

BALTISCH-DEUTSCHES HOCHSCHULKONTOR  
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PRACTICAL CASE-SOLVING IN EUROPEAN LAW

**Case 4**  
(facts of the case)

For several months, the European Union is affected by violent transnational mass protests against its economic and social policy. Some protests cause serious traffic obstructions that complicate travelling in the Union. Finally the Council issues a regulation that obliges the police authorities in the member states to prohibit and dissolve immediately all demonstrations on EU topics that are accompanied by any illegal acts, if they are capable, directly or indirectly, to hinder the free circulation of goods and persons in the Union, and to prosecute the involved persons. The regulation does not invoke any specific legal basis. Before taking the decision, the Council consults the European Parliament. The EP unanimously supports the proposed measure and urges the Council to adopt it in the most uncomplicated way without losing time.

In the media, several organisations of the civil society have criticised the regulation as "illegal under all aspects". Now your local member of the European Parliament asks for your opinion:

Please examine the legality of the regulation!

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

**Case 4**

(discussion of the case)

**SUBJECTS:** Legality of legal acts of the European Union (requirements of legality - grounds of review).

**OUTLINE OF THE CASE SOLUTION:**

The regulation of the Council is legal if it meets all the requirements of legality that apply to the legal acts of the European Union, resulting from the higher-ranking primary law (or, in some cases, from higher-ranking secondary law). These requirements can be classified into four categories, following the structure laid out in art. 263 sub-sect. 2 FEU Treaty<sup>1</sup>. According to this provision, an action for annulment can be based on the "grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to its application, or misuse of powers". These grounds of review represent the elements of legality and their specific collocation in Union law.

**A. Competence**

The regulation might be illegal for lack of competence. According to the principle of specific attribution of powers (or "principle of conferral", see art. 5(1, 2) EU Treaty<sup>2</sup>), the Union shall act within the limits of the powers specifically conferred upon it in the Treaties. Within the Union, the same applies to the individual institutions (see art. 13 II EU Treaty). In the case under consideration, the objective of the regulation is to safeguard public security and to ensure criminal prosecution, thereby protecting the free circulation of goods and persons in the Union. With regard to the main emphasis, the regulation does not represent a measure in the fields of transport (art. 90 et seq. FEU Treaty<sup>3</sup>) or internal market law (art. 26 et seq. FEU Treaty<sup>4</sup>) but of police and criminal law (see the provisions on judicial cooperation in criminal matters, art. 82 et seq. FEU Treaty, and on police cooperation, art. 87 et seq. EU Treaty). Consequently, only art. 82(1, 2), 83(1, 2), 87(2, 3) EU Treaty may be the legal basis for this measure. However, these provisions only confer very limited competences to the Union, which are not relevant in the given case. The competences under art. 82 concern cooperation and minimum rules in the field of proceedings in criminal matters. The competences under art. 83(1) concern minimum rules on the definition of criminal offences and sanctions in the areas of "particularly serious crimes" - but not in case of problems related to traffic obstructions caused by political demonstrations. The competences under art. 83(2) concern the approximation of criminal laws and regulations of the member states if it proves essential to ensure the effective implementation of Union policies in areas, which have been subject to harmonisation measures. They also do not allow a general harmonisation of criminal law in matters of political demonstrations. The competences in art. 87 concern the coordination and cooperation of police institutions but not the right to demonstrate. Moreover, as the German Federal Constitutional Court has reasoned convincingly in its Lisbon judgement from June 30, 2009<sup>5</sup>, the competences in the field of criminal law have to

<sup>1</sup> Formerly (until the Treaty of Lisbon came into force) art. 230 sub-sect. 2 EC Treaty.

<sup>2</sup> Formerly art. 5 EU Treaty, 5 sub-sect. 1 EC Treaty.

<sup>3</sup> Formerly art. 70 et seq. EC Treaty.

<sup>4</sup> Formerly art. 14 et seq., 23 et seq. EC Treaty.

<sup>5</sup> Federal Constitutional Court, 30.06.2009, 2 BvE 2/08 and others, no. 352 ff., English translation at [www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

be interpreted restrictively. Even under the Treaty of Lisbon, *police and criminal law are still core competences of the member states*.

Furthermore, concerning the competences under art. 82(2), 83 FEU Treaty, the Council has chosen the *wrong legal instrument*. These provisions only allow directives but not regulations. If the Council intended to act on the basis of these provisions, it has acted *ultra vires*.

Conclusion: The regulation of the Council is illegal for lack of competence.

