



<b>Judicial Review of the Management of Assistance provided by the European Social Fund for the promotion of Employment</b>
<b>Dimitrios V. Skiadas</b>
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<b>Abstract</b>
This article considers the matters arising during the judicial review of the management of the assistance provided through the European Social Fund for the promotion of employment. Issues such as the direct actions for annulment, the actions for failure to act, the enforcement actions, the preliminary rulings and the actions for damages are examined in detail. The analysis focuses on topics like the identity of the reviewable acts, the standing of the applicants, the grounds of review, etc.
<b>Kurzfassung</b>
Dieser Artikel erörtert Fragen, die sich während der juristischen Überprüfung der Handhabung der Unterstützungsleistung des Europäischen Sozialfonds zur Förderung der Beschäftigung ergeben. Im Detail untersucht werden die direkten Nichtigkeitserklagen, die Klagen bei Unterlassung von Handlungen, Durchsetzungsklagen, die Vorabentscheidungen und die Schadensersatzklagen. Die Analyse konzentriert sich auf Themen wie die Identität der nachprüfbaren Rechtsakte, die Stellung der Beitrittskandidaten, die Überprüfungskriterien etc.
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## 1 Introduction

Many dispositions of the EC Treaty demonstrate the European Union's interest in promoting employment. Perhaps the most fundamental is Art 2 according to which the Community has to promote, *inter alia*, a high level of employment and of social protection. This provision was added by the EU Treaty to the very first chapter of the EC Treaty. It therefore constitutes a basic principle of Community action. From its wording, the Community is clearly obliged to promote employment and social protection.

The promotion of employment by the Community is performed at two levels. First, there is the development of a legislative framework (including both primary and secondary Community legislation) regarding many aspects of social policy and employment, and thus creating "European Social Law", "European Employment Law" and "European Labour Law". Second, there is the development of the so called "flanking policies" (E. Szyszczak, 2000, p. 159), meaning the use of structural instruments (among them the European Social Fund) in order to reorientate and restructure the Member States' economies and thus fulfil the objectives mentioned in Art. 3 EC Treaty. In this latter case, the relevant measures encourage through financing certain sort of activities over others thus operating as an indirect method of regulating matters of employment. This is a delicate issue.

The Union must respect the Member States' competence regarding employment (See Art. 127 of the EC Treaty). The Member States and the Community (after Amsterdam) now have joint competence to develop an employment strategy (See Art. 125 of the EC Treaty). Nevertheless, it is still argued that all social policy issues, including employment, remain principally within the competence of the Member States (T. Hervey, 1998, p. 4), so all European initiatives and activities in that area are seen as supplementary to the Member States' national social policies (P. Tsakloglou, 1996, p. 211). It has been noted that the Commission uses the programmes financed by the Structural Funds in order to claim an interest in the field of employment, although it has no formal competence (T. Hervey, op. cit., p. 52).

For the past 40 years, especially the two last decades, the European Social Fund (ESF) has been the European Union's main source of finance to help people to help themselves (European Commission, 1998). The relevant resources are currently managed according to Council Regulation 99/1260/EC laying down general provisions concerning the Structural Funds (OJ 1999, L 161/1) and Council Regulation 99/1784/EC concerning the European Social Fund (OJ 1999, L 213/5). Since this management is described in legislative provisions, it can be reviewed judicially. The legality of action of the European institutions is very significant and the financial propriety, legitimacy and accountability in the allocation of resources must be safeguarded (T. Hervey, op. cit., p. 39). The competent institutions for the judicial review at Community level are the European Court of Justice (ECJ) and the Court of First Instance (CFI). The legal basis for judicial review consists mainly of Articles 230 and 232 EC Treaty. Reference will also be made to Articles 226, 234 and 288 EC Treaty. The latter Articles can be applied in order to provide solutions to problems identified in the management of ESF resources. Their function is supplementary to the main provisions on judicial review. Consequently, below, the following aspects are examined: direct actions for annulment, actions for failure to act, enforcement actions, preliminary rulings and actions for damages.

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## 2 Direct Actions for annulment <sup>↑</sup>

In analyzing such actions with regard to the management of ESF resources, several issues can be identified. One involves the question of whether the Commission or another body has adopted the contested act. Another concerns the reviewability of acts in the context of ESF management procedures. A major issue is the *locus standi* of regional/local authorities and the recipients (natural and legal persons) of structural assistance to bring an action for annulment before the ECJ. Some interesting matters also arise concerning the grounds of annulment. Finally, the time limits for bringing an action for annulment can be confusing, given the complexity of procedures about the management of ESF resources. The relevant provisions are included in Art. 230 EC Treaty.

### 2.1 Reviewable Acts <sup>↑</sup>

According to Art. 230(1) EC Treaty:

*“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 European Central Bank, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.”*

The legislation regarding the ESF provides for the Commission to adopt the relevant legislative acts. Originally, the ECJ and the CFI confirmed that only the Commission assumed (vis-à-vis the recipient) legal responsibility for approving, suspending, reducing, or withdrawing ESF assistance

(C-32/95, *Commission of the European Communities v. Lisrestal-OrganizaçãO GestãO de Restaurantes Colectivos Lda and Others*, [1996] ECR I-5373 at I-5397 para 29; T-271/94, *Eugenio Branco Lda v. Commission of the European Communities*, [1996] ECR II-749 at II-763 para 39; T-151/95, *Instituto Europeu de FormaçãO Profissional Lda (INEF) v. Commission of the European Communities*, [1997] ECR II-1541 at II-1553 para 36). National authorities cooperated with the Commission but were not responsible for any final decision regarding the management of ESF resources. It was noted that the procedure established by those Regulations created a financial relationship between the Commission and the Member State authorities on the one hand and between those authorities and the recipient of the financial assistance on the other (C-310/81, *Ente Italiano di Servizio Sociale (EISS) v. Commission of the European Communities*, [1984] ECR 1341 at 1353 para 15). It is interesting to consider whether this two-level relationship is still maintained under the provisions currently regulating the ESF, especially considering that one of the most important principles of the standing provisions is the partnership between the Commission and national authorities in ESF programmes.<sup>(1)</sup> It could be argued that the national authorities now share the responsibility for all final decisions with the Commission. This does not seem convincing. It is true that, under the current provisions, the role of the national authorities is very important. They participate greatly in drawing, negotiating, implementing, monitoring and evaluating the structural operations funded by the ESF. The responsibility, however, for producing a legally binding act regarding the approval, reduction, withdrawal or suspension of ESF assistance lies exclusively with the Commission.

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However, the situation is less clear with regard to projects financed within the framework of the operational programmes of a Community Support Framework. More specifically, the Member States submit draft operational programmes to the Commission, which is competent to approve them. These drafts do not contain specific information on particular projects to be financed within the operational programmes' scope, therefore the Commission's approval of the programme as a whole does not necessarily imply specific approval of its constituent parts (J. Scott, 1999, p. 633). Consequently it remains uncertain who actually approves the projects included in operational projects. The solution to this problem can be found in examining the role of the Monitoring Committees responsible for the supervision of the programmes' implementation. It is true that the current provisions (Articles 35(3) and 15(6) of Council Regulation 99/1260/EC), the Monitoring Committees must approve the complement programmes containing all the details of the measures to be implemented within the scope of the operational programmes. These complement programmes must be submitted to the Commission for information purposes. Consequently, these documents determine the exact content of the measures to be implemented under the operational programmes. This is actually a form of project selection. It is therefore concluded that the authority selecting the projects to be financed under the operational programmes is the relevant Monitoring Committee. Since this Committee operates within the legal, institutional and financial framework of a Member State and the Commission participates only in an advisory capacity, any judicial action against the Committee's decisions falls within the jurisdiction of the national courts. It is true that, in practice (J. Scott, 1999, p. 635), the Commission officials attending the Monitoring Committee do not simply adopt an advisory role, even declaring projects ineligible. If, despite this, a project is approved, the Commission's official states his/her objection to including the project within the programme's expenditure. This type of participation by the Commission, although understandable given its task to implement the budget under Art. 274 EC Treaty, does not alter the nature of the decision adopted by the Monitoring Committee. Furthermore, such behaviour or the absence thereof, on the Commission's part, cannot constitute a reviewable act. However, it has been suggested (J. Scott, op. cit., p. 636), that the Commission's behaviour can be reviewed judicially.

