

Documentation



LITIGATING EUROPEAN UNION LAW



416DT76 Trier and Luxembourg, 5-6 October 2016



This seminar is organised with the financial support of the specific programme «Justice 2014-2020» of the European Commission. The contents of this publication are the sole responsibility of ERA and can in no way be taken to reflect the views of the European Commission.

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Litigating European Union Law

ERA Seminar
5th – 6th of October 2016

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THE JUDICIAL SYSTEM OF THE EUROPEAN UNION

Composition, organisation and competences of the Court of Justice of the European Union. The reform of the General Court

Christian Gänsler
Legal Secretary, Court of Justice*
Chambers of Judge Jean-Claude Bonichot

* The views of the speaker reflect his personal opinion

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I. The Court of Justice – a Timeline

One mission since 1952:

“ensure that in the interpretation and application of [the Treaties] the law is observed”

Three core tasks

The Court:

- I. reviews the legality of the acts of the institutions of the European Union,
- II. ensures that the Member States comply with obligations under the Treaties,
- III. and interprets European Union law at the request of the national courts and tribunals.

So what is the Court?

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One institution – one or more courts

1952: the Court of Justice of the European Coal and Steel Community



© Court of Justice

- 7 Judges from the 6 founding states (France, Germany, Italy, Luxembourg, Netherlands, Belgium)
- Seated in the Villa Vauban
- 2 Advocates General
- First judgments: 21st December 1954:
 - *France v High Authority* (1/54, EU:C:1954:7)
 - *Italy v High Authority* (2/54, EU:C:1954:8)

1957: European Economic + European Atomic Energy Communities

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Back in 1952...



© Court of Justice

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1988: Creation of the Court of First Instance

2004: Establishment of the Civil Service Tribunal

2009: Name changes

“Court of Justice of the European Communities”

-> “**Court of Justice of the European Union**”

composed of:

1. *Court of Justice*
2. *General Court*
3. *Civil Service Tribunal*

2015: Reform of the General Court

2016: Suppression of the Civil Service Tribunal

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II. One Institution – Two Courts

The Court of Justice of the European Union

1. The Court of Justice
2. The General Court



© Court of Justice

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1. The Court of Justice

- **28 Judges**
 - One judge per Member State
- **11 Advocates General**
 - 6 “permanent” positions: FR, DE, GB, IT, ES, PL
 - 5 “rotating” positions, currently held by: CZ, DK, SV, BE, BG
- **“Terms and Conditions”**: Article 19 TEU / Articles 253-255 TFUE
 - Renewable terms of 6 years
 - Persons “whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”
 - Consultation of the “Article 255” panel
 - Appointed by the Member States – common accord

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2. The General Court

- **At least one judge per Member State** (Article 19 TEU)

Article 47 of the Statute:

- 40 judges as from 25th December 2015
- 47 judges as from 1st September 2016
- 2 judges per Member State as from 1st September 2019 (56 judges)

- **0 Advocates General**

- **“Terms and Conditions”**: Article 19 TEU / Articles 253-255 TFUE

- Renewable terms of 6 years
- Persons “whose independence is beyond doubt and who possess the ability required for appointment to high judicial office”
- Consultation of the “Article 255” panel
- Appointed by the Member States – common accord

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III. Behind the Scenes

The Court of Justice of the European Union is composed of its Members and supported by its staff:

- Approx. 2 122 posts (civil servants, temporary and contract agents)
 - 1 285 women
 - 837 men

The different “Services” of Court of justice of the European Union

1. 2 Registrars (Court and General Court)
2. Common Administration/technical support
3. Linguistic Services
4. Library and Research
5. Judges’ Offices

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1. The Registries

- Maintaining the case-files for pending cases
- Keeping the register (procedural documents)
- Receives, keeps and distributes all procedural documents sent to the Court/General Court
- Responsible for all correspondence relating to the proceedings before the Court/General Court
- The Registrar of the Court manages the institution's departments under the authority of the President of the Court

3. The Linguistic Services - Directorate General for Translation

- 1 000 posts = 47 % of the Institution's staff
- 625 lawyer linguists
- 75 interpreters
- 24 official languages
- 552 language combinations
- Translation work currently exceeds 1 000 000 pages per year

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4. Library and Research

- **The Library**
 - Works on EU law, international law and comparative law,
 - Works on the national laws of all the Member States and certain non-member countries
 - Approx. 230 000 volumes
- **The Research and Documentation Directorate**
 - Lawyers covering all the Member States' legal systems
 - 3 main missions:
 - a. Analysis of incoming cases (mostly requests for preliminary rulings)
 - b. Elaboration of comparative law resources for the two courts
 - c. Legal analysis – summarisation and indexing of judgements

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5. Judges' Chambers

Each member of the two Courts is assisted by his staff

- Up to 4 legal secretaries – “*Référéndaires*”
 - Lawyers from all member states of the EU with various legal backgrounds and experiences
 - Tasks include, notably:
 - Preparation of case files and various legal documents
 - Drafting of Preliminary Reports
 - Assist at hearings
 - Drafting of Judgements and Conclusions
 - Legal secretaries are excluded from deliberations
- 2 or 3 Assistants
- Possibility to offer internships

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IV. Competences

The Court of justice of the European Union:

- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties,
- and interprets European Union law at the request of the national courts and tribunals.

For that purpose, the General Court (1.) and the Court of Justice (2.) have different competences which are divided mainly according to the different type of actions and legal remedies and procedures.

The actions, remedies and procedures before the two courts concern all possible areas of life (3.).

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1. The general Court's jurisdiction

- a) Direct actions brought by natural or legal persons for annulment of acts of the institutions, bodies, offices or agencies of the EU, including litigation of civil servants of the EU
- b) Actions brought by the Member States against the Commission
- c) Actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures
- d) Actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the EU or their staff
- e) Actions based on contracts made by the EU which expressly give jurisdiction to the General Court

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2. The Court's jurisdiction

- a) References for preliminary rulings
- b) Actions for failure to fulfil obligations
- c) Actions for annulment brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or between EU institutions
- d) Actions for failure to act
- e) Appeals against decisions from the General Court

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3. Relevant Areas of Law

- Access to documents, Inter-institutional litigation
- Harmonisation, Taxation
- Area of freedom, security and justice, Judicial cooperation in civil and criminal matters, Asylum, Border control
- Foreign and security policy
- EU Citizenship, Consumer protection, Health, Social policy, Social security for migrant workers
- Free movement of goods, capital and persons, Freedom of establishment and to provide services
- Commercial policy, Fisheries policy, Agriculture
- Company law, Competition, Intellectual property, Anti-Dumping
- Economic and monetary policy, Financial Supervision
- Energy, Environment , Network Enterprises, Transport
- EU Budget, Customs
- Public procurement, State aid

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V. Judicial Organisation

The Court and the General Court sit as full courts or in chambers

- The Court may sit as a full court ("*Assemblée plénière*"), in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.
- The General Court usually sits in chambers of three or five Judges; the rules of procedure also provide for a Grand Chamber and a single judge.



