

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Diagram 1

The legality of legal acts of the European Union

- = no incompatibility with primary law or higher-ranking secondary law
- the examination follows the categorisation of the grounds of review for an action for annulment in art. 263 sub-sect. 2 FEU Treaty¹

A. No lack of competence

I. Competence of the Union as acting organisation [no "incompétence absolue"]

- 1) Exercise of an attributed competence
 - existence of a *specific legal basis*, fulfilment of its requirements, acting within the limits of the conferred power
 - in particular: no use of legal instruments not provided for in the legal basis² [no "incompétence matérielle"]
- 2) No illegitimate exercise of the competence
 - compliance with the principle of subsidiarity (art. 5(1, 3) EU Treaty³)
 - compliance with the principle of proportionality (art. 5(1, 4) EU Treaty⁴)
- 3) Acting within the territorial jurisdiction of the European Union [no "incompétence territoriale"]

II Competence of the acting institution [no "incompétence relative"]

B. No infringement of essential formal or procedural requirements

- = "infringement of an essential procedural requirement" / "violation des formes substantielles"⁵

I. No infringement of essential formal requirements

- 1) Adequate *statement of reasons* (art. 296 sub-sect. 2 FEU Treaty⁶)
 - in particular specification of the legal basis
- 2) Other formal attributes required by primary or secondary law
 - e.g. information on legal remedies

II. No infringement of essential procedural requirements

- 1) Decision-making in accordance with the standard procedure referred to in the legal basis
 - mostly the ordinary legislative procedure (art. 294 FEU Treaty)⁷
 - a choice between several legal bases must rest on objective factors amenable to judicial review
- 2) Participation of institutions and member states as specified in the legal basis
 - in particular the often required *proposal from the Commission*
 - in particular the *consultation* of the European Parliament, the Committee of the Regions or the Economic and Social Committee
- 3) Voting with the majority specified in the legal basis
- 4) Hearing of concerned natural or legal persons

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

² Note: If the competence norm prescribes a certain legal form (type) of the act (e.g. directive), the use of any other form (e.g. regulation) is *ultra vires*. If it does not, the legal form must be selected on a case-by-case basis in compliance with the principle of proportionality (art. 296 sub-sect. 1 FEU Treaty).

³ Formerly art. 2 sub-sect. 2 EU Treaty, 5 sub-sect. 2 EC Treaty.

⁴ Formerly art. 5 sub-sect. 3 EC Treaty.

⁵ The Treaty of Lisbon has not corrected the discrepancy between the English translation and the wording in the other languages.

⁶ Formerly art. 253 EC Treaty.

⁷ Formerly the co-decision procedure (art. 251 EC Treaty).

C. No infringement of substantive law

- = "infringement of the Treaties or of any rule of law relating to their application"⁸

I. No violation of substantive law specific to the concerned policy

- 1) No violation of specific Treaty provisions
 - compliance with *special policy objectives*, other guiding principles and restrictions on content
- 2) No violation of specific secondary law
 - compliance also with international treaties (but insofar limited judicial review)

II. No violation of general requirements of substantive law

- 1) Compliance with the *fundamental values* of the European Union (art. 2 EU Treaty⁹)
- 2) Compliance with the *general objectives* of the European Union (art. 3 EU Treaty¹⁰)
- 3) No violation of other rules and principles in the Treaties
- 4) No violation of *general principles of Union law*
 - in particular compliance with the principles deriving from the rule of law

III. In particular no violation of the rights of the citizens of the Union

- 1) No violation of the economic *fundamental freedoms*
- 2) No violation of *fundamental rights* as guaranteed in the *Charter of Fundamental Rights* (cf. 6(1) EU Treaty)¹¹
- 3) No violation of the rights deriving from the citizenship of the Union (art. 20 et seq. FEU Treaty¹²)
- 4) No prohibited discrimination (cf. in particular art. 18 FEU Treaty¹³)

D. No misuse of powers

- = "détournement de pouvoir"

I. No pursuit of an objective other than specified

- power must not be exercised exclusively or mainly for another purpose
- in particular no hidden pursuit of illegal objectives

II. No evasion of a procedure specifically prescribed for dealing with the circumstances of the case

- power must not be exercised exclusively or mainly for this purpose

Note: Such an examination scheme may serve as a "check list" for the preparatory solving of the case on the basis of a draft outline preceding the writing down of the case solution. Avoid, however, any stereotype trudging through the schemes in the final text!

Further reading: *Hartley*, European Community Law, 6th edition 2007, p. 398 ff.; *Craig/de Búrca*, EU Law, 4th 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, 6th edition 2004, art. 230 EC Treaty, no. 103 ff.

(Datei: Diagram1 (Cases-EULaw))

⁸ Note: Since all external and formal aspects fall into the first two categories, this category is practically limited to infringements of substantial law.

⁹ See for the past art. 6(1) EU Treaty.

¹⁰ See for the past art. 2 EU Treaty, 2 EC Treaty.

¹¹ See also the old fundamental rights that have been discovered as general principles of Union law by the European Court of Justice. They will stay in force (cf. art. 6(3) EU Treaty), but only as a subsidiary source of protection that must not interfere with the rights guaranteed in the Charter.

¹² Formerly art. 18 et seq. EC Treaty.

¹³ Formerly art. 12 EC Treaty.