

## European Union Law

**Topic 4:** Jurisdiction of the ECJ.

**Lecture 3** (of 3);

### Judicial Review of Acts & Omissions of the EU's Institutions.

#### **Aim:**

To provide an overview of the old EC Treaty provisions under which the acts and omissions of the Institutions could be subjected to judicial review by the ECJ (now CJEU); and to update the analysis to accommodate the amendments brought about by the Treaty of Lisbon.

#### **Learning Outcomes**

After carefully studying the following notes, and other prescribed readings for this lecture, you should be able to:

1. Explain the types of actions that might be taken against Union Institutions under **Art.263 TFEU** and associated Treaty Articles by referring to the previous EC Treaty provisions and jurisprudence of the ECJ;
2. Provide a detailed analysis, orally and in writing, of the provisions of **Art.263 TFEU** and, in particular, discuss the limitations of this Article in respect of a natural person seeking annulment of an act of an Institution; and
3. Discuss the situations where it is appropriate to invoke the provisions of **Arts.265** and **277 TFEU**; and explain what has to be established to successfully pursue an action for damages under **Art.340 TFEU**.

#### **Introduction**

The Union Institutions must act within the powers they derive from the Union Treaties; i.e., they must act within the *powers conferred* upon them: **Arts.5(2) and 13(2) TEU**; and **Art.7 TFEU**. To ensure that the political Institutions do act within their powers and that they comply with their obligations, the TFEU has empowered the ECJ to review the manner in which the Institutions have discharged or failed to discharge their responsibilities. Indeed, the ECJ has exclusive jurisdiction to review the legality of acts of Union institutions and the sole competence to declare an act of an institution to be invalid: Case 314/85, Foto-Frost v. Hauptzollamt Lubeck-Ost [1988] 3 CMLR 57.

Under the TFEU, four types of action may be taken against Union institutions, viz;

An action for annulment: **Art.263 TFEU**;

An action for failure to act: **Art.265 TFEU**;

the plea of illegality: **Art.277 TFEU**; and

an action for **damages** in respect of non-contractual liability: **Art.340 TFEU**.

## **Art.263 TFEU: Annulment.**

**Art.263(1) TFEU** provides the power for the CJEU (“ECJ”) to:

... 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*<sup>1</sup>, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-a-vis* third parties<sup>2</sup>. ...

Thus, the category of reviewable acts - i.e., the acts capable of annulment under Art.263 TFEU - includes *all* acts which have legal effects. Accordingly, it is **not** limited to the acts provided for in **Art.288 TFEU**: Case 22/70, Commission v. Council (1971) {the ERTA case}; and Case 294/83, Les Verts v. European Parliament (1983).

**Art.263(2) TFEU** provides that an action for annulment may be brought on any one of four or five grounds. The paragraph provides that the ECJ has jurisdiction ‘in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of ...

- [i] lack of competence;
- [ii] infringement of an essential procedural requirement;
- [iii] infringement of the Treaties **or** of any rule of law relating to their application; or
- [iv] misuse of powers.’

Whether there are four or five grounds on which an action may be annulled depends on whether [iii] above gives rise to one or two grounds. (It’s generally accepted as one ground). {See infra for more detail on the above grounds}.

### **Privileged and semi-privileged applicants.**

Under **Art.263(2) TFEU**, Member States of the EU, the European Parliament, the Council and the Commission all have unqualified *locus standi* (save for the time limit) to challenge any legally binding act, i.e. they are all privileged applicants. The lesser status of *semi-privileged* applicants is accorded to the *Court of Auditors* and the *ECB* under **Art.263(3) TFEU**. This means they have *locus standi* only ‘for the purpose of protecting their prerogatives.’ Prior to the **Treaty of Nice** (ToN), the European Parliament also was a *semi-privileged* applicant.

<sup>1</sup> Recall that under **Art.288 TFEU** ‘Recommendations and Opinions shall have no binding force’.

<sup>2</sup> Prior to amendment by the ‘Maastricht’ TEU, Art.230 EC (ex art.173 EEC) [now Art.263 TFEU] had provided only for acts that were adopted by the Council or the Commission.

Moreover, it is only since the amendment of **Art.230EC** by the **TEU** ('Maastricht') that the Article has incorporated the case law of the ECJ. This, firstly, has expressly permitted the Court to review "the legality of acts adopted jointly by the European Parliament and the Council," – an amendment that recognized the extension of the powers of the European Parliament and recognized that Parliament can be responsible for acts that create legally binding effects in respect of third parties, and, so, should be open to review.

