The coverage of direct actions varies greatly from course to course and the wide variety of potential questions reflects this. You may be tested on your knowledge of procedure and your ability to evaluate this, for instance in relation to enforcement actions under Article 258 TFEU. You may be asked to analyse developing case law, for instance concerning the difficulties for individuals in establishing standing under Articles 263 and 265 TFEU or the right to damages against the EU under Article 340 TFEU. In compiling problem questions, examiners often draw inspiration from the facts of cases, so be familiar with these.
As well as actions brought indirectly to the Court of Justice through preliminary references from national courts under Article 267, the TFEU also provides for actions that are brought directly before the Court.

Under Articles 258 and 259 TFEU (ex Articles 226 and 227 EC), respectively, the European Commission and Member States may bring enforcement proceedings against a Member State in breach of Treaty obligations. Article 260 TFEU (ex Article 228 EC) requires compliance with the Court’s judgment.

Article 263 TFEU (ex Article 230 EC) concerns judicial review of EU acts. The outcome of a successful action is annulment.

Article 265 TFEU (ex Article 232 EC) provides for actions against the EU institutions for failure to act.

Article 277 TFEU (ex Article 241 EC) may be invoked in the course of other proceedings, for instance in an action under Article 263, to challenge the underlying regulation on which a contested act is based.

Under Article 340 TFEU (ex Article 288 EC) individuals who have suffered loss as a result of EU action can recover damages.

The Treaty of Lisbon amended the EC Treaty and renamed it the ‘Treaty on the Functioning of the European Union’ (TFEU), replaced all references to ‘European Community’ and ‘Community law’ with ‘EU’ and ‘EU law’ respectively, and changed the numbering of Treaty articles. Note that pre-Lisbon case law uses the previous terminology and Treaty numbering. This chapter uses the term ‘EU’ and the new Treaty numbering throughout, placed in brackets where they appear in the case summaries.
Overview: Article 263 TFEU

Challenging EU law: non-privileged applicants

Court of Justice has jurisdiction to review the legality of acts of the institutions

Any natural or legal person ('non-privileged applicant') may challenge:
- an act addressed to the applicant
- an act addressed to another person which is of direct and individual concern to the applicant
- a regulatory act which is of direct concern to the applicant and which does not entail implementing measures

Locus standi: non-privileged applicants

An act addressed to another person
Applicant must show both direct and individual concern

A regulatory act which is of direct concern to the applicant and which does not entail implementing measures

Direct concern
A direct link or an unbroken chain of causation between the EU measure and the damage suffered:
Member State has no discretion in implementation (Municipality of Differdange)

Individual concern
The decision affects the applicant 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons' (Plaumann)

'Closed class' test:
an applicant is individually concerned if it was a member of class of persons that was fixed and ascertainable at the date the measure was passed (Paraiki-Patraiki)

Reform:
Court of Justice rejects less restrictive test (UPA, Jégo-Quéré)

Grounds for annulment
- Lack of competence (eg Germany v European Parliament and Council (Tobacco Advertising))
- Infringement of an essential procedural requirement (eg Roquette Frères)
- Infringement of the Treaty or of any rule of law relating to its application (eg Transocean Marine Paint)
- Misuse of powers (eg UK v Council)

* (see page 69)
Enforcement actions against Member States (Articles 258–260 TFEU)

**Enforcement actions against Member States (Articles 258–260 TFEU)**

Member States have a duty, under Article 4 TEU, to fulfil their EU obligations. Articles 258–260 provide enforcement mechanisms comprising proceedings against Member States in breach of EU law, brought by the European Commission (Article 258) or another Member State (Article 259) directly in the Court of Justice. Article 260 complements these provisions by requiring Member States to comply with the Court’s judgment.

Originally, Article 258 was intended to be the principal mechanism for enforcement of EU law. However, since the development of the doctrines of direct effect, indirect effect, and state liability, providing for the enforcement of EU law in the national court at the suit of individuals, direct actions in the Court of Justice form only part of the system of ‘dual enforcement’ of EU law.

**Enforcement actions by the Commission (Article 258 TFEU)**

**What constitutes a breach?**

Whilst the Treaty provides no definition, the Court of Justice has held that breaches include not only acts but also failures to act. Commonly, infringements comprise failure to implement directives or to implement them correctly, or direct breaches of the Treaty.

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**Commission v Belgium (Case 1/86) [1987] ECR 2797**

In proceedings brought by the Commission under [Article 258 TFEU], the Court of Justice found that Belgium had not met its Treaty obligations by failing to implement, by the deadline, a directive concerning water pollution.

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**Spanish Strawberries** concerned a failure to act.

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**Commission v France (Spanish Strawberries) (Case C-265/95) [1997] ECR I-6959**

For over a decade, the French authorities had failed to prevent violent protests by French farmers directed against agricultural products being imported from other Member States. In [Article 258] proceedings, the Court of Justice held that, in failing to take adequate preventative action, France had breached its obligations under Article 10 EC (now Article 4 TEU).
Identifying breaches

The Commission discovers suspected breaches through its own investigations, complaints from private parties, or reports from Member States. Individual citizens or companies affected by a breach cannot compel the Commission to take action.

*Star Fruit Company v Commission (Case 247/87) [1989] ECR 291*

Star Fruit had complained to the Commission about breaches of [EU] law by France relating to the organization of the French banana market and now brought proceedings against the Commission under [Article 265 TFEU] (considered below) for failure to act. The Court of Justice held that the Commission has a discretion, not a duty, to commence proceedings. Individuals cannot require the Commission to take action.

