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Chapter 6

Various procedures for the review of legality of secondary law

6.1. Procedures

6.1.1. Introduction

The legality of secondary Union law can be reviewed in various procedures available in the Union’s legal order. In principle, these are the following four procedures: i) the action for annulment (Article 263 TFEU); ii) the preliminary ruling procedure (Article 267 TFEU); iii) the plea of illegality (Article 277 TFEU); and iv) the action for damages based on non-contractual liability of the Union (Articles 268 and 340 TFEU).

6.1.2. Action for annulment

The action for annulment – a direct action, in which eligible applicants have direct recourse to the Union courts against a Union act – is governed by Article 263 TFEU. First, it specifies the type of acts which are amenable to judicial review:

“The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.”

‘Acts’ has a broad meaning, thus, both acts of general application and individual acts are reviewable, as well as formal acts set out under Article 288 TFEU and atypical acts not mentioned under Article 288 TFEU as long as they are intended to produce legal effects. The amendments brought about by the Lisbon Treaty added to the acts of the traditional institutions (Commission, Council, European Central Bank and the European

517. ECJ, 31 March 1971, Case 22/70 Commission v Council (ERTA), paras. 39-42.
Chapter 6 - Various procedures for the review of legality of secondary law

Parliament) acts of various bodies, offices or agencies of the Union and even those of the European Council provided that they are intended to produce legal effects vis-à-vis third parties. The Court in its earlier case law interpreted acts which are intended to produce legal effects as “any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position”. As acts of various Union bodies and agencies are most frequently expert opinions which – although customarily followed by the Union institutions – only inform the rulemaking which those institutions are in charge of, it is doubtful whether those acts themselves can be considered as “bringing about a distinct change in the applicant’s legal position”. This phrase will have to be interpreted flexibly in order for the amended provision in Article 263 to effectively broaden the scope of Union acts subject to judicial review.

Certain Union acts are excluded from the scope of judicial review under Article 263. These are the acts which concern areas where the Court lacks jurisdiction or its jurisdiction is restricted. Specifically, decisions in the field of Common Foreign and Security Policy are not reviewable by the Court with the exception of decisions adopted by the Council providing for restrictive measures against natural or legal persons, which may come under judicial scrutiny upon a challenge by such persons brought pursuant to the conditions set out in the fourth paragraph of Article 263. Furthermore, the review of legality of acts adopted by the European Council or the Council in the procedure set out under Article 7 TEU relating to the expulsion of a Member State is limited insofar as the Court may review those acts only from the point of view of the procedure but not in respect of the substantive grounds on which such acts are based.

As to the grounds of review, according to the second paragraph of Article 263 an action for annulment can be brought on the grounds of i) lack of competence; ii) infringement of an essential procedural requirement; iii) infringement of the Treaties or of any rule of law relating to their application; and iv) misuse of powers. Regarding ground i) – as it is relatively rare that a Union institution would act in the absence of any sort of competence – the ground of the claim for annulment here is rather the trespassing by an institution on the competences of another institution. This normally surfaces in a legal basis dispute, which may as well be considered under ground iii)

518. ECJ, 11 November 1981, Case 60/81 IBM v Commission, para. 9.
519. Chalmers, Davies and Monti, supra note 17, p. 399.
520. Article 24(1), second subparagraph, TEU and Article 275 TFEU.
521. Article 269 TFEU.
in that the choice of a wrong legal basis for a Union act is also an infringement of the Treaties. Under ground ii) Union acts can be challenged on the ground of infringement of rights of process. As many procedural rules and guarantees are expressly laid down in the Treaties or in secondary legislation, claims on this ground may also belong to ground iii). The same is true for due process rights which exist as (unwritten) general principles of law or fundamental rights incorporated in the Charter, which can be invoked as “a rule of law relating to the application of the Treaties”. Violations of substantive provisions of the Treaties and secondary legislation, which is higher in the hierarchy than the contested act, or fundamental rights and general principles of law other than the mentioned due process rights are actionable under ground iii). Claims, which are in the focus of our attention, that is, those asserting that a piece of secondary Union law infringes the fundamental freedoms, also fall under this heading, as they are based on an alleged breach of a substantive Treaty provision. Finally, as regards ground iv), misuse of powers, covers either a manifest error of assessment committed by the author of the Union act or an actual abuse of power, i.e. exercising power for purposes other than those for which it was intended.522

The most salient and most widely-discussed aspect of Article 263 TFEU is the standing requirements for the various groups of applicants intending to challenge a Union act under that provision. Privileged applicants are the Member States, the European Parliament, the Council and the Commission, which have unconditional locus standi in actions for annulment.523 As we have seen earlier, the Court adopted a very liberal interpretation of the predecessor of Article 263 in the EEC Treaty in order to place the European Parliament on the same footing with the other institutions despite it not having been mentioned in that earlier provision at all either as an eligible applicant or a defendant in an action for annulment (see Section 3.3.3.).524

The group of semi-privileged applicants under the provision currently in force consists of the Court of Auditors, the European Central Bank and the Committee of the Regions, which can bring an annulment action for the purpose of protecting their prerogatives.525

As regards private applicants, the Court interpreted their standing requirements – in contrast to privileged applicants – very rigidly under the

522. Chalmers, Davies and Monti, supra note 17, p. 403.
523. Article 263, second paragraph, TFEU.
524. Case 294/83 Les Verts; Case C-70/88 European Parliament v Council (‘Chernobyl’).
525. Article 263, third paragraph, TFEU.
pre-Lisbon version of Article 263 TFEU inducing a great deal of controversy and criticism regarding this issue. The EEC and EC Treaty contained the following provision with regard to private applicants:

“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

Although the wording referred to decisions and a decision in the form of regulation, the Court has allowed all measures, that is, also regulations and directives which were not disguised decisions but measures of general application, to be challenged in an action for annulment as long as they were of direct and individual concern to the applicants. However, this has not helped individual applicants to a great extent given that the condition of ‘direct and individual concern’ is extremely difficult to be satisfied in the case of decisions, regulations and directives, which are general in nature or decisions which are addressed to a person other than the applicants. The condition of being ‘directly concerned’ by the contested Union act is satisfied when the Union act affects the legal situation of the applicant directly and it “… leave[s] no discretion to the addressee(s) of that measure, who are entrusted with the task of implementing it, such implementation is purely automatic and resulting from the Community rules without the application of other intermediate rules...”. Another aspect of ‘direct concern’ is that the measure complained of must be such as to adversely affect the applicant’s legal position; an adverse effect on a legally not protected interest is not sufficient. It is, however, the ‘individual concern’ part of the test, which caused almost insurmountable hurdle for private plaintiffs. The CJ has insisted throughout its jurisprudence that the rigorous Plaumann test needs to be satisfied in order for individual concern to be established. This test requires the applicants to show that they are affected by the contested act “by reason of certain attributes 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

526. Article 230, fourth paragraph, EC Treaty.
529. Chalmers, Davies and Monti, supra note 17, p. 417 referring to Case C-486/01 P Front National.
person addressed”.

In essence, this means that the individual applicant has to be differentiated from all others affected by the measure in the same way as an addressee. This overly restrictive interpretation stirred endless debates in academic spheres and led to one of the most publicized division of opinion between the two Union courts and between the CJ and its Advocate General. Advocate General Jacobs’ famous Opinion in *UPA* sets out comprehensively the arguments in favour of relaxing the interpretation of ‘individual concern’ placing the principle of effective judicial protection to the centre of his argumentation. His arguments persuaded the General Court, which – in another case that it decided after the delivery of Advocate General Jacobs’ Opinion but before the CJ’s judgment in *UPA* – interpreted ‘individual concern’ by using an alternative, less stringent test. However, the CJ remained unmoved and continued to apply the *Plaumann* test in its judgment in *UPA*. The CJ was of the view that the Union Courts cannot set aside the conditions of *locus standi* for private persons expressly laid down in the Treaty without going beyond the jurisdiction assigned to them; therefore, any change to those standing requirements must come from a Treaty amendment.

Eventually, that amendment was brought about by the Lisbon Treaty, as a result of which the fourth paragraph of 263 TFEU now provides that:

> “Any natural or legal person may, under the conditions referred to in the first and second subparagraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

Thus, the amendment eased the standing requirements with respect to a certain category of Union acts, namely, ‘regulatory acts’ which do not entail implementing measures. With respect to this type of act private applicants do not have to meet the condition of ‘individual concern’; it is sufficient for them to be directly concerned. The only problem was that the Treaty, which defines ‘legislative acts’, ‘delegated acts’ and ‘implementing acts’, gives no clue about the meaning of ‘regulatory act’. Not only is a definition

532. CFI, 3 May 2002, T-177/01 *Jégo-Quéré & Cie SA v Commission*.
534. Case C-50/00 P *UPA*, paras. 44-45.
535. Articles 289-291 TFEU, see Section 4.2.
lacking in the Treaty but the term is not mentioned anywhere else therein.\footnote{The term was taken over from the Draft Constitutional Treaty, see Article III-365(4).} For nearly two years following the entry into force of the Lisbon Treaty until the first case on this issue was decided by the General Court, we could only guess the meaning of ‘regulatory act’. The phrase suggests a dichotomy of ‘legislative’ and ‘regulatory acts’ from which we could infer that all non-legislative acts are, in fact, regulatory acts.\footnote{Chalmers, Davies and Monti, supra note 17, p. 415; De Witte, supra note 33, p. 102.} This would mean that delegated and implementing acts are likely to fall into this category. However, would any other measure belong here? And would the general/individual nature of the act matter for the purpose of qualification as ‘regulatory act’? As delegated acts are acts of general application by virtue of their definition under Article 290 TFEU, the question would be relevant only in the case of implementing acts. Further, the condition according to which the relaxed standing requirements are to be applied to regulatory acts which do not entail implementing measures seems to exclude directives from its scope. Taking into account all these considerations, the options for the interpretation of ‘regulatory act’ are:

- regulatory acts are all non-legislative acts
- regulatory acts are delegated and implementing regulations, directives and decisions, including individual implementing decisions
- regulatory acts are delegated and implementing regulations, directives and decisions of general application
- regulatory acts are delegated and implementing regulations and decisions of general application and all non-legislative atypical acts of general application intended to produce legal effects \textit{vis-à-vis} third parties adopted by either the traditional institutions or by Union agencies, bodies or offices which do not entail any implementing measures.

The General Court has recently issued an order providing an interpretation of ‘regulatory act’ and thus, putting an end to the guesswork about the term’s meaning.\footnote{Order of the General Court, 6 September 2011, Case T-18/10 \textit{Inuit Tapiriit Kanatami and Others} v European Parliament and Council. See also GC, 25 October 2011, Case T-262/10 \textit{Microban International Ltd and Microban (Europe) Ltd} v European Commission.} The General Court employed literal, historical and teleological interpretation in order to flesh out the meaning of the term. First, it held that from the meaning of the word ‘regulatory’, it is apparent that it covers acts of general application. It follows that the relaxed standing requirement does not pertain to all acts of general application but to a limited category of such acts, namely, regulatory acts. It then referred to the first subparagraph
of Article 263, which expressly distinguishes legislative acts and other acts intended to produce legal affects vis-à-vis third parties which can either be general or individual in nature. Thus, when reading the fourth subparagraph in conjunction with the first subparagraph, it appears that it enables private applicants to start an annulment action i) against an act addressed to them, (ii) against a legislative or regulatory act of general application which is of direct and individual concern to them, and (iii) against certain acts of general application, namely regulatory acts, which are of direct concern to them and do not entail implementing measures.539 Second, the General Court referred, interestingly, to the Draft Constitutional Treaty where the term ‘regulatory act’ first appeared and looked at the explanatory documents drafted at that time. Such historical method of interpretation has hardly ever been used by the Union Courts in their case law. History showed that at the time of the drafting of the Constitutional Treaty a deliberate distinction had been made between legislative acts and regulatory acts and the eased standing requirements were not intended to apply to the former.540 Third, the General Court by way of teleological interpretation concluded that the purpose of the new wording in Article 263 was to enable individuals to challenge acts of general application other than legislative acts which do not require implementation without those individuals being forced to infringe the law in order to secure access to court.541

