Member States' legal systems, as being a part of Community Law. It judged that the imposition of a fine on a sister company during the infraction committed by the concerned undertaking is not sufficient to punish the latter as recidivist.<sup>24</sup>

In yet another case concerning fines, the Court of First Instance held on July 10, 1997 in the case of *AssiDomän v. Commission*<sup>25</sup> on the effects of a ruling by the court in which it overturned a decision of the Commission that had imposed a fine on

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22. This reflects the judgment of the Court of First Instance from April 6, 1995, in *Tréfilunion v. Commission*, Case T-148/89, [1995] E.C.R. II-1063, II-1119-20, ¶ 142.

23. This reflects the judgment of the Court of First Instance from March 11, 1999, *Thyssen Stahl v. Commission*, Case T-141/94, [1999] E.C.R. \_\_\_\_\_, \_\_\_\_\_, ¶ 609.

24. *Id.* ¶ 617.

25. The judgment of the Court of First Instance from July 10, 1997, *AssiDomän v. Commission*, Case T-227/95, [1997] E.C.R. II-1185, II-1213, ¶ 72. It is necessary to state that this judgment was appealed to the Court of Justice by the Commission (Case C-310-97 P). In his conclusions of January 28, 1999, Advocate General D. Ruiz-Jarabo delivered his findings in favor of the appellant accepting the conclusions to this case in supporting that the delay of two months, as foreseen in Article 173 of the EC Treaty, place an importance upon the judicial security that cannot be distorted by a liberal interpretation of Article 176 of the EC Treaty. In its judgment of September 14, 1999, the Court of Justice accepted the suggestions of the Advocate General.

certain undertakings that engaged in concerted practices. According to the Court of First Instance, in this case, the Commission may be required—under Article 233 (ex Article 176)<sup>26</sup> of the EC Treaty to consider—pursuant to a request made within a reasonable period, whether it needs to take measures in relation not only to the successful parties, but also to the addressees of that act who did not bring an action for annulment. Where that ruling could produce direct effects only for the parties who had made recourse to the court, it would have been inconsistent with the principle of legality for the Commission not to have a duty to repeal its initial decision in relation to another party that did not lodge an analogous recourse.

## 2. The Rights of Workers with Respect to the Evaluation of State Aid; The Functional Character of the Criterion Used To Evaluate an Actor in a Market Economy

The positions taken in the cases discussed above show how the Court of First of Instance recognizes that even when dealing within the delicate sphere of discretionary powers of Community Institutions, there is a space reserved for the legal protection of the rights of individuals. This protection that it assures to individuals is made in the public interest directed by European Community Competition Law. In this way, it is particularly interesting to note the positions that the Court of First Instance has taken in the application of the articles of the EC Treaty and the Treaty establishing the European Coal and Steel Community concerning state aids.

It was necessary to establish the criteria utilized in the legal evaluation of the exercise of power that the aforementioned Treaties have given to the Council and to the Commission in this matter. This analysis was done in the framework of an appeal from a Commission decision refusing authorization of certain state aids. On the one hand, one has evoked the justification of social necessity in maintaining that this decision would wrong the right of work of employees of undertakings who would have benefited from these aids; and on the other hand, one has maintained that the safeguarding of the salaries of the employment of

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26. Consolidated EC Treaty, *supra* note 5, art 233, O.J. C 340/3, at 273 (1997), 37 I.L.M. at 126 (ex Article 176).

these undertakings would cause damage to the employees of competing undertakings.

The Court of First Instance maintained the balance that the Court of Justice has established between these two competing demands when the Court of First Instance ruled that the intervention of a Member State or a Member State Public Authority, whether in the form of a subsidy or a reduction of the expenses normally born by such an undertaking, is compatible with Community Law. This intervention is justifiable on the basis of criteria that would be followed by a large scale undertaking (such as a holding) acting with a long term plan in a market economy. In response to the observation that the application of such criterion is not adequate in all sectors, such as that of the iron and steel industry that has a particular need for public subsidies, the Court of First Instance stressed that the said criterion had been confirmed by Community Legislation. It also stressed that the criterion had stated specifically that, in the framework of the European Coal and Steel Community as well as in that of the European Community, it may be applied "in so far as it serves to detect advantages which damage or threaten to damage competition."<sup>27</sup> To the confirmation of the criterion established by the Court of Justice, the Court of First Instance added, in an implicit but sufficiently clear manner, an important clarification: this criteria does not have an absolute character, but a functional one, permitting it to operate as an instrument in the pursuit of one of the objectives of the European Community.