Looking for extra marks?

The discretion may be criticized as diluting the effectiveness of EU law enforcement.

The Commission is not obliged to keep the complainant informed of the progress of any action that it may be taking, though in a 2002 Communication, it undertook to keep complainants more closely informed.

Member States as defendants

Although national governments are the defendants in Article 258 proceedings, an action may be brought in respect of the failure of any state agency, whether executive, legislative or judicial.

*Commission v Belgium (Case 77/69) [1970] ECR 237*

Belgium maintained that it was not responsible for its Parliament’s failure, through lack of time, to amend national tax legislation, which violated [EU] law. The Court of Justice held that Member States are responsible ‘whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution’.

Procedure

*Administrative stage*

Article 258 provides that ‘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’. The administrative
Enforcement actions by the Commission (Article 258 TFEU)

Phase incorporates the required elements: the Member State concerned must be given the opportunity to submit its observations; if the Commission is not satisfied, it delivers a reasoned opinion.

The Commission’s practice is first to raise the matter informally with the Member State. If not satisfied with the response, it commences the formal procedure.

Formal proceedings begin with the ‘letter of notice’ to the Member State setting out the Commission’s reasons for suspecting an infringement. The Member State must be given a reasonable period of time to respond. Typically, there follow discussions between the Commission and the Member State, with a view to negotiating a settlement. If this proves impossible, the Commission moves to the next phase, the reasoned opinion.

The reasoned opinion sets out precisely the grounds of complaint and specifies a time limit within which the Member State is required to take action to end the infringement. In determining whether the deadline is reasonable, the Court of Justice takes account of all the circumstances.

Commission v France (Case C-1/00) [2001] ECR I-9989

France had continued to ban beef imports from the UK, despite the relaxation of the export restrictions imposed on the UK by the EU during the BSE (‘mad cow disease’) crisis. The Commission took action under [Article 258]. France complained that it had been given insufficient time to respond to the Commission’s opinion. The Court of Justice held that a very short period would be justified where, as here, the Member State is already fully aware of the Commission’s views.

Measures taken by the Commission during the administrative stage, including the letter of notice and reasoned opinion, have no binding force. They cannot be challenged under Article 263 TFEU (considered below).

Judicial stage

Once the time limit for a response to the reasoned opinion has passed, if the matter is not settled the Commission may commence proceedings in the Court of Justice. Here, the Commission cannot rely on matters not raised in the reasoned opinion. Interested Member States, but not individuals, may intervene in the proceedings.

Revision tip
Questions may require consideration of the procedure – be familiar with this.

Defences

The Court of Justice has generally been dismissive of defences raised by Member States, save for those based on a denial of the alleged facts or of the obligation.
Force majeure

‘Force majeure’ was defined in McNicholl v Ministry of Agriculture (Case 296/86) as abnormal and unforeseeable circumstances, beyond the control of the person committing the breach, the consequences of which could not have been avoided through the exercise of all due care. Force majeure may provide a defence.

**Commission v Italy (Re Transport Statistics) (Case 101/84) [1985] ECR 2629**

The Court of Justice accepted that the bombing of the data-processing centre involved in the implementation of a directive could amount to force majeure and would provide a defence to non-implementation. However, a delay of over four years in implementing was too long and inexcusable.

Political or economic difficulties

This defence is unlikely to succeed.

**Commission v UK (Tachographs) (Case 128/78) [1979] ECR 419**

The Court of Justice rejected the UK’s defence to its non-implementation of [an EU] measure requiring the fitting of tachographs in lorries on the basis that this would be costly and cause difficulties with trade unions.

Reciprocity

The Court of Justice has rejected the defence of reciprocity – that non-compliance is justified because other Member States have not complied or an EU institution has failed to act.

**Commission v Belgium and Luxembourg (Cases 90–91/63) [1964] ECR 625**

The Court rejected the argument of the two governments that their actions, allegedly breaching Article 25 EC (now Article 30 TFEU), would have been lawful had the Council adopted measures which it had power to enact.

**Commission v France (Case 232/78) [1979] ECR 2729**

It was no defence that another Member State had failed to fulfil a similar obligation or that the Commission had not brought proceedings against that state.

Actual compliance

Where a national provision conflicts with EU law, it is no defence that the provision is not applied in practice or that there is administrative compliance with EU law.
Enforcement actions by the Commission (Article 258 TFEU)

*Commission v France (Case 167/73) [1974] ECR 359*

French provisions on employment in the merchant fleet were discriminatory and violated [EU] law. The Court rejected France’s argument that the provisions were not enforced in practice.

**Revision tip**

Get to grips with the cases on defences – you may need to apply these to facts (problem questions) or discuss them (essay questions).

**Interim measures**

It can take many months to reach a resolution, during which there may be continuing harm to affected individuals. Articles 278 and 279 TFEU (ex Articles 242 and 243 EC), respectively, provide for suspension orders and orders for interim measures.

*Commission v UK (Case C-246/89R) [1989] ECR 3125*

The Court of Justice ordered the suspension of provisions of the UK Merchant Shipping Act 1988, which the Commission claimed infringed [EU] law, pending judgment in the main [Article 258] enforcement proceedings.

