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Establishing *Locus Standi* Under Article 173(2) of the EEC Treaty

INTRODUCTION

Article 173 of the Treaty of Rome¹ allows natural and legal persons² to obtain judicial review of certain legal acts of the Council or Commission of the European Economic Community (EEC Council or Commission). Specifically, Article 173(2) allows nonaddressees of a decision³ or a decision in the form of a regulation⁴ to petition the Court of Justice of

¹ Mar. 25, 1957, 298 U.N.T.S. 11, 75, 2 COMMON MKT. REP. (CCH) ¶ 4635 [hereinafter cited as the EEC Treaty]. Article 173 provides:

(1) The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers.

(2) Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

(3) The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Id.

² Legal persons include, for example, trade associations, enterprises and cooperatives. See generally Angulo & Dawson, *Access by Natural and Legal Persons to the Court of Justice of the European Communities*, 36 U. CIN. L. REV. 583, notes 98-111 and accompanying text (1967) [hereinafter cited as Angulo]; 4 H. SMIT AND P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY* § 173.14 (1976) [hereinafter cited as SMIT & HERZOG].

³ Article 189 of the EEC Treaty lists the types of legal acts which can be adopted by the EEC Council or Commission. Decisions are always addressed to either a Member State or a natural or legal person. They are directly binding on the addressee. EEC Treaty, *supra* note 1, at 78-79, 2 COMMON MKT. REP. (CCH) ¶ 4901. Examples of decisions include the Commission deciding that a Member State can take protective measures to protect its internal markets or granting a private individual an exemption from the Community's antitrust laws. EEC Treaty, Article 173(2) allows addressees and nonaddressees to challenge decisions. See EEC Treaty, Art. 173, *supra* note 1. This Comment will only discuss nonaddressee challenges of decisions.

⁴ The highest possible legal act of the Community is the regulation. Regulations are binding in their entirety and directly applicable in all Member States. EEC Treaty, *supra* note 1, art. 189, at 79, 2 COMMON MKT. REP. (CCH) ¶ 4901. Regulations do not have specific addressees; they are general legislative measures. The antitrust provision, Regulation 17, is an example. Occasionally, a regulation is not a legislative measure but an administrative measure, affecting an ascertainable group of persons. The Court will look beyond the form of such a measure and declare it to be a decision. For

the European Community⁵ (the European Court) for an annulment of the legal act on one of four grounds.⁶ Before an application for an annulment is admissible, however, the applicant must show that the legal act is of "direct and individual concern" to him.⁷ Yet, the European Court has not clearly interpreted "direct and individual concern": the *locus standi* requirement,⁸ or the right of appearance in the European Court. The European Court's unclear interpretation of the *locus standi* requirement generates uncertainty and reduces the utility of Article 173(2) as a judicial review provision.⁹

a discussion of when a regulation is really a decision, see T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 354 (1981).

⁵ The European Court is composed of twelve judges, conventionally one judge from each Member State plus an additional judge to prevent deadlocks. Each judge serves a term of six years. The terms are staggered. The Court sits in a quorum whenever the Council or Commission brings an action or requests the Court to sit in full to hear a case. Otherwise, the judges form chambers of three to hear less important cases. EEC Treaty, *supra* note 1, arts. 165, 167, at 73-4, 2 COMMON MKT. REP. (CCH) ¶ 4600; T.C. HARTLEY, *supra* note 4, at 26-38.

Most generally, the Court's jurisdiction is divided into direct jurisdiction and indirect or preliminary jurisdiction. *Id.* at 33. In the former, the plaintiff or applicant brings an action directly before the Court. The Court serves as the court of first and last resort. An example of a direct action is a judicial review action, such as an annulment proceeding. There, the applicant seeks to have the Court declare an act of the Council or Commission void. See *infra* note 6.

In its preliminary jurisdiction, the European Court is not the court of first and last resort. The applicant has initiated his action in the national courts and it will ultimately be decided there. T.C. HARTLEY, *supra* note 4, at 34. The Court only answers abstract questions of law directed to it by the national court. The national court then applies the answer to its question in the case before it. *Id.*; see generally L. BROWN & F. JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (1977).

⁶ In an annulment proceeding, the applicant seeks to have the Court invalidate a legal act of the Council or Commission on one of four specified grounds: (1) lack of competence; (2) infringement of an essential procedural requirement; (3) infringement of the Treaty or any rule of law relating to its application; or (4) misuse of powers. EEC Treaty, *supra* note 1, art. 173(1). If the applicant proves one of these grounds, then the Court must declare the act null and void. EEC Treaty, *supra* note 1, art. 174, at 76, 2 COMMON MKT. REP. (CCH) ¶ 4641; SMIT & HERZOG, *supra* note 2, § 174.03.

When annulling the act, the Court recognizes an existing nullity rather than the annulling of a theretofore valid act. SMIT & HERZOG, *supra* note 2, § 174.05. The act is void from the time it came into existence. *Id.* The declaration of nullity has a binding effect on the whole world. *Id.* However, the Member States must follow such acts until they are declared invalid. *Id.*; see generally T.C. HARTLEY, *supra* note 4, at 457-62.

⁷ EEC Treaty, *supra* note 1, art. 173(2).

⁸ See *infra* notes 16-20 and accompanying text. This Comment will only address one of the three requirements an applicant must meet before his application for an annulment can be admitted and the Court is able to consider the merits of voiding the Community act. Assuming the European Court has jurisdiction, and the action is timely, the applicant must also show he has *locus standi*, the right of appearance in the Court, before his application is admissible. T.C. HARTLEY, *supra* note 4, at 39. In the case of nonaddressees of a decision, the Treaty requires that the applicant be "directly and individually concerned." EEC Treaty, *supra* note 1, art. 173(2). This Comment will analyze how the Court has been interpreting this requirement and suggest a mode of analysis for determining whether the applicant has *locus standi*.

⁹ Unclear admissibility requirements generate uncertainty in the several ways. On the one

The primary objective of this Comment is to help clarify the *locus standi* requirement in order to reduce uncertainty. To meet this objective, this Comment will analyze how the European Court is interpreting the *locus standi* requirement. The Comment will also suggest a mode of analysis for determining whether an applicant is directly and individually concerned by the legal act he is seeking to annul.

Clarification of the *locus standi* requirement may save legal resources by enabling potential applicants to identify fruitless claims early.¹⁰ It is also hoped that such clarification will enable scholars to rethink the *locus standi* requirement and how it affects the development of the Community and its laws.¹¹

I. DIRECT CONCERN

A. Direct Concern and Direct Applicability

Neither the European Court nor the Advocates General¹² have explicitly indicated the policy reasons for the direct concern requirement.¹³

hand, litigious law firms or companies may risk petitioning the Court for an annulment and hope the latter admits their application. This may result in fruitless claims consuming legal resources. On the other hand, a potential litigant with a meritorious claim may decide not to institute annulment proceedings because he is unable to predict satisfactorily his chance of success. The potential litigant may choose a more costly alternative with more certainty or not bring an action at all. The latter choice results in less public input on Community legislation. See generally Barav, *Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court*, 11 COMMON MKT. L. REV. 191 (1974).

¹⁰ Philip Allott, Fellow of Trinity College, Cambridge, has indicated that litigious American law firms and corporations try to challenge Community Acts and expend legal resources despite the fact that annulments of Community decisions are difficult to obtain from the Court. Lectures by Philip Allott, Common Market Trade Law, Cambridge-Warsaw International Trade Law Program, Trinity College, Cambridge, England, (July-August 1984) [hereinafter cited as Allott, Lectures].

¹¹ If the admissibility requirements are being interpreted too strictly, the Court may be reducing popular input on Community legislation. This may be undesirable if the Community is striving increasingly to become a federation. P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW, 226-43 (3d ed. 1980). Conversely, strict admissibility requirements may result in fewer challenges to legislation and thereby preserve the fragile political compromises they represent. For a discussion of the legal policies involved in annulment decisions, see Stein & Vining, *Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AM. J. INT'L L. 219, 230-34 (1976) [hereinafter cited as Stein].

