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## The Right to Effective Judicial Protection in Community Law: Intervention before Community Courts

**Abstract.** The principle of fair administration of justice requires that formal restrictions on initiating procedures before courts correspond to the right to access to a court. Based on the rule of law—Community law shall ensure that its provisions on the administration of justice are in accord with the fundamental law requirements established in Community law. The provisions on intervention before Community courts contain certain restraints on access to a court that are worth scrutinising on a fundamental right basis. The aim of the paper is threefold. First, it wishes to recover the jurisprudence of Community courts interpreting the conditions of intervention. Second, it attempts to reveal the jurisprudence of the Strasbourg and Luxembourg courts on access to justice with respect to formal restrictions. Third, it essays to implement the access to court test on the restraints of access to justice in intervention.

**Keywords:** European Community law, European Convention on Human Rights, fundamental rights, access to justice, right to effective judicial protection, intervention, fair administration of justice

### Introduction

Formal restrictions on initiating procedures before Community courts have always been in the centre of debate in Community law. The *locus standi* conditions of annulment actions under Art. 230 EC attracted much of attention in the past mainly due to the notoriously strict interpretation on the postulate of individual concern anchored by the European Court of Justice. The ever since growing importance of fundamental rights in Community law established a new source of standards not only set against the legal provisions of the Member States but against the Community legal system. It became evident that the Community provisions restricting access to justice cannot avoid the binding criteria of fundamental rights.

The expressed correspondence of the Community system of fundamental rights protection to the law of the European Convention on Human Rights (ECHR) premised that the two separate orders of European human rights'

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protection apply similar elements when determining the limits of a basic right. The in Community law recognised right to effective judicial protection covers the right to a fair trial and the right to an effective remedy as named in the ECHR.

The right to access to a court—developed from the right to a fair trial—provides that according to the principle of fair administration of justice the formal restrictions on the initiation of procedures before a court shall not result in a denial of justice. Furthermore, it requires the restrictions to be supported by a proportionate legitimate interest.

The intervention before a court allows the interveners to support the parties in a pending procedure to attain the form of order sought. This way the interests can be represented before a court without launching a separate action which in some circumstances may be extensively difficult. It follows that the rules governing intervention that establish formal restrictions on applying for a leave to intervene before Community courts shall also correspond to the conditions mounted by the right to access to a court.

### **How is Intervention Regulated in Community Law?**

According to Art. 40 (former 37) of the Statute of the European Court of Justice (Statute) in direct actions<sup>1</sup> before Community courts the Member States and the Community institutions have the right to intervene in any case before the Courts. Any other person may intervene in any case except for cases between the Member States, between the Community institutions or between the Member States and the Community institutions, if the intervener is able to establish an interest in the result of the case.

Art. 93 of the Rules of Procedure of the European Court of Justice<sup>2</sup> provides that either the President of the Court or the Court decides on the application for intervention. The application must be presented after six weeks of the publication of the original procedure in the Official Journal. An application may be accepted after the expiry of the above period, but before the opening of the oral procedure. In appeal the intervention is open until one month after the publication of the appeal in the Official Journal.<sup>3</sup> The intervener shall

<sup>1</sup> The request for a preliminary ruling (Art. 234 EC) can be characterised as an indirect action.

<sup>2</sup> Art. 115 of the Rules of Procedure of the Court of First Instance contains similar provisions.

<sup>3</sup> Art. 123 of the Rules of Procedure of the European Court of Justice.

accept the case as he finds it at the time of his intervention and shall support only one of the parties.<sup>4</sup>

Art. 34 of the Statute of the Court of Justice of the European Coal and Steel Community, however, did not apply the limitation based on the types of actions. It provided that any natural or legal person in any case before the Court may intervene, if the intervener establishes an interest in the result of the case. In addition, it limited the intervention to supporting or requesting the rejection of the submissions of one of the parties.

In preliminary ruling proceedings the possibility of intervention does not exist. However, those who have intervened in the proceedings in the national court may participate in the procedure before the ECJ. This has been clarified by the Court in *Biogen v. Smithkline and Beecham Biologicals*.<sup>5</sup> In this case an application to intervene in a preliminary ruling procedure was found inadmissible as the Court ruled that the right to intervene before the Court only applied “to contentious proceedings before the Court, designed to settle a dispute.”<sup>6</sup> The Court found that the preliminary ruling procedure was not such procedure, as its aim is to ensure the uniform interpretation of Community law by ensuring co-operation between the national courts and the ECJ. The Court then referred to Art. 20 (now 23) of the Statute governing the participation in preliminary ruling cases, which states that “the parties (...) shall be entitled to submit statements of the case or written observations to the Court”. The Court asserted that the term “parties” referred only to the parties in the procedure before the national court. Consequently, a person who has not been granted a leave to intervene before the national court is not entitled to submit observations in the procedure before the Court.

Even though it is not named intervention, Art. 23 of the Statute orders that in cases governed by Art. 234 EC the Member States, the Commission and, where appropriate, the European Parliament, the Council and the European Central Bank are entitled to make written and oral observations of the case to the Court. The last paragraph of the same article provides that in cases with EEA or EFTA relevance non-member states are also allowed to submit written or oral observations of the case to the Court. In spite of the fact that it is clear that this intervention-like procedure is justifiable on functional grounds, so that the uniform interpretation and application of Community law is observed, in case of

<sup>4</sup> Art. 40 of the Statute of the European Court of Justice.

<sup>5</sup> C-181/95, Order of the President of the Court of 26 February 1996, *Biogen Inc. v. Smithkline and Beecham Biologicals SA* [1997] ECR 0357.

