

Action for annulment of an EU act

SUMMARY

An action for annulment is a legal procedure before the Court of Justice that guarantees the conformity of EU legislative acts, regulatory acts and individual acts with the superior rules of the EU legal order. An action can be brought within two months of the publication or notification of the contested measure.

Applicants are divided into three categories: privileged, semi-privileged and non-privileged. Privileged applicants – the Member States, Parliament, Commission and Council – may bring an action for annulment purely in the interests of legality, without proving any particular interest. Semi-privileged applicants – comprising the European Committee of the Regions, the European Central Bank and the European Court of Auditors – may bring an action for annulment only to protect their own prerogatives. Finally, non-privileged applicants, comprising all natural and legal persons, including regional or local governments, may bring an action for annulment only if they prove that the contested act infringes upon their interests. More specifically, they may bring an action against an act addressed to them, or – if it is not addressed to them – if it is of direct and individual concern to them, as well as against a regulatory act that is of direct concern to them and does not entail implementing measures.

The Treaty provides five grounds for annulment, i.e. reasons for which the Court may declare an EU act to be null and void. These are lack of competence; infringement of an essential procedural requirement; infringement of the Treaties; infringement of a rule relating to the application of the Treaties; and, finally, misuse of powers.

If the Court finds the action well founded, it declares the nullity of the contested act, which, in principle, is considered null from the moment of its adoption. However, the Court may decide that some effects of the contested act should, nonetheless, remain in force in the interests of protecting legitimate interests and legal security.



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Background

The EU is a [community of law](#) – its functioning and institutional architecture are based on the principle of the **rule of law**. This means that all measures adopted by the EU institutions must have a legal basis. Specifically, all legal acts – be they general (like regulations or directives) or individual (like decisions) – must be based on the EU Treaties and must be in conformity with the Charter of Fundamental Rights, which has had equal legal force with the Treaties since 1 December 2009.

In order to ensure uniform application of EU law, the power to verify whether a given EU legal act, general or individual, is in conformity with the Treaties and the Charter, has been vested in a single body – the Court of Justice of the European Union (CJEU). As a result, national courts, including constitutional courts, are not competent to verify the conformity of acts of the EU institutions with the EU Treaty. They may, however, pose questions concerning that validity within the framework of the **preliminary reference procedure**.

Exercising its power to review the legality of acts of EU institutions, the Court of Justice is exercising the powers of **an administrative court and a constitutional court**. Most, though not all,¹ EU Member States have a separate constitutional court entrusted with the task of reviewing the constitutionality of legislation adopted by national parliaments. All EU Member States provide for the judicial review of administrative action (e.g. individual decisions adopted by administrative bodies), either by a separate system of administrative courts (or tribunals), or by courts of general jurisdiction (civil courts). In the EU constitutional architecture, all these functions are fulfilled by one court – the CJEU.

Acts against which an action for annulment may be brought

List of acts

Under Article 263(1) of the Treaty on the Functioning of the European Union (TFEU), the following acts can be subject to an action for annulment:

- legislative acts, in particular regulations and directives;
- acts of the Council, other than recommendations and opinions;
- acts of the Commission, other than recommendations and opinions (e.g. decisions);
- acts of the European Central Bank, other than recommendations and opinions;
- acts of the European Parliament intended to produce legal effects vis-à-vis third parties;
- acts of the Council intended to produce legal effects vis-à-vis third parties;
- acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

International agreements

The mechanism for a preventive test of an international agreement's legality under a special procedure set out in Article 218 TFEU does not preclude a subsequent review of its legality by the CJEU, i.e. after it has entered already into force ([Case C-25/94 *Commission v Council*](#)). This is because in the hierarchy of acts constituting the EU legal order, international agreements are placed below the EU Treaties. Since the ratification of an international agreement takes place via an act of the Council, it is that act (of ratification) that is subject to the CJEU's review under Article 263 TFEU,² not the treaty itself.