¹² The Court of Justice is composed of two categories of members: Judges and Advocates General. The Judges decide the cases. The Advocate General does not participate in the decision but orates an independent opinion on all the issues in a case and indicates how the Court should decide it. His views are carefully considered by the Court. The Advocate General's opinion, which is published after the Court's Opinion in the official reports, is especially persuasive and is cited authority when the Court is silent on an issue. The Advocate General may disagree with the Court on an issue and his opinion may be used by scholars to criticize a Court decision. Dashwood, *The Advocate General in the Court of Justice of the European Communities*, 2 LEGAL STUD. 202, 207-16 (1982).

¹³ It is clear that the function of the direct and individual concern requirement is to limit chal-

One scholar has indicated that through the direct concern requirement the Court and Advocates General have tried to "maintain the delicate balance between member state and community power"¹⁴ or to "promote [a] Community interest in preserving the discretion of member governments."¹⁵ These explanations, however, are not very helpful because of their vagueness.¹⁶

The European Court's test for determining whether direct concern is present is not clear. The European Court has not consistently followed the tests proposed by its Advocates General. For example, Advocate General Roemer has argued that if the Member State had discretion in implementing the decision, then the Community act was not of direct concern to the applicant and vice versa.¹⁷ The European Court's decisions have not consistently followed Mr. Roemer's reasoning.¹⁸

In fact, one scholar after examining the case law of the Court through 1975 has stated that "one may question whether there is yet a workable or meaningful doctrine of directness."¹⁹ He pointed out that it is unclear whether Member State discretion is determinative of the issue.²⁰ Moreover, if marginal discretion is permissible, how much discretion is permitted before direct concern is precluded?

It appears that through the direct concern requirement the European Court is trying to ensure that an independent Community legal act is ultimately responsible for the alleged harm to the applicant. If a Community legal act is responsible for the alleged harm to the applicant, then

lenges by nonaddressees to those who meet these requirements. But the question asked here is: why are these nonaddressees special? See *infra* notes 20-22 and accompanying text.

¹⁴ Stein, *supra* note 11, at 227.

¹⁵ *Id.* at 229.

¹⁶ Moreover, the author does not indicate whether this is the exclusive Community interest to be preserved by the direct concern requirement or whether there are other interests.

¹⁷ See, e.g., *Toepfer v. Commission*, 1965 E. Comm. Ct. J. Rep. 405, 434, 1966 Common Mkt. L.R. 111.

¹⁸ Compare *Toepfer*, *id.* with *Eridania v. Commission*, 1969 E. Comm. Ct. J. Rep. 459, [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8099. In *Toepfer*, the Member State had discretion, in theory, to use the Commission's authorization, but the Court ignored it and found direct concern present. But in *Eridania*, the remote possibility that the Italian government would reject EEC subsidies for certain sugar refineries which Italy was committed to helping, led the Court to deny direct effect because Italy had discretion. Accord Stein, *supra* note 11, at 227.

A broader view of direct concern was advanced by Advocate General Gand. He indicated that when the intervention of the Member State is limited to a purely technical execution, the Community decision directly concerns the individual. Barav, *supra* note 9, at 193. The European Court seemed to follow this view in *Alcan Aluminum v. Commission*, 170 E. Comm. Ct. J. Rep. 385, 1970 Common Mkt. L.R. 337, and in *Fruit Co. v. Commission*, 1971 E. Comm. Ct. J. Rep. 411, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142.

¹⁹ Stein, *supra* note 11, at 229.

²⁰ *Id.*

that natural or legal person's claim lies against the Council or Commission of the EEC. If a Community act is not responsible for the harm, then the applicant must seek redress in the Member State courts.

This thesis is supported by the European Court's explicit use of the concept of direct applicability when it decided the direct concern issue in the *Toepfer*²¹ case and evidence that it was using this concept in other cases.²² The European Court has used the concept of direct applicability to establish the independence of Community law from Member State law.²³ In the context of analyzing EEC Treaty provisions, the European Court has defined a directly applicable provision as one which "produce[s] direct and immediate effect within the national legal order and assure[s] individual rights."²⁴ A directly applicable provision is one which penetrates the legal system of the Member State.²⁵ It is superior to the law of the Member State and renders it inapplicable.²⁶ Indeed, subsequent national legislation cannot modify or undermine the directly appli-

²¹ *Toepfer v. Commission*, 1965 E. Comm. Ct. J. Rep. 405, 1966 Common Mkt. L.R. 111.

²² See *infra* notes 42-93 and accompanying text. This thesis was also recognized, but not developed, in Barav, *supra* note 9, at 193-94.

²³ P. MATHIJSEN, *supra* note 11, at 227.

²⁴ Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 19 INT'L & COMP. L.Q. 257, 269 (1970). Like Dr. Bebr, this Comment assumes directly applicable and direct effect mean the same thing. Other scholars limit the definition of direct applicability to those provisions which automatically become a part of the national legal system as soon as promulgated by the Community authorities and require no national incorporation measures. See, e.g., Winter, *Direct Applicability and Direct Effect—Two Distinct and Different Concepts in Community Law*, 9 COMMON MKT. L. REV. 425, 438 (1972). They define "directly effective" provisions as those which create rights for nationals which they can invoke in their own courts. See, e.g., P. MATHIJSEN, *supra* note 11, at 228.

However, "the two expressions seem to be equivalent in the Court's language." Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, 8 EUR. L. REV. 155 n.2 (1983). Moreover, the tests for direct applicability in the limited sense are virtually the same as those for direct effect and direct applicability in the broader sense. Automatically effective provisions are unconditional, require no further executory measures, and do not give discretion to the Member States. These are the tests of direct applicability in the sense used by Bebr and this Comment. For a discussion of direct applicability see *infra* notes 28-41 and accompanying text.

Finally, the ultimate test of whether a Community provision creates effects within a national legal order is whether it is justiciable and can be enforced by the courts. To be justiciable the legal act must be unconditional and be sufficiently precise. Pescatore, *supra*, at 174. The tests discussed *infra* reflect this fact.

²⁵ A directly applicable treaty provision or regulation "does not have to be transformed into national law by a national measure." P. MATHIJSEN, *supra* note 11, at 100.

²⁶ "[B]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves." *Costa v. ENEL*, 1964 E. Comm. Ct. J. Rep. 585, 593, 1964 Common Mkt. L.R. 425, 455.

cable provision.²⁷

A Treaty provision or secondary legislation²⁸ is directly applicable if it is "complete and legally perfect."²⁹ A provision is "complete and legally perfect" if it is (1) clear or specific; (2) unconditional; (3) requires no further measures either on the part of the Member States or of the Community institutions; and (4) if further measures are necessary, Member States may have practically no discretion in taking them.³⁰

Through its case law, the European Court has indicated how it applies the "complete and legally perfect test." When applying this test, the European Court considers the "whole" provision. It considers the spirit, structure, and wording of the provision. Indeed, the actual text of the provision may play a limited role in the Court's analysis.³¹

Under the first element, the "clear" requirement, negative provisions or provisions prohibiting a Community institution, Member State, or natural and legal person from performing an act are likely to be found to be clear. Yet, negative provisions must be sufficiently precise to indicate what actions are no longer allowed and provide criteria for identifying such actions.³² Indeed, the limits of the prohibition must be clear. Positive provisions or provisions requiring an entity to take an affirmative act must also be sufficiently clear to specify what actions must be taken.

The second requirement, that the provision be "unconditional," is closely related to the third and fourth elements.³³ A provision cannot have immediate effect within a national order or create a right for a national if it depends on something within the control of an independent body.³⁴ In sum, a provision is unconditional if it has automatic effectiveness.

The third element of "no further necessary measures" is fulfilled if

²⁷ This obligation stems from EEC Treaty, art. 5, which provides, *inter alia*, that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty." EEC Treaty, *supra* note 1, at 17, 1 COMMON MKT. REP. (CCH) ¶ 181.