<sup>6</sup> Par. 4; the Court also refers to C-6/64 *Costa v. ENEL* [1964] ECR 614 and C-19/68 *De Ciccio v. Landesversicherungsanstalt Schwaben* [1968] ECR 473.

a request for preliminary ruling on validity of Community acts it is questionable that the lawmaker(s) are able to participate in the procedure, the legal subjects of the act in question, however, not. Finally, the legal construction applied in preliminary ruling cases may be controversial in cases of a request for a preliminary ruling on the validity of Community acts, as this question may not be assessed in the procedure in the national court, thus the person having interest in this matter does not apply to intervene before the national court.<sup>7</sup>

### **The Intervention of Private Parties in Direct Actions**

With the exclusion of certain cases private parties may intervene in cases before the Community courts, if they are able to prove sufficient interest in the result of the proceedings. It is for the Community courts to decide upon this question, which produced a large amount of case-law. The analysis of these cases will provide us information to establish the major tendencies on the admissibility of applications for intervention by private parties. The cases in which applications for intervention the most frequently take place, due to the restrictions in Art. 40 of the Statute, are mainly actions for annulments under Art. 230 EC and procedures for interim relief. The disputes cover almost all fields of substantive Community law from staff cases to competition law.

### **How is the Concept of an Interest in the Result of the Case Interpreted by Community Courts?**

An important line of interpretation can be outlined from *Rijnoudt and Hocken*<sup>8</sup> in which a Community official wanted to intervene in an action for annulment of salary statements brought by other officials. The CFI ruled that the concept of an interest in the result of the case must be interpreted as a direct interest in the decision on the claims. The CFI dismissed the application by stating that an official who did not bring an action in relation to his own salary statement,

<sup>7</sup> Schermers, H. and Waelbroeck, M.: *Judicial Protection in the EU*, 6<sup>th</sup> ed, Kluwer, 2001, 724, § 1452.

<sup>8</sup> T-97/92 and T-111/92, *Loek Rijnoudt and Michael Hocken v. Commission* [1994] ECR staff cases.

although he could have done so, can only establish an indirect interest in the result of the case.<sup>9</sup>

The CFI in *Elena Candiotte*<sup>10</sup> went further and declared that

“an interest in the result of the case within the meaning of the second paragraph of Art. 37 of the (...) Statute of the Court of Justice must be understood as a direct, existing interest in the success and failure of the submissions which relate specifically to the measure whose annulment or suspension is sought.”<sup>11</sup>

In this case some members of the institutions’ Staff Committee applied to intervene in support of the applicant who sought the annulment of a decision not admitting a self-employed artist to the second stage of a competition for selecting the works of art to be installed in a new building of a Community institution. The CFI found that these persons lacked direct interest in the outcome of the case, as they were unable to demonstrate any personal interest in the admission of the applicant to the second stage of the competition or to show that their position could be affected by the result of the case.

In *ACAV*<sup>12</sup> the President of the First Chamber of the CFI ordered that the concept of an interest in the result of the case must be understood as a direct and actual interest in the manner in which applications for forms of order are dealt with. In particular, traders established in a Member State have an interest in the outcome of the dispute, in so far as the contested measure prevents them from carrying on part of their activities and affect their income. Moreover, the court concluded that a local or regional body also establishes such interest, if it is able to prove that its economic and social structure essentially depends on the sector affected by the contested measure, and the contested measure could require a conversion plan for the whole area concerned. However, to evade the risk of unemployment and loss of business of traders in the area as a favourable result to obtain is an interest indirect and remote. In order to prove direct and actual interest the local or regional body must show that the economical and social structure as a whole is essentially dependent of that sector of activity.

<sup>9</sup> This ruling was repeated in an order in the very similar C-76/93 P, *Piera Scaramuzza v. Commission* [1993] ECR I-5715 case.

<sup>10</sup> T-108/94, *Elena Candiotte v. Council* [1994] ECR II-0249.

<sup>11</sup> Par. 5.

<sup>12</sup> T-138/98, *ACAV v. Council* [1999] ECR II-1797.

A different approach was introduced in *Compagnie Maritime Belge*<sup>13</sup> in which the CFI held that an interest in the result of the case was established as the contested decision closed the procedure initiated by the Commission following the complaints of a trade association, whose members included the companies applying to intervene. The court supported its argument by stating that these companies participated in the procedure before the Commission by submitting written observations and attending at the hearings. This argument was further affirmed by the CFI in *Eurosport*<sup>14</sup> in which it stated that an undertaking whose complaint caused the proceedings of the Commission to be initiated which was concluded by the contested decision has an interest in the result of the case. In another case<sup>15</sup> the leave to intervene was granted partly on the basis that certain interveners took part in the procedure as complainants, in which the contested decision was adopted.

In *Eurosport* the CFI found another specific situation in which an interest in the outcome of the dispute is established. It declared that an undertaking who was the addressee of the contested decision and, as a result, enjoyed an independent right of action under Art. 230 EC also possessed such interest without the obligation to initiate the action for annulment. This approach was upheld in a later case<sup>16</sup> in which the Court granted a leave intervene to a company which had an independent right to launch an action for annulment against the contested regulation under Art. 230 EC, as the company was of direct and individual concern of the contested measure. The fact, however, that it did not bring a separate action for annulment confined its rights as an intervener to support the forms of order sought by the respondent.

It is also worth analysing the intervention cases under Art. 34 of the Statute of the Court of Justice of the European Coal and Steel Community as it applies the same test of having an interest in the result of the case. In a very early case<sup>17</sup> the Court decided to examine precisely which provision the interveners had an interest in having annulled. The Court concluded that the interveners could only prove their interest in the result of the case in relation to a small segment of the case. This meant that the Court allowed their intervention to support The

<sup>13</sup> T-24/93 R, *Compagnie Maritime Belge Transport NV v. Commission* [1993] ECR II-0543.

<sup>14</sup> T-35/91, *Eurosport Consortium v. Commission* [1991] ECR II-1359.

<sup>15</sup> T-395/94 R, *Atlantic Container Line AB and Others v. Commission* [1995] ECR II-0595.

<sup>16</sup> C-245/95 P, *Commission v. NTN Corporation and Koyo Seiko Co. Ltd.* [1996] ECR I-0553.

<sup>17</sup> C-25/69, *The Netherlands v. High Authority of the ECSC*.

Netherlands to have only a limited part of the contested decision annulled. Furthermore, as a condition for intervention in this case the Court examined whether the interveners were directly affected by the contested decision.

