THE ECJ CASE-LAW ON THE ANNULMENT ACTION: GROUNDS, EFFECTS AND ILLEGALITY PLEA

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Abstract

For practitioners in the field, but also for academicians it is equally important to know that there exists, under certain circumstances, the possibility of bringing an action for annulment, having as object the legally binding EU acts. All questions concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law is offered by the grounds for annulment, the plea of illegality and correlatively by the effects of the decision ruled within the action in for annulment, and these are some issues to which we shall refer further.

Keywords: *the ECJ case-law; annulment for action; grounds; effects; the plea of illegality.*

1. General aspects

The European Union's status of special subject of international law is given, in particular, by the atypical non-classic institutional system, special and different from the extremely known classic structure of Montesquieu type and its own legal order, by the legal system belonging to it, through its features that send to immediate, direct and imperative implementation of the rules of EU law. In the third place, especially in the latter stage of European construction, we notice a peculiar system of European diplomacy[1]. All the three issues above mentioned, taken as a whole, give a special character (status) to the European Union, as subject of international law. This special status is given equally by similarities of the European Union both to states and international organizations, and also by the differences between the European Union and states, respectively international organizations, in terms of their status as subjects of international law.

It is relevant for our analysis, the normative component which, at a closer look, has the same atypical and non-classic character, likely to confer, together with the other two, a special status to the European Union. Notable are the European Union's (ordinary and special) procedures for adopting rules of law, in terms of drafting (the initiative) and their adoption (institutions directly involved send, as bicameral rule, to the decision-making triangle - Commission, Council, Parliament) - and as an exception, we note the special procedures under which the executive, as an institution that owns the lead in the ordinary legislative procedure, is alternatively replaced either by the Council or the Parliament, in the special legislative procedure.

By symmetrically researching issues related to the adoption of rules of EU law, the annulment of the same rules is highlighting distinct features aimed at: acts that may be subject to an action for annulment; subjects of law that may bring an action for annulment (who may have active trial legitimisation); subjects of law against which an action for annulment (who may have passive trial legitimisation) may be brought; the time limit in which an action for annulment may be brought and the grounds (causes) for which an action for annulment may be brought. All these aspects are correlative with the effects of the decision ruled in the action for annulment to which other issues can be added.

For practitioners in the field, but also for academicians, it is equally important to know that there exists, under certain circumstances, such a possibility regulated in EU law, similar to the one existing in national law, with the cumulative fulfilment of certain conditions[2].

All questions listed above concerning the action for annulment have their significance in the theory and practice of the field, but a consistent case-law[3] is offered by the annulment grounds, the plea of illegality and correlatively by the effects of the decision ruled in the action for annulment, issues to which we shall refer further.

2. Grounds (causes) for annulment

The main and fundamental premises of the matter are provided by art. 263 TFEU, which in par.

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[1] Ion M. Anghel, *Diplomaţia Uniunii Europene (şi regulile acesteia)*, Universul Juridic Publishing House, Bucharest, 2015, p. 310.

[2] Elena Emilia Stefan, *Drept administrativ. Partea a II-a,*, University Course, second edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2016, pp. 68-111.

[3] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182- 188; Laura-Cristiana Spătaru-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

(1) states that the Court in Luxembourg (the Court of Justice of the European Union) „reviews the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions (only the legally binding acts, according to art. 288 TFEU) and of regulations of the European Parliament and the European Council intended to produce legal effects towards third parties. „According to the same paragraph, CJEU controls the „legality of acts of the bodies, offices or agencies, as entities operating in the EU, under the condition above formulated, namely that the acts in question" take legal effects (give rise to rights and obligations) to third parties".

Enlightening for our approach is the second paragraph of art. 263 TFEU according to which „the Court has jurisdiction to rule on actions brought (...), for reasons of lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to its application, or abuse of power".