The starting point for an overview of the evolving increase in the status of the European Parliament (EP) over the 15 years from 1988 – 2003 was: (i) the ECJ's decision in Case 302/87, EP v. Council (Comitology) that the European Parliament could not challenge under Article [263 TFEU] (though it could under Art.[265 TFEU], *see infra*); but then (ii) the qualified reversal of this position in Case C-70/88, EP v. Council (Chernobyl) to the extent that the EP *could* challenge to protect its prerogatives; and (iii) the confirmation of this limitation of a *right* to challenge to protect its prerogatives, i.e., the status of the European Parliament was that of a semi-privileged applicant in Case C-295/90, E.P. v. Council (Students Rights). Then - and this was the second contribution made by the TEU with respect to the EP's powers - **Art.230(3)EC** was amended so as to provide a Treaty basis for confirming that: "The Court shall have jurisdiction ... in actions brought by the European Parliament ... for the purpose of protecting [its] prerogatives." As noted, as from the coming into force of the ToN, the European Parliament is now a privileged applicant under **Art.263(2) TFEU** (ex.Art.230(2)).

## Grounds for Review

**(i) Lack of competence;** this may arise from the absence of a legal power attributed to the institution in question to adopt the contested measure: Case 9/56, Meroni v. High Authority.

**(ii) Infringement of an essential procedural requirement.** This includes, inter alia: (a) the duty to provide adequate reasons when making a decision: Case 24/62, Germany v. Commission; and (b) the failure to consult the European Parliament when so required by the [EC] Treaty: Case 138/79, Roquette Freres v. Council (1980).

**(iii) Infringement of the Treaties, or of any rule relating to their application.** The scope of this ground is wide enough for virtually all other headings to come within its compass. It is the ground most commonly cited and the one that has proved most successful to claimants. It is the ground which includes infringement of the general principles of law recognised by the ECJ, such as fundamental human rights: Case 4/73, Nold v. Commission; and proportionality or equal treatment: Case 114/76, Bela-Mulle v. Grows-Farm.

**(iv) Misuse of Powers.** This ground provides the basis of an action for annulment when it can be shown that a discretionary power has been used to achieve some object other than that for which the power was conferred. As stated in an early (ECSC) case, Case 8/55: 'it is a matter of discovering what was the object in fact pursued by the author of the act, when he took the decision, in order to be able to compare it with the object he ought to have

pursued and which, unless the contrary is proved, he is deemed to have pursued.’ An act, which achieves a legal object but also, and incidentally, achieves other illegal objects, will **not** constitute a misuse of power, providing the legal object is the dominant one.

### **Natural or Legal Persons: ‘non-privileged applicants’**

By contrast with the provisions in indents (2) and (3), **Art.263(4)TFEU** makes provisions for non-privileged applicants, i.e., it provides that any natural or legal person seeking to institute proceedings can do so ...

... 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

The current provision contrasts with the former provision under Art.230(4) EC which provide that proceedings could be instituted ...

... against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

Under the EC Treaty, the challenge was in establishing that a ‘decision’... was of ‘direct and individual concern’ to one of these *non-privileged* applicants. Whereas the scope of this provision did not appear to extend to an individual mounting a legal challenge against a Directive, the ECJ had, in fact, decided in Case C-298/89, Gibraltar v Council, that **an individual could challenge a Directive if it was of direct and individual concern to him.**

In short, an applicant, - a natural or legal person wishing to invoke an annulment action under Art.230EC – had to establish:

- (a) that the measure was, in substance, a Decision; and
- (b) the [decision] was of direct concern to the applicant; and
- (c) that it was of individual concern to the applicant.

It was noteworthy that the requirements were cumulative: in other words, the requirement that all stages had to be satisfied meant that failure in any one of them would lead to a rejection of the applicant’s case. Moreover, the **ECJ** had decided that where a person could have instituted proceedings under Art.230EC (now Art.263 TFEU), then Art.234EC proceedings (now Art.267 TFEU) were inadmissible - a decision that reversed earlier practice: Case C-188/92, TWD Textilwerke.