Parties eligible to bring an action

Institutional applicants

Privileged applicants

The 'privileged' applicants³ entitled to bring an action for annulment are named in Article 263(2) TFEU. Under this rule, power to bring an action is vested in:

- EU Member States,
- the European Parliament,
- the Council, and
- the Commission.

Privileged applicants are allowed to bring an action for annulment **without proving any interest** on their side (they can do it simply in the interests of legality) ([Case 45/86 Commission v Council](#), paragraph 3; [Case T-369/07 Latvia v Commission](#), paragraph 33). Importantly, their right to bring an action for annulment **does not depend on their stance during the legislative proceedings** (or other proceedings leading to the act's adoption) – they can support the act but later change their mind about its compatibility with the Treaties.⁴ Thus, for instance, a Member State could vote in favour of an act in the Council, but later question its legality before the CJEU ([Case 166/78 Italy v Council](#), paragraphs 5 and 6).

The notion of a Member State is understood strictly as referring to its central government. Regional authorities (municipalities, federal states and regions) **are not privileged** applicants. If they have a legal personality, they can bring an action as a non-privileged applicant (as can any other legal or natural person) (order in [Case C-406/06 Schleswig Holstein v Commission](#); and judgment in [Case 222/83 Differdange v Commission](#), paragraph 9).

Partially privileged applicants

Limited power to bring an action for annulment – only 'for the purpose of protecting their prerogatives' – is vested in the following three institutions (Article 263 paragraph 3 TFEU):

- the Court of Auditors,
- the European Central Bank, and
- the European Committee of the Regions.

The term 'prerogative' refers to the body's respective competence.⁵ The three institutions are referred to as 'partially privileged applicants',⁶ in contrast to the four privileged applicants (Member States, the European Parliament, the Council and the Commission). Furthermore, the Committee of the Regions may bring an action if it considers the principle of subsidiarity has been violated, as provided by Protocol (No 2) on the application of the principles of subsidiary and proportionality. Importantly, the action will be admissible regardless of whether the CoR was actually consulted.⁷

European Parliament's standing prior to the Treaty of Nice

The original Community treaties did not provide for a privileged status for the Assembly (Parliament) with regard to the action for annulment. In the [Comitology](#) case (302/87 *Parliament v Council*), the Court openly rejected Parliament's arguments that it should enjoy unlimited standing akin to other privileged applicants. However, in the [Chernobyl](#) case (C-70/88 *Parliament v Council*) the Court overruled *Comitology* and indicated that the 'absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap', and therefore, in the interests of institutional balance, it decided to allow Parliament to bring such actions against acts of the Council or the Commission, but 'only to safeguard its prerogatives' and if the action was 'founded only on submissions alleging their infringement'. Essentially, this allowed Parliament to initiate litigation concerning the legal basis of acts adopted by the Commission or Council in situations where the legal basis chosen provided for lesser involvement of Parliament than a possible alternative (or joint) legal basis. With the entry into force of the [Treaty of Nice](#) on 1 February 2003, Parliament became a fully fledged privileged applicant.

Institutions without standing

Two institutions of the EU **do not have the power** to bring an action for annulment: the European Council, and the European Economic and Social Committee.

Non-privileged applicants

Natural and legal persons

The notion of 'non-privileged applicants' refers to **natural and legal persons**, i.e. individuals, companies, associations, foundations and any other bodies corporate (endowed with legal personality). In principle, it is up to **national law** to determine which bodies enjoy legal personality ([Case 18/57 Nold v High Authority](#)).⁸ However, the notion of 'legal personality' used in the Treaty 'has been given an independent Union law meaning which is not necessarily the same one it has in national law.'⁹ Therefore, a body not having legal personality under national law may still bring the action if the defendant institution dealt with it as a negotiating partner ([Case 176/73 Union Syndicale](#), paragraph 12; [Case T-170/94 Shanghai Bicycle Co.](#), paragraph 26) or took part in a tender ([Case 135/81 Groupement des Agences de Voyage](#), paragraphs 10 and 11).

