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Column 12

Dear citizens of Georgia,

With this twelfth and final column in this series, we turn to legal protection before the European Court of Justice and the courts of the member states. The focus of the presentation – primarily from the perspective of individual legal protection for citizens – is on the following topics: the allocation of jurisdiction between the European Court of Justice (ECJ) and the European General Court (GC), procedural processes and types of proceedings, and appeal procedures. We will particularly address the topic of "preliminary ruling proceedings" in the context of legal proceedings pending before a court of a member state. The column concludes with an overview of legal protection before the courts of the member states.

*The presentation follows – also here in this column (see Chapter VI - Institutional Structure of the European Union, paragraphs 6 and 7) – the 13th edition of the textbook "**European Law**", published in 2023, by the team of authors and university professors Andreas Haratsch, Christian Koenig, and Matthias Pechstein, and published by Mohr Siebeck Verlag Tübingen (Baden-Württemberg). **

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* Andreas Haratsch, Christian Koenig, Matthias Pechstein – European Law

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All previous columns are also based on this textbook.

This textbook is recommended and strongly encouraged to interested readers, especially law students, if they wish to further their studies of European law. There, they will find comprehensive answers to their questions on all topics of European law, as well as detailed examination schedules for written examinations and for legal practice.

Legal Protection before the Court of Justice of the European Union

1. Position and Tasks of the European Court of Justice

As an *independent judicial body* and within the powers conferred on it by the Treaties, the Court of Justice of the European Union (ECJ) ensures that the law is observed in the interpretation and application of European Union law (Article 19(1), first subparagraph, second sentence, TEU). It supervises the institutions of the Union and the Member States, i.e., it reviews their actions for legality and compatibility with Union law. Its interpretation of Union law is binding. As an EU institution, it is bound by the principle of conferral (Article 5 (1), first sentence, and Article 5 (2) TEU).

The ECJ has a court attached to it – the European Court of Justice (CJEU) (Article 19 (1) TEU, Articles 254 and 256 TFEU), as well as – currently the only specialized court (Article 257 TFEU) – the Court of Civil Service Disputes.

The *judicial review* exercised by the ECJ is of particular importance given the structural deficiencies in the Union's democratic legitimacy. Alongside judicial review, the court's *task of judicial development* is equally important. This primarily concerns, as we have already explained, the development of general legal principles of Union law as a matter of public policy (*ordre public*), of which the fundamental rights formulated in the Charter of Fundamental Rights are paramount. Judicial development of the law is equally bound by the principle of conferral.

The task of *upholding Union law* encompasses primary and secondary law, including general legal principles, Union law Customary law and international agreements concluded by the Union, with the exception of agreements concluded by individual Member States among themselves, with third countries or other international organizations, as well as non-binding opinions and recommendations of the Union institutions.

The ECJ is responsible for safeguarding the law in the *interpretation and application* of Union law. The subject of the application of the law is to examine whether a specific situation meets the constituent elements of a legal norm (subsumption) and to enforce the law. Interpretation determines the content of a norm (factual elements and legal consequences, including their conditional connection). In doing so, the Court essentially applies the methods of interpretation customary in the legal systems of the Member States, but has developed them into a canon of interpretation specific to the Union.

The relevant methods of interpretation are:

- *grammatical* interpretation, based on the wording of the norm;
- *systematic* interpretation, which focuses on the interrelationships within the system of norms;
- *teleological* interpretation, which focuses on the meaning and purpose, with the determination of the "*effet utile*" (useful effect) being of particular importance;
- *historical* interpretation, which draws on the legislative history of the norm (this method of interpretation, however, plays no role in primary law due to the inaccessibility of the materials and the objective of integration).

The treaties – TEU and TFEU – are drafted in several languages. The text of the Treaties is equally authentic in each of these languages, which is why the ECJ, where necessary, relies on the authentic texts for interpretation. The currently authentic Treaty languages are: *Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish* (Article 55 TEU and Article 358 TFEU, Article 55 TEU). English will remain an official language of the Union even after the United Kingdom's withdrawal. It should be emphasized that, due to the often different meanings of the texts in the individual languages, the most important approach is systematic interpretation and interpretation aimed at achieving a useful effect ("*effet utile*").

2. Allocation of jurisdiction between the European Court of Justice (ECJ) and the European General Court (CJEU)

Material jurisdiction of the General Court

The jurisdiction of the General Court extends, in accordance with Article 256(1), first subparagraph, TFEU in conjunction with Article 51 of the **Statute of the ECJ** *)

*) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL>
- English version:

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PROTOCOL (No. 3) ON THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union)

to all *direct actions brought by natural and legal persons* (except those referred to a specialised court) and to certain Member States Actions. Furthermore, it is provided that the General Court may have jurisdiction to give preliminary rulings under Article 267 TFEU in specific areas defined in the Statute (Article 256 (3), first subparagraph, TFEU). However, such a provision is currently missing from the Statute.

Specifically, pursuant to Article 256 (1) TFEU, the General Court currently has jurisdiction at first instance for all:

- actions brought by staff against the institutions and other bodies of the Union (Article 270 TFEU),
- actions for annulment brought by natural and legal persons (Article 263 (4) TFEU),
- actions for failure to act brought by natural and legal persons (Article 265 (3) TFEU),
- actions for damages brought by natural and legal persons for non-contractual liability of the Union (Article 268 TFEU),
- arbitration actions brought by natural and legal persons (Article 272 TFEU),
- applications brought by natural and legal persons for interim measures (Article 279 TFEU) and for suspension of the implementation of measures adopted by an institution of the Union (Article 278 TFEU);

furthermore, for the following actions by Member States:

- against Council decisions pursuant to the third subparagraph of Article 108 (2) TFEU;
- against legal acts adopted by the Council pursuant to a Council regulation on trade defence measures within the meaning of Article 207 TFEU;
- against Council acts exercising implementing powers pursuant to Article 291 (2) TFEU.

In addition, the General Court is the appellate court for decisions of the specialized courts established under Article 257 TFEU (Article 256 (2), first subparagraph, TFEU).

Maturity Jurisdiction of the ECJ

The ECJ has jurisdiction over legal disputes not assigned to the General Court. This includes, first of all (see Article 51 of the ECJ Statute), almost all direct actions brought by Member States and EU institutions. In addition to actions for failure to act and actions for annulment, this includes infringement proceedings and disputes between Member States arising from an arbitration agreement. Finally, the ECJ is the appellate court for decisions of the General Court. Furthermore, in exceptional cases, it may review the General Court's appeals against decisions of the specialized courts if there is a serious risk that the unity or consistency of Union law will be affected (Article 256 (2), second subparagraph, TFEU).

An extension of jurisdiction is provided for in Article 262 TFEU: This allows the Council to confer jurisdiction on the Court of Justice to rule on disputes relating to the application of EU intellectual property rights.

Referral in Case of Lack of Jurisdiction and Stay of Proceedings

In the event of lack of jurisdiction, the General Court refers a case pending before it to the ECJ, which will *finally* examine jurisdiction and, if necessary, refer the case back to the General Court. The General Court is bound by the Court's referral, thus precluding any negative conflict of jurisdiction.

If cases with identical subject matter are pending before both the ECJ and the General Court, or if they concern the same question of interpretation or the validity of the same legal act, the General Court, after hearing the parties, may stay the proceedings until the ECJ delivers its judgment. If the actions are for annulment of the same legal act, the General Court may, in turn, declare itself without jurisdiction, so that the Court of Justice may decide on these actions. The ECJ may also stay the proceedings, so that the proceedings continue before the General Court (Article 54 (3) of the Statute of the ECJ).

3. Procedure before the ECJ and the General Court

The procedure before both courts is only fragmentarily regulated in the EU Treaties. The remaining provisions can be found in the *Protocol on the Statute of the Court of Justice of the European Union* (Statute of the ECJ – see point 2 above for the reference), as well as in the Rules of Procedure of the Court of Justice (Rules of Procedure of the ECJ *) and of the General

Court (Rules of Procedure of the General Court **). The procedural rules are essentially the same for both courts.