© Court of Justice

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VI. Statistical Overview – Caseload and Output

1. 2015 general figures:

- 1 711 cases were brought before the three courts
- 1 755 cases completed

a) The Court of Justice

- 713 new cases
- 616 completed cases
- 884 cases pending

b) The General Court

- 831 new cases
- 987 completed cases
- 1267 cases pending

c) The Civil Service Tribunal

- 167 new cases
- 152 completed cases
- 231 cases pending

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2. The Most Important Numbers

a) At the Court

- 436 New references for preliminary rulings introduced (61,15 %)
- 206 New appeals (28,89 %) – 27 % of the General Court’s decisions
- Average duration of proceedings:
 - Approx. 15 months for preliminary rulings
 - Approx. 14 months for appeals

b) At the General Court

- 332 new actions for annulment (various subjects – 39,95 %)
- 302 new actions in the field of intellectual property (36,34 %)
- Average duration of proceedings:
 - Approx. 47 months for competition cases
 - Approx. 18 months for IP
- 27 % of the decisions were challenged (appeal before the Court)

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VII. A need for reform

Challenges for the General Court

- **Caseload**
 - Fewer than 600 new cases before 2010
 - 1270 pending cases at the end of November 2015
 - Developing competences of the EU (e.g. the Banking Sector)
- **Duration of proceedings**
 - Deliver judgments within a reasonable time
 - Respect of Article 47 of the Charter of Fundamental Rights
 - Claims for damages pending
- **Quality of judgements**
 - Maintain the high quality of the General Court's decisions
 - Only 27 % of the decisions are challenged

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Questions?

Thank you for your attention!

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5 October 2016

**An Overview of the Proceedings before
the Court of Justice of the European Union**

1) REFERENCES FOR A PRELIMINARY RULING (Article 267 TFEU)

2) DIRECT ACTIONS

- **Actions for Annulment (Article 263 TFEU)**
- **Actions for a Failure to Act (Article 265 TFEU)**
- **Actions for Damages (Article 268 and 340 TFEU)**
- **Infringement Actions (Articles 258-260 TFEU)**

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

On the nature of the preliminary reference procedure

"This dialogue between judges, initiated by the national judge, constitutes the foundation of the Union legal order. The European Union is an empire without an emperor and without an army where the law is implemented through the intermediary of the Member States. The national judge, solely responsible for its execution, provides for the observance of the law while the Court of Justice ensures that the law is interpreted in a uniform manner throughout the Union."

Caroline Naômé, *Le renvoi préjudiciel en droit européen – Guide pratique*
(my translation)

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

What questions may be referred?

Article 267, first para, TFEU:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

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

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

Which courts are entitled/required to make a reference?

Article 267, second and third paras, TFEU:

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

Exceptions from the obligation to refer

- An identical question has already been decided ("*acte éclairé*")
- The correct application of Union law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved ("*acte clair*")

Case 283/81 *CILFIT*, EU:C:1982:335.

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

The case law of the ECtHR on Article 267 TFEU

A decision not to refer and the application of the "Bosphorus presumption"

Michaud v France (Application no. 12323/11)

A decision not to refer and Article 6 of the ECHR (right to a fair trial):

Ullens de Schooten and Rezabek v. Belgium (applications 3989/07 and 38353/07):

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

Article 23a of the Statute of the Court

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

The expedited preliminary reference procedure

Article 105 of the Rules of Procedure

At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires ...

I. REFERENCES FOR A PRELIMINARY RULING (ARTICLE 267 TFEU)

The urgent preliminary reference procedure ("PPU")

Article 107 of the Rules of Procedure

1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.

2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure ...

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Which acts are reviewable?

Article 263, first para, TFEU:

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.

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

What are the grounds of review?

Article 263, second para, TFEU:

It shall for this purpose have jurisdiction in actions brought ... on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Who may bring an action?

Article 263, second and third para, TFEU:

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission ...

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Case C-70/88, *Parliament v Council*, EU:C:1990:217, para

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Who may bring an action? (continued)

Article 263, fourth and fifth para, TFEU:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, 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.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against their acts.

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Who may bring an action? (continued)

"... an act ... which is of a direct and individual concern"

The requirement of being "directly concerned":

Case C-125/06 P, *Commission v Infront WM*, EU:C:2008:159, para 47:

"... requires the contested [Union] measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from [Union] rules without the application of other intermediate rules..."

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Who may bring an action? (continued)

"... an act ... which is of a direct and individual concern"

The requirement of being "individually concerned":

Case C-260/05 P - *Sniace v Commission*, EU:C:2007:700, para 54:

"... persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed"

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Who may bring an action? (continued)

"... a regulatory act which is of direct concern to them and does not entail implementing measures"

C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para 60:

"... the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, laid down in the fourth paragraph of Article 230 EC, was to enable those persons to bring, under less stringent conditions, actions for annulment of acts of general application other than legislative acts."

Article 289, para 3, TFEU: *"Legal acts adopted by legislative procedure shall constitute legislative acts."*

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

What is the time-limit for bringing an action?

Article 263, sixth para, TFEU:

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

Which court has jurisdiction?

Article 256 TFEU and Article 51 of the Statute of the Court:

The General Court has jurisdiction to hear and determine at first instance, with the exception of certain actions brought by Member States or institutions that are reserved to the Court of Justice;

II DIRECT ACTIONS

- Actions for Annulment (Article 263 TFEU)

What are the effects of a judgment?

As a rule, the invalid act is annulled with a retroactive effect.

Article 264 TFEU:

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.

The Court may, e.g., declare that the effects of the annulled act are to remain in force until the entry into force of a new act.

II DIRECT ACTIONS

- Actions for a Failure to Act (Article 265 TFEU)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

II DIRECT ACTIONS

- Actions for a Failure to Act (Article 265 TFEU)

Article 265 TFEU as a "mirror-image" of Article 263 TFEU

The main difference: under Article 265 TFEU an action is admissible only if the institution, body, office or agency concerned has first been called upon to act.

Example: Case T-521/14, *Sweden v European Commission*, EU:T:2015:976

II DIRECT ACTIONS

- Actions for Damages (Article 268 and 340 TFEU)

Article 268 TFEU

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 340, second paragraph, TFEU

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

II DIRECT ACTIONS

- Actions for Damages (Article 268 and 340 TFEU)

What are the elements of liability?

Case C-4/69, *Lütticke v Commission*, EU:C:1971:40, para 10:

“By virtue of the second paragraph of Article [340] and the general principles to which this provision refers, the liability of the [Union] presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct.”

Who is entitled to bring an action?

II DIRECT ACTIONS

- Actions for Damages (Article 268 and 340 TFEU)

Against which institution should the action be brought?

Joined cases C-63 to 69/72, *Werhahn and others v Council*, EU:C:1973:121, para 7:

“Under the [Union] legal system on the other hand it is in the interests of a good administration of justice that where [Union] liability is involved by reason of the act of one of its institutions, it should be represented before the Court by the institution or institutions against which the matter giving rise to liability is alleged.”

II DIRECT ACTIONS

- Actions for Damages (Article 268 and 340 TFEU)

What is the time-limit for bringing the action?

Article 46 of the Statute of the Court:

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. [...]

II DIRECT ACTIONS

- Actions for Damages (Article 268 and 340 TFEU)

Which court has jurisdiction?

Article 256 TFEU:

The **General Court** has jurisdiction at first instance.

II DIRECT ACTIONS

- Infringement Proceedings (Articles 258 to 260 TFEU)

The first phase: the establishment of an infringement

Article 258 TFEU:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

II DIRECT ACTIONS

- Infringement Proceedings (Articles 258 to 260 TFEU)

The objective and nature of infringement proceedings

Case T-191/99, *Petrie and others*, para. 68:

[T]he Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article [258 TFEU] proceedings ...

II DIRECT ACTIONS

- Infringement Proceedings (Articles 258 to 260 TFEU)

Joined cases C-514/11 P ja C-605/11 P, *LPN and Finland*, para 63:

The disclosure of the documents concerning an infringement procedure during its pre-litigation stage would, in addition, be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged, in order to enable European Union law to be respected and to avoid legal proceedings.