Nevertheless, these proceedings must be distinguished from the actual procedure of authorizing

structural expenditure, as is described in the Financial Regulation. Authorizing structural expenditure entails a decisive authority since the Authorizing Officer (with regard to the ESF, this officer is the Director-General for Employment and Social Affairs) first examines all the relevant information, afterwards adopts the decision to authorise the expenditure and then asks the Accounting Officer to pay the sums involved. Such decisions obviously produce legal effects and it has been correctly contended that they can be reviewed judicially ((J. Scott, op. cit., p. 637).

If Art. 230(1) EC Treaty is read in combination with Art. 249 EC Treaty, it is clear that the ECJ can review regulations, decisions and directives, including of course those concerning the ESF. However the criterion of review is not the form of an act but its substance. The ECJ has accepted that reviewable acts have binding force or produce legal effect, whatever their form (C-22/70, *Commission of the European Communities v. Council of the European Communities*, [1971] ECR 263 paras 48-55). A simple letter (Joined Cases C-8/66, C-9/66, C-10/66, C-11/66, *Cimenteries CBR Cementsbedrijven NV v. Commission of the European Communities*, [1967] ECR 75), a communication (C-57/95, *France v. Commission of the European Communities*, [1997] ECR I-1627) and even a press release (C-106/96, *United Kingdom v. Commission of the European Communities (re Poverty 4)*, [1998] ECR I-2729) from the Commission, has been held to be reviewable because of its contents.

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An interesting issue has arisen recently, regarding the internal guidelines adopted by the Commission concerning the net financial corrections in the context of the application of Art. 24 of Council Regulation 88/2052/EEC as amended by Council Regulation 93/2081/EEC. According to this provision the Commission may suspend or reduce the assistance granted to an operation if irregularities are found in that operation. The internal guidelines provide for the procedures within the Commission regarding the sums involved in such cases and in cases when the Member States violate their obligations under Art. 23(1) Council Regulation 88/2052/EEC as amended. These guidelines were challenged for lack of legal basis. The ECJ, however, ruled that they have effects only within the Commission, do not create rights or obligations of third parties, and consequently cannot be considered to produce legal effects, therefore they cannot be reviewed judicially.<sup>(2)</sup> The problem of the obligatory or advisory nature of internal guidelines regarding the Structural Funds and the management of the relevant resources has also been examined by the European Parliament. It was found that such ambiguity is useful as the threat of sanctions is necessary in order to oblige the Member States to treat the policy priorities of the Union more seriously (European Parliament, A4-0214/98, p. 9). The legal services of the Parliament declared such guidelines legally binding but it has been noted that they would be more effective as advisory instruments or guiding principles whose force would lie in their relevance and applicability to the practitioners who seek to implement them (European Parliament, A4-0214/98, p. 9). Nevertheless, the Parliament regarded these guidelines as instruments designed to penalize irregularities attributable to the breach of the Member States' obligations under Art. 23 of Regulation 88/4253/EEC (European Parliament, A4-0230/97, p. 9). In light of this analysis, it seems that these guidelines produce more legal effects vis-à-vis the Member States than the ECJ acknowledged in its aforementioned ruling.

It has also been found that the reports and relevant recommendations adopted by the Union's anti-fraud bodies (previously UCLAF, now OLAF) after an inquiry on the management of Structural Funds' resources, are not reviewable acts because they do not directly affect the legal position of the (natural or legal) persons concerned. These reports notify the national authorities of any irregularities or frauds detected and suggest follow-up action but it is the duty of the national authorities to actually take action, i.e. judicial proceedings, recovery action, etc (T-492/93, *Nutral SpA v. Commission of the European Communities*, [1993] ECR II-1023 at II-1033, II-1034, paras 26-29, C-476/93 P, *Nutral SpA v. Commission of the European Communities*, [1995] ECR I-4125 at I-4146, I-



4147, paras 30-31).

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In the area of the ESF the matter of reviewable acts has arisen several times. The normal practice under all Regulations so far regarding the ESF, was the following: the Commission issued a decision and sent a letter about this to the competent national authority, usually but not always enclosing the actual decision. The national authorities either wrote to the recipients of ESF assistance, informing them of the Commission's decision, or more rarely, forwarded the letter of the Commission and the decision itself. Consequently most recipients of ESF assistance did not receive the actual Commission decision but a letter from a national authority informing them of it. The difficulty in challenging a decision under these circumstances is obvious. The ECJ, however, stated that if the informing letter did not provide sufficient information (e.g. the date and content of the decision), the applicants seeking the decision's annulment could not be criticized for not providing in support of their application more extensive particulars concerning the contested decision (C-157/90, *Infortec-Projectos e Consultadoria Lda v. Commission of the European Community*, [1992] ECR I-3525, at I-3553 para 14). Of course, in order to challenge a decision, it is necessary for one to exist. If the applicants cannot furnish any evidence (not even a letter) of the existence of a decision, their action for annulment will be inadmissible (C-130/91, *ISAE/VP (Instituto Social de Apoio ao Emprego e à Valorização Profissional) and Interdata (Centro de Processamento de Dados Lda) v. Commission of the European Communities*, [1992] ECR I-69, at I-73 para 11). The existence in law of a decision regarding the ESF is to be determined having regard to its tenor and effects. Decisions concerning ESF assistance may be notified by an ordinary letter from the Directorate General for Employment and Social Affairs (T-446/93, *Frinil v. Commission of European Communities*, not published in the ECR, paras 29 and 32; Joined cases T-432/93, T-433/93 and T-434/93, *Socurte-Sociedade de Curtumes a Sul do Tejo, Lda and Others v. Commission of the European Communities*, [1995] ECR II-503 at II-519, II-520 para 47). The fact that the decision is formally embodied only in the documents by which it is notified (usually letters) does not call into question its existence in law (Joined cases T-432/93, T-433/93 and T-434/93, *op. cit.*, p. II-520 para 47).

It has also been noted that, for a measure to amount to a decision, those to whom it is addressed must be able to recognize clearly that they are dealing with such a measure (C-271/94, *op. cit.*, p. II-764 para 15). For example, the recovery orders issued by the Commission purport to be measures definitively reducing ESF assistance and requiring the recipient to reimburse part of the advance paid. Such orders affect the recipient's legal position and thus constitute decisions that can be challenged under Art. 230 (C-199/91, *Foyer Culturel du Sart-Tilman ASBL v. Commission of the European Communities*, [1993] ECR I-2667 at I-2694 para 21; T-151/95, *op. cit.*, p. II-1554 para 39). The fact that such a decision may be communicated to the recipient of the assistance directly by the Commission instead of the competent national authority, does not affect its legal nature (C-199/91, *op. cit.*, p. I-2694 para 22). Similar recovery decisions can be issued by the competent national authorities regarding national contributions to the structural operations. Such decisions are not attributable to the Commission and it is for the competent national court, not the ECJ, to review the validity of such national measures implementing Community acts relating to ESF assistance (C-271/94, *op. cit.*, p. II-766 para 53).

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A final issue concerns the replacement of one Commission decision with another. This is not rare in the area of ESF assistance, since after the adoption of the first decision the national authorities or recipients of the assistance may submit remarks to the Commission that will make it change the

original decision. If the original decision has been challenged and but then repealed by a further decision, the action against the original decision becomes devoid of purpose and the ECJ does not have to adjudicate on the relevant application (T-145/95, *Proderec-Formação e Desenvolvimento de Recursos Humanos ACE v. Commission of the European Communities*, [1997] ECR II-823 at 832 para 27).

## 2.2 Locus Standi

Another problem concerning judicial review within the European Union involves the question of who may bring an action against a reviewable act. According to Art. 230 there are three categories of possible applicants.

