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The incorporation of the Schengen *acquis* into the framework of the EU by example of the "ne bis in idem" principle

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I. The prohibition against double jeopardy in Article 54 of the 1990 Schengen Convention

Under the rules of general international law, a State may prescribe under its criminal law all conduct exhibiting a certain connection to its territory. Such a "meaningful link" is obvious for offences committed or carried on by acts within the territory of the State (territorial principle[1]), offences in which the State's national is actively involved (nationality principle), or offences affecting the State's nationals or legal interests (passive personality principle and protective principle[2]).[3]

As a result, acts that can be meaningfully linked to the criminal law of two or more states as a consequence of sufficient territorial connections give rise to competing jurisdiction of these States with regard to criminal prosecution.

In order to avoid possible instances of "double" or "multiple" jeopardy, corresponding rules for the conflict of laws were created at the European level by international legal agreements.[4]

Besides the so-called Double Jeopardy Convention[5] of 1987 is first and foremost the Schengen Convention of 1990,[6] which standardises the prohibition against subsequent prosecution for the same offence.[7] According to Article 54 of the Schengen Convention, "[a] person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party". Article 54 of the Schengen Convention therefore ensures that valid convictions and acquittals effectuate a procedural bar within the entire Schengen legal area.[8/9]

However, in accordance with Article 55(1) lit. a of the Schengen Convention, each Contracting Party may, when ratifying, accepting or approving the Convention, declare that it is not bound by Article 54 *leg. cit.* in one of the exhaustively listed cases, *inter alia*, "where the acts to which the foreign judgment relates took place in whole or in part in its own ter-

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1 See, for the Austrian criminal code, § 62 StGB (A); for German law, § 3 StGB (D).

2 See §§ 5 and 7(1) StGB (D).

3 On the principles of international criminal law, see *Jescheck/Weigend*, Lehrbuch des Strafrechts - Allgemeiner Teil, 5th ed., Berlin (D), 1996, at 167 et seq.; see also the overview in *Leidenmühler/Plöckinger*, Zur Zuständigkeit bei Internetdelikten, in: *Plöckinger/Duursma/Helm* (eds), Aktuelle Entwicklungen im Internet-Recht, Vienna (A), 2002, at 104 et seq., with further references.

4 Although the principle of "ne bis in idem" is not a basic tenet of general (customary) international law, it is anchored in numerous international law treaties. See e.g. Article 4 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (BGBl. (A) 1988/628; signed by Germany on 19 March 1985, not yet ratified). See generally *Ebensperger*, Strafrechtliches „ne bis in idem" in Österreich unter besonderer Berücksichtigung internationaler Übereinkommen, [1999] ÖJZ 171, 172; see also *Wyngaert/Stessens,* The International non bis in idem Principle: Resolving Some of the Unanswered Questions, [1999] ICLQ 779.

5 Convention between the Member States of the European Community on Double Jeopardy of 25 May 1987 (BGBl. (A) III 2000/1; BGBl. (D) 1998 II, at 2226).

6 Convention of 19 June 1990 applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders (BGBl. (A) III 1997/90, at 1930 et seq.; BGBl. (D) 1993 II, at 1010). An unofficial English translation of the Schengen Convention is available at http://ue.eu.int/ejn/data/vol_c/9_autres_textes/schengen/indexen.html.

7 Between States bound by both the 1990 Schengen Convention and the 1987 Double Jeopardy Convention, the provisions of the Schengen Convention take priority in the event of a contradiction in accordance with the general rules of international law (*lex posterior* in relationship of both treaties between the parties).

8 The Schengen treaty system, which goes back to the agreement concerning the gradual abolition of checks at common borders of 14 June 1985 originally signed between Belgium, Germany, France, Luxembourg and the Netherlands in Schengen, Luxembourg, and which in the meantime now consists of several conventions and decisions, aims at the realisation of the free movement of persons in Europe. The resultant security problems should be prevented by compensatory measures put in place to offset the loss of the filtration function of border controls. See *Oberleitner*, Schengen und Europol, Vienna (A), 1998, at 54 et seq.