²⁸ "Secondary legislation" means regulations, directives, decisions.

²⁹ Bebr, *supra* note 24, at 268.

³⁰ *Id.* at 270.

³¹ *Id.* at 269.

³² *Id.* at 270.

³³ This close relationship is illustrated by how Judge Pescatore described determining whether a provision is unconditional:

It is necessary to consider in each individual case whether there may be some reservation, inherent either in the provision itself or in the system of which it is part, with a view to further implementing measures implying some discretion, to be taken either by one of the Community Institutions or by Member States.

Pescatore, *supra* note 24, at 174.

³⁴ T.C. HARTLEY, *supra* note 4, at 193.

the Community institutions or Member States have already taken any necessary executory actions.³⁵ Negative provisions generally meet this requirement since they prohibit any further actions. Positive provisions may also meet this requirement if the affirmative actions required are only secondary or formalistic measures to be taken. If the further obligations are very specific and nondiscretionary, the European Court will dispense with them and find this element fulfilled.³⁶ Also, if the mere omission of a secondary measure would undermine a fundamental provision of Community law, the Court is likely to ignore these secondary measures.³⁷

Finally, under the fourth element, the European Court and Advocates General have recognized that marginal discretion does not necessarily prevent a provision from being directly applicable. Only a certain "actual or real discretion will preclude direct applicability."³⁸ Real discretion exists if the Treaty or secondary legislation expressly provides for it.³⁹ Real discretion may also exist if the provision has no specific objective which inherently limits discretion or if it does not provide methods or criteria for performing an act.⁴⁰

To the extent that the direct concern requirement aims at determining whether an independent Community act is responsible for the alleged harm to the applicant, the "complete and legally perfect" test of direct applicability could be employed to determine direct concern. To the extent that an immediately effective decision or decision in the form of a regulation clearly requires an entity to refrain from or to perform a non-discretionary act, it is a directly applicable decision, which penetrates the national sphere and has the potential of harming an applicant. Thus, if the applicant can show that the legal act meets the "complete and legally" perfect test, then the European Court is likely to find direct concern. The following cases contain evidence that the European Court is applying the direct applicability test when analyzing the direct concern issue.⁴¹

B. Decisions Addressed to a Member State

In its opinion in *Toepfer v. Commission*,⁴² the European Court ex-

³⁵ *Id.* at 196.

³⁶ Bebr, *supra* note 24, at 275.

³⁷ *Id.* at 276.

³⁸ *Id.* at 278.

³⁹ Pescatore, *supra* note 24, at 175.

⁴⁰ Bebr, *supra* note 24, at 280-81.

⁴¹ See *infra* notes 42-93 and accompanying text.

⁴² 1965 E. Comm. Ct. J. Rep. 405, 1966 Common Mkt. L.R. 111.

plicitly employed the concept of direct applicability to decide the direct concern issue, thereby indicating there is a close relationship between the two concepts. In this case, the EEC's elaborate Common Agricultural Policy (CAP)⁴³ in cereals was involved. Pursuant to Regulation 19 of the CAP in cereals, a Member State which fears that cereal imports from other Member States will disrupt its own market may implement protective safeguards. The Member State authorities must notify the Commission of the measures taken. Upon notice, the Commission must decide whether the protective measures are to be retained, amended, or abolished within four working days. Article 22 of Regulation 19 provides that the Commission's decision shall come into force immediately.⁴⁴

The German authorities implemented various safeguards, including denying Toepfer's import license application, because the EEC failed to schedule a tariff on cereals for October 1st and the Germans feared excessive imports. They notified the Commission of their actions pursuant to Regulation 19 and the Commission validated the safeguards through a decision addressed to the German import authority.⁴⁵ Toepfer challenged the Commission's decision validating the import authority's denial of his import license application filed on October 1st.

The European Court held that since the Commission's decision validating the protective measures taken by the West German authorities went into effect immediately, it was *directly applicable* and thereby of direct concern to the applicants.⁴⁶ In its holding, the Court was indicating implicitly that the tests of direct applicability were fulfilled. Indeed, since the Commission's decision went into effect immediately, it was unconditional and did not require any further implementing measures by the Commission itself or the West German authorities. Thus, the "unconditional" and "no further measures" tests were met.

Moreover, through its citation to the various provisions of Regulation 19, the Court was indicating that it was clear that the Commission

⁴³ Through the CAP, the EEC is trying to overcome the varying natural resource endowments and climates of the Member States and (1) create a single market for agricultural goods, within the EEC; (2) establish a unified trading front against non-EEC countries; and (3) assure its farmers an adequate income. Allott Lectures, *supra* note 10. See generally Note, *American Agricultural Exports and the EEC's Common Agricultural Policy (CAP)*, 1982 WIS. INT'L L.J. 133, 134; P. MATHUSEN, *supra* note 11, at 139.

⁴⁴ *Toepfer*, 1965 E. Comm. Ct. J. Rep. at 411, 1966 Common Mkt. L.R. at 141.

⁴⁵ *Id.* at 412, 1966 Common Mkt. L.R. at 142.

⁴⁶ The Court stated:

The last sentence of the second paragraph of Article 22 provides that the Commission's decision shall come into force immediately. Therefore a decision of the Commission amending or abolishing protective measures is *directly applicable* and concerns interested parties subject to it as directly as the measures which it replaces.

Id. at 411, 1966 COMMON MKT. L.R. at 142 (emphasis added).

was responsible for the decisions made in this area and that its obligations were specific.⁴⁷ Hence, only Community law was involved in *Toepfer*.

Advocate General Roemer's opinion explicitly mentioned two of the direct applicability tests in addressing the direct concern issue. Mr. Roemer indicated that there could be no direct concern when a Member State has (1) discretion to take (2) acts to implement the Commission's decision.⁴⁸ Mr. Roemer argued that the German authorities had discretion to apply the validated safeguards in this case and consequently there was no direct concern. The Court rejected this argument, holding that validation of the safeguards had the same effect as if they had been abolished.⁴⁹ If the measures had been abolished, the German authorities could not have used them and they would have had no discretion in the matter. Thus, the validation of the safeguards resulted in the applicant being directly concerned.

An applicant may also be directly concerned if the Member State seeks authorization for a protective measure it has not yet employed, and the Member State unequivocally informs the applicant that it intends to employ such protective measure once a Community institution authorizes it. In *Bock v. Commission*,⁵⁰ the applicants contested the Commission's decision authorizing the German authorities to exclude from Community treatment⁵¹ Chinese mushrooms already circulating among the Member States. For a variety of reasons, the West German authorities requested permission to exclude the mushrooms from Community treatment pursuant to Article 115 of the EEC Treaty. Article 115 provides that if the Commission fails to obtain cooperation among the Member States when deflection of trade occurs, "it shall authorize the Member State to take the necessary protective measures, the conditions and details of which it shall determine."⁵²

The only issue which was contested by the Commission in the direct concern inquiry was whether the German authorities had the discretion not to apply the protective measure—denying the applicant's import

⁴⁷ *Id.*

⁴⁸ *Id.* at 434, 1966 Common Mkt. L.R. at 116-17.

⁴⁹ The Court stated "it would be illogical to say that a decision to retain protective measures had a different effect, as the latter type of decision does not merely give approval to such measures, but renders them valid."

Id. at 411, 1966 Common Mkt. L.R. at 142.

⁵⁰ 1971 E. Comm. Ct. J. Rep. 897, 1972 Common Mkt. L.R. at 160.

⁵¹ The Treaty of Rome requires that Member States treat goods from other Member States in the same manner as their domestic goods. *E.g.*, EEC Treaty, *supra* note 1, art. 95, at 53, 1 COMMON MKT. REP. (CCH) ¶ 3001 (prohibits discriminatory taxation).