Requirements of admissibility

In order to bring an action (regardless of whether it is well founded or not) non-privileged applicants must prove certain elements that are **preconditions of admissibility** of the action. According to Article 268 TFEU, they may bring an action:

- against an act **addressed** to them,
- against an act not addressed to them, but that is of **direct and individual concern** to them, or
- against a **regulatory act** that is of **direct concern** to them and does not entail implementing measures.

Whereas the situation in which a given act is addressed to a natural or legal person is rather straightforward (as that person is mentioned in the act), the situation of acts not addressed to a given person requires clarification of the notions of: direct concern, individual concern and the concept of 'regulatory acts'.

Notion of direct concern

According to CJEU case law, the notion of direct concern presupposes the joint fulfilment of two premises:¹⁰

- the EU act **affects the legal situation** of the person concerned **directly** ([C-486/01 P Front National v Parliament](#), paragraphs 34 to 43); and
- the EU act **leaves no discretion** to the addressees who are responsible for its implementation, making the implementation of the act automatic, and without the involvement of intermediate rules ([Cases 41-44/70 International Fruit Co.](#), paragraphs 23 to 28).

Notion of individual concern

An act is of individual concern to a natural or legal person if it:

- affects that person by reason of **certain attributes** that are peculiar to them or by reason of **circumstances** in which they are differentiated from all other persons, and
- by virtue of these factors **distinguishes them individually** just as in the case of the addressees of the act ([Case 25/62 Plaumann](#)).

In the literature it is noted that the requirement of individual concern, as formulated in *Plaumann* 'is a particularly strict requirement, and it extensively curtails the ability of natural or legal persons to bring actions for annulment'.¹¹

Notion of regulatory act

The Treaty does not define the concept of a 'regulatory act'.¹² According to the doctrine and case law, a regulatory act is understood as 'an act of general application which has not been adopted in accordance with the ordinary legislative procedure or the special legislative procedure within the meaning of paragraphs 1 to 3 of Article 289 TFEU'.¹³ Therefore, for a given act to be considered as a regulatory one, two premises must be fulfilled:

- the act must be of **general application** (as opposed to an individual act, directed to a specific addressee or group of addressees); and
- the act must **not be a legislative act**, i.e. must not have been adopted under a legislative procedure (i.e. it can be a Commission regulation or Commission decision, as opposed to a regulation or directive of the Parliament and of the Council; **delegated acts** of the Commission are a special category of regulatory acts that are, by definition, non-legislative acts of general application).¹⁴

Jurisdiction to hear an action

According to Article 256(1) TFEU, the **General Court** (GC) is competent to hear actions for annulment in the first instance. Once a judgment has been given by the GC, the parties may appeal to the Court of Justice, which will decide the case in the second and last instance.

According to Article 51 of the CJEU Statute, however, the CJEU hears cases brought by both privileged and non-privileged applicants as the court of first and only instance if the contested act is an act of the Council, Parliament or the Commission in the area of enhanced cooperation. There is no possibility of appeal from such a judgment. Other cases brought by privileged and semi-privileged applicants are decided by the GC.

Time limits for bringing an action

The sixth paragraph of Article 263 TFEU lays down the **time limits** for bringing an action for annulment: **two months** running from the publication or notification of the act. If a given act was neither published, nor notified, the deadline runs from the moment the applicant gained knowledge about it by other means. The deadline may not be extended, and the Court verifies its observance **ex officio** (order in [case C-498/08 P *Fornaci Laterizi Danesi*](#)).

For the deadline to be met, the action must be **lodged at the Registry of the CJEU** within the prescribed period (Articles 21 and 52 of the CJEU Rules of Procedure). Under Article 45 of the CJEU Statute an application can be brought for **restitution of a deadline**, if the applicant shows that by reason of unforeseeable circumstances or *vis major* they were unable to meet the deadline.

