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**JUDICIAL REVIEW BY THE COMMUNITY COURTS OF
DISCRETIONARY AND/(INCLUDING) LEGISLATIVE POWERS:**

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I INTRODUCTION

1. The term discretionary power is one that is usually associated with the executive function. And the ability to judicially review the exercise of discretionary power (by the executive) is integral to the rule of law.
2. How does this analysis apply in the Community context?
3. Firstly, within the Community, there is no clear separation of the executive and legislative functions. All Community legislation is the product of the exercise of discretionary power (and concomitantly does not have the democratic legitimacy of an act of primary domestic legislation).
4. Secondly, and even within this context, the Treaty does not seek to differentiate explicitly between measures of a normative (legislative) nature and those of an administrative nature.
5. In this respect, Article 249 EC identifies the different measures capable of adoption by the Community institutions (regulations, directives, decisions, recommendations and opinions). But there is no clear hierarchy of norms implicit in this Article, nor is there a necessary correspondence between a particular type of measure and the institution empowered to adopt it.
6. Within this framework, the familiar signposts which we find within the domestic law context informing the approach to the review of discretionary power are missing. How then do the Community Courts approach the review of discretionary power?
7. In this paper, I will seek to outline (i) the different circumstances in which the Community Courts will come to review Community action (ii) some principles which appear to inform their approach to the review of 'executive' or administrative action and (iii) finally, some of the features which relate specifically to the review of Community legislation.
8. It is suggested that a brief survey of the cases shows that:
 - whilst questions of validity of Community action remain to be determined by the Community Courts the resources of national courts are being

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deployed to act as admissibility filters - such that only “well-founded” complaints are referred to the Court;

- despite the lack of a separation of powers, the approach of the Community Courts to the review of Community *administrative* action is to a large extent informed by considerations consistent with those that flow from the separation of powers;
- particular challenges arise where the norm being challenged is of a legislative nature: as the measure is “normative” it attracts a presumptive deference as to the aims pursued and the policy choices that it reflects; yet it nonetheless falls to be reviewed both by reference to the general principles of law (the principles of subsidiarity, proportionality, transparency as well as fundamental human rights norms) but also, where relevant, by reference to substantive Treaty provisions (eg those governing the fundamental freedoms).

II MECHANICS

9. The starting point is of course the fact that the validity of Community action can only be adjudicated upon by the Community Courts: see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20.
10. There is only one route by which a Community measure can be the subject of direct challenge - the action for annulment in Article 230 EC (and the corresponding action for failure to act - in Article 232 EC) - by which privileged and, to a significantly more limited extent, non-privileged, applicants can challenge acts falling within the scope of Article 230(1) EC (subject to observing the two month time limit for proceedings: Article 230(5) EC).
11. However, the Courts can come to adjudicate on Community action in two other ways. Firstly, when, in proceedings before the Courts, a plea of illegality is made in relation to a Community measure which is in issue in the proceedings (Article 241), the Courts may review the measure in the same way as it would in a direct action under Art 230 EC.
12. Secondly, in domestic proceedings a question may arise as to the validity of a Community measure, warranting a request for a preliminary ruling from the ECJ under Article 234 EC.
13. Once before the Courts (and admissibility thresholds have been met), then the grounds of review will be the same in all three cases. Furthermore, the effect of a court’s ruling of invalidity, both in response to a plea of illegality and under the preliminary reference procedure corresponds in substance (if not in form) to a declaration of invalidity granted upon a successful action for annulment.