Rules of Procedure of the ECJ *)

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012Q0929\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012Q0929(01))

- English

Rules of Procedure of the General Court **)

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015Q0423\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015Q0423(01))

- English

While Member States and EU institutions may be represented by their own agents, (other) **legal** and **natural persons** may, under the Statute of the ECJ, *Legal representation* is mandatory. Therefore, you must be represented at all legal instances by a lawyer admitted to practice in one of the Member States or by a university professor who has the legal standing to represent you in court, i.e., the capacity to act as a legal representative in your home country. The *language of the proceedings* before both courts can be any Treaty language. The language of the proceedings is determined by the respective procedural rules.

In actions against Union institutions or against the Union, the plaintiff specifies the language of the proceedings in their statement of claim. However, if the *action before the ECJ* is directed against a Member State or, in the appeal proceedings, against a natural or legal person of a Member State, the official language of the defendant is the language of the proceedings. In *preliminary ruling proceedings*, the language of the proceedings is determined by the language of the referring national court.

The proceedings are generally divided into a written and an oral part. The *written part* begins with the filing of a statement of claim. The defendant must respond to the action within two months of service of the statement of claim. The statement of claim and the defence may, where appropriate, be supplemented by a reply from the plaintiff (reply - *Replik*) and a rejoinder from the defendant (rejoinder - *Duplik*).

The *preliminary ruling procedure* begins with the *transmission of the question* referred by the national court (Article 23 of the Statute of the European Court of Justice). This question is then served on the parties, the Member States, the Commission, and, where appropriate – under the conditions further specified in the Statute – also on the ECB, the European Parliament, and

the Council. Within two months of service, the parties to the proceedings may then submit written pleadings or observations.

The *oral procedure* shall include the reading of the report submitted by a Judge-Rapporteur, the hearing of agents, advisers, and lawyers, the Advocate General's Opinion, and, where appropriate, the hearing of witnesses and experts. After deliberating in secret, the Court's *judgment* shall be delivered in open court.

In direct actions and preliminary ruling proceedings, five procedural stages can be distinguished:

- Initiation of proceedings (Articles 21 et seq. of the ECJ Statute),
- Written procedure (Article 20 para. 2 of the ECJ Statute, Articles 57 et seq., 120 et seq. of the ECJ Rules of Procedure, Article 76 et seq. of the General Court Rules of Procedure),
- Oral hearing before the plenary or chamber (Article 20 para. 4 and Article 53 of the ECJ Statute, Articles 76 et seq. of the ECJ Rules of Procedure, Articles 106 et seq. of the General Court Rules of Procedure),
- Opinion of the competent Advocate General (Article 82 of the ECJ Rules of Procedure, Article 112 of the General Court Rules of Procedure) – *the parties may no longer comment on the opinion*,
- Deliberation and delivery of the judgment (Article 35 of the Statute of the ECJ; Articles 86 et seq. of the Rules of Procedure of the ECJ, Articles 116 et seq. of the Rules of Procedure of the General Court).

CJEU cases are listed with the letter "C" (Cour), while CFI cases are listed with the letter "T" (Tribunal). Up to and including 2011, the decisions of the ECJ and the General Court were published in the official collection of decisions, with the page numbers of the ECJ decisions preceded by a "Roman numeral one" and the page numbers of the General Court decisions preceded by a "Roman numeral two."

Since the end of 2011, the official collection of decisions has been discontinued; since then, the decisions of both courts have only been published online and are provided with a case law identifier (European Case Law Identifier, ECLI) and cited accordingly.

4. The Individual Types of Procedure

Infringement Procedures and Their Function

Introduction

The Union Treaties grant the *Commission* and the *Member States* the possibility of challenging *Member States' infringements of the Treaty* and subjecting them to judicial review. The Treaties do not provide for legal action by *natural or legal persons* to have (state) infringements of the Treaty established by the Union courts. Nor can infringements be the subject of these proceedings.

In both cases, the national courts have jurisdiction. If, however, private action can be attributed to the Member State in question, an independent breach of contract by that Member State exists. If, however, private action cannot be attributed to the Member State in question, that Member State may be in breach of its duty to protect, as it fails to prevent the infringement of fundamental freedoms by private individuals. This breach of a duty to protect may also be the subject of infringement proceedings.

With Articles 258 TFEU and 259 TFEU, the EU legal order has created mandatory judicial review to enforce compliance with the Treaty. Infringement proceedings grant both the Commission and the Member States the competence under EU law to hold Member States in breach of the Treaty accountable, to prosecute them before an independent court, and – if convicted – to compel them to take measures required by the Treaty, even against their will. For this reason, reprisals between Member States due to a breach of EU law by one of these Member States are not possible. In particular, no Member State can justify its own breach of contract in the sense of reprisal by citing a breach of contract by other Member States. The infringement action fulfills an *exclusively objective legal function*, namely the uniform enforcement and safeguarding of Union law. The violation of subjective rights is therefore irrelevant in the context of the infringement procedure.

Article 258 TFEU regulates the so-called *supervisory action* by the Commission, while Article 259 TFEU contains provisions regarding the so-called *state action*. Both procedures exist independently of one another, meaning that the Commission is not prevented from conducting supervisory action proceedings under Article 258 TFEU by a state action under Article 259 TFEU. Since Member States usually try to avoid direct confrontation in disputes among themselves and encourage the Commission to initiate supervisory action proceedings, the supervisory action is the significantly more practical procedure.

*For the admissibility and merits of the action for infringement of the Treaty, see the textbook on **European law**, cited at the beginning, paragraphs 474 to 492 (including the examination scheme).*

Action for annulment

Function of the action for annulment

An action for annulment can be used to review the legality of acts of the Union institutions. Article 263 TFEU summarizes three types of actions for annulment, which are classified according to different requirements regarding standing:

- *actions for annulment* by a Member State and actions for annulment by an organ, brought by the Council, the Commission, or the Parliament under Article 263 (2) TFEU,
- *actions for annulment* brought by the Court of Auditors, the ECB, or the Committee of the Regions under Article 263(3) TFEU,
- the *Individual nullity action* brought by a *natural* or *legal person* under Article 263 (4) TFEU.

The classification of standing follows the institutional functions of the action for annulment. Since the so-called *privileged applicants* under Article 263 (2) TFEU do not have to prove standing to bring an action, i.e., they do not have to assert a violation of their own rights or interests, the Member States, the Council, the Commission, and the Parliament can enforce an *abstract review of secondary Union law* by means of an action for annulment. Regional authorities, on the other hand, do not have privileged standing to bring an action as part of a Member State, but only as legal persons pursuant to Article 263 (4) TFEU.

The addition of the subjective admissibility requirements of individual and direct concern in the context of an individual action for annulment under Article 263 (4) TFEU makes it clear that an action for annulment brought by *natural* and *legal persons* serves not only to objectively review the legality of secondary Union law (established by institutions), but primarily to provide **legal protection** against Union legal acts that directly and individually concern them. The annulment procedure thus enables, on the one hand, an objective review of the legality of secondary Union law against the standard of primary law, and, on the other hand, it guarantees **subjective individual legal protection** against Union legal acts.

Admissibility of Actions for Annulment

According to Article 256 (1) TFEU and Article 51 of the ECJ Statute, the General Court has jurisdiction over actions for annulment brought by **natural** and **legal persons**. The ECJ, however, has jurisdiction over actions for annulment brought by a Member State or an EU institution as the plaintiff. Active parties to annulment proceedings include the Member States, the Commission, the Council, the European Parliament, the Court of Auditors, the ECB, and the Committee of the Regions, as well as any natural or legal person.

To strengthen the judicial enforcement of the *principle of subsidiarity*, the Treaty of Lisbon created the possibility for national parliaments to enforce a *subsidiarity action* – as an action for annulment – by their Member State (Article 8 (1) of the Protocol on the Application of the Principles of Subsidiarity and Proportionality).

Article 263 TFEU contains a catalogue of acts that can be challenged by an action for annulment: Pursuant to Article 263 (1) TFEU, states and institutions may bring an action for annulment against legislative acts, as well as against acts of the Council, the Commission, and the ECB, provided they are not recommendations or opinions, and against acts of the European Parliament, the European Council, and Union bodies, offices, and agencies that produce legal effects vis-à-vis third parties.

Proceedings by states and institutions may therefore be directed against any legal act attributable to one of the Union institutions referred to in Article 263 (1) TFEU or to a Union body, office, or agency, provided it is not a recommendation or an opinion, i.e., a non-binding legal act. However, an exception is possible if the contested act cannot be classified as a genuine recommendation due to its content.