Grounds for annulment

List of grounds

The list of grounds for annulment (i.e. **pleas** that the applicant may raise) is set out in Article 263 TFEU; these are:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties;
- infringement of any rule of law relating to the application of the Treaties; and
- misuse of powers.

Importantly, the General Court and the Court of Justice are called upon to verify the **legality** of the act in question, not its **expediency** ([Case C-84/94 UK v Council](#), para 23). In other words, the Court may not 'substitute their own reasoning for that of the author of the contested act'.¹⁵ This is because the action for annulment is a form of **judicial review**, in which the court controls the conformity of the contested legislative or regulatory or individual act with the legal framework, but is not called upon to issue a new, better decision or to evaluate its content from a political or economic perspective. The competence of the Court is therefore framed narrowly and limited to a strictly **legal perspective** of evaluation of the contested act.

Who raises the grounds

According to CJEU case law, the first two grounds for annulment must be raised by Court **ex officio** (i.e. even if the parties failed to raise them). These are the grounds of lack of competence and infringement of an essential procedural requirement with regard to the adoption of the contested act ([Case C-166/95 P Daffix](#), paragraph 24; [Case C-210/98 P Salzgitter](#), paragraph 56).¹⁶ The remaining pleas – relating to infringement of the Treaties, or a rule pertaining to their application, or the misuse of powers **must be raised by the parties** ([Case C-367/95 P Sytraval](#), paragraph 67). Hence, if the applicant does not raise such a plea, the Court may not verify the act's legality in the light of it.

1 – Lack of competence

The notion of lack of competence as grounds for annulment can refer both to EU's external competence (as opposed to the Member States', for instance), as well as the internal division of competences between the EU institutions.¹⁷ As Lenaerts, Maselis and Gutman point out, the grounds of verification of the lack of competence 'generally consists of a dispute about the **legal basis** of the contested act'.¹⁸

The judicial review of competence to adopt an act may also pertain to **delegated and implementing acts**, as provided for in Articles 290-291 TFEU. In the case of delegated acts, the Court must therefore verify whether the objectives, content, scope and duration of the delegation of power, contained in the basic act, were not overstepped.

2 – Infringement of an essential procedural requirement

As Lenaerts, Maselis and Gutman define it, an essential procedural requirement 'is a procedural rule intended to ensure that measures are formulated with due care, compliance with which may **influence the content** of the measure'.¹⁹ The Court, verifying the observance of an essential procedural requirement will enquire whether, if the requirement had not been breached, the consent of the act in question could have been **substantively different** ([Cases 2019-2015 and 218/78 Van Landewyck](#), paragraph 47).²⁰ There must have been a **substantial procedural defect** for the Court to annul the contested act, and if despite the infringement the aims of the provision were still achieved, there will be no annulment ([Case 282/81 Ragusa](#), paragraph 22).

Specific forms of infringement of essential procedural requirements include:

- infringement of the **requirement to consult** a different institution, body or committee ([Case 1/54 France v High Authority](#)), giving the latter sufficient time to express its opinion ([Case 138/79 Roquette Frères](#), paragraph 33);
- infringement of the requirement to **hear the addressee** before an act affecting that person is adopted ([Case 31/69 Commission v Italy](#), paragraph 13);
- infringement of the **duty of confidentiality**, as prescribed by Article 339 TFEU with regard to professional secrecy, especially with regard to information about businesses, their relations and cost components;²¹
- infringement of **internal rules of procedure** of the institution that adopted the act; the institution in question has a duty to follow its own rules of procedure, and a breach

of those rules may lead to the annulment of the adopted act (e.g. [Case 68/86 UK v Council](#), paragraphs 40 to 49, where the Council breached its own rules of procedure);

- infringement of the requirement **to provide a statement of reasons** for the adoption of the act, as required by Article 296 TFEU; the duty to give reasons is a safeguard of the Court's judicial review, as it can verify the content of the adopted act with the reasons given (e.g. in the preamble), checking if they are logically compatible with each other.²²

3 – Infringement of the Treaties

The concept of 'Treaties', in respect of grounds of infringement, giving rise to the annulment of an EU act, covers the following legal acts:²³

- the Treaty on European Union (TEU);
- the Treaty on the Functioning of the European Union (TFEU);
- the Treaty establishing the European Atomic Energy Community (Euratom Treaty);
- the protocols annexed to the Treaties;
- the Charter of Fundamental Rights; and
- accession treaties and acts.