Direct actions: Articles 230 and 232 EC

14. There are particular features of a direct action (Article 230 and 232).
15. Firstly, there is arguably more scope for challenging a broader range of Community action under a direct action than via a plea of illegality or via the preliminary reference procedure. The range of reviewable acts under Article 230 EC is not limited by those acts specified in Article 249 but can encompass any acts intended to produce legal effects: see the ERTA case. Thus actions which precede the potential future adoption of a measure specified in Article 249 can be challenged if it commits the body to a course of action (thereby producing 'legal effect'²) or, even though it is merely preliminary or preparatory to a final decision, it causes irreparable harm to the applicant.³
16. Secondly, under a direct action, a failure to act on the part of a Community institution can also be challenged. No such challenge can be made via a plea of illegality or via the preliminary reference procedure.
17. Thirdly, the ability of a non-privileged (private) applicant to challenge a Community measure is significantly limited by the restrictive rules of standing - to the ability to challenge decisions addressed to the applicant or a regulation or decision addressed to another person which is of "direct and individual concern" to him/her.
18. Finally, proceedings under Article 230 must be brought within the 2 month time limit.

The 'plea of illegality': Article 241 EC

19. Strict time limits and the restrictive rules on standing applicable to direct actions are to an extent mitigated by Article 241 EC which provides for the 'plea of illegality':

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

20. The following features merit mention.

² See for example, Case C-15/63 *Lassalle v Parliament* [1964] ECR 31 and Case T-185/05 *Re Commission Recruitment Notices* [2009] 1 CMLR 34.

³ Case C-53/85 *AKZO v Commission* 1986] ECR 2585: disclosure of confidential documents to the complainant would cause irreparable damage to the applicant's rights of confidentiality. Cf Case T-457/08 *Intel Corporation v Commission* [2009] CMLR 18 (at esp §§ 53 to 57).

21. Firstly, the plea of illegality can be raised in any proceedings before the Court by any party (ie notwithstanding that he may not have standing to challenge the measure in question under a direct action). For example, an individual challenging a decision addressed to him by a Community institution can under Article 241 EC also challenge - by way of a plea of illegality - a regulation on which it is based.
22. Secondly, whilst Article 241 EC refers only to regulations, it encompasses any act producing legal effects *which natural and legal persons are unable directly to challenge under Article 230 EC* (ie a decision addressed to a third party): see Case 92/78 *Simmenthal v Commission* [1979] ECR 777.⁴
23. Thirdly, Member States may also raise a plea of illegality - to challenge a regulation. They are not however permitted to raise such a plea against a decision addressed to it (which they could have but did not challenge under Article 230 EC).

Article 234/ preliminary reference procedure

24. An Article 234 reference is often the means by which challenges to Community measures are brought before the ECJ.
25. For instance, in proceedings before a national court a party may assert that domestic implementing legislation or action taken pursuant to such legislation is unlawful on the basis that the directive which it seeks to implement is itself unlawful as a matter of Community law.
26. The ECJ in Case C-263/02 P *Jégo Quéré* [2002] ECR II-2365 made express reference (in mitigation of its decision on the standing of non-privileged applicants under Article 230 EC) to the possibility of such indirect challenges (para 35):

“It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national courts under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the regulation indirectly. It is likewise possible that under national law an operator directly concerned by [the Regulation at issue] may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge this regulation indirectly.”

⁴ Similarly, a natural or legal person who fails to challenge a Community act under Article 230 (even though he has standing to do so) may not subsequently contest the validity of that act in proceedings before a national court: Case C-188/92 [1994] ECR I-833, Case C-178/95 *Wiljo v Belgian State* [1997] ECR I-585.

27. Indeed in Case C-50/00 P *Union de Pequenos Agricultores v Council* (“UPA”) [2002] ECR I-6677 the ECJ held by reference to the preliminary reference procedure that it was for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection. It stated that “it was in accordance with the principal of sincere cooperation laid down in Article 5 EC, that national courts are required, as far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of the act” (para 41).
28. Perhaps in reflection of the obligation imposed on national courts in *UPA*, the Court held in Case C-491/01 *R v Secretary of State, ex parte British American Tobacco* [2002] ECR I-11453 that a claimant’s right to plead the invalidity of a Community act of general application before a national court did not depend on the existence of domestic implementing measures. (In that case, the applicants sought judicial review in the High Court of “the intention and/or obligation” of the UK government to transpose a directive on tobacco products into national law. The Court held that a reference by the High Court on the validity of the directive was admissible, even though at the time of the application for judicial review the deadline for implementing the directive had not expired and the government had not yet adopted any implementing measures.)