The first category includes the Member States, the Council and the Commission, which can challenge any reviewable act. For this reason they are called “privileged applicants” (See P. Craig-G. De Burca, 1998, p. 457, J. Steiner, -L. Woods, 1998, p. 457, W. Cairns, 1998, p. 110, A. Arnulf, 1995, p. 13). With regard to Member States, the ECJ has accepted that these may have “legitimate expectations” regarding the grant of assistance by the ESF, which expectations can be enforced judicially (C-84/85, *United Kingdom v. Commission of the European Communities (re Aid for part-time work)*, [1987] ECR 3765 at 3798 paras 25-27). Moreover, the ECJ has held that since a Member State contributes to the Community Budget, it can rely on the damage which would arise from expenditure being incurred contrary to the rules regarding the financial management of the Union and its institutions (Joined Cases C-239/96, C-240/96, *United Kingdom v. Commission of the European Communities (re Measures to combat poverty and social exclusion)*, [1996] ECR I-4475 at I-4492 para 66). An interesting question is whether regional or local authorities, which are often involved in the implementation of Structural operations and the management of ESF assistance, are also entitled to challenge any reviewable act. Initially, the ECJ accepted, indirectly (C-222/83, *Municipality of Differdange and Others v. Commission of the European Communities*, [1984] ECR 2889), that regional and local authorities could bring actions only under Art. 230(4) (see below). On another occasion it stated that since the admissibility of an application of a regional or local authority was not contested, there were no grounds for examining it on its own initiative (Joined Cases C-62/87 and C-72/87, *Exécutif régional Wallon and SA Glaverbel v. Commission of the European Communities*, [1988] ECR 1573 at 1592 para 8). More recently, however, the ECJ stated clearly that simply because it did not consider it necessary to examine the admissibility of an action brought by a regional or local authority did not imply acknowledgement that such an action was brought by a legal entity equivalent to a Member State (C-95/97, *Région Wallone v. Commission of the European Communities*, [1997] ECR I-1787 at I-1791 para 5). It also stated that the term “Member State” in Art. 230(2) refers only to government authorities and cannot include regional or local authorities, irrespective of the powers they may have (C-95/97, *op. cit.*, I-1791 para 6). Therefore it must be accepted that regional and local authorities may challenge acts only under Art. 230(4), without enjoying privileged applicant status (E. Besila Vika-D. Papagiannis, 1996, p. 95-96). It has been noted that while regional authorities have a vital role to play in the articulation of cohesion and integration policies, the ECJ does not secure a role for them in judicial proceedings (A. Evans, 1999, p. 301).<sup>(3)</sup> This, however, contradicts the tendency promoted especially by the current provisions on the Structural Funds, according to which regional and local authorities are strongly encouraged to get involved in the management of structural resources. However, depriving them of the right to bring actions for annulment before the ECJ freely, which national authorities enjoy, is a serious disincentive, since they may regard this as deprivation of a more effective judicial protection.

The second category of applicants is indicated in Art. 230(3). The Parliament, the European Court of Auditors and the European Central Bank are entitled to challenge only those reviewable acts that

affect their prerogatives. These bodies are called “semi-privileged applicants”, because of that limitation. (P. Craig-G. De Burca, op. cit., p. 458-460, J. Steiner, -L. Woods, op. cit., p. 457-458, A. Arnall, op. cit., p. 13).

The third category includes the so called “non privileged applicants” (P. Craig-G. De Burca, op. cit., p. 461-473, J. Steiner, -L. Woods, op. cit., p. 458-472, W. Cairns, op. cit., p. 110-112, A. Arnall, op. cit., p. 12-13). According to Art. 230(4), this consists of any natural or legal person. The applicants may challenge only a) a decision addressed to them, b) a decision addressed to another person but of individual and direct concern to them, c) a decision in the form of a regulation which is of individual and direct concern to them. From these three options, the first is straightforward: the addressee of a decision can challenge this decision. The third option (challenging a decision “disguised” in the form of a regulation) is quite interesting (for a detailed analysis of the relevant case law see J. Usher, 1994, pp. 636-640, R. Greaves, 1986, pp. 119-133, P. Craig-G. De Burca, op. cit., p. 466-473, J. Steiner, -L. Woods, op. cit., p. 460-463, P.J.G. Kapteyn, P. Verloren van Themaat, 1998, p. 481-488, A. Arnall, op. cit., p. 16-40, N. A. E. Neuwahl, 1996, pp. 17-31) but does not fall within the scope of this article, because according to the legislative framework of the Structural operations, the legislative instruments regarding the management of ESF assistance by the national authorities are decisions in the technical sense of the term as described in Art. 249 EC Treaty. The most common case in the management of ESF assistance is a decision addressed to another person but of direct and individual concern to the applicant. Usually the decision is a Commission act, addressed to the national authorities but concerning the recipients of ESF assistance individually and directly.

It is therefore necessary to examine more in detail the condition of “direct and individual concern”. This condition is the clearest indication that there cannot be an “*actio popularis*”, especially in proceedings regarding the management of ESF assistance. There are always economic actors which are quite eager to challenge Community acts when the annulment thereof may mean the continuation of their business profits and the repayment of any sums unduly paid under an illicit Community measure (N. A. E. Neuwahl, op. cit., p. 18). The financial stakes may be high and there are always attempts to “torpedo Community administration in pursuit of individual interests” (P.J.G. Kapteyn, P. Verloren van Themaat, op. cit., p. 477). This is sometimes the case with ESF assistance. The amounts involved are large and there are always those who are willing to profit at the expense of Community structural assistance. Consequently, in order to protect, *inter alia*, the Communities’ financial interests there is a test. Any natural or legal person seeking the annulment of an act relating to the management of ESF assistance must prove that it is directly and individually concerned by that act. This is a cumulative test: both conditions (direct concern, individual concern) must be met (N. A. E. Neuwahl, op. cit., p. 20).

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The ECJ’s method of establishing individual concern is found in its judgement in *Plaumann*, according to which (see C-25/62, *Plaumann & Co. v. Commission of the European Communities*, [1963] ECR 95 at 107):

“Persons...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, and by virtue of these factors distinguishes them individually...”.

The general rule for direct concern is that if a Member State is granted any discretion to act under the disputed provision, then the provision by its nature cannot give rise to direct concern (Joined Cases C-41/70, C-42/70, C-43/70, C-44/70, *NV International Fruit Company v. Commission of the European Communities*, [1971] ECR 411, at 422-423, paras 25-28). Furthermore, it has been found



(in the context of Community liability under Art. 288 of the EC Treaty) that if the Community institutions have been granted broad discretion to act the applicants cannot claim that the provisions granting this discretion, concern them directly (T-113/96, *Édouard Dubois et Fils v. Council of the European Union and Commission of the European Communities*, [1998] ECR II-125 at II-146, II-147, paras 59-66). These general definitions have been applied by the ECJ and the CFI in several cases regarding the management of ESF assistance. As mentioned above, normally the Commission sends a letter to the competent national authorities, usually incorporating its decision about approval, reduction, suspension or withdrawal of the ESF assistance (the majority of cases before the ECJ and the CFI concerned reduction of this assistance). It has been held repeatedly that the contested decision, although addressed only to the national authorities, since it named and expressly referred to the applicants as direct beneficiaries of the assistance granted, was of direct and individual concern to the applicants inasmuch as it deprived them of part of the assistance originally granted to them, the Member States having no discretion in that respect (C-291/89, *Interhotel v. Commission of the European Communities*, [1991] ECR I-2257 at I-2279 para 13; C-304/89, *Estabelecimentos Isidoro M. Oliveira SA v. Commission of the European Communities*, [1991] ECR I-2283 at I-2311 para 13, C-157/90, *op. cit.*, p. I-3554 para 17; C-181/90, *Consorgan-Gestão de Empresas, Lda v. Commission of the European Communities*, [1992] ECR I-3557 at I-3568 para 12; C-189/90, *Cipeke-Comércio e Indústria de Papel Lda v. Commission of the European Communities*, [1992] ECR I-3573 at I-3585 para 12; T-450/93, *Lisrestal-Organização Gestão de Restaurantes Colectivos Lda and Others v. Commission of the European Communities*, [1994] ECR II-1177 at II-1195 paras 45-46; T-85/94, *Eugénio Branco Lda v. Commission of the European Communities*, [1995] ECR II-45 at II-55 paras 25-26). Clearly, it follows that this rule also applies to decisions granting ESF assistance, since the concerned parties are mentioned therein as beneficiaries. Thus, the ECJ and the CFI have adjusted their case law to the practice followed by the Commission in deciding on the management of ESF assistance. It has been suggested that whenever the Commission refuses payment of assistance which it has previously undertaken to grant, it disputes a prior commitment or denies the existence of a prior commitment, thereby adopting an act having legal effect and which can be challenged (A. Evans, *op. cit.*, p. 295). This may happen when persons who had previously applied for assistance have participated in protracted procedures for evaluation of their application by the Commission (see T-465/93, *Consorzio Gruppo di Azione Locale "Murgia Messapica" v. Commission of the European Communities*, [1994] ECR II-361 at II-373 para 26).