### III. TWO EXAMPLES FROM THE JURISPRUDENCE IN THE AREA OF CUSTOMS LAW. THE LEGAL PROTECTION OF IMPORTERS AND THE CONCEPT OF COMMERCIAL RISK

The case law of the Court of First Instance has attempted to define further in a substantive manner the dimensions of the protection of individual rights in the application of the principle of proper administration, which is not only manifested in the area of Competition Law, but may also be seen in other areas related to it. It is enough here to show the manner in which it has recently manifested itself in the field of customs law in the

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27. This reflects the judgment of the Court of First Instance from March 25, 1999, in *Forges de Clabecq v. Commission*, Case T-37/97, [1999] E.C.R. \_\_\_\_\_, \_\_\_\_\_, ¶ 71.

cases of *Primex*<sup>28</sup> (better known as the "Hilton Beef" case) and *Opel Austria*.<sup>29</sup>

In the *Primex* case, two German undertakings had imported meat from Argentina in the framework of a quota, "the Hilton quota." The importation of this meat under the quota was contingent upon the presentation of a certificate of authenticity that had to be delivered by an Argentine authority. Although subject to a tariff of twenty percent, they were exempt from this tariff through these certificates, and the tariff would have amounted to approximately DM10/kilogram. It was found that many of the certificates upon which these importations had been exempted had been falsified. The German companies, after that fact, were requested to pay customs duties according to the tariff of twenty percent. After having paid, they solicited for remission of the import duties, on the basis of Article 13 of Commission Regulation No. 1430/79.

The German Ministry of Finance in turn asked the Commission to make a judgment on this matter. The decision of the Commission having been unfavorable to the German undertakings, presented an appeal to the Court of First Instance. The Commission has, among other things, maintained that the European Community has not supported the detrimental consequences of incorrect actions of importers. Furthermore, an economic operator, advised and aware of the state of regulations in a particular market, must be able to evaluate the inherent risks in the market in which he is prospecting and accept those risks as normal commercial risks. The German undertakings, on their part, complained to the Commission about the lack of oversight in supervision of the imports under the Hilton quota, failures that would have prevented such falsifications and the losses that they sustained.

The problem presented is how to determine to what degree the Commission had the responsibility to oversee the authenticity of the Argentine certificates and to what degree it was the responsibility of the importers. The Commission claimed that all vigilance should have been the responsibility of the importers, also claiming that the importers should also have born all of

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28. *Primex v. Commission*, Case T-50/96.

29. This reflects the judgment of the Court of First Instance of January 22, 1997, in *Opel Austria GmbH v. Council*, Case T-115/94, [1997] E.C.R. II-39.

the consequences of the fact that the certificates were fake and that they should therefore pay, after the fact, the tariffs due—this all being part of the “commercial risk” that the importers undertook. The Court of First Instance did not agree.

Article 13 of Regulation No. 1430/79, invoked by the applicants, contains a general equity clause, intended to be applied when the circumstances characterizing the relationship between an economic operator and the administration are such that it is not fair to impose on this operator a harm to which he would not have normally been subjected. The Court of First Instance held that when applying this standard the Commission should consider the totality of the circumstances. If the Commission in this regard uses its discretionary power, then it is bound to exercise such power balancing the interests of, on the one hand, the interests of the European Community to insure the integrity of its laws on importation, and on the other hand, the interests of the importers who in good faith did not undertake any risk greater than the *normal commercial risk* of such an enterprise. At the time of its analysis of the request for a remission of the tariffs due, the Commission did not consider the interests of the importers. The Commission should also, if need be, have considered its own role in the incident.<sup>30</sup> In this case, the Court of First Instance held that the actions of the Commission were flawed in that their refusal to remit the tariff in question had caused to the German companies a damage inequitable in the use of Article 13 of the regulation mentioned above.

A. *The Protection of Legitimate Expectations and the Conformity of the Communities Actions to the International Laws and Treaties*

In the case of *Opel Austria*,<sup>31</sup> the Court of First Instance gave significant impetus to the development of the jurisprudence of the Court of Justice in matters of protection of the legitimate expectations that the Community Institutions may engender in individuals. The case law of the Court of Justice in this area initially developed from the idea that the principle of protection of legitimate expectations is an equitable principle applied by the

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30. *Primex*, *supra* note 28, Case T-50/96, ¶ 116.