Discretion to refer questions of validity

29. Whilst national courts are precluded from ruling on the validity of a Community measure (*Fotofrost*) and are under an obligation (under Article 5 EC) to facilitate the ability to challenge Community measures (*UPA*), the ECJ has subsequently stated that Article 234 EC does not constitute a means of redress available to parties to a case pending before a national court: Case C-344/04 *International Air Transport Association* [2006] ECR I-403 (“*Intertanko*”).
30. On this basis, it confirmed (in *Intertanko*) that national courts are not obliged to refer questions of validity of Community measures to the ECJ (unless they are a court of last resort - in which case such an obligation will arise under Article 234(3) EC). It was only where the national court considers that one or more arguments for invalidity of the act which have been put forward by the parties or otherwise raised by it or of its own motion are “well founded” that a reference should be made.
31. As understood by the domestic courts, “well-founded” means more than arguable and that the contentions that the act of the institutions is invalid have a reasonable prospect of success: *R (Intertanko) v Secretary of State for Transport* [2007] Env LR 8 (at para 46).
32. The domestic courts are thereby acting as form of admissibility filter in cases of indirect challenges brought by natural or legal persons to the validity of Community measures.

Obligation to refer as court of last resort

33. Article 234(3) EC imposes an obligation to refer questions of Community law only on courts or tribunals of a Member State against whose decision there is no remedy.
34. Can the Court of Appeal ever be a court of last resort? The ECJ has rejected the “functional approach” to this question according to which only the House of Lords would be the court of last resort - holding that the obligation to refer falls on the court of last resort *in the case in question*: Case 6/64 Costa v ENEL [1964] ECR 585). On this basis, two issues arise.
35. Firstly, when refusing permission to appeal to the House of Lords is the Court of Appeal a court of last resort? The ECJ has answered that it is not, notwithstanding the fact that the House of Lords may refuse leave to appeal on the basis that when considering whether or not grant leave the House of Lords will itself need to consider whether or not the case raises a question of Community law and can make a reference if it so considers: Case C-99/00 *Lyckeskog* [2002] ECR I-4839.
36. Secondly, when the Court of Appeal refuses permission to appeal from a lower court, will it be a court of last resort (on the basis that its decision effectively determines the case) and so be obliged to make a reference where a question of Community law arises? Alternatively, must the Court of Appeal grant permission and proceed to determine the appeal following a substantive hearing whether or not the argument that the act of the Community institution is invalid is “well-founded” (before eg deciding not to make a reference and disposing of the appeal)?

Grounds of review

37. Article 230(2) specifies the grounds on which the Community Court may review Community measure:
 - lack of competence;
 - infringement of an essential procedural requirement;
 - infringement of this Treaty or of any rule of law relating to its application;
 - misuse of powers.
38. The third ground is the broadest and is capable of subsuming the other categories. (For instance, Article 253 EC enshrines a duty to give reasons – in relation to the adoption of regulations, directives and decisions, a breach of which would be challenged under both the second and third grounds.)

III REVIEW OF “ADMINISTRATIVE” ACTS

39. With certain qualifications, the way in which the Community Courts carry out their review of acts of an *administrative* nature displays similarities with the way in which the domestic courts in the UK seek to review the exercise of discretionary power. This paper will not seek to address this area in detail. However a few observations are made.

40. Firstly, the willingness of the Courts to scrutinise a measure depends on the extent to which a desire to protect a broad area of discretionary judgement enjoyed by the institution in a given field is outweighed by concerns relating to the interests of the individual. In many cases, the balance will be struck having regard to whether the measure sought to be challenged is of general (or wider application) or is decision concerned with the interests of an individual (ie where the measure sits on the ‘administrative/judicial spectrum’; cf planning decisions in domestic law). (By reference to some recent cases) compare:

Case T-69/04 *Schunk GmbH v Commission* [2008] 4 CMLR 2: the fact that reg 15 of Regulation 17 conferred a discretion on the Commission in setting the level of fines was not in itself inconsistent with the rights of the defence, provided that the scope of the discretion and the manner of its exercise were indicated with sufficient flexibility; the Commission may adjust the level of fines - by reference to broader policy considerations - such that its decision to increase the level of fines did not breach the principle of equal treatment);

Case T-345/05 *Mote v European Parliament* [2009] 1 CMLR 15: the fact that the privileges and immunities had been provided in the public interest of the Community justified the power given to the institution to waive the immunity where appropriate but did not mean that these privileges and immunities were granted to the Community and not directly to its officials.

