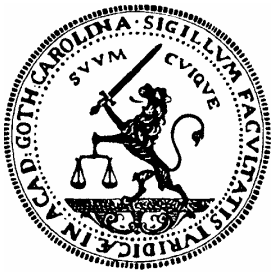

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Judicial Protection for individuals against European Community and Union measures

A decentralised system in need of further reform

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Contents

SUMMARY 1

PREFACE 2

ABBREVIATIONS 3

1 INTRODUCTION 4

1.1 Purpose 6

1.2 Method and Material 7

1.3 Delimitations 7

1.4 Disposition 8

2 HUMAN RIGHTS IN EUROPEAN COMMUNITY AND UNION LAW 9

2.1 Effective Judicial Protection as a Human Right and a General Principle 11

2.1.1 Effective Judicial Protection and its interaction with the Principle of Effectiveness *14*

2.2 The interrelationship between the European Court of Justice and the European Court of Human Rights 15

2.2.1 Indirect review of European Union measures by the European Court of Human Rights *18*

3 JUDICIAL PROTECTION FOR INDIVIDUALS IN EUROPEAN COMMUNITY LAW 23

3.1 A restrictive interpretation of the standing rule in Article 230(4) of the EC Treaty 26

3.1.1 Does the alternatives to direct action provide effective judicial protection against European Community measures? *32*

3.2 Institutional and jurisdictional "ghetto": Immigration, Asylum and Civil law 35

3.3 Decentralised judicial protection? The role of National Courts 37

3.4 Strasbourg's view. The ruling in Bosphorus 43

3.5 The future of remedies in present Community law 46

4 JUDICIAL PROTECTION FOR INDIVIDUALS IN EUROPEAN UNION LAW 49

4.1 Provisions on Police and Judicial Co-operation in Criminal Matters 50

4.2 Provisions on a Common Foreign and Security Policy 58

4.3 Decentralised judicial protection? The role of National Courts 61

4.4 Strasbourg's view. The non-ruling in Segi/Gestoras Pro-Amnistía 63
4.5 The future of remedies in present European Union law 65

5 CONCLUSIONS 68

BIBLIOGRAPHY 73

TABLE OF CASES 77

Summary

The notion of *effective judicial protection* is recognised as a fundamental human right and furthermore a general principle in EU law. The present thesis discusses whether or not European Union citizens' right to such protection against European Community and Union measures is adequate. The investigation is based on the view that fundamental human rights are not worth much, if they cannot be enforced. And that it is of great importance for the citizens in whose interest the European Union is to work that no powers are exercised unless expressly granted by the Treaties and that no illegal measures are adopted. The European Court of Justice here has a crucial role to play and the present study investigates the role of the Court in different part of EC and EU law and assesses the system of judicial protection of individuals in relation to EC and EU measures.

The result of the study shows that the level of judicial protection in the Union varies between its different parts. It is strongest in "mainstream" Community law, but weaker in its Title IV with provisions concerning immigration, asylum and civil law. The judicial protection in regard of the Police and Judicial Co-operation in Criminal Matters is similarly limited but greater than in regard of the measures adopted within the Common Foreign and Security Policy of the Union.

It is submitted that the judicial protection of individuals is insufficient and that there is a pressing need for reform. As "avenues" for reform, it is argued that the European Court of Justice could relax its interpretation of relevant Treaty provisions, that national courts could play a greater role in providing judicial protection and that some, but not enough, changes are introduced by the Lisbon Treaty. The possibility that the European Court of Human Rights could provide the necessary impetus for reforms is another argument brought forward.

The topic of the thesis could also be summarised as a question about how human rights are protected against international organisations that increasingly take on executive powers.

Preface

I am indebted to my supervisor Xavier Groussot for his support throughout the writing of this thesis. I have enjoyed our discussions and also his teaching in the specialised courses “Enforcement of European Community law” and “European Court Procedural Law”. Both courses were very rewarding and they inspired me to the choice of topic for my paper.

Rasmus Naeyé

Stockholm, 3 February 2008

Abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CT	Constitutional Treaty
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EC	Treaty establishing the European Community
EU	European Union
JHA	Justice and Home Affairs
TEU	Treaty on European Union
ToA	Treaty of Amsterdam

1 Introduction

Is the European Union citizens' fundamental human right to effective judicial protection safeguarded against European Community and Union measures? That is in essence the question that this thesis sets out to answer. I do not intend to provide an evaluation of how different human rights are being applied by the European Court of Justice. In fact, I am not very interested in what kind of substantial findings the ECJ would reach when individuals claim violations of their fundamental human rights. Instead, I am concerned with a more basic question. Do these cases reach a competent court at all?

The investigation is based on the view that fundamental human rights are not worth much, if they cannot be enforced. Thus, rules concerning standing, or *locus standi*, are of crucial importance to any legal system.[1] These rules could be described as the gateway through which individuals gain access to the principles of judicial review in order to invoke public decision-making accountable and secure their rights.[2] While the theme of the citizen seeking relief was a novel idea in the foundational period of the European Communities, as the individual was a new-comer in international law, it is now one of the most frequently used perspectives. With all right, the individual is now at the centre of attention.

It is of great importance for the citizens in whose interest the European Union is to work, but also for the Member States, which transferred sovereignty to the Union, and for the Institutions that no powers are exercised unless expressly granted by the Treaties and that no illegal measures are adopted. The European Court of Justice here performs – and could perform – an essential function in controlling the activity of the European Institutions and the Member States, and the present study will investigate the role of the ECJ in different part of EC and EU law and assess the system of judicial protection of individuals in relation to EC and EU measures.

The intention of this thesis in not to present detailed suggestions for how the rules on standing could be redrafted. My purpose is rather to identify the different possible avenues for reform that exist.

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[1] However, questions on standing is of course only a part of the debate. If access to the courtroom is a human right, then so must access to legal services be, argues Carol Harlow, "Access to Justice as a Human Right : The European Convention and The European Union" in Philip Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford 1999, at 189.

[2] For a criticism of an "excessive reliance upon judicial remedies" as the way to safeguard human rights in the EU, *see* Philip Alston & J.H.H. Weiler, "An Ever Closer Union in Need of a Human Rights Policy : The European Union and Humans Rights" in Alston (ed.), *supra* note 4, at 12-13.

As such "avenues for reform" I will discuss the way that the ECJ has interpreted the Treaties and argue that it would indeed be possible for the Court to relax its rather restrictive case law. But I will also argue that *national* courts could play a more important role in the system of judicial protection in the future. Ever since the *Foto-Frost* ruling of the ECJ, it has seemed clear that they are banned from reviewing the legality of EU measures. Maybe that principle has to be reconsidered if individuals otherwise risk being deprived of their fundamental human right to effective judicial protection?

A third possibility is that the Member States themselves would reform the primary law of the Union. Accordingly, I will also provide an outlook into the future of remedies in the EU, taking into consideration the latest developments of the Intergovernmental Conference of 2007.

What could then be the necessary impetus for reform? To begin with, the three different "actors" just mentioned, that is the ECJ, the national courts and the Member States, could of course act on their own initiative. But this thesis also recognises the special role of the ECHR in the EU and in the legal orders of the Member States. In what way have the European Court of Human Rights contributed to the protection of human rights within the European Union and what impact could the Strasbourg court have on the judicial protection of individuals in the EU? Is it possible that the ECtHR would rule that the judicial protection in the EU is insufficient? And how would the Union and the Member States react to such a development?

The issue of effective judicial protection concerns not only questions about jurisdiction and rules on standing, but also the basic issues of the legal nature of different EC and EU measures. Do legal effects of Community law apply also to the Second and Third pillars? Of more immediate relevance to the present study is however if different actions impose binding obligations on the individual, which could affect her fundamental rights. If they do not, the question of access to justice might have to be assessed differently.

An analysis of any aspect of EU law will inevitably risk failing to capture emerging trends and the bigger picture. Presently, with the signing in December of a "reform Treaty", the Lisbon Treaty, that risk is perhaps greater now than in the last years. Yet it is precisely because so much is happening simultaneously that it is vital to try to capture the major current themes and dynamics in the field. Even if the timetable of the Lisbon Treaty would be followed, and all 27 Member States will succeed in ratifying the Treaty, the citizens of the Union would still have to live with the present system for another year.[3]

[3] http://europa.eu/lisbon_treaty/faq/index_en.htm#21 (Questions and answers about the Lisbon Treaty, Gateway to Europe webpage): "The goal is that the Treaty once ratified will come into force by 1 January 2009, to allow its provisions to apply before the European Parliament elections in June 2009".

I also believe that it is of great importance, at the time of reform, to evaluate the present system of judicial protection. Also, even if the Lisbon Treaty will indeed introduce some important changes, it is debateable whether those changes are sufficient. Furthermore, the legacy of the Union in respect of these questions will inevitably be brought into the future. And if this study will find that the human rights of the European citizens have in fact been violated over the last years due to an insufficient level of access to justice, such a finding would of course be of significant importance and prompts further questions as to the consequences thereof.

The centring of the individual as an important subject in EU law, as described above, does not necessarily mean that her judicial protection has been increased over the years. As the integration on the European continent continued and continues with an accelerating speed, more and more decision-making has been transferred to the European institutions. At the same time, individuals might risk being deprived of the possibility to challenge measures which before could have been challenged before national courts. Another trend, which has to be identified as a risk in general, is the tension between human rights and security objectives. In the wake of the terrorist attacks of September 11th 2001 in the United States, this tension has emerged with even greater force than before, both on national and international levels.

Finally, some terminological notes. In the following, acts adopted under the EC Treaty will be referred to as "EC acts" or "measures", whereas acts adopted under the TEU will be referred to as "TEU acts" or "measures". The term "EU measures" will refer to both categories of acts. The European Court of Justice, which includes its Court of First Instance, will be referred to as the "ECJ". When it serves to point out differences in the view between the Court of Justice and the Court of First instance, they will be referred to as "the Court" or the "Court of Justice" and the "CFI" respectively. The European Court of Human Rights will only be referred to as the "ECtHR".

1.1 Purpose

The study aims at providing a description of the differing systems of judicial protection in the various parts of EC and EU law and to assess whether or not those systems provide effective judicial protection for individuals. The purpose of the study is furthermore to look into different avenues for reforms which could improve the level of judicial protection and as such consider the input from the ECtHR, next to the role of the national courts in providing judicial protection against EU measures and in what way the Member States have chosen to reform the system in the Lisbon Treaty.

1.2 Method and Material

The starting point of this thesis is a course paper written together with the students Chen Yun Xiao and Anna Stoffaneller in the fall 2006. It was entitled "Advancing Locus Standi in the name of Effective Judicial Protection" and presented the case law of the ECJ on Article 230(4) and investigated two possibilities for future reform, that of the review from the ECtHR and that of the European Convention and the Constitutional Treaty. The present study is broader, as it is not only an analysis of the said EC law article, but also the judicial protection in Title IV EC and in the Second and Third pillars of the TEU. Furthermore, an additional possibility for reform has been added, as the study also discussed the role of national courts in challenging the validity of EU measures.

The results of the thesis are based on a broad reading of articles, monographs and collective works. Next to these sources, the relevant case law of the ECJ and the ECtHR has been analysed. Furthermore, the present Treaties have been compared with the Constitutional Treaty and the subsequent Lisbon Treaty to enable an up-to-date comment on the "future of remedies" in EC/EU law. The method of the study can accordingly be described as a conventional method in legal science.

1.3 Delimitations

As pointed out above, the focus of the present study is limited since it only addresses one fundamental human right, that of the individual's right to effective judicial protection. Consequently, other human rights and the way that the European Courts have applied and interpreted them will not be discussed. The possibility that national legal orders contain different and even more far reaching rights to effective judicial protection is also not considered. I think that it is interesting enough to discuss whether or not the Union's own standard, based on the ECHR, is upheld. The substantive law of certain sensitive parts of EC/EU law is also outside the scope of the study. It suffices to conclude that the Union's action in several different fields risk infringing the rights and fundamental human rights of its citizens.

When describing the system of judicial protection, it will not be possible to offer a detailed description of the different actions that are possible within different parts of EC and EU law. The possibilities of direct challenge will be given more attention than indirect actions and the questions about what acts that are susceptible of judicial review and which legal remedies that allow for their review will be centred, instead of the questions about what grounds of illegality that may be raised before the Court or the actual effects of judicial review.

Furthermore, the assessment of the level of judicial protection as regards measures of the UN Security Council is also outside the scope of this thesis, but would indeed be an interesting topic for another study.[4]

1.4 Disposition

The first chapter of the thesis is dedicated to a short but necessary description of the general human rights protection in the EU, and more specifically, that of the fundamental right to effective judicial protection. Furthermore, the interrelationship between the ECJ and the European Court of Human Rights and its indirect review of EC/EU measures will be presented. Finally, possible changes introduced by the Lisbon Treaty will be taken into consideration.

Then, the judicial protection in Community law will be discussed. Its Title IV with provisions concerning immigration, asylum and civil law will be dealt with under a separate heading, as the judicial protection it different under this Title as compared to mainstream Community law. In the third chapter I will turn to Union law and discuss the judicial protection in regard of the provisions on Police and Judicial Co-operation in Criminal Matters, followed by a shorter analysis of the judicial protection in regard of the Common Foreign and Security Policy. This disposition follows, as will be clear, the level of judicial protection available under the different pillars.

In the two chapters discussing the judicial protection in EC and EU law respectively, I will also discuss the input from the European Court of Human Rights, the possibility of seeking relief in national courts and finally provide an outlook into the future of remedies taking into consideration the latest developments of the Intergovernmental Conference of 2007, which resulted in a Treaty signed by the Heads of State or Government of in Lisbon on 13 December 2007.[5]

[4] *See* Martin Nettesheim, "U.N. Sanctions Against Individuals – a Challenge to the Architecture of European Union Governance", (2007), CML Rev. vol. 44, issue 3, 567.
[5] Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01 [hereinafter Lisbon Treaty or Reform Treaty] This Treaty "replaced" the Treaty Establishing a Constitution for Europe [2004] OJ C310/1 [hereinafter Constitutional Treaty] upon the failure to have that Treaty ratified by all Member States.

2 Human Rights in European Community and Union law

The Court of Justice, as will be discussed further in the following, has declared that the "general principles of EC law" include protection for fundamental rights, which are recognised as part of the common constitutional traditions of the Member States and contained in international human rights treaties on which they have collaborated or which they have signed,[6] and this has been affirmed in the EU Treaty.

Article 6(2) TEU furthermore states that:

> [t]he Union shall respect fundamental rights, as guaranteed by the European Convention […] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[7]

Various Treaty amendments have constituted significant political moves to assert the role of fundamental human rights within the European Union. Following the ToA, respect for these fundamental principles was also formally listed as condition of application for membership of the EU by article 49 TEU. Next to these treaty law developments and the important case law of the Court, the Union has begun to develop a range of human rights policies.[8] There has also been a series of institutional initiatives in this field.[9] Furthermore, a Charter of Fundamental Rights for the EU was drafted and officially "proclaimed" in 2000.[10] The significance of the Charter will be analysed in the following.

The initial trigger for the Court's declaration that fundamental rights formed part of the EC legal order was arguably the challenge posed to the

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[6] The most central cases will be referred to in the following, *see infra*, at 10.

[7] The Lisbon Treaty, *supra* note 5, does not seem to alter this. Its Article 6(3) states that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[8] At the level of internal policy, these are most notably in the field of anti-discrimination law, pursuant to Article 13 of the EC Treaty. At the level of external policy, human rights has played a role in the EC's international trade and development policy, and in its use of "political conditionality" for candidate Member States, but also in a growing range of "human rights and democratization" policies and in the Common Foreign and Security Policy.

[9] These include *inter alia* the establishment in the Amsterdam Treaty of a sanction mechanism for serious and persistent breaches of human rights in Article 7 TEU.

[10] Charter of Fundamental Rights of the European Union [2000] OJ C364/01. The Charter will become binding according to Article 6(2) of the Lisbon Treaty, *supra* note 7, which states that: "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

supremacy of Community law by Member State courts, which felt that EC legislation was encroaching upon important rights protected under national law. Since then, there has however been a considerable expansion of both judicial and legislative activity in the area of human rights protection, including the extension by the ECJ of fundamental rights review to certain acts of the Member States.[11]

The case *Stauder*[12] represented a distinct change in approach, introducing the idea of general principles of EC law, which include protection for fundamental human rights. The new approach was confirmed an elaborated upon in the famous *Internationale Handelsgesellschaft Case*,[13] in which the German Constitutional Court was asked to set aside an EC measure which conflicted with German constitutional rights and principles.[14] In the case of *Nold*, the Court indicated that there were two primary sources of inspiration for the general principles of EC law: *firstly*, the common national constitutional traditions, and *secondly*, international human rights agreements:

> As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold the measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.[15]

As far as international treaties are concerned, the Court has consistently treated the European Convention on Human Rights as a special source of inspiration for the general principles of EU law.[16] It has ruled, for example, that EC legislation restricting the powers of Member State authorities to limit free movement and residence, rights against sex discrimination and legislation concerning the right to pursue claims by judicial process were specific EC law manifestations of general principles contained in the ECHR.[17]

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[11] Paul Craig & Gráinne De Burca, *EU Law: Text, Cases, and Materials*, Oxford University Press, Oxford 2007, at 381.
[12] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.
[13] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.
[14] Craig & De Burca 2007, *supra* note 11, at 382.
[15] Case 4/73 *Nold v Commission* [1974] ECR 491, at para 13.
[16] The interrelationship between the ECJ and the European Court of Human Rights will be described below, *see infra*, at 15.
[17] *See* e.g. Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651, at para 18, and Case C-424/99 *Commission v Austria* [2001] ECR I-09285, at paras 45-47, on judicial protection.

2.1 Effective Judicial Protection as a Human Right and a General Principle

It is essential, to begin with, that Member States when they implement Community law be subject to adequate judicial control. According to the Court in the *Johnston case*, this implies that Member States:

> [m]ust take measures which are sufficiently effective to achieve the aim of [Community] directives and that they must ensure that the rights thus conferred may be effectively relied upon before the national court by the persons concerned. … It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law.[18]

According to the Court, the requirement of judicial control reflects the general principles of law, which underlines the constitutional traditions common to the Member States and that principle is also laid down in Article 6 and 13 of the European Convention on Human Rights.[19]

The requirement of judicial control importantly however applies not only to the activity of Member States but of course extends also *mutatis mutandis* to Community Institutions. The Court has thus repeatedly stressed that:

> The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its Institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[20]

According to the Court, it is essential that remedies be open in all cases against acts of Community Institutions. Indeed:

> …the general scheme of the Treaty is to make a direct action available against all measures adopted by the Institutions…which are intended to have legal effects.[21]

The rights of defence and to a fair hearing are intimately linked to the right to judicial control. By 1977, this "principle in force in the Member Sates"

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[18] *Johnston*, *supra* note 17, at paras 17-20. Interestingly, as Groussot points out, AG Darmon in *Johnston* did not analyse the scope of a potential general principle in the field of judicial protection. However, Groussot submits that the analysis is implied in its reference to the concept of the rule of law. And indeed, the AG considered that the right to challenge a measure before the Courts is inherent in the rule of law. Xavier Groussot, *General Principles of Community Law*, Europa Law, Groningen 2006, at 238.

[19] *Johnston*, *supra* note 17, at para 18. *See* also Case 222/86 *Heylens* [1987] ECR 4097, at para 14 and *Commission v Austria*, *supra* note 17.