31. *Opel Austria GmbH*, [1997] E.C.R. II-43. For information on this case, see also, MENGOLZI, *supra* note 3, at 201.

courts using a “case by case balance of interest.” According to this approach, a legitimate expectation can be considered to exist and deserve protection only if two conditions are simultaneously met:

- 1) the creation, in the mind of the individual, of the expectation of the maintenance of a situation in his favor by the decisions of Community Institutions, an expectation that must be reasonable and which does not result from improper behavior by the individual or by error of law committed by the said Community Institution; and
- 2) the compatibility of the legal protection of said expectation with the general objectives pursued by the European Community.

In each concrete case, the Court of Justice would determine if there was a legitimate expectation, and consequently, whether it should be protected through balancing these two considerations, both being worthy of equal consideration.

Over time the Court of Justice abandoned this method and switched to a “two-step analysis approach” and affirmed that the analysis bearing on the existence of legitimate expectations and that the analysis aimed at establishing a balance between the protection of this legitimate expectation with the general public interest were to be put into effect separately, the one after the other—granting a superior judicial protection to an existing legitimate expectation. Following this new approach, the legitimate expectation is created, and therefore must be protected, as long as the first condition is satisfied (a reasonable expectation such as the one qualified in point 1 above). The derogation from the protection of the legitimate expectations is still, however, possible in the pursuit of the general interest, but only in certain extreme situations.<sup>32</sup>

The impetus that the Court of First Instance, through the Opel Austria case, gave to changing the Court of Justice’s approach to the application of the principle of legitimate expectations is significant. It is significant that the Court of First Instance brought forth from this new method of analysis important

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32. This reflects the judgment of the Court of Justice of June 2, 1994, in *De Compte v. Parliament*, Case C-326/91, [1994] E.C.R. I-2091. On the changing of the test that marks this case, see Paolo Mengozzi, *Evolution de la méthode suivie par la jurisprudence communautaire en matière de protection de la confiance légitime: de la mise en balance des intérêts, cas par cas, à l'analyse en deux phases*, SINGLE EUR. MARKET R., 1997, 13 *et seq.*

consequences with respect to the determination of the consequences of the incompatibility of a normative Community act with an international treaty/law.

In effect, before the judgment in the *Opel Austria* case, European Community case law had affirmed in a theoretical way that a Community act is not valid when it is incompatible with an international treaty binding the European Community and containing some directly applicable provisions. This theoretical conclusion, however, had never seen a practical application. The problem of incompatibility of a Community act with international law notably presented itself in the cases concerning the validity of certain Community acts against the General Agreement on Tariffs and Trade<sup>33</sup> ("GATT") of 1947. In all of these cases, the European Community judge refused to invalidate the Community acts, based on the motive that the invoked terms of the treaty that conflicted with the attacked Community acts did not have direct application.

In the *Opel Austria* case, the applicant was seeking an invalidation of the Regulation of December 20, 1993,<sup>34</sup> which withdrew certain tariff concessions granted in the free trade agreement concluded between the European Communities and Austria.<sup>35</sup> This repeal could be justified on the basis of the Free Trade Agreement, but not on the basis of the Treaty of the European Economic Area<sup>36</sup> ("EEA Treaty") that the European Communities, the last party to enter into it, had approved on December 13, 1993. All the parties to the treaty (including the European Communities) received notification that the EEA Treaty would take effect on January 1, 1994.

The applicant claimed, among other things, that by adoption of the litigated Regulation, the Council had violated the international public law principle of good faith. The applicant challenged the fact that at the moment the Regulation was adopted, December 20, 1993, the Council was already aware that the EEA Treaty would have entered into force a few days later. Since one of the major objectives of the Treaty was the abolition

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33. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, A-23-25, A-52-53, 55 U.N.T.S. 194, 212-16, 250-51

34. Council Regulation No. 3697/93.

35. See Council Regulation No. 2836/72.

36. Treaty on the European Economic Area, [1991] E.C.R. I-6079, [1992] 1 C.M.L.R. 245.

of the rights to import tariffs between the contracting parties, the European Community would have compromised the realization of this goal by adopting a conflicting Regulation after the ratification of EEA Treaty.

