CHAPTER EIGHT

Judicial Review of Acts and Omissions of EU Institutions: The Annulment Action

8.1. Introduction

[8:01] This chapter concerns the annulment action, under which Member States, EU institutions or indeed private persons or undertakings may bring proceedings before the Court of Justice, seeking to have a legal measure taken by an EU institution annulled. Later it will be necessary to consider the grounds on which such actions may be brought (*i.e.* the legal basis on which EU measures may be annulled), the types of measures which may be challenged, and the effects of an annulment, but first it is necessary to set out the persons or institutions who have standing to bring an Article 263 action and the circumstances in which they will be deemed to have such standing.

8.2. Standing under Article 263 TFEU

Article 263 TFEU provides as follows:

> *"The Court of Justice of the European Union shall review the legality of legislative acts, 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 and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.*
>
> *It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.*
>
> *The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.*
>
> *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."*

Privileged and semi-privileged applicants

[8:02] By virtue of Article 263(1), the so-called 'privileged' applicants – Member States, the Commission, the Council, and the European Parliament – have a general power to seek judicial review of the acts of the EU institutions, subject only to the relevant limitation periods. The privileged applicants in effect have what Chalmers et al. (2010, p. 413) call *"general, unrestrained policing powers against the EU institutions"*. Article 263(3) lists several bodies – the European Central Bank (ECB), the Court of Auditors, and the Committee of the Regions – which are also

entitled to bring judicial review proceedings, but only *"for the purpose of protecting their prerogatives"*. These bodies are often referred to as 'semi-privileged' applicants. Their standing to seek judicial review extends only to matters affecting their own prerogatives (*i.e.* legal entitlements).

Non-privileged applicants

[8:03] Article 263(4), by contrast, provides that any natural or legal person *"may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."* This formulation – which replaced a more convoluted previous wording – quite clearly encompasses Decisions (which are addressed to a person), as well as, where the test of *"direct and individual concern"* met, Regulations and Directives. This test has been the main focus of the case law. Before passing on to that case law, another change introduced by the Treaty of Lisbon should be noted, namely the reference to *"regulatory acts"* in the second half of Article 263(4). This will be discussed further below.

Direct concern

[8:04] The case law has identified two key aspects to the notion of direct concern. The first is that there must be a causal link between the act under review and the infliction of harm on the applicant. The second aspect is that the interest affected by the measure must be legal in nature: it must be affect his/her legal position directly. These can be summarised as follows:

> *"The contested measure must directly produce effects on the legal situation of the person concerned and its implementation must be purely automatic and follow solely from the [Union] rules, without the application of other intermediate measures."*[1]

[8:05] As to the first aspect, the usual approach is to ask whether the measure taken by the body or institution left Member States any discretion as to its implementation: If it did, then the institution may validly argue that the Member State (and not it) is responsible for any harm done to the applicant? In *Piraiki-Pitraiki*, upon the accession of Greece to the Union, France went to the Commission to ask for permission to continue a discriminatory regime which restricted imports of Greek cotton. The Commission granted the permission sought. When Greek cotton exporters challenged this decision, the Commission argued that its decision had left the French authorities with a discretion as to whether to continue with the restrictive regime. The Court rejected this argument, saying that in this case there was only a very small, theoretical possibility that the French authorities would not have continue with their approach, once granted permission. The approach of the Court has been criticised, with authors such as Chalmers et al (2010), p 416, suggesting that in circumstances such as this the Commission and the Member State should be jointly liable.

[8:06] The second aspect of 'direct concern', as noted above, is that interest affected must be one recognised by the Court as being legally protected. *Front National* is a good example here.[2] That was a case in which a number of MEP's, together with their representative group (the *Front National*), challenged a decision of the European Parliament to decline to grant them group status in the Parliament. This disadvantaged the applicants by affording them less parliamentary rights and financial advantages, including in relation to secretarial support. The General Court held that the applicants were directly concerned by this decision, but the ECJ overturned this ruling, holding that although MEP's such as the applicants, in running for election, may hope

[1] *BUPA and others v Commission* [2008] ECR II-81 (Case T-29/03)
[2] Front National v European Parliament [2004] ECR I-6289 (Case C-486/01)

that they will be in a position to promote their ideals in the same way as other parties and under the same conditions, this did not confer a (legal) right on them to be entitled to form a group or join one.

[8:07] The test that measures must *"affect directly the legal situation of the [applicant]"* can be somewhat uncertain, however, as it may not always be clear when a 'legal' interest is affected. Thus in *Regione Siciliana*, the Court of Justice overturned a decision of the General Court and held the test was not met in a case where the Commission had cancelled regional assistance for the construction of a dam in Sicily, thereby depriving the region of assistance it would otherwise have received and requiring it to repay money already received. It was the Italian Republic that had made the application; the region was merely the administering authority. Therefore the region had no legal right to the money and so, despite the financial impact, could not be said to be "directly concerned".[3]

There may be further discussion of the notion of direct concern in the case law post-Lisbon, given that it is the principal criterion in the new provision of Article 263 regarding *"regulatory acts"*.