In *Lemmerz-Werke*<sup>18</sup> the Court assessed that the intervener must show a direct and existing interest in the acceptance by the Court of the submissions of one of the parties. The Court rejected the application to intervene because the only interest the intervener claimed was in the success of certain of the applicants arguments. In *British Coal*<sup>19</sup> the CFI held that the intervention of a person showing direct and present interest in the result of the case was admissible. On these grounds it ruled that the company which made the complaint before the Commission was entitled to intervene, since the application sought the annulment of a decision favourable to it. On the other hand a purchaser of coal was not granted a leave to intervene in the action for annulment initiated by a producer of coal of the Commission's refusal to reject the complaint, even though the Commission instituted proceedings against both of them on the basis of the same complaint, however by reason of different infringements of Community law, since the infringements were distinct and did not share the same legal framework. The President of the Court in *National Power*<sup>20</sup> ruled in the following way:

“For the purposes of granting leave to intervene, the Community judicature ascertains whether those seeking it are directly affected by the contested act and whether their interest in the result of the case is established. Similarly, it is necessary to establish a direct, existing interest in the grant by the Court of the order as sought and not an interest in relation to the pleas in law put forward. The interest necessary in this respect must relate not merely to abstract legal arguments but to the actual form of order sought by a party in the main action.”

Just as in case of the action for annulment under Art. 230 EC<sup>21</sup> the Community courts developed a separate interpretation of the admissibility conditions of

<sup>18</sup> C-111/63, *Lemmerz-Werke GmbH v. High Authority of the ECSC*.

<sup>19</sup> T-367/94, *British Coal Corporation v. Commission* [1997] ECR II-0469.

<sup>20</sup> C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc v. British Coal Corp. and Commission* [1997] ECR I-3491.

<sup>21</sup> See cases: C-67/85, C-68/85 and C-70/85, *Van der Kooy v. Commission* par. 21–24 [1988] ECR 219; T-585/93, *Greenpeace v. Commission* par. 59 (and the cited cases) [1995] ECR II-2205; T-122/96, *Federolio v. Commission* [1997] ECR II-1559, T-84/01; T-173/98, *UPA v. Council* par. 47 [1999] ECR II-3357; T-84/01, *ACHE v. European Parliament and Council* par. 25 [2002] ECR II-0099.

intervention for (trade)associations. In the *Kruidvat* case<sup>22</sup> the CFI ruled that the as *FEPD (Fédération Européenne des Parfumeurs Détaillants)* represented a large number of undertakings in the sector. Since its objective was to protect their interests in particular in relation to the institutions of the European Union, it had an interest to intervene in a case in which the operation of selective distribution systems in the field of *de luxe* cosmetics was at stake. In *Atlantic Container*<sup>23</sup> the intervention was found admissible, as it was ascertained that the immediate application of the contested measure was likely, *prima facie*, to affect the activities of the members of the intervening trade associations. The President of the Court in *Pharos*<sup>24</sup> granted a leave to intervene an association comprising of national associations from the animal health industry in Europe and manufacturers of animal health products, since the outcome of the case was of direct concern to the members of this association. In another two cases<sup>25</sup> the intervention of representative associations was dependent on whether their objective was to protect the interest of their members in cases dealing with questions of principle liable to affect their members.

The specific nature of the *AAC* case<sup>26</sup> lies in the fact that the CFI decided upon the intervention on the basis of the termination of the interest in the result of the case. *Casillo Grani* and *Italigrani* were granted a leave to intervene in the procedure. Later, however, the lawyer of *Casillo Grani* submitted a declaration to the CFI that *Casillo Grani* was in liquidation. The CFI ruled that in spite of the fact that *Casillo Grani*'s interest in the case was constituted by the fact that it was in competition with the company in receipt of the aid in question in the proceedings, this interest no longer existed as *Casillo Grani* was in liquidation. Moreover, the CFI added that because of the fact that the aid had not yet been paid to the recipient, the competitive position of *Cassilo Grani* could not have been affected before it was declared to be in liquidation.

<sup>22</sup> T-87/92, *Kruidvat BVBA v. Commission* [1993] ECR II-1375.

<sup>23</sup> *Atlantic Container Line AB and Others v. Commission...* *op. cit.*

<sup>24</sup> C-151/98 P(I), *Pharos SA v. Commission* [1999] ECR I-8157.

<sup>25</sup> Orders in C-151/97 P(I) and C-157/97 P(I), *National Power plc and PowerGen plc v. British Coal Corp. and Commission...* *op. cit.* par. 66 and T-13/99 R *Pfizer Animal Health SA v. Council* par. 15 (not published in ECR).

<sup>26</sup> T-442/93, *Association des Amidonneries de Céréales de la CEE and Others v. Commission* [1995] ECR II-1329.



*Summary*

Generally speaking the Community courts interpret the condition of an interest in the result of the case under Art. 40 of the Statute as a direct and actual (existing, present) interest in the forms of orders sought by one of the parties. The decisions of the courts in this matter are based on the submissions of the prospective interveners and/or on the facts of the case. In certain cases the courts see the interest in the result of the case established, if the administrative procedure preceding the procedure in the court was instrumented on the basis of the complaint of the intervener and/or the intervener took part in the administrative procedure. In (trade)association cases the intervener's aim to protect its members proves to be sufficient to fulfil the condition provided in Art. 40 of the Statute. In case of local or regional bodies such interest is established, if they are able to prove that their economic and social structure essentially depends on the sector affected by the contested measure. One specific case when the interest in the result of the case is established, when the intervener has the right to initiate an independent action for annulment under Art. 230 EC against the contested measure in the main procedure. This may seem to be overtly restrictive, as the courts examine, whether the standing conditions of Art. 230 (4) EC are fulfilled, however, the Community courts only applied this construction, when the intervener's action for annulment would have been found admissible. In some cases the Community courts required the prospective interveners to prove that the contested measure in the main procedure directly affected them. Finally, the power of Community courts to decide upon the admissibility of applications to intervene not only allows them to assign the intervention in support of one of the parties, but they are able to restrict the intervention to certain claims of the supported party on the basis of the interest in the result of the case.