[20] Case 294/83 *First Les Verts Case* [1986] ECR 1339, at para 23.

[21] *First Les Verts Case*, *supra* note 20, at para 24.

hade clearly developed into a general principle of Community law. [22] The Court of justice then spoke of:

> [t]he general principle that when any administrative body adopts a measure which is liable gravely to prejudice the interests of an individual it is bound to put him in a position to express his point of view.[23]

The importance of the conditions for admissibility appears particularly called for by the *ubi jus ibi remedies* principle expressed *inter alia* in Article 47 of the Charter of Fundamental Rights of the European Union which recognises that "everyone whose rights and freedoms guaranteed by the Union are violated has the right to an effective remedy before a Tribunal".

Moreover, Article 6 ECHR similarly provides that:

> In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing […] by an independent and impartial tribunal established by law.

Concerning the interpretation of Article 6(1), the European Court of Human Rights stated in 1970 in *Delcourt v Belgium* that paragraph 1 had to be interpreted broadly. In this sense, the ECtHR ruled that, in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that the restrictive interpretation of that article would not correspond to the aim and purpose of that provision.[24]

Article 13 of the Convention further provides that "[e]veryone whose rights and freedoms as set fourth in this Convention are violated shall have an effective remedy", even against public authorities. In a case from 1975, *Golder v United Kingdom*, the ECtHR ruled that the State cannot impede judicial review in certain areas, since according to Article 13 ECHR, "everyone whose rights and freedoms as set fourth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in a official capacity".[25]

Important to mention is however also the doctrine of "a wide margin of appreciation" conferred to the States in relation to the effectiveness of a

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[22] Henry G. Schermers & Denis F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, The Hague 2001, at 50f.
[23] Case 121/76 *Moli* [1977] ECR 1979, at para 20.
[24] *Delcourt v Belgium* (2689/65) [1970] ECHR I.
[25] *Golder v The United Kingdom* (4451/70) [1975] ECHR I. It suffices to recall here that this Article should be read in conjunction with Article 6 ECHR, in order to provide the concept of effective judicial remedies from which the ECJ seems to base its inspiration. However, it has been accepted, in certain instances, by the Commission of Human Rights that Article 13 ECHR could be read as implying a right to an effective remedy without the combining it with Article 6 ECHR. Groussot, 2006, *supra* note 18, at 238.

remedy. This was established by the ECtHR in *Leander v Sweden* in the late eighties, when national security considerations led the Court to consider that, "the right to an effective remedy could be subject to the inherent limitations of the context".[26] According to Xavier Groussot, such a doctrine of wide margin of appreciation appears difficult to apply in the EC system, since it seems that the Member States are compelled to provide an effective remedy to the European citizen each time that a Community law right is infringed.[27] In the words of AG Jacobs in *UPA*, the case law on the principle of effective judicial protection is evolving. The AG considered that, "[w]hile that principle was enunciated in 1986, in the case of *Johnston*, its implications have only gradually been spelt out in the Court's case law in the subsequent period".[28]

The right to effective judicial protection is, in sum, not only a fundamental human right, but also a general principle recognised by the ECJ, and effective review of the legality of EU measures therefore has to be guaranteed by the Union.[29]

Tridimas holds that this however gives us little guidance as to the specific contents of that right, the constraints to which it may be subject, and the way it is to be balanced with other, conflicting, interests. In general, however, he argues, it includes the right of access to the courts and the right to obtain effective judicial review before the Court itself and before national courts.[30] Regarding the specific content of the principle, Groussot has also pointed out that "[i]t is extremely difficult to give an exact 'positioning' of the general principle of effective judicial protection", but that it appears from the case law that this principle "obviously" constitutes a fundamental right, which also is deflected into the procedural field.[31]

That the rights to effective judicial protection is elevated to a general principle of Community law, which also can create jurisdiction for national courts, and new causes of action and remedies for individuals, is further recognised by Claes.[32] She explains how the principle of effective judicial protection was introduced first to control whether a particular national remedy or sanction was appropriate to provide adequate protection of Community law rights as prescribed by a directive.[33] Later, in *Johnston*, the Court introduced the right to effective judicial review, and accordingly of access to a competent court, as an *aspect* of the principle of effective

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[26] *Leander v Sweden* (9248/81) [1987] ECHR 4.
[27] Groussot 2006, *supra* note 18, at 238.
[28] AG Jacobs in C-50/00 P *UPA* v Council [2002] ECR I-667, at para 97.
[29] *See* also Case C-260/89 *ERT* [1991] ECR I-2925 and compare the reasoning of Schermers & Waelbroeck 2001, *supra* note 22, at 450.
[30] Takis Tridimas, *The General Principles of EU law*, Oxford University Press, Oxford 2006, at 443.
[31] Groussot 2006, *supra* note 18, at 235-236.
[32] Monica Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford 2006, at 136.
[33] Claes 2006, *supra* note 32, at 136.

judicial protection.[34] It is this latter aspect of the principle that is the focus of this thesis.

Finally, the Court has not expressly stated that all general principles of EC law apply to Union law. The "best known" of the general principles, the protection of humans rights is however expressly referred to in Article 6(2) TEU, cited above, which has been applied by the Court in its judgments in *Pupino*, *Segi* and *Advocaten voor de Wereld*.[35] And in *Pupino*, the Court expressly stated that Third Pillar measures had to be interpreted in light of human rights principles, including the jurisprudence of the European Court of Human Rights.[36]

2.1.1 Effective Judicial Protection and its interaction with the Principle of Effectiveness

The remedial jurisprudence of the Court can be described as largely dictated by the necessity of ensuring the full effectiveness of the fast developing and expanding European competences. How should then the interaction between the principle of effective judicial protection and effectiveness be understood? Are they just the flip side of each other?

The term "effectiveness" or *effet utile* can be characterised as one of the key words in EU law. The concept of effectiveness instilled the constitutional development of Community law and has constituted a primary source of inspiration for the reasoning of the European Court of Justice. In that regard, the concept of effectiveness may even be seen as the corner stone for the functioning of the EU legal order. The motivation underlying the ruling in *Van Gend en Loos*, and other cases on direct effect, is the concept of effectivity, i.e. that in order to ensure the effectiveness of the European legal order, an individual must be able to assert directly effective community rights at the national level.[37]

In the view of Claes, the right to effective judicial protection of individual rights has become a source for new duties and powers of national courts. As such, it serves to mention *Factortame I*, in which the ECJ stated that "the national courts whose tasks is to apply provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals".[38]

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[34] Claes 2006, *supra* note 32, at 137.
[35] Case C-105/03 *Pupino* [2005] ECR I-5285, at paras 58-60, Case C-355/04 P *Segi, Izaga and Galarraga v Council* [2007] ECR I-1657, at para 51 and C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, at para 45.
[36] Steve Peers, "Salvation Outside the Church : Judicial Protection in the Third Pillar after the Pupino and Segi Judgments", (2007), CML Rev. vol. 44, issue 4, 883, at 926.
[37] Case 26/62 *Van Gend en Loos* [1963] ECR I.
[38] Case C-6/90 and 9/90 *Francovich* [1991] ECR I-5357.

Consequently, to ensure the effectiveness, the national courts have been bestowed with the task of protecting individual rights at the domestic level. Subsequent case law has emphasised the role of national courts to provide effective protection for those rights and the reasoning has normally been based on the principle of co-operation stemming from Article 10 EC.[39] According to Claes, that principle of effective judicial protection and the principle of the effectiveness of Community law will often coincide: the effective remedy offered to the individual for the protection of his Community law rights, contributes to enforcing the correct application and the enforcement of Community law.[40]

At least, it is clear that there exists a strong relationship between the principle of effective protection and other principles developed by the Court in the light of Article 10 EC. In other words, the basic assumption is to reckon that the principle of effective judicial protection interacts with the principle of effectiveness.

Dougan, however, would not go as far as to view the two principles as the flip side of each other and he is rather dismissive of the individual rights dimension of the case law on judicial protection. One should not believe certain propaganda that effective application and individual protection are two sides of the same coin, he argues. At the same time, he continues, it is nonetheless undeniable that the case law under discussion, which will be presented in the following, is one of the examples of a general process in western legal systems whereby access to justice and to an effective remedy have become part of the individual rights heritage.[41]

2.2 The interrelationship between the European Court of Justice and the European Court of Human Rights

Fundamental human rights thus have a well-recognised status within the EU legal order and in a recent article by John Morijn, the current status and application of the ECHR in Union law is described by reiterating the "well known formula" in *ERT*. [42] In that case the Court reiterated that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, it draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are

[39] Groussot 2006, *supra* note 18, at 240.
[40] Claes 2006, *supra* note 32, at 138.
[41] Michael Dougan, *National Remedies before the Court of Justice : issues of harmonisation and differentiation*, Hart Publishing, Oxford 2004.
[42] John Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution", (2006), European Law Journal, vol. 12, issue 1, 15, at 18.

signatories. Finally, it established that "[t]he ECHR has special significance".[43]

Although the ECJ has never said that the ECHR is formally binding upon the EC/EU, or that its provisions are formally incorporated into EU law,[44] Article 6 TEU, quoted above at 9, expressly refers to the ECHR. In more practical terms, the ECJ routinely refers to the "special significance" of the Convention as a key source of inspiration for the general principles of EU law. Despite the fact that the ECHR is not binding on the Union as such, the Court of Justice has thus come to consider the ECHR and the case law of the ECtHR as an *obligatory* point of reference in dealing with cases involving fundamental rights.[45] Morijn concludes that "[t]he ECHR and the case law of the Court of Human Rights could hence be characterised as a compulsory guideline of special significance in Union law".[46]

By treating the ECHR as a source of inspiration rather than a formally binding, incorporated charter, the ECJ has retained the freedom to "go beyond" the Convention in recognising rights as part of EU law which were not expressly protected in the ECHR. Thus, the consensus in relation to the ECHR appears to be that it represents "a floor" rather than "a ceiling"[47] and that while the protection for rights should not fall below what is provided by the Convention, EU law can provide more extensive protection. This is also the view that prevailed in the drafting of the EU Charter on Fundamental Rights.[48] What is more, in this way the Court can continue to claim the autonomy and supremacy of Community law, and, while avoiding the charge of having judicially incorporate the Convention and other international agreements into Community law without Member State consent, it can at the same time point to a strong consensus among the States – all of which are signatories to the ECHR – as regards the foundation of the general principles of Community law. Apart from the ECHR, the Court occasionally draws on other regional and international instruments.[49]

Before the analysis proceeds, it serves to point out a few of the questions which are at stake when the interrelationship between the two courts are discussed. As Costello reasons, lack of control over EU action and Member State acts based thereon could create an intolerable gap in legal protection in the view of the ECtHR. This could, over time, denude the ECHR of relevance, as the scope of EU action increases. For the ECJ, on the other hand, a finding by the ECtHR of a violation of fundamental rights would, as

[43] *ERT*, *supra* note 29, at para 41.
[44] Craig & De Burca 2007, *supra* note 11, at 384.
[45] Case C-238/99 P *Montedison* [2002] ECR I-8375, at para 274.
[46] Morijn 2006, *supra* note 42, at 18.
[47] *See* e.g. Lenz AG in Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681, 2690.
[48] *See* Article 52(3) of the Charter.
[49] Craig & De Burca 2007, *supra* note 11, at 384.

she puts it, "imperil its assertion of the autonomy of the Community legal order and undermine its own arrogated fundamental rights role".[50]

Under the current case law of the ECtHR, no complaints can be brought *against the communities or the Union directly*, as they are simply not party to the Convention. However, complaints may be brought against *the Member States* for the execution of Community acts alleged to be contrary to the ECHR. The Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention irrespective of whether the act or omission in question is a consequence of domestic law or of the necessity to comply with international obligations. This is because a transfer of powers does not necessarily exclude a state's responsibility under the Convention with regard to the exercise of the transferred powers; otherwise the guarantees of the Convention could be limited and thus be deprived of their unconditional character. The indirect review of EU measures will be discussed in the following section of this chapter.

As to the respective positions of the Luxembourg and Strasbourg Courts, the ECtHR is established on the basis of the ECHR and interprets the Convention *ex tunc*. Accordingly, it must be assumed that the case law of the ECtHR forms an integral part of the meaning and scope of these rights.

It thus appears that there is a hierarchy in the authority between both Courts, and that the Court of Justice will have to follow the interpretation by the ECtHR. This would also be in line with the current practice of the ECJ. Yet, incorporation of the Charter alone will not guarantee that protection offered by the ECJ will in all cases be equivalent with that offered by the Strasbourg Court: divergent case law may continue to arise, if only because a question may arise in Luxembourg before it has been decided in Strasbourg, and because the Court of Justice interprets fundamental rights through the prism of Community law and may strike different balances to those struck by the Strasbourg Court.[51]

The complex but co-operative relationship between the ECJ and the European Court of Human Rights is increasingly highlighted both by the number of cases before the CFI and the Court of Justice in which ECHR jurisprudence is cited and followed and by the growing number of cases coming before the ECtHR which indirectly challenge EU measures, including the important recent *Bosphorus* judgment,[52] which will be analysed in the following. The ongoing attempts by the two European judiciaries, and by the EU Charter, to promote harmony and to avoid conflict between the two systems, do not resolve all of the concerns. The question of accession by the EU to the ECHR, despite the failure of the

[50] Cathryn Costello, "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe", (2006), Human Rights Law Review, vol. 6, issue 1, 87, at 88-89.
[51] Claes 2006, *supra* note 32, at 697.
[52] Bosphorus HavaYollari Turizm v Ireland [2006] 42 EHRR 1.

Constitutional Treaty,[53] remains very much on the agenda and has been a persistent one for many decades.[54] The question whether the EU, and formerly, the EC, should accede to the ECHR did not disappear with the drafting of the EU Charter of Fundamental Rights. On the contrary, the present Lisbon Treaty pursues, just as the CT did, a twin-track strategy by both making the Charter legally binding and by providing for the EU to accede to the ECHR.[55] At the same time, a parallel provision allowing for accession by the EU on the part of the ECHR has been added to Article 59 of the ECHR by Protocol No. 14.

Arguably, it is in the interest of ensuring credibility that protection is ensured under the supervision of an external institution. In the view of Claes, the ECJ cannot perform this function of third party where Union acts are concerned, as it belongs to the Union system itself.[56]

2.2.1 Indirect review of European Union measures by the European Court of Human Rights

At present, while the Court of Human Rights will not admit complaints brought *directly* against the EC/EU, the Court however entertains *indirect* complaints against EU measures which are brought against one or all Member States and thus developing the position taken by the former commission on Human Rights in *M & Co v Federal Republic of Germany*.[57]

Taking *Matthews v United Kingdom* as a starting point, Costello argues that a change in the ECtHRs approach towards the EU was evident in this case,[58] where the Court, according to her, for the first time subjected an EC law measure to explicit review.[59] The Strasbourg Court here indicated that it was likely to scrutinise transfer of power to international organisations more closely than in the past.

The alleged violation in *Matthews* flowed not from acts adopted by the Community or Union institutions, but from international instruments which were freely entered into by the United Kingdom. The act of primary law in question could not be challenged before the European Court of Justice, as it lacked jurisdiction. The United Kingdom was held responsible for securing the Convention rights and the Court held that the Convention does not exclude the transfer of competences to international organisations provided that the ECHR rights continue to be secured. If the Convention is to guarantee rights which are not theoretical or illusory, the Contracting Parties

[53] *Supra* note 5.
[54] Craig & De Burca 2007, *supra* note 11, at 427.
[55] Article 6(2) of the Lisbon Treaty. Craig & De Burca 2007, *supra* note 11, at 418.
[56] Claes 2006, *supra* note 32, at 702.
[57] *M & Co v Federal Republic of Germany* [1990] 64 DR 138.
[58] *Matthews v United Kingdom* [1999] 28 EHRR 361.
[59] Costello 2006, *supra* note 50, at 92.

should undertake responsibility for any obligation which they voluntary enter into just as they are for the exercise of their sovereign powers within the domestic legal order.[60]

This rationale seems convincing from a human rights perspective. Thus, Strasbourg asserted its jurisdiction, given that the very own institutions of the Community were not in a position to assess their compliance with human rights standards, according to Parga.[61] It seems that Treaty clauses which limit the Court's jurisdiction might potentially be vulnerable on grounds of violation of Article 6 ECHR if the Member States do not offer at national level sufficient alternative protection.

Lyons argues that the implication of *Matthews* was that the EU was put on notice that even though it had not acceded to the Convention the Union would still be subject to its jurisdiction.[62] Thus, this case indicates that some scrutiny of EU measures may be exercised by Strasbourg, but as regards national implementation of EU and international obligations, the States generally remain responsible under the ECHR as was stated in *M & Co*.[63]

According to Costello, the decision in *Senator Lines*[64] was expected to clarify the scope of collective state responsibility for EU action. Before the ECtHR, Senator Lines GmbH alleged a violation of Article 6 ECHR arising out of the refusal to suspend a competition fine pending judicial review by the CFI. However, the hearing of the case in Strasbourg was cancelled when the CFI heard the main case and set aside the fine. Despite the fact that the main argument made by the respondent government was that the impugned measure was an act of the EC Commission and not an act of any State within the jurisdiction of the ECHR, the Court of Human Rights made no reference to this.[65]

A similar approach was also taken in the *Segi/Gestoras Pro-Amnistía* and *Emesa Sugar* cases, according to Craig & De Burca. In the latter case, the applicant complained of a violation by the European Court of Justice of its right to a fair hearing under Article 6(1) of the ECHR, due to the fact that the applicant had no opportunity to respond to the Advocate General's opinion prior to the ruling by the ECJ.[66] The first argument made both by the respondent Dutch government and by the EC Commission, intervening,

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[60] Koen Lenaerts & Eddy De Smijter "A Bill of Rights for the European Union", (2001), CML Rev. vol. 38, 273, at 291.
[61] Alicia Hinarejos Parga, "Bosphorus v Ireland and the Protection of Fundamental Rights in Europe", (2006), E.L.Rev. vol. 31, 251, at 254.
[62] Carole Lyons, "Human Rights Case Law of the European Court of Justice, January 2003 to October 2003", (2003), Human Rights Law Review, vol. 3, issue 2, 323, at 344.
[63] *M & Co*, *supra* note 57.
[64] *Senator Lines GmbH v the 15 Member States of the European Union* [2004] 39 EHRR SE3.
[65] Craig & De Burca 2007, *supra* note 11, at 421.
[66] App. No. 62023/00, *Emesa Sugar v Netherlands*, admissibility decision of the ECtHR of 13 Jan. 2005. The corresponding decision of the ECJ is Case C-17/98 *Emesa Sugar v Aruba* [2000] ECR I-665.

was that the ECtHR should declare the application inadmissible, given that it was directed specifically against an act of an EC Institution, the ECJ. Once again, however, the ECtHR ignored the argument and instead declared the application inadmissible on a substantive point because it concerned the payment of import duties, which did not fall within the meaning of "civil rights and obligations" in Article 6(1) of the ECHR.[67] In *Segi/Gestoras Pro-Amnistía*, an action was brought by two Basque organisations against the then 15 Member States to challenge the fact that they had been listen in the annex to an EU Common Position on combating terrorism.[68] While the Common Position, as an act unanimously adopted under the Second and Third Pillar, has more in common with the international agreement in *Matthews* than with the Commission fine in *Senator Lines* or the ECJ proceedings in *Emesa Sugar*, the ECtHR once again did not address these matters in considering whether it had jurisdiction to hear the case. Instead, the Court dismissed the application on the basis that the two organisations were not yet "victims" within the meaning of the Convention, and the Court specifically emphasised the applicability of its case law concerning the status of victim to "the acts of an international legal order".[69]

Thus, although in *Guérin*, *Senator Lines*, *Segi*, and *Emesa Sugar*,[70] the ECtHR eventually rejected the admissibility of each of the applications brought against a range of different EU acts (Commission decisions, a Council Common Position, and an ECJ Ruling, respectively), it is significant that in none of the cases did the ECtHR do so on the ground that it lacked jurisdiction to examine violations committed by the Union.[71]

Costello describes *Bosphorus* as what became the key case,[72] arguably reflected by the decision to have it submitted to the Grand Chamber and to allow the European Commission to intervene[73] and "the most recent attempt by the ECtHR to maintain fundamental rights standards whilst accommodating the autonomy of the EU legal order".[74] Also Craig & De Burca describes the case as the most important ruling to be given by the ECtHR concerning its jurisdiction over acts of the Community in recent years. The ECtHR here took the view that the alleged violation was committed by Ireland due to the State's compliance with a binding and non-discretionary EC law obligation – in other words, the EC Regulation was the real source of the alleged violation. The ECtHR went on to set out the approach which it should adopt when complaints of this kind were made to it.[75]

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[67] Craig & De Burca 2007, *supra* note 11, at 421.
[68] *Segi*, *supra* note 35.
[69] Craig & De Burca 2007, *supra* note 11, at 421.
[70] *See* e.g. *Senator Lines*, *supra* note 64, *Segi*, *supra* note 35 and *Emesa Sugar*, *supra* note 66.
[71] Craig & De Burca 2007, *supra* note 11, at 422.
[72] *Bosphorus*, *supra* note 52.
[73] Costello 2006, *supra* note 50, at 96.
[74] Costello 2006, *supra* note 50, at 88.
[75] Craig & De Burca 2007, *supra* note 11, at 422.