### **Decided case law and the new Treaty (i.e., post –ToL) Provisions**

The new para.4 provision refers to an ‘act addressed to [a] person’ as opposed to ‘a decision addressed to that person’ and it makes reference to a ‘regulatory act’; but it makes no direct references to Decisions or Regulations. Notwithstanding such

differences, the general academic opinion is that established case law will remain relevant as an act of direct and individual concern to a person is, in effect, a Decision.

**‘an act ... which is of direct and individual concern [to the person in question]: i.e., Decisions addressed to ‘another person:’ Criteria to be established.**

**(a) The measure is, in substance, a decision.**

Prior to 1994, it was thought that an individual could not have *locus standi* to challenge a ‘true’ regulation. That a ‘decision’ could be clearly distinguished from a ‘true’ regulation was decided in Cases 16 and 17/62, *Producteurs de Fruits v. Council*<sup>3</sup> where the ECJ stated that:

The essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety. Consequently, in order to determine in doubtful cases whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of individual concern to specific individuals.

In essence, then, until 1994 an individual seeking annulment of an action under Art.230 EC had to show that (i) the measure was not ‘essentially of a legislative nature;’ and that (ii) the measure was of individual concern in that it applied to a fixed and identifiable group of persons of whom he was one. However, this must now be revised in the light of the decision in Case C-309/89, *Codorniu*. (See ***Weatherill & Beaumont***, pp257-260). The relaxation of the requirement that the measure challenged must be in the nature of a decision has been permitted *providing* that the applicant can establish that the **‘true’ regulation which is challenged is of direct and individual concern to him.**

In Case 25/62, *Plaumann v. Commission*, it was also decided that a decision addressed to a Member State is a decision addressed to ‘another person’ for the purposes of **Art.230(4)**. It is uncertain, however, whether a Directive can be challenged by an individual who can show direct and individual concern – though there’s no evidence in support of this.

**(b) The measure must be of individual concern to the applicant.**

The ECJ expressed the meaning of individual concern in Case 25/62, *Plaumann v. Commission*, where it stated that:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed.

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<sup>3</sup>[1962] ECR 471.

In essence, the general rule relating to 'individual concern' is expressed by **Weatherill and Beaumont**<sup>4</sup> who state that:

To be individually concerned by a decision addressed to another person an applicant normally needs to show that he or she is part of a 'closed circle of persons who were known at the time of its adoption.'

In *Plaumann*, an importer of clementines challenged a Decision addressed to the German Government refusing them permission to amend the duty on clementines imported from outside the EC. However, the ECJ dismissed the challenge because *Plaumann* could not demonstrate that he was distinguishable from other persons generally by virtue of certain attributes or circumstances: that as any other person could carry out the commercial activity he was involved with, he was not part of a 'closed class'.

The *Plaumann* test remains the law, notwithstanding challenges to the test both in the ECJ and before the CFI. First, in *Case C-50/00P, UPA*, an association of farmers (UPA) sought to annul a regulation. The CFI dismissed the challenge as the members of the association were not individually concerned under Art.230(4)EC. The association appealed to the ECJ basing their challenge, as they saw it, on the denial of effective judicial protection. **Advocate General Jacobs** sympathized with the applicants and suggested that 'an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests'. A-G Jacobs then cited four advantages this test would have and he also discussed how the objections to this enlarging of standing were unconvincing.

Support for the approach in UPA came from a second case, one that was heard by the CFI, *Case T-177/01, Jeago-Quere*<sup>5</sup>. As **Craig & de Burca** noted<sup>6</sup>, the CFI held that:

... in order to ensure effective legal protection, a person should be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations.

However, the ECJ rejected the approaches of A-G Jacobs and the CFI. In its judgment, in *Case 50/00P*<sup>7</sup>, published in July 2002, the ECJ retained the *Plaumann* test. The Court said that where natural or legal persons could not challenge Community measures of general application, they could, depending on the circumstances, either seek to show the invalidity of the measure before the Community Courts under **Art.277 TFEU** (ex Art.241EC) or they could ask their own national courts to make an **Art.267 TFEU** reference to the ECJ for a preliminary ruling on the validity of the measure.

**Karen Davies** has written<sup>8</sup> that this is 'a surprising attitude for the ECJ to take, given its previous willingness to ensure citizens have sufficient opportunity to enforce their rights

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<sup>4</sup>See 3/e, 1999, p265.