Case T-284/08 *People’s Mojahedin Organisation of Iran v Council* [2009] 1 CMLR 44: whilst the Council had a broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60, 301 and 308 EC, the decision by the Council to add the applicant to the list of persons and entities whose funds must be frozen in order to combat terrorism was vitiated by, inter alia, the insufficiency of the evidence on which it was based.

41. Secondly, where the allegation is that the Community institution has breached a *procedural* obligation, the Courts are more willing to intervene: (i) a particular concern of the Courts is to promote and protect the transparency in the decision making process; (ii) where the decision is “quasi-judicial” in nature, the Courts’ approach is to recognise the *effects* that a decision may have on the interests of the individual: see *People’s Mojahedin Organisation of Iran v Council*: the Council’s decision was (also) vitiated by the fact that the decision had been adopted in breach of the applicant’s rights of defence.

42. In any event, but consistently with these concerns, procedural rights are in certain cases expressly conferred in legislative procedures on “interested” persons, and the Courts have been willing on the basis of such express

provision to invalidate a measure adopted in breach of the rights conferred. See eg:

Case C-521/06 P *Athinaiki Techniki v Commission* [2008] 3 CMRL 34 (a decision not to proceed to a formal investigation under Article 88(3) EC following a “complaint” under Article 20 of Regulation 659/1999);

Case T-306/05 *Scippacerola v Commission* [2008] 4 CMLR 20 (decision addressed to a complainant under Article 3(2)(b) of Regulation 17 that the Commission would not proceed to a formal investigation).

III REVIEW OF COMMUNITY LEGISLATION

43. Review of Community legislation gives rise however to a number of specific concerns. The measure will fall to be reviewed against a multiplicity of Treaty provisions and principles of law enshrined in the Treaty. Issues which arise acutely in relation to the review of legislation relate to the competence (or the proper legal basis of the measure) and their interplay with the:

- the principle of subsidiarity;
- the principle of proportionality;
- fundamental human rights norms.

44. In addition, concerns in relation to transparency (particularly in light of the “democratic deficit” in the Community’s legislative process) remain a central concern.

Competence and the principle of subsidiarity

45. The principles of subsidiarity and proportionality often feature in challenges to Community legislation.

46. The relationship between the proper legal basis of a given measure and the principle of subsidiarity gives rise to issues in the following way:

- consider Article 95 EC (the Treaty basis for single market measures). Whilst the principle of subsidiary does not apply to areas falling within the Community’s exclusive competence (Article 5(2) EC), Article 95 EC has been held to confer only shared competence on the Community: Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079;
- it is well known that Article 95 EC however empowers the Community to adopt harmonising measures which whilst demonstrably pursuing an internal market aim (ie those designed to eliminate identifiable obstacles to trade) also pursue other policy (eg public health) objectives. The Court has explained this approach by drawing a distinction between the *aim* (ie single market) of the measure and the *manner* (ie by the taking into

account of public health objectives when devising the standard of harmonisation) in which that single market aim is carried out: see. C-434/02 *Arnold Andre* [2004] ECR I-11825; Case C-210/03 *Swedish Match* [2004] ECR I-11893 and Case C-154/05 *Alliance for Natural Health* [2005] ECR I-6451;

- how then, when a measure is adopted in an area of shared competence, is the principle of subsidiarity to be applied? Is it applied by reference to the 'formal' or primary (single market) aim of the measure? Or is it applied to the accompanying (and often real) aim of the measure (eg public health objectives)? It is now clear that the Court adopts the former approach, considering only whether the *internal market* measure could be better achieved at Community level: *British American Tobacco*, paras 181 and 61, and not asking itself this question in relation to the public health objectives in the Directive.