After the orders in Inuit and Microban it is now clear that ‘regulatory act’ in the fourth subparagraph of Article 263 TFEU must be understood to cover all acts of general application apart from legislative acts.542 Taking into account the extra condition included in the fourth paragraph of Article 263, i.e. a regulatory act not entailing implementation, the definition basically corresponds to the last option mentioned above. Therefore, the term ‘regulatory act’ covers delegated and implementing regulations and decisions of general application and all non-legislative atypical acts of general application intended to produce legal effects vis-à-vis third parties adopted by either the traditional institutions or by Union agencies, bodies or offices and not entailing any implementing measures.

As regards the resulting system, academic commentators point out that it is reasonable to maintain the strict standing requirement of ‘direct and individual concern’ with respect to legislative acts while easing those requirements with respect to regulatory acts and thus, allowing the latter to be

539. Case T-18/10 Inuit, paras. 42-45.
540. Ibid. para. 49.
541. Ibid. para. 50.
reviewed in a broader scope.\textsuperscript{543} This is so because regulatory acts are adopted by non-representative institutions and bodies outside the remit of the guarantees of the legislative process; thus, it is justified to subject them to greater scrutiny by the judiciary.

The strict standing requirement of ‘direct and individual concern’ has been retained not only with respect to legislative acts, which are inherently general in nature, but also with regard to individual acts which are addressed to a person other than the applicant intending to challenge the act concerned. The Commission’s decisions in the field of State aid represent an important category of such acts. Those decisions, including the State aid decisions on tax measures, are invariably addressed to the Member States. Therefore, for private applicants who intend to challenge the legality of such decisions the decisions must be of direct and individual concern. This is worth being addressed in the context of this study having regard to Part III which deals in great detail with the State aid rules and their relationship with other sources of EU law.

To describe briefly the standing of individual applicants in actions for annulment brought against the Commission’s State aid decisions, it can be inferred from the case law that the recipients of State aid which a Commission decision declares incompatible with the internal market (‘negative decision’) are most of the times directly and individually concerned by such a decision\textsuperscript{544} and thus, have standing to contest it. This is the case where the aid at issue is an individual aid and the applicant has already received the aid\textsuperscript{545} or he is a potential recipient of such aid.\textsuperscript{546} Conversely, the case law has not been unequivocal as to the question whether the general nature of the aid measure which is the subject matter of a Commission decision precludes a private applicant from being individually concerned by that decision. In \textit{Van Der Kooy}, the Court stated that a decision which disallows an aid scheme which applies generally to any person satisfying certain

\textsuperscript{543}. Chalmers, Davies and Monti, supra note 17, p. 415.
\textsuperscript{544}. Direct and individual concern, which is a general requirement under Article 263 TFEU must be distinguished from being an ‘interested party’ or ‘party concerned’ within the meaning of Article 108(2) TFEU. The latter is defined in Article 1 h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty as “any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.”
\textsuperscript{545}. ECJ, 9 March 1994, Case C-188/92 \textit{TWD Textilwerke Deggendorf GmbH v Germany}, para. 14; CFI, 12 September 2007, Joined Cases T-239/04 and T-323/04 \textit{Italy and Brandt Italia SpA v Commission}, para. 44.
objective conditions was not of individual concern to the potential recipients of the aid as they were only concerned by virtue of their objective capacity and not by certain attributes which are peculiar to them as required by the *Plaumann* test. On the other hand, the Court has also held that recipients of aid under an aid scheme were individually concerned by a negative decision where they had actually received the aid and the recovery of the aid had been ordered. This is a relaxation of the Court’s original position as regards general measures and individual concern. This trend continued until the recent *British Aggregates* judgment where the Court declared in a general manner that even in the case of general aid measures, the applicant – being either the recipient of the aid or, as in the case at hand, a competitor of the recipient of aid – may be able to establish individual concern by meeting the *Plaumann* conditions. Therefore, the general nature of the aid measure does not automatically mean that a private applicant can only be concerned by virtue of its objective capacity:

“[…] irrespective of whether the aid measure in question is individual or general in nature, an applicant must, when bringing into question the soundness of the decision assessing the aid as such, demonstrate that he has a ‘special status’ within the meaning of *Plaumann v Commission* […]”

The *British Aggregates* case dealt with the standing of competitors of the undertaking in receipt of aid, which represent the other category of potential private applicants in procedures for the review of legality of the Commission’s State aid decisions. In respect of competitors, the vital question is the same as in the case of recipients of aid, that is, whether or not the competitors can be considered individually concerned by a Commission State aid decision which they intend to challenge. Competitors will have an interest in challenging decisions which declare a measure not to be State aid or State aid compatible with the internal market (‘positive decision’). As we saw in *British Aggregates*, the general nature of the aid measure does not preclude a competitor from being individually concerned by a positive State aid decision even though “an undefined number of other competitors may, in appropriate circumstances, allege that they have suffered similar harm”

547. See ECJ, 2 February 1988, Joined Cases 67/85, 68/85 and 70/85 *Kwekerij Gebroeders van der Kooy BV and Others v Commission*, para. 15.
549. ECJ, 22 December 2008, Case C-487/06 P *British Aggregates Association v Commission*, para. 55.
to that of the applicant. The Court applies a specific interpretation of ‘individual concern’ to the competitors of the aid recipient which, in a certain sense, is more lenient than the regular Plaumann test. In essence, two distinct tests have been developed in the case law in this respect which set different conditions for admissibility according to the procedural stage at which the contested Commission decision was adopted and the objective sought by the person bringing the action. The less rigorous test applies to actions brought against positive decisions adopted at the end of the preliminary investigation procedure conducted by the Commission pursuant to Article 108(3) TFEU. In such an action it is sufficient for the competitor of the aid recipient to prove that it is ‘concerned’ within the meaning of Article 108(2), that is, its interest might be affected by the grant of the aid provided that it expressly seeks to safeguard its procedural rights without contesting the merits of the Commission’s decision. The test is lenient as the condition of being affected by the grant of the aid is fulfilled as soon as the applicant establishes that a competitive relationship exists between it and the aid recipient. A more demanding test is applied where the applicant challenges the merits of the Commission’s decision irrespective of whether that decision was adopted at the end of the preliminary investigation phase or the formal investigation phase:

“[...] If the applicant calls in question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as ‘concerned’ within the meaning of Article 88(2) EC [now Article 108(2) TFEU] cannot suffice for the action to be considered admissible. It must then demonstrate that it enjoys a particular status within the meaning of Plaumann v Commission. That would in particular apply where the applicant’s market position would be substantially affected by the aid to which the decision at issue relates [...]”

Thus, when the applicant’s aim is not only preserving its procedural rights but also questioning the substantive assessment made by the Commission, the rigour of the Plaumann test resumes in the sense that the particular status of the applicant has to be established by showing a substantial effect on

550. Ibid. para. 56.
553. ECJ, 13 December 2005, Case C-78/03 P Commission v Aktionsgemeinschaft Recht und Eigentum (ARE) eV, para. 35; ECJ, 11 September 2008, Joined Cases C-75/05 P and C-80/05 P Germany and Others v Kronofrance SA, para. 38; Case C-487/06 P British Aggregates Association, para. 28. See Barennes, supra note 551, p. 326-327, 332.
554. Case C-78/03 P ARE, para. 37; Joined Cases C-75/05 P and C-80/05 P Kronofrance, para. 40; Case C-487/06 P British Aggregates, para. 30.

176
his market position. The ‘substantial effect’ test does not require the applicant to have been involved in the Commission’s formal State aid investigation procedure. It rather looks at the evidence adduced by the competitor as regards the structure of the market where it competes with the aid recipient and its specific position on the market and the fact that due to those factors the grant of the aid substantially affects its position.555

Besides the standing requirements, which – although relaxed by the Lisbon changes and applied by the Court in a more lenient manner in certain categories of cases – are still rather stringent for individuals, another restriction on the recourse to the direct action is the two-month deadline within which such action must be initiated.556

6.1.3. Preliminary ruling procedure

The Court considers that the limitations characterising the direct action are compensated for by other procedures available in the Union’s legal order, which offer for private applicants viable alternative routes to contest the validity of Union acts of general application. As it stated in *Les Verts*:

“[...] in Articles 173 and 184 [now Article 263 and 277 TFEU], on the one hand, and in Article 177 [now Article 267 TFEU], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty [now fourth paragraph of Article 263]. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.”557

555. Barennes, supra note 551, p. 332.
556. Article 263, sixth paragraph, TFEU.
557. Case 294/83 *Les Verts*, para. 23; Case C-50/00 P *Unión de Pequeños Agricultores v Council (UPA)*, para. 40.
Thus, the Court recalls that even in cases where individual applicants do not meet the standing conditions under the fourth paragraph of Article 263 TFEU and are thus, precluded from bringing a direct action against a Union act of general application they are not left without judicial protection. First, when the Union measure of general application is implemented at Union level, they may bring an action for annulment against the Commission’s (or Council’s) implementing act which is addressed to them or which is of direct (and before the Lisbon changes also individual) concern to them. In addition, in the same action, they may plead the illegality of the general measure under Article 277 TFEU. Conversely, if the general Union measure is implemented at Member States’ level, individual applicants may challenge the national implementing act before the national courts and request the latter to refer preliminary ruling questions to the Court on the validity of the underlying normative Union act.

Hence the Court views the preliminary ruling reference and the plea of illegality as complementing the action for annulment and considers that the three procedures together make up a complete system of legal remedies. Although this statement has been reiterated by the Court in several cases since Les Verts, it was definitely not an accurate description of the state of affairs before the Lisbon amendments and even after those amendments, doubts can still be raised as to the actual ‘completeness’ of the Union’s system of judicial remedies. Before Lisbon, all acts of general application which did not require implementation either at Union level or at Member States level fell through the gaps of this allegedly complete system. This is demonstrated by UPA where a Council Regulation deprived the applicants of certain rights and Jégo-Quéré where a Commission Regulation imposed obligations on them directly without the intermediation of any implementing measure. Since the Regulations were not of individual concern to the applicants, they had no access to the Union courts to request their annulment. In the absence of a national implementing act and without the availability of a declaratory relief under national law, they also could not turn to the national courts for remedy. The only way for the applicants to obtain redress would have been to infringe the Regulations and expose themselves to potential sanctions the decisions on which they could have contested before the national courts. This can hardly be considered

558. Vandamme, supra note 516, pp. 56-60.
559. Lenaerts, supra note 139, p. 304.
560. In UPA the Council Regulation abolished certain financial aids for olive oil farmers while in Jégo-Quéré the Commission Regulation imposed minimum mesh sizes for fishing nets.
561. Lenaerts, supra note 139, pp. 304-305.
as sufficient judicial protection being granted to private applicants.\textsuperscript{562} As regards the situation after Lisbon, regulatory acts which require no implementation can be challenged before the Union courts in an action for annulment without establishing individual concern. Legislative acts, however, which do not entail implementation – such as, for example, the Council Regulation in \textit{UPA} – remain incontestable by private applicants unless they deliberately infringe them, which still casts a shadow on the ‘completeness’ of the system of judicial protection in the Union’s legal order.