⁵² EEC Treaty, *supra* note 1, art. 115, at 60, 2 COMMON MKT. REP. (CCH) ¶ 3888.

licenses—after they were given authorization by the Commission. The Court took a nonformalistic approach and held that there was no discretion since the German authorities had already informed the applicants that they would reject their application as soon as the Commission granted them authorization.⁵³

The fact that the German authorities unequivocally informed the applicant that they would employ the authorized measure may have led the European Court to treat this as a validation case similar to *Toepfer*. The German authority's communication effectively put the safeguard measure in place and the Commission validated it. As in *Toepfer*, once the measure was validated, the German authorities lacked the discretion not to employ it.

The Court may also have applied its test for determining whether an act of the Council or Commission is reviewable⁵⁴ to the import authority in this case. The Court has held that when the Council or Commission makes a definite and unequivocal statement that it intends to take an action, it may be challenged and reviewed by the Court even though it is possible the institution may not take the action.⁵⁵ In *Toepfer*, the Court may have considered the import authority's rejection communication to be a reviewable act. The Court then attributed the act to the Commission once it validated the communications. Thus, the applicant was directly concerned.

C. Decisions in the Form of Regulations

The European Court actually used the labels of the elements of the direct applicability test when it addressed the direct concern issue in *Fruit Co. v. Commission*.⁵⁶ Because of disruptions in the common market in dessert apples, the European Commission established a licensing system so that it could control the import of dessert apples into the Community. Under this system, the Member States were to collect applications for import licenses for dessert apples and notify the Commission each

⁵³ The Court stated:

The appropriate German authorities had nevertheless already informed the applicant that they would reject its application as soon as the Commission had granted them the requisite authorization.

They had requested that authorization with particular reference to the applications already before them at that time.

It follows therefore that the matter was of direct concern to the applicant.

Bock, 1971 E. Comm. Ct. J. Rep. at 908, 1972 Common Mkt. L.R. at 170-71.

⁵⁴ T.C. HARTLEY, *supra* note 4, at 330.

⁵⁵ *Id.* at 344.

⁵⁶ 1971 E. Comm. Ct. J. Rep. at 411, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142.

week of the quantity of apples requested and for what time periods. The Commission would make licensing decisions based on this information.

Soon thereafter, another regulation was issued that indicated that the Commission would make its decision on the basis of a formula.⁵⁷ The Member States were required to gather the data and make the necessary calculations for this formula. The regulation specifically stated that the Commission "shall assess the situation and decide on the issue of licenses."⁵⁸

The Commission rejected the plaintiff's import license application because he had exceeded his import allotment under the formula. The applicant was notified of the Commission's decision through the German authorities. The applicant contested the Commission's decision.

In holding that direct concern was present in this case, the Court employed the direct applicability tests. After describing the system established by the Commission, the Court said, "it is *clear* from the system introduced by Regulation 459, and particularly from Article 2(2) thereof, that the decision on the grant of import licenses is a matter for the Commission."⁵⁹ The Court also noted that according to this regulation, the "Commission alone is competent to assess the economic situation in light of which the grant of import licenses must be justified."⁶⁰ Thus, the Court indicated that the Commission's obligations were "clear."

Furthermore, the Court addressed the "unconditional" and "no further necessary measures" requirements simultaneously. It held that Regulation 459 did not leave the national authorities any discretion in the matter of the issue of licenses or the conditions on which the applications were to be granted.⁶¹ The Court noted that the Member States' duties were merely to collect the data required by the Commission and subsequently to notify the applicant of the Commission's decision.⁶² Since these duties were very specific and did not give the Member State any discretion, the Court did not consider the acts significant enough to prevent a finding of "no further necessary measures" under its directly applicable analysis. Thus, the directly applicable requirements were met in

⁵⁷ [E]ach application was to be granted in full, subject to the proviso that no importer could import more apples in any one month than the number he imported in the corresponding month of the previous year (or, if it was greater, the average for the corresponding months of the years 1967-69). T.C. HARTLEY, *supra* note 4, at 361.

⁵⁸ *Fruit Co.*, 1971 E. Comm. Ct. J. Rep. at 421, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142, at 7628.

⁵⁹ *Id.* at 422, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142, at 7628 (emphasis added).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

this case: Community law was involved, not Member State law.⁶³

In the *Exportation des Sucres v. Commission*⁶⁴ case, it was so clear that Community law was involved, that the Court did not fully address the direct concern issue in its opinion. Under the CAP in sugar, the Community was subsidizing its exporters of sugar when the world market price in sugar was depressed. An exporter could fix the amount of his subsidy in his national currency in advance if he held an offer to tender sugar at the time he applied for his license. A regulation provided that should the parity relationship between the Member State's currency and the Community's unit of account⁶⁵ change, transactions with fixed subsidies which have not been consummated could be adjusted.⁶⁶ Another regulation added that holders of subsidy certificates could cancel them if they were disadvantaged by the change in parity.⁶⁷

As a result of currency parity changes and a fear that widespread cancellations of refund certificates would disrupt its administration of the market, the Commission decided to abolish the right of cancellation of certificates issued within a specific time period.⁶⁸ Instead, the Commission would compensate the exporters according to a fixed schedule.⁶⁹ The applicants in *Exportation des Sucres* challenged the Commission's decision to abolish their right to cancel their license refund certificates if the refunds became disadvantageous as a result of a change in parity between their national currency and the Community's unit of account currency.

In this case the Court was dealing with various regulations which according to Article 189 of the EEC Treaty are directly applicable.⁷⁰ The

⁶³ Advocate General Roemer arrived at the same conclusion as the Court. He used a phrase associated with direct applicability to express it—"we can draw a parallel with the *Toepfer* case in saying that the Community measure penetrated directly into the national sphere." *Id.* at 435, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142, at 7636.

⁶⁴ 1977 E. Comm. Ct. J. Rep. at 709, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418.

⁶⁵ A measure which serves as a Community-wide currency. It is fixed annually by the Council for different products. Allott Lectures, *supra* note 10.

⁶⁶ *Exportation des Sucres*, 1977 E. Comm. Ct. J. Rep. at 724, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418, at 7491.

⁶⁷ *Id.*

⁶⁸ *Id.* at 725, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418, at 7491-92.

⁶⁹ Subsequently, the Commission amended its schedule. The decision to amend the schedule was challenged in *Toepfer v. Commission*, 1978 E. Comm. Ct. J. Rep. 1019, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488. The applicant was initially entitled to DM 2.33 per 100 kilograms of sugar. The Commission changed this compensation to DM 1.82 per 100 kilograms of sugar. The Advocate General referred to the opinion in *Exportation des Sucres* for its discussion of the direct concern issue. *Id.* at 1034, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488, at 8790.

⁷⁰ See EEC TREATY, *supra* note 4, art. 189, at 78-9, 2 COMMON MKT. REP. (CCH) ¶ 4901.

regulations clearly specify that the Commission was responsible for the administration of subsidies. Since the Member States merely determined the amount of the subsidy according to a predetermined formula, the Court probably viewed these acts as secondary acts. They were very specific and did not grant the Member State any discretion. Thus, the directly applicable requirements were met here.⁷¹

An elaborate Community regulatory scheme was also involved in *Simmenthal v. Commission*.⁷² As a result of falling meat prices and increasing imports of meat into the Community, the Commission, which initially did not impose any duties on frozen meat entering the Community in order to help its meat processing industry, decided to link the granting of import licenses for meat to the licensee obtaining a purchase contract for frozen meat with an intervention agency.⁷³ Under this linking system, an intervention agency⁷⁴ announced that it is accepting bids from qualified importers for a minimum quantity of meat in its possession. At the close of the bidding, the intervention agency submitted the bids to the Commission. Upon receipt of the bids, the Commission set the minimum bid for each agency according to Member State and category of meat. The individual intervention agencies then notified their bidders of the results and consummated any contracts.

The applicants challenged the Commission's decision to set the minimum bid price for frozen meat held by the intervention agencies at a price above their bid. Since the applicants were unsuccessful in obtaining a contract with the intervention agency, they were also ineligible to obtain a license to import meat which was conditioned upon obtaining a meat contract with the intervention agency.