**Effect of a judgment (Article 260 TFEU)**

Article 260 requires Member States to comply with the Court’s judgment. If the Commission considers that the state has not complied it may bring the case before the Court, after giving that state the opportunity to submit its observations. The Treaty on European Union amended Article 228 EC (now Article 260 TFEU) to allow the Commission to recommend an appropriate lump sum or penalty payment. The Court of Justice is not bound to follow this recommendation. It can set any level of penalty it wishes, with no upper limit, including a dual financial penalty, incorporating both a penalty payment levied in respect of each day (or other time period) of delay in complying with the judgment and a lump sum penalty (*Commission v France (Case C-304/02)*). Where, at the date of the judgment, a Member State has complied with its obligations, the imposition of a penalty payment will not be necessary, though the Court of Justice may order a lump sum payment where the breach was serious and has persisted for a considerable period of time (*Commission v France (Case C-121/07)*).

Article 260(3) TFEU, introduced by the Treaty of Lisbon, provides that when the Commission brings a case before the Court pursuant to Article 258 on the grounds that a Member State has failed to fulfil its obligation to notify measures transposing a directive, it may specify the amount of 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 there is an infringement it may impose a lump sum or penalty payment not exceeding the specified amount, taking effect on a date specified by the Court.
Enforcement actions brought by Member States (Article 259 TFEU)

A Member State may bring an action against another Member State which it considers has failed to fulfil EU obligations. First, the complaint must be brought before the Commission which, before any Court action is taken, asks for submissions from both states, delivers a reasoned opinion, and seeks a settlement. Sometimes, the Commission takes over the action, as it did in Commission v France (Case 1/00). Article 259 actions are rare, as Member States generally prefer, for political reasons, to ask the Commission to act under Article 258.

Action for annulment: Article 263 TFEU

Whereas Articles 258 and 259 concern proceedings against Member States for alleged breaches of EU law, Article 263 provides for judicial review of acts adopted by the EU institutions, through direct actions in the Court of Justice. Actions brought by individuals are heard, at first instance, in the General Court (formerly the Court of First Instance). Applicants may challenge acts of the institutions 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’. If the challenge is successful, the act is annulled.

Annulment actions may be brought by Member States, the EU institutions (against other EU institutions), and individuals. Member States, the European Parliament, the Council, and the Commission have automatic right of access to the Court in such cases. By contrast, individuals’ right of access – their ‘standing’ or ‘locus standi’ to bring Article 263 proceedings – is limited. These limitations have given rise to widespread criticism and to calls for reform of this area of EU law.

Revision tip

Locus standi (standing) is the most contentious element of Article 263. Questions frequently focus on this aspect.

Acts that may be challenged

Article 263 allows the Court of Justice to review the legality of acts of the EU institutions, other than recommendations or opinions, which are ‘intended to produce legal effects vis-à-vis third parties’. The Treaty of Lisbon extended the category of reviewable acts in Article 263 to include the acts of ‘bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties’. Whilst reviewable acts clearly include legally binding acts, namely regulations, directives, and decisions, other kinds of act may also be susceptible to judicial review. For instance, the Court of Justice held that a Council resolution concerning the European Road Transport Agreement could be challenged (Commission v Council (ERTA) (Case 22/70)).
In *IBM v Commission* (Case 60/81) the Court defined a reviewable act as ‘any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’.

Unfortunately, whether a particular act results in such a change is not always easily ascertained. The Court’s conclusions have sometimes been controversial, as may be illustrated by *IBM* and *SFEI*. In *IBM*, the Court refused to allow IBM to challenge a letter from the Commission setting out its intention to institute competition proceedings and the basis of its case. By contrast, a letter from the Commission stating that it intended to close its file on a complaint alleging breaches of competition law was held to be susceptible to judicial review (*SFEI v Commission* (Case C-39/93P)).

**Time limit**

Actions must be brought within two months of publication of the measure or its notification to the applicant or, in the absence of either, the date on which it came to the applicant’s knowledge.

**Why seek judicial review?**

Judicial review provides applicants with the means to challenge EU acts which they believe have impacted on them adversely. For instance, in *Commission v Council (ERTA)* the Commission challenged the Council’s power to participate in negotiation and conclusion of the European Road Transport Agreement, claiming that it, and not the Council, held the necessary powers. Typically, individuals seek to challenge EU acts which affect their business interests. The fishing company Jégo-Quéré, for instance, sought to challenge a regulation on the preservation of hake stocks which prohibited the use of small-meshed fishing nets (*Commission v Jégo-Quéré* (Case C-263/02 P)). Other challenges have concerned the withdrawal of subsidies or import licences or the imposition of import quotas.

**Revision tip**

Consider the cases carefully, thinking about the kinds of situations in which individuals have sought to challenge EU acts.

**Standing: who may bring Article 263 proceedings?**

Standing or *locus standi*, meaning the right to bring a legal challenge before the Court, depends upon the prospective applicant’s status. There are three classes of applicants – privileged, semi-privileged, and non-privileged.
Privileged and semi-privileged applicants

Privileged applicants, comprising Member States, the Council, Commission, and Parliament, do not need to establish any particular interest in the legality of EU acts. They have an unlimited, automatic right to bring Article 263 proceedings. Semi-privileged applicants, comprising the Court of Auditors, the European Central Bank, and the Committee of the Regions, have standing under Article 263 ‘for the purpose of protecting their prerogatives’, in other words when their interests are affected.

Non-privileged applicants

These comprise all other applicants, be they natural persons (including individuals in business), or legal persons (companies). Challenges by non-privileged applicants begin in the General Court, with appeal lying to the Court of Justice. Unlike privileged and semi-privileged applicants, non-privileged applicants’ right of access to the Court is severely limited.

Revision tip
Non-privileged applicants figure prominently in questions. Make sure you are confident about the principles applying to them.

Standing: non-privileged applicants

The Lisbon Treaty amended the provisions of Article 230 EC relating to the standing of non-privileged applicants.