Irrespective of the question whether the system of judicial remedies is sufficiently complete or not, the preliminary ruling procedure is an important part of that system in that it provides an alternative route for individuals to initiate the judicial control of Union acts of general application.\textsuperscript{563} Its central role is evidenced also by the fact that most of the cases where the Court was asked to review a normative Union measure on substantive grounds, including the infringement of the fundamental freedoms, stemmed from a preliminary ruling reference. The reason why mostly private applicants tend to bring this type of claim before their national courts (which refer preliminary questions to the CJ) is that the substantive provisions of primary Union law – most importantly, EU fundamental rights and the fundamental freedoms – confer rights directly on individuals. Union institutions and, to a lesser extent Member States, mainly contest secondary Union law on procedural grounds and naturally, they do so in a direct action. Conversely, for individuals, the preliminary ruling procedure constitutes virtually the only way – because of the strict \textit{locus standi} in an action for annulment – through which they can enforce \textit{vis-à-vis} the Union institutions the rights conferred on them by primary Union law. This underlines the importance of the preliminary ruling procedure in the constitutional order of the Union.\textsuperscript{564}

Article 267 TFEU provides that:

\begin{quote}
\textit{The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
\begin{itemize}
\item[(a)] the interpretation of the Treaties,
\end{itemize}
}\end{quote}

\textsuperscript{562} This was confirmed by \textit{Unibet} (ECJ, 13 March 2007, Case C-432/05 \textit{Unibet v Justitiekanslern}, para. 62) with regard to a claim which asserted that national law infringed Union law. It is questionable whether this means – having regard to \textit{UPA} which said that it is for the national laws to provide effective judicial protection – that national procedural laws must provide for a declaratory relief which would be available for claims asserting that Union law infringes a higher ranking source of Union law.

\textsuperscript{563} Admittedly, it is only one of the functions of the preliminary ruling procedure while others are promoting the development of EU law, preserving the unity of EU law and dispute resolution, see Chalmers, Davies and Monti, supra note 17, pp. 157-168.

\textsuperscript{564} Differently Vandamme, see supra note 516, p. 57.
Chapter 6 - Various procedures for the review of legality of secondary law

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

..."

The preliminary ruling procedure is an indirect action as it is through the intermediation of national courts that the question about the validity of a Union act gets to CJ. Hence private persons do not have a direct access to the Union courts in this procedure. Another difference between the two procedures is that in an action for annulment it is normally the General Court which hears and determines the case at first instance, at least, when it is brought by private applicants\(^{565}\) whereas in a preliminary ruling procedure, only the CJ has jurisdiction to decide on the validity of a piece of secondary law. Furthermore, Article 267 mentions the ‘validity’ of secondary law instruments whereas Article 263 refers to the ‘legality’ thereof. Probably, this is only a difference in terminology which does not entail a difference in the nature or degree of review that the Court is empowered to carry out under these different procedures. It is true that Article 263 expressly enumerates the grounds for review while no such list exists under Article 267. Regarding the latter provision the Court specifically stated in *International Fruit Company* that:

According to the first paragraph of Article 177 of the EEC Treaty [now Article 267 TFEU] ‘The Court of justice shall have jurisdiction to give preliminary rulings concerning ... the validity ... of acts of the institutions of the Community’.

Under that formulation, the jurisdiction of the Court cannot be limited by the grounds on which the validity of those measures may be contested.

Since such jurisdiction extends to all grounds capable of invalidating those measures, the Court is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of international law.”\(^{566}\)

This could suggest that the scope of scrutiny is broader under the preliminary ruling procedure than under the action for annulment, as with regard to the latter the grounds for review are limited. However, as we have seen above, the grounds listed in the second subparagraph of Article 263 are so broadly interpreted that they do not impose a meaningful limit on the remit of review. For example, the infringement of the rules of international law by a Union act which was at issue in the preliminary ruling procedure in

\(^{565}\) Article 256(1) TFEU. Article 251 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union reserves jurisdiction for the CJ in actions for annulment brought by a Member State against an act of the Council (with certain exceptions), the European Parliament or a joint act of the two as well as in actions brought by the Union institutions against acts of other Union institutions.

\(^{566}\) Joined Cases 21-24/72 *International Fruit Company*, paras. 4-6.

180
International Fruit Company could also be claimed in an action for annulment as an infringement of a “rule of law relating to the application of the Treaties”. Thus, the nature, scope and degree of review that can be conducted by the Court under these two procedures appear to be the same. As the Union courts have exclusive competence to assess the legality of Union measures in an action for annulment, it is reasonable to assume that they would retain exclusive competence over this issue even when it arises before a national court in proceedings in which a preliminary ruling reference can be made to the CJ. However, this has not been so unequivocal on the basis of the language of Article 267 TFEU, which does not oblige national courts other than the last instance court to make a reference to the CJ when interpretation or validity questions about Union law arise before them.\footnote{567} It was in Foto-Frost that the CJ clarified that, although national courts may reject a claim of invalidity of a Union act when they consider such claim unfounded, they cannot admit such claims to the effect of establishing the invalidity of Union acts themselves. In particular, the Court held:

“…[national courts against whose decisions there is a judicial remedy under national law] do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 International Chemical Corporation v Amministrazione delle Finanze [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article 177 [now Article 267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.”\footnote{568}

As it appears, the main reason for denying national courts the power to declare Union acts invalid was the need to maintain the uniform application of Union law. However, the Court also referred to the coherence of the system of judicial remedies in the Union’s legal order which would be compromised if – depending on the type of the procedure – either the Union courts exclusively or the national court before which invalidity of a Union act is invoked had the competence to decide on that invalidity:

“[…] it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 Parti écologiste ‘les Verts’v European Parliament [1986] ECR 1339),

\footnote{567} Article 267, second paragraph, TFEU.
\footnote{568} ECJ, 22 October 1987, Case 314/85 Firma Foto-Frost v Hauptzollamt Lübeck-Ost, para. 15.
Chapter 6 - Various procedures for the review of legality of secondary law

‘in Articles 173 and 184 [now Article 263 and 277 TFEU], on the one hand, and in Article 177 [now Article 267 TFEU], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions’.

Since Article 173 [now Article 263 TFEU] gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.”