The Commission stipulated to a finding of direct concern in this case.⁷⁵ It is clear that the Commission is responsible for determining who will obtain a contract with an intervention agency and thereby qualify for an import license through its setting of the minimum price. It was the Commission's responsibility to fix a price which would "ensure that the predetermined quantity of meat held by the intervention agencies was

⁷¹ Since the category of exporter affected by the decision was clearly specified, this decision may have *per se* concerned the exporters. Addressees of decisions *per se* have standing to challenge the decision. EEC TREATY, *supra* note 1, art. 173(2).

⁷² 1979 E. Comm. Ct. J. Rep. 777, 1980[1] Common Mkt. L.R. 25.

⁷³ *Id.* at 794, 1980[1] Common Mkt. L.R. at 51.

⁷⁴ Part of the EEC's Common Agricultural Policy is to insure farmers a minimum price for their products. When market price for a good falls below a minimum price, intervention agencies purchase the goods on the open market to raise its price. The intervention agencies then use various mechanisms to sell the goods without lowering market price. Allott Lectures, *supra* note 10.

⁷⁵ *Simmenthal*, 1979 E. Comm. Ct. J. Rep. at 797, 1980[1] Common Mkt. L.R. at 53.

disposed at the most profitable prices for them.”⁷⁶ The Court indicated the minimum price was set by the Commission alone.⁷⁷

The Commission’s minimum price went into effect immediately and was not conditional upon any acts of the Member States. The Court also held that the intervention agencies were only “acting as agents for the purpose of collecting [bids] and notifying the participants of the result.”⁷⁸ The Court indicated that the intervention agencies had some discretion concerning subsidiary matters but these did not affect its finding of direct concern.⁷⁹

A decision addressed to the Member States was also involved in *Control Data Belgium v. Commission*.⁸⁰ Control Data Belgium, a wholly-owned subsidiary of Control Data Corporation of the United States, challenged a Commission decision which declared that the two models of computers it sold were not scientific instruments and thereby ineligible for importation duty-free into the Community.⁸¹

Under Article 7 of Regulation 1798, the individual Member State is competent to grant an instrument duty-free status under the Community’s exemption for scientific instruments if it has adequate information to make the decision. If it does not have adequate information to make the decision, the Member State refers the decision to the Commission. If there is any dispute among the Member States about whether the instrument is a scientific instrument, the matter is referred to the Commission’s Committee on Duty-Free Arrangements. On the basis of the Committee’s decision, the Commission is directed to make a decision and notify the Member States.

The Commission did not raise the direct concern issue in this case, and the Court did not address it.⁸² It is clear that Community law was involved in this case. On the one hand, the Member State could make the exemption decision pursuant to the Community’s regulations. The Member State would have no discretion in the matter; it would have to apply Community law. On the other hand, in the event of a dispute, the regulations specify that the Commission is to make the decision pursuant to the advice of the Committee on Duty-Free Arrangements.⁸³

⁷⁶ *Id.* at 797, 1980[1] Common Mkt. L.R. at 54.

⁷⁷ *Id.* at 798, 1980[1] Common Mkt. L.R. at 54.

⁷⁸ *Id.*

⁷⁹ These subsidiary matters included the system of invitation to tender and the conclusion and performance of contracts of sale. *Id.* at 798, 1980[1] Common Mkt. L.R. at 55.

⁸⁰ 1983 E. Comm. Ct. J. Rep. 911, 1983[2] Common Mkt. L.R. 357.

⁸¹ *Id.* at 924, 1983[2] Common Mkt. L.R. at 373.

⁸² *Id.* at 927, 1983[2] Common Mkt. L.R. at 375.

⁸³ *Id.* at 926, 1983[2] Common Mkt. L.R. at 374.

Advocate General Slynn did address the direct applicability requirements in this case. He stated that the Member States applied the decision automatically, thereby indicating that it was unconditional.⁸⁴ Moreover, he indicated that the Commission did not need to take any further measures to implement the decision,⁸⁵ hence the “no further measure” requirement was met here. Mr. Slynn dismissed the defense that since the Member State still needed to notify the applicant of the Commission’s decision, it was not a final decision.⁸⁶ Mr. Slynn argued that accepting this defense would be “taking the Court’s decisions on this requirement too far.”⁸⁷ Implicit in his statement is the fact that the notification requirement was of secondary importance and would not preclude the Court from finding the applicant directly concerned.

D. Decisions Addressed to Private Individuals

The Court expressly stated that Community rules alone were involved in the “Ball Bearing”⁸⁸ litigation when it addressed the direct concern issue. In that litigation, four major Japanese ball bearing producers, their subsidiaries, and exclusive importers challenged a Community regulation which required the Member States to collect provisional anti-dumping duties from the applicants and suspended the collection of a general anti-dumping duty on their products. The regulations involved in these case were passed after the Council formally investigated the alleged dumping practices of the applicants. Since the four major Japanese ball bearing producers were addressed in the regulations, they were *per se* concerned by them. Thus, their applications were admissible.⁸⁹

Furthermore, the Court found that the exclusive importers were also directly concerned by the anti-dumping measures,⁹⁰ despite the fact that unlike the producers, they were not mentioned in the regulation. The Court noted that anti-dumping regulations are the exclusive prov-

⁸⁴ *Id.* at 937-8, 1983[2] Common Mkt. L.R. at 366.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ NTN Toyo Bearing Company v. Council, 1979 E. Comm. Ct. J. Rep. 1185, 1979[2] Common Mkt. L.R. 257; I.S.O. v. Council, 1979 E. Comm. Ct. J. Rep. 1277, 1979[2] Common Mkt. L.R. 257; Nippon Seiko v. Council and Commission, 1979 E. Comm. Ct. J. Rep. 1303, 1979[2] Common Mkt. L.R. 257; Koyo Seiko v. Council and Commission, 1979 E. Comm. Ct. J. Rep. 1337, 1979[2] Common Mkt. L.R. 257; Nachi Fujikoshi v. Council, 1979 E. Comm. Ct. J. Rep. 1363, 1979[2] Common Mkt. L.R. 257.

⁸⁹ *E.g.*, NTN Toyo Bearing Co., 1979 E. Comm. Ct. J. Rep. at 1205, 1979[2] Common Mkt. L.R. at 335.

⁹⁰ *E.g.*, I.S.O., 1979 E. Comm. Ct. J. Rep. 1277, 1979[2] Common Mkt. L.R. 257.

ince of the Council, so national laws were not involved.⁹¹ Moreover, the Court held that the regulations were unconditional since they were applied by the Member States automatically.⁹² In applying these regulations, the Member States had no discretion because the amount of duty they were to collect was specified in the regulations.⁹³

E. Conclusion

The European Court appears to be applying the "complete and legally perfect" test of direct applicability to determine if an applicant is directly concerned by the decision he seeks to annul. Thus, the potential applicant should examine the wording, structure and spirit of the provision to see if it is "complete and legally perfect." He should consider whether the provision is a *per se* validation of a Member State's action or an authorization which is in effect a validation. To the extent that the provision is "complete and legally perfect" or a validation, it is likely that it directly concerns the applicant.

II. INDIVIDUAL CONCERN

Again, neither the European Court nor the Advocates General have explicitly stated the policy reasons for the individual concern requirement. Scholars have expressed their views which fail to satisfactorily explain the policy reasons behind the requirement.⁹⁴ Unlike the case of the direct concern requirement, however, the European Court has expressed the test for individual concern.

Since the *Plaumann v. Commission*⁹⁵ decision, the European Court has expressed the test for determining individual concern in the following boilerplate:

persons other than those to whom a decision is addressed can justifiably

⁹¹ *Id.* at 1294, 1979[2] Common Mkt. L.R. at 335.

⁹² *Id.*

⁹³ *Id.* at 1293, 1979[2] Common Mkt. L.R. at 334.

