CHAPTER 7A

Judicial Protection under EU Law: Direct Actions

Armin Cuyvers

7.1 Introduction

This chapter discusses the different direct actions under EU law.[1] The term direct action indicates that these legal actions provide parties with a remedy directly before the Court of Justice or the General Court. Only five direct actions exist under EU law, being the action for annulment, the action for inaction, an action for damages against the EU, the infringement proceeding and the request for an advisory opinion from the CJEU. Most of these actions have a rather limited scope, or like the action for annulment are only open to a very limited category of applicants. The limited availability of direct actions further emphasizes the point already made in chapter 2, namely the crucial role played by national courts in the interpretation and application of EU law.[2] It also helps to explain the central importance of the preliminary reference procedure discussed in EU chapter 8.

7.2 The Action for Annulment

Article 263 TFEU allows certain applicants to bring an action for annulment against all legal acts from EU institutions or other EU bodies, offices or agencies. An action for annulment, however, cannot be brought against EU primary law.[3]

1 For a more elaborate analysis on direct actions see amongst many others P. Craig and G. De Búrca, *EU Law* (6th edn, OUP 2015), chapters 12–16.

2 Also see on this point EU Chapter 8 par. 1.

3 For a discussion of the fascinating question if primary law or proposed Treaty amendments can ever violate (even) higher principles of EU law, and for that reason be annulled or disapplied see Unierecht N. Idriz-Tescan, *Legal constraints on EU Member States as primary law makers: a case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession* (Diss. Leiden 2015, Meijersreeks;MI-247), or A. Cuyvers, 'The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States'. *European Constitutional Law Review*, 7, pp. 481–510.

These acts may be challenged '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.'[4] Especially considering the inclusion of the catch-all ground of 'infringement of the Treaties' this essentially means that an act can be challenged for any violation of EU law. This includes, for example, the use of an incorrect legal basis as discussed in EU chapter 3, or a conflict with a fundamental right. An EU act can only be annulled, however, where it violates a *higher* norm of EU law. A legislative act adopted under the ordinary legislative procedure, for example, can only be annulled for a conflict with higher norms such as a General Principle of EU law, the Charter, or provisions in the TEU or TFEU, but not for a conflict with lower rules such as delegated or implementing acts.

The most complex and contested issue under Article 263 TFEU concerns the three different categories of applicants that are allowed to bring an action for annulment, and especially the very limited standing of individuals to do so.[5] As EAC law does not impose similar restrictions on individuals that want to bring an action for annulment, a detailed overview on this point would be of limited comparative value. Consequently, this section only gives a general overview of the legal complexities surrounding the standing of individuals under Article 263 TFEU.[6]

The first category, the so-called privileged applicants, consists of the Member States, the European Parliament, the Council and the Commission. These applicants have a general right to start an action for annulment against any EU legal act, without having to prove any legal interest whatsoever.

The second category consists of the Court of Auditors, the European Central Bank and the Committee of the Regions. These semi-privileged applicants may bring an action for annulment against any EU act that affects their own prerogatives. They therefore do have to establish a certain legal interest in the act being challenged, and must prove that this act in some way affects their own powers or responsibilities.

4 Article 263(2) TFEU.

5 Cf. T. Tridimas and S. Poli, '*Locus Standi* of Individuals under Article 230(4): The Return of Eurydice?' in: A. Arnull, P. Eeckhout, and T. Tridimas (eds), *Continuity and Change in EU law: Essays in Honour of Sir Francis Jacobs* (OUP, 2008), ch. 5, or S. Balthasar, '*Locus Standi* Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU' (2010) 35 *ELRev*, 542.

6 For the very broad standing under the EAC equivalent action see Chapter 7. For a more detailed analysis on standing under Article 263 TFEU see A. Ward, *Judicial Review and the Rights of Private Parties in EU law* (OUP, 2nd edn, 2007).

The third category consists of all natural or legal persons that are not privileged or semi-privileged, usually referred to as 'individuals'. These individuals only have standing to bring an action for annulment against an EU act in one of three scenarios. To begin with, individuals can institute annulment proceedings against an act specifically *addressed* to them. This includes for example companies that receive a decision from the Commission lowering a grant or imposing a fine for a violation of competition law. In such cases, standing will be easy to establish, as the parties will be identified by name in the act they want to challenge.