## B. No infringement of essential formal or procedural requirements

The regulation might also be illegal for infringement of essential formal or procedural requirements. Concerning this aspect, the wording of art. 267 sub-sect. 2 FEU Treaty is inconsistent in the various language versions. Following the French legal tradition, the French, Italian, Dutch and German original wordings only mention the essential formal requirements ("...formes substantielles", "...forme sostanziali", "...wezenlijke vormvoorschriften", "...wesentlicher Formvorschriften"). The later English translation points out to the "...procedural requirements". There is, however, a consensus, based on historical and teleological interpretation that, with regard to the rule of law in the European Union, this clause actually refers to both kinds of requirements.<sup>6</sup> In the case under consideration, there is reason to discuss both categories:

### I. No infringement of essential formal requirements

The regulation might be illegal for infringement of formal requirements, because it does not invoke a specific legal basis. With regard to the principle of specific attribution of powers (= principle of conferral), every legal act must be based on a *specific* competence norm. It is crucial for the understanding - and judicial review - of the legal act to know the exact competence norm on which the act is based. According to art. 296(2) FEU Treaty<sup>7</sup>, regulations must state the reasons on which they are based. The information about the chosen legal basis is an essential element of this statement.<sup>8</sup> It is in particular essential in the case under consideration, given that the legal act pursues objectives of police and criminal law but with special regard to objectives of internal market law. Therefore, the missing indication of the legal basis represents an infringement of an essential formal requirement.

### II. No infringement of essential procedural requirements

There is also an infringement of an essential procedural requirement, since the regulation has not been adopted by the Council and the European Parliament in a co-decision process but just by the Council, after consultation of the European Parliament. All the various legal bases in the fields of judicial and police cooperation mentioned above require that the European Parliament and the Council act in accordance with the ordinary legislative procedure under 294 FEU Treaty (the former co-decision procedure under art. 251 EC Treaty).<sup>9</sup> The mere consultation of the European Parliament does not comply with the complex requirements of this procedure. In this context, it is irrelevant that the European Parliament unanimously supports the proposed measure and urges the Council to adopt it in the most uncomplicated way without losing time, since the requirements of this formalised procedure are essential and cannot be circumvented or evaded.

Conclusion: The regulation of the Council is also illegal for infringement of essential formal and procedural requirements.

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<sup>6</sup> See, as examples, *Haratsch/Koenig/Pechstein*, *Europarecht*, 6<sup>th</sup> edition 2009, no. 467; *Bieber/Epiney/Haag*, *Die Europäische Union*, 8<sup>th</sup> edition 2009, § 7 no. 7; *Ehricke*, in: Streinz (editor), *EUV/EGV*, 2003, art. 230 EC Treaty, no. 73; *Gaitanides*, in: von der Groeben/Schwarze (editors), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, volume 4, 6<sup>th</sup> edition 2004, art. 230 EC Treaty, no. 122.

<sup>7</sup> Formerly art. 253 EC Treaty.

<sup>8</sup> See ECJ, case 158/80, *Rewe*; case 45/86, *Commission v. Council*.

<sup>9</sup> Only a measure based on art. 87(3) can be taken by the Council after consulting the European Parliament. However, in this case, which is not relevant here, the Council must act unanimously.

### C. No infringement of substantive law

The regulation might also be illegal for an infringement of substantive law [= material law], that means of higher-ranking legal norms that limit the potential contents of legal acts (Treaty provisions, general principles of law, fundamental rights, international treaties concluded by the European Community etc.).<sup>10</sup> The regulation has a severe impact of the right of the citizens in the member states to demonstrate, since it obliges the police authorities to prohibit and dissolve immediately all demonstrations on EU topics accompanied by illegal acts, if they are capable - even indirectly - to hinder the free circulation of goods and persons in the Union. Thereby, it encroaches on the fundamental right to freedom of assembly that has been recognized as a general principle of Union law in the jurisprudence of the European Court of Justice<sup>11</sup> and is now guaranteed in art. 12 of the Charter of Fundamental Rights of the European Union (read together with art. 6(1) EU Treaty). Such encroachments can be justified by the fundamental rights' limits, which derive from art. 11(2) ECHR, since the right under art. 12 of the Charter corresponds to that under art. 11 ECHR and, therefore, according to art. 52(3) of the Charter, has the same meaning and scope. Thus, the right to assembly can be restricted in the interest of *public safety* or for the *prevention of disorder*. In the case under consideration, disorder is provoked by the illegal acts committed at the demonstrations and by the obstacles to the free circulation of goods and persons in the internal market that are caused by the serious traffic obstructions accompanying them.<sup>12</sup>

The encroachment must comply, however, with the principle of proportionality as a "limit of limits". According to art. 11(2) ECHR, only restrictions "necessary in a democratic society" are justified. This requires that they are suitable, necessary and proportional in the strict sense. It is already questionable if the categorical order to prohibit and dissolve demonstrations accompanied by illegal acts is *suitable* to protect public safety and free circulation within the Union, since such police measures carry the risk to provoke strongly violent resistance that would represent a much more dangerous disorder. For this reason, the police laws of the member states confer a wide discretionary power to the police authorities that allows also for de-escalation strategies. Furthermore, it is *not necessary*, since in many cases there will be less intrusive acts of intervention that are equally conducive. In order to protect free circulation in the Union, it would be sufficient to oblige the police authorities to impose a marching route on the demonstrators that does not carry the risk of traffic obstacles with international impact or to impose other appropriate restrictions. Finally, the measure is *not proportional in the strict sense* since the burden imposed is out of proportion to the aim in view. On the one hand, not every demonstration accompanied by illegal acts represents a serious threat to public safety. At any demonstration, minor contraventions of laws (in particular of traffic law) are almost inevitable. Concerning free circulation in the Union, in the end traffic obstacles caused by demonstrations, even by mass demonstrations accompanied by illegal acts, can only have a minor impact. On the other hand, any prohibition and dissolution of a demonstration represents a serious restriction of an essential freedom in a democratic society. For these reasons, the encroachment does not comply with the principle of proportionality and therefore is not justified by the fundamental right's limits.