Individual concern

[8:08] The other part of the test is "individual concern". The leading case is *Plaumann*.[4] The background to that case was that the Commission refused an application by Germany for authorisation to suspend customs duty on the importation of clementines. The applicant, an importer of clementines, challenged the Commission's Decision. The Court of Justice ruled that he lacked standing – the Decision was not addressed to him and he had not demonstrated "individual concern". The Court stated:

> *"Persons other than those to whom a decision is addressed may only claim to be individually concerned it 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 just as in the case of the person addressed."*

[8:09] The *Plaumann* test accordingly requires that an applicant for judicial review differentiate himself from all others by virtue of certain attributes or circumstances. The Court effectively took the approach that, even though there were not that many persons who imported clementines, in theory more or less anyone else could enter that business, and accordingly Mr. Plauman was not sufficiently distinctive from everyone else. Hartley has suggested that the Court was in effect drawing a distinction between fixed and open categories: An open category is one where the membership is not fixed and determined when a measure comes into force (and *vice versa*).[5] The *Plaumann* analysis has been criticised as somewhat restrictive and artificial, but it remains the approach followed by the Court.

[8:10] The open/closed category analysis was applied by the Court more recently, in, for example, *Commission v Koninklijke Friesland Campina*,[6] an example of a case in which the *Plaumann* test was satisfied. There the applicant (KFC) challenged a Decision of the Commission that a Dutch scheme, which gave tax benefits to companies carrying out international financing activities. KFC had been refused entry to the scheme in 2001 after the announcement by the

[3] Regione Siciliana v Commission [2007] ECR I-2591 (Case C-15/06 P) (for the first instance decision, see [2005] ECR II-4139 (Case T-60/03))

[4] Plaumann & Co. v Commission [1963] ECR 95 (Case 25/62)

[5] T. Hartley, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, 6th ed., (Oxford University Press, 2007), p. 348.

[6] Commission v Koninklijke Friesland Campina (Case C-519/07)

Commission of an investigation into whether the scheme amounted to illegal state aid. The Commission decided in 2003 that the scheme was illegal but stated that all undertakings benefiting from it could continue to do so. KFC unsuccessfully challenged the Decision before the ECJ (having at first succeeded before the General Court), but the ECJ did accept that the applicant met the "individual concern" test. The Court of Justice repeated the *Plaumann* formula and then stated as follows:

> *"An undertaking cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis that undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner …*
>
> *By contrast, the Court has held that, where a contested measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders …"*[7]

[8:11] The Court held that KFC formed part of a closed group of undertakings – and not of an indefinite number of undertakings belonging to the sector concerned – specifically affected by the contested decision. Because admission to the scheme in question was (or should have been) automatic and as of right, once certain criteria were fulfilled, then the undertakings whose authorisation was pending must be regarded as individually concerned by the contested decision.

[8:12] As Chalmers et al. note,[8] the result of *KFC* is that an applicant must seemingly have had a pre-existing legal relationship, which was disrupted by the measure under review. Thus the Court has held that applicant were individually concerned in the case of traders who had signed contracts which could not be carried out, due to a Commission Decision[9]; and also where applicants were part of a small group who had benefited from a tax scheme which was withdrawn because of a Commission Decision.[10]

[8:13] 'Individual concern' may also be found if special procedural safeguards are provided prior to an act being adopted. In *Vischim*,[11] EU legislation provided for the phasing out certain plant protection products. Vischim, the manufacturer of a product called chlorothalonil, was among the companies allowed to present information as to the qualities of its product. A subsequent Directive banned chlorothalonil. The General Court took the view that the company was individually concerned because of the procedural safeguards provided by the original legislation.

[8:14] Similarly, in *Pfizer Animal Health v Council*,[12] it was argued that, in challenging a Regulation, Pfizer was in no different position from all other producers or all other potential producers of a product called virginiamycin. It turned out that there was in fact Pfizer was the only producer of virginiamycin in the world, from which the Regulation withdrew authorisation for use as an additive in foodstuffs. The Commission argued that this was merely a coincidence, and that that fact was in no way relevant to the adoption of the regulation. Pfizer did not enjoy a manufacturing monopoly and there was nothing to prevent

[7] *ibid*, para. 53–54
[8] Chalmers, Davies and Monti, *European Union Law*, 2nd ed., (Cambridge University Press, 2010), p. 420
[9] Piraiki-Pitraiki and others v Commission [1985] ECR 207 (Case 11/82); Sofrimport v Commission [1990] ECR I-2447.
[10] Belgium and Forum 187 v Commission [2006] ECR I-5749 (Joined Cases C-182/03 and C-217/03)
[11] *Vischim* [2009] ECR II-3911 (Case T-420/05) (Judgment of 7 October 2009)
[12] *Pfizer Animal Health v Council* [2002] ECR II-3305 (Case T-13/99)

other undertakings from manufacturing the substance. The Court of Justice held that, even though the Regulation was general in its nature and application, Pfizer was individually concerned with the Regulation. However, the Court held that the fact that Pfizer was the only undertaking to market the substance in the EU was not, in itself, such as to distinguish Pfizer from all the other traders concerned:

> *"It must be borne in mind that the fact that it is possible to determine the number or even the identity of the persons to whom a measure applies at a given moment with a greater or lesser degree of precision does not mean that those persons must be considered to be individually concerned by it, as long as it is established that the measure is applied by virtue of an objective legal or factual situation defined by it".*[13]

[8:15] On the contrary, it is necessary to ascertain whether an applicant was affected by the adoption of the measure by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons. By making an application for further authorisation of its product, Pfizer was entitled to the benefit of certain legal safeguards (under Directive 70/524) and *"enjoy[ed] a particular legal situation"* and therefore met this standard.[14]

Is such a restrictive approach as that adopted in *Plaumann* necessary or appropriate?

As has been noted:

> *"The bulk of the academic literature has … been highly critical of the Plaumann formula. It is viewed, in the first place, as highly restrictive, preventing applicants adversely affected by Union measures from any effective judicial redress. There is also a sense that it is textually unjustified. The text of Article 263 TFEU clearly does not require it. Nor does it justify it. There is nothing in the Treaty to imply that the phrase 'direct and individual concern' should be interpreted as narrowly as the Court chose to in Plaumann."*[15]

It is, at first sight at least, a somewhat strange test by which a court can hold that an applicant is not individually concerned with a Union measure, even though it is the only party affected by it.[16]

[8:16] The most potent criticism of *Plaumann*, however, has come from Advocate General Jacobs. In his Opinion in *Union de Pequenos*, AG Jacobs argued the case for modification of the *Plaumann* approach. Advocate General Jacobs set up the argument as follows:

> *"As is common ground in the present case, the case-law of the Court of Justice acknowledges the principle that an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community law must have access to a remedy against that measure and be able to obtain complete judicial protection.*
>
> *That principle is, as the Court has repeatedly stated, grounded in the constitutional traditions common to the Member States and in Articles 6 and 13 of the European Convention on Human Rights. Moreover, the Charter of fundamental rights of the European Union, while itself not legally binding, proclaims a generally recognised principle in stating in Article 47 that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal'."*[17]

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[13] *ibid*, para. 89
[14] *ibid*, para. 98–100
[15] Chalmers, Davies and Monti, *European Union Law*, 2nd ed., (Cambridge University Press, 2010), p. 422
[16] As was the case in *Spijker v Commission* [1983] ECR 2559 (Case 231/82).
[17] *ibid*, para. 38–39

Advocate General Jacobs then set out a proposed alternative approach, which it is worth quoting in detail:

> *"The key to the problem of judicial protection against unlawful Community acts lies therefore, in my view, in the notion of individual concern laid down in the fourth paragraph of Article 230 EC. There are no compelling reasons to read into that notion a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. On that reading, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. The fact that a measure adversely affects a large number of individuals, causing wide-spread rather than limited harm, provides however to my mind a positive reason for accepting a direct challenge by one or more of those individuals.*
>
> *In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.*
>
> ***Advantages of the suggested interpretation of the notion of individual concern***
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> *A development along those lines of the case-law on the interpretation of Article 230 EC would have several very substantial advantages.*
>
> *First, if one rejects the solutions advanced by UPA and by the Council and Commission - and there are very strong reasons for doing so - it seems the only way to avoid what may in some cases be a total lack of judicial protection - a déni de justice.*
>
> *Second, the suggested interpretation of the notion of individual concern would considerably improve judicial protection. By laying down a more generous test for standing for individual applicants than that adopted by the Court in the existing case-law, it would not only ensure that individual applicants who are directly and adversely affected by Community measures are never left without a judicial remedy; it would also allow issues of validity of general measures to be addressed in the context of the procedure which is best suited to resolving them, and in which effective interim relief is available.*
>
> *Third, it would also have the great advantage of providing clarity to a body of case-law which has often, and rightly in my view, been criticised for its complexity and lack of coherence, and which may make it difficult for practitioners to advise in what court to take proceedings, or even lead them to take parallel proceedings in the national courts and the Court of First Instance.*
>
> *Fourth, by ruling that individual applicants are individually concerned by general measures which affect them adversely, the Court of Justice would encourage the use of direct actions to resolve issues of validity, thus limiting the number of challenges raised via Article [267 TFEU]. That would, as explained above, be beneficial for legal certainty and the uniform application of Community law. It may be noted in that regard that the TWD case-law - according to which an individual cannot challenge a measure via Article [267 TFEU] where, although there was no doubt about his standing under the fourth paragraph of Article [263 TFEU], he omitted to take action within the time-limit laid down in the fifth paragraph of that Article - would, in my view, not normally extend to general measures. Individuals who were adversely affected by general measures would therefore not be precluded by that case-law from challenging such measures before national courts. None the less, if the notion of individual concern were interpreted in the way I have suggested, and standing for individuals accordingly liberalised, it may be expected that many challenges would be brought by way of direct action before the Court of First Instance.*
>
> *A point of equal, or even greater, importance is that the interpretation of Article [263 TFEU] which I propose would shift the emphasis of judicial review from questions of admissibility to questions of substance. While it may be accepted that the Community legislative process should be protected against undue judicial intervention, such protection can be more properly achieved by the*

> *application of substantive standards of judicial review which allow the institutions an appropriate 'margin of appreciation' in the exercise of their powers than by the application of strict rules on admissibility which have the effect of 'blindly' excluding applicants without consideration of the merits of the arguments they put forward."*[18]

[8:17] Shortly after this Opinion was handed down, the General Court approved of this reasoning in *Jego-Quéré*,[19] agreeing with Advocate General Jacobs's view that there was no compelling reason to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.