Additionally, individuals can also bring an action for annulment against an act that is not addressed to them if this act 'is of direct and individual concern to them'. The criterion of direct concern requires that the EU act 'directly affects the legal situation of the individual' and leaves no discretion to those implementing it, such as a Member State.[7] It is the criterion of 'individual' concern, however, that forms the real bottleneck. In the (in)famous *Plaumann* ruling, the CJEU gave an extremely restrictive interpretation of individual concern:

> 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 these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee.[8]

Essentially, the CJEU thereby restricts individual concern to those situations where an act is so specifically affecting a certain party that it is *de facto* addressed to it. The main test the CJEU uses for this purpose is the idea of an 'open group'. Whenever an act affects an 'open group', that is a group to which new members can accede, the member of this group are not individually concerned, even if they can be identified very precisely. In *Plaumann*, for example, the contested act affected importers of clementines. The CJEU held that this

7 Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, par. 43, or Joined Cases C-445/07 P and C-455/07 P *Ente per le Ville vesuviane* [2009] ECR I-7993, par. 45.

8 Case 25/62 *Plaumann* ECLI:EU:C:1963:17, my italics.

is an open group, as any person may decide to become a clementine importer and join this group. As a result, clementine importers were not individually concerned, and had no standing under Article 263 TFEU. Any act, therefore, that affects an open group, such as a certain profession or industry, will not be of individual concern to the members of this group, and consequently they will not be able to bring an action for annulment under Article 263 TFEU.

The interpretation given by the CJEU in *Plaumann* is extremely restrictive, and indeed individuals almost never succeed in proving that they are individually concerned.[9] Despite serious criticism that the *Plaumann* doctrine excessively limits the legal protection of individuals, however, the CJEU has so far refused to soften is approach.[10] The CJEU instead argued that expanding standing for individuals under Article 263 TFEU required a Treaty amendment.

With the Treaty of Lisbon in 2009, the standing for individuals was indeed somewhat extended, albeit in a rather complex way. Individuals can now also bring an action for annulment against 'a regulatory act which is of direct concern to them and does not entail implementing measures.' Under this ground, the restrictive requirement of individual concern no longer has to be met. In its place have come two new requirements, namely that the act is regulatory in nature, and does not require any implementing measures. The term 'regulatory act' however, was new and was not defined anywhere in the Treaty. The CJEU therefore, had to provide its own definition of regulatory action in *Inuit*:

> The General Court concluded, in paragraph 56 of the order under appeal, that 'the meaning of "regulatory act" for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts'. Consequently, a legislative act may form the subject matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them.[11]

9 For a rare example, and a nice illustration of just how specific an act needs to target a particular individual for individual concern to exist, see Case C-309/89 *Codorniu* ECLI:EU:C:1994:197.

10 For an authoritative criticism on this restrictive interpretation, as well as the refusal of the CJEU to change its case law, see the Opinion of Advocate General Jacobs in C-50/00 P *Union de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, as well as the judgment of the General Court being reviewed and the General Court's openly critical judgment in Case T-177/01 *Jégo-Quéré* [2002] ECLI:EU:T:2002:112.

11 Case C-583/11 P *Inuit* ECLI:EU:C:2013:625, par. 12.

The third possible ground of standing for individuals, therefore, only allows them to challenge non-legislative acts, i.e. acts that were not adopted under a legislative procedure, which do not require any implementation, such as for example some implementing regulations.[12]

All categories of applicants, moreover, must bring their action for annulment within two months, starting from the publication of the measure. If the measure was not published, the time limit starts to run from either the notification to the plaintiff, or, if there was no notification or the plaintiff hears about the measure before notification, from the day on which the measure came to the knowledge of the plaintiff.

7.3 The Action for Inaction

The action for failure to act in Article 265 TFEU can be used where an EU institution, body, office has a legal obligation to act but fails to do so. Again there is a group of privileged applicants, consisting of the Member States, the European Parliament, the European Council, the Council, the Commission and the ECB with unlimited standing. Individuals, on the other hand, only have limited standing, and can only bring an action where the body concerned should have addressed an act specifically to them. Before a plaintiff can start an action for inaction, he or she first must call on the relevant body to act.