In some cases, the legal effect vis-à-vis third parties is a prerequisite for challengeability. As a result, the scope of acts that can be challenged with an action for the annulment of an organ or a state is not limited to the forms of binding legal acts listed in Article 288 (2) to (4) TFEU – *regulations, directives, and decisions* – but also includes *atypical legal acts*, insofar as they are intended to produce legal effects. These include, for example, international agreements concluded by the Union, such as the Framework Agreement with Central and South American countries on tariff quotas for bananas.

An action for annulment of an individual measure is admissible under Article 263 (4) TFEU if it seeks the annulment of an act

- which is addressed to the plaintiff or

- which is of direct and individual concern to the plaintiff without being addressed to him,
- as well as against regulatory acts which, although of direct concern to him, are not of individual concern and do not entail implementing measures.

Article 263 TFEU provides for a differentiated system of tiered standing, depending on the plaintiff:

- Paragraph 2 – Member States, Council, Commission, Parliament
- Paragraph 3 – Court of Auditors, ECB, Committee of the Regions
- Paragraph 4 – natural or legal persons

Actions for annulment require a specific examination of standing. Member States, the Council, the Commission, and Parliament have *privileged standing* under Article 263 (2) TFEU, meaning they do not have to prove standing. The Court of Auditors, the ECB, and the Committee of the Regions, on the other hand, can only bring an action for annulment *to protect their rights*, i.e., their institutional powers. **Natural and legal persons**, on the other hand, must demonstrate *direct and individual* concern by the challenged legal act if they are bringing an action against a legal act that is neither formally nor substantively addressed to them. If the action is directed against a *regulatory act* that does not entail an implementing act, proof of direct concern is unnecessary.

The characteristics of *direct and individual concern* serve to specify how the legal act actually affects the plaintiff's interests, which is crucial for the entitlement to bring an action. Direct concern exists when the legal act itself, and not a subsequent implementing measure, interferes with the plaintiff's interests. Direct concern is to be affirmed in the case of decisions and regulations if no further national implementing or implementing act, even a separate legal act, is required to implement the legal consequence provided for in the legal act.

Direct concern must under no circumstances be equated with the direct validity, direct applicability, or direct effect of secondary law. If, for example, a directly applicable regulation still requires a national implementing act, for example, an *administrative act* in the design and adoption of which the national authority *exercises its discretion*, there is no direct concern in relation to the regulation underlying the administrative act as a legal act.

In determining individual concern, the ECJ generally applies the following **formula**:

*The plaintiff can only claim to be individually concerned if the contested provision "affects him by reason of certain attributes peculiar to him or by reason of circumstances in which he or she is differentiated from all other persons and, by virtue of these factors, distinguishes him or her individually in the same way as the addressee." The ECJ applies this so-called **Plaumann formula** *) in all cases. The focus on the same addressees with regard to the criterion of being affected simultaneously ensures the character of the decision as an individually directed act (decision).*

*) ECJ Case 25/62 - Plaumann

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87101&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4023449> – English

However, this formula covers different case scenarios. Particularly in cases where the plaintiff challenges an individually addressed decision based on a regulation or directive, or a decision addressed to a Member State, the Court affirms the standing of natural and legal persons to bring an action if the number and identity of the persons affected are already known at the time the legal act is adopted (sham regulation or directive, bundle of individual acts).

However, it is not sufficient if the number or identity of the persons to whom the measure applies at a given point in time can only be objectively determined based on the facts of the case. This is the case if the circle of persons affected is not legally closed and a new person affected can be added at any time. The mere possibility of identifying the persons currently affected by the legal act therefore does not change the regulatory nature of the legal act, as long as it is linked to an objective legal or factual situation. This applies even if a legal act can clearly only refer to a single market participant.

Substance of the Action for Annulment

An action for annulment is well-founded if, according to the parties' factual submissions, the contested legal act of the defendant EU institution is (at least partially) vitiated by one of the grounds for annulment listed in Article 263 (2) TFEU, and this infringement is invoked by the applicant or raised *ex officio* by the court. The EU courts regularly examine the grounds of annulment of their *own motion*, namely lack of jurisdiction and breach of essential procedural requirements. Other grounds for annulment are occasionally also examined *ex officio*. Otherwise, the EU courts limit themselves to examining the grounds for annulment put forward. Following French administrative procedural law, the examination of the substance of the case is limited to determining whether the contested legal act is subject to one of the grounds for

annulment exhaustively listed in Article 263 (2) TFEU. In contrast – unlike an action for annulment under German law (Section 113 (1) Sentence 1 of the Administrative Court Act (VwGO) – it is structurally irrelevant whether the plaintiff has infringed a *subjective public right*. However, in individual cases, the ground for annulment based on a breach of contract may also consist in a violation of a *subjective right* of the plaintiff, such as a fundamental freedom or a fundamental right.

The ground for annulment based on *lack of jurisdiction* relates both to the Union's collective competence vis-à-vis the Member States and to the competence of the institutions. A *breach of essential procedural requirements* occurs when procedural or formal requirements have been violated, compliance with which would have led to a different decision. The ground for annulment based on a *breach of contract* is a catch-all provision that encompasses all breaches of the Treaty not covered by other grounds for annulment (TFEU and TEU – Article 275 TFEU). An abuse of discretion occurs when a margin of appreciation or decision (with regard to the facts or legal consequences) is used for purposes other than those stated, or when it is used to circumvent a contractually stipulated procedure.

Effects of a judgment in nullity proceedings

If the action is admissible and well-founded, the Court of Justice declares the contested act void and annuls it (Article 264 (1) TFEU). Even partial annulment of a legal act is possible. The annulment has general effect (*erga omnes*) and retroactive effect (*ex tunc*), so that the annulled legal act is deemed non-existent ab initio. However, according to Article 264 (2) TFEU, when annulling regulations, the Court of Justice may maintain the effects of the annulled legal act in whole or in part. According to the case law of the ECJ, this also applies to decisions and directives by applying Article 264 (2) TFEU mutatis mutandis.

Action for Failure to Act

Function of an Action for Failure to Act

An action for failure to act may be brought against the European Parliament, the European Council, the Council, the Commission, the European Central Bank, or bodies, offices, or agencies for failure to act in breach of the Treaty with regard to an act which they are contractually obliged to perform (Article 265 (1) TFEU). Like an action for annulment, an action for failure to act serves both to objectively review the legality of the conduct of the institutions and to provide (individual) legal protection against breaches of the Treaty by the EU

institutions. While an action for annulment challenges the act contrary to EU law, an action for failure to act is directed against the inaction of an EU institution contrary to EU law. However, the failure to act cannot be enforced in the sense of a judgment requiring an order (see Section 113 (5) of the Administrative Court Act – VwGO – under German law), since this act is not the subject of the dispute, but only the inaction related to it.

Admissibility of Actions for Failure to Act

The jurisdiction to hear actions for failure to act corresponds to the allocation of jurisdiction in actions for annulment. Member States and the institutions of the Union (Article 265 (1) TFEU), i.e., the European Parliament, the European Council, the Council, the Commission, the Court of Auditors, the ECB (Article 31 (2) TEU), and any **natural** or **legal person** (Article 265 (3) TFEU), have *active legal capacity* to bring proceedings. The European Council, the Council, the Commission, the European Parliament, the ECB, and Union bodies, offices, and agencies as defendants have *passive legal capacity* to bring proceedings.

Before an action is brought, a *preliminary procedure* must be conducted in which the Union institution, body, office, or agency concerned must be requested to take action.

In addition to self-monitoring, the preliminary procedure is intended to facilitate the amicable elimination of the objectionable conduct and thus avoid legal disputes. To this end, Article 265 (2) TFEU provides for an exchange of mutual views and the granting of deadlines for restoring the contractually agreed situation. Furthermore, the preliminary procedure defines the subject matter of the subsequent legal dispute: If an amicable settlement of the dispute fails, the subject matter of the preliminary procedure determines the subject matter of the subsequent legal proceedings.

First, the institution, body, or agency must be requested to take *action in a letter of formal notice*. They then have two months to respond to this request (Article 265 (2) TFEU). If this occurs within this period, the action for failure to act is inadmissible, as the failure to act ceases *eo ipso*. Legal protection is then possible through the filing of an *action for annulment* pursuant to Article 263 TFEU if the relevant admissibility requirements are met. An opinion within the meaning of Article 265 (2), second sentence, TFEU is given when a decision on the matter has been taken by the institution, body, or other agency concerned specifically expresses its opinion, either positively or negatively, on the alleged failure to act and the requested measures. Even if, when called upon, these institutions, bodies, or other agencies definitively

refuse to perform the requested legal action, an opinion leading to the inadmissibility of the action for failure to act exists, since it in itself puts an end to the failure to act.