Summarized, we note that, according to the matter premises cited above, there are four grounds that can determine the action for annulment of a legal act of the European Union, namely: the absence/ lack of competence („non-competence"); the infringement of essential procedural requirements; the infringement of the Treaties or of any rule of law relating to its application and the abuse of power.

Even if we were inclined to operate with some similarities existing also in national law (with the unconstitutional actions, i.e. contentious matters in the competence of the administrative courts), we shall not do this, however we cannot stop the reader to have such thoughts. The compared look represents to us the subject of a future approach.

Having a rich case-law on the matter, we reserve the possibility to rely, for each situation, only on those decisions that we consider relevant, noting that the historical case-law[4] of the Court of Justice of the European Union is extremely generous.

The lack of jurisdiction. One of the reasons very well known in the field, which has been dating from 1994, but it is important also nowadays, refers to the quite controversial field of competition, which knows new approaches, especially after the presidential elections from 2016 which were held in the US and after the European Brexit. Specifically, in the case of *France v./ Commission*[5], the Luxembourg Court ruled the annulment of an act of the EU executive (European Commission), act through which the foundations were laid for an agreement with the US to enforce competition law. The reason given by the court referred to the absence of the EU executive's jurisdiction to conclude such an agreement. On substance, the agreement had the purpose of „promoting cooperation, coordination and reducing the risk of disputes between the parties in the application of laws concerning the competition or of reducing their effects"[6].

The EU executive found that the legal nature of the agreement was different, meaning that" in reality, an administrative arrangement for the conclusion of which it is[7] „competent and „the failure to comply with the agreement would not determine the liability of the Community, but simply the termination of the agreement"[8]. The Court in Luxembourg, on the contrary, said that „the agreement is binding on the Community and it creates obligations, this is why it cannot be qualified as administrative agreement"[9], which is why it decided to cancel it. The cause of cancellation of the agreement was based on the fact that the EU executive had no power to its conclusion, established expressly by the Treaties.

From the doctrine in the field[10], it results that the lack of jurisdiction may arise in the case of delegation of powers from the Council to the Commission or to the Member States, but this issue arises also in the case of making decisions in the Commission, through the empowerment procedure.

The infringement of essential procedural requirements. By adopting the same logic of presentation, we find that the premises of the matter are art. 296 and 297 TFEU.

According to art. 296 par. (1) TFEU, „in the case where the Treaties do not specify the type of act to be adopted, the institutions shall select it from case to case with the compliance of the applicable procedures and the principle of proportionality". This is the general framework, as the second paragraph of art. 296 TFEU customizes, by sending to an essential procedural requirement, namely: „legal acts shall be justified and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties". In this regard, the Court, in Case *Sytraval*[11], considered that „the Court of First Instance failed to draw the necessary distinction between the requirement to state reasons and the substantive

[4] The historical jurisprudence is made available to all, including in Romanian as official language of the European Union (according to the translation of the European Institute of Romania, for the jurisprudence until 2007, the year of Romania's EU accession and to the translations made at EU level, after 2007).

[5] Decision *French Republic v./ European Communities Commission*, C-327/91 ECLI:EU:C:1994:305.

[6] Ibid, pt. 5.

[7] Ibid, pt. 21.

[8] Idem.

[9] According to Roxana-Mariana Popescu, *Competențele Curții de Justiție a Uniunii Europene în materia controlului realizat cu privire la acordurile internaționale la care Uniunea Europeană este parte*, Post-doctoral Thesis, „Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, Bucharest, 2015, p. 54.

[10] Gyula Fábián, *Drept instituțional al Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2012, p. 376.

[11] Decision European Commission v./ Chambre syndicale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL, C-367/95, ECLI:EU:C:1998:154, pt. 72.

legality of the decision. On the basis of an alleged insufficiency of reasoning, it criticised the Commission for a manifest error of assessment attributable to the inadequacy of the investigation carried out by that institution".