The main difficulty for the action of inaction is to prove a sufficiently clear and well-defined obligation to act that can also be enforced by a Court.[13] Partially in light of this difficulty, the action for inaction is not used very frequently.[14]

12 See Article 289(3) TFEU for the concept of legislative act. For an example of a regulatory act that does not require implementation, see Case T-262/10 *Microban* ECLI:EU:T:2011:623.

13 See on this difficulty especially Case 13/83*Parliament v Council* (Transport Policy), ECLI:EU:C:1985:220.

14 For further examples see Case 4/69 *Lütticke* ECLI:EU:C:1971:40 or Case T-395/04 *Air One* ECLI:EU:T:2006:123.

7.4 The Action for Damages

The action for EU liability under Article 30 TFEU should be distinguished from the possibility to hold Member States liable for violations of EU law.[15] Article 340 TFEU can only be used to hold EU institutions and bodies liable for any damages caused by them or their servants. A distinction should further be made between the contractual liability of the EU and the non-contractual liability. Contractual liability of the EU is determined by the law applicable to the relevant contract, and by the national civil court that has jurisdiction under the rules of Private International Law. Only the non-contractual liability of the EU for violations of EU law is determined by EU law itself.

Any party that claims to have suffered damages caused by an unlawful act of an EU institution or body can start an action for damages before the CJEU. The defendant is not the EU as such, but the institutions whose alleged unlawful act has caused the damage. Three criteria have to be met for EU liability to exist: 1) an *illegal act* by an EU institution or body, 2) actual *damage*, and 3) a *causal* relation between the illegal act and the damage.[16] The most complex and restrictive criterion is the existence of an illegal act, which requires a sufficiently serious breach of a rule of EU law intended to confer rights on individuals. In turn, a breach is sufficiently serious where the institution concerned 'manifestly and gravely disregarded the limits on its discretion.'[17] Consequently, the more discretion an institution had, the more difficult it will be to hold it liable for any damages caused by its actions.[18] This means that it is extremely difficult to establish liability of for instance the European Parliament for legislative choices made, but easier to establish liability where the Commission wrongly implements a very straightforward rule that leaves almost no discretion.[19]

Under Article 46 of the Statute of the Court, a time-limit of five years applies.[20]

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15 On this principle see EU chapter 6 as well as Case C-6/90 and 9/90 *Francovich* [1991] *ECR* I-5357 and Case C-46 and 48/93 *Brasserie du Pêcheur* [1996] *ECR* I-1029. At the same time, the substantive criteria for the non-contractual liability of a Member State for violations of EU law are identical to the ones for EU liability. See Case C-352/98P *Bergadem* [2000] *ECR* I-5291.

16 Case C-352/98P *Bergadem* [2000] *ECR* I-5291.

17 Case C-46 and 48/93 *Brasserie du Pêcheur* [1996] *ECR* I-1029.

18 See for example Case C-472/00 P *Fresh Marine* ECLI:EU:C:2003:399, or for liability of the EU Courts themselves, case C-385/07 P *Der Grüne Punkt* ECLI:EU:C:2009:456.

19 See for example Case T-260/97 *Camar* ECLI:EU:T:2005:283.

20 For the details see Case C-51/05 P *Cantina Sociale* ECLI:EU:C:2008:409.

7.5 The Plea of Illegality

The plea of illegality under Article 277 TFEU is not an independent remedy. Instead, it is an *argument* that parties which are already in front of the CJEU may rely on to question the legality and validity of an EU act.[21] For example, a farmer may bring an action for annulment against a Commission decision refusing to grant the farmer a milk-subsidy. The farmer, as addressee of this decision, is then allowed to start an action for annulment against this Commission decision under Article 263 TFEU. In the context of this annulment procedure, the farmer may then rely on the plea of illegality to challenge *another* relevant EU act, such as the directive on which the Commission decision was based. After all, if the farmer can prove that the directive underlying the Commission decision itself is invalid, this will also affect the validity of the Commission decision itself. The plea of illegality itself, however, does not provide a self-standing remedy.[22]

7.6 Infringement Proceedings

The infringement procedure is another atypical remedy that allows Member States or the European Commission to bring a Member State before the CJEU for violating its obligations under EU law.[23] As it is highly exceptional for Member States to start infringement procedures against each other, also in light of the political costs, it is almost exclusively the Commission that starts infringement proceedings under Article 258 TFEU.[24] Partially because of the reluctance of Member States to infringe each other, the independent and autonomous power of the Commission to start infringement proceedings against Member States has proven of great importance to ensure the respect for EU law.[25]