Another aspect of the coherence of the Union system of judicial protection is that the direct and indirect actions for contesting the legality of Union acts complement each other in a way that does not render the strict conditions of the direct action ineffective. Specifically, in TWD Textilwerke Deggendorf,571 the Court stated that a private applicant is precluded from pleading the invalidity of a Union act in front of a national court with a view to initiate a preliminary ruling reference under Article 267 TFEU on the issue where he or she could have challenged the act directly by bringing an action for annulment under Article 263 TFEU. If it was otherwise private applicants could challenge without any time-limit the legality of Union measures which would jeopardize legal certainty:

“It follows from the [...] requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty [now Article 108 TFEU], who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty [now sixth paragraph of Article 263 TFEU] to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision.

569. Ibid. paras. 16-17. The rule that national courts may not themselves declare Union acts invalid is a very strict one, not even in situations of acte éclairé is an exception made to it (see ECI, 6 December 2005, Case C-461/03 Gaston Schul Douane-expediteur BV v Minister van Landbouw, Natuur en Voedselkwaliteit). Only one concession has been allowed by the Court in IATA (ECJ, 10 January 2006, Case C-344/04 The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport) where it held that a national court should only refer a question to the Court on the validity of a Union measure when it considers the argument to that effect well-founded, see Lenaerts, supra note 139, pp. 310-311.

570. Lenaerts, supra note 139, pp. 312-313.

To accept that in such circumstances the person concerned could challenge the implementation of the decision in proceedings before the national court on the ground that the decision was unlawful would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired.\textsuperscript{572}

6.1.4. Plea of illegality

Besides the preliminary ruling procedure, the Court in \textit{Les Vert} also referred to the plea of illegality as a procedure which complements the action for annulment and thereby helps making the Union system of judicial protection complete. Article 277 TFEU provides for this procedure in the following terms:

“No\textsuperscript{\textit{withstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.}}\textsuperscript{573}

As described in \textit{Les Verts}, this procedure is mainly used in conjunction with the action for annulment in which the applicants challenge an implementing act which is either addressed to them or which is of direct (and individual) concern to them on the ground of the illegality of the basic instrument which the act implements. In such a situation, the applicant may not be able to contest the basic act directly either because of the strict conditions of \textit{locus standi} or because of the expiry of the time-limit. Instead, the applicant can plead the inapplicability of the basic act. Thus, this procedure is not an independent, self-standing action but an ancillary one which is always attached to another procedure. The underlying procedure is most frequently an action for annulment instituted against an implementing or delegated act of the Commission. There are two restrictions on the use of the plea of illegality which are aimed at preventing the abuse of the procedure. First, the illegality of a general measure cannot be pleaded where a matter on the same issue is pending before another court or before the same court in another action. Second, similar to the \textit{TWD} rule, a party who could have challenged the general measure earlier may not raise the plea of illegality.\textsuperscript{573}

This practically excludes the Member States and the Union institutions from pleading the illegality of an act in another procedure given that they are privileged applicants under Article 263, therefore, with them it is always

\textsuperscript{572} Case C-188/92 \textit{TWD Textilwerke Deggendorf}, paras. 17-18.
\textsuperscript{573} Chalmers, Davies and Monti, supra note 17, pp. 430-431.
the case that they could have challenged the act of general application in an action for annulment within two months after its publication. Allowing them to plead the illegality of the act later in another action would enable them to circumvent the deadline.574

6.1.5. Non-contractual liability

Finally, the last route through which the legality of Union measures can be reviewed is an action based on the Union’s non-contractual liability set out in the second subparagraph of Article 340 TFEU. An example is given in Kind,575 a case where a supply butcher claimed damages that he suffered due to the fact that a Council regulation introduced a claw-back of slaughter premium on lamb that he had imported from the UK to Germany, which resulted in the increase of export prices and thus, a reduction of his profits. He claimed that the Council regulation was unlawful as it introduced a charge having equivalent effect to customs duties in breach of the Treaty provisions on the free movement of goods; therefore, the Union had to make good the damages arising from that unlawfulness. In another case, Assurance du Crédit,576 private export credit insurance companies claimed compensation for damages they suffered due to the fact that a directive obliged them to make additional financial reserves for the protection of insured persons whereas no such reserves had to be made by public export credit insurance companies. They maintained that the directive infringed several provisions of primary EU law, such as the principle of equal treatment, the Treaty’s competition rules, the freedom of establishment and the State aid rules.

As it appears, the main purpose of the action based on the Union’s non-contractual liability is to provide a means for claiming damages from the Union and not for instituting a validity review of Union acts. However, when damages claims stem from the Union’s exercise of legislative or rulemaking powers, the adjudication of the action inherently involves a control of the legality of the Union act alleged to cause the damages. It is important to point out that it is an independent action which gives direct access to the Union courts for private applicants even against normative Union acts

574. Vandamme, supra note 516, pp. 86-87 referring to ECJ, 13 December 2001, Case C-1/00 Commission v France (with regard to Member States) and ECJ, 5 October 2004, C-475/01 Commission v Greece (Ouzo) (with regard to the Commission).

575. ECJ, 15 September 1982, Case 106/81 Julius Kind KG v European Economic Community.

without the need to prove direct (and individual) concern and to observe the two-month time limit. The fact that it is an independent action means that it can be instituted without the Union act that is claimed to have caused the damages having previously been declared invalid in a preliminary ruling procedure. Thus, the Court can decide on the legality of the Union act and on the award of damages in one and the same action. Although no strict standing requirements apply to this action, this does not mean that the action for damages is an easy route to a possibly successful and financially rewarding challenge of the validity of Union acts. Basically, in order to substantiate a claim for damages against the Union institutions, the same conditions must be met as those in the case of damages claims against Member States as laid down in *Brasserie du Pêcheur*. Namely, the conduct of the institution must infringe a rule of law intended to confer rights on individuals; the breach of EU law must be sufficiently serious, and there must be a direct causal link between the breach by the EU institution and the damages sustained by the applicant. In applying this test, the Court attributes relevance to the complexity of the matter forming the subject matter of the Union act and the degree of discretion that the Union institution enjoys when adopting the act. In less complex cases or where the Union institution had no or minimal discretion, a mere infringement of a superior rule of law which confers rights on individuals or a failure to exercise due diligence is enough to establish a sufficiently serious breach. On the other hand, in highly complex matters or in cases where the Union institutions enjoy greater discretion, an infringement of the highest ranking norms of primary law, such as general principles of EU law, fundamental rights and misuse of powers, seems to be required in order to hold the Union institutions liable and even there a sufficiently serious breach will only be established if the institutions manifestly and gravely disregarded the limits on their discretion. Apart from these conditions, another difficulty regarding the action for damages is that in cases where the EU institution that enacted the act and the Member State implementing it are jointly liable for the damages, the Court seems to require that the applicant first exhaust the remedies available at the national courts.