Article 263 TFEU provides that:

Any natural or legal person may 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.

In other words a non-privileged applicant may challenge:

- an act addressed to the applicant
- an act addressed to another person which is of direct and individual concern to the applicant
- a regulatory act which is of direct concern to the applicant, and which does not entail implementing measures

‘An act addressed to that person’

With respect to acts addressed directly to the applicant, such as Commission decisions on competition law breaches addressed directly to companies, admissibility is unproblematic. Such measures may be challenged without restriction, provided they are brought within the
Action for annulment: Article 263 TFEU

Two-month time limit. Whilst the similar provision in Article 230 EC referred to a ‘decision’ addressed to the applicant, the position under the amended provision remains substantially unchanged, since acts addressed to individuals typically take the form of decisions.

‘An act addressed to another person’

‘An act addressed to another person’ clearly includes a decision addressed to another person (typically to a Member State or Member States). To challenge such a measure, the applicant must establish both direct and individual concern.

By contrast, the position regarding regulations is less clear. Previously, under Article 230 EC, in order to establish standing to challenge a regulation (in addition to the requirements for direct and individual concern), an applicant had to show that the measure was ‘a decision in the form of a regulation’. Although the Court of Justice addressed this provision in a number of cases, the precise scope of the ‘decision in disguise’ requirement remained uncertain. With the Lisbon Treaty amendments, this provision has been abandoned in its entirety. However, fresh uncertainty has been introduced by the new provision in Article 263 TFEU concerning ‘regulatory acts’.

‘A regulatory act which is of direct concern to the applicant, and which does not entail implementing measures’

Article 263 affords standing to a non-privileged applicant in respect of ‘a regulatory act which is of direct concern to the applicant, and which does not entail implementing measures’. Unfortunately, the Treaties do not define ‘regulatory act’, though the TFEU makes a distinction between ‘legislative acts’ (adopted by the Council and the European Parliament under legislative procedures) and ‘non-legislative acts’ (adopted by the Commission under delegated powers) (Articles 289–290 TFEU). If defined broadly, ‘regulatory act’ could include both legislative regulations and non-legislative regulations. Conversely, if defined narrowly, ‘regulatory act’ could well be confined to non-legislative regulations.

The broad definition of ‘regulatory act’ would result in a more liberal approach to standing for non-privileged applicants, since only direct concern would need to be established in relation to both legislative and non-legislative regulations, provided the regulation in question did not entail implementing measures. On the other hand, if the narrow definition were to be adopted, legislative regulations would presumably fall within the scope of ‘acts addressed to another person’ and applicants would need to establish both direct and individual concern.

It will be for the European Court of Justice to decide the meaning of ‘regulatory act’ and the Court’s conclusion on this point will no doubt be awaited with great interest. Whatever the outcome, ‘direct concern’ (in relation to all acts, save those addressed to the applicant) and ‘individual concern’ (in relation to ‘acts addressed to another person’) will continue to be key concepts in EU judicial review.

Direct concern

To establish direct concern the applicant must show a direct link or unbroken chain of causation between the act and the damage sustained. A link is not established if the measure...
leaves a Member State discretion in implementation, for here the applicant is affected not by the act itself but by its implementation.

**Municipality of Differdange v Commission (Case 222/83) [1984] ECR 2889**

A Commission decision addressed to Luxembourg authorized it to grant aid to steel producers, provided they reduced production capacity. The applicant sought annulment of the decision, claiming that reduced production would result in the loss of local tax revenue. The Court of Justice held that the decision left the national authorities and producers discretion in implementation, particularly regarding the choice of factories for closure. It was the exercise of that discretion that affected the applicant, which was therefore not directly concerned by the Commission decision.

Identification of direct concern can entail fine distinctions.

**Paraiki-Patraiki v Commission (Case 11/82) [1985] ECR 207**

The applicant companies sought to challenge a Commission decision authorizing France to impose quotas on cotton yarn imports from Greece. The French authorities had discretion, since they could choose whether or not to use the authorization. Despite this, the Court of Justice held that the possibility that the authorities would not impose quotas was ‘purely theoretical’, since France already restricted Greek yarn imports and had requested permission to impose even stricter quotas. The applicants were therefore directly concerned by the decision.

With respect to ‘regulatory acts’, the distinction (if any) between direct concern and ‘entailing implementing measures’ remains to be determined.

**Individual concern**

This requirement is applied very restrictively and has proved a significant hurdle for applicants. The *Plaumann* formula is the classic test.

**Plaumann v Commission (Case 25/62) [1963] ECR 95**

Plaumann, a clementine importer, sought to challenge a Commission decision addressed to Germany refusing it authorization to reduce customs duties on clementines imported into the [EU]. The Court of Justice declared that persons other than those to whom a decision is addressed are individually concerned only if the 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’. The decision must distinguish them individually in the same way that it distinguished the original addressee. Plaumann was affected because of a commercial activity that in future could be taken up by any other person. The company could not claim to be singled out by the decision and so was not individually concerned.
The Plaumann test has been criticized as unrealistic commercially and, in practice, virtually impossible to satisfy. Whilst theoretically anyone in the EU can set up business in a particular sector, for instance as a clementine importer, this may not be possible where, as is often the case, the sector is dominated by a small number of operators. Against that commercial reality, it can be argued that anyone might, in theory, enter the market or, more generally, that the distinguishing characteristics claimed by the applicant may in the future be acquired by any other person. Consequently, it is difficult to establish individual concern.