9 See *Schomburg/Lagodny*, Internationale Rechtshilfe in Strafsachen, 3rd ed., Munich (D), 1998, Article 54 of the Schengen Convention, para. 4.

ritory [...]". Both Austria[10] and Germany[11] have made use of this possibility.

II. Legal issues arising from the transfer of the Schengen *acquis* into Union law

A. The protocol for the incorporation of the Schengen *acquis* into the framework of the EU

By means of the Schengen treaty system, thirteen[12] Member States of the European Union (EU)[13] created a legal area technically anchored outside of the Union/Community legal order, *inter alia* with the free movement of persons and police cooperation.

With the Treaty of Amsterdam[14] the entire Schengen *acquis* is now incorporated into the Union's legal and institutional framework.[15] The formal settlement was achieved by a protocol annexed to the Treaty empowering the Schengen Contracting Parties to establish under primary law a closer cooperation among one another within the framework of the Schengen *acquis*, which is defined in an annex to the protocol (Schengen Protocol[16]).

This Schengen *acquis*, which also encompasses the decisions of the Executive Committee created by the Schengen Convention, was in principle already of immediate applicability since the entry into force of the Treaty of Amsterdam. At the same time the Council has stepped into the place of this Executive Committee.[17]

It was foreseen in the Schengen Protocol, however, that the Council would determine by unanimous[18] decision the legal basis for any provision and decision forming the Schengen *acquis*.[19] The Council took this position by means of *Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis.*[20] A portion of the legal bases – those for Article 54 of the Schengen Convention among them – is to be found in Title VI of the EU Treaty (Provisions on police and judicial cooperation in criminal matters), another part in Title IV of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons).[21]

The Schengen *acquis* is subject to the sole jurisdiction of the ECJ since the formal transfer into the legal framework of the EU, in keeping with the general jurisdictional rules for the ECJ within the scope of the EC Treaty and the EU Treaty.[22] In no case is the Court competent to make measures or decisions concerning the maintenance of law and order and the safeguarding of internal security.[23]

B. The Schengen *acquis* in detail

The provisions and decisions that were individually transferred into the Union framework were enumerated in an appendix to the Schengen Protocol.

Accordingly, the Schengen *acquis* encompasses the 1985 Schengen Agreement; the 1990 Schengen Convention with the pertinent final act and the joint declarations made thereto; the Accession Protocols and Agreements to the Schengen Agreement and Schengen Convention that have been concluded with Italy, Spain, Portugal, Greece and Austria, as well as Denmark, Finland and Sweden, and their relevant final acts and declarations; decisions and declarations of the Executive

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10 BGBl. (A) III 1997/90, at 2048.

11 BGBl. (D) 1994 II, at 631.

12 Great Britain and Ireland are not taking part, although they can request at any time that individual or all provisions of the Schengen *acquis* be applied to them (see Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the EU). Great Britain made such a request including Article 54 of the Schengen Convention, which was accepted by a Council Decision 2000/365/EC of 29 May 2000 (OJ 2000 L 131, at 43). A similar request by Ireland was accepted by Council Decision 2002/192/EC of 28 February 2002 (OJ 2002 L 64, at 20). Special arrangements continue to exist for Denmark (see Article 5 of the Protocol on the position of Denmark, which was annexed to the EC Treaty and the EU Treaty by the Treaty of Amsterdam) in addition to the associated States of Iceland and Norway (see Article 6 of the Protocol integrating the Schengen *acquis* into the framework of the EU and Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*, OJ 1999 L 176, at 36).