47. Such an approach serves in effect to weaken the principle of subsidiarity to a procedural requirement:

- in this respect, it is notable that the Amsterdam Protocol which has injected a degree of transparency into the decision-making process. In particular it states that (i) for any proposed legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principle of subsidiarity (ii) the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators and (iii) in the course of the co-decision and co-operation procedures the Council is required to inform the European Parliament of its position on the application of subsidiarity principle by way of a statement of the reasons which led the Council to adopt its common position;
- however the Protocol also states that compliance with subsidiarity should only be established where action at the Community level would produce *clear* benefits compared with action at the level of the Member State. Any failure to comply with these standards of subsidiarity should, it is suggested, give the Court greater power when considering whether the principle of subsidiary has as a matter of substance been complied with.

The principle of proportionality

48. The principle of proportionality appears as a ground of review of administrative as well as legislative action. In the *former* context, the principle is used to control the extent to which measures adopted by the Community authorities in furtherance of objectives of the Treaty are permitted to override the interest of particular individuals: Article 5(3) EC.

49. However in the context of reviewing legislation, the principle appears in a number of ways.

legal basis and proportionality

50. Firstly, it is said to be relevant in the assessment as to the correct legal basis of the measure:
- as explained above, a single market measure adopted under Article 95 EC may as a matter of reality have a policy objective independent of the single market aim;
 - the Court has acknowledged that the principle of proportionality may have a role to play when reviewing a measure's adoption under Article 95 EC: it has held that Article 95 EC authorises the Community legislature to intervene by adopting "*appropriate* measures in compliance with Article 95(3) EC⁵ and with the legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality" (*Arnold Andre*, para 34, *Swedish Match*, para 33, and *Alliance for Natural Health*, para 32; cf the earlier position in Case C-74/99 *Imperial Tobacco* [2000] ECR I-8599);
 - however, the way in which the principle is applied *for this purpose* is unclear: see *Alliance for Natural Health*, paras 35 to 40. In this case, the Court simply observed that the conclusion that the measure was properly adopted on the basis of Article 95 EC was *not invalidated* by the fact that human health considerations could play a part in the formulation of the provisions: see para 39.

proportionality as an independent ground of review

51. Secondly, the principle of proportionality also appears as an independent ground of review (distinct from one which challenges the legal basis of the measure): see eg Case C-84/94 *United Kingdom v Council* [1996] ECR I-5575 (the *Working Time Directive* case), paras 59 to 60. In this case, the Directive was (found to be validly) adopted on the basis of (ex) Article 118a. Accordingly, the Court was able to undertake the proportionality assessment by reference to the formal social aim of the Directive (the protection of the health and safety of workers), and in so doing adopted a deferential approach to the policy choices reflected in the Directive.

proportionality and whether the measure is unlawful restriction trade

52. Finally, provisions within a Community measure may also be challenged as constituting an obstacle to trade (eg contrary to Article 28 EC - notwithstanding that the measure is itself a single market measure aimed at eliminating barriers to trade). In such a case, a proportionality review will take place when considering the question of justification under Article 30 EC.
53. It is interesting to note that in contrast to the assessment of a measure's observance of the *subsidiarity* principle (where the assessment is undertaken

⁵ This requires the Commission, in those of its legislative proposals under Article 95(1) EC which concern health, safety, environmental protection and consumer protection to adopt as a base a high level of protection.

only by reference to the single market aim of the measure - see para 46(3) above), the proportionality assessment under Article 30 EC is undertaken by reference to *both* the public health objectives (ie underpinning the discrete provisions of the measure sought to be challenged) as well as the single market objectives of the measure as a whole: see eg *Alliance for Natural Health*, paras 47 to 70. Whilst intellectually justifiable (as after all the specific provisions challenged under Article 28 EC pursued purely public health aims), the Court was thereby in effect able to review the proportionality of the Directive *by reference to its (real) underlying public health objectives*. (Such an exercise would have been more difficult if undertaken as an independent assessment of the proportionality of the Directive as a whole - ie under a free-standing proportionality challenge to the Directive.)