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A relevant issue concerns the competitors of the recipient(s) of assistance. These may challenge the legality of a decision to grant the assistance where their market position has been "significantly effected" by the assistance (C-169/84, *Cie Française de l'Azote (COFAZ) SA v. Commission of the European Communities*, [1986] ECR 391 at 415 para 28; Joined Cases T-447/93, T-448/93, T-449/93 *Associazione Italiana Tecnico Economica del Cemento, British Cement Association, Titan Cement Company SA v. Commission of the European Communities*, [1995] ECR II-1971 at II-1994 paras 55-56 and II-2002 para 80). However it has been noted that simply because a decision affects competition in the market, a trader in any competitive relationship with the recipient cannot be regarded as directly and individually concerned by that decision (A. Evans, *op. cit.*, p. 296). Only specific circumstances can give standing (Joined Cases C-10/68, C-18/68, *Società "Eridania" Zuccherifici Nazionali v. Commission of the European Communities*, [1969] ECR 459 at 481), such as the competitor being located in the same region as the recipient (A. Evans, *op. cit.*, p. 296), or the competitor participating in the proceedings leading to the contested decision (A. Arnall, *op. cit.*, p. 33, C-169/84, *op. cit.*, p. 415, paras 25-26, C-264/82, *Timex Corporation v. Council and Commission of the European Communities*, [1985] ECR 849 at 865, paras 12-16). It has been suggested that the ECJ should acknowledge the admissibility of actions brought by natural or legal persons whose participation in the proceedings can be regarded as having affected their outcome.<sup>(4)</sup> There are positive reactions to this suggestion which is considered conducive to a healthy democracy, by promoting both public participation in the decision-making process and the control of the legality of

its outcome (N. A. E. Neuwahl, op. cit., p. 27). However, it also raises possible questions such as the extent of the involvement necessary to confer standing, or the criteria for establishing that the outcome of a procedure has been influenced (N. A. E. Neuwahl, op. cit., p. 27). It must be noted that, with regard to ESF management, the participation of all interested parties in the relevant decision-making procedure is sometimes obligatory, thus constituting an essential procedural requirement (see below).

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Finally, reference must be made to the *locus standi* of certain groups such as trade associations or interest groups (A. Evans, op. cit., p. 296-300). Trade associations must prove that they have a “personal” interest in the case by showing that this interest is distinct from those of the industrial policy of the Member State concerned (C-282/85, *Comité de Développement et de Promotion du Textile et de l’ Habillement v. Commission of the European Communities*, [1986] ECR 2469 at 2481 para 18 ). A trade association does not have *locus standi* if the decision affects the general interests of the category of persons represented by this association (Joined Cases 16/62, 17/62, *Confédération Nationale des Producteurs de Fruits et Légumes v. Council of the European Economic Community*, [1962] ECR 471 at 479-480; T-117/94, *Associazione Agricoltori della Provincia di Rovino v. Commission of the European Communities*, [1995] ECR II-455 at II-466 para 27-28). A relevant criterion established by case law is that an association may challenge a decision only where its members can also do so individually (T-197/95, *Sveriges Betodlares Centralförening and Sven Åke Henrikson v. Commission of the European Communities*, [1996] ECR II-1283, at II-1296-1297, para 35). It has also been found that representative bodies have standing to challenge decisions not addressed to them, in the field of state aids (C-313/90, *Comité Internationale de la Rayonne et des Fibres Synthétiques (CIRFS) and others v. Commission of the European Communities*, [1993] ECR I-1125 at 1185, paras 29-30, Joined Cases 67,68 and 70/85, *Kwekerij Gebroeders Van der Kooy BV and Others v. Commission of the European Communities*, [1988] ECR 219 at 268-269, paras 20-24). These bodies must have been in close contact and cooperation with the Commission during the proceeding leading to the adoption of the decisions in question, which must affect their members’ interests. With regard to interest groups, that same reasoning has proven to be problematic (A. Evans, op. cit., p. 297). An example is provided in the area of environmental protection, which is now a high priority among the objectives of structural action. According to the current provisions on the Structural Funds all programmes financed must take account of the environment. The CFI, however, has found that Greenpeace, a major environmental group, has no standing to challenge a decision granting assistance the use of which might affect the environment because its members’ interests were not individually affected (T-585/93, *Stichting Greenpeace Council (Greenpeace International) v. Commission of the European Communities*, [1995] ECR II-2205 at II-2230, II2231 para 60). It has been observed, however, that environmental protection is now such an integral part of cohesion, and the link between structural assistance and environmental protection is so strong, that it should justify judicial action not only by those individually affected but also by groups representing such persons (A. Evans, op. cit., p. 298). Nevertheless, the ECJ recently reaffirmed the CFI’s opinion, ruling once more that associations such as Greenpeace have no *locus standi* since their members are not individually concerned but are concerned only in a general and abstract fashion, like any other person interested in the protection of the environment (C-321/95, *Stichting Greenpeace Council (Greenpeace International) and others v. Commission of the European Communities*, [1998] ECR I-1651 at I-1715, paras 28-29).

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### 2.3 Grounds for Annulment

According to Art. 230(2) there are four grounds for annulment of Community acts: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application and misuse of powers.<sup>(5)</sup> It has been ruled that the grounds for annulment must be clearly stated in the relevant application, indicating the basic legal and factual particulars of the case and avoiding “catch-all” references to other documents annexed to the application, since it is not for the Court to seek and identify from the annexes the grounds on which the application is based (T-84/96, *op. cit.*, p. II-2090, II-2091 paras 29-34).

### 2.3.1 Lack of Competence

This ground for annulment is the natural corollary of Art. 7 EC Treaty according to which all Community institutions must act within the limits of the powers conferred upon them by Community law (W. Cairns, *op. cit.*, p. 114). A Community institution must have legal authority to adopt a measure, otherwise this measure shall be declared void for lack of competence. With regard to the management of ESF assistance the issue arising is the competence of the Commission’s departments to issue decisions about ESF assistance. In *Funoc* the applicant submitted that the decision in question was not taken by the Commission itself but by the Head of Division of the Directorate General for Employment and Social Affairs, who was not empowered to do so. The ECJ noted that under the applicable provisions regarding the Commission’s structure, the Directorate General for Employment and Social Affairs is responsible for managing ESF, in cooperation with the Financial Controller (C-200/89, *Funoc v. Commission of the European Communities*, [1990] ECR 3669 at 3691-3692 paras 12-13). There is a Directorate of ESF affairs within the Directorate General for Employment and Social Affairs. This department is competent to manage ESF affairs, including granting, withdrawing, reducing or suspending ESF assistance, through the system of delegation of signature, which is the normal means used by the Commission in exercising its powers. Delegation of authority to sign within an institution is a measure relating to the internal organization of the Commission’s administrative departments in accordance with its Rules of Procedure. Therefore, officials may be empowered to adopt in the Commission’s name and subject to its control, clearly defined measures of management and administration relating to the ESF (Case T-450/93, *op. cit.*, p. II-1191, 1192 para 34). The applicant must prove the Commission’s Rules of Procedure have been violated and not refer generally to the Regulations on the Structural Funds which mention only the Commission in general as the competent body for the relevant decisions.

### 2.3.2 Infringement of an essential procedural requirement

Community law provides various mechanisms to ensure that certain requirements of natural justice and fairness are observed in procedural matters (W. Cairns, *op. cit.*, p. 115). The infringement of such a requirement will result in the annulment of the measure. The ECJ may consider this ground of annulment on its own motion, even if it is not put forward by the applicants (C-1/54, *France v. High Authority*, [1954] ECR 1 at 15, C-2/54, *Italy v. High Authority*, [1954] ECR 37 at 52). In the CFI’s opinion this happens because individuals have a legitimate interest in relying in the Community courts (ECJ, CFI) regarding a possible non-observance of the procedure laid down by the Regulations regarding the Structural Funds, inasmuch as such an irregularity could affect the legality of the contested decisions concerning them (Joined Cases T-432/93, T-433/93, T-434/93, *op. cit.*, p. II-525 para 63).