13 The European Union essentially consists of the three European Communities: European Coal and Steel Community (ECSC) (being phased out in the meantime), the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). These form the basis of the European Union ("first pillar") in accordance with Article 1, third paragraph, of the EU Treaty; this is supplemented by Common Foreign and Security Policy ("second pillar") and the provisions on police and judicial cooperation in criminal matters ("third pillar"). While the "first pillar" touches on a supranational legal order created by the Community treaties, the other two present merely a intergovernmental cooperation conventional under international law.

14 The Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts of 2 October 1997 (OJ 1997 C 340, at 1) has been in force since 1 May 1999 and is the latest change of the primary legal order now in effect. See e.g. *Griller/Droutsas/Falkner/Forgó/Nentwich*, The Treaty of Amsterdam, Vienna/New York (A/USA), 2000; *Hummer* (ed.), Die Europäische Union nach dem Vertrag von Amsterdam, Vienna (A), 1998.

15 On this point, see *Epiney*, Die Übernahme des „Schengen-Besitzstandes" in die EU, in: *Hummer* (*supra* note 14), at 103, 106 et seq.; *Hailbronner/Thiery*, Amsterdam – Vergemeinschaftung der Sachbereiche Freier Personenverkehr, Asylrecht und Einwanderung sowie Überführung des Schengen-Besitzstands auf EU-Ebene, [1998] EuR 583, 608 et seq.; *Ukrow*, Die Fortentwicklung des Rechts der Europäischen Union durch den Vertrag von Amsterdam, [1998] ZEuS 141, 154 et seq.; *Wagner*, The Integration of Schengen into the Framework of the European Union, [1998/2] LIEI 1.

16 Protocol (No 2) of the EU Treaty and the EC Treaty integrating the Shengen *acquis* into the framework of the European Union (OJ 1997 C 340, at 93).

17 See Article 2(1) of the Schengen Protocol.

18 It should be noted that this decision required not only the agreement and/or abstention of the Schengen Contracting States, but also of all EU Member States. See Article 2(1), second sentence of second paragraph, in contrast with Article 2(1), first sentence of second paragraph of the Schengen Protocol.

19 Up until the relevant Council Decision, the elements of the Schengen *acquis* governed as legal instruments supported by Title VI of the EU Treaty (Provisions on police and judicial cooperation in criminal matters; the so-called "third pillar") (see Article 2(1), fourth paragraph of the Schengen Protocol).

20 OJ 1999 L 176, at 17.

21 In the latter case, the transformed Schengen provisions– just like other Community law – have direct effect and precedence over national law.

22 See Article 2(1), first sentence of third paragraph of the Schengen Protocol.

23 See Article 2(1), second sentence of third paragraph of the Schengen Protocol.

Committee constituted on the basis of the Schengen Convention as well as legal instruments of organs to which the Executive Committee has delegated its decision-making authority.

C. Continuing validity of unilateral declarations and reservations of Member States after transfer into the framework of the EU?

For declarations made pursuant to Article 55 of the Schengen Convention, which enable a limitation of the scope of the prohibition against double jeopardy contained in Article 54 *leg. cit.*, the question that arises is their continuing validity after the transfer of the Schengen Convention into the EU framework.

In accordance with the annex to the Schengen Protocol, only the joint declarations to the 1990 Schengen Convention as well as all declarations made in the accession protocols and conventions will be transferred into the system of Union law.

In accordance with the wording which is to this extent unambiguous, unilateral declarations, which are only made by a joining Contracting Party on the occasion of the deposit of a ratification to an accession agreement,[24] are not part of the Schengen *Acquis* since they concern neither a *joint* declaration to the original 1990 Schengen Convention nor a *pertinent* declaration of the respective accession convention.