II DIRECT ACTIONS

- Infringement Proceedings (Articles 258 to 260 TFEU)

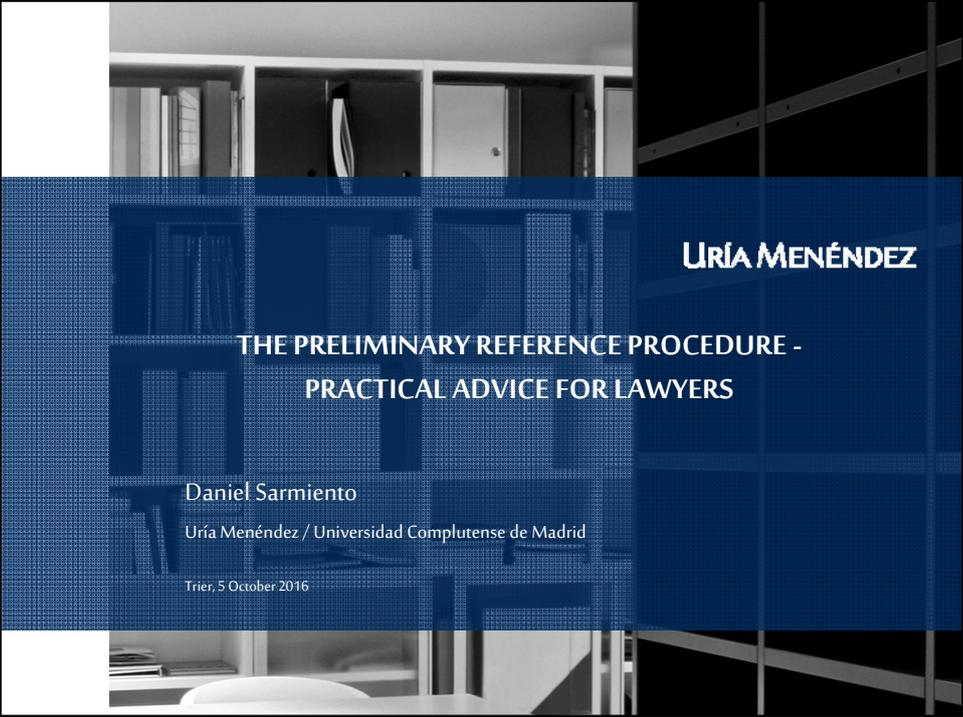
The second phase: establishment of non-compliance with the judgment

Article 260 TFEU

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.



REQUESTING A REFERENCE



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REQUESTING A REFERENCE

1. A LINK WITH EU LAW
2. A "JURISDICTION"
3. FIRST OR LAST INSTANCE COURT
4. INTERPRETATION / VALIDITY
5. MAKING A CASE
 1. The main argument or simply one more
 2. Proposing a question for reference
 3. Challenging a Parliamentary Act

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THE QUESTIONS REFERRED



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THE QUESTIONS REFERRED

1. A CHANCE TO INFLUENCE IN THE QUESTIONS REFERRED
2. WHAT IF YOU DO NOT AGREE WITH THE QUESTIONS REFERRED?
3. WHAT IF YOU DO NOT AGREE WITH THE ANSWER PROPOSED BY THE REFERRING COURT
4. APPEALS AGAINST THE ORDER FOR REFERENCE
5. WITHDRAWAL OF THE REFERENCE

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PROCEDURES INVOLVED



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PROCEDURES INVOLVED

1. THE URGENT PRELIMINARY PROCEDURE
2. THE EXPEDIENT PROCEDURE
3. ART. 99 RP
4. REFERENCES BEFORE THE GENERAL COURT?

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THE WRITTEN PROCEDURE



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THE WRITTEN PROCEDURE

5. OBSERVATIONS TO THE COURT
6. NO REPLY – ALL SUBMISSIONS AT A SINGLE TIME
7. JOINING OF PROCEDURES
8. FAST-TRACK REFERENCES: ART. 99 RP
9. QUESTIONS TO THE NATIONAL COURT

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THE ORAL PHASE



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THE ORAL PHASE

1. THE HEARING
 1. Language
 2. Structure
 3. Questions from the Court
 4. Practical tips
2. THE OPINION OF THE ADVOCATE GENERAL
3. REOPENING OF THE ORAL PROCEDURE

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THE JUDGMENT OF THE COURT



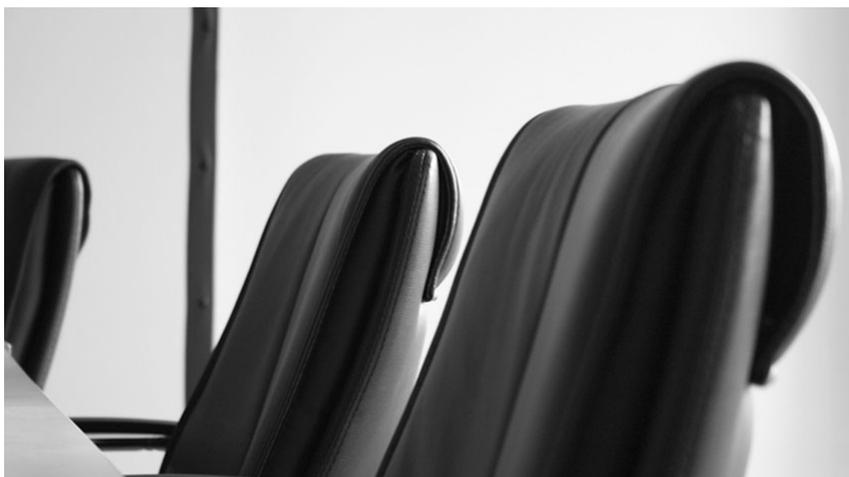
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THE JUDGMENT OF THE COURT

1. PERSONAL SCOPE
2. TERRITORIAL SCOPE
3. TEMPORAL SCOPE
4. LIMITATION OF EFFECTS
5. RES IUDICATA?

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Conclusion



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THANK YOU!

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Direct actions before the General Court

ERA Conference on Litigating EU Law

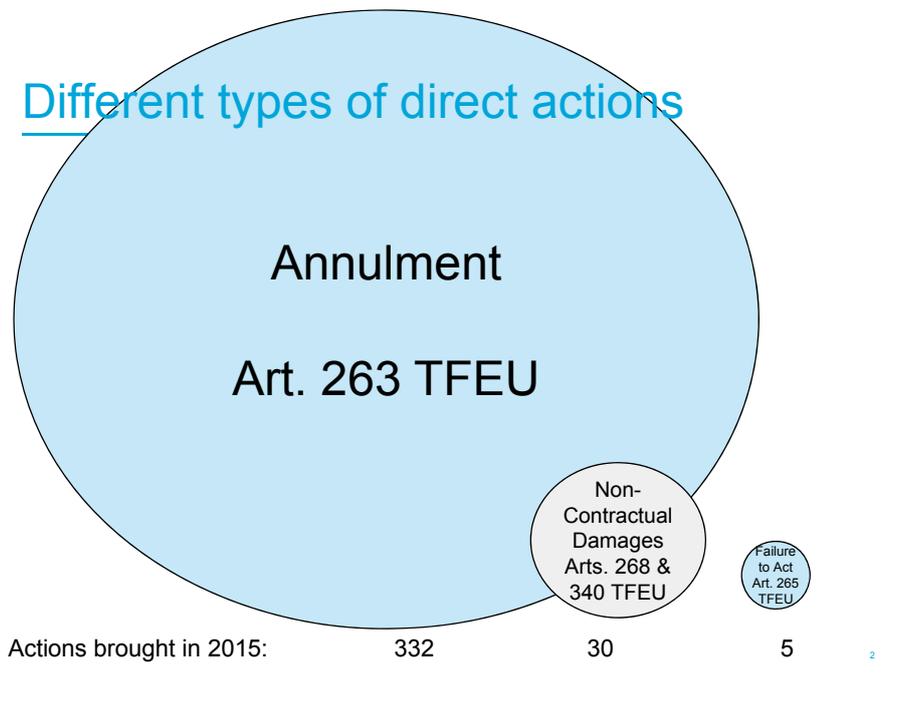
James Killick, Partner
Genevra Forwood, Counsel

5 October 2016

Outline

1. Types of direct actions
2. Do I have an action?
3. When is the deadline?
4. What grounds can I bring?
5. How prepare and file the Application
6. What happens next?
7. Other tools in the toolbox : Interim measures, Expedited procedures
8. Intervention
9. The Oral Hearing
10. Judgment

Different types of direct actions



Admissibility (I): What act can be challenged?