Despite the difficulties, non-privileged applicants are sometimes able to establish individual concern. They have done so, in particular, when they were a member of a class of persons that was fixed and ascertainable (a ‘closed class’) at the date the measure was passed and, consequently, the measure had only retrospective impact on a specific group of persons.

Paraiki-Patraiki v Commission (Case 11/82) [1985] ECR 207

It will be recalled that the applicants sought annulment of a Commission decision authorizing France to impose quotas on cotton yarn imports from Greece. Considering individual concern, the Court of Justice declared that the mere fact that the applicants exported the product to France was not sufficient to distinguish them from any other current or future exporter. However, they were distinguished by the fact that, before the adoption of the decision, they had entered into contracts for sale of the products. They were held to be individually concerned.

Because the applicants had entered into contracts before the decision was adopted, they were part of a closed class of applicants, a class that was fixed and ascertainable at the date the measure was passed.

Union de Pequeños Agricultores v Council (UPA) (Case 50/00 P) [2002] ECR I-6677

UPA’s challenge to a regulation withdrawing aid for olive oil producers had been held inadmissible by the Court of First Instance (CFI). UPA had failed to establish individual concern. The CFI
rejected UPA’s argument that the current test for individual concern denied individuals effective legal protection, declaring that UPA could have brought proceedings in the national court and sought an Article 267 reference on the legality of the regulation.

On appeal to the Court of Justice, Advocate-General Jacobs articulated the difficulties of the Article 267 route. In particular, there may be no national implementing measure on which national action could be based, a national court has no power to annul EU law, an applicant cannot insist on a reference, and the preliminary reference procedure entails delay and cost. He proposed a new test for individual concern: ‘the measure has, or is liable to have, a substantial adverse effect on [the applicant’s] interests’.

The Court of Justice rejected these arguments and reaffirmed the existing case law on individual concern.

Before the judgment in UPA, and in the light of Advocate-General Jacobs’ opinion in that case, in Jégo-Quéré v Commission (Case T-177/01), the CFI called for review of the test for individual concern. It proposed that an individual should be regarded as individually concerned by a regulation if it ‘affects his legal position in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’. The Court of Justice subsequently upheld the Commission’s appeal against the CFI’s decision in Jégo-Quéré, again reaffirming the Plaumann test for individual concern (Commission v Jégo-Quéré (Case C-263/02P)).

Revision tip
Be familiar with the key points on standing for non-privileged applicants – direct concern, individual concern, and the new provision on ‘regulatory acts’

Grounds for annulment

The grounds for annulment, which may well overlap in individual cases, are set out in Article 263(2).

Lack of competence

Here, the institution adopting the measure does not have the necessary power. For instance, in Germany v European Parliament and Council (Tobacco Advertising) (Case C-376/98) a directive banning tobacco advertising, identified as a public health measure, was annulled because it was adopted under a Treaty article concerning the internal market. Lack of competence is similar to ultra vires in English law.

Infringement of an essential procedural requirement

This arose, for instance, in Roquette Frères v Council (Case 138/79), concerning a failure to consult Parliament before the adoption of a measure, as required by the Treaty.
**Infringement of the Treaty or of any rule of law relating to its application**

This broad ground covers any infringement of EU law, including the general principles of non-discrimination, proportionality, and fundamental human rights. *Transocean Marine Paint v Commission (Case 17/74)* provides an example of annulment on the basis of a breach of the principle of natural justice.

**Misuse of powers**

This entails the adoption of a measure for a purpose other than that intended by the Treaty provision constituting its legal base. In *UK v Council (Case C-84/94)* for instance, the UK argued, unsuccessfully, that the Working Time Directive was wrongly based on Article 118a EC (now 153 TFEU) concerning health and safety at work.

**Effect of annulment**

If the grounds are established, the measure is declared void and the institution concerned must take measures to comply with the judgment.

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**Action for failure to act: Article 265 TFEU**

Article 265 allows privileged and non-privileged applicants to challenge inaction by the EU institutions, the European Central Bank and the bodies, offices, or agencies of the EU, where they have a duty to act. That duty must be sufficiently well defined.

*European Parliament v Council (Case 13/83) [1985] ECR 1513*

Parliament challenged the Council’s failure to implement a common transport policy, as required by Article 74 EC (now Article 90 TFEU), and to ensure freedom to provide transport services, as required by various other Treaty provisions. Parliament succeeded on the second allegation, as the relevant obligation was clear, but not on the first, as the obligation was not sufficiently precise.

Originally, strict *locus standi* requirements were imposed on non-privileged applicants.

*Bethell v Commission (Case 246/81) [1982] ECR 2277*

Lord Bethell sought to challenge the Commission’s failure to act on breaches of the competition rules by airlines. Declaring the action to be inadmissible, the Court of Justice held that to bring a challenge under [Article 265], the applicant must show that it would be an addressee of the potential act.
Subsequently, the standing requirements have been relaxed.

_T Port v Bundesanstalt für Landeswirtschaft und Ernährung (Case C-68/95) [1996] ECR I-6065_

The Court of Justice applied _locus standi_ requirements analogous to those under [Article 263 TFEU], holding that the applicant must show that it would be directly and individually concerned by the potential act.

An action will be admissible only if the institution concerned has first been called upon to act and has failed to define its position within two months. Following a declaration of failure to act, the institution must take the necessary measures to comply with the Court’s judgment (Article 266).

**Relationship between Articles 263 and 265**

Articles 263 and 265 complement each other by covering, respectively, illegal action and illegal inaction. They have been described by the Court of Justice as prescribing ‘one and the same method of recourse’ (_Chevally v Commission (Case 15/70)_) They can be pleaded in the alternative but both cannot be applied to the same circumstance.