However, an opinion pursuant to Article 265 (2), second sentence, TFEU does not exist if the institution (body, body, or other agency) concerned does not respond at all to the request, since silence generally lacks any explanatory content – unless a secondary legal act assigns a specific explanatory content to its silence. Even mere delaying statements or references to later action are not considered a position.

The *subject matter of the action* is the failure to adopt a decision in violation of the Treaties. The term "decision" within the meaning of Article 265 (1) TFEU is not to be understood in the sense of Article 28 (4) TFEU, but encompasses any possible legal act. Article 265 TFEU defines the scope of the subject matters of the action differently for the categories of plaintiffs referred to in paragraphs 1, 2, and 3. According to Article 265 (1) TFEU, the action against organs and states is aimed at the failure to adopt a decision..

Natural and legal persons may only *object to the failure of an institution, body, office, or agency of the Union (...) to address to them an act other than a recommendation or an opinion* (Article 265 (3) TFEU).

Article 265 TFEU therefore grants Member States and Union institutions a more comprehensive right of action than natural and legal persons. The former group of plaintiffs can challenge the failure to adopt any "decision" (*the term is not identical to that in Article 28(4) TFEU*), including, in particular, the failure to adopt a recommendation or opinion, provided that the measure is sufficiently specified to enable it to be implemented within the meaning of Article 266 TFEU.

The *natural or legal person* must therefore, within the framework of the *admissibility of the subject matter of the action*, prove that they are in the legal position of a (potential) addressee of the legal act, i.e., that the omitted legal act would have individual effect for them. Measures of general application that are legally binding but "are not addressed to individuals by their form or legal nature" are excluded. According to the General Court, individual plaintiffs may also complain that an EU institution has failed to adopt a legal act directed at a third party and that they are directly and individually affected by this failure to act (*positive competitor action*). However, the admissibility requirement is that the failure to adopt a decision addressed only to third parties directly and individually affects the plaintiff.

In cases expressly regulated by the Treaty, an action for failure to act does not require a *specific examination of standing*. Member States and EU institutions have standing to bring an action under Article 265 (1) TFEU without any further "individualization requirement." Although the right of action of **natural** and **legal persons** is limited under Article 265 (3) TFEU, this limitation concerns the scope of actionable conduct by the institutions and must therefore be discussed in the context of the admissibility of the subject matter of the action. A separate examination of standing is only necessary if a natural or legal person claims that the defendant institution failed to address a legal act to a third party. In this case, as already mentioned, it must be examined whether the plaintiff is directly and individually affected by this inaction.

The *form of the application* must comply with the provisions of Article 21 (1), second sentence, of the ECJ Statute and Article 120 of the Rules of Procedure of the ECJ, and in proceedings before the General Court, with the provisions of Article 76 of the Rules of Procedure of the General Court. The *application* must essentially seek a declaration that the alleged inaction of the defendant EU institution is contrary to the Treaty. If the inactive EU institution has not responded to the plaintiff's request (Article 265 (2), first sentence, TFEU) within the two-month period, the plaintiff may "bring an action for a declaration of that infringement" (Article 265 (2), second sentence, TFEU) within a further two-month period. The admissibility of an action for failure to act therefore requires compliance with two time limits – the time limit for submitting a statement and the time limit for bringing the action.

The plaintiff must also assert a violation of EU law as a result of the failure to act within the scope of admissibility. This means that he must identify the obligation to act that he believes has been violated and provide conclusive evidence of the alleged interference with the EU law obligation. However, whether this argument is factually and legally correct must first be examined in the context of the merits.

Merits of the action for failure to act

An action for failure to act is well-founded if the defendant EU institution, body, office, or agency has failed to "take a decision" (Article 265 (1) TFEU) or to address a legal act to the plaintiff or a third party (Article 265 (3) TFEU), in breach of an obligation to act arising from primary or secondary EU law. In this case, it is generally only necessary to examine whether the defendant objectively failed to take the action required by EU law and thereby breached an obligation to act arising from primary or secondary EU law, or from general legal principles. If EU law grants a margin of discretion, the relevant consideration is whether, in the specific case, a reduction of discretion arises which, had the EU institution, body, office, or agency

correctly applied the EU law, would have led to a *bound decision*. The "objective failure to act" test generally does not require any special explanation, since the failure to act has already been addressed and established in the context of admissibility.

Effects of the Judgment in Failure to Act Proceedings

If the action for failure to act is admissible and well-founded, the Court finds that the defendant EU institution has failed to take the action required by EU law, in breach of the Treaty. In contrast to an action for annulment, which, as an action for a definitive interpretation, aims to remedy the contested legal act, an action for failure to act is designed as an action for a declaratory judgment. A judgment granting failure to act does not legally remedy the situation in breach of the Treaty, but rather establishes the objective violation of an obligation to act under EU law.

The action for failure to act is therefore not comparable to an action for performance and, in particular, not to an action for an order under German law (Section 24 (1) of the Code of Administrative Court Procedure - VwGO), in which, if successful, the state is ordered to adopt the requested administrative act. However, according to Article 26 TFEU, the Union institutions "whose act has been declared void or whose failure to act has been declared contrary to the Treaty (...) shall take the necessary measures to comply with the judgment of the Court of Justice."

Action for official liability

Function of an action for official liability

Individuals can be adversely affected and harmed in their legal position by both administrative (e.g., incorrect commitments regarding transport subsidies) and normative (e.g., price and quota regulations for sugar sales in the internal market by regulation) measures of the Union. The TFEU takes into account the possibility of such adverse effects in Article 340 (2) and Article 268 TFEU through a liability system for damages caused by *non-contractual sovereign acts* of the institutions or servants of the European Union.

The judicial enforcement of claims for official liability thus serves to provide **individual legal protection** against damaging Union action. The action for official liability compensates for the still partial lack of an individual right of action against normative legal acts in the context of an action for annulment (Article 263 (4) TFEU). If *natural and legal persons* are denied the right

to bring an action for annulment against normative acts contrary to EU law – which is the case with legislative acts and where tertiary legal acts require implementation – they should at least be granted compensation for the damage caused by that act. Furthermore, the ECJ has made it possible in its case law for actions for official liability (beyond the wording) to also assert claims for negligent conduct and unjust enrichment.

Admissibility of actions for official liability

The General Court has jurisdiction to hear actions for official liability brought by **natural and legal persons** (Article 256 TFEU, Article 15 of the ECJ Statute). The ECJ, in contrast, has jurisdiction over actions for official liability brought by Member States.

Any person who has suffered damage caused by an EU institution or an EU official has *active legal status*. Whether Member States may also bring an action for official liability is *controversial* due to their privileged legal options under Article 263 (2) TFEU. The European Union, represented by the institution to which the conduct giving rise to liability is attributable, as well as the Commission, which regularly represents the Union in court, has *passive legal standing*.

The *form of the application* must comply with the provisions of Article 21 (1), second sentence, of the ECJ Statute, as well as Article 120 of the ECJ Rules of Procedure and Article 76 of the General Court Rules of Procedure. The *main claim* must be for compensation for the damage caused by an EU institution or servant. The plaintiff may also initially request a *determination of EU liability* in their application if the exact amount of the damage is not yet established at the time the action is brought, for example, because the damage has not yet (fully) materialized. The Court then decides in an *interlocutory judgment* on the existence of the grounds for the claim. Once the actual amount of damages has become known, the plaintiff can, by amending the action, change the claim from a declaratory action to a claim for performance before the interlocutory judgment is issued.

Article 340 (2) TFEU does *not provide for a time limit* for bringing an action. However, for some time, the Court treated the five-year limitation period for the claim for official liability, as stipulated in Article 46 (1) of the ECJ Statute, as a procedural prerequisite for a judgment on the merits (to be examined *ex officio*). However, the Court now classifies the period under Article 64 of the ECJ Statute as a substantive *limitation period* and, due to its nature as a plea, no longer examines it *ex officio*.

In the context of an action for official liability, the *need for legal protection* is of considerable procedural importance. The plaintiff must not be deprived of a more appropriate and thus preferential remedy for achieving the objective of his action, either through other remedies under EU law or through domestic law.