- Act must produce legal effects; form is irrelevant. Usually obvious, but not always..
- T-3/93 *Air France* : Statement by Commission spokesman that Commission had no jurisdiction to examine merger.

Examples of challengeable acts:

- Final competition decisions: imposing fine / prohibition / commitments; blocking/approving mergers, etc
- Investigative acts producing legal effects: Dawn raid decisions; Refusals to grant confidential treatment or LPP; RFI by decision.
- Final State aid decisions, suspension injunctions, opening decisions in 'new aid' cases, ...
- Approvals / authorisations of products / substances.
- Etc...

Examples of non-challengeable acts:

- Preparatory/intermediary acts (e.g. SO, data removal & questioning of employee during dawn raid; 'voluntary' RFIs...)
- Confirmatory acts,
- Internal guidelines,
- Political resolutions,
- Etc...



Admissibility (II): Does my client have standing?

Art 263(4) TFEU 'natural or legal persons' can only bring an action if:

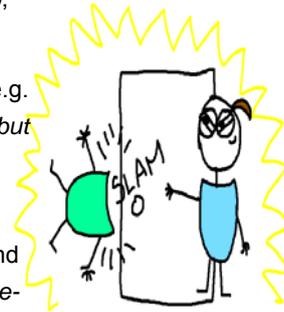
They are the addressee of the contested act (e.g. company fined under Articles 101/102 TFEU) (*Generally obvious*);

OR

The contested act is 'of direct and individual concern' (e.g. State aid beneficiary facing recovery) (*May be obvious but be ready to justify*);

OR

The contested act is 'regulatory act' of direct concern and 'does not entail implementing measures' (*New test, case-law still developing; would need to justify upfront*).



4

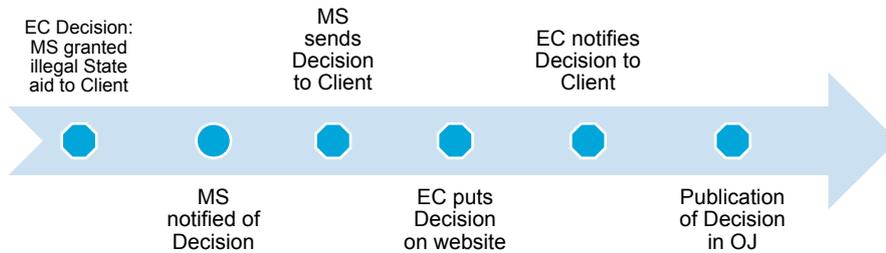
The first fence: the deadline

- Two months & ten days (Art 263 TFEU+ RoP)
 - This is a hard deadline. Exception for *force majeure*, but never plan to rely on it.
 - Be ready the day before. Don't leave it till 23h59.
- When do you count from?
 - notification (only addresses),
OR
 - publication (in the OJ) in which case extra 14 days,
OR
 - if neither of the above, day of actual knowledge.
- If deadlines falls on a weekend or Court holiday, go to the next working day.



5

Calculating the deadline: in practice



Deadline for MS to file an action for annulment?

- *When do we count from? How long have we got?*

Deadline for Client to file an action for annulment?

- *When do we count from? How long have we got?*

6

Grounds for annulment

- Actions for annulment are not appeals but reviews of the legality of the act.
- Limited grounds under Art. 263 TFEU: competence, procedure, misuse of powers, breach of EU law (Treaties, secondary legislation, general principles etc).
- If successful, GC will annul, leaving the EU institution to take 'necessary measures'.
- GC can substitute its own decision only when requested to exercise its 'unlimited jurisdiction' (Art. 261 TFEU: competition fines and other situations).

7

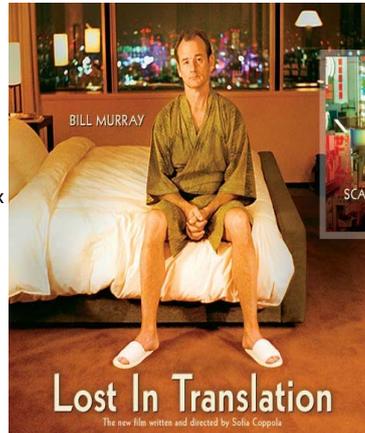
Preparing the Application (I)

□ Be complete.

- New pleas cannot (usually) be added later. Limited possibility for Court to consider pleas of its own motion.
- Further evidence only allowed in rebuttal or if previously unavailable.

□ Be Concise.

- Page limits (50 for application/defence; 25 for reply/rejoinder, etc. 40% tolerance). Exception for complex legal/factual cases.
- Easy to fill the page limit; but not always good advocacy.
 - Introduction: Imagine explaining to a colleague what this case is *really* about.
 - Background facts and procedure: Think what is *really* necessary.
 - Applicable law: is this an issue? If not, waste of space.
 - Admissibility: is this an issue? If not, waste of space.



8

Preparing the Application (II)

□ Be structured.

- Headings and signposting are essential.
- **Establish the legal test; break it down and address each component element.**
- Avoid complex and overlapping sub-pleas. Cross-refer if necessary to avoid repetition.

□ Be clear.

- The court works from the French translation. How will your polished rhetoric be translated?
- Short sentences are better.

□ Don't overlook the form of order sought.

- Full or partial annulment.
- If you don't ask, you don't get (*non ultra petita*). But don't ask for the impossible.
- Exercise of the Court's unlimited jurisdiction (very carefully worded).
- Always ask for costs.

□ Consult [RoP & Practice Rules](#)

9

Supporting evidence (Annexes)

- What evidence to offer?
 - Must offer evidence in application. Further evidence accepted in Reply, if delay is justified, or in rebuttal or to amplify previous evidence.
 - Usually documentary evidence, but can offer live witness evidence. Must be necessary to decide the case (*Dalli v Commission*: Barroso gave evidence of Dalli resignation conversation).
 - Annex A.1 should be the contested decision.
 - No need to annex EU legislation or EU case-law.
- Don't include argument in your annexes: won't be read / not admissible.
- Annexes (at least extracts) must be translated into the language of the case
- Schedule of Annexes
 - Very specific rules which have to be followed.

10

Formal documents

- No need to annex to the application; but lodge them at the same time.
- Power of Attorney
 - Is it wide enough ? Any other lawyers; potential appeal.
 - Signed by the right person? (NB Court no longer checks this).
- Proof of existence in law (if client a legal person)
 - Articles of Association, extract from registry etc.
 - Must come from an official authority (a "stamp is always welcome").
- Lawyer certificates (unless on e-curia)
 - Lawyers authorised to practise before courts of an EEA country, and
 - University teachers nationals of a Member State where have right of audience.
- Summary for OJ Notice ([template provided by GC](#); Registry prefers .doc by email).