<sup>5</sup> [2003] 2WLR 783

<sup>6</sup> **Craig, P & de Burca, G.** *EU Law: Text, Case and Materials*, 3<sup>rd</sup> edn., 2003. Oxford: OUP, p502

<sup>7</sup> [2003] QB 893

<sup>8</sup> **Davies, K.** *Understanding European Union Law*, 2/e. London: Cavendish, 2003, p75

and also to extend the scope of Art.[263 TFEU] (as in the *ERTA*, *Les Verts* and *Chernobyl* cases)'.<sup>9</sup>

{To summarise, it would appear that to be individually concerned where a decision is addressed to another person, (i) an applicant would have to be part of a fixed and closed class and (ii) that the applicant disputes an act *concerning a period in the past*. This summary may be extracted from the decisions in *Cases 25/62, Plaumann*, and *106 & 107/63, Toepfer*. **N.B.:** See **Art.263(4)** of the **Treaty on the Functioning of the European Union** – now that the Treaty of Lisbon is ratified - for a relaxation of the requirement for 'individual concern': *Jego-Quere* 'revisited' – but giving the applicant greater prospects of success in respect of a 'regulatory act'?.}

### (c) **The measure must be of Direct concern to the applicant.**

Generally, a decision is of direct concern to an applicant if the addressee - perhaps the applicant's national government - has no discretion in implementing the decision. Accordingly, *MacLean*<sup>9</sup> explained the meaning of 'direct concern' by noting that:

"Generally, a decision, irrespective of its form or addressee, will concern the applicant directly if it imposes a disadvantage on, or denies an advantage to, a class of persons of which the applicant is a member, or, conversely, grants an advantage to, or terminates a disadvantage which had been imposed on, the applicants' competitors, if these results follow automatically and necessarily from the decision. Where, however, the results are merely likely to follow, but depend upon the intervention of certain persons or upon the fulfilment of certain conditions, there will be no direct concern.

"The consequence of this restrictive approach is that, unless the decision is addressed to the applicant, a natural and legal person will only be directly and individually concerned if the act complained of has a retroactive effect - retroactive in the sense that the parties who will be subject to the act are then ascertained, rather than ascertainable.

"Where, for example, a number of companies apply for licences to import goods into the European Community, and the Commission then makes a decision on these licences, the companies are directly and individually concerned. The leading cases on this point are now [*Cases 89 and 91/86, L'Etoile Commerciale CNTA v. Commission; Case 55/86, ARPOSOL v. Council; and Case 253/86, Sociadade Agro-Pecuaría Vincente Nobre Lda v. Council*]."

However, if the addressee of the decision who is not the applicant (i.e., a 'third party') informs the applicant in advance of how it will exercise its discretion under the Community measure, then the applicant will be directly concerned. Thus, in *Case 62/70, Bock*, where the German State informed an importer that it would reject its application for a licence to import Chinese mushrooms, even though it (Germany) had a discretionary power not to ban the imports, the State had fettered its discretion and the importer was held to be directly concerned.

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<sup>9</sup>European Union Law Textbook. London: HLT Publications, 7/e, 1995/96, pp65-66.

What makes the annulment procedure unattractive for natural or legal persons is the short *limitation period*. An action for annulment must be brought within **two months** of the publication of the measure in question, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to knowledge of the latter, as the case may be: **Art.263(6) TFEU**.

**Art.264 TFEU** provides for the *legal consequence of a successful challenge*, i.e. 'If the action is well founded, the Court of Justice shall declare the act concerned to be void.'

## Summary of Art.263 TFEU

The essence of this article may be reduced to five questions. The questions, along with the gist of the answers and the authorities are;

Questions	Answers	Authority
1. What acts can be challenged;	<b>All</b> acts which may have legal effects – not just those provided for in <b>Art.288 TFEU</b>	<b>Art.263(1) TFEU</b>
2. On what grounds may the act(s) be challenged;	Lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application; misuse of powers.	<b>Art.263(2) TFEU</b>
3. By whom;	Privileged, semi-privileged and <u>non-privileged applicants</u>	<b>Art.263 TFEU</b> , paras. 2, 3 and <b>4</b>
4. Within what time;	Two months	<b>Art.263(6) TFEU</b>
5. With what consequences?	The act will be declared void; and The institutions are obliged to take the necessary measures to comply with the judgment of the ECJ:	<b>Art.264 TFEU</b>  <b>Art.266 TFEU</b>

## **Art.277 TFEU: 'Illegality.'**

**Art.277 TFEU** provides for a measure which is complementary to Art.263 TFEU and it does so by allowing, in certain circumstances, a party to the proceedings to take action on the same grounds as provided for in **Art.263(2)**, (lack of competence, etc.,) and to do so even if the limitation period of two months, as provided for in Art.263(6) has passed. In more detail, **Article 277 TFEU** provides that:

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph<sup>10</sup>, any party may, in proceedings in which an act of general application adopted by an institution... is at issue, plead the grounds specified in article 263, second paragraph, in order to invoke before the [ECJ] the *inapplicability* of that act.