This position was confirmed by Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*.[25] Under this decision, the Schengen *acquis*, in accordance with the annex to the Schengen Protocol, covers all the legal instruments contained in Annexes A and B of the decision. These annexes thus form a (final) compendium of all legal instruments which now make up the Schengen *acquis*. It includes the Schengen Agreement, the Schengen Convention, the Accession Protocols and Agreements, the decisions and declarations of the Schengen Executive Committee as well as the decisions of the Central Group which have been authorised by the Executive Committee. Listed in a table in Annex A are 99 decisions and 37 declarations of the Schengen Executive Committee as well as 5 decisions of the Central Group; Annex B cites individually, *inter alia*, those declarations from the Accession Protocols and Agreements that were transferred into the framework of the EU. Even in this extremely detailed list, there is no reference to a transfer into the EU framework of declarations made by individual States under Article 55 of the Schengen Convention; it is therefore to be assumed that they have lost their legal validity with the entry into force of the Treaty of Amsterdam (on 1 May 1999).

The incorporation of such reservations would moreover run counter to the goal pursued with the transfer of the Schengen *acquis* into the order of the Union of deepening European integration and in particular affording the EU the opportunity to develop into an area of freedom, security and justice.

D. Article 54 of the Schengen Convention as a legal instrument under Title VI of the EU Treaty

Pursuant to the relevant provisions of the EU Treaty, Council Decision 1999/436/EC[26] determined a legal basis for the prohibition against double jeopardy in Article 54 of the Schengen Convention, which was already "immediately applicable"[27] (as an unspecified legal instrument supported by Title VI of the EU Treaty) as part of the Schengen *acquis* in thirteen[28] Member States with the entry into force of the Treaty of Amsterdam. Annex A of Decision 1999/436/EC envisions Articles 34 and 31 of the EU Treaty as legal bases for Article 54 of the Schengen Convention, without additionally committing itself to one of the various forms of legal rules in Article 34(2) lit. a to d of the EU Treaty. It appears particularly problematic that since the forms of the Article 34 of the EU Treaty are not all directly applicable, whereas "immediate applicability" of the entire Schengen *acquis* was envisioned under Article 2(1), first subparagraph, of the Schengen Protocol. This leads to the question of whether this "immediate applicability" also means "direct applicability" or, for example, "direct effectiveness" in the sense that all the provisions were to be observed without additional implementing decisions from the authorities and, if necessary, produced legal effects for individuals.

The direct applicability of the Schengen *acquis* cannot be developed by the mere fact of the transfer into the framework of the EU, which was unable to change anything in the substantive version of the corresponding provisions of the Schengen *acquis*.[29] To the contrary, it appears impossible for those instruments that are classified as intergovernmental Union law and not supranational EC law. Legal instruments of the Schengen *acquis*, for which Article 34 of the EU Treaty was determined to be the legal basis as in the case of Article 54 of the Schengen Convention, are thus (understood as decisions or framework decisions) obligatory, although not directly applicable.[30] In any event, implementing measures are required, either by the Member States[31] or by the Council.[32]

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[24] Such as the declarations made pursuant to Article 55 of the Schengen Convention. See *supra* notes 10 and 11.

[25] OJ 1999 L 176, at 1; OJ 2000 L 239, at 1.

[26] Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, at 17).

[27] See Article 2(1), fourth paragraph, in connection with Article 2(1), first paragraph, of the Schengen Protocol.

[28] The transfer by Great Britain came only later (see OJ 2000 L 131, at 43). See *supra* note 12.

[29] Ultimately, however, this is crucial for the appropriateness of direct applicability. Therefore Article 2(1), first paragraph of the Schengen Protocol cannot be understood in the sense of a stipulation to the direct effectiveness of all provisions of the Schengen *acquis*. See *Epiney* (*supra* note 15), at 110.

[30] The situation presents itself differently with regard to the portions of the Schengen a*cquis* that were supported with the "first pillar" as a legal basis. See *supra* note 19.