11

E-curia

In the olden days...

- Stop the clock by physical delivery of signed original application + schedule of annexes or email or fax.
- Follow within 10 days with signed originals + annexes + 6 or more certified copies.
- Late-night taxis & upside-down faxes...



Now with E-Curia

- ✓ Upload pdfs to secure online platform.
- ✓ (Almost) instant validation.
- ✓ Filing by e-curia = electronic signature, but must be on POA.
- ✓ All lawyers named on pleadings can file or receive documents.
- ✓ Assistants can receive documents.
- ✓ Becoming the norm; luddites can fax (no email)



12

Interim measures

- To suspend the operation of the contested act until main judgment.
- By separate application:
 - at same time as or after the main application.
 - Must be sufficiently complete to enable to the President to decide based on the file (oral hearings rare). Incomplete applications will be dismissed.
- Need to show:
 - *prima facie* case (usually sufficient to set out main pleas)
 - urgency (irreparable harm) : this is usually where IM cases fail
 - Any parent/majority shareholder/network of companies who could step in?
 - Evidence that it is 'objectively impossible' to obtain a bank guarantee?
 - Rare case when IM granted in 1.garantovaná (calcium carbide)
 - Balance of interests.

13

Expedited procedure

- Separate application, at the same time as the main Application.
- Need to demonstrate urgency.
- Appropriate for simple cases, few pleas, no complex facts or law.
- Case gets priority treatment , shorter deadlines (1 month for Defence) & no second round of pleadings.

- Examples in competition cases:
 - Case T 464/04 *Impala* : 1 ½ years (Commission clearance of Sony/BMG merger)
 - Case T 417/05 *Endesa* : 7 months (Commission finding lack of Community dimension in Gas Natural/Endesa)
 - Case T-87/05 *EDP* : 7 months (Commission negative merger decision)
- Examples in tender cases:
 - Case T 196/09 *TerreStar Europe Ltd* ; Case T 211/02 *Tideland*

14

Intervention

- Conditions:
 - support one of the main parties
 - demonstrate an interest in the outcome of the case: *does the annulment of the decision affect their legal position?*

- Member States and EU institutions can intervene as of right.
- Application to intervene
 - Deadline: 6 weeks + 10 days from OJ notice.
- If admitted: receive (redacted) pleadings, can lodge statement in intervention and attend oral hearing.
- NB: only for direct actions (not preliminary rulings in ECJ).



15

The rest of the Written Procedure

- Defence (two months, usually extendable by a month).
- Reply/Rejoinder (usually one month, usually extendable by a month).
- (Intervention – application and statement in intervention)



Keep files in good order as you go.

Keep a Q&A document to record thoughts/arguments.

- Keep folder of authorities (don't leave to last minute).

16

The long wait to Luxembourg

- Written questions from the Court
- J - 6 weeks: notice of date
- J - 3 weeks: draft Report for the Hearing
 - Factual errors? Confidentiality issues?
 - Report for the Hearing is public (copies available outside the hearing room).



How to prepare?

- Re-read + organise the file.
- Finalise "Q & A" ; use indexes/tabs to locate responses quickly.
- Draft opening speech (15 mins: condense, clarify, deal w new points (any questions raised by Court?). Think of the interpreters.
- Outline modules of closing speech (5 mins)
- Mock hearing?

17

The oral hearing – practicalities

- Book hotel and meeting room for final preparations/run-through.
- Mobile office + printer for last-minute redrafting.
- [Email speech to interpreters.](#)
- Greeting the judges “backstage”; Judges might flag questions.
- Two-person teams: can split speaking time and questions. One speaks while the other locates winning document.
- Respect the time-limits for speeches.
- But take your time with the Qs.
- **Answer the questions.**



Judgment Day

- When and how will we know?
 - In person at the Court: operative part read out.
 - Media might report shortly after.
 - Court press release – check first whether there will be one.
 - Full text on curia website within hours.
 - Full text notified to the parties, same (or next..) day.
- Anticipate:
 - In high-profile cases: prepare alternative press statements.
- Appeal to the CoJ?
 -  Gain another week by not accepting service of judgment on ecuria.

—
Thank you

Case Study on drafting an application

Genevra Forwood & James Killick

ERA seminar, 5 October 2016, Trier

Objective

- To show you how – in practice – to prepare and file an action before the EU Court.
- Together, we will:
 - Analyse the problem;
 - Identify the scope of the action;
 - Develop the legal arguments;
 - Discuss strategic and procedural aspects: urgency, interim measures, confidentiality;
 - Discuss practical considerations: evidence, deadlines, formalities etc.

Factual Background

[10-15 minutes to read the background on WhizzIT]

Group discussion (I)

- Is there a remedy before the EU Court?
- What acts(s) can WhizzIT challenge?
- When is(are) the deadline(s)?

Group Discussion (II)

- What pleas would you raise?

Group Discussion (III)

- What evidence do you need? How can you get it?
- What other strategies / procedural could you deploy?

Group Discussion (IV)

- What about their questions about urgency?

- What about their concerns about confidentiality?

Break into groups

- Each group to outline a plea (or the IM application)
 - Legal argumentation (what are the elements you need to show?)
 - Evidence needed (how can you show it?)
 - Other strategic / tactical ideas.

Plenary session

- Feedback from the groups
- Conclusions

Drafting an application to the General Court

9

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In this presentation, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

Case Study on drafting an application

James Killick (Partner) & Genevra Forwood (Counsel)

Factual Background

Your client, WhizzIT is an IT company that has for many years supplied IT services to the European Commission and a number of its agencies. These contracts are granted following the usual open tender procedures.

Back in early 2014, OLAF informed WhizzIT that it was carrying out an audit to investigate possible irregularities concerning the way it bought some computers to be supplied to an EPSO assessment centre some years ago. OLAF informed WhizzIT in very general terms about the allegations and mentioned that it might be listed in the EU’s “Early Detection and Exclusion System” and excluded from future EU contracts. After the audit, WhizzIT repeatedly asked the Commission about the status of the investigation but it never received any meaningful response.

On 1 October 2016, it received a letter (which was dated 15 September 2016) from the Commission. In the letter, the Commission concluded that irregularities had occurred, and these constituted significant deficiencies in WhizzIT’s compliance with its contractual obligations. As a result, the Commission decided to impose an administrative sanction penalty consisting of excluding WhizzIT from participating in EU procurement procedures for the next three years.

This letter referred to an earlier letter of 1 July 2014, that it says was sent to WhizzIT, giving it the chance to comment on the allegations before it. WhizzIT is adamant that it never received this letter. It had moved offices the year before and wonders whether the letter was sent to a wrong address. WhizzIT is especially upset because it thinks it has a good explanation for these irregularities, and can show that it had no impact on the prices paid or the overall performance of the contract, but it was never able to explain its side of the story.

WhizzIT also suspects that it has been 'black-listed' even before the investigation ended. Despite a good track-record of succeeding in EU contracts (on average winning 5 a year), since mid-2014 every single application has been rejected.

WhizzIT is highly dependent on funding from EU contracts. If it is excluded from all EU funding for another 3 years, it is concerned that it will not survive. It asks how long it will take for the Court to decide the case, and whether anything can be done to speed things up to avoid the worst, including bankruptcy?

WhizzIT is also very concerned about its reputation. It has asked whether this court action will be made public, and if so, what information exactly will be in the public domain. It asks whether there is any way to keep this confidential.

