 DOI: 10.53122/ISSN.0452-5027/2024.1.05

Review of the Legality of EU Acts

The Plea of Illegality as a Legal Remedy

The article presents the conditions and principles developed in the case-law of the Court of Justice of the European Union for raising the plea provided for in Article 277 of the Treaty on the Functioning of the European Union (hereinafter TFEU or Treaty) for the review of the legality of acts of EU law. This objection commonly referred to in the legal writing as the plea of illegality allows challenging an act of general application which constitutes the basis for an individual act. This review may be carried out after the expiry of the (two-month) period provided for in Article 263 TFUE to declaration of acts of EU law as void, also by individual persons and entities that do not meet the conditions of the so-called Plaumann test. Unfortunately, this rule is subject to numerous limitations, especially in the view of the principle developed in case-law, according to which the admissibility of an plea of illegality depends on the prior submission of an action for annulment. The paper also analyses the conditions for the admissibility of raising the plea of illegality by Member States and EU institutions (so-called privileged applicants).

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Introduction

The remedy referred to in Article 277 of the Treaty on the Functioning of the European Union has not been extensively elucidated in Polish nor in foreign legal writings, remaining rather off the mainstream of academic discourse. This seems mainly due to the fact that it is an ancillary (incidental) remedy[1], and in order to successfully benefit from it, a series of

[1] Judgment of the CJ of 16.6.1981, Renato Albini v Council and Commission, 33/80, EU:C:1981:186, paragraph 17; judgment of the CJ of 16.3.2023, Commission v Ana Calhau Correia de Paiva, C-511/21 P, EU:C:2023:208, paragraph 43.

formal and legal requirements should be met, which mostly do not originate directly from the Treaty provisions, but have been developed by the Court of Justice of the European Union (hereinafter 'CJEU' or 'the Court')[2].

This remedy, if it were formulated in a transparent and explicit manner in Article 277 TFEU, could play a key role as a model review for any type of implementing measures (i.e. for both individual decisions and acts based on legislative acts) which determine the legal position of private persons and entities. The inherent consequence of drafting the legislation in a general and abstract manner is that legal defects in legal provisions do not normally manifest themselves until after they have been applied in practice.

The unclear legal structure of this measure determines its use in formulating an alternative plea in the form of an additional request in the pleadings, forming the basis of an action for annulment against an act of EU law (lodged on the basis of Article 263 TFEU). However, there are some grounds for the exception stipulated in Article 277 TFEU to be applied in all kinds of proceedings, therefore its limitation to the actions for annulment alone would run counter to the objective of that provision[3]. This remedy also plays its specific role in employment cases involving elements of compensation as well as in intellectual property cases[4], but its use in actions for damages cannot be ruled out[5]. In this regard the plea is being described as an indirect remedy[6]. Indeed, from the beginning of its activity, the Court has held that a plea of illegality cannot be the basis of a new form of an autonomous action (does not constitute an independent right of action[7]) or an obligation for the national court to refer a question for a preliminary ruling[8].

Due to the limited scope of this article, as a preliminary point, I would like to clarify a number of concepts which otherwise might lead to confusions caused by terminological and semantic ambiguities. It is useful to start with the very concept of 'review of legality', which must be understood in the context of the CJEU jurisdiction to examine the conformity of

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[2] For the sake of brevity, I use the term the Court of Justice of the European Union, which sits as the Court of Justice (CJ) or the General Court (GC). In view of the continuation of the case-law, I also skip institutional transformations of this institution, i.e. the fact that the CJEU previously included, as an institution, the Court of First Instance (CFI), now the General Court and Civil Service Tribunal (CST), which has now been abolished.

[3] C. Gaitanides: *Artikel 277* [in:] H. von der Groeben, J. Schwaze, A. Hatje (eds.), *Europäisches Unionsrecht. EUV.AEUV.GRC. Kommentar*, vol. 4, Baden-Baden 2015, MN 5, p. 1018.

[4] V. Luszcz: *Plea of Illegality* [in:] V. Luszcz (ed.), *European Court Procedure. A Practical Guide*, Hart Publishing 2020, p. 350.

[5] Judgment of the General Court of 18.9.2014 in case T-168/12, Aguy Clement Georgias and Others v Council of the EU and Commission, EU:T:2014:781, paragraph 35.

[6] A. Barav: *The Exception of Illegality in Community Law: A Critical Analysis*, "CMLRev" No 3/1974, p. 367; M. Vogt: *Indirect judicial protection in EC law – the case of the plea of Illegality*, "E.L. Rev." No 3/2006, pp. 364-377.