[31] The international law obligation arising from Article 54 of the Schengen Convention was considered by Austria, *inter alia*, by the amendment of § 34(1) StPO (A) with StRÄG 1998 (BGBl. (A) I 1998/153). The following sentence was added: The prosecution of a criminal offence committed abroad is to be refrained from, however, if required

This attempt at classification reveals that Council Decisions 1999/435/EC and 1999/436/EC are incomplete. The form of legal rule that the individual provisions would take in the framework of the Union and/or Community legal order should also have been clarified in addition to the legal basis for the individual parts of the Schengen *acquis*.[33] It will be left to the ECJ to provide clarification regarding the legal nature and questions of the direct applicability of the transformed Schengen *acquis* in individual cases by way of requests from national courts for preliminary rulings.[34/35]

This does not rule out that the ECJ will understand the transfer of Article 54 of the Schengen Convention as a form of legal rules *sui generis* to which direct applicability can be accorded (in contrast to the decisions and framework decisions), given that the rule makers made no formal assignment to one of the forms of legal rules contained in Article 34(2) lit. a to d of the EU Treaty. Without a doubt, the provision of Article 54 of the Schengen Convention was substantively unconditional and sufficiently precise ("self executing") and presented a norm favouring individuals. Thus the conditions developed by the ECJ[36] for the direct effect of a Community legal norm (within the scope of the EC Treaty) would be fulfilled.[37]

In this connection, the issue of publicity arises once again: Of the roughly 3 000 total pages comprising the Schengen *acquis* – above all the decisions of the Executive Committee – the majority were never officially announced,[38] not even by the press organs of the Member States.[39] For this reason the binding character of the individual instruments of the Schengen *acquis* for the legal subjects of the Member States before they appear in the Official Journal is answered in the negative with reference to the tenet of legal certainty[40] elaborated by the ECJ as a principle of the Community legal order.[41] In the meantime parts of the Schengen *acquis* have been published in the Official Journal;[42] however, the publication in the case of certain documents, in particular those classified as "confidential", is excluded.

E. The interpretation of Article 54 of the Schengen Convention after transfer into the framework of the EU

As a consequence of its legal nature, the 1990 Schengen Convention was to be understood as an international treaty not forming part of Community law in accordance with international law rules of treaty interpretation (especially Article 31 et seq. of the Vienna Convention[43]). Since no international tribunal exercised exclusive jurisdiction to provide an ultimately binding interpretation, the uniform interpretation and application of the Schengen Convention was not secured in the Contracting States prior to the entry into force of the Treaty of Amsterdam.[44]

With the transfer of the Schengen Convention into the EU – for the most part into Title VI of the EU Treaty, to a lesser extent in Title IV of the EC Treaty – the applicable method of interpretation itself changes. With the pooling for instance of the integration into the "third pillar" of the Union's legal order, the ECJ acquires jurisdiction to interpret pursuant to Articles 220 et seq. and 68 of the EC Treaty (in the first case) as well as Article 35 of the EU Treaty (in the second case).

III. Conclusion

The prohibition against double jeopardy anchored in Article 54 of the 1990 Schengen Convention was transferred into Union law by means of the Schengen Protocol annexed to the Treaty of Amsterdam. The restrictions created by declarations of Member States under Article 55 *leg. cit.* have thereby lost their validity.

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by an international agreement. ("Von der Verfolgung einer im Ausland begangenen strafbaren Handlung [ist] jedoch abzusehen oder zurückzutreten, wenn eine zwischenstaatliche Vereinbarung dazu verpflichtet.")

32 For Austria and Germany, this was achieved by general transformations of the Schengen Convention even before the transfer of the Schengen *acquis* into the framework of (see BGBl. (A) III 1997/90 and BGBl. (D) 1993 II, at 1010). The Convention was thereby endowed with the fundamental suitability for direct application. Whether executive acts can in fact be supported by individual provisions is a question of their content. In any event, the direct applicability in national law is to be affirmed for the substantively unconditional and sufficiently precise ("self executing") Article 54 of the Schengen Convention.