The case concerned the seizure, based on an EC Regulation, by the Irish government in 1993 of an aircraft owned by Yugoslav Airlines, but leased to Bosphorus Airways, a Turkish company. In 1995 the Supreme Court of Ireland had made a reference to ECJ which then interpreted the Regulation in question broadly and found the interference with Bosphorus' property rights justified.[76] Having concluded that Ireland was acting as required under EC law, the ECtHR held that this was in itself a "legitimate general interest" capable of serving as a justification for breaches of property rights. It put emphasise on the principle of *pacta sunt servanda* and the importance of international cooperation, both of which take on amplified significance in the context of the "supranational" EU.[77]

In balancing that legitimate general interest with the need to ensure that Contracting Parties do not escape or, indeed, evade their ECHR obligations, the ECtHR invoked the "equivalent protection" doctrine which does not absolve states of their responsibility, but rather acts as a conditional immunity. However, it also provides a justification for a state's conduct which would otherwise be in breach of the ECHR. The Court ruled that

> [s]tate action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [citing M & Co[78]] … However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.[79]

The protection provided by the ECJ was found to be "equivalent" and it is only after this assessment has taken place that the ECtHR concludes that Ireland's compliance with its EC obligations is presumptively justified. Costello concludes that the "equivalent protection" doctrine depends on an assessment of the level of fundamental rights protection provided. Although this assessment is general in nature, in that the ECtHR looks at the EC judicial system as a whole, and the status of the ECHR as generally reflected in the EC case law, an inquiry nonetheless did take place. This contrasts sharply with earlier decisions, in particular *M & Co* itself, where the mere existence of judicial mechanisms was sufficient to establish "equivalent protection". Nonetheless, it is a general, rather than a specific, finding.[80]

Finally, where an EU measure – as in *Senator Lines* or *Emesa Sugar* – is one which is not subject to implementation by the States but is adopted by an autonomous EU institution such as the Commission or the Court, it seems that an applicant will have to bring an action against all of the

[76] Case C-84/95 *Bosphorus Airways* [1996] ECR I-3953.
[77] *Bosphorus*, *supra* note 52, at para 150.
[78] *Supra* note 69.
[79] *Bosphorus*, *supra* note 52, at para. 155.
[80] Costello 2006, *supra* note 50, at 103.

Member States collectively as the author of the act, and it seems likely that the ECtHR will apply the presumption of compatibility. It is possible, although unlikely, that the ECtHR might refuse to apply the presumption of compatibility in the case of such "self-executing" EU acts if they are for some reason not subject to adequate review within the EU itself – as was true of the measure at issue in *Matthews*. It is possible also to imagine a non-reviewable Common Position, like that in *Segi*, which does not require any implementation, being treated by the ECJ like the international agreement in *Matthews*. Another possibility, however, is that the ECtHR will apply the presumption of compatibility to such self-executing EU acts, but would treaty the lack of reviewability as a consideration such as to rebut the presumption of ECHR compatibility.[81]

If Costello is right in claiming that in the future the "equivalent protection", "manifest deficiency" approach "potentially facilitates a deep and specific enquiry into the level of fundamental rights protection afforded by the EU and the ECJ in individual cases",[82] then the saga of indirect scrutiny by Strasbourg has by no means come to an end.

A temporary conclusion is that it is evident that the ECJ can adopt views on the interpretation of fundamental human rights which depart from those which may later by taken by the ECtHR.[83] Consequently, it is also imaginable that the Strasbourg court might, in the years to come, contest the conclusion by the ECJ that its so-called complete system of legal protection within the EU legal system is in accord with the protection offered by Article 6(1) and 13 of the ECHR. The significance of the *Bosphorus* case in the specific context of the level of judicial protection within EC law will be discussed below.[84] In a corresponding section of the chapter on the judicial protection within EU law, the input of the ECtHR and what could be called the "non ruling" in *Segi*,[85] will be assessed from that perspective.

[81] Craig & De Burca 2007, *supra* note 11, at 424.
[82] Costello 2006, *supra* note 50, at 129.
[83] Schermers & Waelbroeck 2001, *supra* note 22, at 311.
[84] *Bosphorus*, *supra* note 52.
[85] *Segi*, *supra* note 294.

3 Judicial Protection for individuals in European Community law

Any discussion of judicial review of Community acts requires an examination of, *firstly*, which acts that are susceptible of judicial review. Normally, to be challengeable, the act must fulfil several conditions and *inter alia* be binding, produce legal effects *vis-à-vis* third parties, be definitive and be taken by an EC Institution in the exercise of its competences.[86] *Secondly*, the different grounds of illegality that may be raised before the Court is another significant aspect.[87] *Thirdly*, and which this paper focuses on, the different legal remedies that allow for the judicial review of Community acts and *finally*, the effects of the judicial review has to be considered. The last aspect is important, but it cannot be further discussed within the scope of this paper.[88]

Turning to the available remedies, there are various ways to challenge Community acts, either directly or indirectly. According to the EC Treaty, there are five methods in which a community act can be challenged, each one serving a different purpose and therefore applicable to different situations.

i. The *action for annulment* is a direct attack on the act, aiming at its total elimination. In the interest of legal certainty it may only be brought during a short period of time. However, the action for annulment is, as will be demonstrated, restricted, and it has to be put into context of the other actions. Accordingly, several authors, and the ECJ itself, have put the *locus standi* rules in Article 230(4) into context, and viewed the alternative, indirect or independent actions, as rules that can be said to be part of a *system of legal protection* or *remedies* within the Community legal order.[89] The way that the standing conditions for this action in regard of individuals, or so-

[86] For a description of these conditions, *see* Schermers & Waelbroeck 2001, *supra* note 22, at 313.
[87] The five grounds of illegality enumerated by the Treaties are: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the Treaty; (iv) infringement of any rule of law relation to the application of the Treaty; (v) missue of powers.
[88] For a description of these effects, *see* Schermers & Waelbroeck 2001, *supra* note 22, at 504ff.
[89] *See inter alia* Albertina Albors-Llorens, *Private parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford 1996, Angela Ward, *Judicial review and the rights of private parties in EC law*, Oxford University Press, Oxford 2000 and Xavier Groussot, "The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?", (2003), Legal Issues of Economic Integration vol. 30, issue 3, at 222 and *UPA*, *supra* note 28.

called “unprivileged applicants”, will be discussed below.

ii. The *action against a failure to act* has been created for the purpose of challenging the failure to act of Community institutions. Its aim is to provoke action by the Community authorities.[90] As this action does not provide the possibility of questioning the validity of a Community measure, it will not be further discussed.

iii. The *plea of illegality* is designed to prevent the application of an illegal act from being used as a legal basis for further action. It can be invoked before the Court of Justice when the validity of such further action is disputed.[91] When private parties institute proceedings against decisions addressed to them these decisions may be based on illegal regulations which they had no standing to contest directly. The plea provides that in proceedings against a decision the invalidity of an underlying regulation may be invoked. Though important, this action does not provide an independent remedy for the challenging of Community measures, and will also not be analysed further.

iv. A *request for a preliminary ruling on the validity of a Community act* can be brought by national courts when they have to apply a Community act whose validity is doubted. Since national courts, arguably, are not allowed to declare Community acts invalid themselves, this procedure obviates the situation where national courts would otherwise be obliged to apply invalid rule of Community law.[92] This action, despite being indirect, is of significant importance for the judicial protection of the individual and will be further discussed in the following.

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[90] EC Article 232 provides that: ”Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established. … Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.”

[91] EC Article 241 provides that: ”Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.”

[92] EC Article 234 provides that: ”The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”

v. In a *suit for damages caused by an illegal act* the ECJ may establish the illegality of an EC measure, as it is one of the conditions for granting compensation to the applicant.[93] But the Court's jurisdiction in actions for damages "is clearly different from that which it exercises in actions for annulment".[94] An action for reparation is directed not at the *abolition* of a particular measure but only at *reparation* of damage caused by an act or failure to act amounting to a wrongful act or omission. The effects of an action for damages are therefore more limited than those of an action for annulment; they concern only the parties and do not entail the disappearance of the act with retroactive effect, also with regard to third parties.

It has to be noticed, and which was pointed out at the outset of this chapter, that the acts susceptible to judicial review under those various procedures are not necessarily always the same. Thus, Article 234 EC on the preliminary ruling procedure is worded more broadly than Article 230 EC on the action for annulment. Article 234 allows the Court to decide on the validity of any acts of the Institutions of the Community and of the European Central Bank, while EC Article 230 contains some restrictions, e.g. as to the binding character of the act, or as to the authors of the act.[95] The right to bring an action is more restrictive against general acts than against individual ones and private parties may only attack general acts in very exceptional circumstances. It is important to mention that the European Court of Justice has taken a non-formalistic approach; the nature of an act depends on its content, not its form.[96] Thus, in general, and I find this crucial to notice, the Court takes care to safeguard the right to institute proceedings against all acts which have legal effects, and not only against those which are enumerated in EC Article 249.[97] Thus, in order to be reviewable, the act must not only be binding but it must also produce legal effects by bringing a distinct change in the legal position of the applicant.[98]

Furthermore, the Court may only annul acts of Community Institutions. It may, in principle, not annul provisions of the Treaties establishing the European Communities or the European Union themselves, nor declare

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[93] EC Article 288(2) provides that: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

[94] Case 9 and 12/60 *Vloebergh* [1961] ECR 197.

[95] Furthermore, under EC Article 241 on the plea of illegality, only acts of a general character may be challenged. For a more extensive description of the acts that can be contested through other actions, *see* Schermers &Waelbroeck 2001, *supra* note 22, at 313-317.

[96] *See inter alia* Case 53 and 54/63 *First Lemmerz-Werke Case* [1963] ECR 247, 248 and Schermers & Waelbroeck 2001, *supra* note 22, at 317.

[97] Schermers & Waelbroeck 2001, *supra* note 22, at 320 and 328.

[98] Case 8-11/66 *First Cement Convention Case* [1967] ECR 91, 92 and Schermers & Waelbroeck 2001, *supra* note 22, at 336. *See* also the *Reynolds* case, *infra* note 130.

them invalid under the preliminary ruling procedure or illegal under the plea of illegality or the action for damages. This seems logical, since the Court itself derives its existence from those Treaties.[99] However, in the recent *Cresson case*, the ECJ did seem willing to review the compatibility of primary law with fundamental rights.[100]

3.1 A restrictive interpretation of the standing rule in Article 230(4) of the EC Treaty

As pointed out above, I view the *action for annulment* under Article 230 EC as the most important provision, as an individual seeks to challenge the validity of a EU measure. The article states that the Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. It further states that the Court of Justice, for this purpose, shall have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers. The provision also attributes the Court of Auditors and the ECB standing, but only for the purpose of protecting their prerogatives. In the very last section a two months time limit is set up for the invocation of proceedings according to the article in question.

However, it is the fourth section of Article 230 EC that has resulted in the most controversies and debate. It concerns the standing of the so-called unprivileged applicants and reads as follows:

> 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. [Emphasis added]

The ECJ has traditionally adopted a restrictive approach to the interpretation of Article 230(4). This is evident in the leading test applied by the Court, the so-called *Plaumann formula*. It was established by ECJ in *Plaumann* that:

> Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons

[99] Schermers & Waelbroeck 2001, *supra* note 22, at 344.
[100] Case C-432/04 *Commission v Cresson* [2006] ECR I-6387.

> and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[101]

The methodology in *Plaumann* has been cited in many later cases,[102] and has been widely recognised as the leading authority on this issue. The formula has also been exposed to fierce criticism as the applicants hardly can succeed except in a very limited category of retrospective cases.

The jurisprudence of the Court has gradually been relaxed. As the ECJ actively promoted the *locus standi* of the European Parliament under Article 230(2), the call for enhancing private parties' admissibility under Article 230(4) increased.[103] Private actions for annulment were declared admissible in cases concerning competition, state aid, and anti-dumping. More significantly, the Court has adopted a more liberal approach in certain cases against regulations, which used to be regarded as unchallengeable under the Plaumann formula. In *Codorniu*,[104] though the Court still cited *Plaumann* as its main reference, its reasoning was apparently more liberal than former cases in that it confirmed that regulations, despite its general application, could be challenged by private parties if it is of individual concern of the latter. However, the crucial constraint of "direct and individual concern" remained. As Arnull argued, the approach of the Court of Justice since *Codorniu* has not been consistent and lacks a coherent overall policy on admissibility.[105]

In recent years, applicants began to argue that lack of effective judicial remedy in national courts should leave room for circumvention of the demanding test "direct and individual concern" and thus that the ECJ should grant admissibility to their cases.[106] The doctrine of effective judicial protection is not a brand-new concept, however. It has been recognised by ECJ in former judgments, as described in the first chapter of this paper.

In *Area Cova*, the Court justified its rejection of admissibility in that the preliminary ruling procedure "constitutes the very essence of the Community system of judicial protection" and was effective to afford judicial protection. [107] The Court further stated that even if the judicial remedies provided under the EC treaty were not effective, in any event, it "cannot constitute authority for changing, by judicial action, the system of

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[101] Case 25/62 *Plaumann & co. v Commission* [1963] ECR 95.
[102] *See* Case 1/64 *Glucoseries Réunies v Commission* [1964] ECR 417, Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207, Case C-34/88 *Cevap v Council* [1988] ECR 6265, 6270, Case T-398/94 *Kahn Scheepvaart v Commission* [1996] ECR II-477, Case T 86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unte v Commission* [1999] ECR II-179.
[103] Case C-70/88 *European Parliament v Council* [1990] ECR I-02041.
[104] *See* Case C-309/89 *Codorníu SA v Council* [1994] ECR I-01853.
[105] *See* Anthony Arnull, "Private Applicants and the Action for Annulment since Codorniu", (2001), CML Rev. vol. 38, 7.
[106] *See* Joined Cases T-172/98, 175/98-177/98 *Salamander AG v Parliament* [2000] ECR II-2487.
[107] Case C-301/99 *Area Cova and others v Council and Commission* [2001] ECR I-1005, at para 46.

remedies established by Articles, 230, 234 and 235 of the EC Treaty".[108] Furthermore, in *Greenpeace*, in face of the applicants' claim based on environmental concerns, the CFI and ECJ upheld the Plaumann formula and rejected the applicants' argument concerning the right to effective judicial protection.[109]

Arguably, the Court's judgments seem to be based on the view that Community measures are in principle challengeable by individuals through proceedings before national courts, and that effective judicial protection is further granted to individual applicants through preliminary rulings upon the request of national courts under Article 234 EC. Therefore, the arguments, to enable direct actions to enable effective judicial protection were mostly set aside by the Court. Though the ECJ consistently stuck to the Plaumann formula and rejected claims based on lack of effective judicial protection in its judgments, the controversy upon it never ceased. The conflict between ECJ's traditional interpretation approach and the quest for effective judicial protection became more acute when no national remedy was available.

Therefore, and as Groussot point out, the principle of effective judicial protection provoked an intensive debate in relation to the standing rules under Article 230(4) EC, especially during the year 2002. The main questions at stake were to determine whether the proceedings before national courts might provide effective judicial protection for individual applicants and whether alleged lack of judicial protection at the domestic level, under the preliminary ruling procedure, could justify a reform of the standing rules regarding Article 230 EC.

Relying on an extensive interpretation of the *Greenpeace* judgment, the applicants in the *UPA* case submitted that the absence of a remedy at the domestic level to review the Community act authorises *locus standi* before Community Courts.[110] Conversely, the Council and the Commission stressed that the breach of the principle of effective judicial protection by a national court cannot be remedied by twisting the wording of Article 230(4). The Court observed the necessity to examine whether, in the absence of any legal remedy, the right to effective judicial protection necessitates the individual to have standing in order to bring an action for annulment.[111] The Court noted that the Community is based on the rule of law and thus the acts of the institutions are subjected to judicial review in the light of the Treaty and the general principles of Community law. Using the traditional formula, it emphasised that the principle of effective judicial protection constitutes a general principle of Community law, which derives from the common constitutional traditions and the ECHR.[112] Then, it stressed that the system of legal remedies is comprehensive and affords protection both before the Community Courts in the form of direct action and plea of illegality and the

[108] *Ibid*.
[109] *See* Case T-585/93 *Greenpeace International v Commission* [1995] ECR II-2205.
[110] *UPA*, *supra* note 28, para 28.
[111] *Ibid*., at para 33.
[112] *Ibid*., at para 38-39.

national courts through preliminary ruling on validity. Concerning the latter protection, it stated that:

> it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the light to effective judicial protection […] in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply *national* procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other *national* measure relative to the application to them of a *Community* act of general application, by pleading the invalidity of such an act.[113] [Emphasis added]

According to Claes, it is striking that the Court in this case no longer speaks of a *right* to effective judicial protection, but only of a *principle* of effective judicial protection in the light of which Article 230 EC must be interpreted. It seems that it does not by and of itself create a right to judicial review or right to access to a Court having jurisdiction to conduct such review, as seemed to be the case for the national courts in *Johnston*, *Heylens* or *Borelli*.[114] And it may be said that the Court here refuses to embed into judicial activism such as in *Les Verts*[115] or *European Parliament v Council.*[116] The Court clearly stated that an extensive interpretation would go beyond its jurisdiction. Groussot suggests that the Court confirms its self-restraint which is already visible in some rather recent case law, e.g. *Grant* and *Hautala*.[117] In addition, it may be said that it reverses the ruling of the CFI in Jégo-Quéré and that it rejected the notion that fundamental rights prevail over the wording and scheme of the Treaty, according to Groussot.[118]

The attitude of the Community Courts has been more clearly manifested in *Jégo-Quéré*. [119] Initially, the CFI boldly departed from established jurisprudence and ruled that the case should be admissible so as to afford effective judicial protection. The CFI's approach was in line with the views of academic commentators and inspired by A.G. Jacobs's opinion in *UPA.*[120]

Consequently, the CFI in *Jégo-Quéré* considered that an Article 234 proceeding does not constitute an adequate means of judicial protection, since there was no act of implementation capable of forming the basis for an action before national courts. Subsequently, citing the Opinion of AG

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[113] *Ibid*., at para 41-42.
[114] Claes 2006, *supra* note 32, at 140.
[115] *First Les Verts Case*, *supra* note 20.
[116] *European Parliament v Council*, *supra* note 103.
[117] Groussot 2006, *supra* note 18, at 249. Case C-249/96 *Grant* [1998] ECR I-621 and Case C-355/99 P *Council v Hautala* [2001] ECR I-9565.
[118] Groussot 2006, *supra* note 18, at 249.
[119] Case C-263/02P *Jégo-Quéré et Cie SA v Commission* [2004] ECR I-3425.
[120] Brown & John Morijn 2004, *supra* note **Fel! Bokmärket är inte definierat.**.