[8:18] However, when *Union de Pequenos* came before the Court of Justice, it declined to follow the advice of its Advocate General and instead stuck rigidly to the *Plaumann* formula, and it has since continued to do so.[20]

[8:19] The *Plaumann* approach has also been criticised on the grounds that it is easier to meet when some financial or material interest has been prejudiced, and so favours trading or business interests over the causes of groups representing public interests such as the environment, the regions or the consumer.[21]

[8:20] Particular difficulties indeed arise in relation to actions brought in the name of the protection of such general public interests (sometimes called "public goods"), which do not benefit any particular persons in an individual sense. The classic example is the environment. The leading case is *Greenpeace v Commission*,[22] where several individuals and three associations concerned with the protection of the environment sought the annulment of a Commission decision granting Spain financial assistance for the construction of two electric power stations in the Canary Islands. The General Court rejected an attempt to argue that in such a case the criteria set out in the case law should be expanded or relaxed, stating:

> *"The applicants are 16 private individuals who rely either on their objective status as "local resident", "fisherman" or "farmer" or on their position as persons concerned by the consequences which the building of two power stations might have on local tourism, on the health of Canary Island residents and on the environment. They do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision, in so far as it grants financial assistance for the construction of two power stations on Gran Canaria and Tenerife, is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned.*
>
> *The applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation."*[23]

As to the possibility of an association such as Greenpeace having standing, the General Court stated:

> *"It has consistently been held that an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned for the*

[18] *ibid*, para. 59–6
[19] *Jego-Quéré* [2002] ECR II-2365 (Case T-177/01)
[20] See, for example, Flaherty v Commission [2008] ECR I-2649 (Joined Cases C-373/06 P, C-379/06 P and C-382/06 P); Sahlstedt v Commission (Judgment of 23 April 2009) (Case C-362/06 P).
[21] Chalmers, Davies and Monti, *European Union Law*, 2nd ed., (Cambridge University Press, 2010), p. 425
[22] *Greenpeace and others v Commission* [1995] ECR II-2205 (Case T-585/93); see also *Danielsson and others v Commission* [1995] ECR II-3051 and *An Taisce v Commission* [1994] ECR II-733 (Case T-461/93)
[23] *Greenpeace and others v Commission* [1995] ECR II-2205 (Case T-585/93), para. 54–55

> *purposes of the fourth paragraph of Article 173 of the Treaty by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually".*[24]

Consequently, the application was declared inadmissible. On appeal, the Court of Justice held that the interpretation taken by the General Court was "consonant with the settled case-law of the Court of Justice,"[25] and dismissed the appeal.

[8:21] In passing, it should be noted that the Court of Justice has accepted, in the *Bieticoltori* decision,[26] that interest groups or associations may have standing to bring an annulment application due to the prior granting of certain procedural entitlements set out in EU law or the practice of EU institutions:

> *"It should be pointed out, second, that an application for annulment lodged by an association may be admissible in three types of situation, namely:*
>
> *(a) where a legislative provision expressly confers a range of procedural powers on trade associations …;*
>
> *(b) where the association represents the interests of undertakings having locus standi to seek the annulment of the provision in question …;*
>
> *(c) where the association is distinguished because its own interests as an association are affected, in particular because its position as a negotiator has been affected by the measure whose annulment is sought ….*
>
> *In those three types of situation the Court of Justice and the Court of First Instance have also taken into account the participation of the associations in question in the procedure …."* [27]

Such cases are likely to be unusual and are in effect dependent on a pre-existing relationship or recognition of certain persons or associations, whether in law or as part of consultations or negotiations. In other words, they would involve "insiders".

[8:22] Arguments may be made in favour of the current position as well as against it.[28] For example, it might be argued that a more relaxed standard would allow significantly more challenges by private parties seeking the annulment of Union measures, thereby unduly disrupting the process of Union decision-making. This *"floodgate"* argument has particular force in the context of the EU, where legislation is the result of a balancing act between all the Member States and necessarily reflects compromises agreed to by them, perhaps sometimes after difficult negotiations. The other argument that is sometimes made is that a restrictive approach is necessary to protect the position and status of the Court of Justice by channelling applicants challenging Union measures into national courts which, under the principle of subsidiarity, are principally called upon to defend the rights of individuals, and who can if necessary make a preliminary reference to the Court of Justice as to the validity of a Union act or measure.