The action for official liability is a separate legal remedy from the action for annulment (Article 263 TFEU). It is therefore not necessary to have the damaging legal act of the EU institution declared void by means of an action for annulment before bringing the action for damages. The situation is different if the action for damages serves merely as a pretext for the annulment of an EU legal act, which is in fact sought by way of in rem restitution, and which can no longer be challenged in court due to failure to comply with the time limit for bringing the action because it has already become final. However, the plaintiff may only be referred to other legal remedies within the limits of what is reasonable and sensible.

Compared to domestic legal remedies, an action for damages before the ECJ is subsidiary to the extent that the damage is based on a measure taken by a Member State in the application of Union law. Article 268 TFEU grants the Court of Justice jurisdiction over disputes arising from the non-contractual liability of the Union. The Union courts therefore only have jurisdiction to rule on claims for damages based on the damaging conduct of an EU institution acting on behalf of the Union. With regard to the admissibility of an action for official liability, the Court of Justice examines only the substantiated presentation of damage and a causal link between that damage and the challenged Union action.

Damage caused by national institutions in the implementation of Union law, however, is subject to the *jurisdiction of the Member States*. The distinction between Member State and Union official liability depends on whether the damage was caused by conduct of EU institutions or national bodies attributable to the Union or the Member States. *National legal recourse* is therefore generally available when the incorrect implementation of lawful Union law by national institutions is at issue. This principle applies both to direct indirect implementation, when directly applicable Union law is implemented by the national authorities, and to indirect indirect implementation, when national law is implemented that transposes a *directive* into domestic law. However, national legal recourse is only available if the damaging domestic enforcement measure can actually be attributed to the Member State. If a national authority acts on the basis of a binding instruction from an EU institution, liability is not attributed to the Member State concerned, despite the national institution's action, but to the Union. If an EU institution issues an instruction to a national authority, it itself regulates the individual case and merely "uses" the Member State authority as an "instrument of action" (*agency situation*).

Merits of an action for official liability

An action for official liability is well-founded if an institution, the ECB, or a member of the Union's staff, in the exercise of their official duties, has committed a serious breach of a superior legal rule intended to protect individuals and thereby directly caused causal damage to the plaintiff. According to the case law of the ECJ, liability of the Union is excluded in the case of lawful Union action.

Effects of Judgments in Official Liability Proceedings

If the action for official liability is admissible and well-founded, the substantive decision granting an order for damages is issued in the form of a *judgment for performance*. If only the Union's liability is established on the merits, the substantive decision is issued in the form of a *declaratory judgment*. In contrast to a non-enforceable declaratory judgment, the plaintiff receives an *enforceable title* with the judgment for performance (Article 280 TFEU). The enforcement procedure is governed by Article 29 (2) to (4) TFEU. A successful action for official liability does not lead to the (incidental) elimination of the unlawful act that gives rise to the claim for official liability. Rather, the Court of Justice establishes the unlawfulness in the official liability proceedings, without thereby affecting the validity of the Union act with effect erga omnes.

Preliminary ruling procedure

Function of the preliminary ruling procedure

In a preliminary ruling procedure pursuant to Article 267 TFEU, the ECJ may, in the context of a legal dispute pending before a court of a Member State, clarify a *question concerning the interpretation or validity of Union law* that is relevant to the outcome of that dispute. Both the courts of the Member States and the Court of Justice apply Union law. This could lead to diverging decisions if a central Union court does not ensure uniform interpretation and assessment of validity throughout the Union. The preliminary ruling procedure is intended to counteract this risk and prevent the emergence of case law in a Member State that is inconsistent with norms of Union law. To this end, Article 267 TFEU provides for a *cooperative relationship* between the ECJ and the courts of the Member States: If the courts of the Member States encounter difficulties in examining questions of Union law relevant to their decisions, they are empowered, and in certain cases even obliged, to request clarification of these

questions from the ECJ. Only after the ECJ has established the standards of interpretation of Union law in its *preliminary ruling judgment* does the court of the Member State apply the Union law provision interpreted by the ECJ to the facts of the case in its decision.

The preliminary ruling procedure is therefore an *interim procedure* within the context of the national legal dispute involving the Court of Justice of the European Union. On the one hand, it serves to preserve legal unity by ensuring that Union law is interpreted and applied uniformly by the national courts. On the other hand, the procedure strengthens the **legal protection of individuals**, as the preliminary ruling procedure offers individuals the opportunity to enforce Union law before the national courts. *However, individuals cannot compel a referral.*

The new *expedited procedure*, which applies to preliminary ruling procedures in the areas of the former *Police and Judicial Cooperation in Criminal Matters* (PJCS) and Articles 77 et seq. TFEU (Articles 107 et seq. of the Rules of Procedure of the ECJ), also takes individual legal protection into account. The relevant questions in this regard concern individual rights that are particularly worthy of protection. The new Article 267(4) TFEU now enshrines this in primary law for preliminary rulings on references from Member State courts concerning a detained person.

Admissibility of the question referred (“admissibility”)

The ECJ has *primary jurisdiction* to decide on requests for a preliminary ruling. However, pursuant to Article 256 (3) TFEU, it is possible for the General Court to be granted jurisdiction to hear requests for a preliminary ruling in specific areas defined in the Statute. However, such a provision has not yet been made in the Statute.

The *subject matter of the reference* is questions concerning the interpretation of the TEU and TFEU (Article 267 (1) lit. a TFEU) and the validity and interpretation of acts of the institutions, bodies, offices, and agencies of the Union (Article 267 (1) lit. b TFEU). The questions referred may therefore relate to the interpretation of all provisions of Union law, i.e., *primary and secondary Union law*, including *general legal principles* and *Union customary law*. Questions concerning the interpretation of international agreements concluded by the Union with third countries or other international organizations are also possible. However, questions concerning the compatibility of a domestic act with Union law are *inadmissible*. Questions concerning the validity of primary law provisions are also inadmissible (compare the wording of Article 267 lit. a and lit. b TFEU). The exception provided for in Article 275 TFEU for the *Common Foreign and Security Policy* (CFSP) also applies to the preliminary ruling procedure.

Article 267 TFEU limits the right to refer a question to the courts of the Member States. In some Member States, in addition to the bodies exercising independent judicial power, there are judicial bodies whose membership in the judicial system within the meaning of the EU law (“autonomous”) concept of a court under Article 267 TFEU is questionable. The ECJ has therefore developed criteria that a judicial body must satisfy in order to be entitled to refer a question. The *EU law concept of a court* presupposes “an independent body established by or on the basis of a law which, within the framework of mandatory jurisdiction, decides disputes with binding effect by applying rules of law, and not solely on the basis of equity.”

With regard to the independence of national courts, the Court has recently highlighted, in particular, the safeguarding of the term of office of judges, as required by Article 19 (1) TEU. National courts whose independence is compromised no longer have the right to refer a case; however, courts *threatened by such a situation* must retain the right to refer a case to the ECJ for protection under Article 19 (1) TEU, provided that this becomes relevant to the decision in the context of a domestic legal dispute.

Difficulties in defining the concept of a court can arise, particularly in the case of *arbitration tribunals*. Although private arbitration tribunals – based on an agreement – have the characteristics of a court within the meaning of Article 267 (2) TFEU, the ECJ denies the right of referral (for example) of private arbitration tribunals established pursuant to Sections 1025 et seq. of the Code of Civil Procedure (ZPO), because the parties are free, upon entering into an arbitration agreement, to transfer the resolution of any legal disputes that arise to the ordinary courts or to such a (private) arbitration tribunal. The public authority is involved neither in the decision on the legal process (proceedings before the ordinary courts or the arbitration tribunal) nor in the procedural process itself, so that an arbitration tribunal established pursuant to Sections 1025 et seq. of the Code of Civil Procedure (ZPO) lacks a sufficient link to the public authority of the Member State. An arbitration tribunal established by an agreement between a Member State and a private investor within the framework of a bilateral or multilateral investment protection agreement was also not considered by the ECJ to be a court within the meaning of Article 267(2) TFEU due to its lack of integration into the Member State's legal order.

According to the case law of the ECJ, a court in this sense also does not exist if a national court (for example, a German district court) acts as a commercial register court, since in this case it does not exercise a judicial activity but rather an administrative activity.