⁹⁴ For example, Stein has suggested that through the individual concern requirement the European Court is looking for "whether or not a private and established legal right is at stake in the case." Stein, *supra* note 11, at 240. He argues that it is analogous to the old "vested right" test of United States common law standing. A "vested right" has been defined as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.* at 236.

However, the European Court seems to have incorporated this concept into its doctrine of reviewable acts and not necessarily in the requirement of individual concern. An act of the Community is reviewable only if it produces legal effects. An act has legal effect if it alters a person's legal position; if "[it] produce[s] a change in somebody's rights and obligations." T.C. HARTLEY, *supra* note 4, at 332-44.

⁹⁵ 1963 E. Comm. Ct. J. Rep. 95, 1964 Common Mkt. L.R. 29.

claim to be individually concerned only if the decision affects them by reason of certain characteristics which are peculiar to them or by reason of a factual situation which is, as compared to all other persons, relevant to them and by reference to which they may be individually described in a way similar to that of the addressee of the decision.⁹⁶

This formula is not enlightening.⁹⁷ After reading it, one is left with the question—just what are the characteristics or fact situations that individualize a natural or legal person?⁹⁸

It appears that once the Court has determined that an independent Community legal act is involved in an annulment proceeding,⁹⁹ it wants to ensure that the nonaddressee has an interest to sue or is individually concerned by the independent act(s). The Court seems to find this interest if the applicant effectively has a *per se* interest to sue—that is if the applicant was effectively the addressee of the challenged Community legal act.¹⁰⁰ The Court has found that Community acts addressed to entities other than the applicant in effect do concern the applicant in four factual situations. A Commission or Council decision individually concerns a nonaddressee if (1) the Community institution knew or should have known its decision would affect the applicant since the latter was in an ascertainable group;¹⁰¹ (2) the Community institution was really making a bundle of individual decisions and just issued the decision in the form of a regulation;¹⁰² (3) the nonaddressee was in a sufficiently close association with the addressee;¹⁰³ or (4) the adjudication of the nonaddressee's claim would facilitate a satisfactory administration of justice.¹⁰⁴

A. Ascertainable Group

In this group of cases, the Council or Commission made a retroactive decision. Advocate General Roemer has analogized such decisions to collective decisions as developed in German administrative law. "They are classed administrative measures, because it is ultimately possible to ascertain which persons they concern."¹⁰⁵

⁹⁶ *Id.* at 107, 1964 Common Mkt. L.R. at 47.

⁹⁷ Stein, *supra* note 11, at 224.

⁹⁸ Others have already asked this question. *Id.*

⁹⁹ The Court does not always address the direct concern issue first. Sometimes it addresses individual concern first if it is easier. If the applicant fails to meet either requirement, his case is not admissible.

¹⁰⁰ See *infra* notes 105-62 and accompanying text.

¹⁰¹ See *infra* notes 105-18 and accompanying text.

¹⁰² See *infra* notes 119-35 and accompanying text.

¹⁰³ See *infra* notes 136-56 and accompanying text.

¹⁰⁴ See *infra* notes 157-62 and accompanying text.

¹⁰⁵ *Toepfer v. Commission*, 1965 E. Comm. Ct. J. Rep. 405, 439, 1966 Common Mkt. L.R. 111, 122.

When the Commission decided on October 4th to validate the German import authority's denial of the applicant's license request because of zero levies for cereal imports prevailing on October 1st in *Toepfer*,¹⁰⁶ it had already established a new set of levies effective on October 2nd. The danger of excessive imports caused by zero levies had passed on October 2nd. Thus, when it validated the safeguards of the German authorities, the Commission was determining the fate of October 1st license applicants since they were the only individuals eligible for the zero levy rate.

The Court held that within the three days following its establishment of a new levy schedule, the Commission was in a position to ascertain who would be affected by its validation decision because the number of applicants had become fixed.¹⁰⁷ The retroactivity of its decision made it possible for the Commission to determine which applicant's legal position would be affected.¹⁰⁸

Advocate General Roemer also added that the October 1st applicants had distinguished themselves from all other potential applicants on that day. The October 1st applicants had undertaken burdens which distinguished them from all abstract applicants: they had completed the required import license applications and had entered contracts with exporters.¹⁰⁹ Thus, the applicant in *Toepfer* was individually concerned.

The fact that the Commission was in a position to know that it was deciding the fate of certain applicants also weighed heavily in the Court's finding of individual concern in *Bock v. Commission*.¹¹⁰ Several factors influenced the Court's decision that the Commission knew or should have known that it was affecting the fate of the applicant. As in *Toepfer*, the decision in *Bock* was retroactive, fixing the number of applicants and enabling the Commission to ascertain who they were. The Commission authorized the protective measures taken by the German authorities on September 15th for applications already pending before the German authorities on September 11th.¹¹¹ Thus, the number of applicants was fixed and ascertainable.

Moreover, the decision itself contained language from which the German authorities could reasonably conclude that it was intended to cover the applications which had already been submitted and were pend-

¹⁰⁶ *Id.*; see *supra* notes 42-49 and accompanying text.

¹⁰⁷ *Toepfer*, 1965 E. Comm. Ct. J. Rep. at 411, 1966 Common Mkt. L.R. at 142.

¹⁰⁸ Normally, the German import authorities had no power to refuse an import license application if properly completed and submitted. T.C. HARTLEY, *supra* note 4, at 369.

¹⁰⁹ *Toepfer*, 1965 E. Comm. Ct. J. Rep. at 439, 1966 Common Mkt. L.R. at 123.

¹¹⁰ 1971 E. Comm. Ct. J. Rep. 897, 908, 1972 Common Mkt. L.R. 160, 171.

¹¹¹ *Id.* at 908, 1972 Common Mkt. L.R. at 170.

ing before them.¹¹² The decision approved the safeguards taken by the German authorities and stated that it “likewise covers imports of these products in respect of which applications for licenses are currently and duly pending before the German authorities.”¹¹³ The Commission’s elaborate argument to the contrary was rejected.¹¹⁴

The Advocate General pointed out additional evidence that the Commission knew that it was determining the fate of the applicants. He noted that the German authorities referred to one application specifically and alluded to others in their request to the Commission for the safeguards.¹¹⁵ Indeed, the applicants’ legal position was affected since they no longer had the right to import dessert apples for that time period.

The applicants in *Ilford SpA v. Commission*¹¹⁶ also contested the Commission’s authorization of protective measures taken by a Member State. On October 15, the Italian Republic lodged an application pursuant to Article 115 of the EEC Treaty to exclude from Community treatment color film originating in Japan. Italy also sought authorization for applying the protective measures to the applications for imports already before it.

The Commission granted this authorization on October 20th, retroactively making it applicable to all applications pending before the Italian authorities since October 4th. The plaintiffs lodged their applications with the Italian authorities on October 13th. Thus, the Commission’s retroactive decision applied to them.

The Court found the applicant was individually concerned.¹¹⁷ The retroactivity of the Commission’s decision enabled it to determine who would be affected by its decision since the number of applicants from October 5th to October 20th was fixed. The Court held that this fact was sufficient to individualize the applicants and it cited the *Bock* decision.¹¹⁸ The applicants were also distinguished from all other potential importers on October 13th because they had undertaken the burden of completing applications, a fact which the Court did not mention in its opinion.

¹¹² *Id.*

¹¹³ *Id.* at 907, 1972 Common Mkt. L.R. at 169-70.

¹¹⁴ The Commission tried to argue that the “words ‘currently and duly pending’ exclude applications for import licenses which the German authorities ought already to have granted before the entry into force of the contested decision. . . .” *Id.* at 907, 1972 Common Mkt. L.R. at 170.

¹¹⁵ *Id.* at 914, 1972 Common Mkt. L.R. at 164.

¹¹⁶ 1984 E. Comm. Ct. J. Rep. 423, 1984[2] Common Mkt. L.R. 475.

¹¹⁷ *Id.* at 427-28, 1984[2] Common Mkt. L.R. at 479.