Questions for discussion

1. Is there a remedy before the EU Court?
2. What acts(s) can WhizzIT challenge?
3. When is the deadline?
4. What pleas would you raise?
5. What evidence do you need?
6. What other strategies / procedural options could you use?
7. What about WhizzIT's questions about urgency?
8. What about WhizzIT's concerns about confidentiality?

Extracts from the Financial Regulation

Regulation No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298 26.10.2012, p. 1), as amended by Regulations No 547/2014 and 2015/1929

Article 105a

Protection of the Union's financial interests by means of detection of risks and imposition of administrative sanctions

1. In order to protect the Union's financial interests, the Commission shall set up and operate an early detection and exclusion system.

The purpose of such a system shall be to facilitate:

- (a) the early detection of risks threatening the Union's financial interests;
- (b) the exclusion of an economic operator which is in one of the exclusion situations listed in Article 106(1);
- (c) the imposition of a financial penalty on an economic operator pursuant to Article 106(13).

2. The decision to exclude and/or to impose a financial penalty shall be taken by the contracting authority. Such a decision shall be based on a final judgment or on a final administrative decision.

However, in the situations referred to in Article 106(2), the contracting authority shall refer the case to the panel referred to in Article 108 in order to ensure a centralised assessment of those situations. In such cases, the contracting authority shall take its decision based on a preliminary classification in law, having regard to a recommendation of the panel.

Where the contracting authority decides to deviate from the recommendation of the panel, it shall justify such decision to the panel.

3. In the cases referred to in Article 107, the contracting authority shall reject an economic operator from a given procedure.

Article 106

Exclusion criteria and administrative sanctions

1. The contracting authority shall exclude an economic operator from participating in procurement procedures governed by this Regulation where:

- (a) the economic operator is bankrupt, subject to insolvency or winding-up procedures, where its assets are being administered by a liquidator or by a court, where it is in an arrangement with

creditors, where its business activities are suspended, or where it is in any analogous situation arising from a similar procedure provided for under national laws or regulations;

- (b) it has been established by a final judgment or a final administrative decision that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the law of the country in which it is established, with those of the country in which the contracting authority is located or those of the country of the performance of the contract;
- (c) it has been established by a final judgment or a final administrative decision that the economic operator is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the economic operator belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:
 - (i) fraudulently or negligently misrepresenting information required for the verification of the absence of grounds for exclusion or the fulfilment of selection criteria or in the performance of a contract;
 - (ii) entering into agreement with other economic operators with the aim of distorting competition;
 - (iii) violating intellectual property rights;
 - (iv) attempting to influence the decision-making process of the contracting authority during the procurement procedure;
 - (v) attempting to obtain confidential information that may confer upon it undue advantages in the procurement procedure;
- (d) it has been established by a final judgment that the economic operator is guilty of any of the following:
 - (i) fraud, within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests, drawn up by the Council Act of 26 July 1995 ([18](#));
 - (ii) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 ([19](#)), and in Article 2(1) of Council Framework Decision 2003/568/JHA ([20](#)), as well as corruption as defined in the law of the country where the contracting authority is located, the country in which the economic operator is established or the country of the performance of the contract;
 - (iii) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA ([21](#));
 - (iv) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council ([22](#));

- (v) terrorist-related offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA ([23](#)), respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision;
- (vi) child labour or other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council ([24](#));
- (e) the economic operator has shown significant deficiencies in complying with main obligations in the performance of a contract financed by the budget, which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which has been discovered following checks, audits or investigations by an authorising officer, OLAF or the Court of Auditors;
- (f) it has been established by a final judgment or final administrative decision that the economic operator has committed an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 ([25](#)).

2. In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d) and (f) of paragraph 1, or in the case referred to in point (e) of paragraph 1, the contracting authority shall exclude an economic operator on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 108.

The preliminary classification referred to in the first subparagraph does not prejudice the assessment of the conduct of the economic operator concerned by the competent authorities of the Member States under national law. The contracting authority shall review its decision to exclude the economic operator and/or to impose a financial penalty on it without delay following the notification of a final judgment or a final administrative decision. In cases where the final judgment or the final administrative decision does not set the duration of the exclusion, the contracting authority shall set this duration on the basis of established facts and findings and having regard to the recommendation of the panel referred to in Article 108.

Where such final judgment or final administrative decision holds that the economic operator is not guilty of the conduct subject to a preliminary classification in law, on the basis of which it has been excluded, the contracting authority shall, without delay, bring an end to that exclusion and/or reimburse, as appropriate, any financial penalty imposed.

The facts and findings referred to in the first subparagraph shall include, in particular:

- (a) facts established in the context of audits or investigations carried out by the Court of Auditors, OLAF or internal audit, or any other check, audit or control performed under the responsibility of the authorising officer;
- (b) non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics;
- (c) decisions of the ECB, the EIB, the European Investment Fund or international organisations;

- (d) decisions of the Commission relating to the infringement of the Union's competition rules or of a national competent authority relating to the infringement of Union or national competition law.

3. Any decision of the contracting authority taken under Articles 106 to 108 or, where applicable, any recommendation of the panel referred to in Article 108, shall be made in compliance with the principle of proportionality and in particular taking into account the seriousness of the situation, including the impact on the Union's financial interests and image, the time which has elapsed since the relevant conduct, its duration and its recurrence, the intention or degree of negligence, the limited amount at stake for point (b) of paragraph 1 of this Article or any other mitigating circumstances, such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority, or the disclosure of the exclusion situation by means of the declaration referred to in paragraph 10 of this Article.

4. The contracting authority shall exclude the economic operator where a person who is a member of the administrative, management or supervisory body of that economic operator, or who has powers of representation, decision or control with regard to that economic operator, is in one or more of the situations referred to in points (c) to (f) of paragraph 1. The contracting authority shall also exclude the economic operator where a natural or legal person that assumes unlimited liability for the debts of that economic operator is in one or more of the situations referred to in point (a) or (b) of paragraph 1.

5. Where the budget is implemented under indirect management with third countries, the Commission may, having regard, where applicable, to the recommendation of the panel referred to in Article 108, take an exclusion decision and/or impose a financial penalty under the conditions set out in this Article, following the failure of the third country entrusted pursuant to point (c) of Article 58(1) to do so. This shall not affect the responsibility, under Article 60(3), of the third country to prevent, detect, correct and notify irregularities and fraud, or to take an exclusion decision or to impose financial penalties.

6. In the cases referred to in paragraph 2 of this Article, the contracting authority may exclude an economic operator provisionally without the prior recommendation of the panel referred to in Article 108, where the participation of the economic operator concerned in a procurement procedure would constitute a serious and imminent threat to the Union's financial interests. In such cases, the contracting authority shall immediately refer the case to the panel and shall take a final decision no later than 14 days after having received the recommendation of the panel.

7. The contracting authority, having regard, where applicable, to the recommendation of the panel referred to in Article 108, shall not exclude an economic operator from participating in a procurement procedure where:

- (a) the economic operator has taken remedial measures specified in paragraph 8 of this Article, thus demonstrating its reliability. This point shall not apply in the case referred to in point (d) of paragraph 1 of this Article;
- (b) it is indispensable to ensure the continuity of service, for a limited duration and pending the adoption of remedial measures specified in paragraph 8 of this Article;
- (c) such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article.

In addition, point (a) of paragraph 1 of this Article shall not apply in the case of the purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under national law.

In the cases of non-exclusion referred to in the first and second subparagraphs of this paragraph, the contracting authority shall specify the reasons for not excluding the economic operator and inform the panel referred to in Article 108 of those reasons.