The doctrine of the field[12] is considerable, highlighting the following situations in which this plea may be invoked: 'non-compliance of rules with regard to drafting and adopting EU legal acts (e.g. how to vote in the institutions, the obligation to consult other institutions, bodies, agencies of the Union or Member States where the Treaties provide this); disregarding the rules concerning the compliance with the right of defence (it involves those rules ensuring the consultation with those concerned (...) before adopting a decision likely to seriously impair their interests); a failure of the obligation concerning the grounding of EU legal acts".

Article 297 section (1) para. 3[13] puts spotlight on the publicity issue, respectively on the notification of the Union's legal acts, which does not mean it is a breach of an essential procedural requirement, however, the consequences of the absence of publicity or notification in the field of bringing the action to court, lead to the ignorance of the date from which the deadline begins to run.

The infringement of the Treaties or of any rule of law relating to their application. There are two causes relevant for this ground of lack of competence, namely the case *Portugal v./ Council*[14] and *Germany v./ Council*[15].

The first cause for dismissal of an action, *Portugal v./ Council* aims at an important matter for that period, the '90s (more precisely 1996), but also for now, concerning the market access for textile products. The legal document that made the object of the invalidation claim, by Portugal to the Court, was Decision 96/386/EC of the Council, of 26 February 1996 on the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products. The grounds that Portugal invoked, were related „on the one hand, to the infringement of certain fundamental WTO rules and principles and, on the other hand, to the infringement of certain fundamental rules and principles of the Community legal order"[16].

Contrary to previous decisions, in that particular case, the Court in Luxembourg said that „the claim of the Portuguese Republic according to which the contested decision was ruled by breaching certain rules and fundamental principles of the Community legal order, was unfounded"[17] and dismissed the action in its entirety[18].

In the second case, *Germany v./ Council*, the Court in Luxembourg annulled art. 1 para. (1) first indent of Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community concerning its fields of competence, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994) according to the request of Germany, on the fields of competence of the Council. It's about the conclusion, on behalf of the European Community, of the agreements of multilateral negotiations of the Uruguay Round (1986-1994), the Council approving the conclusion of the Framework Agreement on Bananas with the Republic of Costa Rica, Colombia, Republic of Nicaragua and the Republic of Venezuela. Germany argued that „the regime established by the Framework Agreement affected the fundamental rights of operators in categories A and C, namely the right to free exercise of the profession and property rights and discriminated in relation with the operators of category B"[19].

The specialized literature[20], by resorting to systematizing these violations of Treaties or of any rule of law relating to their application, highlights the following: „the error of law (concerning the applicable rule of law, the misinterpretation of the rule, the absence of any legal basis); the error of fact (on the facts that affect the application of the rule or assessment of the facts); the error of the facts to which the rule of law applies".

The misuse of law. It is not the same as the misuse of dominance, governed by article 102 TFEU, as anti-competitive practice. The consecration of this cancellation ground belongs to the Court's case-law according to which such an abuse acquires real dimension if an institution of the European Union „pursued (...) through the lack of caution which is tantamount to breaking the law, purposes other than those for which it has been assigned powers provided by the Treaty"[21].

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[12] Sean Van Raepenbusch, Drept instituțional al Uniunii Europene, International Rosetti Publishing House, Bucharest, 2014, p. 506.
[13] „The legislation acts are published in the Official Journal of the European Union".
[14] Decision Portuguese Republic v./ Council of the European Union, C-149/96, ECLI:EU:C:1999:574.
[15] Decision the Federal Republic of Germany v./ Council of the European Union, C-122/95, ECLI:EU:C:1998:94.
[16] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 24 of the decision.
[17] Ibid, pt. 94 of the decision.
[18] For details see Roxana-Mariana Popescu, Competențele Curții de Justiție a Uniunii Europene..., op. cit., p. 55.
[19] Decision the Portuguese Republic v./ Council of the European Union, ECLI:EU:C:1999:574, pt. 48 of the decision.
[20] Sean Van Raepenbusch, op. cit., p. 506.
[21] Decision *Chambre syndicale de la sidérurgie française et autres v./ Haute Autorité de la CECA*, C-3/64, ECLI:EU:C:1965:72, pt. 4 of the Court's reasoning concerning the admission of the claim.