[7] Judgment of the General Court of 12.6.2015 in case T-334/12, Plantavis GmbH and NEM v Commission and EFSA, EU:T:2015:376, paragraph 50.

[8] Judgment of the CJ of 14.12.1962 in joined cases 31/62, 33/62, Milchwerke Heinz Wöhrmann and Alfons Lütticke GmbH v Commission, EU:C:1962:49, p. 503.

rules prescribed in the EU acts with higher level norms as the result and within the limits of actions brought (and, in strictly limited circumstances, also *ex officio*). In this context, review of that kind extends to any type of act intended to produce legal effects towards third parties. The form and wording of the acts are of no relevance, although they usually take the form of either paper documents[9] or, more recently, digital ones. It should be borne in mind that the EU legal order is not a closed and strictly hierarchical one and a special role as a model of control over secondary EU law (directives, regulations and decisions) has been attributed to primary law, i.e. the rules contained in the founding EU Treaties and the general principles of EU law. This situation was altered following the introduction by the Treaty of Lisbon in Article 290 TFEU – delegated acts and in Article 291 TFEU – implementing acts, which are subject to review with regard to the enabling acts (legislative acts) referred to in Article 289 TFEU.

In this paper, the concept of 'scope of (judicial) review' will remain limited by the scope of the single plea raised by the parties and interveners[10], determining that an act of general application cannot be applied to a certain entities. This is a relatively narrow margin of review by reference to the grounds of appeal provided for in the second paragraph of Article 263 TFEU, whereas the full review carried out by the CJEU extends to the whole system of complementary remedies, such as actions for annulment, actions for failure to act or review carried out within the scope of a reference for a preliminary ruling.

Furthermore, certain terminological issues should also be underlined relating to the plea stipulated in Article 277 TFEU, which read as follows: "**Notwithstanding the expiry of the period** laid down in the sixth paragraph of Article263, **any party** may, in proceedings in which **an act of general**[11] application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in the second paragraph of Article 263 in order to invoke before the Court of Justice of the European Union the **inapplicability** of that act"[12].

It is therefore clear from the wording of this provision that it constitutes a basis for pleading before the Court of Justice of the European Union the inapplicability of that act. Some terminological remarks

[9] See J. Bast: *Legal Instruments and Judicial Protection* [in] A. von Bogdandy, Bast, J. (eds.), *Principles of European Constitutional Law*, Oxford/München/Portland, 2011, p. 347.

[10] The wording of Article 277 TFEU may imply that in order to uphold a plea it is necessary that it be raised by a party. However, it is interesting to note some cases in which the CJEU has accepted rising of the plea of illegality by the national court *proprio motu*, which shall be highlighted further in this article, see for example footnotes 43 and 44.

[11] In this Article, the concept of an act *of general application* shall apply, in accordance with the case-law of the CJEU, to all acts, whatever their form (substantive criterion) to all acts which apply to objectively determined situations and produce effects with respect to categories of persons envisaged in general and in the abstract, see judgment of CJ of 15.1.2022 in case C-171/00 P, Alain Libéros v Commission, EU:C:2002:17, paragraph 28.

[12] Highlights by the author.

should be made at this point[13]. In the German literature, this institution is called *die inzidente Normenkontrolle* (incidental review for legal rules)[14]. In English literature one largely uses the term 'plea of illegality' (plea of illegality, objection of lllegality)[15], as well as in French literature (*l'exception d'illégalité*)[16]. This approach may give rise to some confusion, since it suggests (as it has indeed been noted in the CJEU's early case-law[17]) that it is sufficient to plead the illegality of an act, which gives rise for declaration of nullity. However, even if such a plea were to be upheld, the CJEU does not eliminate the concerned act of general application from the EU legal order (as in the case of successful action for annulment), at least it might result in such an effect in relation to entirety or part of the act of individual application or measures related with it[18].