4 – Infringement of a rule of law relating to the application of the Treaties

As Lenaerts, Maselis and Gutman explain, the concept of a 'rule of law relating to the application of the Treaties' covers 'all other binding provisions of the Union legal order',²⁴ and specifically:

- **international agreements** concluded by the Member States before the EEC Treaty ([Cases 21-24/72 International Fruit Co](#), paragraphs 6 to 7);
- international agreements concluded by the EU ([Case 181/73 Haegeman](#), paragraph 5);
- rules of **customary international law** ([Cases C-402/05 P and C-415/05 P Kadi](#) paragraphs 280 to 330);
- **general principles** of EU law ([Case 4/73 Nold](#), paragraph 13), especially: the principle of **proportionality** ([Case T-306/00 Conserve Italia](#), paragraphs 127 to 151); the principle of protection of **legitimate expectations** ([Case C-519/07 P Friesland Campina](#)); the principle of **equal treatment** ([Cases C-182/03 and C-217/03 Forum 187](#)); the principle of **effective judicial protection** ([Cases C-402/05 P and C-415/05 P Kadi](#), paragraph 353); the principle of **ne bis in idem** (order in [Case C-455/02 P Sgaravatti](#)); and the principle of **reasonable time in administrative proceedings** ([Case C-282/95 P Guerin automobiles](#)); and
- rules of **secondary EU law** (if the contested act implemented it).

5 – Misuse of powers

CJEU case law interprets the concept of misuse of powers **objectively**, i.e. with reference to the divergence between the objectives for which the powers were granted to an EU body and the actual outcome of the contested act.²⁵ There is no presumption of the misuse of powers, and the applicant must prove on the basis of objective, relevant and consistent facts that the contested act was adopted for unauthorised purposes ([Case 23/76 Pellegrini](#), paragraph 30).

Article 50 and action for annulment

If an agreement concerning the departure of one of the Member States is signed in the future (as provided for in Article 50(2) TFEU), it will constitute an **act of the Council**, as it would be concluded by the Council with a 'super qualified majority', without the participation of the state concerned (Article 238(3)b TFEU). As E.M. Poptcheva [points out](#), 'unlike accession treaties, the withdrawal agreement is not primary EU law, since it is concluded between the EU and the withdrawing state and not between the latter and the rest of the Member States. It is an international agreement and therefore subject to judicial review by the Court of Justice of the EU (CJEU). The Council decision to conclude the agreement could, for instance, be **challenged before the CJEU** through an action for annulment (Article 263 TFEU)'. Nonetheless, any amendments to the Treaties or protocols, made as a consequence of the withdrawal, would constitute primary law and would need to be ratified by the Member States.

Effects of annulment

Ex tunc effect

According to the first paragraph of Article 264 TFEU, if the action for annulment is found to be well founded, the Court must **declare the contested act to be void** (declaration of nullity). Therefore, the effect of annulment is **ex tunc** (i.e. from the time of adoption of the act, not from the date of judgment, *ex nunc*) ([Case 22/70](#) *Commission v Council (ERTA)*).

Exceptions

However, Article 264 TFEU allows the Court to limit the *ex tunc* effects of the declaration of nullity. Acting *ex officio* or upon request of one of the parties, the Court may decide that some of the effects of the annulled act will be regarded as **definitive**, and therefore will not be nullified retroactively ([Case C-166/07](#) *Parliament v Council*, paras 73-75).