3. The effects of the decision ruled in an action for annulment

We are capitalizing, according to the research system followed, the legislation and case-law specific to the matter.

From the point of view of legislation, the primary premises of the matter are provided by art. 264 TFEU, article in which it is stated that „in the case where the action is well founded, the Court of Justice of the EU declares the act null and void". In other words, the legal act in question ceases its legal effects, even after the entry into force. The effects are to the past and also to the future (*ex tunc* and *ex nunc*).

The jurisprudence accompanies the effects of such a judgment, thus resulting that the „Community court decision to cancel the contested act produces the disappearance retroactively of the act, to all litigants. Therefore, the parties should be put in the state before the adoption of the act"[22].

On the same subject is the *P & O European Ferries decision (Vizcaya) SA v./ Commission*, where the Court states that „the annulment lead to the retroactive disappearance of the [act] (...) with respect to all litigants"[23]. Moreover, in this case, the court stated that „such an annulment decision takes *erga omnes* effect, which gives it res judicata authority"[24].

Other issues stemming from the interpretation of art. 264 par. (2) TFEU[25] refer to the fact that an annulment decision may result in the total or partial nullity of a legal act of the Union.

Regarding the temporal effects of such a decision, in order to avoid prejudices that could be caused to individuals, the Court can order, including the remaining in force of the attacked legal act until the entitled institution adopts another act likely to replace the annulled one[26].

As a corollary of these effects, for reasons of pragmatism and timely manner, in full compliance with art. 266 par. (1) TFEU, „the institution, body, office or agency issuer of the void act or of which failure was declared contrary to the Treaties, shall take measures to comply with the decision of the Court of Justice of the European Union".

4. The plea of illegality

The current premises of the matter are provided by art. 277 TFEU.

From conceptual point of view, we see that art. 277 TFEU establishes what the practice called „plea of illegality". Thus, „under the reserve of the deadline stipulated in art. 263, sixth paragraph [TFEU - two months - our note], in the case of a litigation concerning an act of general application adopted by an institution, body, office or agency of the Union, any party is entitled to grounds specified in art. 263, second paragraph, in order to invoke before the Court of Justice of the European Union, the inapplicability of that act". In term of procedure, although the 2 month term expired and the legal act cannot be challenged anymore by an action for annulment, under the circumstance of a litigation which has as object, a regulation, for example, the plea of illegality can be invoked at any moment. In this situation, the Court will not annul the contested act, but it can declare it inapplicable. Consequently, the plea of illegality „is not a self-contained action, but it depends on a main action within which it may be exercised. (...) it is an ancillary action and the dismissal of the main action entails the inadmissibility of the exception"[27].

Article 277 TFEU establishes „the possibility for the Union court, that in the case of a main legal contest over the legality of an enforcement measure of an act with general application, to exercise an incident control over the legality of the mentioned act. For this purpose, any party to the dispute can invoke - either through the appeal against the enforcement measure or as a means of defence - all grounds provided in the action for annulment, even after the deadline for bringing an action against the act with general application"[28]. However, the same article 277 TFEU „reinforces the principle according to which the illegality of a rule entails the illegality of the measures taken for the enforcement thereof"[29].

This time from the European Union's case-law, art. 277 TFEU „reflects a general principle conferring upon any party the right to challenge, to obtain the annulment of a decision directly and individually concerned, the validity of previous institutional acts which represent the legal basis of the contested decision, if the party has no right to

[22] Decision Centre d'exportation du livre français Centre (CELF) and Ministre de la Culture et de la Communication v./ Société internationale de diffusion et d'édition (SIDE), C-199/06, ECLI:EU:C:2008:79, pt. 61.

