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JUDICIAL POWERS

- The State is governed by the rule of law, which reflects that a legal order should provide for judicial mechanisms to review the legality of all governmental acts.
- The judiciary has the power to <u>annul</u> <u>legislative or executive acts</u>, the power to <u>remedy public wrongs</u> through governmental liability and the power to adjudicate legal disputes between parties.
- The Court of Justice is one of the main mechanisms applied within the EU in order to fulfil these powers in relation to the Union.



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ANNULMENT POWERS; JUDICIAL REVIEW

- The most powerful function of the ECJ is to annul an act.
- The competence and procedure for judicial review in the EU is established in <u>Article 263</u> <u>TFEU.</u>
- If an action for judicial review is well-founded, the Act in question will be declared void by the ECJ. (Article 264(1) TFEU)
- The Union then takes appropriate measures to comply with the judgement of the Court (<u>Article 266 TFEU</u>) and will possibly be required to pay compensation for damage caused by the illegal act. (<u>Article 268 & 340 TFEU</u>)
- **4 procedural components** are required for a judicial review action;
 - 1. <u>The existence of a reviewable act</u>
 - 2. Legitimate grounds for review
 - 3. Legal standing before the court
 - 4. <u>Time limitation</u>



1. <u>THE EXISTENCE OF A REVIEWABLE ACT</u>



- Article 264(1) determines whether there can be judicial review.
- The Court is entitled to review legislative acts, can review unilateral acts of all Union institutions other than the Court of Auditors.
- It cannot judicially review Member States.
- The European Treaties cannot be reviewed by the Court.
- There can be no judicial review for recommendations or opinions as there have no binding force= no reason to be challenged. (Article 288(5) TFEU)
- Acts that are internal to any Union institution are excluded.
- Preparatory acts of the Commission or Council cannot be challenged. (*IBM v. Commission* [1981])
- Wide definition of what can be reviewed as can be seen in ERTA [1971] para 39-42.

2. LEGITIMATE GROUNDS FOR REVIEW

Formal Grounds of Review

- A European Act can be challenged if the Union lacked competence to adopt it. (*ultra vires review*)
- Vertical and horizontal application of the principle of conferral allows the Court to protect the institutional balance of powers within the Union.
- A Union act can be challenged if it infringes an essential procedural requirement. (ERTA case [1971])
- In relation to misuse of powers, this has been obscurely defined as can be seen in *Gutmann vs. Commission* [1965].
- Residual ground of review established by Articles 263(2)(3) TFEU.

<u>Article 263(2) TFEU</u> limits judicial review to <u>4 legitimate grounds;</u>

- 1. Lack of competence,
- 2. Infringement of an essential procedural requirement,
- 3. Infringement of the Treaties or any rule of law relating to their application,
- 4. Misuse of powers.



THE PROPORTIONALITY PRINCIPLE

- Proportionality principle exists to protect liberal values.
- Codified via Article 5(4) TEU.
- Has the furthest reach of all of the grounds of review.
- Tripartite test for proportionality; analysis of suitability, necessity and proportionality in the strict sense is conducted by the Court in order to determine the proportionality of an Union Act. (*Fedesa & Others [1990]*)
- Union has wide margin of appreciation, so the proportionality of an Act will only be tested if the measure is manifestly inappropriate. (*Fedesa & Others* [1990])
- See *Kadi* [2008] for a good example of the proportionality test being applied in relation to a Union Act.

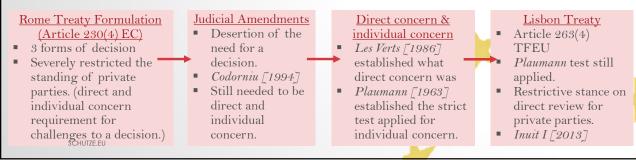


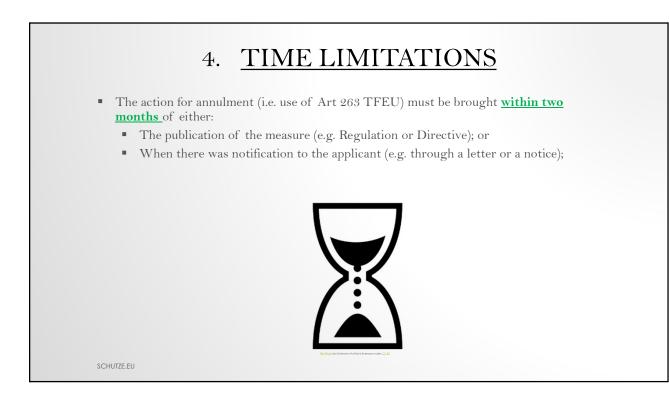
3. LEGAL STANDING BEFORE THE COURT

Article 263 TFEU lists 3 categories of applicants.

- Privileged applicants who can always bring an action for judicial review (Member States, Parliament, Council & Commission) (Article 263(2) TFEU)
- Semi-Privileged applicants who can bring review proceedings for the purpose of protecting their prerogatives. (Court of Auditors, European Central Bank & Committee of Regions)(Article 263(3) TFEU)
- Non-Privileged applicants have to demonstrate that the Union Act affects them specifically. (natural/legal persons) (Article 263(4) TFEU)

Development of Legal Standing





INDIRECT REVIEW

Plea of Illegality (Article 277 TFEU)

- Collateral review
- Inuit II [2013]
- Bypasses two month time limit under Article 263 TFEU & allows individuals the opportunity to challenge legislative acts of regulatory acts that require further implementation. (Simmenthal [1979 para 37 & 41)

Preliminary Rulings (Article 267 TFEU)

- Complementary review (Les Verts [1986])
- Challenge legality of Union Acts in national courts.
- Indirect review via Article 267 over direct review under Article 263?
- Indirect review can be brought against any union act, on any grounds and can be launched by anyone at any time.
- Disadvantages to this form of review are; national court has to have jurisdiction, applicant may need to breach EU law prior to review, individual applicants have no right to demand the review.