8. The measures referred to in paragraph 7, which remedy the exclusion situation may include, in particular:

- (a) measures to identify the origin of the situations giving rise to exclusion and concrete technical, organisational and personnel measures within the relevant business area of the economic operator, appropriate to correct the conduct and prevent its further occurrence;
- (b) proof that the economic operator has undertaken measures to compensate or redress the damage or harm caused to the Union's financial interests by the underlying facts giving rise to the exclusion situation;
- (c) proof that the economic operator has paid or secured the payment of any fine imposed by the competent authority or of any taxes or social security contributions referred to in point (b) of paragraph 1.

9. The contracting authority, having regard, where applicable, to the revised recommendation of the panel referred to in Article 108, shall, without delay, revise its decision to exclude an economic operator ex officio or on request from that economic operator, where the latter has taken remedial measures sufficient to demonstrate its reliability or has provided new elements demonstrating that the exclusion situation referred to in paragraph 1 of this Article no longer exists.

10. A candidate or tenderer shall declare, at the moment of submitting the request to participate or the tender, whether it is in one of the situations referred to in paragraph 1 of this Article or in Article 107(1), and, where applicable, whether it has taken any remedial measures referred to in point (a) of paragraph 7 of this Article. Where appropriate, the candidate or tenderer shall provide the same declaration signed by an entity on whose capacity it intends to rely. However, the contracting authority may waive these requirements for very low value contracts to be defined in the delegated acts adopted pursuant to Article 210.

11. Whenever requested by the contracting authority and where this is necessary to ensure the proper conduct of the procedure, the candidate or tenderer, as well as the entity on whose capacity the candidate or tenderer intends to rely, shall provide:

- (a) appropriate evidence that the candidate, tenderer or entity is not in one of the exclusion situations referred to in paragraph 1;
- (b) information on persons that are members of the administrative, management or supervisory body of the candidate, tenderer or entity or that have powers of representation, decision or control with regard to that candidate, tenderer or entity and appropriate evidence that one or several of those persons are not in one of the exclusion situations referred to in points (c) to (f) of paragraph 1;

- (c) appropriate evidence that natural or legal persons that assume unlimited liability for the debts of that candidate, tenderer or entity are not in an exclusion situation referred to in point (a) or (b) of paragraph 1.

12. The contracting authority may also apply paragraphs 1 to 11 to a subcontractor. In such a case, the contracting authority shall require that a candidate or tenderer replaces a subcontractor or an entity on whose capacity the candidate or tenderer intends to rely, which is in an exclusion situation.

13. In order to ensure a deterrent effect, the contracting authority may, having regard, where applicable, to the recommendation of the panel referred to in Article 108, impose a financial penalty on an economic operator who has attempted to obtain access to Union funds by participating or requesting to participate in a procurement procedure while being, without having declared it in accordance with paragraph 10 of this Article, in one of the following exclusion situations:

- (a) regarding the situations referred to in points (c), (d), (e) and (f) of paragraph 1 of this Article, as an alternative to a decision to exclude the economic operator, where such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article;
- (b) regarding the situations referred to in points (c), (d) and (e) of paragraph 1 of this Article, in addition to an exclusion which is necessary to protect the Union's financial interests, where the economic operator has adopted a systemic and recurrent conduct with the intention to unduly obtain Union funds.

The amount of the financial penalty shall represent between 2 % and 10 % of the total value of the contract.

14. The duration of exclusion shall not exceed any of the following:

- (a) the duration, if any, set by the final judgement or the final administrative decision of a Member State;
- (b) five years for the cases referred to in point (d) of paragraph 1;
- (c) three years for the cases referred to in points (c), (e) and (f) of paragraph 1.

An economic operator shall be excluded as long as it is in one of the situations referred to in points (a) and (b) of paragraph 1.

15. The limitation period to exclude and/or impose financial penalties on an economic operator shall be five years calculated from any of the following:

- (a) the date of the conduct giving rise to exclusion or, in the case of continued or repeated acts, the date on which the conduct ceases, in the cases referred to in points (b), (c), (d) and (e) of paragraph 1 of this Article;
- (b) the date of the final judgment of a national jurisdiction or of the final administrative decision in the cases referred to in points (b), (c) and (d) of paragraph 1 of this Article.

The limitation period shall be interrupted by an act of the Commission, OLAF, the panel referred to in Article 108 or of any entity involved in the implementation of the budget, notified to the economic operator and

relating to investigations or judicial proceedings. A new limitation period shall begin to run on the day following the interruption.

For the purpose of point (f) of paragraph 1 of this Article, the limitation period to exclude and/or impose financial penalties on an economic operator provided for in Article 3 of Regulation (EC, Euratom) No 2988/95 shall apply.

Where the conduct of the economic operator qualifies under several of the grounds listed in paragraph 1 of this Article, the limitation period of the most serious of those grounds shall apply.

16. In order to, where necessary, reinforce the deterrent effect of the exclusion and/or financial penalty, the Commission shall, subject to a decision of the contracting authority, publish on its internet site the following information related to the exclusion and, where applicable, the financial penalty in the cases referred to in points (c), (d), (e) and (f) of paragraph 1 of this Article:

- (a) the name of the economic operator concerned;
- (b) the exclusion situation by reference to paragraph 1 of this Article;
- (c) the duration of the exclusion and/or the amount of the financial penalty.

Where the decision on the exclusion and/or financial penalty has been taken on the basis of a preliminary classification as referred to in paragraph 2 of this Article, the publication shall indicate that there is no final judgment or, where applicable, final administrative decision. In those cases, information about any appeals, their status and their outcome, as well as any revised decision of the contracting authority, shall be published without delay. Where a financial penalty has been imposed, the publication shall also indicate whether that penalty has been paid.

The decision to publish the information is taken by the contracting authority either following the relevant final judgment or, where applicable, final administrative decision, or following the recommendation of the panel referred to in Article 108, as the case may be. That decision shall take effect three months after its notification to the economic operator.

The information published shall be removed as soon as the exclusion has come to an end. In the case of a financial penalty, the publication shall be removed six months after payment of that penalty.

In accordance with Regulation (EC) No 45/2001, where personal data is concerned, the contracting authority shall inform the economic operator of its rights under the applicable data protection rules and of the procedures available for exercising those rights.

17. The information referred to in paragraph 16 of this Article shall not be published in any of the following circumstances:

- (a) where it is necessary to preserve the confidentiality of an investigation or of national judicial proceedings;
- (b) where publication would cause disproportionate damage to the economic operator concerned or would otherwise be disproportionate on the basis of the proportionality criteria set out in paragraph 3 of this Article and to the amount of the financial penalty;

- (c) where a natural person is concerned, unless the publication of personal data is exceptionally justified, *inter alia*, by the seriousness of the conduct or its impact on the Union's financial interests. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001.

18. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the content of the declaration referred to in paragraph 10 of this Article, on the evidence referred to in point (a) of paragraph 11 of this Article, that an economic operator is not in one of the exclusion situations, including by reference to the European Single Procurement Document as provided for in Article 59(2) of Directive 2014/24/EU, and on the situations in which the contracting authority may or may not require the submission of such a declaration or evidence.

[...]

Article 108

The early detection and exclusion system

1. Information exchanged within the early detection and exclusion system referred to in Article 105a of this Regulation shall be centralised in a database set up by the Commission and shall be managed in full compliance with the right to privacy and other rights provided for in Regulation (EC) No 45/2001 ('the database').