_Eridania v Commission (Cases 10&18/68) [1969] ECR 459_

The Court of Justice held that the Commission’s refusal to revoke certain decisions on the grant of aid to sugar producers amounted to an act, not a failure to act. Accordingly, only [Article 263] could be applied. [Article 265] should not be used to bypass the limitations of [Article 263], notably the two-month time limit for bringing proceedings. The annulment action was held inadmissible for lack of direct and individual concern.

**Plea of illegality: Article 277 TFEU**

Under Article 277 ‘any party’, including privileged and non-privileged applicants, may challenge an ‘act of general application’ indirectly, even where the two-month time limit laid down by Article 263 has elapsed. Article 277 does not provide an independent cause of action but may be invoked during other proceedings. For instance, in an action for annulment of a decision under Article 263, the applicant may seek to challenge the underlying regulation on which that decision is based. The grounds for review are identical to the Article 263 grounds. The outcome of a successful challenge is a declaration of inapplicability.
EU liability in damages

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' (Article 340 TFEU)

General principles common to the laws of the Member States—applicant must establish:
- wrongful act
- actual damage
- causation
  (Lütticke)

Wrongful act

Schöppenstedt
(General legislative measures involving choices of economic policy)
The applicant must show:
- a sufficiently serious breach (HNL)
  (institution has 'manifestly and gravely disregarded the limits on its discretion' with regard to the effect of the measure (HNL); or Court of Justice may require the conduct to be 'verging on the arbitrary' (Amylum)
- of a superior rule or law for the protection of individuals
  (eg general principles of law, such as non-discrimination (HNL)

Bergaderm
Infringement of a rule of law intended to confer rights on individuals
Test for a sufficiently serious breach: the degree of discretion accorded to the institution, not the arbitrariness of the act or the seriousness of the damage caused

Damage
Must be quantifiable and exceed the loss arising from the normal economic risks inherent in business (eg HNL)

Causation
The damage must be a sufficiently direct consequence of the institution’s breach.
(Dumortier)
Article 340 provides a mechanism for recovery of damages by individuals who have suffered loss as a result of EU action:

In the case of non-contractual liability, the Union shall, in accordance with the 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.

This is an independent form of action, so an applicant need not first secure annulment under Article 263.

In cases of damage caused by EU officials, the Court of Justice will apply the test in Sayag v Leduc (Case 9/69): the EU ‘is only liable for acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to [it]’. Where, more commonly, the claim concerns an act of an EU institution, three elements must be established: a wrongful or illegal act, damage, and causation (Lütliche v Commission) (Case 4/69)).

Wrongful act: the original approach in Schöppenstedt

Under the so-called Schöppenstedt formula, a distinction was drawn between legislative and administrative acts (Schöppenstedt Aktien-Zuckerfabrik v Council (Case 5/71)). With regard to administrative breaches, liability could be established on the basis of illegality alone.

Administrative breaches

Adams provides an example.

Adams v Commission (Case 145/83) [1985] ECR 3539

Adams had alerted the Commission to alleged competition law breaches by his employer, the Swiss pharmaceutical company Hoffmann-La Roche. The Commission disclosed documents to the company from which the latter identified Adams as the informant. Subsequently Adams was convicted of economic espionage in Switzerland. In [Article 340] proceedings brought by Adams, the Court of Justice found that the Commission’s negligence in disclosing the documents to La Roche and its failure to warn Adams, who had moved to Italy, that he would be prosecuted if he returned to Switzerland, gave rise to liability in damages.

General legislative measures involving choices of economic policy

In Schöppenstedt the Court applied a more rigorous test to general legislative measures involving choices of economic policy. For these measures, liability arose only where there was a ‘sufficiently flagrant violation of a superior rule of law for the protection of the individual’.
EU liability in damages: Article 340 TFEU

A sufficiently flagrant violation of a superior rule of law

Applying Schöppenstedt subsequently, the Court of Justice included within the scope of ‘superior rule of law’ Treaty articles and general principles of law, such as equality, proportionality, legal certainty, and legitimate expectation. According to Schöppenstedt, not only must the applicant establish a breach, but that breach must be a sufficiently flagrant violation of superior rule of law for the protection of individuals. Where the institution concerned acted with a wide discretion, the applicant must show that the institution manifestly and gravely disregarded the limits on its powers. In HNL, the Court’s assessment was based upon the effect of the measure.


In order to reduce surplus stocks of skimmed milk powder, a regulation was passed requiring its purchase for use in poultry feed. Previously, the Court of Justice had held the regulation void, as discriminatory and disproportionate. Here, the applicant claimed an adverse effect on its business because the measure increased the cost of feed. The Court found that the regulation affected wide categories of traders, reducing its effect on individual businesses. Further, the regulation had only limited impact on the price of feed, by comparison with the impact of world market price variations. Consequently, the breach was not manifest and grave.

In other cases the Court focused on the nature of the breach. In Amylum it applied an even more rigorous test, requiring the institution’s conduct to be ‘verging on the arbitrary’.

Amylum NV v Council and Commission (Isoglucose) (Cases 116 & 124/77) [1979] ECR 3497

A small group of isoglucose producers sought damages in respect of a regulation imposing production levies, which had previously been held invalid for discrimination because no levies were imposed on sugar, a competing product. Despite the serious impact of the measure, including the liquidation of one of the companies, the action failed. The Court of Justice held that the institution’s conduct could not be regarded as ‘verging on the arbitrary’.

Looking for extra marks?