**Are There Cases of Specific Nature?**

The special circumstances in these cases allow to treat them separately from the main line of cases since considerations other than the conditions in the Statute may be discovered to be taken account of. In both *Roquette Frères* and *Maizena*<sup>27</sup> the European Parliament applied to intervene in the cases. The Council argued, however, that the right to intervene was to be equated with the right of action, in particular the initiation of an action for annulment and the

<sup>27</sup> C-138/79, *SA Roquette Frères v. Council* [1980] ECR 3333 and C-139/79, *Maizena GmbH v. Council* [1980] ECR 3393.

submission of observations in a preliminary ruling procedure, which the Parliament lacked. Furthermore, the Council asserted that the Parliament's right to intervene would depend upon the existence of a legal interest. The Court, however, rejected the Council's submissions and stated that such restrictions would adversely affect the institutional position of the Parliament and would be incompatible with Art. 37 (now 40) of the Statute.

The Staff Committee of the European Parliament applied to intervene in the *Lassalle*<sup>28</sup> case on the grounds that the word "person" in Art. 37 (now 40) of the Statute extend the right to intervene to all parties representing an organised focus of legitimate interests. The Court, on the contrary, ruled that there was no reason to believe that the treaty-makers intended to extend the right to intervene to entities lacking legal personality or even its basic aspects. The Court pointed out that the independence, the responsibility and the functions of a body or organ would be decisive in ascertaining its capacity to bring legal proceedings, in particular to intervene in a case.

The intervention is a major instrument in the hands of public interest litigation, however, the restrictions on the type of actions in Art. 40 of the Statute largely limit its elbow-room. Nevertheless, there are numerous examples of public interest litigation in intervention cases. In the *Ford* case<sup>29</sup> the *BEUC* (*Bureau Européen des Unions des Consommateurs*), an international consumer protection organisation incorporated under Belgian law was granted a leave to intervene on grounds that the procedure of the Commission had originated from its complaints. The *BEUC* applied to intervene in a very similar procedure for interim relief in the *Peugeot* case.<sup>30</sup> The *Unione Nazionale Consumatori* applied for a leave to intervene in support of the Commission against the companies allegedly violating the Community competition rules in *Suiker Unie*.<sup>31</sup> In *AM&S*<sup>32</sup> the Consultative Committee of the Bars and Law Societies of the EC applied to intervene in order to support the protection of the right to confidential communication between lawyer and client. The *IPO* (Intellectual Property Owners Association) sought to intervene in the *Magill* case,<sup>33</sup> in which the relationship between intellectual property and competition law was discussed.

<sup>28</sup> C-15/63, *M. Claude Lassalle v. European Parliament* [1963] ECR 115.

<sup>29</sup> C-228 and 229/82, *Ford v. Commission* [1982] ECR 3091.

<sup>30</sup> T-23/90 R, *Peugeot v. Commission* [1990] ECR II-195.

<sup>31</sup> C-40-48/73 and C-50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v. Commission* [1975] ECR 1663.

<sup>32</sup> C-155/79, *AM&S Europe v. Commission* [1982] ECR 1575.

<sup>33</sup> C-241/91 P and 242/91 P, *RTE and ITP v. Commission* [1995] ECR I-0743.

The overtly restrictive nature<sup>34</sup> of the limitation on the types of actions in Art. 40 of the Statute is exposed in a case, in which various Italian car importers applied to intervene in the dispute between the Commission and Italy.<sup>35</sup> Italy was found to be in breach of Community law as it introduced new administrative requirements involving the production of documents necessary for parallel import of vehicles. Since Art. 40 of the Statute excludes the intervention of natural or legal persons in cases between a Member State and a Community institution, the undertakings involved in the imports of vehicles could not represent their presumably direct interest in the case by supporting one of the parties. The approach to this restrictive rule was, however, given a peculiar twist in the *Italy and Sardegna Lines* case.<sup>36</sup> Two actions for annulment were initiated side by side against the Commission on the same basis. In the one case launched by Sardegna Lines the CFI declined its jurisdiction in order to enable the ECJ to hear the claim. The case was registered anew and was joined with the other action instituted by Italy. This meant that Sardegna Lines was able to participate in a dispute between a Member State and a Community Institution, which would have been impossible under Art. 40 of the Statute, if the two actions had not been joined.

### Some Recent Cases on Intervention

In *Pescadores*<sup>37</sup> the CFI ruled that an interest in the result of the case meant a direct and present interest in the decision on the claims. The CFI added that it must ascertain that the intervener is directly affected by the measure and that his interest in the result of the case is certain. It continued that an application to intervene by a local or regional body of a Member State must be dismissed, if it has not been proven that the economic and social structure of that entity depends primarily on the given economic sector. The *Autorità Portuale di Ancona* (APA) applied for a leave to intervene in the case *Coe Clerici*,<sup>38</sup> in which the applicant sought the annulment of a Commission letter refusing to act on the applicant's complaint against the bye-law of governing the carrying on of self-handling

<sup>34</sup> Schermers–Waelbroeck: *Judicial Protection in the EU... op. cit.* 718, § 1443.

<sup>35</sup> C-154/85 R, *Commission v. Italy* [1985] ECR 1753.

<sup>36</sup> C-15/98 and C-105/99, *Italy and Sardegna Lines v. Commission* [2000] ECR I-8855.

<sup>37</sup> T-54/00 R, *Federacion de Cofradías de Pescadores de Guipuzcoa, Federacion de Cofradías de Pescadores de Vizcaya, Federacion de Cofradías de Pescadores de Cantabria and others v. Council* [2000] ECR II-2875.

<sup>38</sup> T-52/00, *Coe Clerici Logistics Spa v. Commission* [2002] ECR II-2553.

operations in the Port of Ancona passed by APA. The CFI ordered that in its capacity as a party, against who the applicant's complaint was addressed, APA has a direct and existing interest in the grant of the order sought. In *Comafrika Dole*<sup>39</sup> the court declared that it is settled case law that the interest in the result of the case must be understood as a direct and existing interest in the grant of the order sought. The CFI ordered that in spite of the fact that the applicant established a certain interest in the result of the case, the application must be dismissed, as the applicant did not prove the existence of a direct and existing interest in the grant of the claims.