33 See *Griller/Droutsas/Falkner/Forgó/Nentwich* (*supra* note 14), at 511.

34 Article 35(1) of the EU Treaty foresees ECJ jurisdiction to decide requests for preliminary rulings from courts of Member States "on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them" provided that the Member State has submitted a corresponding declaration accepting the Court's jurisdiction under Article 35(2). For Austria, see the Bundesgesetz über die Einholung von Vorabentscheidungen des Gerichtshofes der Europäischen Gemeinschaften auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen (Federal law on requesting preliminary rulings of the Court of Justice of the European Communities in the area of police cooperation and judicial cooperation in criminal matters), BGBl. (A) I 1999/89; for Germany, see the corresponding EuGH-Gesetz (Law concerning the European Court of Justice), BGBl. (D) 1998 I, at 2035 and BGBl. (D) 1999 I, at 728. Article 35(6) of the EU Treaty envisions a proceeding patterned after its conception of an action for annulment under Article 230 of the EC Treaty.

35 As for the rest, a first request for preliminary ruling in connection with Article 54 of the Schengen Convention is pending before the ECJ in the meantime (ECJ – C-187/01 – *Staatsanwaltschaft Aachen* v *Hüseyin Gözütok*; on the basis of OLG Cologne (D), decision of 30 March 2001 – 2 Ws 590/97).

36 See in particular ECJ 6 October 1970 – 9/70 – *Grad* v *Finanzamt Traunstein*, [1970] ECR at 825, paras 5 and 9; ECJ 19 January 1982 – 8/81 – *Becker* v *Finanzamt Münster-Innenstadt*, [1982] ECR at 53, para. 25; ECJ 8 October 1987 – 80/86 – *Kolpinghuis Nijmegen*, [1987], at 3969, para. 9 et seq.

37 From the almost impenetrable literature on the direct effect of Community law norms, see e.g. *Epiney*, Unmittelbare Anwendbarkeit und objektive Wirkung von Richtlinien, [1996] DVBl. 407; *Hilf*, Die Richtlinie der EG - ohne Richtung, ohne Linie?, [1993] EuR 1.

38 A partial, informal publication was made by the General Secretariat of the Council: "In die Europäische Union übernommener Schengen-Besitzstand", Brussels (B), 2001.

39 On this point, see *Griller/Droutsas/Falkner/Forgó/Nentwich* (*supra* note 14), at 501 et seq.

40 See ECJ 25 January 1979 – 98/78 – *Racke* v *Hauptzollamt Mainz*, [1979] ECR at 69, para. 15.

41 See *Griller/Droutsas/Falkner/Forgó/Nentwich* (*supra* note 14), at 502.

42 OJ 2000 L 239, at 1.

43 Vienna Convention on the Law of Treaties of 23 May 1969 (BGBl. (A) 1980/40; BGBl. (D) 1985 II, at 927).

44 But see *Hailbronner/Thiery* (*supra* note 15), at 605 et seq.; *Wagner* (*supra* note 15), at 17 et seq.

Although Article 54 of the Schengen Convention has lost its character as a creature purely of international law since it was grouped into the so-called "third pillar" of the European Union by a Council decision, the provision remains subject however to intergovernmental cooperation under international law with the framework of the EU. This has consequences in particular with regard to judicial control, which now falls to the ECJ as provided in the modalities[45] laid out in Title VI of the EU Treaty.

[45] See *supra* note 34.

Locus standi of individuals before Community courts under Article 230(4)EC: Illusions and Disillusions after the *Jégo-Quéré* (T-177/01) and *Unión de Pequeños Agricultores* (C-50/00 P) judgments

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1. Introduction

As Professor Neuwahl rightly commented, "Judicial review of Community acts at the initiative of individuals is one of the most complex issues of European Community Law".[1] This question has been the subject of extensive debate among practitioners and in the legal literature.[2] The two commented cases – *Jégo-Quéré*, delivered by the Court of First Instance of the European Communities (hereinafter CFI) on 3 May 2002,[3] and *Union de Pequeños Agricultores* (hereinafter *UPA*), delivered by the Court of Justice on 25 July 2002[4] – provide vivid examples of this controversy. The central issue in both is whether it is appropriate to widen *locus standi* of individuals when they challenge the validity of Community acts before the two Community courts.