Erga omnes effect

A declaration of nullity has an *erga omnes* effect, i.e. it has effect not only for the parties to the litigation (the applicant and the defendant institution, which would be *inter partes* effect), but has a generally binding effect, i.e. for all EU institutions, national administrations and judiciaries, all legal and natural persons.²⁶ The *erga omnes* effect extends only to **successful actions**. If an action is dismissed, the act may still be contested by other parties.²⁷

Possible follow-up

Article 266 TFEU obliges the author of the annulled act to take the necessary measures to comply with the judgment. This may involve:

- payment of compensation (if sought on the basis of an action for damages, as envisaged by Article 340 TFEU), or
- reimbursement of fines (especially in the context of competition law and state aid law, as provided for by Articles 101 and 102 TFEU).

Conclusions and outlook

The action for annulment is an important element of the judicial architecture of the European Union. In comparison to national law, it fulfils a double function – on the one hand, it is the equivalent of a constitutional complaint, which enables the Court of Justice to perform **constitutional review**, i.e. verify the conformity of EU legislation with primary law (the Treaties, the Charter). On the other hand, it is the equivalent of a complaint to an administrative court, which enables the Court of Justice to perform **judicial review of administrative action**, i.e. verify the legality of individual administrative decisions taken by EU institutions, agencies and bodies with regard to individuals. The fact that both functions are fulfilled by one action, provided for by Article 263 TFEU, means that the Court has to ensure that individuals may question only individual or regulatory acts that are directed to them or are of individual concern to them. This is because the European legal order does not provide for an *actio popularis*, i.e. the possibility for individuals to trigger directly constitutional review of legislation. In the interests of procedural economy, if individuals wish to question the conformity of EU legislation with primary EU law, they may always bring an action against an individual decision **before national courts** which, in turn, may bring a [request for a preliminary ruling](#) to the Court of Justice. If, in a judgment rendered in the preliminary reference procedure, the CJEU declares an act of the institutions invalid, that decision has effects not only *inter partes*, but also *erga omnes* (i.e. outside the litigation in which the question arose ([Case 66/80](#) *International Chemical Corporation*, 66/80 paragraphs 12 to 13)).

MAIN REFERENCES

Lenaerts K., Maselis I. and Gutman K., *EU Procedural Law*, Oxford University Press, 2014.
Geiger R., Khan D.-E. and Kotzur M. (eds), *European Union Treaties*, Hart Publishing, 2015.

ENDNOTES

- ¹ Exceptions include the Netherlands, Luxembourg and the UK. In Estonia, constitutional review is performed by a special chamber of the Supreme Court.
- ² M. Kotzur, in *European Union Treaties: A Commentary* (C.H. Beck 2015), p. 878.
- ³ Kotzur, p. 879.
- ⁴ Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, Oxford University Press 2014, p. 310.
- ⁵ Kotzur, p. 879.
- ⁶ Kotzur, p. 879.
- ⁷ Lenaerts et al., p. 312.
- ⁸ Lenaerts et al., p. 313.
- ⁹ Lenaerts et al., p. 314.
- ¹⁰ Lenaerts et al., pp. 318-319.
- ¹¹ Lenaerts et al., p. 324.
- ¹² Lenaerts et al., p. 334.
- ¹³ Lenaerts et al., pp. 334-335.
- ¹⁴ Lenaerts, et al. ,p. 369.
- ¹⁵ Lenaerts et al., p. 365.
- ¹⁶ Lenaerts et al., p. 365.
- ¹⁷ Lenaerts et al., p. 367.
- ¹⁸ Lenaerts et al., p. 367.
- ¹⁹ Lenaerts et al., p. 371.
- ²⁰ Kotzur, p. 884.
- ²¹ Lenaerts et al., p. 377.
- ²² Lenaerts, et al. p. 379.
- ²³ Lenaerts et al. pp. 382-383.
- ²⁴ Lenaerts et al., pp. 383-384.
- ²⁵ Lenaerts et al. p. 386.
- ²⁶ Lenaerts et al., pp. 414-415; Kotzur, p. 887.
- ²⁷ Kotzur, p. 888.

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