In principle, a national court has a right of reference in cases of doubt regarding the validity or interpretation of Union law (Article 267 (2) TFEU). The question referred must, in the opinion of the referring national court, be *relevant to the outcome of the legal dispute* pending before it; that is, it must depend on how Union law is to be interpreted or whether a Union legal act is valid in the specific case. Relevance to the decision may also exist in a purely domestic context, if it concerns the interpretation of provisions of Union law that are declared applicable by the national law of a Member State to purely domestic situations, or if it concerns the applicability of Union law in a specific case. General or hypothetical questions are not admissible. In this respect, however, the ECJ will examine whether there has been an abuse of the preliminary ruling procedure. Whether and at what stage of the proceedings a preliminary ruling is required is at the discretion of the court empowered to make the reference. A question may also be referred in the context of *interim relief proceedings*.

In certain cases, a Member State court is not only entitled but also obligated to refer a question to the ECJ. A court has a *duty to refer* a matter under EU law:

- if its decision can no longer be challenged by legal remedies under domestic law (Article 267 (3) TFEU), or
- if it considers an EU secondary act to be ineffective and therefore does not wish to apply it, or
- if it intends to annul, not apply, or suspend a Member State act implementing EU law.

In addition, there are *constitutionally* based duties to refer a matter in Germany (which will not be discussed in detail here).

Courts of last instance – in Germany, the highest courts: the Federal Court of Justice (BGH), the Federal Administrative Court (BVerwG), the Federal Fiscal Court (BFH), the Federal Social Court (BSG), and the Federal Labor Court (BAG) – as well as the *Federal Constitutional Court* (BVerfG) are always required to refer a matter in cases of such doubt. However, *lower courts* whose decisions in the specific case are no longer subject to legal challenge are also required to refer the matter. Therefore, a specific approach is required to determine the court of last instance, because the function of the preliminary ruling procedure **to protect individual rights**, as well as the need to ensure the *uniform application* of EU law, require the ECJ's monopoly on interpretation and rejection of EU law to be safeguarded as comprehensively as possible.

However, there are some exceptions to the obligation to refer the matter. Even if the conditions for a reference are met, a Member State court is not obliged to initiate a preliminary ruling procedure if:

- the question raised has already been referred in a similar case and answered by the ECJ, or
- there is established case law under EU law on this issue that has already clarified the legal issue in question, even if the issues at issue are not entirely identical and regardless of the type of procedure in which this case law was developed, or
- the correct interpretation of EU law is so obvious that there is no scope for reasonable doubt as to the answer to the question posed and neither the Court itself nor the other courts of the Member States would have any doubts about this interpretation ("*acte clair*").

The ECJ has since specified the relevant criteria and, among other things, has considered the mere existence of conflicting decisions by national courts insufficient to establish an obligation to refer the matter. However, an obligation to refer a case arises when there is a risk of divergences in case law at the EU level. This is certainly the case when a large number of courts have already referred a case on this issue.

If a Member State court violates its obligation to refer a case, this constitutes a violation of the TFEU, which can be challenged by the Commission or other Member States before the ECJ through *infringement proceedings*. The extent to which this gives rise to a claim for liability is problematic in detail. At the domestic level, in Germany, the arbitrary failure to refer a case violates the *constitutional right to a judge appointed by law* (Article 101 (1) second sentence of the Basic Law - GG) – in this case concerning the ECJ – and can be challenged by means of a **constitutional complaint** *) before the Federal Constitutional Court. This legal remedy is particularly important because the parties to the original proceedings have *no direct right to refer the case to the Court of Justice for a preliminary ruling*.

***) Excursus:**

If a national court of last instance wrongfully refuses to initiate a preliminary ruling procedure and submit a disputed question of interpretation to the ECJ for a preliminary ruling, the party disadvantaged by this can claim that it has been deprived of its legal judge and defend itself by filing a constitutional complaint.

The Constitution of Georgia, like the constitutional law of the Basic Law in Germany, guarantees that the national constitutional court can be called upon for this reason:

Chapter 6 of the Constitution of Georgia

Article 60. Constitutional Court of Georgia.

1. *The Constitutional Court of Georgia shall exercise judicial authority through constitutional proceedings.*

2.

3.

4. *The Constitutional Court of Georgia shall in accordance with the procedures established by the organic law:*

a) review the constitutionality of a normative act with respect to the fundamental human rights enshrined in Chapter Two of the Constitution on the basis of a claim submitted by a natural person, a legal person or the Public Defender;

.....

j) exercise other powers determined by the Constitution.

.....

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Chapter 2 of the Constitution of Georgia

Article 31. Procedural rights.

1. Every person has the right to apply to a court to defend his/her rights. The right to a fair and timely trial shall be ensured.

2. Every person shall be tried only by a court that has jurisdiction over the case.

Since the ECJ is authorized exclusively to answer questions of EU law, the subsumption of the facts in dispute under EU law cannot be submitted to it. Rather, the question regarding the interpretation of EU law must be *formulated in the abstract*. The ECJ has no jurisdiction over the national law of the Member States; in particular, it cannot examine the law of Member States against the standard of EU law. Therefore, the *formulation of the question* referred must be limited to the interpretation of EU law; the compatibility of national law with EU law must not be questioned.

A perfectly formulated question of interpretation in a reference order from the (German) Federal Administrative Court (BVerwG) reads:

Is Article 2 (4), subparagraph 1, of Regulation (EEC) 1624/76 of July 2, 1976 (...) to be interpreted as meaning that, when skimmed milk powder produced in Germany is exported to Italy by truck for the purpose of compound feed production, the competent authority must take a sample from each truckload and have it examined in order to be able to issue the certificate referred to in the provision?

In fact, in the interest of the effective administration of the reference procedure, the ECJ considers itself empowered to clarify imprecisely worded references by exercising its judicial right to ask questions and by interpreting the questions. The question of validity, on the other hand, must be *formulated specifically*, as it concerns the legal validity of a specific provision of secondary EU law.

A **validity reference** would be formulated as follows:

Is the first subparagraph of Article 2(4) of Regulation (EEC) 1624/76 of 2 July 1976 (...) legally valid?"

To the extent that the *time limit for bringing an action* under Article 263 (6) TFEU *has expired*, the decision becomes *final* against the person concerned. This *final effect* could be circumvented if the party who could have brought an action for annulment against a corresponding EU act fails to do so and instead, at a time after the entry into force of the action, contests the validity of this EU provision in a legal dispute concerning a national act implementing this EU act. If the national court submits the relevant provision to the ECJ for *review of validity*, there is a risk of circumventing the final effect. For this reason, the ECJ has made the acceptability of a corresponding validity reference dependent on the party to the original dispute having brought an action for annulment before the national court. The court invoking the invalidity of the EU legal act was not "obviously" entitled to bring an action for annulment. However, it is not easy to specify the standard of "obviousness" in detail. In this respect, the decisive factor is the clarification of the admissibility requirements for an action for annulment under Article 263 TFEU by the EU Courts.

Answer to the question referred by a judgment of the ECJ

In the grounds of a judgment on a question of interpretation, the ECJ sets out and explains detailed criteria of interpretation to enable the referring national court to examine the compatibility of a national provision with the provisions of EU law. In the operative part, it provides the interpretation of the corresponding provisions of EU law. The application of these criteria of interpretation to the facts of the case is the sole responsibility of the referring court.

If the subject of the preliminary ruling procedure is a reference for validity, the ECJ will examine the legality of the Union act for its compatibility with higher-ranking (primary) Union law against the standard set out in Article 263 (2) TFEU and, in the operative part of the judgment, will determine the validity or invalidity of the legal act referred.

Legal effects of the preliminary ruling judgment

The legal effects of a preliminary ruling are not specified in the TFEU. The preliminary ruling becomes final and is therefore binding, at least for the referring court. Its *binding effect* extends not only to the court of origin, but also to all courts that must decide the same case (appeal courts, court hearing a case). However, according to settled case law, the courts have the power to refer the matter to the ECJ again for further clarification, such as the scope or temporal effect of a declaration of invalidity.

With regard to effects outside the main proceedings, a distinction must be made: If the Court of Justice declares an act of an organ invalid, the judgment also has binding effect outside the main proceedings (*erga omnes*). This effectively corresponds to an annulment under Article 264 TFEU. If, however, the Court of Justice establishes the validity of an act of an organ, the judgment does not have a generally binding effect, since it cannot be ruled out that new factors not previously considered in the examination may lead to a different assessment and thus justify or necessitate a further reference.