<sup>10</sup> The two-month limitation period in the final paragraph of Art.263 TFEU.

In common with the approach under Art.263 TFEU, however, it is the substance rather than the label of the act which is important. Accordingly, the reviewable act is **not** confined to being a 'Regulation' within the meaning ascribed by **Art.288 TFEU: Case 92/78, *Simmenthal SpA v. Commission***. Indeed, as in this case, the ECJ has interpreted a reviewable act as any act of general application that has been adopted by the Institutions and which is capable of producing legal effects similar to those of a Regulation.

**Steiner**<sup>11</sup> has noted that:

The purpose of Article [277] is not to evade the limitations of Article [263] by allowing individuals to challenge Regulations or applicants generally to avoid the time limits laid down in that Article, but to achieve the setting aside of an act, *prima facie* lawful, by *indirect* challenge to the legislative measure on which it is based. By establishing the 'inapplicability' of the Regulation, on the grounds prescribed for annulment under Article [263], the measure based on that Regulation itself becomes unlawful.

Thus Article [277], which can only be invoked before the Court of Justice, is essentially a complementary remedy.

Indeed, ***Brown and Kennedy***, in the *Court of Justice of the European Communities*, 5<sup>th</sup> edn., 2000, p166, emphasise:

“that the plea [of illegality] does not provide an independent cause of action but can only be invoked where proceedings are already properly before the court under some other Article of the [TFEU]. ... Commonly, the plea is made in conjunction with an action to annul under **Article [263]** ... ”

In essence, then, an **Art.277** action is not an independent action: it is available only as a defence when other proceedings have been taken against the applicant; *Cases 31 and 33/62*. The purpose is to provide an individual with protection from the application of an illegal regulation.

A party designated a 'privileged' applicant for the purposes of Art.263 TFEU may also instigate an action under Art.277: *Case 32/65, Italy v. Council and Commission*.

## **Art.265 TFEU: Failure to Act.**

In common with Article 277, **Article 265 TFEU** is also complementary to Article 263. **Art.265(1) TFEU** provides that:

Should the European Parliament, the European Council, the Council [or] the Commission ..., in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice to have the infringement established.

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<sup>11</sup>**Steiner, J.** *Enforcing EC Law*. London: Blackstone Press, 1995, p139.

However, it must be noted that the action is admissible only if the institution has first been called upon to act. The Article continues by referring to the procedural and limitation provisions, viz; If, within two months of being so called upon, the institution ... concerned has not defined its position, the action may be brought within a further period of two months.

Paragraph 3 provides that: 'Any natural or legal person may, under the [same] conditions laid down in the preceding paragraphs [institution has been called upon to act + time limit] complain to the Court that an institution ... of the Union has failed to address to that person any acts other than a recommendation or an opinion.'

No action may be brought under Art.265 TFEU against an institution which has 'defined its position.'

In common with actions under Article 263 TFEU, natural or legal persons have limited *locus standi* under **Art.265**. However, as they can only challenge a failure to 'address to that person any act other than a recommendation or an opinion,' it may appear that their standing is limited to a right to demand that a decision be addressed to themselves. However, as this would lead to a position even more restrictive than the requirements for pursuing an action under Art.263 TFEU, the ECJ has established the right of an applicant to challenge a decision addressed to another person providing it may be based on the decision being of direct and individual concern to the applicant - though no case has yet succeeded: Case 246/81, Lord Bethell v Commission.

It should be noted that the essence of an action for a judicial review in respect of a failure by one of the named Institutions (viz., the European Parliament, the Council or the Commission) to act under Art.265 TFEU, has to be based on the failure being alleged to constitute an infringement of the Treaty. This requires the Institution to be under a clear legal duty to take a particular action and it is a failure to take that action which constitutes a breach of that duty. It will not suffice for the Institution to fail to take an action based on a discretionary power: the failure must constitute an illegality.