Generally speaking, legal systems may adopt three different approaches to the right of individuals to challenge an act.[5] The first and most restrictive alternative is to accord *locus standi* solely when the concerned act infringes the individual's legal rights. At the other end of the spectrum is the so-called *actio popularis*, the most liberal approach, which allows *locus standi* for every citizen irrespective of a particular interest. The third and middle way is to allow an individual to challenge the validity of an act when he can demonstrate that the act will adversely affect him in some way or another.

Article 230 EC (former Article 173 of the Treaty) admits the right of individuals to request annulment of an act adopted by Community institutions and organs listed in that provision. More precisely, Article 230(4) EC states that "[a]ny natural or legal person may (…) institute proceedings against a decision addressed to that person or against a decision which although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". On the mere basis of this wording, one could say that Community law appears to fall within the third approach highlighted above. However, it bears severe restrictions as to the nature of the act ("a decision") and as to the way the concerned act of general application affects the individual, i.e. the necessity to demonstrate "direct *and* individual concern". Against this wording, the Court of Justice in earlier days applied indeed a threefold test in order to determine whether an individual had *locus standi*. The first and decisive issue was to determine whether a Community regulation was in truth a decision. It is, however, established since the landmark cases of *Extramet*[6] and *Codorníu*[7] that even a true regulation, keeping its legislative character, can be challenged under Article 230(4) EC. Since then, the only issue of admissibility of an action for annulment of a Community act by an individual is therefore whether he is "directly and individually concerned" by the act. However, the case law concerning this latter expression has brought *locus standi* in Community law closer to the first, rigid approach indicated above.

It is precisely the debate of relaxation of *locus standi* of individuals, and more particularly the interpretation of the notion of "individual concern", which is at the centre of *Jégo-Quéré* and *UPA*. Both cases involved an application by legal persons for annulment of regulations adopted by the Commission (*Jégo-Quéré*) and by the Council (*UPA*). In both cases, the defendant institutions raised inadmissibility of the actions for annulment on the grounds that the applicants were

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[1] *Neuwahl*, Article 173 paragraph 4 EC: Past, Present and Possible Future, [1996] 21 E.L.Rev. 17.

[2] Cf. *inter alia*, *Arnull*, Private Applicants and the Action for Annulment under Article 173 of the EC Treaty, [1995] 32 CMLRev. 7 and Private Applicants and the action for annulment since Codorníu, [2001] 38 CMLRev. 7; *Waelbroeck and Verheyden*, Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires: à la lumière du droit comparé et de la Convention des droits de l'homme, [1995] *Cahiers de droit européen* 399; *Vandersanden*, Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que les décisions qui leur sont adressées, [1995] *Cahiers de droit européen* 535. An extensive list of other relevant sources can be found in the Opinion of General Advocate Jacobs delivered on 21 March 2002 in ECJ C-50/00 P – *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-nyr.

[3] CFI 3 May 2002 – T-177/01 – *Jégo-Quéré and Cie SA* v *Commission* [2002] ECR II-nyr = printed in this edition at 269.

[4] ECJ 25 July 2002 – C-50/00 P – *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-nyr = printed in this edition at 264.

[5] See further on this, *Arnull*, Private Applicants and the Action for Annulment under Article 173 of the EC Treaty, [1995] 32 CMLRev. 7, 11.

[6] ECJ 16 May 1991 – C-358/89 – *Extramet Industrie* v *Council* [1991] ECR I-2501, para. 13.

[7] ECJ 18 May 1994 – C-309/89 - *Codorníu SA* v *Council* [1994] ECR I-1853, para. 19.