In applying these restrictive tests the Court of Justice sought to ensure that the risk of successful damages claims by individuals did not hinder the legislative function. The strictness of the tests meant that such actions rarely succeeded.

Bergaderm: a different approach

The development of state liability caused the Court of Justice to reconsider its approach to EU liability. In Bergaderm it aligned the principles relating to state and EU liability,
reiterating its previous declarations in *Brasserie du Pêcheur* and *Factortame III* (Cases C-46 & 48/93).

**Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission (Case C-352/98P) [2000] ECR I-5291**

This was an appeal against a Court of First Instance decision rejecting Bergaderm’s damages claim in respect of loss suffered as a result of a directive restricting the permissible ingredients of cosmetics, on health grounds.

The Court of Justice affirmed that the same conditions apply to state liability and EU liability. Liability arises where the rule infringed confers rights on individuals, the breach is sufficiently serious and there is a direct causal link between the breach and the damage. A sufficiently serious breach is established when there is a manifest and grave disregard of discretion by the EU or the Member State. Where that discretion is considerably reduced or there is no discretion, a mere infringement may be sufficient. The general or individual nature of a measure is not decisive in identifying the limits of the institution’s discretion.

This represents a significant departure from *Schöppenstedt*. The rule infringed need no longer be a ‘superior rule of law’, but merely intended to confer rights on individuals. The decisive test for a sufficiently serious breach is the degree of discretion accorded to the institution, rather than the arbitrariness of the act or the seriousness of the damage. It is likely that the additional factors set out in *Brasserie du Pêcheur* will be applied, namely the clarity of the rule, whether the error of law was excusable or inexcusable, and whether the breach was intentional or voluntary. Finally, a distinction is no longer drawn between administrative and legislative acts.

**Revision Tip**

Be ready to discuss the developing test for a ‘wrongful act’ under Article 340 and the closer alignment of state and EU liability.

**Damage**

The applicant must prove the loss, which must be quantifiable and exceed the loss arising from the normal economic risks inherent in business. In *HNL*, for instance, the loss did not satisfy this requirement. Damage to person or property and economic loss are recoverable, but the Court will not compensate speculative loss. Steps must be taken to mitigate the loss. Damages will be reduced if the applicant has in some way contributed to its loss.

**Causation**

To establish the necessary causal link, the applicant must show that the damage is a sufficiently direct consequence of the institution’s breach. Compensation is not available for every harmful consequence, however remote.
Dumortier Frères v Council (Cases 64 & 113/76, 167 & 239/78, 27, 28 & 45/79) [1979] ECR 3091

In relation to an unlawful withdrawal of production subsidies, the Court of Justice rejected claims based on reduced sales, financial problems, and factory closures. Even if the Council’s actions had exacerbated the applicants’ difficulties, those difficulties were not a sufficiently direct consequence of the unlawful conduct to give rise to liability.

Concurrent liability

Frequently, EU legislation requires implementation by national authorities. Where loss results wholly or partly from implementation, the question arises as to whether the applicant should bring proceedings against the national authorities in the national court, against the relevant EU institution in the Court of Justice, or both. Only national courts have jurisdiction to award damages against national authorities and, conversely, claims in respect of damage caused by EU institutions must be brought in the EU General Court. The Court of Justice has held that any national cause of action must be exhausted before proceedings are brought before the Court of Justice, provided the national action can result in compensation (Krohn v Commission (Case 175/84)).

Time limit

Article 340 proceedings must be brought within five years of the materialization of the damage (Statute of the Court, Article 46).

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<td>Article 258 cases</td>
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<td>Commission v Belgium</td>
<td>Failure to implement a directive.</td>
<td>Breaches include acts and failures to act.</td>
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<td>(Case 1/86) [1987] ECR 2797</td>
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<td>Star Fruit Company v Commission</td>
<td>Star Fruit complained to the Commission about breaches of [EU] law by France.</td>
<td>The Commission has a discretion, not a duty, to commence proceedings</td>
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<td>(Case 247/87) [1989] ECR 291</td>
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<td><strong>Commission v Italy (Re Transport Statistics)</strong> (Case 101/84) [1985] ECR 2629</td>
<td>Failure to implement a directive due to the bombing of a data-processing centre.</td>
<td>This could amount to force majeure and provide a defence to non-implementation but a delay of four years was inexcusable.</td>
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<td><strong>Commission v UK (Tachographs)</strong> (Case 128/78) [1979] ECR 419</td>
<td>Failure to implement a directive on fitting tachographs to lorries due to cost and political difficulties.</td>
<td>Defence based on economic and political difficulties rejected.</td>
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<td><strong>Commission v France</strong> (Case 232/78) [1979] ECR 2729</td>
<td>France argued in its defence that another Member State had failed to fulfil a similar obligation and that the Commission had not brought proceedings.</td>
<td>Defence based on reciprocity rejected.</td>
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<tr>
<td><strong>Commission v France</strong> (Case 167/73) [1974] ECR 359</td>
<td>Discriminatory French provisions on employment in the merchant fleet were not enforced in practice.</td>
<td>Actual or administrative compliance is no defence.</td>
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**Article 263 cases**