Considering these facts, the Court of First Instance voided the challenged Regulation. In order to do this, they observed that the principle of good faith of international public law is the corollary principle of the protection of legitimate expectations that is part of Community Law. Applying the two step analysis approach of the Court of Justice and by accomplishing the goal of the protection of the rights of individuals, the Court of First Instance stated that "the right to avail oneself of the principle of legitimate expectations is open to each economic operator in which the Community Institution has created reasonable expectations." Then, it clarified:

In a situation where the Communities have approved an international treaty and where the date entrance into force of such treaty is known, the economic operators can avail themselves of the principle of the protection of legitimate expectations in order to challenge the adoption, by the Community Institutions, in the period proceeding the date of entrance into force of that treaty, of any act inconsistent with directly applicable provisions of it.

It is interesting to note that in this instance, the Court of First Instance restricted itself to stating that a legitimate expectation had been created immediately by the Community Institution's adoption of the enabling statutes and the fact that the date of entrance into force of the treaty was known. These legitimate expectations were therefore justified to such a point that the Court of First Instance did not even deem it necessary to proceed to the second phase of analysis, this phase being aimed at the evaluation whether a general public interest could possibly justify a derogation from the protection of the legitimate expectations. This stand confirms the "two step analysis approach," in that the statement of the very existence of the legitimate expectations is absolutely autonomous with relation to the taking into account of the compatibility of the legal protection with the general public interest of the European Community.

Besides, with regards to the relation between Community acts and international law, one cannot help remark that the Court of First Instance has arrived at its conclusion not by con-



fining itself to commenting on the incompatibility of the Regulation with a rule of international law binding the European Community. It has done so by attaching a decisive importance to the fact that this incompatibility violated the right granted to an economic actor from the working of the principle of legitimate expectations. If one wants, reviewing the jurisprudence with relation to the GATT Treaty of 1947, then the analysis continues to be unchanged: the importance attached to the international treaty in the invalidation of an incompatible normative Community act remains subordinate not only to the fact that the treaty could bind the European Community, but also to the circumstance that its provisions have a direct effect with respect to applicants. The principle of respect of international law, while this principle could previously appear as mere "lip service" given to the European Communities desire not to appear as an island unto itself, found itself with the judgment of the Court of First Instance concretely embedded into the living body of European Community law.

In addition, by having recourse to the principle of the protection of the legitimate expectation of economic operators, the Court of First Instance enlarged the scope of the obligation of the Community Institutions to consider international law with a direct effect at the moment of exercising their normative powers. In fact, the aforementioned principle has permitted the Court of First Instance to hold invalid normative Community acts, in spite of the fact that the provisions of the EEA Treaty that were invoked to invalidate the contested act, although capable of a direct effect, were not yet entered into force at the time of the adoption of the same act.

*B. The Court of First Instance and the Access to Justice: The Recognition of Professional Associations and the Right To Challenge Community Acts or Failure To Act of a Community Institution*

Concerning the principle of the access to justice, the contribution of the Court of First Instance is particularly clear with regard to:

- a) the determination of persons, both natural and judicial (local entities included), having to challenge acts of Community Institutions in accordance with Article 230

of the EC Treaty (formerly Article 173);<sup>37</sup>

- b) the determination of cases in which it is possible to challenge the failure to act of a Community Institution in accordance with Article 232 of the EC Treaty (formerly Article 175).

Concerning the determination of persons who qualify under Article 230, the Court of First Instance has held that a professional association having protected, in the framework of a hearing before the Commission, the interests of certain of its members and having demonstrated that these members are directly and individually concerned by the decision made following this hearing, must be considered as individually concerned in the sense of Article 230. It follows that an association having defended only general interests is not able to bring such an action.<sup>38</sup> The fact that they pursue general interests and the fact that they claim to act for the just safeguarding of those interests does not suffice, according to the Court of First Instance, to show that it is directly and individually concerned by the act that they are challenging.<sup>39</sup>

### C. *The Recognition of Local Entities To Challenge the Safeguarding of Its Prerogatives*

The Court of First Instance later expanded the interpretation of Article 230 by granting standing to the Flemish Region in its challenging of a Commission decision. This decision had stated that an interest free loan of BFR20 million to the region by the Kingdom of Belgium was contrary to Community law, and had compelled the Kingdom of Belgium to apply a normal interest rate on the amount lent. The task of the Court of First Instance was not easy, because Community law holds the Member States responsible for all aid granted by the public. The Court of

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37. Consolidated EC Treaty, *supra* note 5, art 230, O.J. C 340/3, at 272 (1997), 37 I.L.M. at 125 (ex Article 173).

38. This reflects the judgment of the Court of First Instance of July 6, 1995, in AITEC v. Commission, Case T-447/93, T-448/93, and T-449/93, [1995] ECR II-1971. In general, for information on the access to justice before Community judges in matters of competition law, see Bo Vesterdorf, *Complaints Concerning Infringements of Competition Law Within the Context of European Community Law*, COMMON MARKET L.R., 1994, 77.