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LIABILITY ACTIONS

Damages for losses granted under Article 268 TFEU with reference to Article 340 TFEU.

Schoppenstedt formula to Bergaderm formula

- Distinction between legislative & administrative Union Acts. н.
- Administrative: low liability threshold (Adams vs. Commission [1985])
- Legislative:
 - Schoppenstedt formula [1971]

Liability dependent on;

- 1. The breach of a superior rule of Union law
- 2. That grants rights to individuals
- 3. The breach is sufficiently serious.
- Bergaderm [20007 reformed this in 3 ways:
 - 1. Distinction between administrative and legislative Acts abandoned.
 - 2. Abolished the need for a superior rule
 - 3. To establish seriousness, the Union had to "manifestly and gravely disregard the limits on its discretion."
- FIAMM [2008] The Union is not liable for damage caused by actions that are legal. SCHUTZE.EU

ENFORCEMENT ACTIONS: AGAINST STATES



- It is the reactive function of the judiciary
- Central adjudication follows two routes: adjudication against Member States & enforcement actions against the Union.
- Enforcement actions against Member States (for actions the State is responsible for) are conducted under Article 258 and 259 TFEU.
- Other Member States and the Commission (once satisfying the pre-litigation stage) can raise proceedings.
- Any judgement does not repeal the national law in question, but *a declaration of violation* is made and this can be paired with financial sanctions. (France vs. Commission [1979])
- States are required to take necessary measures to rectify any violations. (Article 260(1) TFEU.)
- Sanctions regime (Article 260(2) & (3) TFEU.)

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ENFORCEMENT ACTIONS: AGAINST THE UNION

- Infringement proceedings can be brought against Union institutions for <u>failure to act under Article 265 TFEU</u>.
- Can be brought against any institution other than the Court of Auditors or the European Court.
- Actions can be brought by any similar to the criteria set in Article 263(4) TFEU.
- Judicial stages will only commence once the relevant institution has been called upon to act and hasn't defined its position in two months.
- Material scope of Article 265 is wider than that of Article 263 TFEU. (*Parliament vs. Council (Comitology)*[1988])
- <u>There needs to be an obligation to act</u> for failure to act to be cited. (*Parliament vs. Council (Common Transport Policy* [1985])
- <u>Article 266 TFEU</u> establishes that if it is found that a Union institution has failed to act they will need to take the necessary measures to rectify this failure.

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PRELIMINARY RULINGS

All national courts of Member States are entitled and obliged to apply EU law. (*Simmenthal [1978]*) Preliminary ruling procedure allows national courts to ask the EU court questions regarding the application and interpretation of EU law. (*Article* <u>267 TFEU</u>)

Article 267(1) TFEU; Jurisdiction of the ECJ

- Covers all Union law & international agreements entered into by the Union. (<u>Haegemann [1974]</u>) Doesn't include national law at all.
- Competence extends to questions of validity and interpretation. (Doesn't concern application (*Costa vs. ENEL [1964]*))
- Blurred lines between interpretation & application.

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<u>Article 267(2) TFEU;</u> The Conditions for a Preliminary Ruling

- <u>Dorsch Consult [1997]</u> established the criteria to be met for whether a body is a court or tribunal in accordance with the Article.
- Wide definition of what a court or tribunal is as seen in <u>Broekmeulen [1981]</u>
- All national courts can make a preliminary reference even if a superior court exists. (<u>Rheinmuhlen [1974]</u>)
- National courts are allowed to make a preliminary reference if it is deemed necessary for them to make a ruling.
- Rarely will a request be rejected, see <u>Foglia vs.</u> <u>Novello[1980]</u> for an example of when a preliminary reference will be refused.

PRELIMINARY RULINGS (cont.)

<u>Article 267(3)TFEU;</u> The Obligation to Refer and Acte Clair

- If there is no judicial remedy under national law the Court or Tribunal must bring the action to the attention of the European Court.
- Procedural theory favoured by the Court of Justice; key concept of this obligation is the appealability of a judicial decision.
- If there is no means of appeal it must be raised with the European Court.
- If there is a question regarding the validity of EU law, national courts are obliged to bring these to the attention of the EU Court. (*Case* C-344/04 [2006])
- The obligation is limited; *acte clair* applies when the answer is so clear, there is no need for a question regarding interpretation to be raised with the court. (*Da Costa[1963]*) SCHUTZE.EU

• *CILFIT [1982]* establishes the conditions required for *acte clair* to apply in order to remove the obligation to refer from a Member State.

Legal Nature of Preliminary References

- Preliminary rulings cannot bind the parties to a conflict, they do not decide the dispute in question.
- The interpretation provided by a ruling is binding. (*Benedetti vs. Munari* [1977])
- Preliminary rulings are not decisions- deemed to be declarations as "the judgements are assumed to be declaring pre-existing law."
- Retroactive effect of preliminary rulings? See Kuhne & Heitz [2004]

CONCLUSION

- The ECJ has extensive powers and has the power to annul European law, power to remedy illegal acts of the Union and the power to enforce European Law through adjudication
- Union is based on the concept of the rule of law.
- Both the Unions actions and Member States can be judicially reviewed.
- National Courts are European Courts from a functional perspective.
- Preliminary references allow national courts to seek assistance with interpreting EU Law.





DES COMMUNAUTES EUROPEENNES

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