¹¹⁸ *Id.*

B. Bundles of Individual Decisions

In the following cases the Commission's decision was either in the form of a regulation or a decision addressed to numerous Member States. Despite the general abstractness of the decision, the Commission was in fact making a bundle of individual decisions. On that basis and other factors, the Court was able to find individual concern.

In the regulatory scheme involved in the *Fruit Company* case¹¹⁹, the Commission was granting or denying license applications on the basis of a formula.¹²⁰ Through this formula, the Commission was effectively deciding the fate of each applicant even though it only took account of the total quantity of dessert apples requested. Indeed, the Court held that the Commission was making "a conglomeration of individual decisions under the guise of a regulation . . . each of which decision affects the legal position of each author of an application for a license."¹²¹

Further individualization was involved in this case because of the retroactive nature of the decision. Through its May 28th decision, the Commission extended the effectiveness of the Community licensing procedures for the importation of dessert apples until May 22nd. The applicants submitted their license application on May 13th. Again, the retroactivity of this decision led the Court to hold that the number of applications affected was fixed and ascertainable.¹²²

Indeed, the Advocate General noted that, just as in the *Toepfer* case, the applicants had distinguished themselves individually by completing the necessary application procedures. Furthermore, the Commission's decision affected the individual legal position of the applicants because they were denied the opportunity to import apples and possibly became liable under the import contracts they had already entered.¹²³

The contested regulation in the *Exportation des Sucres* case¹²⁴ abolished the right of exporters to cancel their refund certificates which became disadvantageous because of currency fluctuations.¹²⁵ However, this seemingly general regulation was only applicable to refund certifi-

¹¹⁹ 1971 E. Comm. Ct. J. Rep. 411, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142.

¹²⁰ See *supra* note 57.

¹²¹ *Fruit Co.*, 1971 E. Comm. Ct. J. Rep. at 422, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142, at 7628.

¹²² *Id.*

¹²³ *Id.* at 435, [1971-73 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8142, at 7636.

¹²⁴ 1977 E. Comm. Ct. J. Rep. 709, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418.

¹²⁵ See *supra* notes 64-71 and accompanying text.

cates issued before March 15th and not used before July 1st.¹²⁶ The Court's language could be interpreted as indicating that this specificity resulted in the license holders being *per se* individually concerned.¹²⁷ Moreover, since the applicants fixed their refunds in advance, they distinguished themselves from all other persons and effectively were the addressees of the regulation.¹²⁸ Indeed, their legal position was changed.

The *Toepfer v. Commission* case¹²⁹ basically dealt with the same regulations that were involved in the *Exportation des Sucres* case. Concurrent with its decision to abolish the right of cancellation for holders of white sugar refund certificates, the Commission provided compensation for those affected according to a fixed schedule. Subsequently, the Commission developed a new method for calculating the compensation for white sugar refund certificate holders and changed the compensation amounts in its schedule.

The applicant held a license with a refund certificate issued in the period specified in the regulation, and his right of cancellation had been abolished. Consequently, he was entitled to a particular compensation amount under the Commission's initial schedule.¹³⁰ Subsequent changes in the schedule, however, reduced his compensation.¹³¹ The applicant challenged the reduction in his compensation.

The European Court found the applicant eligible to challenge the decision to reduce his compensation amount because he was directly and individually concerned.¹³² Referring to *Exportation des Sucres*, the Court found that the applicant was individually concerned by the Commission's decision to abolish his cancellation rights. Consequently, the Commission's decision to change his compensation only further changed his legal position.¹³³

The Court also found a conglomeration of individual decisions in

¹²⁶ *Exportation des Sucres*, 1977 E. Comm. Ct. J. Rep. at 725, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418, at 7491.

¹²⁷ The court stated, "[o]n the other, the traders are distinguished individually by the fact that they obtained, for the product in question, advance fixing in licenses issued before 15 March 1976 and still valid on 1 July 1976." *Id.*, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8418, at 7492.

¹²⁸ *Id.*

¹²⁹ 1978 E. Comm. Ct. J. Rep. 1019, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488.

¹³⁰ The compensation fixed initially for white sugar for West Germany was DM 2.33 per 100 kilograms. *Id.* at 1029, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488, at 8787.

¹³¹ The new compensation amount for white sugar for West Germany was DM 1.87 per 100 kilograms. *Id.*

¹³² *Id.* at 1030, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488, at 8787.

¹³³ *Id.*, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8488, at 8788.

Simmenthal v. Commission.¹³⁴ In this case, the Commission determined the minimum price for categories of frozen meat held by the intervention agencies in the Member States for which bids had been submitted. For Italy, the Commission set the minimum price of 1.601 units of account per ton. This price was above the bid submitted by the applicants and thus they were ineligible to consummate a contract with the agency.

The Court held that by determining a minimum selling price, the Commission determined that the applicant's bid would be rejected.¹³⁵ Thus, the applicant was individually concerned by the decision. This decision also had a retroactive element. The applicant submitted his bid on January 20th. The Commission determined the minimum price on February 15th. Thus, the number of bids was fixed and the applicants were readily ascertainable.

C. Sufficiently Associated With the Addressee

The European Court has found individual concern where the applicant is "sufficiently closely associated with the natural or legal person addressed."¹³⁶ The Court has found the subsidiaries, exclusive importers, distributors, and coordinators of a parent company individually concerned when the parent company or subsidiary is the addressee.¹³⁷

In the "Ball Bearing"¹³⁸ cases, the European Court found the four major Japanese producers and their subsidiaries individually concerned. The third article of the regulation contested in these cases imposed a provisional anti-dumping duty on the products of the major Japanese producers.¹³⁹ Thus, it was clear that the parent companies were *per se* individually concerned. Moreover, the Court held that the parent company and its subsidiaries were sufficiently closely related that there was no need to distinguish between them on the question of whether they were individually concerned by the regulation.¹⁴⁰ Thus, either the parent or the subsidiary were in a position to challenge the regulation.

The Court came to this conclusion on the basis of the fact that the Commission, during the course of its dumping investigation, applied the special provisions concerning export prices of Article 3(3) of Regulation

¹³⁴ 1979 E. Comm. Ct. J. Rep. 777, 1980[1] Common Mkt. L.R. 25.

¹³⁵ *Id.* at 798, 1980[1] Common Mkt. L.R. at 54.

¹³⁶ See *infra* notes 138-56 and accompanying text.

¹³⁷ *Id.*

¹³⁸ See *supra* note 88.

¹³⁹ E.g., NTN Toyo v. Council, 1979 E. Comm. Ct. J. Rep. 1185, 1240, 1979[2] Common Mkt. L.R. 257, 293-94.

¹⁴⁰ *Id.* at 1204, 1979[2] Common Mkt. L.R. at 334.

459.¹⁴¹ This provision calls for establishing the true export price of a product suspected of being dumped into the Community at the price sold to the first independent buyer "where it appears that the export price is unreliable because of association or a compensatory arrangement between exporter and the importer."¹⁴² The Commission found that the subsidiaries were not independent buyers. Thus, the parent and subsidiary were considered as one seller. The Court used this same provision of Regulation 459 to justify its finding that an exclusive importer of one major producer was individually concerned by the regulation addressed to the producer in *I.S.O. v. Council*.¹⁴³

A factor with more precedential value for finding a sufficiently close association between a nonaddressee and an addressee than Regulation 459 was involved in *Control Data Belgium v. Commission*.¹⁴⁴ There, a subsidiary challenged the Commission's decision refusing to grant its computer duty-free status as a scientific instrument. The Commission argued that the subsidiary was not individually concerned by this decision, but that its parent company as the manufacturer of the computer was individually concerned.¹⁴⁵

The Court rejected this argument. It noted that the subsidiary was wholly-owned by the manufacturer and that since the subsidiary was the sole importer of this product in Belgium, there was a very close relation between the subsidiary and the parent.¹⁴⁶ Moreover, since the subsidiary initiated the procedures which led to the Commission's decision not to grant its computers duty-free status and ultimately to the annulment proceedings, the Court held that it would be pure formalism to require the parent company to bring the action.¹⁴⁷

The Advocate General also raised a number of arguments which tended to indicate that the Commission was effectively addressing its decision to the subsidiary. First, the Commission only considered the computer models of the subsidiary.¹⁴⁸ Second, the subsidiary's models were likely to be distinguishable from another manufacturer's computer models since computers are not fungible goods like agricultural products.¹⁴⁹ Finally, the potential number of addressees was limited and ascertain-

¹⁴¹ *Id.*

¹⁴² *Id.* at 1221, 1979[2] Common Mkt. L.R. at 274.