39. This reflects the judgment of the Court of First Instance of October 4, 1996, Sveriges Betodlares v. Commission, Case T-197/95, [1996] E.C.R. II-1283.

First Instance, however, accepted the standing of the action because in its opinion two conditions had been satisfied:

- 1) the Region in question was a jurisdictional person;<sup>40</sup> and
- 2) the challenged Decision affected directly and individually the Flemish Region by preventing it from exercising, as it understood them, the powers that it inherently possessed and were not delegated by the Belgian State.<sup>41</sup>

The idea came from the recognition in the Community system of local autonomous powers, which compare to those of Member States. This recognition is limited to the protection of their prerogatives; it will be nevertheless interesting to note the reaction to this decision in the Member States, and if need be, that of the Court of Justice.

*D. The Determination of Persons Individually Concerned and Qualified To Challenge the Failure of a Community Institution To Act in Matters of State Aid and in Matters of Special or Exclusive Rights Granted to Undertakings*

According to Article 232 of the EC Treaty, as interpreted by the Court of First Instance and the Court of Justice, a natural or judicial person who would be directly and individually concerned by an act of a Community Institution may bring an action for failure to act against such Community Institution. The Court of First Instance recently has been called to take a position on two of these failures to act regarding state aid and with reference to the exercise of exclusive or special rights granted to public or private enterprises.

### 1. Specific Rules of State Aid

The specific rules of state aid, established by Articles 87-89 (formerly Articles 92 to 94)<sup>42</sup> of the EC Treaty, differ from those

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40. It should be noted, in this regard, that Article 230 of the EC Treaty does not limit itself like its corresponding Article did in the European Coal and Steel Community, to anticipating the possibility of a challenge only by businesses and associations, but it refers to "any natural or legal person." For such an observation, see the most recent judgment of the Court of First Instance of June 15, 1999, in *Regione Autonoma Friuli-Venezia Giulia v. Commission*, Case T-288/97, [1999] E.C.R. \_\_\_\_.

41. This reflects the judgment of the Court of First Instance of April 30, 1998, in *Région flamande v. Commission*, Case T-214/95.

42. Consolidated EC Treaty, *supra* note 5, art 87-89, O.J. C 340/3, at 211-12 (1997), 37 I.L.M. at 96 (ex Article 92-94).

governing cartels and abuse of a dominant position established by Articles 81 and 82 of the same treaty, in its lack of acts such as Regulations No. 17/62 and 99/63, which provide guarantees of hearings to certain undertakings and undertakings associations. The guarantees anticipated by these Regulations make it easy for these people to be considered "individuals" among all of the possible persons that could have any sort of interest in an act adopted by a Community Institution. Consequently, it is possible to recognize these same persons as individually concerned. Such a situation did not occur with reference to the application of Article 232 to state aid, being that it neither did not exist nor were there any Community acts comparable to the cited Regulations.

The Court of First Instance, however, believed that the "individualization" of persons having the right to challenge the failure to act of a Community Institution is equally possible, since paragraph 2 of Article 88 (formerly Article 93) of the EC Treaty contains a procedural guarantee of a hearing in favor of certain undertakings, which is comparable to guarantees foreseen by the aforementioned Regulations. This guarantee springs from the fact that the Commission must grant the interested individuals the right to present their observations during this administrative proceedings. The Court of First Instance added that the interested parties in this sense are persons, undertakings, or associations whose interests are possibly affected by the granting of aid, which is to say probably the competing enterprises and the associated professional organizations. These same persons, the Court of First Instance concluded, who exhibit certain qualities that are particular to them or by reason of a factual situation that distinguishes them in relation to similarly situated parties, must be considered individually concerned in the case of such a failure to adopt an act. Consequently, they may bring a case for the failure to act by a Community Institution before the Court of First Instance.

In applying these ideas, the Court of First Instance recognized in a case concerning financial endowments given by the Spanish state to some public television channels, that one of three private, competing television channels was qualified to apply for a declaration under Article 232 (formerly Article 175) of the EC Treaty that the Commission failed to fulfill its obligations under the EC Treaty. It failed first, by failing to adopt a decision

in relation to the complaints made by the applicant against the Kingdom of Spain for breach of Article 87 of the EC Treaty. Secondly, it failed to initiate the procedure provided for under Article 88(2) of the EC Treaty, alternatively, for annulment under Article 173 of the Treaty of the Commission's decision allegedly contained in a letter of February 20, 1996.<sup>43</sup> The result is that there is strengthened legal protection for economic operators in the single market.