One essential procedural requirement often infringed has been the obligation of the Commission to consult the Member State concerned before issuing a decision regarding the ESF assistance given to that State. This obligation is established by all Regulations concerning the operations of the Structural Funds. The Member State is the sole interlocutor of the ESF and it is responsible for the

facts and accounts regarding transactions financed by ESF in its territory. Having regard to this central role of the Member State and to the importance of the responsibilities which it assumes in the presentation and supervision of the financing of vocational training measures, the opportunity for it to comment and present its opinion before a definitive decision regarding ESF assistance is adopted constitutes an essential procedural requirement the disregarding of which renders the contested decision void (C-291/89, op.cit., p. I-2280 paras 16-17; C-304/89, op. cit., p. I-2312 paras 20-21; C-199/91, op. cit., p. I-2696 para 34; C-334/91, *Innovation et Reconversion Industrielle ASBL v. Commission of the European Communities*, [1993] ECR I-2851 at I-2869 para 25; C-157/90, op. cit., p. I-3554, I-3555 para 20).

A similar requirement also exists for individuals (natural and legal persons) by virtue of a relevant general principle, according to which any person who may be adversely affected by the adoption of a decision should be able to effectively make known his views on such evidence concerning him as the Commission has used in adopting that decision (T-450/93, op. cit., p. II-1194 para 42; C-32/95, *Commission of the European Communities v. Lisrestal-Organizaç o Gest o de Restaurantes Colectivos Lda and Others*, [1996] ECR I-5373 at I-5396 para 21). In the case of ESF assistance, it has been noted that despite the central role played by the Member States in the system established by the Regulations concerning the Structural Funds, there is a direct link between the Commission and the recipient of the assistance since the latter is directly implicated in the investigation leading to the decision (C-32/95, op. cit., p. I-5396, I-5397 paras 24 and 28). A classic example of such a case might be a decision reducing, suspending or withdrawing ESF assistance, which significantly affects the recipients' interests by depriving them of the whole of the assistance initially granted to them, and is equivalent to a sanction (C-32/95, op. cit., p. I-5398, paras 33-34). It is necessary therefore for the recipients of ESF assistance to submit their opinion to the Commission before it adopts its decision.

It has been found that the possibility for a Member State and the final recipient of ESF assistance to enter into a dialogue with the Commission after the relevant decisions have been notified to them is not an acceptable solution. It would practically bar them from bringing an action under Art. 230 because of a possible expiry of the relevant time-limits (C-304/89, op. cit., p. I-2313 para 23). Also the mere presence of representatives of the national authorities, during on-the-spot checks performed by the Commission in the premises of the final recipient in order to form an opinion and produce the decision, does not guarantee that these authorities or the recipient itself are consulted before the adoption of the decision.<sup>(6)</sup> Furthermore, when discussions are actually taking place between the representatives of the Commission, the national authorities and the final recipients, they must refer to the specific project and decision and not to a comparable one (Joined Cases T-432/93, T-433/93, T-434/93, op. cit., p. II-530 para 74). Finally, any political compromises reached between the national authorities and the Commission cannot, in any event, substitute the requirement of previous consultation (Joined Cases T-432/93, T-433/93, T-434/93, op. cit., p. II-530 para 75).

Another essential procedural requirement is provided for by Articles 253 and 254 EC Treaty according to which all regulations, directives and decisions adopted by the European institutions must state the reasons on which they are based.<sup>(7)</sup> The purpose of this obligation is to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested. The extent of that obligation depends on the nature of the measure in question and on the context in which it was adopted (C-32/86, *Societ a industrie siderurgiche meccaniche e affini SpA (Sisma) v. Commission of European Communities*, [1987] ECR 1654 at 1670, para 8). It has been found that in the context of an initial application for ESF assistance, a statement of reasons in summary form satisfies the requirements of



Art. 253 EC Treaty because such a summary is an unavoidable consequence of computer processing of several thousand applications for assistance on which the Commission must adjudicate within a short period of time as a more detailed statement of reasons in support of each individual application would compromise the rational and efficient allocation of financial assistance from the ESF (C-213/87, *Gemeente Amsterdam and Stichting Vrouwenvakhschool voor Informatica Amsterdam (VIA) v. Commission of the European Communities*, [1990] ECR I-221 at I-222). This is justified by the fact that a decision accepting or rejecting an application merely entails the grant or refusal of the assistance applied for (C-181/90, op. cit., p. I-3569 para 15; C-181/90, op. cit., p. I-3586 para 15).

However, with regard to decisions reducing, withdrawing or suspending ESF assistance, it has been accepted that these decisions entail more serious consequences for the recipients (C-181/90, op. cit., p. I-3569 para 16; C-181/90, op. cit., p. I-3586 para 16): According to the Regulations on ESF the recipients initially receive only an advance from the assistance approved, so they are obliged to advance considerable sums from their own capital in order to cover the total expenditure of the operation. The recipients legitimately expect to receive the balance from the ESF, provided that they use the assistance in accordance with the conditions set out in the decision of approval.

Consequently, a decision reducing, suspending or withdrawing ESF assistance must clearly state the reasons which justify such action (C-181/90, op. cit., p. I-3569 paras 17-18; C-181/90, op. cit., p. I-3586 paras 17-18; T-450/93, op. cit., p. II-1197 para 52; T-85/94, op. cit., p. II-57 para 33). It must be noted that the issue of whether these reasons are correct or not, does not concern the adequacy of the statement of reasons but the substance of the case (T-84/96, op. cit., p. II-2094, para 49).

Examples of decisions which fulfil the above analyzed requirement are: a decision reducing ESF assistance because the period of practical vocational training had to be the same as that of theoretical vocational training (C-181/90, op. cit., p. I-3569, I-3570, paras 19-20); a decision reducing ESF assistance after a relevant suggestion of the Member State only if that decision itself states the reasons for the reduction, or if it refers to a measure of the competent national authorities clearly stating the reasons (T-85/94, op. cit., p. II-58 para 36); a decision accompanied by a memorandum detailing reductions in respect of specific headings of expenditure because this expenditure was not provided for in the initial application, or because this expenditure was not duly evidenced by the necessary supporting documents (T-81/95, *Interhotel v. Commission of the European Communities*, [1997] ECR II-1265 at II-1293 paras 74-76); and a decision devoting several pages to a detailed account of the factual and legal considerations forming the basis of the justification in law of the reduction, especially of the itemization of reduction in each heading and of the method of calculation applied in these reductions (T-84/96, op. cit., p. II-2094, paras 48-49).

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Decisions which have been found not to fulfil the requirement of the statement of reasons are: a decision reducing ESF assistance, allocating the reduction between the members of the group of beneficiaries in proportion to their share under the items concerned and not in accordance with the precise amount of the irregular expenditure, and not notifying the beneficiaries about this itemization and the method of calculation (C-181/90, op. cit., p. I-3570 paras 22-23; C-181/90, op. cit., p. I-3587 paras 20-21); and a decision based on inspection reports which did not identify with respect to each of the beneficiaries the items to which the reduction related (T-450/93, op. cit., p. II-1197, para 52).

### 2.3.3 Infringement of the Treaty or any rule of law relating to its application

The term “any rule of law relating to the Treaty’s application” does not only include legislative measures adopted by the Community institutions but also the so called general principles of Community law. These can be defined as unwritten legal rules adopted by the ECJ and deriving from the common legal traditions of the Member States. Their use in the legal system of the European



Union is to supplement and clarify written European legislation. Some of the most important general principles of Community law are the principle of proportionality, the principle of legal certainty, and the principle of the protection of legitimate expectations.

Some general principles have been invoked in cases regarding the management of ESF assistance. For instance, the ECJ has ruled that it is not disproportionate for the Commission to substantially reduce the ESF assistance granted to a project of vocational training after considering the recipients' private interests, if during the implementation of the project there are substantive modifications to the original contents on which the approving decision of the Commission was based (C-200/89, op. cit., p. I-3694 paras 25-26). It has also been found that the protection of legitimate expectations is not violated when the Commission reduces ESF assistance initially granted to a programme, when it discovers irregularities in the programmes' implementation, which prove that the programme was not implemented according to the approving decisions (T-73/95, *Estabelecimentos Isidoro M. Oliveira SA v. Commission of the European Communities*, [1997] ECR II-381 at II-395, II-396 paras 34-35). The CFI also stated that since in the case of annulment of a Commission act it is justifiable for the Commission to re-examine the entire case file in order to produce a new act, this being a very time consuming procedure, there is no violation of the principle of legal certainty because a delay in the process of complying with a judgment is not liable in itself to affect the validity of the measure finally adopted (T-73/95, op. cit., p. II-398, II-399 paras 43-47).