¹⁴³ *I.S.O. v. Council*, 1979 E. Comm. Ct. J. Rep. 1277, 1292, 1979[2] Common Mkt. L.R. 257, 334.

¹⁴⁴ 1983 E. Comm. Ct. J. Rep. 911, 1983[2] Common Mkt. L.R. 357.

¹⁴⁵ *Id.* at 927, 1983[2] Common Mkt. L.R. at 375.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 937, 1983[2] Common Mkt. L.R. at 365-6.

¹⁴⁹ *Id.*

able. There was no indication that the parent company was going to form more subsidiaries or grant distribution licenses to other entities in the Community.¹⁵⁰ These factors further individualized the Commission's decision in the form of a regulation.

Arguably, given the unique model of the computer involved and the fact that the subsidiary initiated the duty-free application procedure, the Commission knew that its decision would determine the fate of the applicant. It appears that this decision was very specific and was only communicated to the remainder of the Community for efficiency and notice reasons. Thus, the subsidiary was individually concerned.

A corporate entity which coordinated the activities of the subsidiaries of its parent company was found to be individually concerned by a decision addressed to the subsidiaries in *Ford of Europe Inc. & Ford Werke A.C. v. Commission*.¹⁵¹ Ford Werke, a German corporation, is a subsidiary of Ford Motor Co. which manufactures right-hand drive cars and left-hand drive cars for distribution to its franchisees in Germany and for export to other Member States. Ford Werke supplied British distributors with right-hand drive cars.

As a result of advantageous currency exchange rates, many British customers were buying right-hand drive cars directly from the German franchisees. Ford Werke, concerned that this practice would undermine Ford Britain and its distributors, sent a circular to its franchisees indicating that right-hand cars would only be available from British subsidiaries or franchisees. The European Office of Consumer Unions expressed opposition to Ford Werke's decision and complained to the Commission.

After a hearing, the Commission decided to order Ford Werke to withdraw its circular and to inform the German Ford dealers that the right-hand drive cars would still be directly available to them.¹⁵² If Ford Werke did not comply with this decision, it would be subject to penalties. Ford Werke and Ford of Europe contested this decision. Ford of Europe is not a subsidiary of Ford Werke. Ford of Europe oversees the policies of the European subsidiaries on behalf of the parent company and coordinates the allocation of economic activity among the European subsidiaries.

The Commission argued that Ford of Europe was not individually concerned by the decision since it was not the addressee of the decision and would not suffer any losses on account of the decisions.¹⁵³ The

¹⁵⁰ *Id.*

¹⁵¹ 1984 E. Comm. Ct. J. Rep. 1129, 1984[1] Common Mkt. L.R. at 649.

¹⁵² *Id.* at 1158, 1984[1] Common Mkt. L.R. at 670-71.

¹⁵³ *Id.* at 1159, 1984[1] Common Mkt. L.R. at 671.

Court rejected these arguments and found Ford of Europe individually concerned. It held that the German dealers' effective undermining of British Ford dealers was a problem which "unquestionably [came] within the province of the activities for which Ford of Europe was responsible in its capacity as co-ordinator of manufacture and sales for the companies belonging to the Ford Group."¹⁵⁴

Advocate General Slynn elaborated on the basis of the Court's decision. He cited the "Ball Bearings" cases as indicating that the connection between a parent company and its subsidiary may be sufficiently close for each to be individually concerned by a decision addressed to the other.¹⁵⁵ He emphasized that Ford of Europe was acting on behalf of the parent company with regard to its subsidiaries. This factor, combined with the fact that Ford of Europe's interests were unlike the interests of consumers and dealers, enabled the Court to find individual concern.¹⁵⁶ Thus, the coordinating body was individually distinguished.

D. Facilitating the Administration of Justice

An applicant may sufficiently distinguish himself from others if he files a complaint with the Council or Commission while others in his group or position do not. Thus, he may be able to challenge a decision adverse to his complaint. This was the result in *Metro v. Commission*,¹⁵⁷ a case dealing with the Community's antitrust regulations.

Article 85 of the EEC Treaty prohibits activities which result in the restriction of trade within the Community.¹⁵⁸ Article 3(2)(b) of Regulation 17 allows anyone with a legitimate interest to lodge a complaint with the Commission if he suspects anticompetitive activity. In *Metro*, the applicant filed a complaint with the Commission indicating that a German electronics firm did not distribute its products to self-service wholesalers such as the applicant and thereby restricted trade.

The Commission investigated the complaint and found that the electronics dealer was not engaging in anticompetitive behavior.¹⁵⁹ The Commission decided not to pursue the complaint. The applicant sought to annul the Commission's decision rejecting his complaint.

Despite the Commission's objections, the Court found the application admissible. The Court held that it was in the "interest of a satisfac-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1167, 1984[1] Common Mkt. L.R. at 660.

¹⁵⁶ *Id.*

¹⁵⁷ 1977 E. Comm. Ct. J. Rep. 1875, 1978[2] Common Mkt. L.R. 1.

¹⁵⁸ EEC Treaty, *supra* note 1, art. 85, at 47, 2 COMMON MKT. REP. (CCH) ¶ 2005.

¹⁵⁹ 1977 E. Comm. Ct. J. Rep. at 1898, 1978[2] Common Mkt. L.R. at 29.

tory administration of justice that anyone entitled to make a complaint under 3(2)(b) be allowed to institute proceedings if the complaint was dismissed."¹⁶⁰ It is likely that the applicant individualized himself by filing the complaint while other self-service dealers had not.¹⁶¹ The Court also probably wanted to ensure that someone had standing to review the Commission's decisions under this Article.¹⁶²

E. Conclusion

After showing that the provision he is challenging is complete and legally perfect, the nonaddressee applicant must show that he is individually concerned in order to annul a community decision under Article 173 of the EEC Treaty. To meet this burden, the applicant should consider whether the provision is an administrative measure effectively addressed to him. This is likely to be the case if it is a retroactive decision and is applicable to a fixed and ascertainable group of which the applicant is a part. A regulation may also be an administrative measure if it is really making a bundle of individual decisions affecting the applicant's legal position.

The nonaddressee applicant may also be individually concerned with a decision if he is closely associated with the addressee of the decision. He should also consider whether admitting his application would help the European Court administer justice. Under each of these possibilities, the applicant should consider any burdens he had undertaken which may distinguish him from others, such as filing applications, entering contracts, etc.

The requirements for establishing *locus standi* appear to be quite formidable. Such rigorous requirements limit the amount of private input on the effects of Community legislation. These requirements also reduce the effectiveness of popular control for ensuring that the Council or Commission follows the proper procedures in enacting Community secondary legislation. To the extent that the EEC is striving to become a federation, strict *locus standi* requirements restrict such a development by limiting local checks on centralized power. To the extent that the EEC is not striving to become a federation but primarily an economic organization, strict *locus standi* requirements may be desirable as they restrict the ability of applicants to upset the delicate economic and political decisions of the Community.

Scholars should consider how the *locus standi* requirements affect

¹⁶⁰ *Id.* at 1901, 1978[2] Common Mkt. L.R. at 31.

¹⁶¹ T.C. HARTLEY, *supra* note 4, at 372.

¹⁶² *Id.*

popular input and checks on Community legislation. They should also consider how the *locus standi* requirements affect the development of the Community. It is hoped that scholars will now be in a better position to consider these effects.

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