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577. Vandamme, supra note 516, p. 73.
578. ECI, Joined Cases C-24/93 and C-48/93 *Brasserie du Pêcheur v Germany*, para. 42.
580. Chalmers, Davies and Monti, supra note 17, pp. 432-433.
581. Ibid. p. 436. Vandamme suggests that the Court makes an exception to this requirement in the case of actions involving directives referring to *Bergaderm* (C-352/98 P), *Assurances du Crédit* (Case C-63/89) and *Biret* (Case T-174/00). However, as he later points out, in these cases there was no joint liability between the Union and the Member
Vandamme highlights that even where the conditions described above are not satisfied and thus, the Union institutions cannot be held liable for damages, the Court may declare the Union act at issue invalid in the action.582

6.2. Legal effects of the procedures

Finally, we must address the consequences of the annulment or the declaration of invalidity of a Union measure under all four procedures described in this chapter. First, it is interesting to note another terminological difference between the action for annulment and the preliminary ruling procedure at this point. As regards the consequences of an action for annulment, Article 264 TFEU provides:

“If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void. However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.”

While according to this provision the Court declares a Union act ‘void’ as a consequence of a successful action for annulment, in preliminary ruling proceedings the Court declares the act at issue – if the action is well-founded – ‘invalid’,583 The question is whether there is any substantive difference between the legal effects of an annulment and a declaration of invalidity, which would correspond to the different terminology. Briefly, the answer is that both the annulment of a Union act and its declaration of invalidity have *erga omnes* and *ex tunc* effect. This means that the decisions of the Court declaring an act void or invalid are binding upon all retroactively as from the entry into force of the act. Whereas these effects are rather evident in the case of the annulment of an act given that the word ‘annulment’ suggests a complete nullification thereof, they are less obvious in the case of a declaration of invalidity. The fact that a declaration of invalidity of a Union act in preliminary ruling proceedings binds all the national courts and national authorities within the Union was clarified in the *ICC* case.584 The

582. Ibid. p. 73.
583. Ibid. p. 22. As Vandamme points out, this may have to do with the other terminological difference between the two provisions, i.e. ‘legality’ under Article 263 and ‘validity’ under Article 267.
Court pointed to considerations of legal certainty and the uniform application of Union law as the reasons necessitating such effect. The retroactive effect of the declaration of invalidity became clear when the Court started to apply the exception set out in Article 264, allowing the maintenance of certain effects of an act declared void in an action for annulment also to declarations of invalidity under Article 267 TFEU.\textsuperscript{585} Vandamme observes that the only difference between annulment and declaration of invalidity is that the latter entails a duty for the Union institutions to formally repeal the invalidated act.\textsuperscript{586}

As it appears, there is no substantive difference between the annulment of a Union act and its being declared invalid, therefore, in the forthcoming parts of this study we will use ‘declaration of invalidity’ or ‘invalidation’ as a general term encompassing both declaration of invalidity under Article 267 and annulment pursuant to Articles 263 and 264 TFEU. Similarly, we will employ the terms ‘legality’ and ‘validity’ as synonyms rather than attributing them differing meanings.

As regard the plea of illegality, the language of Article 277 TFEU refers to the inapplicability of the act at issue meaning that in the case of a successful plea, the Court’s decision has effect only \textit{inter partes}. However, the formulation of the presumption of validity of Union acts used by the Court in its case law puts the plea of illegality on equal footing with annulment and declaration of invalidity in preliminary ruling proceedings as regards their effect:

“\textsc{…measures of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.}”\textsuperscript{587}

This suggests that the Court perceives no practical difference between all these procedures in terms of legal effect. The same opinion is expressed by


\textsuperscript{586.} Vandamme, supra note 516, p. 71.

\textsuperscript{587.} ECJ, 5 October 2004, Case C-475/01 Commission v Greece (Ouzo), para. 18.
Vandamme who adds that inapplicability of a directive can at any time be upgraded to invalidity through the initiation of a preliminary ruling reference. 588

Finally, the action for damages brought pursuant to Article 268 and the second subparagraph of Article 340 TFEU does not result in the formal invalidity of the Union act the unlawfulness of which triggers the damages and thus, does not have effect erga omnes. It has already been pointed out that such action is centred on the claim for damages and any declaration of unlawfulness is purely incidental. Nevertheless, commentators point out that the practical effect of such declaration does not differ too much from a formal declaration of invalidity given that the Union institutions will most likely repeal such an act in order to prevent the reoccurrence of damages claims. The difference is that while such repeal is voluntary in the case of a declaration of invalidity in an action for damages, in preliminary ruling proceedings the repeal is compulsory. 589

When discussing the effects of an annulment or declaration of invalidity of a Union measure we can distinguish between internal effects, which arise within Union law and external effects which refer to the effects on national law, which may have been enacted as a consequence of the Union measure. 590 As to the internal effects, we have seen the ex tunc, erga omnes effect of invalidation, which means that the rights and obligations deriving from an invalidated Union act cease to exist retroactively for everyone (unless the effects of the act are maintained by the Court pursuant to Article 264 TFEU). If on the basis of the invalidated act other delegated Union acts had been adopted or if it had been subject to implementation at Union level, these delegated and implementing acts also automatically become invalid as ultravires acts. 591 From the point of view of external effects, directives are at the centre of attention, as they are the type of Union measures which invariably require transposition by the Member States into their national laws. While the invalidation of directives always raises questions regarding the status of the national law implementing it, the invalidation of regulations or decisions does so only occasionally where the regulation or decision entails the enactment of national law executing the former. The consequences of the invalidation of a directive to the status of national law implementing the directive are extensively analysed by Vandamme in his comprehensive study on the invalid directive frequently referred to in this Chapter. Here