It may therefore be pinpointed that it is a legal concept ensuring merely an incidental review of the consistency of the rules within the EU legal order, the objective of which is to eliminate the negative effects which arise in the process of applying the law with regard to specific entities, which had not previously made use of the possibility to challenge the rules of law concerning them. In my view, it is a terminological confusion that may have contributed to the development of the case-law of the CJEU, according to which a non-use of the judicial remedy by bringing an action for annulment of an act of EU law obstructs the means of bringing an effective remedy under Article 277 TFEU. However, the function of these two remedies is fundamentally different: the objective of an effective action for annulment is to derogate legal act from the EU legal order with *erga omnes* effect, whereas the plea provided for in Article 277 TFEU results in the inapplicability of the rule concerned only in respect to a particular person *(inter partes*), but it does not exclude the possibility that it may, paradoxically, apply either to the other addressees of the same act[19]. However, it cannot be ignored that a judgment declaring inapplicability of the rule produces some indirect legal effects,

[13] These observations are made purely form the terminological point of view, without referring to the formation of the legal institution concerned in the national legal order. While it has been argued in legal writing that Article 277 TFEU was drafted on the basis of the French model of *l'exception d'illégalité*, the legal designation of that institution in the national legal systems has no bearing on the ongoing analysis, bearing in mind the autonomy of legal concepts in the EU legal order.

[14] For example O. Suhr, W. Cremer: *Artikel 277* [in:] Ch. Calliess, M. Ruffert (eds.), *EUV.AEUV. Kommentar*, München 2011, p. 2393.

[15] See K. Lenaerts, I. Maselis, K. Gutman, J.T. Nowak, (eds.), *EU Procedural Law*, Oxford 2014, p. 441. A similar approach is to be found in Polish legal literature. A. Wyrozumska (ed.), *System ochrony prawnej Unii Europejskiej*, Warsaw, 2010, p. 230.

[16] See J. Sirinellis, B. Bertrand: *Droit du contientieux de l'Union Européenne*, Paris 2022, p. 337.

[17] Joined Cases 31/62, 33/62 Milchwerke Heinz Wöhrmann that Sohn KG and Alfons Lütticke GmbH v Commission, p. 503.

[18] The judgment of the GC of 2.10.2014 in case T-177/12, Spraylat GmbH v ECHA, EU:T:2014:849, paragraph 43, in this case the GC held the contested decision inapplicable and consequently annulled that act and the invoice based on it.

[19] Judgment of the CJ of 25.10.2006 in case T-173/04, Jürgen Carius v Commission, EU:T:2006:333, paragraph 45.

mainly by rebutting the presumption of legality thereof[20] and paving the way for similar claims to be brought by those affected by that act[21].

Nevertheless, due to a widespread practice existing both in the legal writings as well as in the CJEU's case law, I shall use the term 'the plea of illegality' to designate the legal concept referred to in Article 277 TFEU, although it may be more correct to use term 'the plea of inapplicability'.

In this paper I will examine the main structural elements of Article 277 TFEU, i.e. the legal environment and the objective of this remedy, then indicate the most important conditions – who and when may rise a plea, as well as what are its consequences, taking into account the most recent case-law of the CJEU in this area. Finally, I will also set out certain specific features relating to the application of this plea in various areas of law, and afterwards summarize the analysis of the Court's case-law.

Substance of the measure referred to in Article 277 TFEU

It is worth recalling the general systemic context for the remedy provided for in Article 277 TFEU (and previously in Article 241 of the Treaty on European Community). An examination of the CJEU's acquis in light of this provision may lead to the conclusion that it is a relatively rarely debated measure in relation to the action for annulment codified in Article 263 TFEU. It seems that this is due to a rather limited application of this provision within the CJEU case law[22]. In its initial wording, this provision referred only to the inapplicability of regulations, whereas, after the rejection of the textual interpretation of that provision by the Court, which held that it is applicable to all legislative acts having similar effects to those of regulations[23], it appeared that it may extend the scope of the reach of the remedy. However, the CJEU relatively quickly acknowledged that its broad application would constitute a circumvention of the requirements of an action for annulment and therefore again limited its scope by expressing the general principle that, in order to be accessible to a party, such a remedy cannot replace an action for annulment which had not been brought within the time limit laid down in Article 263 TFEU. That position has given rise to several academic commentaries[24], and the literature rightly emphasises that it is difficult for individuals to examine in

[20] Judgment of the CJ of 5.10.2004 in case C-475/01, Commission v Republic Greckeij, EU:C:2004:585, paragraph 18.

[21] It is so called the practical consequence of the judgment of the CJEU – cf. J. Sirinellis, B. Bertrand, op.cit., p. 347.

[22] In that regard, in his view, Advocate General Bot introduced a submission to the exception provided for in Article 277 TFEU in relation to an action for annulment under Article 263 TFEU, see Opinion of Advocate General Bot delivered on 31.1.2008 in Case C-442/04, Kingdom of Spain v Council of the European Union, EU:C:2008:58, point 53.