With regard to Arts.263 TFEU and 265 TFEU, the first paragraph of **Art.266 TFEU** provides that:

The institution or institutions whose act has been declared void or whose failure to act has been declared contrary to this Treaty shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

With regard to **Art.265**, the action is for a declaration that the institution be made to adopt the measure which terminates the infringement.

## **Action for Damages for non-contractual liability under Article 340(2) TFEU.**

Suffice it to say that **Article 268 TFEU** provides the ECJ with ‘jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340’ i.e., compensation for non-contractual [tortious] damage; and under **Art.340(2)**: ‘the Union shall, in accordance with the *general principles common to the laws of the Member States*, make good any damage caused by it or by its servants in the performance of their duties.’

Under **Art.340(2)TFEU**, there are no restrictions on the persons who may bring an action. To succeed in an action, however, a causal connection must exist between the applicant’s injury and the wrongful act or omission of the institution’s conduct: Case 4/69, Lutticke; and the action is subject to a five-year limitation period. The limitation period doesn’t begin until the applicant is aware of the injury.

Unlike (say) an Art.277 TFEU action, an Art.340(2) action for damages may be brought *independently or in addition* to any claim pursued under Arts.263 and 265 TFEU: Case 4/69, Lutticke. Moreover, a declaration of invalidity may be obtained *in the course of* pursuing a claim for damages and this may circumvent the *locus standi* limitations of Art.263 TFEU; but such a claim would probably NOT be admissible if the primary purpose was to attain by another means the remedy provided for in Art.263 TFEU: Case 175/84, Krohn.

### **Elements of non-contractual liability**

The non-contractual liability of the Union is based on proving three elements, viz,;

- Illegality / a wrongful act or omission on behalf of an institution;
- The claimant has suffered damage; and
- There is a causative link between the act or omission and the damage suffered.

### **Establishing Illegality / a wrongful act or omission on behalf of an institution: the Schöppenstedt formula and its modification by Bergaderm**

Liability for illegality has been held to be dependent on there being ‘a sufficiently flagrant violation of a superior rule of law for the protection of the individual’ – the *Schöppenstedt* formula: Case 5/71, Schöppenstedt. The type of culpable conduct (i.e., wrongful act or omission) which *may* give rise to the applicant’s injury has included the enactment of an improper Union measure: Cases 56-60/74, Kurt Kampffmeyer – and here the ECJ decided that where damage to the claimant was imminent, or likely with a high degree of certainty to occur, he could initiate Art.340(2) proceedings before the damage occurs.

In essence, a ‘superior rule of law’ is usually one of the general principles of Union law, e.g., proportionality, equality and legitimate expectations; but it also extends to the doctrine of misuse of powers: Cases T-481 & 484/93, Vereniging.

Whereas the ‘superior laws’ derive from principles that are common to the laws of the Member States, issues of liability and causation may not be common – but the ECJ has drawn on principles of tortious liability within the Member States to formulate its own principles governing liability in Union law.

Establishing an unlawful act under the *Schöppenstedt* formula required the proof of three elements, viz;

- A legislative measure involving choices of economic policy;
- A breach of a superior rule of law for the protection of individuals; and
- That the breach is ‘sufficiently serious’.

### Overview of Schöppenstedt

- ‘Legislative measures’ generally related to Regulations; and practically any legislative measure could be construed as ‘economic’ in the context of the Treaty of Rome (as amended).
- As noted, a ‘superior rule of law’ generally referred to a general principle of EC law and a claim for damages succeeded when a legitimate expectation was breached in Case C-152/88, Sofrimport SARL.
- A breach of ‘a superior rule of law’ would not suffice: the breach had to be regarded as sufficiently serious; and in Cases 83 & 94/76, and 4, 15 & 40/77, Bayerische, the ECJ said that where an Institution was able to exercise wide discretion in legislating, liability would not be incurred unless the institution had manifestly and gravely disregarded the limits on the exercise of its power.

However, the strictness of the *Schöppenstedt* formula was such that in Joined Cases C-46 & 48/93, Factortame (3), **A-G Tesouro** observed that, at that time, only 8 claims for damages against the institutions had succeeded. In *Factortame (3)*, then, the ECJ not only modified the criteria for State liability, as established in Cases C-6 & 9/90, Francovich, they decided that the criteria delimiting State liability also applied to the liability of the [Union] Institutions under **Art.[340(2) TFEU]**. The ‘sufficiently serious’ breach as the basis of liability that was confirmed in *Factortame(3)* was then applied to Institutional (Commission) liability for the first time in Case C-352/98 P, Bergaderm.