In *Poste Italiana*<sup>40</sup> the CFI examined the admissibility of applications to intervene by *Recapitalia Consorzio Italiano delle Agenzie di Recapito Licenziatarie del Ministero delle Comunicazioni* and by the TNT Post Group. With respect to the application of *Recapitalia Consorzio* the CFI ordered that representative associations, whose object is to protect their members in cases raising questions of principle liable to affect those members are allowed to intervene. The CFI also pointed out that the member undertakings of *Recapitalia Consorzio* lodged complaints against Italy in the Commission in connection with the activity of *Poste Italia*. Furthermore, these members of *Recapitalia Consorzio* are able to establish interest in the result of the case, as their functioning depends on the final decision in the main proceedings. Concerning the application by the TNT Post Group the President of the CFI granted a leave to intervene, since the final order in the main procedure would determine whether it could continue its business activity. In addition, the complaint lodged by the TNT Post Group in the Commission also establishes an interest in the result of the case.

The President of the CFI in *IMS Health*<sup>41</sup> decided that the interest in the result of the case of the three interveners was established, as NDC was the complainant in the procedure before the Commission, NDC Health was directly involved in the copyright infringement proceedings brought by IMS Health in Germany and AzyX was not merely IMS Health's only other current competitor on the relevant market, but it was also closely associated with the investigation of the Commission. In the *NFV* case<sup>42</sup> the CFI acknowledged the right of CEF City and CEF Holdings to intervene on the basis of Art. 37 (now 40) of the Statute, as they had lodged a complaint before the Commission and, thereafter, participated in the procedure. Furthermore, the CFI added that the outcome

<sup>39</sup> T-139/01, *Comafrika Dole v. Commission* [2002] ECR II-0799.

<sup>40</sup> T-53/01 R, *Poste Italiana v. Commission* [2001] ECR II-1479.

<sup>41</sup> T-184/01 R, *IMS Health Inc. v. Commission* [2001] ECR II-3193.

<sup>42</sup> T-5/00 R, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission* [2000] ECR 4121.

of the procedure could adversely affect the interests of CEF City and CEF Holdings.

In the PVC cases<sup>43</sup> the Court ruled on a specific aspect of the intervener's interest in the result of the case. In all of these cases *DSM* applied to intervene in support of the applicants who sought the annulment of the judgements of the CFI denying the annulment of the Polypropylene Decision of the Commission.<sup>44</sup> In the mean time, the Court delivered its PVC judgement<sup>45</sup> on an appeal annulling a CFI judgement denying the annulment of the Polypropylene Decision. Following, the Court examined whether its PVC judgement dissolved the interest of *DSM* in the result of all the cases. The Court found that the interest of *DSM* did not die on delivery of the PVC judgement of the Court of Justice and held that the defects found by this judgement were not such as to warrant treating the decision challenged in the PVC cases as non-existent. The PVC judgement did not establish the non-existence of the Polypropylene Decision, and, therefore, it did not bring the interest of *DSM* in obtaining a finding of such non-existence to an end. The Court also asserted in these cases that the fact that the Court, by a previous order, had allowed intervention in support of the form of order sought by a party does not preclude a fresh examination of the admissibility of the intervention.

### *Summary*

These cases highlight that the Community courts interpret the condition of an interest in the result of the case as a direct and present interest. However, they also require the interveners to prove that the contested measure in the main procedure affected them directly. Furthermore, a new element appears in the test: the intervener must establish a certain interest in the result of the case. Moreover, it is stated that an interest in the result of the case is established, if the orders sought could adversely affect the interest or the functioning of the intervener. In other cases the direct and existing interest was also established by interveners, if the administrative procedure preceding the procedure in the court was instrumented on the basis of the complaint of the intervener, and/or the

<sup>43</sup> T-199/92 P, *Hüls AG v. Commission* [1999] ECR II-4287; T-200/92 P, *ICI v. Commission* [1999] ECR II-4399; T-227/92 P, *Hoechst AG v. Commission* [1999] ECR II-4443; T-234/92 P, *Shell v. Commission* [1999] ECR II-4501; T-235/92 P *Montecatini v. Commission* [1999] ECR II-4539; T-242/92 P; T-245/92 P, *Chemie Linz v. Commission* [1999] ECR II-4643.

<sup>44</sup> Commission Decision 86/398/EEC of 23 April 1986, OJ L 230, 18/08/1986, 1–66.

<sup>45</sup> C-137/92 P, *Commission v. BASF and Others* [1994] ECR I-2555.

intervener took part in the administrative procedure, or the intervener was closely associated with the administrative procedure. The application to intervene of a local or regional body is admissible, if their economic and social structure essentially depends on the sector affected by the contested measure. In association cases the protection of members' rights is sufficient to prove to have a leave to intervene granted.

### **The Concept of the Right to Effective Judicial Protection in Community Law**

Procedural rights, such as the right to effective judicial protection, are central to the principle of rule of law,<sup>46</sup> as they ensure the fair administration of justice.<sup>47</sup> Community law is based on the rule of law,<sup>48</sup> thus it ensures that the right to effective judicial protection is observed. Moreover, it is settled case law that fundamental rights form an integral part of the general principles of Community law inspired by the constitutional traditions common to the Member States and by the international treaties on the protection of human rights signed by the Member States.<sup>49</sup> It follows that the right to effective judicial protection is a general principle of Community law.

The principle of effective judicial protection was explicitly established in Community law in cases *Johnston* and *Heylens*.<sup>50</sup> In its *UPA* judgement<sup>51</sup> the Court stated that the

<sup>46</sup> Harlow, C.: *Access to Justice as a Human Right: The European Convent and the European Union*, 188, in Alston, P.: *The EU and Human Rights*, Oxford University Press, 1999.

<sup>47</sup> Jacobs, F.: *The European Convention on Human Rights*. Clarendon Press, Oxford, 1996. 125.

<sup>48</sup> C-294/83, *Les Verts v. European Parliament* par.23 [1986] ECR 1339.