However, it has been ruled that when the Commission reduces the ESF assistance granted to a programme based on provisions of the initial approving decision which were not notified to the recipients of the assistance, it violates the principle of legitimate expectations (T-81/95, op. cit., p. II-1286-II-1288, paras 49-57).

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In general it has been noted that the rationale behind the use of the principles of legal certainty and legitimate expectations is that foreseeability as to the payment of assistance is necessary to enable the recipients to commit themselves to expenditure, being free of the risk of ultimately having to bear the burden of it themselves (A. Evans, op. cit., p. 302).

In the case of withdrawal of unlawfully granted assistance there could be a conflict between the principle of legality of financial management of Community resources and the principle of legal certainty of the recipients. In other words, a conflict between the public interest in the management of Community funds and the private interest of the recipients thereof (A. Evans, op. cit., p. 303). Usually in such a conflict the public interest prevails over the private interest (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94, T-234/94, *Industrias Pesqueras Campos SA, Transacciones Maritimas SA, Recursos Marinos SA, Makuspesa SA v. Commission of the European Communities*, [1996] ECR II-247 at II-278 para 76).

A final point involves the initial decision granting or refusing assistance. The Commission is usually considered to have considerable discretion since it must evaluate economic circumstances, assess complex facts and accounts or determine which of the several Union objectives are better served by the application in question. However this discretion is not unlimited and the Commission assessment and decision may be overturned if there is an "erreur manifeste d'appréciation", a clear error of assessment (A. Evans, op. cit., p. 303-304). Such an error exists when, for instance, although the project's description fits the policies adopted to meet the Union's priorities the Commission rejects the relevant application (C-213/87, op. cit., p. I-221).

### 2.3.4 Misuse of Powers

The basic concept of this final ground of annulment is that if an institution is found to have used its competences to achieve an end other than the one for which the competence was granted, or to have evaded a procedure specifically prescribed by the Treaties for enacting the measure in question (C-84/94, *United Kingdom v. Council of the European Communities* (“*Working time Directive*”), [1996] ECR I-5755 at 5814, para 69), the resulting act is void. So far, with regard to ESF assistance, there no cases have been brought on this ground. This is understandable, given the difficulty in establishing such a case. A possible misuse of power in the area of ESF assistance could be a decision of the Commission to reduce, withdraw or suspend the assistance granted, or to reject an initial application for ESF assistance, simply because the Commission wishes to put pressure on the Member State concerned to fulfil another EC Law obligation.

## 2.4 Time Limits

According to Art. 230(5) EC Treaty all proceedings for the annulment of a measure must be instituted within two months of its publication, or of its notification to the applicant (or, in the absence thereof, of the day on which it first came to the applicant’s attention). Furthermore, it has been ruled that failing publication or notification, it is for a party having knowledge of a decision concerning it to request the whole text thereof within a reasonable period, but that the period for bringing an action can begin to run only from the moment when the third party concerned acquired precise knowledge of the content of the decision in question and of the reasons of its adoption, in such a way as to enable it to exercise its right of action (C-236/86, *Dillinger Hüttenwerke AG v. Commission of the European Communities*, 1988 [ECR] 3761 at 3784 para 14; T-465/93, *Conorzio Gruppo di Azione locale “Murgia Messapica” v. Commission of the European Communities*, [1994] ECR II-361 at 374 para 69).

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In the case of ESF assistance, given that the usual method of communication between the Commission, the competent national authorities and the recipients of the assistance is mail correspondence, there have been cases where the starting date of the period during which a decision could be challenged was not easily established. Usually the Commission informs the national authorities of its decision and the reasons justifying it, and then the national authorities inform the beneficiaries. The information provided to the beneficiaries contains an abstract of the decisions and a general statement of the justifying reasons. The beneficiaries must request, as stated the whole text of the decision and the reasons within a reasonable period of time. This period of time starts when the beneficiaries first discover that the decision exists. It has been found that any direct or indirect reference to such a decision in a letter from the Commission to the beneficiaries constitutes a method of bringing the decision’s existence to the beneficiaries’ attention (T-151/95, *op. cit.*, p. II-1556, II-1557 paras 46-48). It has also been found that 2 years is an unreasonably long period for the beneficiaries to wait before requesting the whole text of the decision (T-468/93, *Frinil-Frio Naval e Industrial SA v. Commission of the European Communities*, [1994] ECR II-33 at II-45 paras 32-34). The beneficiaries, however, may challenge the decision based only on the notification of its existence. Since the notification does not state neither the date nor the content of the decision, the beneficiaries cannot be criticized for not providing in support of their application more extensive particulars about the decision (C-157/90 *op. cit.*, p. I-3553 para 14). Once the beneficiaries have requested the whole text of and reasons for a decision, the national authorities and Commission cannot merely send a brief summary. Only when the beneficiaries receive the full text and reasons, does the period in which the decision may be challenged commence (Joined Cases T-432/93, T-433/93, T-434/93, *op. cit.*, p. II-521 paras 50-51; C-143/95P, *Commission of the European Communities v. Socurte-Sociedade de Curtumes a Sul do Tejo, Lda and Others*, [1997] ECR I-1 at I-21, I-22 para 31-32). A final issue concerns the aforementioned possibility of a dialogue between the Commission, the national authorities and the beneficiaries after the adoption of the decision. This

possibility has been excluded by the ECJ because if the Commission insists on its original decision and issues another one, after the dialogue, merely confirming the first decision, the beneficiaries would not be able to challenge the second decision since they did not challenge the first within the appropriate time limits (C-304/89, op. cit., p. I-2313 para 24).

### 3 Actions for failure to act <sup>↑</sup>

With special regard to the management of ESF resources, there are three main problems. First, there is the problem of reviewing omissions to adopt non-reviewable acts. The second problem concerns the *locus standi* of non-privileged applicants. The third issue concerns the procedural problems involved in bringing an action for failure to act. The relevant provisions are included in Art. 232(1) EC Treaty:

*“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.”*

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The main issues are the same as those analyzed above regarding actions against acts: What are reviewable omissions? Who may bring an action against an omission and on what grounds? What are the relevant time limits? Therefore reference will be made in this section only to the issues which require a different approach.

With regard to reviewable omissions, it has been noted that because of the unity principle, failures to act within the scope of Art. 232(1) are failures to adopt only a reviewable act (P. Craig-G. De Burca, op. cit., p. 491, J. Steiner, -L. Woods, op. cit., p. 482, P.J.G. Kapteyn, P. Verloren van Themaat, op. cit., p. 468). However the ECJ has allowed the Parliament to challenge the failure to adopt an act which was not reviewable.<sup>(8)</sup> Within the field of ESF, reviewable acts have been defined above. Given the complexity of the system of managing ESF funds, it would be very dangerous to allow anyone to challenge omissions to adopt non-reviewable acts. This could lead to confusion, since both the Commission and the national authorities are responsible for several acts regarding the Funds management. It is true that the omissions of national authorities can be challenged only before national courts. However the natural and legal persons involved in these cases, especially if not accustomed to such complex mechanisms, might not be able to determine who has competence to issue an act and whether he/she has failed to do so. This problem is highlighted in the case of projects implemented under operational programmes.

As in Art. 230 natural and legal persons are non privileged applicants since they can only challenge failures to act in connection with measures addressed to them. They cannot challenge failures to adopt recommendations or opinions. The ECJ has ruled that it is possible for a non privileged applicant to challenge a failure regarding an act not addressed to him as long as this applicant is directly and individually concerned (C-107/91, *Empresa Nacional de Urânio SA (ENU) v. Commission of the European Communities*, [1993] ECR I-599 at I-630 para 17). The test of direct and individual concern is the same as that for Art. 230 EC Treaty.