### The Bergaderm ‘Modifications’

#### **Case C-352/98 P, Laboratoires Pharmaceutiques Bergaderm v Commission**

A Commission Decision had amended a 1976 Directive by banning the use of *bergapten* in sun oil, on the basis that it was carcinogenic. Bergaderm (BD) was the only company that used this chemical in its sun oil and, following the Decision, BD went into liquidation. BD then sued the Commission claiming that, inter alia, the Commission had breached the principle of proportionality and misused its powers by incorrectly interpreting scientific evidence and amending the Directive.

**Held:** BD failed in its action but in delivering its judgment, the ECJ set out, particularly in paras.41-43, new parameters for Art.[340(2) TFEU]:

41. The Court has stated that the conditions under which the State may incur liability for damage caused to individuals by breach of [Union] law cannot, in the absence of particular justification, differ from those governing the liability of the [Union] in like circumstances. The protection of the rights which individuals derive from [Union] law cannot vary depending on whether a national authority or a [Union] authority is responsible for the damage ...

42. As regards Member State liability for damage caused to individuals, the Court has held that [Union] law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties ...

43. ... as regards both [Union] liability under Art.[340(2)] ... and Member State liability for breaches of [Union] law, ***the decisive test*** for finding that a breach of [Union] law is sufficiently serious *is whether the Member State or the [Union] institution concerned manifestly and gravely disregarded the limits on its discretion*

...

So, ‘the crucial factor in establishing whether there ha[s] been an unlawful act [is] the degree of discretion available to the institution concerned ... [where] there is considerably reduced, or no, discretion, the mere infringement of [Union] law may be a sufficiently serious breach’<sup>12</sup>.

**Schöppenstedt and Bergaderm Compared**

	<b>Schöppenstedt</b>	<b>Bergaderm</b>
<b>1</b>	A legislative measure involving choices of economic policy.	The degree of discretion available to the institution
<b>2</b>	Damage via a breach of a superior rule of law for the protection of individuals.	Damage via the rule infringed being intended to confer rights on individuals.
<b>3</b>	Unlawfulness of conduct: the breach is ‘sufficiently serious’.	Same: but determine whether the breach is <i>sufficiently serious</i> by applying the criteria referred to in para.56 of Factortame (3) – e.g., the clarity and precision of the rule breached; the degree of discretion available ...

<sup>12</sup> Steiner, J, Woods, L and Twigg-Flesner, C. *EU Law*, 9/e. Oxford: OUP, 2006, pp296-297.

## References

- Chalmers, D, et al*, *European Union Law*, 2<sup>nd</sup> edn., 2010. Cambridge: CUP, Ch.10;  
*Fairhurst, J.* *Law of the European Union*, 8<sup>th</sup> edn., 2010. Harlow: Pearson, Ch.8;  
*Foster, N.* *EU Law Directions*, 2<sup>nd</sup> edn., 2010. Oxford: OUP, Ch.9;  
*Kaczorowska, A.* *European Union Law* 2<sup>nd</sup> edn., 2010. Abingdon: Routledge, Ch.16;  
*Steiner, J, Woods, L & Twigg-Flesner, C.* *EU Law*, 9<sup>th</sup> edn., 2006. Oxford: OUP, Chs.11-13;

## Workshop Questions

1. The manner in which **Article 230 EC** had been interpreted and applied by the Court of Justice of the European Communities was not helpful to an individual who sought to challenge the validity of acts of Union Institutions. Accordingly, an individual seeking to challenge the validity of such acts would have been advised to have contemplated doing so by means other than invoking Article 230EC. The post-Treaty of Lisbon position enshrined in **Art.263 TFEU** is likely to prove equally unhelpful, with an individual again being advised to pursue other means of redress.

Discuss.

2. Discuss the assertion that ‘whilst **Art.340 TFEU** provides for an action for damages against Union Institutions, the practical benefit of doing so is questionable given the unduly restrictive provisions’.

3. Answer **BOTH** parts of this question.

(a) Discuss the assertion that ‘those who have the standing to invoke **Art.265 TFEU** are likely to find it to be of very limited benefit’.

### **AND:**

Discuss the assertion that ‘those who have the standing to invoke **Art.277 TFEU** are likely to find it to be of very limited benefit’.