When considering the infringement procedure, it is important to realize that the main purpose of infringement is not to impose a penalty on the Member

21 Joined cases 31/62 and 33/62 *Wöhrmann* ECLI:EU:C:1962:49.

22 See for an example Case C-11/00 *Commission v European Central Bank*, ECLI:EU:C:2003:395.

23 Articles 258–260 TFEU.

24 So far, only four infringement proceedings were started by Member States against each other, all in situations that were already at an advanced stage of political escalation. See for the most recent example Case C-364/10 *Hungary v. Slovak Republic* ECLI:EU:C:2012:3798.

25 See in this context also the institutional responsibility of the Commission as 'guardian' of the *acquis* as described in EU Chapter 2.

State. Rather, the main purpose is to ensure that EU law is applied correctly, preferably without having to proceed to the CJEU and asking for sanctions.[26] This main purpose is reflected in the set-up of the infringement procedure, which is divided into several stages.

An infringement starts with a first administrative, or pre-litigation, phase, in which the Commission becomes aware of a possible violation of EU law by a Member State.[27] This can either be based on the own investigations of the Commission or on complaints that the Commission received.[28] The Commission then engages in an informal dialogue with the Member State to further explore if EU obligations are indeed not respected, and if that is the case, to request the Member State to make the necessary improvements. If the matter is not solved during the informal dialogue, the Commission can decide to send a letter of formal notice. The letter contains a brief overview of the problems found and allows the Member State to react or make improvements. If the Commission is still not satisfied with the explanation or improvements it can decide to issue a reasoned opinion. This is an important step in the entire proceedings. The reasoned opinion formally has to set out all the complaints that the Commission has concerning the way in which the Member State fulfils its obligations, and must give the Member State a reasonable period to comply.[29] If the Member State does not comply, the reasoned opinion becomes the basis for the next phase, which is the first judicial phase. It has to be stressed though that at this stage over 90% of all infringements have been resolved, as either the Commission has been convinced that there is no violation of EU law or the Member State has already made the necessary improvements to ensure future compliance.

In the first judicial phase the Commission brings the Member State before the CJEU. The case before the CJEU is delineated by the reasoned opinion, and may for example not include any alleged violations that were not already

26 See on this point for example Case 293/85 *Commission v Belgium* (*University Fees*), ECLI:EU:C:1988:40.

27 It does not matter which organ or body of the state actually violated EU law. Under EU law the central government is responsible for the behaviour of all public bodies, including the courts. The infringement, therefore, will always be addressed to the central government.

28 Where the Commission receives complaints from third parties on possible violations of EU law it has absolute discretion to initiate infringement proceedings or not. This allows the Commission to effectively use its limited resources. See Case 247/87 *Star Fruit* ECLI:EU:C:1989:58.

29 Case 293/85 *Commission v Belgium* (*University Fees*), ECLI:EU:C:1988:40, and Case C-304/02 *Commission v France*, ECLI:EU:C:2005:444.

included in the reasoned opinion.[30] If the CJEU agrees with the Commission that the Member State has indeed failed to fulfil its obligations under EU law, it will render a declaratory judgment detailing the failure of the Member State and ordering it to bring an end to the violation.[31] In this first judicial phase, therefore, no sanction is yet imposed on the Member State, as the main aim is still to ensure compliance.[32]

In the exceptional cases where Commission thinks the Member State is not complying with its obligations under EU law and the judgment of the CJEU, it can start the second administrative, or pre-litigation, phase of the infringement procedure.[33] The Commission again starts with an informal dialogue, potentially followed by a letter of formal notice. In the second pre-litigation phase, however, no reasoned opinion is given or necessary, as the dispute is already clearly delineated by the judgment of the CJEU.

If the Commission is still not convinced that the Member State has fully complied at the end of the second pre-litigation phase, it can initiate the second judicial phase. In this phase, the Commission may request the Court to impose a lump sum fine and/or a penalty payment for every day the Member State fails to comply. Ultimately, it is then up to the CJEU to determine if a sanction should be imposed and if so how severe this sanction should be. If sanctions are imposed, however, they can be very serious indeed, running into the tens of millions of euros.[34] So far, Member States have always complied with such penalties when imposed, but if they were not such penalties could probably simply be deducted from any EU subsidies the Member State receives from the EU.