[8:23] For now though it appears that the approach adopted in *Plaumann* is effectively set in stone. One possible avenue for further challenge to the *Plaumann* formula may derive from the Charter of Fundamental Rights, (which post-Lisbon has binding force) and in particular Article 47 thereof and the principle of *effect utile*. However, such arguments were raised by Advocate

[24] *ibid*, para. 59
[25] *Greenpeace and others v Commission* [1998] ECR I-1651 (Case C-321/95 P), para. 27
[26] Associazione Nazionale Bietcoltori v Council [1998] ECR II-4191 (Case T-38/98)
[27] *ibid*, para. 25–26
[28] See Chalmers, Davies and Monti, *European Union Law*, 2nd ed., (Cambridge University Press, 2010), pp. 421–422.

General Jacobs in *Union de Pequenos* and so it must be considered that the Court is unlikely to alter its position in the short term.

8.3. What may be reviewed?

[8:24] Article 263(1) TFEU allows review of the following categories of acts

- *'legislative acts'*: This is a new addition by the Treaty of Lisbon. The category of legislative acts is defined by Article 289(3) as comprising '[l]egal acts adopted by legislative procedure'. Pursuant to Article 289(1) and 289(3), any act adopted by the ordinary legislative procedure or the special legislative procedure must take the form of a regulation, a directive or a decision, which are the three forms of legally binding acts defined by Article 288 TFEU.
- *'acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions'*: The two excluded categories – recommendation and opinions – are stated by Article 288 to have "no binding force." Naturally, acts in the form of regulations, directives or decisions come into this category. The Court has, however, taken the view that it should extend to all acts in whatever form, which were intended to produce legal effects vis-à-vis third parties.
- *'acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'*: The wording relating to acts of the European Parliament reflects the case law (including *Les Verts v Parliament*[29]). The reference to the Council was an addition by the Treaty of Lisbon and reflects the new status of the Council as an institution of the Union with formal power to make decisions.
- *'acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'*: This again was an addition by the Treaty of Lisbon, but one which reflected the case law.

[8:25] The Court had long taken the view that Article 263 may, as a general rule, be used to challenge measures adopted by EU institutions, in whatever form, as long as they were intended to produce legal effects vis-à-vis third parties. And indeed, as Wyatt and Dashwood note: "Successive amendments to the first paragraph of the Article [263] have been designed to give explicit effect to that principle."[30]

[8:26] Thus the Court held in *ERTA* (also an important case on the question of the Union's powers in the field of external relations) that an informal agreement by the Council establishing that negotiation and conclusion of a European road transport agreement would be undertaken by the Member States, rather than by the Commission, was an 'act' susceptible of judicial review. The Court noted that Article 263 treated acts of binding force as open to review, but held that it would be inconsistent with the purpose of Article 263, which is to ensure that the law is observed pursuant to Article 19(1) TEU, "to limit the availability of this procedure merely to categories of measures referred to by Article [288 TFEU]." Therefore the Court held that an action for annulment must be available "in the case of all measures adopted by the institutions, whatever their nature of form, which are intended to have legal effects."

[8:27] Likewise in *Les Verts v Parliament*,[31] a French political grouping sought the annulment of two measures adopted by the European Parliament. At that time the Parliament was not mentioned in (what is now) Article 288. Nevertheless the Court held that it would be inconsistent with the general spirit and scheme of the Treaty to exclude such acts from review. The Treaty

[29] *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339 (Case 294/83)
[30] Wyatt and Dashwood, European Union Law, 6th ed. (2011), p. 158
[31] *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339 (Case 294/83)

had adopted "a complete system of legal remedies designed to allow the Court to review the legality of measures adopted by the institutions."[32]

[8:28] The possibility of reviewing an act of a body other than one listed in Article 288 was considered by the General Court (formerly known as the Court of First Instance) in *Sogelma*.[33] The impugned measure in that case was a decision of the European Reconstruction Agency (ERA) to cancel a tendering procedure. The legislation governing the ERA provided for the General Court to have jurisdiction as to the non-contractual liability of the ERA, but made no mention of jurisdiction regarding annulment proceedings. The General Court reiterated what it had said in *Les Verts* – that "any act of a Community body intended to produce legal effects *vis-à-vis* third parties must be open to judicial review" – and continued:

> *"[T]he situation of Community bodies endowed with power to take measures intended to produce legal effects is identical to the situation which led to the Les Verts judgment; it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review."*[34]

[8:29] Omission by an EU institution, or failure to act, may in certain circumstances be deemed to be a positive decision capable of review under Article 263. (The position is somewhat complicated by the fact that there is a quite separate remedy for 'failure to act' under Article 265 TFEU.) For example, in *Eurocoton v Council*,[35] a challenge was brought to the Council's failure to adopt proposals put forward by the Commission which would have imposed a definitive anti-dumping duty.[36] It was held that the non-adoption had "all the characteristics of a reviewable act within the meaning of [Article 263 TFEU]," in that it produced "binding legal effects capable of affecting the appellants' interests".[37] The key factor here was that a fixed time limit, within which particular anti-dumping proceedings must be terminated, was about to expire. This gave the Council's failure to act a positive legal effect.