[23] See judgment of the CFI of 26.10.1993 in Joined Cases T-6/92 and T-52/92, A.H. Reinarz v Commission, EU:T:1993:89, paragraph 56, stating that the sickness insurance scheme as defined in the Staff Regulations is an act of general application against which non-application may be invoked.

[24] For an overview of the arguments, see M. Vogt: *Indirect judicial protection in EC law – the case of the full text of Illegality*, pp. 365 to 370.

detail each measure of general application as soon as it is published[25]. It is quite common for defects affecting a measure of general application to become apparent only after they are applied to the particular circumstances of the case[26], and any interest in bringing proceedings against a measure of general application will often at this stage be purely hypothetical[27].

Another development in the design of this legal institution was introduced by the Treaty of Lisbon, to some extent indirectly, by introducing the concept of implementing measures and loosening the Plaumann test requirements in the wording of Article 263TFEU[28]. However, it seems that the case-law of the Court has continued so far, even after the entry into force of the Treaty of Lisbon, without making substantial changes to the modification of the plea of illegality.

With regard to the substance of the remedy provided for in Article 277 TFEU, it should be noted that the right to an effective remedy is one of the general principles of law, stemming from the constitutional traditions common to the Member States, and that right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 47 of the Charter of Fundamental Rights of the European Union[29].

According to the established position of the CJEU, a Treaty provision referring to the plea of illegality gives expression to the abovementioned general principle, which confers on any party to proceedings the right to challenge, for the purpose of obtaining the annulment of an act of individual and direct concern to that party, the validity of an act of an institution which constitutes the legal basis for the adoption of that act. However, that right is available only if that party was not entitled to bring a direct action challenging the acts by which it was thus affected without having been in a position to seek their annulment[30].

It should be borne in mind that the Court has from the outset adopted a functional (teleological) interpretation of the rules relating to this legal concept and that, although the original provision referred only to the possibility of raising such a plea against a regulation, the Court has held that it is also applicable to all measures having similar effects, in all cases in which certain entities did not have the right to bring an action for annulment[31]. In this regard, the form of the act does not matter, but the most important from the legal point of

[25] K. P. E. Lasok: *Lasok's European Court Practice and Procedure*, Bloomsbury Publishing 2022, p. 1293.
[26] Opinion of Advocate General Roemer delivered on 22.3.1966 in Italy v Council and Commission (32/65, EU:C:1966:14, p. 414).
[27] Judgment of the CJ of 16.3.2023 in joined Cases C-439/20 P and C-441/20 P, Commission and Council EU v Jiangsu Seraphim Solar System Co. Ltd, EU:C:2023:211, paragraph 77.
[28] See remarks in A. Albors-Llorens: *Remedies against the EU institutions after Lisbon: An area of opportunity?*, "Cambridge Law Journal" No 3/2012, p. 529.
[29] Judgment of the CJ of 5.6.2023 in case C-204/21, Commission v Poland, EU:C:2023:442, paragraph 69.
[30] Judgment of the CJ of 6.3.1979, SpA Simmenthal v Commission, 92/78, EU:C:1979:53, paragraph 39.
[31] ibid., paragraph 40.

view is its substantive content and effects it causes. It is therefore immaterial, in light of the case-law of the Court, whether it is an act adopted in the course of a legislative or non-legislative procedure and that the very scope of such wording also extends to a whole series of other acts, such as communications or staff rules, which *prima facie* do not appear to have much in common with generally applicable law.

In the judgment in Case 294/83 Parti écologiste 'Les Verts' v European Parliament, the judges considered the plea of inapplicability of an act of general application as one of the fundamental pillars of the complete system of legal remedies in the European Union. This system is designed to protect natural and legal persons against the application of acts of general application which they cannot challenge directly before the Court by reason of special conditions of admissibility (i.e. the need to satisfy the *Plaumann test*)[32]. Within the framework of this system, natural or legal persons who cannot, by reason of restrictive conditions for admissibility, challenge directly acts of general application, may plead the invalidity of such acts indirectly before the Courts of the European Union or before the national courts (where national measures are related to a EU act), so that national courts, which do not themselves have jurisdiction to declare the abovementioned acts invalid, may refer a matter to the Court of Justice for a preliminary ruling[33]. It may be noted that in case of preliminary reference to the CJEU as a result of rising of the plea of illegality before a national court, the latter will rule not on the inapplicability of the act in question, but on its invalidity[34].