Conclusion: The regulation of the Council violates the fundamental right to freedom of assembly (art. 12 Charter of Fundamental Rights) and therefore is also illegal for infringement of substantive law.

### D. No misuse of powers

The regulation might also be illegal for misuse of powers, since it has the indirect effect to impede the manifestation of political criticism of the policies of the European Union. The Council is not allowed to misuse its competences in a way that affects the democratic process. However, with regard to its background in French legal tradition, the concept of misuse of power is interpreted narrowly. There is only a misuse of power if the legal act mainly pursues an objective other than specified (or even an illegal objective) or aims to evade a procedure specifically prescribed by the Treaty for dealing with the circum-

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<sup>10</sup> This is essentially meant by the reference to the "infringement of the Treaties or of any rule of law relating to their application" in art. 263 sub-sect. 2 FEU Treaty, given that all external and formal aspects (competence, formal requirements, procedural requirements) fall into the two categories discussed above.

<sup>11</sup> Cf. ECJ, case C-112/00, Schmidberger, no. 77 ff.

<sup>12</sup> Free circulation in the internal market represents an important public interest; see ECJ, case C-112/00, Schmidberger, no. 51 ff. (concerning the free movement of goods).

stances of the case.<sup>13</sup> Concerning the regulation of the Council, these grounds cannot be established with the necessary certitude on the basis of the facts of the case: The obligation to prohibit and dissolve demonstrations on EU topics is limited to those demonstrations that are accompanied by illegal acts and capable to hinder the free circulation of goods and persons in the Union. Its main objective is apparently not to manipulate the democratic process but to safeguard public security and free circulation in the Union. The regulation is disproportional and may be politically scandalising but does not represent a misuse of powers.

General conclusion: The regulation of the Council suffers from lack of competence, infringement of essential formal and procedural requirements and infringement of substantive law. It is illegal.

### **NOTE:**

The Treaty of Lisbon has replaced the former Title VI EU Treaty by new provisions on the judicial cooperation in criminal matters and on police cooperation that follow new concepts (see Title V Chapters 4 and 5, art. 82 et seq., 87 et seq. FEU Treaty).

### **FURTHER READING:**

On the elements of the legality of legal acts of the European Union, as reflected by the grounds of review listed in art. 267 sub-sect. 2 FEU Treaty, see *Hartley*, *European Community Law*, 6<sup>th</sup> edition 2007, p. 398 ff.; *Craig/de Búrca*, *EU Law*, 4<sup>th</sup> edition 2007, p. 538 ff.; *Gaitanides*, in: von der Groeben/Schwarze (editors), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, volume 4, 6<sup>th</sup> edition 2004, art. 230 EC Treaty, no. 103 ff.

More informations on this course at [www.lanet.lv/~tschmit1](http://www.lanet.lv/~tschmit1). For any questions, suggestions and criticism please contact me via e-mail at [tschmit1@gwdg.de](mailto:tschmit1@gwdg.de).

(Datei: Case3 (Cases-EULaw))

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<sup>13</sup> Cf. (with further references) *Cremer*, in: Calliess/Ruffert (editors), *EUV/EGV*, 2<sup>nd</sup> edition 2002, art. 230 EC Treaty, no. 77; *Ehricke*, in: Streinz (editor), *EUV/EGV*, 2003, art. 230 EC Treaty, no. 79; *Craig/de Búrca*, *EU Law*, 4<sup>th</sup> edition 2007, p. 568; *Hartley*, *The foundations of European Community law*, 6<sup>th</sup> edition 2007, p. 403.

- introductory sentence

## A. Competence

- art. 82(1,2), 83(1,2), 87(2, 3) FEU Treaty as legal basis?
- use of the right legal instrument?

## B. No infringement of essential formal or procedural requirements

### *I. No infringement of essential formal requirements*

- art. 296(2) FEU Treaty

### *II. No infringement of essential procedural requirements*

- here: to act in accordance with the ordinary legislative procedure

## C. No infringement of substantive law

- violation of the freedom of assembly (art. 12 Charter of Fundamental Rights, read together with art. 6(1) EU Treaty)
  - justification of the encroachment by the freedom's right's limit (art. 52(3) Charter read together with art. 11(2) ECHR)?
  - in particular: proportionality of the encroachment?
    - legitimate aim
    - suitability
    - necessity
    - proportionality (in its strict sense)

## D. No misuse of powers