Jacobs in *UPA*, it noted that individuals could not be required to breach the law in order to gain access to justice.[121] In the second place, it determined that an action for damages does not provide an adequate solution, since such an action cannot lead to the removal of the contested illegal measure.[122] The CFI [even] concluded that both procedures "can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the Charter of Fundamental Rights, [123] as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation.[124] It thus held that the strict interpretation of Article 230(4) must be reconsidered in order to achieve effective judicial protection and consequently it seems that the *general principle* of effective judicial protection prevailed over the *wording of the Treaty*.[125]

However, when the case was appealed to the ECJ, it upheld its traditional jurisprudence. In its judgment, the ECJ for the first time recognised the shortcomings of its restrictive interpretation approach with regard to effective judicial protection, which was commented as an apparent progress.[126] However, the Court stuck to the traditional approach and repeated the jurisprudence in *UPA.* [127] Even AG Jacobs, who was such a passionate advocate in *UPA*, "softened" his objection to traditional interpretation and recognised that it would be beyond the Court's capacity to render *locus standi* on basis of effective judicial protection and held that "[it was an] unavoidable consequence of the limitations which the current formulation of the fourth paragraph of Article 230 is considered by the Court to impose".[128]

After the judgement in *Jégo-Quéré* the Court of Justice and the CFI have ruled in several cases where effective judicial protection has been invoked as a reason for admissibility under Article 230 EC without success.[129] And

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[121] *Jégo-Quéré, supra* note 119, at para 45.
[122] *Ibid.*, at para 46.
[123] Interestingly, it referred directly, and only for the second time to Article 47 of the CFR, which codifies the general principle of effective judicial protection, *see* Jégo-Quéré, *supra* note 119, at para 42. The first mentioning of the CFR was in Case T-54/99 *Max-Mobil v Commission* [2002] 4 CMLR 32, also then in relation to Article 47 of the Charter.
[124] *Jégo-Quéré, supra* note 119, at para 47.
[125] Groussot 2006, *supra* note 18, at 247.
[126] *Ibid.*
[127] *Jégo-Quéré supra* note 119, at para 48.
[128] Opinion of Advocate General Jacobs, delivered on 10 July 2003 in Case C-263/02P *Jégo-Quéré, supra* note 119, at para. 46. In Case T-231/02 *Gonnelli v Commission of the European Communities*, [2004] ECR II-1051, the CFI however admitted that it is possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles. However, it was concluded, again, that it is for the Member States, if necessary, in accordance with Article 48 Treaty on the European Union (TEU), to reform the system currently in force.
[129] *See* Case T-264/03 *Schmoldt v Commission of the European Communities* [2004] ECR II-1515, Case T-370/02 *Alpenhain Camembert Werk v Commission of the European Communities* [2004] ECR II-2097, Case T-196/03 *European Federation for Cosmetic Ingredients (EFfCI) v European Parliament* [2004] ECR II-4263, Case T-94/04, T-236/04

in the recent *Reynolds* case, the right to effective judicial protection was once again discussed in regard of Article 230 EC.[130] The appellants had asked the Court to set aside the a CFI order in which it dismissed as inadmissible their applications for annulment of two decisions of the Commission in accordance with which civil action was brought against several tobacco companies before a federal court of the USA.[131] Varju submits that the Court in this case provided a more confident approach then previously and clarifies further the corresponding conclusions of the judgment in *UPA*.[132]

The argument on the completeness of the system of legal remedies however appears here to lack the same convincing force and in earlier cases, in which the challenging of legality of Community measures by way of request for a preliminary ruling from national courts served as the tenor of the "completeness" argument.[133] In the present case, however, only the non-contractual liability of the Community was available as an extra safeguard, since courts outside the scope of the EC Treaty are unable to refer questions for a preliminary ruling.[134] Although the availability of an action for annulment may be desirable and the action for damages is *not part* of the system of review of legality of Community measures, the possibility of this alternative remedy could alone ensure effective judicial protection, according to the Court.[135] Reiterating the conclusions of *UPA* and *Jégo-Quéré*, it stated that although the condition of what qualifies as an actionable measure must be interpreted in the light of the principle of effective judicial protection, that interpretation cannot result in setting aside that condition without overstepping the jurisdiction conferred upon the Community courts.[136]

The *Reynolds* case also brings forward the importance of the question about the legal effects of different EU measures and the condition that the challenged measure must entail *binding legal effects capable of altering the legal position of the applicants*, aspects which will also be discussed in the following, when this thesis moves on to a discussion about the legal protection in EU law. The Court of Justice agreed with the ruling of the CFI and held that the contested decisions did not produce binding legal effect for

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and T-241/04 *European Environmental Bureau (EEB) and Others v Commission of the European Communities* [2005] ECR II-4919.

[130] Case C-131/03, *RJ Reynolds Tobacco Holdings Inc and Others v Commission of the European Communities* [2006] ECR I-7795.

[131] Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris and Others v Commission of the European Communities*, [2003] ECR II-1.

[132] Marton Varju, "Case C-131/03 P, R.J. Reynolds Tobacco and Others v. Commission, Judgment of the Grand Chamber of 12 September 2006", (2007), CML Rev. vol. 44, issue 4, 1101, at 1113.

[133] *UPA*, *supra* note 28, at para 40 and *Jégo-Quéré*, *supra* note 119, at para 30.

[134] The competent court was not a national court but an American court.

[135] *Philip Morris and Others v Commission*, *supra* note 131, at para 123 and *Reynolds*, *supra* note 130, at para 83.

[136] *Reynolds*, *supra* note 130, at para 81, referring by analogy to UPA, *supra* note 28, at para 44.

the purposes of Article 230 EC.[137] It was pointed out that Community law requires Community courts to look to the substance of those measures – as, in principle, their form is "immaterial"[138] – and to consider whether the measures have binding legal effects on and are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position.[139]

As Varju points out, after all, the "legal effects" test is not an express requirement of Article 230 EC. According to him, the right to effective judicial protection could have induced a less restrictive interpretation of the "legal effects" test.[140]

3.1.1 Does the alternatives to direct action provide effective judicial protection against European Community measures?

The restrictive interpretation of Article 230(4) EC in regard of both the conditions of individual and direct concern, coupled with a similarly restrictive "legal effects" test have made it very difficult for individual to challenge EC measures directly. In reply to such criticisms, it is occasionally argued that the restrictive conditions of admissibility for direct action open no true gap in judicial protection since the review of the legality of normative acts in any event remains open by means of preliminary ruling under Article 234 EC and the possibility of an action for damages.

Looking first at the preliminary ruling procedure to challenge the validity of a general measure, it must be seen as not providing very strong judicial protection and AG Jacobs, in his Opinion in *UPA*, highlighted those lacunae with strength. *Firstly*, referring to the *Foto-Frost* case,[141] he stressed that the domestic court cannot declare a Community act invalid.[142] I will return to this matter below.

Secondly, the decision to make the reference depends entirely on the national court. Although there is an obligation to refer for the national court of last instance it may refuse to refer a question of validity to the Court of Justice.[143] Thus, the preliminary ruling procedure does not constitute in itself a true "judicial remedy" open to an applicant but rather a judicial cooperation procedure between judges. The applicant in this procedure has no direct access to the Court but depends entirely on the goodwill of the

[137] *Reynolds*, *supra* note 130, at para 56.
[138] *Philip Morris and Others v Commission*, *supra* note 131, at para 76, referring inter alia to Case C-60/81, *IBM v Commission*, [1981] ECR 2639.
[139] *Philip Morris and Others v Commission*, *supra* note 131, at para 77.
[140] Varju 2007, *supra* note 132, at 1114.
[141] Case 314/85 *Foto-Frost* [1987] ECR 4232.
[142] AG Jacobs in *UPA*, *supra* note 28, at para 41.
[143] *See* Takis Tridimas, "Knocking of Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure", (2003), CML Rev. vol. 40, issue 9, at 41-48.

domestic judge who may either refuse to refer or when it may ultimately decide to refer, may not word the question properly or not cover all the issues of interest.[144]

Thirdly, it is extremely difficult to challenge the Community measure in the situation of self-executing regulations, i.e. a regulation that does not require any implementing measure. Thus, the individual might have to violate the Community regulation and wait for the sanction at the domestic level. As put rightly by Jacobs, "individuals cannot be required to breach the law in order to gain access to justice".[145]

Finally, in comparison with the Article 230 procedure, there are a number of procedural disadvantages, e.g. delays, costs and lack of interim measures provided by the ECJ.[146] The preliminary ruling procedure does not afford the parties opportunities to argue their case contradictorily in the same way as the Article 230 procedure which allows for full exchanges of written pleadings.[147] In conclusion, there is a great risk that in view of these lengthy procedures a ruling will come too late – if at all.

Furthermore, the view that an Article 234 procedure could replace a direct action ignores the fact otherwise repeatedly emphasised by the Court that EC Articles 230 and 234 provide for *entirely independent and autonomous procedures*.[148] The action for annulment was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature. Therefore, the – often hypothetical – possibility to challenge a Community act before national courts can never be a true and full substitute for a direct action before the Court of Justice under the fourth paragraph of EC Article 230.[149]

Perhaps most importantly, the argument that parties should rather go before national courts to challenge the validity of Community acts ignores the Court's statement that *national courts are in any event never entitled to declare a Community act invalid*.[150] In those circumstances, obliging parties to go before a national court while the Court of Justice itself was adamant not to allow the latter to decide on such issues would imply a judicial "roundabout" which is neither in the interest of the parties, nor of the courts,

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[144] AG Jacobs in *UPA*, *supra* note 28, at para 42.
[145] *Ibid*., at para 43.
[146] *Ibid*., at paras 44 and 102. The national court may however issue an order granting interim relief while the case is pending, *see* Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v Hauptzollam Itzehoe and Zuckerfabrik Soest AG v Hauptzollamt Paderborn* [1991] ECR I-415. *See* also Groussot 2006, *supra* note 18, at 244-245.
[147] Schermers & Waelbroeck 2001, *supra* note 22, at 452.
[148] Due to the autonomous character of the preliminary ruling procedure, the fact that a regulation could not have been challenged under EC Article 230 was never regarded as an obstacle for challenging its validity under EC Article 234. *See* e.g. T-149/95 *Ducros Case* [1997] ECR II-2031, at paras. 30-34.
[149] Schermers & Waelbroeck 2001, *supra* note 22, at 451.
[150] *See Foto-Frost*, *supra* note 141.

nor certainly not in the interest of economy of procedure or of legal certainty.

Furthermore, as scholars, and recently also the ECJ itself, has held, an action for damages according to Article 235 and 288(2) EC can be seen as complementary to the other actions mentioned.[151] Thus, in some judgments, the Court of Justice has tried to justify its restrictive approach towards direct actions for annulment against normative acts under EC Article 230 by the possibility, which individuals in any event enjoy to obtain damages if the Communities adopt an illegal act.[152] Given the extremely restrictive conditions for actions for damages against normative acts, as a result of which most of the actions hitherto have failed, it is difficult to see in this procedure a credible alternative to the action for annulment as suggested by the Court.[153]

I would like to conclude, that the judicial protection in mainstream Community law has obvious weaknesses and that it probably cannot guarantee the effective judicial protection of EU citizens. This is regrettable, also due to the fact that the wording of the EC Treaty still leaves some room of manoeuvre for the Courts. Indeed, the notions of "individual" and "direct" concern have been defined essentially in the Court's own case-law and not in the Treaty itself, as Schermers & Waelbroeck points out. Moreover, the Court of Justice has otherwise always stressed that the procedural provisions of the Treaty should not be interpreted narrowly but rather that the Community should consistently strive to achieve a "complete system of legal protection"[154]. In other contexts, the Court has also decided that actions had to be declared admissible when it could be demonstrated that there was "no remedy under national law."[155]

Accordingly, as Albors-Llorens commented, ECJ's decisions in the cases presented above represent "a missed opportunity" to embrace a new era in the individual challenge of Community acts.[156]

[151] *See* e.g. Groussot 2003 at 222 and Case C-131/03, *Reynolds*, *supra* note 130.
[152] C-409/96 P *Sveriges Betodlares Case* [1997] ECR I-7531, at para 52.
[153] Schermers & Waelbroeck 2001, *supra* note 22, at 503.
[154] *First Les Verts Case*, *supra* note 20, at paras 23-24.
[155] Schermers & Waelbroeck 2001, *supra* note 22, at 449. *See* e.g. Case 20/88 *Roquette* [1989] ECR 1587, at paras 16-17, where this reasoning was adopted in relation to actions for damages.
[156] Albertina Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?", (2003), Cambridge Law Journal, vol. 62, issue, 1, 72.

3.2 Institutional and jurisdictional "ghetto": Immigration, Asylum and Civil law

As compared to mainstream Community law, it must be noted that the concern about lack of effective legal protection in regard of *locus standi* is even greater when it comes to another part of the Community legal system. The attention of this subchapter is what could be called the institutional and jurisdictional "ghetto" of visas, asylum, immigration and judicial co-operation in civil matters, contained in Title IV EC.

These provisions belongs to the broader "Area of Freedom, Security and Justice" which also comprises Title VI TEU covering police and Judicial Co-operation in criminal matter, and which will be dealt with in the subsequent chapter. The subject matter regulated by these provisions are politically sensitive and of growing importance in the Union.

A major criticism of the Maastricht Treaty was that many of the policies under the JHA Pillar called for institutional provisions and legal controls different from the intergovernmental processes which had been established. Topics such as immigration, asylum, border controls, and constraints on movement touch on fundamental human rights, and raise issues similar to those under the free movement provisions of the EC Treaty. It was argued that the need for openness and accountability in this policy field was much greater, requiring a full role for the European Parliament and jurisdiction for the ECJ. In the Amsterdam Treaty, parts of JHA was incorporated into EC Title IV and the remaining Third Pillar provisions was subjected to institutional controls closer to those under the Community Pillar. Further, the *acquis* of the Schengen Treaty was integrated into the EU framework by a protocol to the ToA.[157] The general aim of Title IV EC is, according to Article 61 EC, the creation of an area of freedom, security and justice by the adoption of measures to deal with matters such as asylum, border controls and visas.

The ECJ's powers under Title VI TEU and Title IV EC differ, and its powers in both areas are different from those normally applicable in the Community Pillar. In general terms, the normal Community legal regime applies in Title IV EC, subject however to the more limited nature of the preliminary ruling mechanism that applies in this area. The preliminary ruling jurisdiction over Title IV is limited to national courts from which there is no judicial remedy, and it has no jurisdiction over certain free movement measures concerning law and order and internal security.[158] There is power pursuant to Article 67(2) EC for the Council, acting unanimously with the consent of the EP, to adapt the provisions relating to the powers of the ECJ. The Commission has proposed that the preliminary

[157] Craig & De Burca 2007, *supra* note 11, at 231.
[158] *See* Article 68 EC.

ruling jurisdiction under Article 68 EC should be brought into line with the general regime under Article 234,[159] but its proposal has not been acted on.[160]

The two first paragraphs of Article 68 EC states that:

> 1. Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State *against whose decisions there is no judicial remedy* under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. [Emphasis added]
>
> 2. In any event, the Court of Justice shall *not* have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the *maintenance of law and order and the safeguarding of internal security*. [Emphasis added]

The Member States may well be wary of changing the current limitations in the jurisdiction of the ECJ and the restricted possibilities for reference for preliminary rulings, since it could impact on their ability to process asylum applications; if any court or tribunal could request a ruling then this might mean that a large number of cases concerning asylum applicants in the same position could effectively be "frozen" pending the outcome of the ECJ's ruling, thereby rendering the attainment of "national targets" for setting asylum applications more difficult.[161]

The limitations on Article 234 references are nonetheless regrettable and have been criticized by commentators.[162] Ward points at the restrictions of the ECJ's role and holds that the may impose intolerable impediments on access to judicial review, precisely given that only courts against whose decisions there is no judicial remedy are entitled to refer questions and that this is even precluded is some cases.[163]

In the words of Claes:

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[159] Adaptation of the provisions of Title IV establishing a European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM(2006)346.
[160] Craig & De Burca 2007, *supra* note 11, at 242.
[161] *Ibid.*, at 255, extending their gratitude to Cathryn Costello for this point.
[162] *Ibid.*, at 255, referring to Steve Peers, *EU Justice and Home Affairs Law*, Oxford University Press, Oxford 2006 and Cathryn Costello, "Administrative Governance and the Europeanisation of Asylum and Immigration Policy" in Herwig Hoffmann & Alexander Türk, *EU Administrative Governance*, Edward Elgar, Cheltenham 2006.
[163] Angela Ward, "Access to Justice", in Steve Peers & Angela Ward (eds.), *The European Union Charter of Fundamental Rights*, Hart Publishing, Oxford and Portland Oregon 2004, at 123-124.

> It is deplorable … that the possibility of sending references to the Court of Justice should be restricted in exactly the area where the need for judicial protection and concern for fundamental rights seem greater than in any other area of Community law: Title IV is after all the area of the Schengen acquis and of the evolving common immigration policy.[164]

Of course, the general criticism of the Article 234 procedure from the perspective of the individual seeking relief and judicial protection presented above, at 32f, applies with the same force here. Furthermore, to rule out the jurisdiction of the Court in regard of measures relating to the *maintenance of law and order and the safeguarding of internal security* in primary law, strikes me as unacceptable. Of course, even human rights have to be weighed against other interests and, according to the ECtHR, Member States do have ”a margin of appreciation” to rely against. But if the case cannot even reach a court, there is no one to judge if the balance has been struck in an acceptable way and in this policy field, the risk that the fundamental rights of individuals could be infringed are but too obvious.