A final, important, issue involves the procedural requirements concerning the judicial review of omissions. According to Art. 232(2) EC Treaty an omission only exists where an institution that has been called upon to act fails to do so within two months. In that case the omission can be challenged within two months of the expiry of the first two-month period. This procedural requirement has been used by the ECJ and the CFI as a barrier, in order to prevent applicants challenging non existing Community decisions regarding the management of ESF assistance. More specifically it has been

ruled that when the applicants cannot establish the material existence of a Commission decision, or when they challenge the act of a national authority before the ECJ (both actions would be inadmissible according to the analysis in the previous section), they cannot assume that their action is also an action for failure to act, because the “previous application” requirement and the time limits set in Art. 232 have not been complied with (C-130/91, op. cit., p. I-73 paras 11-12; T-271/94, op. cit., p. II-766 paras 53-55). The ECJ has also found that it is impossible to annul an act adopted after the two-month period within which it should have been adopted originally, precisely because of that delay in adoption. If such an annulment were allowed then it would be impossible, at that stage (after the period of two months) to adopt any valid decision about the issue concerned (T-81/95, op. cit., p. II-1261 para 67). The complexity of the procedures for managing ESF assistance at European and national level justifies delay in the adoption of acts about this issue and two months is not normally sufficient, especially when the act to be adopted involves detailed examination and analysis of the projects and the relevant financial provisions.

## 4 Enforcement Actions <sup>↑</sup>

These actions, although indirectly connected with judicial review, may be activated within the framework of the management of ESF resources. Art. 226 EC Treaty provides for a procedure designed to ensure that all Member States fulfil their obligations under the Treaty:

*“If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

*If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”*

This provision is regarded as central to the Commission’s role as “guardian of the Treaties”. It actually supplements Art. 211 EC Treaty according to which the Commission must ensure, *inter alia*, that the provisions of the Treaty and the measures taken by the institution pursuant thereto are applied (J. Hanlon, 1998, p. 99).

With regard to the management of ESF assistance, this provision has become increasingly important, given the decentralization of this management to national authorities of the Member States. The Commission monitors the management of this assistance by national authorities and aims to verify its legality, regularity and financial soundness. It may issue reasoned opinions concerning this management.<sup>(9)</sup> These opinions must contain a coherent statement of the reasons which led the Commission to believe that the State in question failed to fulfil its obligations under Community law (C-7/61, *Commission of the European Communities v. Italy*, [1961] ECR 317 at 327). The national authorities must comply with them. If they do not, the Commission may bring an action before the ECJ. According to Art. 228, if this action is successful, the Member State must comply with the ECJ’s judgement. If it does not the Commission may once more issue a reasoned opinion and if the State continues not to comply, the case may again be brought before the ECJ, which may impose a penalty payment on the State.

An interesting question arises when the Commission decides not to take action against a Member State under Art. 226 EC Treaty with regard to the management of structural assistance: does this also constitute a “silent decision” not to reduce or suspend Community financial assistance according to the relevant provisions of the Regulations on the Structural Funds (J. Scott, op. cit., p. 636)? The Court of First Instance found that these two procedures are independent and that not taking action under Art. 226 cannot automatically entail a decision not to reduce or suspend structural assistance.



Such a decision must be adopted by the Commission *expressis verbis* and the fact the Commission has not taken action under Art. 226 does not prevent it from doing so at any time (T-461/93, *An Taisce-The National Trust for Ireland and WWF UK (World Wide Fund for Nature) v. Commission of the European Communities*, [1994] ECR II-733 at II-749, II-750, paras 35-36). This reasoning was also upheld by the ECJ which observed that reducing or suspending structural assistance does not depend on previous actions under Art. 226, although such actions might be taken into account (C-325/94 P, *An Taisce-The National Trust for Ireland and WWF UK (World Wide Fund for Nature) v. Commission of the European Communities*, [1996] ECR I-3727, at I-3738, para 23).

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Enforcement procedures may also be initiated by Member States against other Member States. This is provided for in Art. 227 EC Treaty, according to which the Member State must first bring the matter before the Commission, which shall deliver a reasoned opinion on the issue in question. After that opinion and if the Member States do not change their opinion the case may be brought before the ECJ. If the Commission does not deliver its reasoned opinion within three months the Member States may bring the case before the ECJ without it.

With regard to the management of ESF assistance the provision of Art. 227 can be useful because most programmes financed by the ESF must have a transnational nature, involving authorities from numerous Member States. Therefore any problems arising between the cooperating Member States, during the implementation of such programmes, can be resolved using Art. 227.

The Commission may initiate the Art. 226 procedure for a violation of any provision of Community law, primary or secondary. Given that the management of ESF assistance is regulated by Regulations and Decisions, this is important because the Treaty dispositions of the ESF now make direct reference to secondary Community legislation and do not include detailed provisions on this issue. This is also true for Art. 227 procedures.

Furthermore, any violation of Community law by local authorities of the Member States is regarded as an act of the State concerned, so the defendant in a possible Art. 226 action before the ECJ would be the government of that State (C-95/97, *op. cit.*, p. I-1792 para 7). No action can be brought against the local authorities themselves (E. Besila Vika-D. Papagiannis, *op. cit.*, p. 97). This situation is quite satisfactory. Decentralization of management to the local authorities does not lead to decentralization of responsibility for this management, at least at Community level. This responsibility lies with the governments of the Member States. It is of course possible for these governments to bring actions before the national courts against the local authorities of these States for the violation of Community law.

## 5 Preliminary Rulings

The primary function of the preliminary rulings delivered by the ECJ according to Art. 234 is to contribute to the development of Community law by providing a mechanism for analyzing important concepts and issues such as the concept of direct effect or the issue of the relationship between the national and Community legal systems (For further details see P. Craig-G. De Burca, *op. cit.*, p. 406-452, J. Steiner, -L. Woods, *op. cit.*, p. 414-440, W. Cairns, *op. cit.*, p. 125-134, P.J.G. Kapteyn, P. Verloren van Themaat, *op. cit.*, p. 499-525, J. Hanlon, *op. cit.*, 124-137).

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Nevertheless, Art. 234 is also used as a supplementary mechanism for reviewing the legality of Community measures. The ECJ has jurisdiction to examine the validity of acts of Community institutions within the framework of the Preliminary Rulings procedure. This is regarded as an alternative to the direct actions procedure of Art. 230. The reasons for this include: a) the short period of two months within which a direct action can be brought, b) the fact that non privileged applicants do not develop any interest in the review of Community action until this affects their activities, which might happen a long time after the adoption of the act in question and c) the possible lack of *locus standi* (C. Harding, 1981, p. 96). It has been argued, however, that there are several reasons why the Art. 234 procedure is less satisfactory than the Art. 230 procedure in order to review Community acts (Opinion of Advocate General Jacobs in C-358/89, op. cit., p. I-2524, I-2525, paras 71-74). First, the national courts have no experience in the subject. Secondly, the Council and Commission cannot participate in the proceedings under Art. 234. Thirdly, the ECJ's analysis of the issue and its ruling is limited by the questions asked by the national courts, so the ECJ cannot study the problems in depth. Fourthly, there are extra delays and costs in proceedings before a national court, especially if an Art. 234 reference is involved. The final argument is that the national courts cannot review the legality of Community acts and declare them invalid (See C-314/85, *Foto Frost v. Hauptzollamt Lübeck-Ost*, [1987] ECR 4199 at 4230-4232 paras 14-20). However, the details of the relevant debate are beyond the scope of this article (for more details and an analysis of the relevant case law, see A. Arnulf, op. cit., p. 41-44).

Community acts concerning the management of ESF assistance are not always communicated immediately to the persons concerned. The result is that when they learn about these acts, they cannot challenge them before the Community courts. The solution to this problem, as indicated by the CFI itself, is Art. 234 (T-271/94, op. cit., p. II-766 para 53): The applicants will challenge (before the national courts) the acts of national authorities, based on the Community act(s) in question. The national courts may refer to the ECJ a question concerning the validity of these Community acts, under Art. 234. Thus the acts in question will be reviewed eventually. The drawback of this mechanism, however, is that national courts are not always obliged to make a preliminary reference to the ECJ. If they do not, the Community act in question may never be reviewed by the ECJ. In order to avoid such a situation the ECJ has shown that it can be receptive to actions brought either under Art. 230, by interpreting the provisions about time limits widely (see above), or under Art. 234, by stating that it is possible for an applicant to challenge a measure under Art. 234, if this applicant did not know of this measure in time to challenge it directly under Art. 230 (See C-188/92, *TWD Textilwerke Deggendorf GmbH v. Germany*, [1994] ECR I-833 paras 23-24).