[23] Decision P & O European Ferries (Vizcaya) SA v./ Commission, C-442/03P, ECLI:EU:C:2006:356, pt. 43.

[24] Idem.

[25] Art. 264 par. (2) TFEU: „However, the Court shall indicate, if it considers it necessary, what are the effects of the void act that must be considered as definitive".

[26] For example, the Council of Ministers decided, in agreement with the unions for European civil servants, a pay rise by 10%. Finally, the Council adopted a regulation which stated only a 5% increase in salary. The Court therefore annulled the Council Act, but nevertheless it maintained it until the Council adopted an act which replaced it. Otherwise, the European civil servants would not receive any salary percentage (pt. 15 of the Decision Commission des Communautés européennes v./ Conseil des Communautés européennes, 81/72, ECLI:EU:C:1973:60).

[27] Gyula Fábián, op. cit., p. 380.

[28] Sean Van Raepenbusch, op. cit., p. 574.

[29] Gyula Fábián, op. cit. p. 380.

bring, under art. 230 TEC[30], a direct action against acts that have prejudiced, without being able to request cancellation (...). The article aims at protecting the individual against the application of an unlawful legislative act, provided that the effects of the decision finding its inapplicability, are restricted to litigants and that the ruling does not affect the content of the act itself"[31].

Trying a definition, the specialized literature shows that the plea of illegality is „an incident remedy that serves to implement a general principle that refers to due process, and when it is invoked before a national court, it acts to compensate for the absence of direct action for annulment brought by individuals, in principle, against acts of general application"[32].

After analysing **the documents that can be the object of the plea of illegality**, it is still the case-law that supports our approach.

Thus, according to the Court, to the extent that art. 277 TFEU „is not intended to enable a party to contest the applicability of any general act in favour of an action, the content of a plea of illegality must be limited to what is essential to resolving the dispute. Therefore, the general act, of which unlawfulness is claimed, must be applicable, directly or indirectly, in the case which represents the object of the action and there must be a direct relationship between the contested individual decision and the general act in question. The existence of such a connection may, however, be inferred from the finding that the contested decision is based essentially on a provision of the act whose legality is in dispute, even if the latter does not formally represent its legal basis"[33].

For practitioners, but not only, very important are the following two aspects: **the legal subjects that may determine the plea of illegality and the effects of the admission of the plea of illegality**.

Referring to the first point, according to art. 277 TFEU „any part" of a litigation that has as object to contest a mandatory legal act of the Union can introduce the plea of illegality.

Regarding the possibility of states to invoke the plea of illegality, the Court has initially ruled that they cannot resort to such a remedy against a *decision* (as a legal act of the EU) that they have not attacked within the deadline set by art. 263 TFEU: „to allow a Member State, addressee of a decision (...) to challenge its validity (...), without taking into account the time limit laid down in art. 173 par. (3)[34] of the Treaty, would not be compatible with the principles governing the remedies imposed by the Treaty and would undermine the stability of the system and of the principle of legal certainty on which it is based"[35]. Subsequently, the Court revised its opinion to the effect that „the trenchant position in the matter of not attacking the Court's decisions was" tamed „by other actions under art. 263 TFEU, where the court *ex officio* verified whether the decision whose failure was attributed to a Member State had failed or not, the scope of competence of the State, if there were legal grounds for its adoption in order to avoid that that decision would be non-existent from the legal point of view"[36]. Referring to the possibility of the state to invoke the plea of illegality against *a regulation*, the specialized literature[37] ruled that „Member States should have the right to invoke [it] (...) against [this legal act of the European Union] that was not attacked (...) but which, because of its generality reveals its „shortcomings" only at the moment of its concrete application. Thus, these shortcomings cannot be discovered immediately, as in the case of regulations with individual addressee".