Transparency and the legislative process

54. As mentioned above, transparency in the legislative process is a concern that the Community Courts have been anxious to safeguard. For a recent example see Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] 3 CMLR 17 (concerning access to Council documents relating to the Council's legislative functions).⁶
55. A discrete issue which involves, amongst other things, a question of transparency in relation to Community legislation arises in relation to Commission 'implementing measures':
- under Article 202 EC the Council may by a legislative act confer upon the Commission powers to implement an act. In this respect, questions arise as to the how wide these implementing powers may be and what principles exist for determining their scope. In particular, can the Community legislature establish in a "parent" act a power to draw up implementing rules (or implementing decisions)? How much can the parent act (itself a discretionary measure) legitimately leave to the discretion of the Commission implementing measure?
 - the Court has held that the Commission's implementing powers are limited by the "essential general aims" of the legislative act granting those powers": see Case C-159/96 *Portugal v Commission* [1998] ECR I-7379, paras 40-41 and Case C-403/05 *European Parliament v Commission* (Philippines Border Management Project) [2007] ECR I-9045.⁷ See also *Alliance for Natural Health*, at paras 71 to 92;
 - see also the current 'comitology' Decision: Council Decision 1999/468/EC as amended by Decision 2006/512/EC which establishes a procedure - the "regulatory procedure with scrutiny" - whereby non-essential elements

⁶ See also the Commission "General Principles and minimum standards for consultation of interested parties by the Commission" COM (2002) 764 final.

⁷ See also the current comitology Decision: Council Decision 1999/468/EC as amended by Decision 2006/512/EC which establishes a procedure - the "regulatory procedure with scrutiny" - whereby non-essential elements of an instrument adopted by the decision may be amended: Arts. 2(2) and 5a.

of an instrument adopted by the decision may be amended: Arts. 2(2) and 5a;

Fundamental human rights

56. Whilst the reach of the proportionality and subsidiarity principles are to a degree restricted by the approach of the Courts to questions of competence (and legal basis), there is conversely a symbiotic relationship between questions of competence and fundamental human rights protection. The ECJ has very recently confirmed that the competence of the Community to act within a certain sphere brings as a corollary a concomitant requirement for its acts (in that sphere) to be subject to review: see Case C-402/04 P & C-415/05 P *Kadi & Al Barakat International Foundation v Council* [2008] 3 CMLR 1207. In that case the ECJ held that the Community has competence to adopt economic sanctions not only against states but also against individuals on the basis of Articles 301, 60 and 308 EC. Where the Community had competence to adopt a particular measure, that measure must be susceptible to judicial review. The fact that the measure in question sought to give effect to UNSC resolutions adopted under the UN Charter did not mean that it was not subject to review by the Community Courts.⁸

IV A QUESTION

57. It is difficult to offer a succinct conclusion on this broad topic, so I will limit myself to a question. How will the changes under the Lisbon Treaty (if duly ratified) affect some of these issues? In particular:

- the Lisbon Treaty, preserves a version of the hierarchy of norms introduced under the Constitutional Treaty (distinguishing between legislative, non-legislative acts of general application and implementing acts);
- furthermore, it defines legislative acts as those enacted via a legislative procedure (either ordinary or special) whilst non-legislative acts are those that are not enacted in this manner. (This latter category of acts would correspond most closely with delegated legislation in the UK);
- the creation of delegated acts (with specified control mechanisms) may have implications for the Comitology regime.

58. An emergence of the separation of powers?

⁸ Cf *Behrami and Saramti* (2007) 45 EHRR SE10 which the Court sought to distinguish (both by reference to the facts in *Kadi* but also by reference to the Community's autonomous legal order within which states as well as individuals have immediate rights and obligations and on the basis of which the ECJ ensures respect for the fundamental rights as a "constitutional guarantee").