[8:30] *Eurocoton* was distinguished in a case involving excessive budgetary deficits run up by France and Germany.[38] There the Commission sought to argue that the failure of the Council to adopt measures against France and Germany for breach of the budget deficit rules (*i.e.* measures as provided for in Article 126(8) and (9) TFEU) amounted to an act susceptible of review under Article 263. The Court held that, in contrast to *Eurocoton*, the excess deficit procedure did not lay down any fixed time within which the Council must act, meaning that the Council's omission to do so to date did not prevent it doing so in future and accordingly did not amount to an act having the necessary legal effect. The proper remedy was an action for failure to act under Article 265 TFEU (which would not in any event have succeeded on the facts of the case).

[8:31] It should also be noted, that annulment proceedings cannot be brought in certain circumstances, even though the acts in question may appear to have produced legal effects. That applies to a preparatory step in a procedure having several stages, such as the procedure leading to an adoption by the Commission of a decision that an undertaking is in breach of competition rules.[39] Only the final decision in the procedure may be challenged. Also not

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[32] *ibid*, para. 23. The contested measure must, however (as noted below), be one which produced binding legal effects such as to prejudice the interests of the applicant: see *Le Pen v European Parliament* [2003] ECR II-125 (Case T-353/00).

[33] *Sogelma v EAR* [2008] ECR II-2771 (Case C-411/06)

[34] ibid, para. 37

[35] *Eurocoton v Council* [2003] ECR I—10091 (Case C-76/01)

[36] 'Dumping' here refers to the practice of importing products into the Union from a non-Member State at prices lower than their normal value in the exporting country, resulting in an injury to a particular industry.

[37] ibid, para. 67

[38] *Commission v Council* [2004] ECR I-6649 (Case C-27/04)

[39] IBM v Commission [1981] ECR 2639 (Case 60/81)

capable of review is an act which merely confirms a previous decision, which itself was not challenged within time.[40] Sometimes the position will be less clear-cut. In *Philip Morris International v Commission*,[41] the applicants challenged a decision of the Commission to bring proceedings against them in the United States relating to the prevention of alleged illegal importation of cigarettes into the EU. The General Court held that the mere decision to bring the proceedings did not alter the parties' legal position or definitively determine the parties' obligations. This ruling has been criticised[42] on the grounds that it might be said that the applicants' legal position was clearly altered by having to either participate in the proceedings or else being at risk of judgment being given against them in default of appearance. Furthermore, one of the arguments made was that the Commission had exceeded its powers in merely instituting the proceedings. In addition, although the Court referred to an action for damages against the Union (under Article 340) as a possible remedy, that would not arise until the applicants had lost the action brought by the Commission, perhaps after considerable time and expense.

[8:32] Lastly, it is necessary to be aware of the new category of reviewable act added to Article 263 TFEU by the Treaty of Lisbon, namely *"a regulatory act which is of direct concern … and does not entail implementing measures"*. No definition of *"regulatory act"* is provided, and so the scope of this new provision is not entirely clear.[43]

8.4. Grounds of review

The second paragraph of Article 263 TFEU provides that for the purpose of actions brought under Art. 263, the Court of Justice

> *"shall … have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."*

Over the time the Court has built up a body of case law analysing the meaning of these four grounds. The Court has stated that:

> *"in its review of legality …, the Community judicature conducts a full review as to whether the Commission applied properly the relevant rules of law. On the other hand, the [General Court] cannot take the place of the Commission on issues where the latter must carry out complex economic and ecological assessments in this context. In this respect, the Court is obliged to confine itself to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers, that the competent authority did not clearly exceed the bounds of its discretion and that the procedural guarantees, which are of particularly fundamental importance in this context, have been fully observed."*[44]

[8:33] It will be seen from this passage that the review conducted by the Court goes to whether the contested measures met applicable legal standards under the headings of competence,

[40] Irish Cement Ltd v Commission [1988] ECR 6473 (Joined Cases 166 and 220/86)
[41] Philip Morris International and others v Commission [2003] ECR II-1 (Joined Cases T-377, 379, 380/00 and T-260 and 272/01).
[42] See Wyatt and Dashwood, *European Union Law*, 6th ed. (2011), p. 160
[43] See, for example: J. Usher, "Direct and individual concern – an effective remedy or a conventional solution" (2003) 28 *European Law Review* 575; A. Dashwood and A. Johnston, "The institutions of the enlarged EU under the Constitutional Treaty" (2005) 42 *Common Market Law Review* 1481.
[44] *Commission v Estonia* [2009] ECR II-3463 (Case T-263/07), para. 55

procedural fairness, substantive legality and misuse of power. The Court has no power to consider the merits of contested measures.