## 2. Lack of a "Guarantee of a Hearing"

A "procedural guarantee" comparable to that contained in paragraph 2 of Article 88 of the EC Treaty is not contained in Article 86 (formerly Article 90) of the same treaty, relating to public undertakings and beneficiaries of exclusive or special rights. The Court of First Instance in the case of *Télévision française 1 SA (TF1) v. Commission*,<sup>44</sup> has considered a competitor of an undertaking that benefits from such rights as equally as individually concerned by a failure to act in the application of this Article. The Court of First Instance observed that paragraph 3 of Article 86 of the EC Treaty

inserts itself among the rules whose object is to ensure the free action of competition and that tends therefore to protect the economic operators against measures through which a Member State could place a check on the fundamental economic liberties guaranteed by the Treaty. It results, therefore, that an individual would know when a Member State pronounces or maintains in that which concerns public enterprises or those enterprises benefiting from exclusive or special rights, measures producing an anti-competitive effect equivalent to that produced by anti-competitive behavior of all the other undertakings, would know that he was being deprived of the protection of his legitimate interests.

The Court of First Instance reinforced this conclusion in recalling that,

reviewing its jurisprudence, it has found a number of general principles of European Community law which provide all persons with the ability to appeal acts which may have infringed

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43. This reflects the judgment of the Court of First Instance of September 15, 1998, in *Gestevisión Telecinco v. Commission*, Case T-95/96.

44. This reflects the judgment of the Court of First Instance of June 3, 1999, in *Télévision française 1 SA (TF1) v. Commission*, Case T-17/96, ¶¶ 50, 51.

on rights that have been granted to them by the Treaty. The great estimation of which the Commission places into the body of Article 86 would be able to keep in check this protection.

The Court of First Instance in this way went from an "individualization" of persons affected by the failure to act based upon a by-the-book evaluation of written law<sup>45</sup> to a less formal position based on the application of a general principle of non-written law, a principle according to which the European Community law guarantees the most complete and effective juridical protection of legal situations that it grants to individuals in a substantive manner. Thus the Court of First Instance produced a further reinforcement of the legal protection of individuals.

*IV. THE ENLARGEMENT OF THE RIGHT OF BUSINESS TO ADVANCE THE ENFORCEMENT OF COMPETITION LAW AND THE INCREASE OF THE RESPONSIBILITIES OF THE COURT OF FIRST INSTANCE INCLUDING SPECIAL RESPONSIBILITIES WITH RESPECT TO THE DETERMINATION OF FACTS*

The broad interpretation thus made by the Court of First Instance concerning the notion, alluded to in Article 230 of the EC Treaty, of persons individually concerned, results in a consequence of remarkably practical importance. With the Single European Act, the desire to perfect the establishment of the internal market was asserted and the Commission extended to the enforcement of state aid with the same rigorousness with which it had always checked the behaviors of undertakings in the field of competition law. This rigorousness is inevitably destined to intensify. Given that the Court of First Instance will henceforth be more frequently made to enforce the enforcer, it could be called upon to verify the legality, not only of the decisions that the Commission will make on these topics, but also the legality of possible improprieties the Member States may resort to in the public interest—for example by guaranteeing jobs to a certain number of its citizens, although such actions may interfere with fair trade in a single market.<sup>46</sup> On the one hand, the Commission has intensified the enforcement of the acts of Member State

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45. Council Regulation 17/62, *supra* note 14; Consolidated EC Treaty, *supra* note 5, art 88, ¶ 2, O.J. C 340/3, at 211-12 (1997), 37 I.L.M. at 95 (ex Article 93).

46. See *Télévision française 1 SA (TF1)*, *supra* note 44.

authorities with respect to state aids; on the other hand, undertakings bring complaints to the Commission so that they do not allow their competitors to benefit from state aid, which alters the fair playing field of the single market.

The perspective, it is certain that the Court of First Instance always has adhered, is the spirit of the mission of the European Community, which is to "promote the level of employment and increase social protections." One, however, cannot forget that if the Court of First Instance had been instituted to contribute to the advancement of the legal protection of the citizens of the European Union, then it was done for the benefit of all, not just for some. The Court of First Instance is particularly obligated in this area by virtue of the special prerogatives that are attributed to it in the matter of determination of the facts.