<sup>49</sup> C-29/69, *Stauder v. City of Ulm* [1969] ECR 419; C-11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; C-4/73, *Nold v. Commission* [1974] ECR 491; C-36/75, *Rutili v. Ministre de l'Interieur* [1975] ECR 1219.

<sup>50</sup> C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* par. 18 [1986] ECR 1651; C-222/86, *UNECTEF v. Heylens* [1987] ECR 4097; see also: C-257/85, *C. Dufay v. European Parliament* [1987] ECR 1561; C-314/91, *Weber v. Parliament* [1993] ECR I-0643; C-12/95 P, *TRAMASA v. Commission* [1995] ECR I-0467; C-282/95 P, *Guérin Automobiles v. Commission* [1997] ECR I-1503; T-107/94, *Christina Kik v. Council* [1995] ECR I-1717; C-97/91 *Borelli v. Commission* [1992] ECR I-6313.

<sup>51</sup> C-50/00 P, *UPA v. Council* par. 39 [2002] ECR I-6677.

“right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The CFI in *Jégo-Quéré*<sup>52</sup> concluded that

“access to the courts is one of the essential elements of a community based on the rule of law and is guaranteed in the legal order based on the EC Treaty (...) The Court of Justice bases the right to an effective remedy before a court of competent jurisdiction on the constitutional traditions common to the Member States and on Articles 6 and 13 of the ECHR (...) In addition, the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Art. 47 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000.”

It is evident from the above that the right to effective judicial protection covers the right to a fair trial (hearing) and the right to an effective remedy as mentioned in Art. 6 and 13 ECHR.<sup>53</sup> It is settled in ECHR law that the right to access to a court stems from the right to a fair hearing.<sup>54</sup> The scope of the right to access of a court covers different sets of rules on the administration of justice<sup>55</sup> including the formal restrictions on initiating procedures. It follows that the provisions of Community law on the conditions of intervention before Community courts must also correspond to the right of access to justice.

<sup>52</sup> T-177/01, *Jégo-Quéré v. Commission* par. 41-42 [2002] ECR II-2365.

<sup>53</sup> According to *Picod* the right to a judge involves both the right to access to a judge and the right to effective protection by a judge. Picod, F.: *Le droit au juge en droit communautaire*, 147, in Rideau, J.: *Le droit au juge dans L'Union Européenne*, LGDJ, 1998.

<sup>54</sup> Jacobs: *The European Convention on Human Rights... op. cit.* 126.

<sup>55</sup> Legal aid, the need for formal authorisation to bring proceedings, immunities protecting certain groups, oppressive procedural requirements, practical and financial restrictions, the implementation of rulings; in: www.pili.org, Access to Justice in Central and Eastern Europe: International Standards on Access to Justice: Presentation of Jeremy McBride, University of Birmingham, 2003 by the Public Interest Law Initiative, Columbia University Kht, INTERIGHTS, Bulgarian Helsinki Committee and Polish Helsinki Foundation for Human Rights.

### **The Right of Access to a Court in ECHR Law with Respect to Formal Restrictions on Bringing Procedures**

Notwithstanding the scope of Art. 6(1) ECHR, the interpretation given by the European Court of Human Rights (ECtHR) to the right of access to justice “can supply guidelines which should be followed within the framework of Community law.”<sup>56</sup>

Art. 6(1) declares:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...”

In the fundamental *Golder* case<sup>57</sup> the ECtHR ruled that the principle of the rule of law is hardly conceivable without the possibility of access to courts. It continued that it is one of the universally recognised fundamental principles of law which must be read in the light of the principle of international law forbidding the denial of justice. The ECtHR considered, however, that the right of access to a court is not an absolute right. It stated that this right was set forth in the ECHR without an exact definition, therefore there is room for limitations permitted by implications. Nevertheless, the ECtHR rejected to give a general theory of admissible limitations, which meant that the ECtHR will judge the restrictions on this right on a case-by-case basis.

In *Airey*<sup>58</sup> the ECtHR went further when deciding that the ECHR did not guarantee rights that are theoretical or illusory, but rights that are practical and effective. The ECtHR continued that this particularly applies to the right of access to courts, as the right to a fair trial holds a prominent place in a democratic society.

The court gave a further interpretation on the restriction of the right of access to courts in *Ashingdane*.<sup>59</sup> The ECtHR asserted that the right of access to courts is not an absolute right, thus it may be subject to limitations. These limitations are inherent in this right, as the nature of this right provide the states a certain margin of appreciation to regulate access to courts, which may vary in each state. Nevertheless, the ECtHR concluded that these limitations must not restrict or reduce the access to courts in such way that the essence of the right is

<sup>56</sup> *Nold v. Commission... op. cit.* par. 13.

<sup>57</sup> 4451/70, *Golder v. The United Kingdom*, Series A, No. 18.

<sup>58</sup> 6289/73, *Airey v. Ireland*, Series A, No. 32.

<sup>59</sup> 8225/78, *Ashingdane v. The United Kingdom*, Series A, No. 93.



violated. Moreover, the restrictions can only be upheld, if it pursues a legitimate aim and the principle of proportionality is respected in relation of the aims of the limitation and means applied.

### **The Right to Access to Community Courts in Community Law with Respect to Formal Restrictions on Bringing Procedures**

In *Dufay*<sup>60</sup> a three month deadline for lodging a complaint under Art. 90(2) of the Staff Regulations was contested by the applicant on the basis of the right to a fair trial. The Court decided reflecting to Art. 6 ECHR that the right to a fair trial, which is recognised by the Community legal order, does not prohibit the setting of a time-limit for the institution of legal proceedings.

The CFI in an action for annulment launched by *Christina Kik*<sup>61</sup> ruled that the right to a fair trial protected by Art. 6 ECHR and recognised by the Community judicature in the Community legal order may not be applied in the case, since this right cannot prohibit the application of certain criteria regarding admissibility set for the institution of proceedings. In *Salamander*<sup>62</sup> the CFI decided that an action for annulment shall not be declared admissible because of a lack of adequate judicial protection, since this circumstance, even if proved, could not entitle the CFI to usurp the function of the founding authority of the Community in order to change the legal remedies and procedures established by the Treaty.