Information shall be entered in the database by the relevant contracting authority in the context of its ongoing procurement procedures and existing contracts after notifying the economic operator concerned. Such notification may be exceptionally deferred, where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist.

In accordance with Regulation (EC) No 45/2001, any economic operator subject to the early detection and exclusion system shall have the right to be informed of the data stored in the database upon its request to the Commission.

The information contained in the database shall be updated, where appropriate, following a rectification or an erasure or any modification of data. It shall only be published in accordance with Article 106(16) and (17) of this Regulation.

2. The early detection of risks threatening the Union's financial interests, as referred to in point (a) of Article 105a(1) of this Regulation, shall be based on the transmission of information to the Commission by any of the following:

- (a) OLAF in accordance with Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council ([26](#)) where an OLAF investigation in progress shows that it might be appropriate to take precautionary measures to protect the Union's financial interests, with due regard to the respect for procedural and fundamental rights, and to the protection of whistle-blowers;

- (b) an authorising officer of the Commission, of a European office set up by the Commission or of an executive agency in case of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract;
- (c) an institution, a European office or an agency other than those referred to in point (b) of this paragraph or a body in the cases of presumed grave professional misconduct, irregularity, fraud, corruption or serious breach of contract;
- (d) entities implementing the budget in accordance with Article 59 of this Regulation, in cases of detected fraud and/or irregularity, where required by sector-specific rules;
- (e) entities implementing the budget in accordance with Article 60 of this Regulation, in cases of detected fraud and/or irregularity.

3. Except where information is to be submitted in accordance with sector-specific rules, the information to be transmitted pursuant to paragraph 2 of this Article shall include:

- (a) the identification of the economic operator concerned;
- (b) a summary of the risks detected or the facts in question;
- (c) information that could assist the authorising officer in carrying out the verification referred to in paragraph 4 of this Article or in taking a decision on exclusion as referred to in Article 106(1) or (2), or a decision to impose a financial penalty as referred to in Article 106(13);
- (d) where applicable, any special measures necessary to ensure the confidentiality of the information transmitted, including measures for the safeguarding of evidence to protect the investigation or the national judicial proceedings.

4. The Commission shall transmit the information referred to in paragraph 3 of this Article without delay to its authorising officers and those of its executive agencies, all other institutions, bodies, European offices and agencies in order to allow them to carry out the necessary verification in respect of their ongoing procurement procedures and existing contracts.

In carrying out this verification, the authorising officer shall exercise his or her powers as foreseen under Article 66 and shall not go beyond what is foreseen in the terms and conditions of the procurement documents and contractual provisions.

The retention period for the information transmitted in accordance with paragraph 3 of this Article shall not exceed one year. If, during this period, the contracting authority requests the panel to issue a recommendation in an exclusion case, the retention period may be extended until such time as the contracting authority has taken a decision.

5. The contracting authority may take a decision to exclude and/or to impose a financial penalty and a decision to publish the related information only after having obtained a recommendation of the panel where such a decision is based on a preliminary classification as referred to in Article 106(2).

6. The panel shall be convened at the request of any contracting authority, as referred to in Article 117.

7. The panel shall be composed of:

- (a) a standing high-level independent chair;
- (b) two representatives of the Commission as the owner of the system, who shall express a joint position; and
- (c) one representative of the requesting contracting authority.

The composition of the panel shall ensure the appropriate legal and technical expertise.

The panel shall be assisted by a permanent secretariat, provided by the Commission, which shall ensure the continuous administration of the panel.

8. The following procedure shall apply before the panel:

- (a) the requesting contracting authority shall refer the case to the panel with the necessary information referred to in paragraph 3 of this Article, the facts and findings referred to in Article 106(2) and the alleged exclusion situation;
- (b) the panel shall notify the economic operator without delay of the facts in question and their preliminary classification in law, which may qualify as an exclusion situation referred to in points (c), (d), (e) and (f) of Article 106(1) and/or may lead to the imposition of a financial penalty. The panel shall simultaneously make the same notification to the other contracting authorities;
- (c) before adopting any recommendation, the panel shall give the economic operator and the notified contracting authorities the opportunity to submit observations. The economic operator and the notified contracting authorities shall have at least 15 days to submit their observations;
- (d) in the cases referred to in points (d) and (f) of Article 106(1), the notification referred to in point (b) of this paragraph and the opportunity referred to in point (c) of this paragraph may be exceptionally deferred where there are compelling legitimate grounds to preserve the confidentiality of an investigation or of national judicial proceedings, until such compelling legitimate grounds to preserve the confidentiality cease to exist;
- (e) where the request of the contracting authority is based, inter alia, on the information provided by OLAF, that Office shall cooperate with the panel in accordance with Regulation (EU, Euratom) No 883/2013, with due regard to the respect for procedural and fundamental rights, and to the protection of whistle-blowers;
- (f) the panel shall adopt its recommendation within 45 days from the receipt of the request of the contracting authority. Where the panel requests additional information from the economic operator, that period shall be extended by up to 15 days. In exceptional and duly justified cases, the panel may further extend the period to adopt its recommendation by up to one month. Where the economic operator fails to submit its observations or supply requested information within the time limit specified, the panel may proceed with the adoption of its recommendation.

9. The recommendation of the panel to exclude and/or impose a financial penalty shall contain, where applicable, the following elements:

- (a) the facts or findings referred to in Article 106(2) and their preliminary classification in law;

- (b) an assessment of the need to impose a financial penalty and its amount;
- (c) an assessment of the need to exclude the economic operator concerned and, in that case, the suggested duration of such an exclusion;
- (d) an assessment of the need to publish the information related to the economic operator who is excluded and/or subject to a financial penalty;
- (e) an assessment of remedial measures taken by the economic operator, if any.

Where the contracting authority envisages taking a more severe decision than what has been recommended by the panel, it shall ensure that such a decision is taken with due respect for the right to be heard and for the rules of personal data protection.

10. The panel shall revise its recommendation during the exclusion period on request from the contracting authority in the cases referred to in Article 106(9) or following the notification of a final judgment or a final administrative decision establishing the grounds for exclusion where such a judgment or decision does not set the duration of the exclusion, as referred to in second subparagraph of Article 106(2).

The panel shall notify the requesting contracting authority without delay of its revised recommendation, following which the contracting authority shall review its decision.

11. The Court of Justice of the European Union shall have unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed.

12. All entities participating in the implementation of the budget in accordance with Article 58 shall be granted access by the Commission to the information on exclusion decisions pursuant to Article 106 to enable them to verify whether there is an exclusion in the system with a view to taking this information into account, as appropriate and on their own responsibility, when awarding contracts in the implementation of the budget.

13. As part of the annual report of the Commission to the European Parliament and to the Council, as referred to in Article 325(5) TFEU, the Commission shall provide aggregate information on the decisions taken by the contracting authorities under Articles 105a to 108 of this Regulation. That report shall also provide further information on any decisions taken by the contracting authorities pursuant to point (b) of Article 106(7) of this Regulation and Article 106(17) of this Regulation and on any decisions by the contracting authorities to deviate from the recommendation of the panel pursuant to the third subparagraph of Article 105a(2) of this Regulation.

The information referred to in the first subparagraph of this paragraph shall be provided with due regard to confidentiality requirements and shall, in particular, not allow for the identification of the economic operator concerned.

14. The Commission shall be empowered to adopt delegated acts in accordance with Article 210 concerning detailed rules on the Union's system for the protection of the Union's financial interests, including its database and its standardised procedures, on the organisation and composition of the panel, on the appointment and

the independence of the chair, and on the prevention and management of conflicts of interest of the chair and of the members of the panel.