3.3 Decentralised judicial protection? The role of National Courts

Forty years after *Van Gend en Loos* and *Costa v ENEL*, it seems to have become a truism to say that “every national court in the European Community is now a Community law court”. Indeed, the national courts are first in line to enforce and apply Community law within the Member States. It is the catch all provision of Article 10 EC which has come to serve as the Treaty basis for the Community law obligations of the national courts: the judicial authorities of the Member States are under an obligation to ensure that Community law is applied and enforced in the national legal system and that no measures are taken which could jeopardise the attainment of the objectives of the Treaties.[165]

The involvement of the national courts as common courts of Community law is grafted upon the twin doctrines of *direct effect* and *supremacy* of Community law. The Court of Justice has involved the national courts and made them allies in the enforcement of Community law and, in the words of Tesauro, they constitute “the natural forum” for EC law,[166] and they are responsible for ensuring that Community law is applied and respected in the national legal systems. Finally, it could be stated that the national courts are the guardians of the effectiveness of EC law. At the end of the day, the

[164] Claes 2006, *supra* note 32, at 576-577.
[165] *Ibid.*, at 3.
[166] Guiseppe Tesauro, ”The Effectiveness of Judical Protection and Cooperation between the Court of Justice and National Courts”, in Birgitta Blom (ed.), *Festskrift til Ole Due: Liber Amirocum*, Gad., Copenhagen 1994, at p. 355.

principle of effective judicial protection *lato sensu* appears to include the rights developed through Article 10 EC.[167]

The ECJ has developed the "effectiveness of EC law" as a legal principle,[168] which includes an obligation on national courts to ensure that they give adequate effect to EC law in cases arising before them. Neither the EU Treaties nor Community legislation lay down a general scheme of substantive or procedural law governing remedies for the enforcement of EC law.[169] Early ECJ case law emphasised a principle of national autonomy and primary responsibility in the fields of remedies, [170] whereby EC law would be given effect at domestic level in accordance with the procedures and rules established by national law. The ECJ later emphasised a stronger and generally applicable requirement of adequacy and effectiveness in the domestic enforcement of EC law, which it derived from Article 10 EC. In some cases, the Court even required national courts to make available a particular type of remedy regardless of whether this would be available under national law. National courts are expected to engage in a context specific proportionality analysis of any restrictive provisions of national law and to disapply these whenever necessary to give effect to EC law.[171]

In fact, from the point of view of the citizen, national courts are the primary venue not only for asserting Community rights against Member States but also for challenging the validity of Community acts. The restrictive *locus standi* of individuals under article 230(4) EC often makes indirect challenge before national courts the only viable option.[172] Where natural or legal persons cannot, by reason of the conditions for admissibility laid down in Article 230(4) EC directly challenge Community measures of general application, they must plead the invalidity of such acts before the natural courts.[173] The fundamental principle of a right of access to a competent court however seems much less powerful in the context of review of Community legislation than in the context of the review conducted by the national courts of the compatibility of national law with Community law.

The transformation of national courts into common courts of Community law is not, however, complete. In fact, much of the recent case law, referred to above, on standing for individual applicants under Article 230 EC directs those applicants back to the national courts as the natural interlocutors of

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[167] Groussot 2006, *supra* note 18, at 242.
[168] *See* the section above entitled "Effective Judicial Protection and its interaction with the Principle of Effectiveness".
[169] Craig & De Burca 2007, *supra* note 11, at 305. However, sectoral legislation addressing remedial issues exists in various EU law fields, and there have been moves towards more ambitious and co-ordination projects.
[170] The principle of national procedural autonomy was qualified by two requirements; that national procedures should be applied to rights arising from national law and EC law in the same way (equivalence), and that they should not render the exercise of EC rights impossible in practice (practical possibility).
[171] Craig & De Burca 2007, *supra* note 11, at 305-306.
[172] Tridimas 2006, *supra* note 30, at 419.
[173] *See* lastly the *UPA* case, *supra* note 28.

private applicants and seeks to deviate non-privileged applicants via the national courts.[174] Some scholars nevertheless view this system developed by the Court as problematic. Claes holds "that the system developed by the Court of Justice is, albeit understandable for reasons of procedural economy, flawed. The appropriate forum to challenge the validity of Community law is Luxembourg, as the Court has itself held in cases like *Foto Frost* and *Atlanta*." [175] While it may have seemed "natural" and efficient to involve the national courts as common courts of Community law to ensure the application and enforcement of Community law by the Member States, it is, as Claes points out, much more artificial to make the national courts the ordinary courts of Community law when the *validity* of Community law is at stake. It seems slightly paradoxical to "oblige the parties to seize the national courts while at the same time prohibiting [them] from ruling on the validity of Community law since the questions has necessarily to be referred back to the Court of Justice…".[176]

As will be clear in the following, I disagree with the view that the appropriate forum to challenge the validity of Community law has to be before the ECJ. There is however one very important qualification to that point. It presupposes that the ban, established by the Court, on the national courts to review the validity or applicability of Community law would be abolished or ignored.

The ban on such review stems *firstly*, from the principle of supremacy of Community law, and *secondly*, and independent from the principle of supremacy, from the lack of jurisdiction on the part of the national courts to rule on the validity of Community law on whatever ground.

A piece of secondary legislation may of course be brought directly before a national court on grounds that it is unconstitutional or otherwise invalid. This type of action is not widespread, since it is assumed that acts of the Union institutions are not among those that may be challenged before national courts.[177] First, under the principle of supremacy, precedence must always be given to Community law over conflicting national law however framed and including national constitutional provisions. The validity of Community law can only be reviewed in the light of the Treaties and higher Community law, the general principles of Community law, including fundamental rights, and in the light of international law, but not in the light of national constitutional principles *qua* national principles. The aspect of supremacy will here be left out, it is interesting enough to consider the possibility for national courts to review the validity of EU measures against the human rights standards contained in EU law itself.

[174] Claes 2006, *supra* note 32, at 41.
[175] *Ibid.*, at 43.
[176] *Ibid.*, at 568. *See* also *supra*, at 33.
[177] *Ibid.*, at at 559.

At any cost, the national courts lack the competence to hold Community law invalid themselves:[178] if they are convinced that a provision of secondary law may well be invalid, they must make a reference to the Court of Justice which alone has jurisdiction to declare those measures invalid.[179] This principle concerning lack of jurisdiction, stemming from *Foto-Frost*, is independent of the principle of supremacy of Community law: even if the alleged invalidity follows from an infringement of the Treaties, the national court is under an obligation to refer the case to the European Court which alone has competence to actually declare Community law invalid.

This is however not evident from the text of the Treaties, according to Claes.[180] Article 230 provides for an action for annulment of specified Community acts to the Court of Justice. Yet the wording of Article 234 EC seems to allow the lower national courts to rule on the validity of Community law themselves. Indeed, according to the text of Article 234 EC, the lower courts *may* refer questions as to the interpretation *and the validity* of Community law to the Court of Justice. The text does not make such reference obligatory.[181] Nevertheless, the Court held in *Foto-Frost* that the national courts, in all instances, have no jurisdiction to declare acts of Community invalid. Furthermore, in the case of Courts against whose decisions there is no remedy under national law, this arguable follows directly from the fact that they are under an obligation to refer questions concerning the validity of Community law under Article 234(3) EC. As Claes points out, there is however one exception concerning interim measures.[182]

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[178] An issue which at first sight appears merely technical-judicial, but one with far reaching consequences, is the distinction which is sometimes made between *validity* of Community law and its *applicability* in the national legal order. In line with the wording of Article 234 EC, *Foto-Frost* deals with the issue of the validity of measure of Community law, *see Foto-Frost*, *supra* note 141, at para 19. Some national courts have added another issue, namely that of the applicability of a Community measure in the national legal order. There does not however appear to be a legal difference in practical effect between a declaration made by a national court that a measure is invalid or inapplicable. In both cases the measure remains in existence and both declarations are necessarily limited to one Member State. *See* to this point Claes 2006, *supra* note 32, at 580.

[179] Claes 2006, *supra* note 32, at 560.

[180] *Ibid*., at 562.

[181] The ECJ was of the opinion that "in enabling the national courts against whose decisions there is a judicial remedy under national law, to refer to the Court for a preliminary ruling questions on interpretation or validity, Article 177 EC [present Article 234 EC] did not settle the question whether those courts themselves may declare that acts of the Community institutions are invalid", Case *Foto-Frost*, *supra* note 141, at para 13.

[182] *See* Claes 2006, *supra* note 32, at 563-564. Already in *Foto-Frost* itself, the Court held that "it should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures". Such circumstances occurred in *Zuckerfabrik Süderdithmarschen*, *supra* note 146, where the Court held that where a national measure based on a Community regulation is challenged before a national court on grounds that the validity of the Community measure itself is contested, interim relief may be granted, however under rather detailed and strict conditions.

The Court built its decision in *Foto-Frost firstly,* on the principle that Community law should be uniformly applied by all national courts, *secondly,* on the coherence of the Community system of judicial protection, and *thirdly,* on the fact that the Court is in the best position to decide on the validity of Community acts.[183] But the case law of the Court of Justice on its own jurisdiction and that of national courts in this area may perceived as leaving a gap in the system of judicial review, which some national courts may want to fill.

Arguably, the right to effective judicial protection of individual rights has become a source for new powers of national courts. The principle of effective judicial protection and the principle of the effectiveness of Community law could coincide: the effective remedy offered to the individual for the protection of his Community law rights contributes to enforcing the correct application and the enforcement of Community law.[184] I might understand this differently than the ECJ, but this must also be the case if the national courts would be vested with the jurisdiction enabling them to hold Community measure, which could infringe fundamental human rights, invalid.

The problem is rather that the requirement of uniform application of Community law. The need for uniformity was one of the arguments in favour of the precedence of Community law in *Costa v ENEL*. However, given the fact that Community law depends on national law for its application and enforcement and given the principle of national procedural autonomy, this uniformity will not be complete. There is not and cannot be a principle of full uniformity. On the other hand, the Court has stated that the "uniform application of [Community law] is a fundamental requirement of the Community legal order."[185] The requirement of the uniformity of Community law is especially important in cases where the validity of a Community act is in question, according to Claes.[186] However, who would argue for the uniform application of *illegal* Community law? If the individual has no access to a competent court, that is an obvious risk, which I do not think that the citizens of the European Union should be exposed to.

Turning to Title IV EC on immigration, asylum and civil law, the possibility for national courts to rule on the validity of EC measures seems even more relevant as the impact of measures in these areas and their interpretation has largely been left to be determined by the national courts.

Indeed, as Claes points out, the prohibition imposed on the national courts to hold a Community measure invalid was concomitant with the duty to refer a question on the validity of the measure to the Court of Justice, which [arguably] has sole power to declare Community measures invalid. In the context of Title IV, however, the lower courts do not even have the option

[183] Claes 2006, *supra* note 32, at 565.
[184] *Ibid.*, at 138.
[185] *Zuckerfabrik Süderdithmarschen*, *supra* note 146, at para 26.
[186] Claes 2006, *supra* note 32, at 141.

of referring the issue "to the Kirchberg". [187] The limb of the Court's reasoning in *Foto-Frost* concerning the "coherent system of legal remedies and procedures" established by Article 230 EC and 241 EC on the one hand and Article 234 EC on the other, which is designed to permit the Court of Justice to review the legality of measures adopted by the institutions is devoid of its persuasive force, due to the problem of access.

According to Gaja, the existence of an exclusive power of the Court presupposes first of all that a power is granted – which is not the case with regard to the Community acts mentioned in Article 68(2) – and then that the national courts can engage the Court.[188] In the view of Eeckhout, to have the *Foto-Frost* principle applicable under such circumstances would be "wholly inappropriate in a Community based on the rule of law and on respect for fundamental rights". He continues and submits that to say that a party is entitled to challenge the validity of an act, but that the challenge can only be made at last instance, is not in accordance with the principle of effective remedies.[189]

The oddity of this solution is that Courts of last instance would however still be obliged to refer cases to the ECJ. The most drastic solution would be for the Court to accept references by lower courts on validity issues, contrary to the clear stipulation of the Treaty. Such a decision would be contentious and not very likely, given that this provision was subject of an express and recent negotiation between the Member States.

The effects of a declaration made by a national court that an EC measure is invalid can however only have limited effect, according to Claes. She states that it would have to be restricted to the Member State of the court making the declaration and the measure remains in existence and remains binding.[190] Obviously, the effects of such a declaration raise many different many concerns and prompts answers which however fall outside of the scope of this thesis.[191]

I nevertheless submit that the national courts will have to fill the gap. I recognise that they will do so at the expense of the uniformity of EC law. Consequently, if a national court should find that there are serious doubts about the validity of the measures in question, it will have to make the decision without the help of the ECJ, and with effects in its Member State

[187] *Ibid.*, at 578-579.
[188] Giorgio Gaja, "The Growing Variety of Procedures concerning Preliminary Rulings", in David O'Keeffe & Antonio Bavasso (eds.), *Judicial review in European Union law: essays in honour of Lord Slynn*, Kluwer Law International, The Hague 2000, at 148.
[189] Piet Eeckhout, "The European Court of Justice and the 'Area of Freedom, Security and Justice': Challenges and Problems" in David O'Keeffe & Antonio Bavasso (eds.), *Judicial review in European Union law: essays in honour of Lord Slynn*, Kluwer Law International, The Hague 2000, at 157.
[190] Claes 2006, *supra* note 32, at 580-581.
[191] *See* the discussion in Claes 2006, *supra* note 32, at 581.

only.[192] I do not think that this standpoint should be limited to Title IV of the EC Treaty where the judicial protection, as demonstrated above, is weaker than in other parts of EC law. Instead, national courts should claim this jurisdiction in all cases where individuals would otherwise lack access to a competent court in challenging a Community measure. If the ECJ dislikes such a development, it will have to change its interpretation of Article 230(4) EC.

The formulation of the exact duties of the national courts and the Community approach to jurisdiction, procedural rules, and remedies is the result of a balancing exercise weighing various principles and fundamental requirements. Community law remains dependent on the national legal environment, and the courts will have to find a way to ensure effective protection of individuals, adequate remedies and effectiveness of Community law, while also having regard to principles of legal certainty, uniformity and so on.[193] I thus propose a different weighing of these principles, attaching greater weight to the protection of fundamental right at the cost of the uniformity of EC law. This proposal grants national courts a residual and subsidiary role as ultimate arbiters of fundamental constitutional commitments. National courts are not cast as agents defending an idiosyncratic national tradition against the EU. They should instead be viewed as trying to realize some of the most important norms contained in EC/EU and that they are actually acting in cooperation with EU institutions, at least as far as they are allowed.[194]

3.4 Strasbourg's view. The ruling in Bosphorus

The interrelationship between the ECJ and the European Court of Human Rights has been described in the first chapter of this thesis. There, the way that Strasbourg's indirect review of EC/EU law has developed over the years was also discussed, including the important case *Bosphorus HavaYollari Turizm v Ireland*.[195] In this section, this case will be analysed from a somewhat different view. What was the assessment made by the ECtHR concerning the judicial protection in EC law? And could future review from Strasbourg as regards that protection be the impetus needed for the ECJ to reinterpret the EC Treaty or for national court to seize jurisdiction to review the legality of EC measures themselves?

[192] Compare the similar reasoning in Claes 2006, *supra* note 32, at 583. The author however limits this stand to Title IV of the EC Treaty.
[193] Claes 2006, *supra* note 32, at 141.
[194] Compare the reasoning by Mattias Kumm & Victor Ferreres Comella, "The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty", Jean Monnet Working Paper 5/04.
[195] *Bosphorus*, *supra* note 52.

In their Concurring Opinion, Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki warned of the danger that duplicity of standards in the protection of human rights would pose. Such duplicity could arise from the general assumption that the EU offers an equivalent protection to that of the Convention:

> For the Court to leave the EUs judicial system the task of ensuring "equivalent protection", without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the field of Community law, of Convention standards by a Community standard which might be inspired by Convention standards but whose equivalence with the latter would no longer by subject to authorised scrutiny.[196]

Judge Ress, in his separate Concurring Opinion, also warned against the emergence of double standards through too ready assumptions of "equivalent protection" and drew attention to the deficiencies in the EUs system of judicial protection due to the limited *locus standi* for private parties before the ECJ.

He raised the question whether this amounted to a violation of Article 6(1) of the ECHR[197] and he in particular noted that the ECtHR had "not addressed the question of whether [the] limited access [to the ECJ under Article 230(4), EC] is really in accordance with Article 6(1) of the Convention and whether the provisions…must not be interpreted more extensively in light of Article 6(1)".[198]

Similarly, Ward argues that "[d]oubt remains as to whether the system of judicial remedies elaborated in the EU Treaty comply with Articles 6 and 13 of the European Convention on Human Rights (ECHR), at least in so far as challenge to the legality of EC rules is concerned".[199]

In particular, the Opinion expressed concern about the idea of abandoning a case-by-case review of compliance for a largely abstract review of the organisation's general system of "equivalent protection" for human rights.

Costello claims that Judge Ress' Opinion "makes [it] clear that challenges to the Article 230 EC mechanism could be admissible before the ECtHR" and suggests that a litigant may well bring proceedings before the ECtHR, based on the practical impossibility of challenging the EC measure. Strasbourg should then, in her view, examine this issue fully and refuse to base its ruling on the generally available level of protection. If it were to focus on the generally available level of protection, this would render any Article 6, ECHR claim meaningless, because the essence of this claim is that the

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[196] Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, at para 3.
[197] Craig & De Burca 2007, *supra* note 11, at 423-424.
[198] Concurring Opinion of Judge Ress, at para 2.
[199] Ward 2004, *supra* note 163, at 123.

generally available level of protection has failed. Whether Strasbourg treats this as a case where the ”equivalent protection” doctrine is inapplicable, or rebutted on the basis of ”manifest deficiency”, it is clear that Bosphorus is no impediment to examination of the substance of the matter, according to Costello.[200]

She further argues that even in cases where preliminary references on validity are available and an individual thus succeeds in gaining indirect access to the ECJ, the ECtHR should not be too hasty in concluding that the EC system has provided “equivalent protection”.[201] In her view, *Bosphorus* thus allows the ECtHR to exercise scrutiny over EU actions, on a case-by-case basis. The “equivalent protection” doctrine is not a blanket immunity, and neither automatically nor irrevocably applicable. Rather, as Costello further argues, it depends on the assessment of the protection available from time to time and from sector to sector. It may be rebutted, albeit on the basis of a high standard, namely “manifest deficiency” of protection. She finally notices an operation of the “equivalent protection” doctrine in *Bosphorus* which she holds to be in sharp contrast to earlier cases, where the doctrine was deemed applicable without any careful assessment of the mechanism available in the particular case. [202]

With a more pessimistic view on the possibilities for individuals to get any form of support from the ECtHR, Varju claims that it is very likely that the right to effective judicial protection as interpreted under Article 6 and 13 ECHR is *not* applicable. The combination of Articles 6 and 13 ECHR appears to be dubious in the first place, he argues. Considering that the Article 6 ECHR right stand for the right to access to court, according to established case law the Article 13 ECHR claim is always absorbed by the stricter right to access to court claim.[203] Discussing the “legal effects” at stake in *Reynolds,* he states that it must be examined whether the was a *procedural* or a *substantive* bar to access to justice. If it is a matter of substantive law, Article 6(1) ECHR will not be applicable.[204] Article 6(1) ECHR does not guarantee any particular content for rights in substantive law, and through the interpretation of Article 6(1) ECHR no substantive right could be created. Even if Article 6 ECHR was found to be applicable, ascertaining its violation requires a number of hurdles to be passed. If the “legal effects” test proved to be a procedural bar, it still needs to be determined whether it entailed a proportionate interference serving a legitimate aim, as States have a certain margin of appreciation with respect to regulating access to courts.