Although the *UPA* judgement<sup>63</sup> prejudiced its influence, it is still worth considering the *Jégo-Quéré* judgement<sup>64</sup> of the CFI. The CFI decided that the interpretation of individual concern—the standing condition under Art. 230(4) EC in actions for annulments launched by natural or legal persons—set by the Court in *Plaumann*<sup>65</sup> must be reconsidered on the basis of the right of access to courts and the right to an effective remedy.

In *UPA* the Court following a similar line of argument decided, however, that it is for the Member States to alter the current system of remedies under Art. 48 EU to ensure that the right of access to courts and the right to an

<sup>60</sup> *C. Dufay v. European Parliament...* *op. cit.* par. 10.

<sup>61</sup> *Christina Kik v. Council...* *op. cit.*

<sup>62</sup> T-172/92, T-175/98-177/98, *Salamander AG v. Parliament and Council* [2000] ECR II-2487.

<sup>63</sup> *UPA v. Council...* *op. cit.*

<sup>64</sup> *Jégo-Quéré v. Commission...* *op. cit.*

<sup>65</sup> C-25/62, *Plaumann v. Commission* [1963] ECR 95.

effective remedy is observed in the Community system of remedies. Furthermore, the Court explicitly denied to give a new interpretation to the standing condition of individual concern conforming with the right to effective judicial protection, as such an interpretation cannot have the effect of setting aside the condition set up in the Treaty, without violating the jurisdiction of Community courts.

It should be added that Advocates General in their opinions have continuously expressed that restrictions on bringing cases to the courts shall not result in a denial of justice.<sup>66</sup>

Art. 47 of the Charter of Fundamental Rights of the European Union provides:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Art. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”<sup>67</sup>

The updated explanations relating to the text of the Charter of Fundamental Rights<sup>68</sup> hold that the protection of the right to an effective remedy is more extensive in Union law than in ECHR law since it guarantees this right before a court. Referring to the jurisprudence of the Court<sup>69</sup> the explanations point out that this right not only applies to the institutions of the Union, but of the Member States when implementing Union law. The explanations contend that while Art. 47 covers all rights guaranteed by Union law, it has not been intended to alter the system of judicial review laid down by the Treaties. In connection with the right to a fair hearing the explanations assess that Art. 47 (2) of the Charter correspond to Art. 6(1) of the ECHR. It adds, however, that its scope is not limited to the disputes recorded in the ECHR, which is the consequence of the fact that Union law is based on the principle of rule of law as stated in *Les*

<sup>66</sup> Among others: Opinion of Mr. Advocate General Jacobs in C-50/00 P, *UPA v. Council* [2002] ECR I-6681, in another context: Opinion of Mr. Advocate General Léger in C-224/01, *Köbler v. Austria* nyr.

<sup>67</sup> See also in: Draft Treaty Establishing a Constitution for Europe, Art. II-47.

<sup>68</sup> pg. 41, CONV 828/1/03 REV1, 18/07/2003; the text corresponds to the text in The explanations relating to the text of the Charter of Fundamental Rights of the European Union, Charte 4473/00 Convent 49, 11/20/2000.

<sup>69</sup> *Johnston v. Chief Constable of the Royal Ulster Constabulary...* op. cit., *UNECTEF v. Heylens...* op. cit., *Borelli v. Commission ...* op. cit.

*Verts*.<sup>70</sup> Finally, the explanations provide that except for the limitations on the scope of the right the guarantees in ECHR law apply in a similar way to the Union.

### **Carrying out the Access to Court Test / Conclusions**

On restrictions of the right to access to justice the ECtHR developed a test which provides that the restriction can be upheld, if it does not result in a denial of justice, and, if it is supported by a proportionate legitimate interest. In Community law it is stated that the right to access to a justice may be restricted, however, it shall not constitute a denial of justice. It comes from the general principles of Community law that such restriction is subject to the principle of proportionality which is designed to resolve the conflicts between colliding legitimate interests. Furthermore, reflecting to *Nold*<sup>71</sup> and the Explanations of the Charter of Fundamental Rights the guidelines established in ECHR law should be followed in Community law.

It can be concluded that for scrutinising formal restrictions the Luxembourg and the Strasbourg courts can apply tests that contain very similar elements. It is evident from the above that the correspondence of the two tests is a result of conscious jurisprudence and lawmaking by the Community. Nevertheless, at this point it cannot be concluded that the tests are uniform, since the possible digressions in the application of the tests has not yet been discovered. However, it is not the task of this paper to analyse the possible functional differences, rather it wishes to examine whether the restrictions in question how and with what possible results can be brought under this basic right analysis.

Considering the restriction on the type of actions in which the intervention of any other person than the Member States and the Community institutions is permitted, its justification on the basis of the right of access to courts is highly questionable. Even though its international public law origin is evident,<sup>72</sup> this provision shall not be excluded from the requirement of the fair administration of justice based on fundamental rights.

It follows from ECHR law that it is determined on a case-by-case basis whether the rules on the administration of justice are in conformity with the right to access to a court. Therefore, below it will be considered in the first

<sup>70</sup> *Les Verts v. European Parliament...* *op. cit.*

<sup>71</sup> *Nold v. Commission...* *op. cit.*

<sup>72</sup> Harlow, C.: *Access to Justice as a Human Right*, 193, in Alston: *The EU and Human Rights...* *op. cit.*

place, whether it is possible to put the rules on intervention in the Statute to a test, in which its compatibility with fundamental rights may be scrutinised.

The Statute of the Court of Justice is a protocol annexed to the Treaties at Nice, which, under Art. 311 EC, is an integral part of the Treaty establishing the European Community, if adopted by a common accord of the Member States. It is evident from Art. 230 EC and Art. 234 EC—both designed to provide jurisdiction to the Community courts to review the legality of Community acts, that the founding treaties are not covered by them, thus the test based on fundamental rights could not be executed. On the other hand, it is a paradox situation that the review of a Council decision amending the Statute is possible under the same Treaty provisions. It follows that in Community law the genuine method of reviewing the restriction established in the Statute is in the hand of the Member States as political actors defining the framework of Community law.