It is necessary to consider the four grounds briefly in turn.

i. Lack of competence

[8:34] An EU institution may only act where it has competence to do so.[45] Competence in this sense means legal authority, in the same way that the EU may only legislate in areas in which it has been conferred with competence (*i.e.* legal authority) by Member States. A finding of lack of competence will be rare. The Union's powers are very broad, as exemplified by Article 352 TFEU, which allows the Union to take measures to attain objectives set out in the Treaties, where no other legislative procedure is available.[46]

ii. Breach of essential procedural requirement

[8:35] This ground essentially provides a remedy for lack of fair procedures comparable to that available in domestic (Irish) administrative law. Thus annulment actions may be brought against EU measures on the basis of: failure to consult the European Parliament as required by the Treaty[47]; failure to give an interested party an opportunity to make his views known (perhaps by way of an oral hearing) before making a decision which adversely affects them[48]; or failure to give adequate reasons.[49] The duty to give reasons is expressly provided for in Article 296 TFEU.[50] The Court, in the case of *Omega Air*, has commented on this duty as follows:

> *"…it should be borne in mind that it is settled case-law that the statement of reasons required by Article 253 EC must be adapted to the nature of the act in question. It must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in such a way as to make the persons concerned aware of the reasons for the measure and to enable the Court to exercise its power of review. It follows from the case-law that it is not necessary for details of all relevant factual and legal aspects to be given. The question whether the statement of the grounds for an act meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question ….*
>
> *The Court has also held that if the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made".*[51]

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[45] See, for example, *Germany v Parliament and Council* (tobacco advertising) [2000] ECR I-8419 (Case C-376/98); *Parliament v Council* (safe countries of origin) [2008] ECR I-318 (Case C-133/06).

[46] Article 352, first para: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."

[47] *Roquette Frères v Council* [1980] ECR 3333 (Case 138/79)

[48] *Lisrestal and others v Commission* [1994] ECR II-1177 (Case T-450/93), para. 42; *Foshan Shunde Yongjian Housewares and Hardware Co. v Commission* [2009] ECR I-9147 (Case C-141/08 P)

[49] *Commission v European Parliament and Council* [2003] ECR I-937 (Case C-378/00), para. 34

[50] Article 296 TFEU, second para.: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."

[51] *R v Secretary of State, ex parte Omega* [2002] ECR I-2569 (Joined Cases C-27/00 and C-122/00), para. 46–47

[8:36] The Court in *Omega Air* emphasised that reasons may be sufficient, even if it might be preferable if they had been slightly more extensive, and this may apply particularly in the case of technical regulations:

> *"It would have been desirable to have given a more detailed explanation of the choice of by-pass ratio as the sole criterion and of its being fixed at 3. However, the statement of reasons in a regulation of general application cannot be required to specify the various facts, frequently very numerous and complex, on the basis of which the regulation was adopted, nor a fortiori to provide a more or less complete technical evaluation of those facts ... That is particularly the case where the relevant factual and technical elements are well known to the circles concerned."*[52]

As regards rights of defence, the Court has put the position as follows:

> *"[R]espect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views."*[53]

This principle requires that *"addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views"*.[54]

[8:37] Much the same logic was famously applied in *Kadi v Council and Commission*,[55] a case in which the applicants challenged an EU Regulation implementing UN sanctions restricting financial and material resources to individuals who were on a list of persons suspected of being associated with Osama bin Laden and the al-Qaeda network. The applicant, Kadi, was on the list. He argued, successfully, that his rights of due process had been breached, because he had not been given an opportunity to make his case as to why he should not be on the list or to challenge the grounds for placing him on the list. The Court justified its decision on the following basis:

> *"… [T]he principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union …*
>
> *In addition, having regard to the Court's case-law in other fields …, it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.*
>
> *Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the*

[52] *ibid*, para. 51
[53] *Foshan Shunde Yongjian Housewares and Hardware Co. v Commission* [2009] ECR I-9147 (Case C-141/08 P), para. 83
[54] *ibid*, para. 83
[55] *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 (Joined Cases C-402/05 P and C-415/05 P)

> *Community judicature …, and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty."*[56]

iii. Infringement of Treaty provisions or any rule relating to their application

[8:38] This is the widest of the four grounds and in a sense subsumes the other three. It covers the substantive (as opposed to procedural legality) of the contested measure. A measure of an EU institution may be annulled where it is incompatible with a Treaty provision, with any secondary legislation or with any rule of law relevant to the interpretation or application of same. This encompasses the body of general principles developed by the Court of Justice, such as fundamental rights, proportionality and legitimate expectations.[57] A contested measure may also be annulled and declared void, if it infringes an international agreement to which the Union is a signatory, even if the agreement is not one which has direct effect within the Union.[58]

iv. Misuse of powers/Manifest error of assessment

[8:39] "Misuse of power" is a difficult ground to establish, as it effectively refers to the intention or purpose behind the contested measure, as opposed to its content. It is a claim that the measure was introduced for purposes other than those stated. Thus in *R v Secretary of State, ex parte British American Tobacco*,[59] it was argued that an EU Directive on the manufacture and sale of tobacco products was not merely intended to harmonise legal differences between Member States from the point of view of the internal market, but was intended as to protect public health, an area in which the Union's competence was more limited. The Court of Justice responded as follows:

> *"As the Court has repeatedly held, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case".*[60]

The Court in that case held that the applicants had not met this standard.