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<td><strong>IBM v Commission</strong> (Case 60/81) [1981] ECR 2639</td>
<td>IBM sought to challenge a letter from the Commission setting out its intention to institute competition proceedings.</td>
<td>‘Reviewable act’: ‘any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position’.</td>
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<td><strong>Municipality of Differdange v Commission</strong> (Case 222/83) [1984] ECR 2889</td>
<td>A Commission decision addressed to Luxembourg authorized it to grant aid to steel producers, provided they reduced production capacity.</td>
<td>The decision left the national authorities, and the companies, discretion in implementation in the choice of factories to be closed. The exercise of that discretion affected the applicant, which was not therefore directly concerned.</td>
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<td><strong>Paraiki-Patraiki v Commission</strong> (Case 11/82) [1985] ECR 207</td>
<td>The applicants sought to annul a Commission decision authorizing France to impose quotas on cotton yarn imports from Greece.</td>
<td>The possibility that France would not use its discretion was ‘purely theoretical’; it had already restricted Greek yarn imports and requested permission to impose even stricter quotas. The applicants were therefore directly concerned by the decision.</td>
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## Key cases

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<td><strong>Plaumann v Commission</strong></td>
<td>Plaumann, a clementine importer, sought to challenge a Commission decision addressed to Germany, refusing it authorization to reduce customs duties on clementines.</td>
<td>Persons other then those to whom a decision is addressed are individually concerned only if the 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’.</td>
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<td><strong>Jégo-Quéré v Commission</strong></td>
<td>The applicant sought to challenge a regulation concerning fishing-net mesh sizes.</td>
<td>The Court of First Instance proposed that an individual should be considered individually concerned by a regulation if it ‘affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him’.</td>
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<td><strong>Union de Pequeños Agricultores v Council (UPA)</strong></td>
<td>UPA’s challenge to a regulation withdrawing aid for olive oil producers had been held inadmissible by the Court of First Instance. UPA had failed to establish individual concern.</td>
<td>On appeal to the Court of Justice, the A-G proposed a new test for individual concern: ‘the measure has, or is liable to have, a substantial adverse effect on his interests’. The Court of Justice rejected this test, reaffirming the existing case law.</td>
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<tr>
<td><strong>Commission v Jégo-Quéré</strong></td>
<td>The applicant sought to challenge a regulation concerning fishing-net mesh sizes.</td>
<td>The Court of Justice reaffirmed the Plaumann test for individual concern.</td>
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### Article 340 cases

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<td><strong>Lütticke v Commission</strong></td>
<td>Action concerning the Commission’s refusal to bring enforcement proceedings against Germany.</td>
<td>The applicant must establish a wrongful or illegal act, damage, and causation.</td>
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<td><strong>Schöppenstedt Aktien-Zuckerfabrik v Council</strong></td>
<td>Action concerning a regulation on sugar prices.</td>
<td>The breach must be a sufficiently flagrant violation (sufficiently serious breach (HNL)) of a superior rule of law for the protection of individuals.</td>
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## Exam questions

### Case

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<td>Bayerische HNL Vermehrungsbetriebe GmbH v Council and Commission (Cases 83 &amp; 94/76, 4, 15 &amp; 40/77) [1978] ECR 1209</td>
<td>The applicant claimed damages in respect of a regulation requiring the purchase of skimmed milk powder for use in poultry feed.</td>
<td>Where the institution concerned acted with a wide discretion, the applicant must show that the institution manifestly and gravely disregarded the limits on its powers.</td>
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<td>Amylum NV v Council and Commission (Isoglucose) (Cases 116 &amp; 124/77) [1979] ECR 3497</td>
<td>The applicants sought damages in respect of a regulation imposing production levies.</td>
<td>The institution’s conduct must be ‘verging on the arbitrary’.</td>
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<td>Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission (Case C-352/98P) [2000] ECR I-5291</td>
<td>Appeal against a Court of First Instance decision rejecting Bergaderm’s damages claim relating to a directive on cosmetics ingredients.</td>
<td>The same conditions apply to state liability and EU liability. The right to reparation arises where the rule infringed confers rights on individuals, the breach is sufficiently serious, and there is a direct causal link between the breach and the damage.</td>
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<td>Dumortier Frères v Council (Cases 64 &amp; 113/76, 167 &amp; 239/78, 27, 28 &amp; 45/79) [1979] ECR 3091</td>
<td>Damages claim concerning withdrawal of production subsidies.</td>
<td>The damage caused must be a sufficiently direct consequence of the institution’s breach.</td>
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### Problem question

In 2007 the European Commission adopted (fictitious) Regulation 364/2007, which requires Member States to issue wine import licences each month to importers from outside the EU who submit licence applications during the previous month. On 1 February 2010 the European Commission issued a (fictitious) decision addressed to France allowing it to restrict licences for Argentinian wine imports for February 2010 so as to limit the amount that could be imported into France by an applicant to 10,000 litres during that month.

Argenco SA (‘Argenco’) imports Argentinian wine into the EU. In January 2010 it applied to import 15,000 litres of wine into France in February. A licence was granted on 2 February but was limited to 10,000 litres. The French authorities claimed to be acting pursuant to the Commission decision of 1 February.
Exam questions

Argenco now seeks your advice on instituting annulment proceedings in the General Court in respect of the Commission decision. Advise Argenco as to whether such an action would be admissible.

How, if at all, would your answer differ if in December 2009 the French authorities had informed Argenco that they had sought permission from the Commission to restrict import licences for Argentinian wine to 10,000 litres for the month of February 2010?

Essay question

In the case of non-contractual liability, Article 340 TFEU requires the EU to make good any damage caused by its institutions. Unfortunately, this provision has been interpreted so restrictively that individual applicants face almost insurmountable difficulties in establishing EU liability.

In the light of this statement, critically discuss the interpretation and application of Article 340 (and its predecessor, Article 288 EC) by the Court of Justice.

Outline answers are available at the end of the book and full answers are available online at www.oxfordtextbooks.co.uk/orc/concentrate/