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## JUDICIAL POWERS

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



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## ANNULMENT POWERS; JUDICIAL REVIEW

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



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# 1. THE EXISTENCE OF A REVIEWABLE ACT



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

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# 2. LEGITIMATE GROUNDS FOR REVIEW

## Formal Grounds of Review

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

*Article 263(2) TFEU* limits judicial review to **4 legitimate grounds:**

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



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## THE PROPORTIONALITY PRINCIPLE

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



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### 3. LEGAL STANDING BEFORE THE COURT

Article 263 TFEU lists 3 categories of applicants.

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

#### Development of Legal Standing

##### Rome Treaty Formulation (Article 230(4) EC)

- 3 forms of decision
- Severely restricted the standing of private parties. (direct and individual concern requirement for challenges to a decision.)

##### Judicial Amendments

- Desertion of the need for a decision.
- *Codorniu* [1994]
- Still needed to be direct and individual concern.

##### Direct concern & individual concern

- *Les Verts* [1986] established what direct concern was
- *Plaumann* [1963] established the strict test applied for individual concern.

##### Lisbon Treaty

- Article 263(4) TFEU
- *Plaumann* test still applied.
- Restrictive stance on direct review for private parties.
- *Inuit I* [2013]

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## 4. TIME LIMITATIONS

- The action for annulment (i.e. use of Art 263 TFEU) must be brought **within two months** of either:
  - The publication of the measure (e.g. Regulation or Directive); or
  - When there was notification to the applicant (e.g. through a letter or a notice);



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## INDIRECT REVIEW

### **Plea of Illegality** (*Article 277 TFEU*)

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

### **Preliminary Rulings** (*Article 267 TFEU*)

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

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## LIABILITY ACTIONS

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

Schoppenstedt formula to Bergaderm formula

- Distinction between legislative & administrative Union Acts.
- **Administrative:** low liability threshold (*Adams vs. Commission* [1985])
- **Legislative:**
  - *Schoppenstedt formula* [1971]  
Liability dependent on;
    1. The breach of a superior rule of Union law
    2. That grants rights to individuals
    3. The breach is sufficiently serious.
  - *Bergaderm* [2000] reformed this in 3 ways:
    1. Distinction between administrative and legislative Acts abandoned.
    2. Abolished the need for a superior rule
    3. To establish seriousness, the Union had to “manifestly and gravely disregard the limits on its discretion.”
  - *FIAMM* [2008] The Union is not liable for damage caused by actions that are legal.

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## ENFORCEMENT ACTIONS: AGAINST STATES



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

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## ENFORCEMENT ACTIONS: AGAINST THE UNION

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



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## PRELIMINARY RULINGS

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

### **Article 267(1) TFEU; Jurisdiction of the ECJ**

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

### **Article 267(2) TFEU; The Conditions for a Preliminary Ruling**

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

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## PRELIMINARY RULINGS (cont.)

### Article 267(3) TFEU; The Obligation to Refer and Acte Clair

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

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

### Legal Nature of Preliminary References

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

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## CONCLUSION

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



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