Within this context, Varju continues, the alternative remedies argument can be relied upon. This argument might also be of importance if one were to consider whether declaring the application inadmissible actually constituted

[200] Costello 2006, *supra* note 50, at 115-116.
[201] *Ibid*. at 116.
[202] *Ibid*. at 129.
[203] Referring to *Kudla v Poland* [2000] ECHR 512, at para 146.
[204] *Markovic v Italy* [2006] ECHR 1141, at para 113.

a denial of justice, instead of examining whether the interference could be justified. In the *Reynolds* case, it should for example be examined whether the non-contractual liability of the Community is an adequate substitute for the action for annulment.[205] It follows that in principle the complete system of remedies established in Community law enjoys a plethora of opportunities to escape a condemnation under Article 6 ECHR.[206]

To conclude it seems possible that the ECtHR could rebut the presumption of "equivalent protection" in future cases, both as concerns EC law in general, and even more likely, as concerns Title IV EC. A finding that the system of legal protection in EC law is insufficient and a violation of the rights contained in the Convention would require the Member States to redraft the Treaty in order to stop the infringement, next to providing damages to the victims. Arguably, it would provide both the ECJ and the national courts a very strong, if not formally binding, incentive to enhance the system of judicial protection.

3.5 The future of remedies in present Community law

The Lisbon Treaty[207] reformulates Article 230(4) in the same way that the CT would have done:

> Any natural or legal person may, under the [same] conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The novelty of the provision is that individual concern would not have to be shown for regulatory acts which are of direct concern to a person and which did not entail implementing measures. Such liberalisation would be welcome, and go some way to meet the difficulties in the existing case law. The reform must however be described as limited, as the liberalisation only applies in the case of regulatory acts, defined as secondary norms in the hierarchy of norms, which the CT would have established.[208] If the CT would have come into force, it would not have applied in relation to EU laws, framework laws, decisions, or implementing acts. The only way to avoid this conclusion, according to Craig & De Burca, would have been to read the phrase "regulatory act" to mean something broader than the term European Regulation within Article I-33(1) CT. This might have been

[205] Varju 2007, *supra* note 132, at 1115.
[206] *Ibid.*, at 1116.
[207] *Supra* note 5.
[208] Article I-33(1) CT.

possible, but it would have been difficult both textually and historically, in the view of the authors.[209]

There is moreover nothing to suggest any alteration of the *Plaumann* test on individual concern. Thus if an applicant challenged an act in the form of a decision addressed to a third party, but which the applicant claimed was of individual concern to her, she would still have to satisfy the Plaumann test with all its difficulties. Nor did the reform address the more general difficulties with indirect challenge articulated by Advocate General Jacobs in the *UPA* case.[210]

It remains to be seen in what way the change introduced by the Lisbon Treaty in this regards will influence the possibility for individuals to challenge Community acts before the Community judiciary. It also serves to point out, that the Lisbon Treaty does not seem to introduce any changes to the other indirect remedies available under the EC Treaty. However, article 234 EC will receive a new last paragraph establishing that "[i]f [a question for a preliminary ruling] is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

It is doubtful whether the Community Charter of Fundamental Rights would impact on this area, even when it will be accorded binding legal status. Article 41 enshrines a right to good administration. Article 42(2) sets out certain more specific rights that are included in this right. Article 47 provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Standing rules are not explicitly mentioned in either Article, as Craig & De Burca points out.[211] It would be open to the Community Courts, if they wished to do so, to regard these provisions as the basis for expanding the existing standing rules. They are however unlikely to do so, given their approach to standing hitherto. This is especially so given that the explanatory memorandum stated in relation to Article 47 that there was no intent for this provision to make any change to the rules on standing.[212]

This decentralised model of justice was expressly endorsed by the Constitutional Treaty, Article 29(1), the second sub-paragraph, and the same text is also included in the Lisbon Treaty, Article 9 F (1), also in the second sub-paragraph, which states that:

> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

[209] Craig & De Burca 2007, *supra* note 11, at 527.
[210] *Ibid.*, at 527.
[211] Craig & De Burca 2007, *supra* note 11, at 527.
[212] Charte 4473/00, Convent 49, 11 Oct. 2000, at 41; CONV 828/03, Updated Explanations Relating to the Text of the Charter of Fundamental Rights, 9 July 2003, 41.

This provision, which as Tridimas points out, has no equivalent in the Treaties in force, could be said to fulfil two purposes.[213] It underlines that national courts play an important part in the application and enforcement of Union Rights and, according to Tridimas, it seeks to counterbalance the restrictive *locus standi* under Article 230(4) EC by mandating Member States to fill the remedial gap left by the strict interpretation of direct and individual concern. In his view, this article formalises the pattern of decentralised judicial review favoured by the ECJ. It thus requires the national legal systems to provide *locus standi* to individuals before national courts so as to enable them to challenge the validity of Community acts indirectly via the preliminary reference procedure. The precise scope of this obligation remains however unclear, as he concludes.[214]

The present Title IV of the EC will be accompanied by the area covered by Title VI TEU and the pre-existing distinction between pillar III and I will thus be abolished. Thereto, Article 68 EC, which today restricts the ECJ's jurisdiction in regard of Title IV would be repealed. ECJ's present jurisdiction in mainstream Community law would thus extend to all aspects of the AFSJ and consequently strengthen the judicial protection for individuals compared to the present state. However, according to the new Article 240b, the Court shall continue to lack jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security in connection to the provisions of Chapters 4 and 5 of Title IV of Part Three in relation to the area of freedom, security and justice.

[213] Tridimas 2006, *supra* note 30, at 419.
[214] *Ibid.*, at 419-420.

4 Judicial Protection for individuals in European Union law

The Second and Third Pillars of the Union created by the TEU remains apart from the Community institutional and legal structure, and are characterised by a more intergovernmental and less supranational decision-making structure. The Second Pillar concerns the "Common Foreign and Security Policy" and the Third Pillar concerns "Provisions on Police and Judicial Co-operation in Criminal Matters". These pillars are not entirely disconnected from the Community as they involve the Community institutions and, in particular, the Council to a certain extent.

Article 46 TEU currently stipulates the limits of the jurisdiction of the ECJ in relation to matters covered by the EU Treaty. According to the said article, the provisions of the Community Treaties concerning the powers of the Court and the exercise of those powers shall apply to:

i. Provisions amending the Community Treaties;
ii. Provisions on Police and Judicial Cooperation in Criminal Matters (Title VI, Articles 29-42 TEU) under the conditions provided for by Article 35 TEU;
iii. Provisions on Enhanced Cooperation;
iv. Article 6(2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under [the EU Treaty]; *and*
v. The Final Provisions of the EU Treaty.

Consequently, the jurisdiction of the Court does not extend to Title I (Articles 1-7 TEU), which sets out the Common Provisions on which the Union is based, however with the exception of Article 6(2) in respect of fundamental rights of the Union and of the purely procedural stipulations of Article 7. Importantly, the Common Foreign and Security Policy, which is contained in Title V, Articles 11-28 TEU, is not mentioned and the Court thus seem to lack jurisdiction in regard of Member State's action in this field.[215]

I will now proceed to discuss the judicial protection in the field of Police and Judicial Cooperation in Criminal Matters. In a subsequent section, the

[215] As regards the Common Provisions, the lack of powers of judicial review was confirmed by the ECJ in the *Grau Gomis* case. A request for a preliminary ruling concerning the obligations of the Member States under Article 2 TEU was dismissed as inadmissible, the Court holding that – pursuant to Article 46 – it "clearly [had] no jurisdiction to interpret that article in the context of such proceedings". *See* Case C-167/94 *Grau Gomis* [1995] ECR I-1023, at para 6.

judicial protection, if any, under the Common Foreign and Security Policy will be assessed.

4.1 Provisions on Police and Judicial Co-operation in Criminal Matters

The provisions within the "Area of Freedom, Security and Justice" concerning Immigration, Asylum and Civil law, regulated in Title IV of the EC Treaty, has been discussed above. This area of EC/EU law nevertheless also consists of the provisions in Title VI of the EU Treaty on Police and Judicial Co-operation in Criminal Matters, the so-called Third Pillar. Also these questions are sensitive and lie at the heart of state sovereignty. It includes such controversial matters as the exchange of personal data and the creation of a European Arrest Warrant.

Moreover, because of its great sensitivity, the EU Member States have been unwilling to use the relatively open Community method of legislation with its key roles for the Community institutions – notably the European Parliament and the European Commission; and they have been unwilling also to confer on the European Court of Justice the more wide-ranging jurisdiction elsewhere exercised by that Court, as will be discussed in the following. Instead, the Member States have used methods closer to traditional "intergovernmental" techniques, relying primarily on negotiation behind closed doors and a search for compromises resting on a requirement of unanimity.

The overall aim of the Third Pillar is, according to Article 29 TEU, to provide citizens with a high level of safety within an area of freedom, security and justice, by developing "common action" in three areas: police co-operation in criminal matters, judicial co-operation in criminal matters and the prevention and combating of racism and xenophobia.[216] There were relatively few changes made to the Third Pillar by the Nice Treaty, but a formal Treaty foundation was given to the European judicial co-operation unit, Eurojust. The principle change was however to the provisions on enhanced co-operation in Articles 40, 40a and 40b TEU.

The ECJ now has jurisdiction over certain measures adopted under the Third Pillar. Article 35 TEU thus establishes a preliminary reference procedure similar, though not identical, to that of Article 234 EC. Article 35(1) TEU provides that:

> the ECJ has jurisdiction […] to give preliminary rulings on the validity and interpretation of framework decisions and decisions, and on the interpretation of conventions, and on the validity and interpretation of the measures implementing them.

[216] Craig & De Burca 2007, *supra* note 11, at 231.

This is however operative only if a Member State accepts this jurisdiction of the ECJ, and if it does so the Member State can then specify either that a preliminary reference can be sent by courts or tribunals against whose decision there is no judicial remedy, or by any national court or tribunal.[217]

A separate action for annulment is provided for in relation to acts adopted under Title VI TEU in Article 35(6). It gives the ECJ jurisdiction to review the legality of framework decisions and decisions at the suit of a Member State or the Commission. However this jurisdiction is restricted, in that it cannot review the legality of proportionality of "operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".[218] Most importantly, though, it does not provide any standing for individuals. Consequently, the direct remedy of the annulment action is not provided for under this Title, and individuals are also barred from an action for failure to act, to plea the illegality of an act or an action for damages. [219]

Analysing the jurisdiction of the Court further, Peers makes a distinction between two types of situations. The first concerns the Court's Third Pillar jurisdiction *per se*; the second concerns the circumstances in which the Court's EC Treaty jurisdiction is applicable to Third Pillar matters.[220] According to him, it appears clear that the EU Courts normally exercise their *First Pillar* jurisdiction when they consider whether Third Pillar measures should have been adopted pursuant to the First Pillar, rather than the EU Treaty.[221] Also, the EU Courts exercise their First Pillar jurisdiction pursuant to the EC Treaty rules which are expressly made applicable to the Third Pillar by Article 41 TEU.[222] A third category of cases is where the EC Treaty jurisdiction of the Courts applies even in the absence of a reference to the relevant provisions of the EC Treaty in Article 41 TEU.[223]

In practice, the same author points out; the Court has received[224] no dispute settlement actions, and only two annulment actions. It has received two references for the interpretation of Framework decisions and one reference on the validity of a Framework Decision. The Court has also ruled on six references for interpretation of the Third Pillar provisions of the Schengen *acquis* concerning cross border "double jeopardy"; two further such cases are pending, and two were withdrawn.[225]

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[217] Article 35(3) TEU. For information on which Member States that have signed up to what jurisdiction for the Court, *see* Peers 2007, *supra* note 36.
[218] Article 35(5) TEU.
[219] Ward 2004, *supra* note 163, at 123-124.
[220] *See* Case C-170/96 *Airport Transit Visa* [1998] ECR I-2763 and Case C-176/03 *Commission v Council* [2005] ECR I-7879, para 39.
[221] Peers 2007, *supra* note 36, at 903.
[222] *Ibid*.
[223] *Ibid*., at 906.
[224] As of August 2007.
[225] Peers 2007, *supra* note 36, at 887.

Another question is of course whether the EU courts have any Third Pillar jurisdiction *besides* that conferred upon them by Article 35 TEU. This issue was first raised before the Court of Justice when Spain brought an annulment action against *Eurojust*, concerning the language requirements relating to the hiring of certain Eurojust staff.[226] The Court commented on Spain's argument concerning effective judicial protection and argued that "the acts contested in this case are not exempt from judicial review". [227] The Court does not clearly state in this judgment whether or not it agrees with the Spanish argument that all EU bodies taking decisions must be subject to judicial review, or even whether it agrees that the Union is "based on the rule of law".[228]

Steve Peers compares the ruling of the Court with the opinion of AG Maduro in the same case. The Court's role to ensure compliance with the law, in accordance with Article 220 EC, applies to the Third Pillar as "[t]he logical implication of a Union based on the rule of law, as referred to in Article 6 EU. In a Union governed by the rule of law, it is essential for measures of Union institutions and bodies to be amenable to review by a Union Court, so long as they are intended to produce legal effects vis-à-vis third parties."[229] But the Opinion recognised that the jurisdictional rules of the Third Pillar remained more limited than in the First Pillar, for "[a]lthough the principles of legality and effective judicial review, upheld in the Community context, also prevail in the context of a Union governed by the rule of law, it does not follow that the rules and arrangements for reviewing legality are identical".[230] In contrast to the judgment, the Advocate General's Opinion far more clearly endorsed the application of the relevant basic principles of the Community legal order to the Third Pillar, and argued expressly for a wide interpretation of the Third Pillar rules on standing and on the potential defendants of Third Pillar actions.[231] In sum, the Court's judgment did not expressly state whether Article 35 TEU must be considered to set out its Third Pillar jurisdiction exhaustively.

Next, in the *Pupino* judgment, the Court of Justice referred expressly to Article 46(b) TEU, which confers Third Pillar jurisdiction upon it, but again without stating whether this provision could be considered exhaustive.[232] The Court also stated in passing that "the jurisdiction of the Court of Justice is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty" and that there is "no complete system of actions and procedures designed to ensure the legality of the acts of the institutions" in the context of the Third Pillar.[233] In the same judgment, the Court also stated at paragraphs 19 and 28 that, due to the reference to the Court's EC

[226] Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.
[227] *Spain v Eurojust*, *supra* note 226, at para 41.
[228] Peers 2007, *supra* note 36, at 889.
[229] *See* Opinion of AG Maduro in *Spain v Eurojust*, *supra* note 226, at para 17.
[230] *Ibid*, para 19.
[231] Peers 2007, *supra* note 36, at 890-891.
[232] *Pupino*, *supra* note 35, at para 19.
[233] *Ibid.*, at para 35.

Treaty jurisdiction in Article 46(b) TEU, "the system under Article 234 EC is capable of being applied to Article 35 TEU, subject to the conditions laid down in Article 35" and the Court has subsequently repeated the general point that Article 234 EC applies in principle to the Third Pillar.[234]

The order and judgment in *Segi* were to shed more light on these questions.[235] An alleged "domestic" terrorist group (based within the EU) brought a damages action to challenge its classification as "terrorist" by the Council, which had chosen the instrument of a Common Position adopted jointly using the EUs Second and Third Pillar powers to this end. The applicants were however subjects to Article 4 of the Common Position only. That article, dealing with police and judicial cooperation in criminal matters within the framework of Title VI of the EU Treaty, has as its only relevant basis Article 34 EU.[236]

In rejecting the claim for damages, the Court of First Instance stated that Article 46 TEU "exhaustively" lists the Courts jurisdiction concerning the EU Treaty, by reference to Article 35 TEU.[237] It then noted that Article 35 TEU provides only for references, dispute settlement and annulment actions,[238] after stating that there is no provision for a "judicial remedy" concerning compensation within the Third Pillar.[239] Furthermore, the CFI stated that Article 46(d) TEU, which gives the EU courts jurisdiction over human rights matters, does not grant any further jurisdiction over Third Pillar issues.[240] Moreover, the Court of First Instance accepted that "probably no effective judicial remedy is available to [the applicants] whether before the Community Courts or national courts", as "it would not be of any use for the applicants to seek to establish the individual liability of each Member State for the national measures enacted pursuant to [the] Common Position" and "seeking to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of the common positions … is likely to be of little effect". Nor could the validity of the Common Position be challenged indirectly via the national courts, with a preliminary reference to the Court of Justice, presumably because, as pointed out above – Article 35(1) does not apply to Common Positions. But the CFI concluded that the "absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU". Here it referred to the *UPA* case in which the Court of Justice, [as pointed out above] refused to widen the traditional definition of standing for

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[234] Case C-467/04, *Gasparini*, [2006] ECR I-9199.
[235] Case C-355/04 P *Segi, Izaga and Galarraga v Council*, [2007] ECR I-1657 and Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647.
[236] Compare the earlier Second Pillar claim for damages resulting from the Community measures linked to the allegedly illegal military action against the former Yugoslavia in respect of Kosovo, T-201/99, *Royal Olympic*, [2000] ECR II-4005.
[237] *Segi* order, supra note 235, at para 35.
[238] *Ibid*, at para 36.
[239] *Ibid*, at para 34.
[240] *Ibid*, at para 37.

individuals to bring annulment actions against EC measures.[241] On the other hand, the CFI claimed that it did have jurisdiction to hear the case to the extent that it involved incursion into the competence of the Community; on this point, it rejected the claim on the merits.[242]

The Court of Justice has now addressed more fully the control of legality of Third Pillar measures in its important judgment dismissing the appeal against the CFI order in *Segi*. To begin with, the Court ruled that the CFI had not erred by refusing to consider Segi's claim for damages within the context of the Third Pillar. In the view of the Court of Justice, the Court's Third Pillar jurisdiction applies, pursuant to Article 46 TEU, "only under the conditions provided for by Article 35 EU",[243] which must be viewed as an apparent confirmation that the Court's Third Pillar powers are exhaustively listed in that provision. The Court then listed the jurisdiction conferred by Article 35,[244] stating that "[i]n contrast, Article 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever".[245] Furthermore, applying the *Spain v Eurojust* judgment by analogy, the Court held that Article 41 TEU does not make Articles 235 or 288(2) EC applicable to the Third Pillar.[246]

Next, the Court addressed the argument concerning the lack of effective judicial protection. It began by admitting that, as regards the EU, the Treaties have "established a system of legal remedies in which", referring to *Pupino*, there is "less extensive" jurisdiction for the Court than the EC Treaty provides for; but the Court did not repeat its earlier statement in *Pupino* that the EU Treaty lacks a complete system to ensure the legality of Third Pillar acts.[247] The Court then explicitly left it to the Member States to take up the question of reforming the system in terms nearly identical to its *UPA* judgment, which solidified the limits on the standing to bring direct actions concerning EC measures:

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[241] Segi, order, *supra* note 235, at para 38, referring to *UPA*, *supra* note 28.
[242] Segi, order, *supra* note 235, at paras 41-47. Subsequently, the Court of First Instance has dismissed two similar annulment challenges to the Second Pillar aspects of Common Positions, on similar grounds. In the *Selmani* order, T-299/04, *Selmani*, [2005] ECR II-20, paras 52-58, the Court of First Instance did not refer to Article 5 TEU, possible challenges before Member States' courts, human rights issues or the Council declaration. In the *OMPI* judgment, T-228/02, *OMPI v Council* [2006] ECR II-4665 the CFI referred again to Article 5 TEU and human rights issues, left open the issue of challenges before national courts and distinguished *UPA*, *supra* note 28, to the extent that that judgment stated that the "EC Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the lawfulness of acts of the institutions." Rather for the Second and the Third Pillar, the EU Treaty has "established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available".
[243] *Segi*, *supra* note 35, at para 44.
[244] *Ibid*, at para 45.
[245] *Ibid*, at para 46.
[246] *Ibid*, at para 47.
[247] *Ibid*, at para 50.