588. Vandamme, supra note 516, p. 88.
589. Ibid. 81.
590. Vandamme, supra note 516, p. 113.
591. Ibid.
it suffices to reiterate in a nutshell his main findings on the matter.\textsuperscript{592} The starting point is that EU law itself makes no mention of the effects that the invalidation of a directive has with regard to national implementing rules. This was spelled out by the Court early on in its case law:

\textquote{It is first of all for the national authorities to draw the consequences in their legal system of the declaration of such invalidity made under Article 177 of the EEC Treaty [now Article 267 TFEU].}\textsuperscript{593}

Thus, EU law leaves it to national law to determine the consequences of the invalidation of a Union act in the national legal order. This is what Vandamme calls as lack of a ‘per se’ rule under EU law. However, there are certain exceptions to this main rule. Most importantly, if the national law implementing the invalidated directive infringes primary Union law, it has to be set aside just like any other national legislation violating Union law. In this respect, the ground on which the act of secondary Union law has been invalidated becomes relevant. If secondary Union law is invalidated on the ground of violating a higher ranking norm of Union law that is addressed not only to the Union institutions but also to the Member States, the national legislation implementing such secondary law will also be in breach of the higher ranking Union law. Hence, if secondary law is invalidated for contravening the fundamental freedoms, fundamental rights or general principles of EU law, all of which are addressed also to the Member States, the implementing national law will suffer from the same incompatibility and therefore, cannot remain in force within the national legal system. This is different where secondary Union law is annulled on procedural grounds. The procedural requirements and guarantees pertaining to the adoption of Union acts are only addressed to the Union institutions which enact such acts in order to protect the interest of the Member States. Therefore, national law implementing secondary law that has been found in breach of such procedural requirements can be maintained given that the national law is most likely not in conflict with any norm of Union law. Eventually, it is within the autonomous powers of the Member States to determine the fate of such national rules.

\textsuperscript{592} Ibid. Chapters 3 and 4.
\textsuperscript{593} ECJ, 30 October 1975, Case 23/75 Rey Soda v Cassa Conguaglio Zucchero, para. 51. Although the case concerned the invalidation of a regulation, the rule also applies to the invalidation of directives. See also ECJ, 27 September 2007, Case C-351/04 Ikea Wholesale Ltd v Commissioners of Customs & Excise, para. 67.
6.3. Non-existence of Union acts

Finally, the non-existence of Union acts must be distinguished from invalidity and illegality. The Court defines non-existence as follows:

“[b]y way of exception to [the] principle of [presumption of legality], measures tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent.”

This paragraph refers to a phenomenon and not to a procedure. As the type of act that we are talking about does not exist, it can be neither annulled nor invalidated. Non-existence is a status that can only be affirmed by the Court. Such affirmation can be done without any time limits. Since the declaration of non-existence is not a procedure it does not fall within the jurisdiction of any one court. Any court, including the national courts, can declare an act non-existent if it finds such a serious degree of irregularity in the act that ignoring it completely is justified. The declaration of non-existence is an exception to the Foto-Frost rule, as even national courts have the power to make such declaration without having to refer a validity question to the CJ. Two requirements must be met in order for a Union act to be non-existent; there has to be a sufficiently serious breach which is immediately obvious. The Court limits non-existence of Union acts to extreme cases:

“[t]he gravity of the consequences attaching to a finding that a measure of a Community institution is non-existent means that, for reasons of legal certainty, such a finding might be reserved for quite extreme situations.”

Non-existent acts suffer from such a grave procedural or substantive irregularity that they cannot produce any legal effect at all, not even provisionally. That is why they also represent an exception to the presumption of the legality of Union acts. Otherwise, the declaration of non-existence and the annulment of an act do not differ too much as regards their legal effects. Both have erga omnes and ex tunc effect, with the difference being that the effects of a non-existent act, evidently, cannot be maintained under Article 264 TFEU.

594. Vandamme, supra note 516, pp. 88-90; Craig, supra note 387, p. 268.
595. Case C-475/01 Commission v Greece, para. 19; ECJ, 15 June 1994, Case C-137/92 P Commission v BASF AG and Others, para. 49.
596. Vandamme, supra note 516, p. 89 referring to Case C-404/97 Commission v Portugal; Case 226/87 Commission v Greece; Case C-74/91 Commission v Germany; Case C-261/99 Commission v France.
597. Case C-475/01 Commission v Greece, para. 20.
In the light of the above, it is apparent that non-existence must be distinguished from illegality or invalidity. The latter are established normally in an action for annulment or in preliminary ruling proceedings on the basis of a breach by a Union act of a higher ranking rule of law of a substantive or procedural nature. This study focuses on the possible invalidity of secondary Union law flowing from a breach of the fundamental freedoms. Breach of the fundamental freedoms, which are of an economic nature and the infringement of which normally occurs in order to promote a public interest other than the internal market, is not considered to be such a serious irregularity that it could lead to the non-existence of secondary law. Thus, any statement made by the Court with regard to the non-existence of acts of secondary law is of no relevance to our subject or the broader topic of invalidity of secondary law. Therefore, we do not agree with Sørensen who claims – on the basis of the Ouzo case’s reference to non-existent Union acts – that the Court has declared that it sets aside EU secondary legislation only in extreme situations. That remark was meant to refer only to the most severe manifestation of irregular Union acts which is normally not the case with Union acts which are incompatible with the primary law freedoms.

598. Sørensen, supra note 214, p. 147, 163.