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30 Cf. Case C-350/02 *Commission v Netherlands*, ECLI:EU:C:2004:389. Also note that the CJEU will judge the situation in the Member State at the end of the reasoned opinion. Any improvements made after the time period allowed in the reasoned opinion has expired will therefore not be taken into consideration by the CJEU, and will not prevent a violation from being found. See already Case 167/73 *Commission v France* (Merchant Navy), ECLI:EU:C:1974:35.

31 Article 260(1) TFEU.

32 Cf. Case 128/78 C*ommission v United Kingdom* (Tachographs), ECLI:EU:C:1979:32. See however the exceptional possibility under Article 260(3) TFEU to already impose a sanction in the first judicial phase if the violation at stake was a failure to *notify* the Commission on the measures taken to transpose a directive. If the infringement concerns the incorrect implementation of a directive itself, the normal procedure with two judicial rounds applies.

33 Article 260(2) TFEU.

34 See for example Case C-387/97 *Commission v Greece*, ECLI:EU:C:2000:356 or Case C-304/02 *Commission v France*, ECLI:EU:C:2005:444.

As stated, the infringement procedure is an important instrument in the EU law toolbox to make sure Member States comply with their obligations under EU law. Even if the Commission only has a limited capacity, and hence has to strategically choose which infringements to choose, it still contributes significantly to the effectiveness of EU law and the trust in the overall system. Moreover, most infringement actions are already successful in the first pre-litigation phase, meaning that they do not necessarily have to take very long or become litigious.[35]

7.7 Arbitration Before the CJEU

Under Article 272 TFEU the CJEU has jurisdiction to give a judgment based on any arbitration clause contained in a contract concluded by or on behalf of the EU. This may be in a contract governed by public or private law. In addition, Article 273 TFEU allows for CJEU jurisdiction where any dispute between Member States which relates to the subject matter of the Treaties is submitted to it under a special agreement between the parties.

So far the CJEU has not yet been active under these provisions. In recent years, however, the use of public international law instruments to support or supplement EU action, where collective action under EU law proved impossible, has increased significantly. Increasingly, these fascinating hybrids of EU and Public International law also involve EU institutions outside the boundaries of EU law proper. This includes the grants of jurisdiction to the CJEU. The coming years, therefore, might see some actual uses of these special heads of jurisdiction, which may also be of interest to the comparable heads of jurisdiction enjoyed by the EACJ.[36]

35 Of course where disputes become extremely political, such as in the contested changes to the Hungarian constitution, even the infringement procedure might be limited in what it can achieve. See Case C-286/12 *Commission v Hungary*, ECLI:EU:C:2012:687.

36 For such additional jurisdiction of the CJEU see especially Article 8 of the Treaty on Stability, Coordination and Governance in the EMU (Fiscal Compact), signed on 2 March 2012 by all EU Member States except UK and the Czech Republic, as well as the Treaty establishing the European Stability Mechanism, Brussels, February 2 2012 T/ESM 2012/en 1.

7.8 Advisory Opinions of the CJEU

Article 118(11) TFEU allows the Member States, the European Parliament, the Council or the Commission to request an opinion of the CJEU on the compatibility of an envisaged international agreement with the Treaties. If the CJEU finds that the envisioned agreement is not compatible with the Treaties, the agreement may not enter into force, unless the parts that conflict with the Treaties are sufficiently amended. Asking an opinion is not mandatory. Not asking an opinion, however, runs the risk of the CJEU annulling the entire agreement at a later stage if conflicts with the Treaties are found. Such an annulment would of course create even more legal and political headaches, including possible liability towards the other signatories to the agreement.[37]

Over time, the capacity to give legal opinions has led to some of the most important rulings given by the CJEU, often dealing with foundational questions on the nature of the EU legal order itself, and its relation to other legal regimes. This also in part because legal opinions provide the CJEU with the opportunity to settle such questions in a relatively general manner.[38]

37 See in this context the recent Opinion 2/15 of the CJEU on the trade agreement between the EU and Singapore, considered to be the model for CETA and TTIP.

38 See for example Opinion 2/94 *Accession to the European Convention on Human Rights* [2006] ECR I-929, Opinion 1/09 *Patent Court* [2011] ECR I-1137, or the highly contentious recent Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.