> While a system of legal remedies, in particular a body of rules governing non-contractual liability, other than that established by the treaties can indeed by envisaged, it is for the Member States, should the case arise, to reform the system currently in force in accordance with Article 48 EU.[248]

However, this preceded, in contrast to the *UPA* judgment,[249] a more detailed discussion of the possibilities open to the applicants. The Court stated that, "[a]s is clear from Article 6 TEU, the Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law", so, again paraphrasing *UPA*, "[i]t follows that the institutions are subject to review of their conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union".[250] According to Peers, this is the first unambiguous statement by the Court that the Union is governed by the principle of the rule of law, including the corollary principle of judicial review.[251]

The Court however moved on and stated that Third Pillar Common Positions were not intended to "produce legal effects in relation to third parties".[252] This explains why only framework decisions and decisions may be subject to annulment actions and why the Court's jurisdiction over references for a preliminary ruling does not apply to Common Positions, since the latter jurisdiction applies to "measures adopted by the Council and intended to produce legal effects in relation to third parties".[253] Importantly, the Court then stated that, to guarantee observance of the law in the interpretation and application of the Treaty, the right to refer preliminary rulings to the Court must:

> exist in respect of all measures adopted by the Council, whatever their nature or form, which are *intended* to have legal effects in relation to third parties (referring, *inter alia*, to the *ERTA* judgment).[254]
> [Emphasis added]

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[248] *Ibid*.
[249] *UPA*, *supra* note 28.
[250] *Ibid*, para. 51. The reference to review of the *Member States* is a point in the reasoning of the Court which the *UPA* judgment lacked.
[251] Peers 2007, *supra* note 36, at 895.
[252] *Segi*, *supra* note 35, at para 53. Although Article 34 TEU does not expressly rule out the legal effect of Common Positions upon third parties, it is surely right to rule out such a legal effect as a matter of policy, as it is objectionable in principle that a Third Pillar measure having effects upon individuals could be immune from any prospect of judicial control by the Court of Justice, if only through the limited remedy of the prospect of preliminary ruling on its validity from the courts of barely half of the Member States.
[253] Peers 2007, *supra* note 36, at 895.
[254] *Segi*, *supra* note 35, at para 52, referring to Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263 and Case C-57/95 *France v Commission* [1997] ECR I-1627, paragraph 7 et seq.

Accordingly, a Common Position that goes beyond the bounds of Article 34 TEU because of its content can be reviewed by the Court under the Preliminary ruling procedure. This part ends with the final conclusions:

> Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other *national* measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.[255] [Emphasis added]

This statement, Peers writes, again echoes the *UPA* judgment,[256] except that the latter had also referred to Member States' obligation to "establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection", and explained the obligations concerning national procedural rules as a consequence of the principle of loyal cooperation.[257]

We see here classic ECJ reasoning to circumvent limits to its review power. It relies on the general principle that the EU is founded on the rule of law to provide foundation for judicial review of a Common Position. The nature of a measure is to be judged by its substance, not its form. Hence if a measure bearing the name "common position" produces legal effects in relation to third parties it goes beyond the role assigned for that kind of measure by the EU Treaty and the ECJ can therefore accord it its true classification and give a preliminary ruling.[258] The only reservation that has to be made, is that the Court says that this possibility of having a national court refer a question to the ECJ concerns measures which are *intended* to produces legal effects in relation to third parties. I do hope that this does not mean that the reference possibility exist only when the Council itself has recognised that a measure creates such effects.

The Court's judgment in *Segi* has tried to strike a difficult balance between fidelity to the terms of the Treaties and the wish to find a way to ensure effective and uniform control of the legality of EU acts. Inevitably, there is a conflict between these two objectives in light of the wording of the EU Treaty, and it might not be possible to satisfy booth objectives fully at the same time. To address this conflict, the *Segi* judgment does not take the obvious *Chernobyl* route of expanding the category of applicants,[259] as the Court expressly rules out any EU Court jurisdiction over damages liability within the framework of the Third Pillar, and it also appears to rule out

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[255] *Segi*, *supra* note 35, at para 56.
[256] *UPA*, *supra* note 28, at para 42.
[257] This confirms that the principle of loyal cooperation is binding on the entire framework of Third Pillar cooperation, not just when the Council adopts framework decisions.
[258] Craig & De Burca 2007, *supra* note 11, at 254.
[259] *See European Parliament v Council*, *supra* note 103.

jurisdiction over direct actions for annulment brought by individuals.[260] Nor was it necessary to consider in this case expanding the categories of defendants, as the Court did in *Les Verts*,[261] and evaded doing in *Spain v Eurojust*. Instead, it could be said to take the *ERTA* path of expanding the *categories of acts* which can be challenged *within the existing judicial framework*, coupled with the *UPA* tendency of devolving control over the legality of Third Pillar acts to the national courts. An obvious problem with this approach is that while the *ERTA* judgment had the effect of further strengthening the relatively effective judicial framework of the Community, in the Third Pillar framework not much can be achieved by expanding the categories of acts which can be challenged if the would-be applicants who might wish to benefit from this still lacks the standing to bring direct actions.[262]

As compared to the EC Treaty, the Third Pillar provisions do not offer a choice for individuals between, on the one hand, a relatively effective annulment action (with a corollary jurisdiction under Art 241 EC, and further buttressed by a possible action for damages liability against the EC institutions) and on the other hand, a relatively less satisfactory, and often more difficult,[263] prospect of bringing an indirect action through the national courts with a reference to the Court of Justice to challenge the validity of EC acts. Rather, in the Third Pillar there is *no* express jurisdiction for individuals to bring annulment actions nor a parallel right to bring damages claims, and the ability to bring proceedings via the national courts is obviously curtailed by the inability to obtain preliminary rulings in some half of Member States and the requirement to reach the courts of last instance in another two Member States.[264] An analysis of the case law on legal remedies under the Third Pillar indicates that the legal system established by the Third Pillar cannot sufficiently ensure an effective and uniform application of EU law or an adequate system of judicial control of the legality of EU measures. Such "salvation" can only, if anywhere, by found within the core Community legal order."[265]

It is finally important to notice that the relevant question is whether or not a measure produces binding legal effects in relation to third parties. The ECJ seems ready, also in the context of the EU law, to look to substance and not form. Clearly, it is possible to identify a coherent approach as to the importance of legal effects in relation to third parties. As the *Reynolds* case

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[260] According to Peers 2007, *supra* note 36, at footnote 82 this must follow from the exhaustive nature of Article 35 TEU (para 34 of the judgment, read in combination with paras 35 and 55).
[261] *First Les Verts Case*, *supra* note 20.
[262] Peers 2007, *supra* note 36, at 898.
[263] But according to Peers 2007, at p. 897, it must follow from *UPA* that challenges via this rouse should not be *impossible*. In the Jégo-Quéré appeal, the ECJ effectively concludes that EC measures should always be open to challenge through the national courts without having to contravene them first, even if those measures do not require the adoption of national implementing measures which would be open to challenge as such.
[264] Peers 2007, *supra* note 36, at 897-898.
[265] *Ibid*., at 885.

made clear,[266] also in Community law, it will not be possible to challenge a measure which fails the "legal effects test". It is another question, whether or not this test is too restrictive in it self. But as a principle, it does make sense.

When analysing the system of judicial protection in the Third Pillar, the starting point indeed must be that the intentions of the authors of the EU Treaty were surely that the full extent of the Community legal order would *not* apply. Peers submits, e.g., that the principle of supremacy does not apply to the Third Pillar, and neither does the corollary principle of direct effect or the closely connected obligation to set aside national law in order to apply Community law. If these principles applied to the Third Pillar, the essential distinction between the First and Third Pillar would, in his view, be lost, and the intentions of the Treaty authors would clearly be ignored. Does not this interpretation limit the effectiveness of EU law? Of course. But surely there is a trade-off between effectiveness and sovereignty. The clear indications are that the Member States accepted, at least for the time being that a reduction in the effectiveness of EU law was a price worth paying for increased sovereignty, and the corresponding increased discretion of national governments and increased accountability to and increased powers of national parliaments and courts.[267] Arguably, in the name of the principle of effective judicial protection, there is also a trade-off between the restriction on the powers of the ECJ and that of uniformity of Union law. As I will argue in the subsequent section, national courts might have to seize jurisdiction to hold EU measures invalid as that could be the only way to safeguard the human rights protection of individuals.

4.2 Provisions on a Common Foreign and Security Policy

In contrast to the rather expansive jurisdiction, which the ECJ has construed for itself within the Community Pillar, Article 46 TEU excludes the Provisions on a Common Foreign and Security Policy, the so called Second Pillar, from the jurisdiction of the Court all together.[268] The decision not to grant the Court any powers of judicial review can be ascribed to a number of reasons, according to Garbagnati Ketvel, relating to the sensitive and highly political nature of the field and that CFSP measures tend to be "essentially short-term in character and potentially both wide-ranging and sensitive".[269]

As the CFSP was created to include all areas of foreign and security policy within its scope and the possibility of conflict with parallel parts of

[266] *Reynolds*, *supra* note 130
[267] Peers 2007, *supra* note 36, at 920.
[268] Some of the probable reasons for this jurisdictional exclusion are set out in Eileen Denza, *The Intergovernmental Pillars of the European Union*, Oxford University Press, Oxford 2002, at 311-312.
[269] Garbagnati Ketvel 2006, supra note 274 at 2.

Community external competence must have been clear. In drawing the line between the First and Second Pillars of the Union and determining the proper scope of Community competence, the Court is however effectively exercising its jurisdiction over CFSP for having been adopted under an incorrect legal framework. This occurs whenever adoption under the Community Treaty is prevented and the matter is dealt with in the framework of intergovernmental cooperation. In the *Airport Transit Visas* case, the Court defined its role as being to ensure that acts which fall under the TEU do not encroach upon the powers conferred by the EC Treaty on the Community. The Court ruled that it, in any case, had jurisdiction to review the content of a measure adopted outside the scope of the Community Pillar in order to ascertain whether it affected the powers of the Community and to annul the measure if it appeared that it should have been based on a provision of the EC Treaty instead.[270] The Court then used this power in a subsequent case concerning the possible enforcement of EC environmental law through criminal penalties.[271] In the light of this case law, Garbagnati Ketvel finds it established that it falls within the jurisdiction of the Court, by virtue of the combined provisions of Articles 46(e) and 47 TEU, to ensure that no legal instrument adopted under Title V of the EU Treaty undermines the *acquis communautaire*. As the focus of this thesis is the judicial protection of individuals, these questions will not be further analysed here.

Furthermore, article 46 should not prevent the Court from adjudicating on the provisions of Title V of the EU Treaty indirectly, due to the interaction between the Union and the Community in this field. Foreign policy formulations takes place in the context of the Second Pillar, whereas most of the instruments and assets deployed for the more material conduct of foreign policy are dealt with in the framework of the Community's external policies.[272] If such an indirect review could contribute to the judicial protection of individuals, is however unclear and not very likely.

Turning then to the pressing question on the judicial protection of individuals in regard of CFSP measures, there has indeed been sustained criticism of the lack of judicial control over the law adopted within the CFSP, in particular on account of the likely consequences for individuals. An increasing number of CFSP measures have a legislative or quasi-legislative character and the present limitation of judicial review has been described as "patently insufficient from the perspective of the rule of law".[273] Pursuant to Article 46 TEU, the ECJ thus has virtually no competence over foreign policy and security matters. According to Maria-

[270] Case C-170/96, *Airport Transit Visa*, supra note 220, paras 16-17. Although the case concerned a measure adopted under the provisions of the Third rather than the Second Pillar of the TEU, there is no reason why the interpretation of Article 47 TEU would not be equally applicable to the CFSP, according to Craig & De Burca 2007, *supra* note 11, at 219.
[271] *Airport Transit Visa*, *supra* note 220.
[272] Garbagnati Ketvel 2006, supra note 274 at 3-4.
[273] Piet Eeckhout, *External Relations of the European Union : Legal and Constitutional Foundations*, Oxford University Press, Oxford 2005.

Gisella Garbagnati Ketvel, the absence of judicial control over the exercise of powers by the Union and its Member States in this area of potentially sensitive action does not guarantee the preservation of the institutional balance established by the EU Treaty. It may also prove incompatible for individuals to have a legal remedy in the even of a breach of directly effective CFSP provisions.[274]

The powers enjoyed by the institutions and the Member States in the field of CFSP cannot be exercised in a legal vacuum, particularly when this affects the rights of individuals. The absence of judicial control over the activity of the Union and its Member States pursuant to Title V of the EU Treaty results in the lack of any specific legal mechanisms either for the enforcement of CFSP provisions, or for authoritative interpretation on the status of CFSP provisions in the legal order of the Member States.[275]

Perhaps in a partial response to such critiques, the ECJ has read its jurisdiction somewhat more broadly than the Treaty text suggests. In the *Segi* case,[276] as was discussed in detail in the previous section of this chapter, the ECJ ruled that, despite the text of Article 35(1) EU which does not mention Common Positions among the acts which can form the object of preliminary ruling, the right to make a reference to the court of Justice for a preliminary ruling exists in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. In the case in question, the contested measures had been adopted on a dual legal basis, under both the Second and Third Pillars.[277]

Also, over the last few years, an extensive set of instruments has been adopted in connection with the fight against international terrorism, the most important of which is the freezing of funds of persons, entities and bodies allegedly involved in terrorist acts or in their financing.[278] Some CFSP acts imposing sanctions do not require implementation by means of Community and/or national measures. The difficulties encountered by private parties in this respect can usefully be illustrated by reference to the *Segi* case.[279] In fact, the Union is increasingly adopting instruments which may affect individuals, directly or indirectly.[280] This is most evident in the field of international economic sanctions, according to Garbagnati Ketvel.[281]

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[274] Maria-Gisella Garbagnati Ketvel, "The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy", (2006), 55 ICLQ 77, at 1.
[275] Garbagnati Ketvel 2006, supra note 274 at 20.
[276] *Supra* note 235.
[277] Craig & De Burca 2007, *supra* note 11, at 219-220. *See* by analogy *ERTA*, *supra* note 254, at paras 38 to 42, and Case C-57/95 France v Commission [1997] ECR I1627, paragraph 7 *et seq*.
[278] *See inter alia* Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533 and Case T-315/01 *Kadi* [2005] ECR II-3649.
[279] Garbagnati Ketvel 2006, supra note 274 at 17.
[280] *Ibid*., at 14.
[281] *Ibid*.

In sum, it is clear that the jurisdiction of the ECJ under the Second Pillar, despite that an increasing number of CFSP measures have a legislative or quasi-legislative character, is even more limited than under the Third Pillar. Nevertheless, the principle developed in *Segi*, which seems to enable individuals to seek relief in national court, hoping for a reference for a preliminary ruling, in regard of measures having binding legal effects upon third parties must be considered. Obviously, the same concern about the insufficiency of the reference procedure that has been raised above applies also here.[282] In addition, it seems likely that the Third Pillar's further restrictions as to that procedure apply. As discussed in the section of this chapter dealing with the Third Pillar, the Member States are given the choice what kind of jurisdiction, if any, their courts should have in this regard. It would be very difficult to imagine that the Court would develop a stronger judicial protection in the Second Pillar compared to that of the Third Pillar, since the TEU establishes a clear difference in the role for the ECJ in regard of these pillars.

4.3 Decentralised judicial protection? The role of National Courts

The general story of how national courts have developed into Community courts was told in the corresponding section of the last chapter on EC law.

Here, I will only repeat that the *Foto-Frost* principle, barring national courts from ruling on the validity of Community measures, was build on two different grounds. Under the principle of supremacy, precedence must always be given to Community law over conflicting national law however framed and including national constitutional provisions. In addition, the Court held that national courts, in any case, lacked the jurisdiction to hold a community measure invalid.[283] The Court built its decision *firstly*, on the principle that Community law should be uniformly applied by all national courts, *secondly*, on the coherence of the Community system of judicial protection, and *thirdly*, on the fact that the Court is in the best position to decide on the validity of Community acts.

The pressing question is of course if this principle applies in EU law at all, given the restricted role for the ECJ under the Second and Third Pillars.

It is interesting to compare the judgment in *Segi* with the Opinion of the Advocate General, who essentially argued that while the EU was subject to the principle of effective control of EU measures, such control effectively rested with the national courts, given the lack of jurisdiction of the EU courts over damages actions and the limited jurisdiction over preliminary rulings. He admitted that bringing proceedings through the national courts raised difficult issues relating to the choice of defendant (the Union or the

[282] *See supra*, at 32.
[283] *See supra*, at 39.

Members States), the choice of jurisdiction, the possible immunity of the Union and the choice and content of the applicable law. In general, the judgment and the Opinion reached similar conclusions, except that the Court placed much greater stress on the mechanism of preliminary rulings to ensure the legality of Third Pillar measures, while the Opinion laid greater stress on national courts, and furthermore addressed in detail the issues that national courts would consequently face.[284]

Arguably, it is striking that the Court of Justice in *Segi* did not expressly state whether national courts are able to rule against the validity of EU measures without a reference to the Court of Justice, or whether there should be a distinction in this regard between national courts which can send a reference to the Court of Justice, and those which cannot.[285]

According to Claes, the issue of the competences of the national courts in the context of Title VI is even more critical than in the context of Title IV, given the restricted competences of the Court of Justice. Even if that conclusions could actually be disputed, given the reasoning of the ECJ in the *Segi* judgment,[286] she is right to identify two central issues which arise to answer the question whether national courts have jurisdiction to rule on the validity of EU acts. The first relates to the *effect* of the decisions adopted under the TEU in the national legal order, the second to the possibility of transposing the *Foto-Frost* principle to Title VI.[287]

Again, in my view, however interesting and important, the question about supremacy of EU measures in national legal orders is of less importance here, as the focus of this thesis restricts itself to discuss the possibility of national court's review based on EU standards concerning human rights. The effect of EU measures is however interesting in a different regard, that is if they meet the "legal effects" test, as discussed above.

Claes holds that the *Foto-Frost* principle cannot, as such, apply in the context of the Second Pillar, given the exclusion of the Court of Justice. Since the Court of Justice has no jurisdiction at all in the Second Pillar, that cannot be the ground for excluding the national court's competence. Furthermore, she submits that it is hard to believe that whether or not a national court has the competence to rule on the validity of a decision adopted in the context of Title VI could depend on whether or not its Member State has accepted the jurisdiction of the Court, and in what form.[288] I agree, and would like to argue that the *Foto-Frost* principle should not apply in EU law at all, as far as individuals would otherwise be

[284] Peers 2007, *supra* note 36, at 897.
[285] *Segi*, *supra* note 35.
[286] *Segi*, *supra* note 35. In this case, as described *supra* at 55, the Court established that the right to refer preliminary rulings to the Court must exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties.
[287] Claes 2006, *supra* note 32, at 586.
[288] Claes 2006, *supra* note 32, at 586.

deprived of the right to effective judicial protection, including access to a competent court.