## 6 Actions for damages

It is potentially very useful for the final beneficiaries to be able to bring such actions against the Commission within the framework of the management of ESF resources. It provides an opportunity to claim money, which the Commission, unlawfully, may have not paid. The relevant disposition is Art. 288 EC Treaty according to which

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*“The contractual liability of the Community shall be governed by the law applicable to the contract in question.*

*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.”*

With regard to ESF assistance, there are no contracts between the Commission and the national authorities on the management of this assistance. Everything is regulated by Commission decisions.

The relevant contracts between the national authorities and the final recipients are governed by national law. Community legislation on public procurement is also applicable.

From the above remarks, it is concluded that the actions for damages, within the framework of the management of ESF assistance, focus on the Community's non-contractual liability. The reviewable acts in such a case can be legislative or administrative. The legislative acts include the Regulations on the Structural Funds and the relevant implementing Decisions. So far no action has been brought against these legislative instruments. The reviewable administrative acts which may give rise to action for damages are the Commission decisions adopted within the framework of the implementation of the various programmes financed by the Structural Funds. Such decisions usually refer to the approval of financial assistance or to the withdrawal, reduction or suspension of the assistance initially granted. In order for such a decision to incur liability for the Community under Art. 288(2), the ECJ has established certain criteria: the conduct of the relevant Community institution (in this case the Commission) must be illegal, the applicant must have suffered some damage and this damage must be caused directly by the illegal conduct of the institutions (C-200/89, *op. cit.*, p. I-3695 para 30). Usually the damage is an economic loss (loss actually incurred plus any loss of earnings – see Joined Cases C-5/66, C-6/66, C-7/66 and C-13/66 to 24/66, *Firm E. Kampffmeyer and Others v. Commission of the European Communities*, [1967] ECR 245 at 266) but it may include immaterial loss (W. Cairns, *op. cit.*, p. 121). The illegality or fault of the relevant Community institution usually consists of the breach of a duty owed to the applicant under Community law (C-145/83, *Stanley George Adams v. Commission of the European Communities*, [1985] ECR 3539 at 3590 para 44). Finally, the causal link between the damage and the conduct of the institution in question has to be direct and well established (W. Cairns, *op. cit.*, p. 122). These elements are very important in an action for damages against the Commission, within the framework of the management of ESF assistance. So far, however, such actions have been rare.

A final point concerning these actions for damages, especially with regard to disputes about the management of ESF assistance, is that the applicants often confuse such actions with actions for annulment. When they bring an action for annulment, they include a request for the Court to order the Commission to pay amounts equivalent to the damage they have suffered, these amounts usually being the remaining sums of ESF assistance. The ECJ has ruled repeatedly that itself and the CFI, when reviewing the legality of an act under Art. 230, may only annul the contested act and cannot order the payment of damages (C-199/91, *op. cit.*, p. I-2693 para 17; T-468/93, *op. cit.*, p. II-46; Joined Cases T-432/93, T-433/93, T-434/93, *op. cit.*, p. II-522 para 54). The Commission would have to pay the requested amounts according to Art. 233 EC Treaty which obliges the institutions to comply with the judgement of the Community courts. However, if the applicant's claim were based on Art. 288, the ECJ and CFI would have jurisdiction to order the Commission to pay compensation for the damages caused by its illegal acts.

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## 7 Final Remarks <sup>↑</sup>

Having seen all these aspects of the judicial review proceedings, it is interesting to examine one final issue. Several potential applicants (mainly the European Parliament and the Member States) tend to use the judicial review mechanism in the European Union context not only in order to attack a particular legislative measure but also in order to obtain a public forum to express their viewpoint on the correct interpretation of particular provisions of Community law (H. Cullen, A. Charlesworth, 1999, pp. 1245). This observation is very accurate with regard to interesting issues such as the implementation of the budget of the European Union, as well as issues relating to policies about education, labour, employment, and social policy (H. Cullen, A. Charlesworth, *op. cit.*, p. 1251-1253, 1254-1255, 1258-1260 and 1263-1264). In all these areas, the Parliament and the Member

States have tried to present their political orientations by using legal basis litigation. Especially in such a politically delicate area like the one involving the measures financed by the ESF concerning employment, the expression of views and ideas is crucial. The contents of the policies implemented through the ESF are influenced by such ideas put forward by all actors involved, such as the European Institutions, the Member States, legal entities of private or public law and individuals. The judicial proceedings provide an additional forum for the presentation of views and opinions. After all, such proceedings affect the opinion of the institutions and the persons involved, concerning the institutional framework within which the structural and financing operations are carried out, which may generate pressure for institutional change and improvements with regard to the substance of the implemented policies (J. Scott, *op. cit.*, p. 637).

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## Endnotes

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(1) The partnership principle is defined as “Close consultations between the Commission, the Member State concerned and the competent authorities designated by the latter at national, regional, local, or other level, with each party acting as a partner in pursuit of a common goal. The partnership shall cover the preparation, financing, monitoring and assessment of operations.” See Art. 8 of Council Regulation 99/1260/EC.

(2) C-443/97, *Spain v. Commission of the European Communities*, judgement delivered on 6.4.2000, paras 28-36, available on line at <http://curia.eu.int/en/jurisp/index.htm>. The Advocate General in that case had a different opinion as he accepted that these internal guidelines allow the Commission to reduce or suspend structural assistance not only in case of irregularities (Art. 24 of Regulation 88/2052/EEC as amended by Regulation 93/2081/EEC) but also in case of the Member States violating their obligations under Art. 23(1) of Regulation 88/2052/EEC as amended. Therefore they actually establish new sanctions for the Member States, thus producing legal effects and being reviewable by the ECJ (Advocate General’s opinion in C-443/97, delivered on 28.10.1999, paras 21-24).

(3) It has been suggested (see M. Vellano, *Coesion economica e sociale e ripartizione de competenze: Le nuove iniziative comunitarie*, (1995) RDE, 193-208 at 194) that regional and local authorities should have standing to challenge a measure affecting their own prerogatives. Evans (op.cit., p. 301) considers however that the ECJ’s case law recognizes no link between such prerogatives and cohesion policies of the Union.

(4) See Opinion of Advocate General Jacobs in C-358/89, *Extramet Industrie SA v. Council of the European Communities*, [1991] ECR I-2501 at I-2523, para 66. The ECJ however, in the same case, ignored this approach and focused on the nature of the applicants’ activity, see C-358/89, op. cit., p. I-2531, I-2532 paras 14-17. For an analysis of this behaviour see A. Arnulf, op. cit., p. 34-35.

(5) CFI has tried to make these grounds even more distinct from each other. For example, concerning the difference between the infringement of essential procedural requirement and infringement of Community legislation, it has held that: “...the absence or inadequacy of a statement of reasons constitutes a plea going to infringement of an essential procedural requirement and, as such, is

distinct from a plea going to the incorrectness of the grounds of the contested decision, which by contrast, is reviewed in the context of the question whether a decision is well founded.” T-84/96, *Cipeke-Comércio e Indústria de Papel Lda v. Commission of the European Communities*, [1997] ECR II-2081 at II-2094 para 47.

(6) See for instance C-334/91, *op. cit.*, p. I-2869 paras 21-23; Joined Cases T-432/93, T-433/93, T-434/93, *op. cit.*, p. II-527, II 528 paras 68-71, where there was no substantive consultation between representatives of the Commission, national authorities and final recipients of ESF assistance even though they met and discussed the case within the framework of on-the-spot checks.

(7) Usually these reasons are stated in the preamble of the act in question. However, the preamble is not judicially reviewable since it merely supports the operative part of the act and produces no legal effects itself. See T-138/89, *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken v. Commission of the European Communities*, [1992] ECR II-2181 at 2191, para 31.

(8) C-302/87, *European Parliament v. Council of the European Communities* (“Comitology”), [1988] ECR 5615 at 5641 para 16. The act in question was the draft budget of the European Communities.

(9) The Commission has a discretion to act under Art 169 [226] and it is not obliged to issue a reasoned opinion despite the wording of the Treaty. See C-247/87, *Star Fruit Company SA v. Commission of the European Communities*, [1989] ECR 291 at 301 para 11. Also the acts of the Commission under Art. 169 [226] have no legally binding effect. See C-48/65, *Alfons Lütticke GmbH and Others v. Commission of the European Communities*, [1966] ECR 19 at 27.

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