[8:40] The Court has, as is evident from the passage from *Commission v Estonia* set out above, held that contested measures may be reviewed under this head for what it calls "manifest error of assessment". The leading case on manifest error of assessment is the *Tetra Laval* a merger case.[61] There the Commission had concluded that a conglomerate merger between Tetra Laval, which specialised in cartons, and Sidel, which specialised in PET packaging, would allow Tetra Laval to leverage its dominant position in the market for cartons to persuade customers opting for PET to use Sidel's goods, thereby eliminating competition on the PET market. The General Court found that the Commission had committed a manifest error of assessment, in relying on reports which overestimated the possibility of leveraging and the possibility for growth in the PET market. The Court of Justice upheld this ruling on appeal, stating as follows:

> *"Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and*

[56] *ibid*, para. 335–337
[57] See Chapter 4.
[58] *Netherlands v European Parliament and Council* [2001] 3 CMLR 49 (Case C-377/98)
[59] *R v Secretary of State, ex parte British American Tobacco* [2002] ECR I-11453 (Case C-491/01)
[60] *ibid*, para. 189
[61] *Commission v Tetra Laval* [2005] ECR I-987 (Case C-12/03 P)

> *consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.*
>
> *…*
>
> *The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.*
>
> *It follows from those various factors that the [General Court] did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements of … the Regulation are satisfied."*[62]

Having analysed the General Court's judgment, the Court of Justice held as follows:

> *"It follows from these examples that the [General Court] carried out its review in the manner required of it, as set out in paragraph 39 of this judgment. It explained and set out the reasons why the Commission's conclusions seemed to it to be inaccurate in that they were based on insufficient, incomplete, insignificant and inconsistent evidence."*[63]

Thus it appears that EU measures may be reviewed where they are *"based on insufficient, incomplete, insignificant and inconsistent evidence"* or whether the evidence is capable of substantiating the conclusions reached.

8.5. Time limit

[8:41] The sixth paragraph of Article 263 TFEU provides that an action for annulment must be brought "within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the notice of the latter". Article 297 TFEU requires that all legislative acts, regulations, directives addressed to all Member States and decisions with no specific addressee are to be published in the Official Journal. Other directives and decisions need not necessarily be published, but in practice many of them are.

[8:42] The relevant date is the date of publication (not the date on the cover of the journal), even if the applicant had in fact become aware of the provision before publication. So held in *Germany v Council*,[64] where the Court stated that "the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure."[65]

[8:43] Note, however, that where the time limit for commencing proceedings runs from publication of the contested measure, there is a 14-day grace period: time runs "from the end of

[62] *ibid*, para. 39, 44–45
[63] *ibid*, para. 48
[64] *Germany v Council* [1998] ECR I-973 (Case C-122/95)
[65] *ibid*, para. 35. See similarly *BAI v Commission* [1999] ECR II-139 (T-14/96).

the 14th day after the publication thereof in the *Official Journal of the European Union*".[66] This do not apply where the act in question is a Commission Decision which is notified to the applicant: In such a case, time starts running from the date of notification. It should also be noted that the date on which an event occurs is not counted.[67] The Court shall, in addition, make an allowance of 10 days "on account of distance" between the Member State and Luxembourg.[68]

The Court has held that failure to observe the relevant time limit is an "absolute bar"[69] to bringing proceedings and is "not subject to the discretion of the parties or of the Court".[70]

8.6. Effects of annulment

[8:44] According to Article 264(1) TFU, where the ECJ finds an annulment action under Article 263 to be well founded, it "shall declare the act concerned to be void." In order to minimise potential disruption caused by the declaring of an act void, Article 264(2) provides that "the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive." The Court held, in one case where it annulled a Directive, that "important reasons of legal certainty, comparable to those which operate in cases where certain regulations are annulled" justified it taking the step of ordering the "maintain[ing] for the time being all the effects of the directive annulled, until such time as the Council has replaced it with a new directive adopted on the proper legal basis."[71]

[8:45] The Union Courts have no power to order the institution to take any particular steps,[72] but the institution whose act has been declared void or whose failure to act is required by Article 266 to "take the necessary measures to comply with the judgment of the Court of Justice of the European Union." Article 266 makes clear, however, that this requirement is without prejudice to the possibility of non-contractual liability of the Union for damage caused by its institutions or servants in the performance of their duties set out in Article 340.

[66] Court of Justice Rules, Article 81(1) and General Court Rules, Article 102(1)
[67] Court of Justice Rules, Article 80(1)(a) and General Court Rules, Article 101(1)
[68] Court of Justice Rules, Article 81(2) and General Court Rules, Article 102(2)
[69] *Mutual Aid Administration Services NV v Commission* [1992] ECR II-1335, (Joined Cases T-121/96 and T-151/96) para. 39
[70] *ibid*, para. 38
[71] *Parliament v Council* [1992] ECR I-4193 (Case C-295/90), para. 26–27
[72] *DSM v Commission* [1999] ECR I-4695 (Case C-5/93), para. 36