Interpretive judgments have a limited *erga omnes effect*. Member state courts are obliged to apply EU law as interpreted by the ECJ or, if there are doubts about the correctness of the interpretation, to refer the question of interpretation to the ECJ again. However, the *erga omnes effect* of the judgment does not preclude a future reference of the same questions of interpretation; rather, it merely prohibits arbitrary departure from the preliminary ruling by member state courts. Judgments on interpretation and validity generally have *ex tunc* effect. However, the Court of Justice has the power to limit the retroactive effects of its judgments in preliminary ruling proceedings. However, this time limit must be expressly stated in the judgment.

Appeal Procedure

An appeal *limited to points of law* may be lodged with the ECJ against final decisions, i.e., against judgments and orders of the General Court that terminate the first-instance proceedings entirely or at least partially (Article 256 (1), second subparagraph, TFEU, Articles

56 et seq. of the ECJ Statute, Articles 167 et seq. of the ECJ Rules of Procedure). This appeal has a *devolutive effect*; the proceedings are now pending before the higher instance of the ECJ. Decisions of the General Court only become final upon expiry of the time limit for appeal or upon conclusion of the appeal proceedings. However, there is a special feature in that, according to Article 60(1) of the ECJ Statute, the appeal generally does *not have a suspensive effect*. It has no suspensive effect on enforcement or execution; only the remedy of interim relief can provide relief in this regard.

Article 56 of the Statute of the European Court of Justice regulates the right to lodge an appeal. A distinction must be made between privileged and non-privileged appellants. Only parties to proceedings who have been wholly or partially unsuccessful in their submissions have unrestricted standing to appeal. Member States and EU institutions, due to their "guardianship" (*guardians of the EU Treaties in the figurative sense*), have standing to appeal even in cases in which they were not involved in the first-instance proceedings. Furthermore, supporting interveners may also be considered as appellants if they are "directly affected" by the decision of the General Court (Article 56 (2), second sentence, of the Statute of the European Court of Justice).

Only decisions of the General Court that terminate the proceedings are subject to appeal. Decisions issued after the withdrawal of the action, the settlement of the main proceedings, the interpretation of the judgment, and after a third-party appeal are also considered to be terminating proceedings. Appeals against procedural orders (e.g., extensions of time limits, taking of evidence) are not admissible.

Article 256(1), second subparagraph, TFEU clarifies that (only) "an appeal limited to points of law" may be brought against decisions of the General Court before the Court of Justice in accordance with the Statute. Article 58 of the Statute of the ECJ specifies the concept of "points of law."

The questions that may be subject to appeal are therefore limited to the following grounds:

- lack of jurisdiction (lack of jurisdiction substantively of the General Court or lack of Union jurisdiction over collective bargaining),
- procedural irregularities that adversely affect the interests of the appellant, and
- violation of Union law by the General Court.

In appeal proceedings, the appellant must precisely identify the contested elements of the judgment under appeal and the legal arguments on which their application is based. The appeal cannot change the subject matter of the dispute before the court (Article 170 (1), second sentence, of the ECJ Rules of Procedure).

The *time limit for lodging an appeal* is two months and begins upon service of the contested decision (Article 56 (1), second sentence, of the ECJ Statute). This is a time limit that must be reviewed by the ECJ. An appeal lodged out of time must be dismissed as inadmissible. The appeal must satisfy the formal requirements of Articles 119, 121, and 12 (1) of the ECJ Rules of Procedure.

The appeal is well-founded if the contested decision of the General Court is vitiated by at least one error of law that constitutes one of the grounds of appeal listed in Article 85 of the ECJ Statute and asserted by the appellant, and this error of law has adversely affected the appellant.

Article 256 (2) TFEU provides that the General Court has jurisdiction to hear appeals against decisions of the specialised courts. According to the second sentence of Article 256 (2) TFEU, the ECJ may, in exceptional cases and in accordance with the Statute, review the General Court's decisions on appeals if there is a serious risk that the unity or consistency of Union law will be affected.

Other proceedings before the Courts of the European Union

Judgments based on an arbitration clause

The ECJ has jurisdiction to give judgments based on an arbitration clause contained in a contract concluded by the Union under public or private law (Article 272 TFEU). If a **natural** or **legal person** brings an action based on such an arbitration clause, the proceedings must be brought before the General Court (Article 256 (1) TFEU). The ECJ also has jurisdiction over all disputes between Member States relating to the objectives and tasks of the Treaties, provided they are brought before it pursuant to an arbitration agreement (Article 273 TFEU). The ECJ's jurisdiction within the framework of the Fiscal Compact is also based on Article 273 TFEU.

Opinion

If the Union intends to conclude an *international treaty*, the Council, the Commission, the European Parliament, or a Member State may request an opinion from the Court of Justice on the compatibility of the proposed agreement with the provisions of the Treaties (Article 218 (1) TFEU). This is intended to prevent the Union from concluding agreements that become binding under international law but which the Union could only implement in violation of Union law. However, this does not preclude ex post review of such agreements.

Incidental Fraud

If the legality of a legal act of general application (norm) is at issue in a legal dispute pending before the ECJ or the General Court of First Instance, either party may assert the inapplicability of that legal act (*incidental objection*, Article 27 TFEU). Thus, the TFEU does not provide an independent remedy before the ECJ, but rather the possibility of having the illegality of a final or unassailable normative measure reviewed incidentally in the context of other proceedings pending before the EU courts, provided that the success of that action depends on the invalidity of the norm challenged by the *incidental objection*. It therefore represents a special form of grounds for an action for annulment.

The objection is successful if a ground for annulment exists. However, the legal act is not declared void; rather, the incidental review merely results in its inapplicability in the specific proceedings.

Legal Protection Before the Courts of the Member States

1. Principle of National Procedural Autonomy

Direct legal protection for individuals before the European Court of Justice exists only under Article 263 (4) TFEU (*individual actions for annulment*), Article 265 (3) TFEU (*individual actions for failure to act*), and Articles 268 and 340 (2) TFEU (*claims for damages against the Union*). However, in the vast majority of disputes that have points of contact with Union law, judicial protection is governed by the procedural law of the Member States. The procedural enforcement of legal positions granted under Union law before the courts of the Member States primarily encompasses the application of national legal acts that serve to implement secondary law provisions. Furthermore, national procedural law is decisive insofar as it concerns legal relationships established in the Member States that fall within the scope of directly applicable Union law. Depending on the regulatory or effective relationship of the relevant provisions of Union law, these may also involve horizontal disputes between private individuals.

The Member States' obligation to provide judicial protection in the application of Union law generally arises from their duty to cooperate under Article 4 (3) TEU, which is partly reinforced by secondary law. To the extent that judicial protection before national courts remains within the competence of the Member States, there are in principle no restrictions on their competence in the design of national procedural law, the so-called *principle of national procedural autonomy*.

Nevertheless, **Article 91 (2) TEU** now stipulates that Member States "shall provide remedies necessary to ensure effective legal protection in the fields covered by Union law." **Member States are thus obligated to close gaps in legal protection regarding the enforcement of Union law before national courts.** They retain some discretion in the design of such remedies. Article 19 (2) TEU is supplemented by the *subjective right to effective legal protection* under **Article 74 (1) of the Charter of Fundamental Rights - GRC**, which also requires **Member States to provide effective legal remedies** when implementing Union law. According to the ECJ, if a national authority persistently refuses to comply with a judicial decision requiring it to fulfil a clear, precise, and unconditional obligation under Union law, Article 47(1) of the Charter of Fundamental Rights may require the competent national court to impose coercive detention against officials of the authority.

This presupposes, however, that

- there is a sufficient domestic legal basis for this, and
- the restriction of the right to liberty associated with coercive detention is justified under Article 6 of the Charter of Fundamental Rights - GRC.

The two conflicting rights, the right to effective legal protection on the one hand and the right to liberty on the other, must be weighed against each other. In particular, no less drastic measure than coercive detention must be evident in order to achieve effective enforcement of Union law.