For the second issue, regarding the effects of the admission of the plea of illegality, this time, both the doctrine[38] and the case-law are relevant. From the point of view of the doctrine, the act under the grounds of which, the decision has been ruled, will be declared inapplicable in those precise circumstances. From the perspective of the case-law, the inapplicability of the European Union's legal act, established by the plea of illegality „has binding effect only between the parties to the dispute"[39].

5. Conclusions

We conclude by assessing that the Court of Justice of the European Union, supplemented by the doctrine of the field, both based on the application of EU legislation, contribute, obviously, to understanding the status of EU member state of over 10 years, by our country, with all that this status implies, in terms of rights and obligations.

[30] The current art. 263 TFEU.
[31] Decision *Francesco Ianniello v./ Commission of the European Communities*, T-308/04, ECLI:EU:T:2007:347, pt. 32.
[32] Sean Van Raepenbusch, *op. cit*., p. 574.
[33] Decision *Francesco Ianniello v./ Commission of the European Communities* (ECLI:EU:T:2007:347), pt. 33.
[34] The current art. 263 TFEU para. (6).
[35] Decision *Commission v./ the Kingdom of Belgium*, 156/77, ECLI:EU:C:1978:180, pt. 23.
[36] Gyula Fábián, *op. cit*. p. 381.
[37] Idem.
[38] According to Sean Van Raepenbusch, *op. cit*., p. 578.
[39] Decision *EU Council v./ Busacca* et C-434/98, ECLI:EU:C:2000:546, pt. 26.

References:

- Anghel, Ion M., Diplomaţia Uniunii Europene (şi regulile acesteia), Universul Juridic Publishing House, Bucharest, 2015;
- Dumitraşcu, Mihaela-Augustina, Dreptul Uniunii Europene şi specificitatea acestuia, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015;
- Gyula Fábián, Drept instituțional al Uniunii Europene, Hamangiu Publishing House, Bucharest, 2012;
- Popescu, Roxana-Mariana, Competențele Curții de Justiție a Uniunii Europene în materia controlului realizat cu privire la acordurile internaționale la care Uniunea Europeană este parte, Post-doctoral Thesis, „Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, Bucharest, 2015;
- Spătaru-Negură, Laura-Cristiana, Dreptul Uniunii Europene – o nouă tipologie juridic, Hamangiu Publishing House, Bucharest, 2016;
- Ștefan, Elena Emilia, Drept administrativ. Partea a II-a,, University Course, second edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2016;
- Van Raepenbusch, Sean, Drept instituțional al Uniunii Europene, International Rosetti Publishing House, Bucharest, 2014;
- Decision Centre d'exportation du livre français Centre (CELF) and Ministre de la Culture et de la Communication v./ Société internationale de diffusion et d'édition (SIDE), C-199/06, ECLI:EU:C:2008:79;
- Decision Chambre syndicale de la sidérurgie française et autres v./ Haute Autorité de la CECA, C-3/64, ECLI:EU:C:1965:72;
- Decision Commission v./ the Kingdom of Belgium, 156/77, ECLI:EU:C:1978:180;
- Decision EU Council v./ Busacca et C-434/98 ECLI:EU:C:2000:546;
- Decision European Commission v./ Chambre syndicale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL, C-367/95, ECLI:EU:C:1998:154;
- Decision Francesco Ianniello v./ Commission of the European Communities, T-308/04 ECLI:EU:T:2007:347;
- Decision French Republic v./ European Communities Commission, C-327/91, ECLI:EU:C:1994:305;
- Decision P & O European Ferries (Vizcaya) SA v./ Commission, C-442/03 P, ECLI:EU:C:2006:356;
- Decision Portuguese Republic v./ Council of the European Union, C-149/96, ECLI:EU:C:1999:574;
- Decision the Federal Republic of Germany v./ Council of the European Union, C-122/95, ECLI:EU:C:1998:94.