To extend the *Foto-Frost* principle to instruments in EU law would in many cases render them immune for judicial review, since they cannot reach the Court of Justice and the national courts should fill the gap.[289] The Second and Third pillar is at large an area characterised by judicial deference at EU level to political decisions and accordingly, it is submitted that the role for the national courts could be crucial. If they are to be confronted with acts adopted in the context of the intergovernmental pillars, they will largely be on their own. The Court of Justice cannot be seized or asked for judicial assistance.[290]

On the other end, the powers of national courts could be limited from a international public law perspective. If EU law is considered to be simply a form of international law, that would mean that Member State courts could not invalidate EU measures as such due to the principle of *pacta sunt servanda*, but perhaps only refuse to give them effect.[291]

The question discussed in this section can also be understood in the terms of judicial ”Kompetenz Kompetenz”. Claes points out that from the perspective of Community law, the Court of Justice has sole jurisdiction to review the validity of Community law, and thus to hold it invalid for lack of competence following the *Foto-Frost* ruling. She describes the way that national constitutional courts have challenged this position. Even if the *Foto-Frost* principle can be disputed in general, as I do in the chapter on EC law, the situation is different in respect of those areas of non-Community Union law where the Court of Justice has no or only limited jurisdiction to rule on conflicts of competence, since it may not have jurisdiction to review Union acts at all. In those cases, Claes concludes, there is no positive conflict of jurisdictions between courts claiming *Kompetenz Kompetenz*, as the Court of Justice cannot claim *sole* jurisdiction: it has no jurisdiction at all.[292] Hopefully, the relation between the national and EU legal systems could turn out as pluralistic rather than monistic, and interactive rather than hierarchical.[293]

4.4 Strasbourg’s view. The non-ruling in Segi/Gestoras Pro-Amnistía

The possibility that the ECtHR would express its view on whether the system of judicial protection for individuals in EU law is sufficient must

[289] Compare the reasoning by Claes 2006, *supra* note 32, at 591.
[290] Claes 2006, *supra* note 32, at 591.
[291] Eeckhout 2000, *supra* note 189, at 160.
[292] Claes 2006, *supra* note 32, at 709.
[293] Neil MacCormick, *Questioning Sovereignty*, Oxford University Press, Oxford 1999, at 117-121.

start with its ruling, or non-ruling, in the *Segi* case.[294] The background of the case has been presented above, as the order and judgment by the ECJ was discussed.[295] Compared to the outcome in those courts, the application brought by the two Basque associations in question before the European Court of Human Rights was equally unsuccessful.

In the first chapter of this thesis, I have concluded that the fact that the case concerned an EU measure, and not an EC measure, in itself does not seem to provide an obstacle for the ECtHR to evaluate the system of legal protection in EU law.

Segi submitted in particular that the Common Positions at stake directly and personally infringed its rights under the Convention. The Member States had described it as a terrorist organisation and thus, its right to the presumption of innocence had been flouted. Its assets and the use of them were under threat. Its right to freedom of expression had been infringed. Its freedom of action as an association had been directly challenged. Its right to a hearing by a tribunal and its right to a fair trial had been denied. Its right to an effective remedy did not exist. Lastly, it was unable to obtain compensation for the very serious prejudice it had suffered on account of the Common Positions adopted by the member States on 27 December 2001.

Segi consequently asked the Court to find violations by the fifteen States of Article 6, Article 6 § 2 and Articles 10, 11 and 13 of the Convention and Article 1 of Protocol No. 1.

The Strasbourg Court noted that applicants who claim to be the victims of a violation of the European Convention on Human Rights must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally would occur. Given that the Common Position in question was not directly applicable in the Member States, and could not form the direct basis for any criminal or administrative proceedings against individuals, it did not give rise to legally binding obligations for the applicants. Also, because the application was in any event inadmissible, the Court did not consider it necessary to rule on the question whether the applicants had exhausted the remedies which the Community system could offer them.

Accordingly, there are clear similarities between the Luxembourg and Strasbourg judgments in the case. In the ECJ, the measures at stake where not considered to create binding legal effects upon the applicants, and conversely, the ECtHR did not view them as "victims" in the meaning of the Convention.

Thus, so far, the ECtHR has not had the opportunity to address whether the limited access of individuals to the ECJ in the context of EU law is

[294] App. No. 6422/02 and 9916/02, *Segi & Gestoras Pro-Amnistía v The 15 Member States of the European Union*, admissibility decision of the ECtHR of 23 May 2002.
[295] *See supra* at 53.

compatibility with the rights under the Convention. Arguably, the scope of the "presumption of compliance", established in *Bosphorus*, is furthermore limited to the European Community and if so, it remains to be seen whether it could extend to the intergovernmental cooperation conducted by the Member States pursuant to the EU Treaty.[296]

The question, whether Strasbourg would establish a presumption that the Union system provides the necessary "equivalent protection" is hard to answer. It however serves to notice that doubts were raised already when assessing the Community system of legal protection in *Bosphorus*.[297] In any case, the concept of presumed compliance by the Community should not be interpreted as preventing review of whether there was in fact, in the specific circumstances of a case, a breach of the Convention, as there may be exceptional situations where the protection afforded by the Community system may be found to have been manifestly deficient, for example, when there has been, in procedural terms, no adequate review in a particular case, such as when the ECJ lacks jurisdiction.

4.5 The future of remedies in present European Union law

Considering firstly the changes introduced to the area of Police and Judicial Co-operation in Criminal Matters, the Lisbon Treaty establishes that:

> [a] Title IV, with the heading "Area of Freedom, Security and Justice" shall replace the Title IV on visas, asylum, immigration, and other policies related to free movement of persons. Title IV shall contain the following Chapters:
>
> Chapter 1: General provisions
> Chapter 2: Policies on border checks, asylum and immigration
> Chapter 3: Judicial cooperation in civil matters
> Chapter 4: Judicial cooperation in criminal matters
> Chapter 5: Police cooperation.[298]

The impact of the CT on the AFSJ was significant,[299] and the overall approach is preserved in the Lisbon Treaty. Fifteen years after the setting-up of the pillar structure under the Maastricht Treaty, where the area of Justice and Home Affairs was tacked on externally to the European Community, and 10 years after the Treaty of Amsterdam, which made police and judicial cooperation in criminal matters the so-called Third Pillar, the Lisbon Treaty will abolish the pillar structure and finally move these matters to the EC Treaty, or in its renamed version the "Treaty on the functioning of the European Union".

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[296] Garbagnati Ketvel 2006, supra note 274, at 18.
[297] *See supra* at 44.
[298] Lisbon Treaty, *supra* note 5, at 63).
[299] Articles I-42 CT; Articles III-257-277 CT.

The areas covered by Title VI TEU and Title IV EC will be brought together in a new IV and the pre-existing distinction between pillar III and I will thus be abolished as the area is brought into a common institutional framework. Importantly, the ECJ's jurisdiction would extend to all aspects of the AFSJ.

The new Article 240b however confirms that the Court shall continue to lack jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security in connection to the provisions of Chapters 4 and 5 of Title IV of Part Three relation to the area of freedom, security and justice.[300]

Turning to the Common Foreign and Security Policy, the changes to the jurisdiction of the European Court of Justice are more modest. The Lisbon Treaty contains many of the provisions on international relations which would have come into force if the CT hade been ratified, but there are certain notable changes in the approach of the Lisbon Treaty. One is that the provisions governing the CFSP will not be placed together with the other provisions on external relations, but will continue to be dealt with together with under a separate title. Another is that the Foreign Minister will not be given the title "Minister" but will be referred to as a High Representative. These are in part symbolic but also significant changes, according to Craig & De Burca.[301]

Notably, the European Parliament's role in the CFSP is barely altered, and the field was to remain largely outside judicial control. The important exception is that the Court is to be given jurisdiction to review the legality of European decisions providing for *restrictive measures* against natural or legal persons.[302]

Accordingly, the Lisbon Treaty changes Article 11 TEU concerning the CFSP by adding a new first paragraph which, as regards the role of the Court of Justice, established that:

> The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 25b of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 240a of the Treaty on the Functioning of the European Union.

The new Article 240a confirms the general lack of jurisdiction of the Court and reiterates what was stated in Article 11 on Article 25b, but also adds that:

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[300] Lisbon Treaty, *supra* note 5, at 223).
[301] Craig & De Burca 2007, *supra* note 11, at 228.
[302] Article III-376.

> the Court shall have jurisdiction to […] rule on proceedings, brought *in accordance with the conditions laid down in the fourth paragraph of Article 230 of this Treaty*, reviewing the legality of decisions providing for *restrictive measures* against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union. [Emphasis added]

The Court's powers of judicial review, therefore, are not confined to the implementing measures but extend to the initial foreign policy acts. In any event, legal action by individuals will be subject to the restrictive conditions imposed by Article 230(4). It has been argued that once it is accepted that restrictive measures are subject to the jurisdiction of the Court, there is no reason why the review of their legality should be confined to direct action. The possibility of a challenge in preliminary reference proceedings is not expressly provided, but neither is it necessarily excluded.[303]

An unresolved point concerns what the expression "restrictive measures" in Article 240a is to be understood as limited to measures of an economic nature, or whether it covers measures which might affect individuals other than from an economic point of view, such as visa bans. It is submitted, therefore, that individuals may challenge the legality of restrictive measures affecting their rights, irrespective of the object against which such measures are directed.

The Lisbon Treaty reflects the enduring reluctance on the part of the Member States to grant the ECJ any jurisdiction over acts adopted in the field of the CFSP, which epitomize the exercise of their sovereign powers and national prerogatives. This is by no means satisfactory, as legal issues may always arise in connection with the international action of the European Union.[304]

To conclude, clear improvements will be introduces in regard of the present Third Pillar of EU law, whereas the importance of the reforms in regard of the Second Pillar remains much unclear.

[303] Garbagnati Ketvel 2006, *supra* note 274 at 19, referring to Takis Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?", College of Europe Research Paper No 8/2003.
[304] Garbagnati Ketvel 2006, *supra* note 274 at 19-20.

5 Conclusions

Individuals should be perceived of as agents of and participants in EU law and viewed as holders of rights and duties. Sadly, I am left with the impression that the current system for legal protection of individuals, notwithstanding recent developments and clarifications, do not adequately acknowledge this. As emphasised by the Court, the Union is based on the rule of law and neither its Member States nor its Institutions can avoid a review of the question whether the measure adopted by them are in conformity with the basic constitutional Treaties and fundamental human rights. And as this thesis has demonstrated, the right to effective judicial protection is indeed recognised as a fundamental human right and a general principle in EU law.

When assessing the judicial protection in mainstream Community law, Title IV EC and the intergovernmental Second and Third Pillars, I have made the point that the effectiveness of this protection can be questioned, even if the level of protection varies in these different parts of EU law. The judicial protection, as demonstrated, is strongest in Community law, but restricted in its Title IV on Immigration, Asylum and Civil law. Turning to the provisions on Police and Judicial Co-operation in Criminal Matters contained in the Third Pillar, the judicial protection in this second part of Justice and Home Affairs is constrained in a similar way. Finally, I have shown how the judicial protection is even more restricted, almost nonexistent, in regard of the Union's Common Foreign and Security Policy contained in the Second Pillar.

To contest that the system of judicial protection is sufficient, as I do, is of course a normative statement. In the view of the ECJ, there is no gap in the system. If the European Court of Human Rights would agree with that view is an open question. In addition, it remains to be seen what views national courts might adopt.

Both in Community and Union law, the ECJ seems keen to direct individuals to national courts, which are supposed to provide salvation. If they are capable of that, this development can be described as a "decentralisation of judicial protection". Indeed, the Court has ruled, both in *UPA*, concerning Community law, and in *Segi*, concerning Union law, that it is for national courts to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables individuals to challenge the legality or lawfulness of *national* measures implementing EU law. However, the problem regarding so-called "self-executing" regulations in EC law or other EU measures that do not require implementation seem to remain.

In the context of EU law, the ECJ have opened its doors to national courts as it stated in *Segi* that the right to refer preliminary rulings to the Court

must exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. And indeed, throughout this thesis, the "legal effect" aspect has proved crucial for the possibility of judicial review. Even if the individual would otherwise have standing, she can never be successful in challenging a measure which lacks such legal effects. On the other hand, in the light of *Segi*, a measure entailing such effects should not be excluded from judicial review even if it comes in form of a measure which otherwise cannot be reviewed by the ECJ. Also, if the Council adopts a measure which rightly should have been adopted within Community law, the ECJ will claim jurisdiction to reclassify the act and review its legality. Hence, it is clear that the principle of "substance not form", often applied by the ECJ throughout the years, have also been important in later cases concerning the judicial protection of individuals. Finally, it is also clear that "legal effects" could be crucial for the individual to be considered a "victim" in the view of the ECtHR.

In line with the decentralisation of judicial protection, I have argued that the *Foto-Frost* principle, which bars national courts from ruling on the validity of Community measures, has to be reconsidered in Community law and should not be considered applicable to Union law. As pointed out above, the ban on such review stems *firstly*, from the principle of supremacy of Community law, and *secondly*, and independent from the principle of supremacy, from the lack of jurisdiction on the part of the national courts to rule on the validity of Community law on whatever ground. In this paper I have limited myself to discussing the review of EU measures according to human rights standards in EU law, and accordingly, the question about supremacy is here of less importance. As regard the question of jurisdiction, I cannot accept that national courts should be prohibited from protecting the fundamental human rights of EU citizens, when there is no possible way to access the ECJ. The price to be paid is that of the uniform application of EU law, a price well worth paying for guaranteeing that the human rights of individuals are not violated. With an ever-increasing level of decision and law-making at a European level, all these cases could not be heard before the ECJ, but the solution is not to refuse access to justice altogether. Salvation will have to be available at national level, in a decentralised system of judicial protection. Otherwise, there is an apparent risk that *firstly*, the fundamental right to effective judicial protection would be violated and *secondly*, that the material content of such an act could violate any human right. Of course, two evils cannot make one good. And a decentralisation of judicial protection seems natural, as the subsidiarity principle is increasingly emphasised and as the enlargement of the Union continues, adding more and more possible plaintiffs.

In sum, when the individual claiming the illegality of a EU measure cannot access the ECJ directly, or indirectly through a national court, those courts must be able to rule on the validity themselves. And maybe it is even possible to argue that there exists a tension between the *Foto-Frost* principle and the duty on national courts to provide effective judicial review for the

protection of Community rights, including fundamental human rights and general principles?

The Union is not a party to the European Convention of Human Rights or to other European or international instruments for the protection of human rights. In any way, no direct remedies are available before the European Court of Human Rights. In this paper the importance of the ECHR and the ECtHR has instead been the way that the Convention and Strasbourg has influenced Union law and the possibility that the ECtHR could provide impetus which could be the necessary incentive for reform. I have demonstrated how the ECtHR's indirect review of EU measures have become more and more bold over the years, but also concluded that the question, whether the judicial protection for individuals in the EU is really in line with the Convention is hard to answer. In regard of Community law, Strasbourg has established a presumption that this part of the Union provides the necessary "equivalent protection". However, even in the case *Bosphorus*, which established that presumption, doubts were raised when assessing the Community system of legal protection.[305] In any case, the concept of presumed compliance by the Community should not be interpreted as preventing review of whether there was in fact, in the specific circumstances of a case, a breach of the Convention.

In the "non ruling" in *Segi*, the Union escaped an assessment whether this kind of presumption should apply also to its Second and Third Pillar. It is submitted that the ECtHR could very well, in the years to come, find that the judicial protection within the Union is insufficient. Such a finding would prompt reforms, given the "special significance" of the Convention in EU law and in the legal orders of the Member States. Here, I do view the ECtHR as the final arbiter of fundamental human rights on the European continent. The ECJ could either provide standing and access to a greater extent, review the *Foto-Frost* principle or the national courts could seize jurisdiction and challenge the ECJ themselves. Obviously, Member States could also reform the primary law of the Union further.

Arguably, a weak system of judicial protection for individuals can be regarded as, not only part of an alleged *judicial* deficit, but perhaps even a *democratic* deficit. These considerations seem particularly relevant in the context of the European Union as it seeks to become less remote from ordinary people.[306] It is essential to the *legitimacy* of the EC polity that there exists a system of judicial review guaranteeing compliance by Community institutions with general principles of law and fundamental rights recognised within the legal traditions of the Member States.[307] From this perspective,

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[305] *See supra* at 44.
[306] Anthony Arnull, *The European Union and its Court of Justice*, Oxford University Press, Oxford 1999, at 46-47.
[307] Angela Ward, "Futurology of the Judicial System, Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?" in Alan Dashwood & Angus Johnston (eds.), *The Future of the Judicial System of the European Union*, Hart Publishing, Oxford and Portland Oregon 2001, at 38.

locus standi might be seen as an aspect of citizenship. And the possibility for the citizens to challenge measures is perhaps of even greater concern when they are decided without their participation compared to a situation when the political decision-making processes are regarded as inclusive and open to public participation. Furthermore, it is certainly not satisfactory, that along with the progressive transfer of powers to the European Communities, individuals might have lost the guarantees offered by the judicial system set up by the European Convention on Human Rights. Moreover, it is striking that judicial protection of private parties in the EU today may not live up to the requirements expressed by the European Court on Human Rights in that regard and that it appears to be less protective than the judicial system of the Member States. This means that the more Member States transfer sovereign powers to the Communities, the less the guarantees of judicial protection are.

This paper have further argued that the Lisbon Treaty, which is likely to come into force during 2009, will mitigate the legal situation concerning judicial protection within the Union, but that it will not provide any final solution in any way. Some reforms will be introduced, more in regard of the Justice and Home affairs, but also notable in regard of Community law in general and the Union's Common Foreign and Security Policy.

Furthermore, the EU Charter of Fundamental Rights will become legally binding. There is however an uneasy tension between the Charter rights and the standing rules for direct actions, according to Schermers & Waelbroeck. The Charter accords individual rights, yet the application of the standing rules means that a person who claims that his rights have been infringed by Community law would normally not be able to meet the requirements of *individual concern*. There is of course something decidedly odd about the infringement of an individual right not counting as a matter of individual concern.[308]

Finally, the Lisbon Treaty provides for the Union to accede to the ECHR. And indeed, there seems to be no good reason why the EU, in contrast to its Member States which have well-established and sophisticated domestic systems for constitutional human rights protection, should benefit from a presumption of compatibility of its acts with the ECHR, and should escape full scrutiny by the ECtHR.

This thesis has discussed a plethora of different remedies, direct and indirect, independent and dependent, unrestricted and restricted and in relation to the ECJ, national courts or the ECtHR. It could be argued that, from the perspective of the individual seeking effective judicial protection, what's interesting is supposedly not *where* the judicial protection comes from, but rather at *what level* or if it is provided at all. However, as the complexity of the different avenues for seeking relief becomes too high, that in itself becomes a constraint on the judicial protection, even if there indeed

[308] Craig & De Burca 2007, *supra* note 11, at 528.

is a “theoretical possibility” of access to a competent court. It is submitted that the present supposedly complete system of judicial protection in the EU is indeed too complex, that its legal space is not clearly defined and that the Union in this respect hardly can be described as a constitutional order of states.[309]

Constitutionalism beyond the state concerns itself with the relation among various legal levels and the position of the individual in a multilevel legal system. The question how human rights are protected against international organisations that increasingly take on executive powers cannot be thoroughly answered without confronting the constitutionalism-fragmentation debate in international law theory. The scope of this thesis is too limited for such a discussion, but it would indeed be an interesting topic for further research.

[309] It serves to notice that the *Bosphorus* litigation took 11 years in all, with no final favourable result for the applicant. With such growing complexity there may even be a need for a “private international law of human rights”, as Sionaidh Douglas-Scott argues in “A Tale of two Courts; Luxembourg, Strasbourg and the Growing European Human Rights Acquis”, (2006), CML Rev. vol. 43, issue 3, 629, at 663.

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