Under Art. 1 of the ECHR the contracting states are responsible for all acts and omissions of their domestic organs allegedly violating the ECHR regardless of whether the act or omission in question is a consequence of domestic law or the obligations to comply with international obligations.<sup>73</sup> In the referred case the Commission on Human Rights dismissed the application, as it was basically concerned the autonomous functioning of the Community, although based on the act of the representatives of the Member States. The problem of intervention, however, is more of a question of the legal framework, in which the Community autonomously functions, since the statute is a protocol annexed to the founding treaties adopted by a common accord of the Member States. It can be assumed that the act of the Member States creating the legal framework of the Community is related to the Member States as international actors more closely than an act of the Council, in which the Member States act on behalf of the Community. It follows that the act of the Member States adopting the Protocol of the Statute of the Court of Justice should be such act which they are responsible for under Art. 1 of the ECHR, thus it should be covered by the jurisdiction of the ECtHR.

It is established in ECHR law and in Community law that formal restrictions on access to courts may be applicable, however they may not result in a denial of justice. Such restriction can be upheld on the basis of a legitimate aim which fulfils the requirements established by the principle of proportionality. The restriction of the type of action in which natural or legal persons may intervene does not seem to establish a *déni de justice*, since the system of remedies in Community law offers other ways of judicial protection. It is relatively more difficult to bring forward a proportionate legitimate interest supporting the

<sup>73</sup> 13258/87, *Melcher v. Germany*, 64 D&R 138.

restriction. Since Community law established a complete system of remedies governed by uniform principles, a restriction based on the separation of remedies is far from justifiable. Moreover, considering the interpretation of the principle of proportionality in Community law<sup>74</sup> an absolute ban on the applications on intervention in certain cases does not seem to satisfy the rather chiselled approach established by Community courts.

The requirement of an interest in the result of the case is another provision restricting the access of interveners to Community courts, therefore it shall also be scrutinised under the uniform test based on fundamental rights derived from ECHR law and Community law. It is clear that it does not call forth a denial of justice, since within the complete system of remedies established in Community law other means of judicial protection are provided. A legitimate interest underpinning the restriction may also be discovered, as the effectiveness of judicial protection requires the judiciary to function focusing on the essential and relevant matters in a case. The proportionality of the restriction may, however, be questioned on certain grounds.

First, it is difficult to establish a single line of interpretation concerning the interest in the result of the case—as it is highlighted above, since the applications to intervene differ in a large extent. Furthermore, in the basic line of cases the Community courts apply various elements in their interpretation, even though the basic condition of a direct and present interest in the result of the case can easily be revealed. The scarcely appearing requirement of a certain interest in the result of the case further stiffens the conditions of admissibility. Lastly, the here and there established postulate of being directly affected by the contested measure indicates that the Community courts have the opportunity to strangle the access of prospective interveners to courts. It follows that the suitability of the restrictive condition in question is dubious, since a single line of interpretative elements is difficult to allocate even in the main stream of cases. Moreover, the diversity of the conditions of an interest in the result of the case shall also be reconsidered in the light of the principle of legal certainty, however, it is true that in most case the courts apply the condition of a direct and present interest.

<sup>74</sup> Eg.: C-114/76, *Bela-Mühle v. Grows Farm* [1977] ECR 1211; C-44/79, *Hauer v. Rheinland-Pfalz* [1979] ECR 3727; C-181/84, *R. v. Intervention Board* [1985] ECR 2889; C-331/88, *R. v. Minister for Agriculture, Fisheries and Food ex parte FEDESA* [1990] ECR 4023; C-36/75, *Rutili v. Ministre de l'Intérieur* [1975] ECR 1219; C-33/74, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; C-41/74, *Van Duyn v. Home Office* [1974] ECR 1337; C-34/79, *R. v. Henn and Darby* [1979] ECR 3795.

In the light of the fact that in certain cases<sup>75</sup> it is rather facile to establish an interest in the result of the case, the overtly restrictive approach towards regional and local bodies which are required to prove that their economic and social structure essentially depends on the sector affected by the contested measure seems a bit out of context. Furthermore, considering that associations, notwithstanding their size and significance, are granted a leave to intervene in order to protect their members, it is difficult to appraise the fact that local or regional bodies are only able to intervene to protect the undertakings operating in their territory, if they are able to prove that they entirely and essentially depend on that given sector. It follows that it is worth reconsidering whether less restrictive means are disposable to decide upon the existence of an interest in the result of the case.

Lastly, it is necessary to examine whether it is possible to submit the judicial interpretation of the condition of an interest in the result of the case to the similar access to court tests established in ECHR law and in Community law. It is clear from case law that the Court of Justice considers its interpretation on a condition and the condition itself as a unit, whose legality under basic rights can only be challenged, if the condition established in a Community measure can be subject to a scrutiny.<sup>76</sup> Despite the fact that other opinions<sup>77</sup> support the detachment of the interpretation from the condition itself, therefore allowing a possible self-review of judicial interpretation, it is clear that in order to create a new line of interpretation of an interest in the result of the case, the condition itself provided in the Statute must be challenged. Furthermore, even in ECHR law it is not ascertained whether the fundamental rights based analysis of national law covers the scrutiny of judge-made law—the judicial interpretation of admissibility conditions established in positive law.<sup>78</sup> It follows that on this matter the above explained apply.

<sup>75</sup> Eg.: the administrative procedure preceding the procedure before the court was instrumented on the basis of the complaint of the intervener, the intervener took part in the administrative procedure, the intervener was closely associated with the administrative procedure.

<sup>76</sup> *UPA v. Council... op. cit.*

<sup>77</sup> *Opinion of Mr. Advocate General Jacobs in UPA... op. cit., Jégo-Quéré v. Commission... op. cit.*

<sup>78</sup> Hickman, Tom R.: *The "uncertain shadow": Throwing Light on the Right to a Court under Art. 6(1) ECHR*, 132, Public Law 2004 Spring.