2. Limits of national procedural autonomy

However, it is an established principle of EU law that Member States must exercise their remaining powers while respecting EU law, and thus even nationally designed procedural law – regardless of the jurisdiction – must be measured against the requirements of EU law. The case law of the ECJ has successively brought about an extremely diverse modification of

national legal protection systems in this area, which can essentially be traced back to two principles of primary law. The ECJ has consistently held that national "procedures may not, however, be less favorable than those applicable to similar actions which concern only domestic law" (the so-called *equivalence requirement*), and "they may not make the exercise of rights conferred by EU law practically impossible or excessively difficult" (the so-called *effectiveness requirement*). If a national procedural provision fails to meet these requirements in an individual case and a violation cannot be avoided by interpreting it in accordance with EU law, the corresponding provision must remain inapplicable. In addition, the topos of "wide access to justice" has now become a limit to national procedural autonomy.

While the principle of equivalence has a clearly definable scope of application due to its comparative standard, the ECJ has so far contributed little to developing abstract criteria by which it could be assessed when national proceedings *excessively complicate* the enforcement of EU law within the meaning of the principle of effectiveness. This vagueness is the source of the effectiveness requirement's great potential for influence and further development, which has found expression in extensive case law. The *effectiveness requirement* overcomes, among other things, It extends the scope of legal standing and limits the scope of appeals and restricts the ability of national courts to grant interim relief against the enforcement of EU law provisions.

However, EU law is not blind to the various functions of national procedural rules. For example, it fundamentally recognizes the res judicata effect of judgments due to their importance in ensuring legal peace and the stability of legal relationships, as well as the orderly administration of justice. The ECJ called for an exceptional breach of res judicata effect in the ***Lucchini case***, a case of blatant disregard of a Commission decision under State aid law by an Italian court. The *primacy of application* over a domestic provision of res judicata effect, which was used for the first time in this case, represented an absolute novelty. Previously, the ECJ had always refrained from enforcing EU law out of respect for res judicata effect.

In the ***Klausner Holz case***, however, the ECJ again demanded a break in res judicata, as it refused to accept a judgment that was contrary to State aid law and undermined the Commission's competence to review the compatibility of aid with the internal market. The need for a break in res judicata, which has so far only become apparent in the area of State aid law, is presumably due to its outstanding importance for protecting the internal market from distortions of competition, but above all to the intention to maintain the Commission's exclusive decision-making powers. When other areas of law are affected, a break in res judicata is not mandatory but optional. Only when the procedural autonomy of the Member States provides a

possibility of correcting the situation in conformity with Union law does the ECJ require its consistent use. In this regard, the ECJ subjects the procedurally autonomous means to review in accordance with the principles of equivalence and effectiveness.

In addition, the ECJ instructs national courts to examine whether national provisions on *res judicata* are amenable to interpretation in conformity with EU law. In doing so, the ECJ appears to envisage limiting the concept of the subject matter of the dispute in such a way that only actually discussed obstacles to effectiveness acquire *res judicata*. In the absence of procedurally autonomous means for enforcing EU law against *res judicata*, the ECJ is prepared to accept the domestic court decision and (associated with it) a situation contrary to EU law. The ECJ generally considers time limits for bringing an action and limitation periods to be permissible. Only in the ***Emmott case*** did it consider the suspension of a national time limit to be (at the time) required under EU law in order to ensure the enforcement of rights arising from a late-transposed directive.

Access to administrative courts, for example, within the meaning of Section 42 (2) of the Code of Administrative Court Procedure (VwGO), which is limited under German procedural law to the assertion of subjective public rights, is at least conceptually alien to EU law. The only decisive factor for EU law is whether a provision creates individual rights. EU law is significantly more generous in recognizing such rights than a corresponding assessment under the German theory of protective norms. In the event of a divergence, German administrative procedural law must yield to the extent that the effective protection of legal positions recognized under EU law depends on it.

The judgment in the ***Janecek case*** attracted particular attention in this context. In this context, the ECJ contrasted the obligation of Member States to draw up action plans to reduce particulate matter pollution under Article 7 (3) of Directive 96/62/EC with a right of the individual, thus enabling its enforcement by means of a general action for performance. For an individual-protecting norm of EU law to exist, it is sufficient that the norm serves to protect legal interests that are *also in the interest of the individual*, without, however, distinguishing him from the general public. He then has standing to bring an action if he is actually affected. The inclusion of the individual in the protective effect, as intended by the German theory of protection norms, is therefore not required. However, if environmental goods are protected for their own sake (species protection, ozone layer), no individual legal protection is to be granted under EU law either.

The ECJ's ruling on the *German Environmental Remedies Act* (UmwRG) also significantly expands the options available to environmental protection associations for legal action: Under this ruling, environmental associations are also entitled to assert violations of EU environmental protection norms that do not establish subjective rights.

According to the case law of the ECJ, national courts are empowered to grant **interim relief**, even if this delays the implementation of EU law. However, to ensure the uniform and effective application of EU law, the ECJ subjects the exercise of this power to strict EU law requirements. According to these requirements, a national court may only suspend enforcement (Section 80 (5) of the Code of Administrative Court Procedure - VwGO) if there are *substantial doubts* about the validity of the EU law underlying the national administrative act, the decision is urgent, the applicant is threatened with serious and irreparable harm, and the court takes due account of the interest of the Union. For the adoption of interim measures (Section 123 (1) of the Code of Administrative Court Procedure - VwGO), these requirements were further specified in subsequent case law to the effect that the national court must have referred or intends to refer the validity question to the ECJ in the main proceedings pursuant to Article 267 TFEU (validity reference), and the applicant's interest objectively outweighs the application of EU law (balancing of interests).

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Dear citizens of Georgia,

We have now reached the end of this series, in which I have attempted to introduce you to European law in the constitutional reality of the Federal Republic of Germany, with references to the Georgian constitution. On the other hand, given the global political tensions and the internal centrifugal forces to which the European Union as a political entity is currently exposed, you will focus on other questions and answers. Thus, the columns, with their topics on European law, may seem too abstract and theoretical to some readers because they seem to ignore political reality.

But let us not overlook the fact: History offers no comparable example of how a political union, whose existence as a supranational entity is guaranteed and secured only by international treaties, guarantees its own continued existence and cohesion and continually renews itself politically. The European Union owes this "guarantee of existence" in particular to the fact that, with the ECJ (and the General Court) as an institution and with the authority of their universally recognized jurisprudence, a strong jurisprudence promotes, and in some cases even enforces,

cohesion, loyalty to the alliance, and – despite all conflicting national interests – the loyalty of the Member States to the political union.

Justitia – the scales in one hand, the sword in the other – is the obvious symbol of this: the principle of equality and the guarantee of its implementation, particularly through the jurisprudence of the ECJ and its enforcement, prevent the Union from drifting into a state of imbalance characterized by striving for hegemony of one or a few Member States, which would inevitably lead to the dissolution of the Union.

The ancient Greek city leagues are a negative example of this. Athens' egoistic pursuit of self-interest and hegemony as a naval power and its rivalry with Sparta as a land power inevitably led to the Peloponnesian War and sealed the political doom for both city alliances. Let us not forget that the European Union in its current form, with its magnificent successes in terms of prosperity, freedom, peace, and justice, emerged from the ruins of two terrible world wars.

*To quote the philosopher **Georg Wilhelm Friedrich Hegel** (“Fundamentals of the Philosophy of Right”):*

“But since there is no praetor between states, there is no universal court. And further, because states, as sovereigns, do not exist above themselves but only in their relationship to one another, their relationship is external and law is subjective.”

With this quote, Hegel makes it clear that international law – in contrast to domestic law – has no objective enforcement power because there is no superior authority that could make binding decisions on legal disputes between states. Without a binding authority, the law would remain subjective, thus dependent on the respective state and its interests.

***Thucydides** lets the Athenians speak even more clearly during the attack on the island of Melos and in the negotiations with the Melians (*The Peloponnesian War*, V 89):*

"No, within the framework of what we (the Athenians) recognize as true, seek to achieve what is possible, since you know as well as we do that law prevails in human relations only when the balance of power is equal, and the stronger enforce everything in their power, and the weak submit."

Let us be clear: Only the interrelationship between the ECJ as the judiciary and the political union as a force that also helps enforce the spoken law – with the sword of justice – ensures

the equality of the Member states in the constitutional reality of the Union and its continued existence as a factor of stability in continental Europe. The European Court of Justice (and the General Court) are, as an institution and with their jurisdiction, undoubtedly an unprecedented achievement that must be preserved and promoted.

I wish you and Georgia all the best on your path to the European Union.

(signed) Dr. Kammerer