The essential function of the measure referred to in Article 277 TFEU is to lift the strict procedural consequences arising from the framework of Article 263 TFEU, which sets forth the conditions for bringing an action for annulment. The link between those two institutions is obvious and apparent from the very wording of Article 277 TFEU, which refers to the grounds for claims provided for in the context of that action.

Firstly, the purpose of that measure is to soften the rigour of the two-month time-limit for bringing an action for annulment. As this time limit is relatively short, it is probable that an unlawful EU act will remain in force and will have serious consequences for the entities falling within its scope. Within the framework of the plea of illegality, a party may therefore attempt in principle to remedy its disadvantages indefinitely (irrespective of the expiry of the period laid down in Article 263, sixth paragraph), but this raises in practice a whole series of procedural problems which shall be addressed further. From that point of view, Article 277 may be regarded at the functional level as an institution which allows the time limit

[32] Judgment of the CJ of 23.4.1983, Parti écologiste 'Les Verts' v PE, 294/83, EU:C:1986:166, paragraph 23; judgment of the CJ of 3.10.2013, Inuit Tapiriit Kanatami and Others v Parliament, Council and Commission, C-583/11 P, EU:C:2013:625, paragraph 92.

[33] Order of the CFI of 12.1.2007 in Case T-447/05 SPM v Commission, EU:T:2007:3, paragraph 81.

[34] Compare O. Suhr, W. Cremer, Artikel 277…, op.cit., p. 2394.

laid down in Article 263 TFEU to be reinstated under clearly defined conditions.

Secondly, the subsidiary nature of the plea of illegality allowing it to be raised in any direct action and in intellectual property cases means[35], at least in theory, that there is some relaxation of necessity to satisfy the strict Plaumann's test, i.e. to demonstrate that private entity is individually and directly concerned by the general act in question in order to be entitled to challenge it within the prescribed time[36]. In principle, this procedure is not to be regarded as a second chance of annulling an EU act, although the case-law seems indirectly to lead to such effect[37]. According to the Court's settled case-law, the possibility of rising the plea of illegality exists only if another legal remedy is not available[38].

Apart from the subsidiary nature of the plea of illegality, it is also incidental (incidental review of rules of law). The refusal to apply a provision is related only to the part of the legal act[39] with direct legal connection to the content of an individual act[40]. Furthermore, it has been pointed out in legal writings that, since a decision upholding a plea of illegality may be issued even after a considerable amount of time, it should be deemed to have *ex nunc* effect[41].

It is interesting to note that the literal wording of Article 277 TFEU indicates that it is a plea which may be raised by any party, which seems to suggest that it refers to the parties to the proceedings pending before the court (applicant, defendant, intervener) and it is necessary to include it in the pleadings. Nevertheless, there is a judgment in which such a plea was raised by the referring national court on its own motion and the CJEU examined this application thoroughly for the preliminary ruling[42]. It seems that, in certain circumstances, such a plea may fall within the scope of public policy raised by the CJEU *ex officio*, as in the absence of competence to adopt the act in question[43].

Measure of general application

According to the settled case-law of the CJEU, the substantive concept of an act of general application has been adopted

[35] V. Luszcz, *Plea of Illegality*, op.cit., p. 348.
[36] See broadly in K. Lenaerts, I. Maselis, K. Gutman, J.T. Nowak (eds.), *EU Procedural Law*, p. 442.
[37] D. Sinaniotis, *The Plea of Illegality in EC Law*, "European Public Law" No 1/2001, p. 105.
[38] Judgment of the General Court of 11.12.2011 in case T-15/11, Sina Bank v Council of the EU, EU:T:2012:661, paragraph 43.
[39] Judgment of the CFI of 4.3.1998 in case T-146/96, Maria da Graça De Abreu v TSUE, EU:T:1998:50, paragraph 34.
[40] Judgment of the General Court of 6.9.2013 in joined cases T-289/11, T-290/11 and T-521/11, Deutsche Bahn AG and Others v Commission, EU:T:2013:404, paragraph. 56 and 57.
[41] G. Bebr: *Development of Judicial Control of the European Communities*, The Hague/Boston/London 1981, p. 217; M. Karayigit: *The Plea of Illegality as a Pillar of the Incidental Review*, "European Public Law" No 4/2019, p. 704.
[42] Judgment of the CJ of 10.1.2006 in case C-222/04, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze and Others, EU:C:2006:8, paragraphs 72 to 76.
[43] Judgment of the CFI of 27.9.2005 in joined cases T-134/03 and T-135/03, Common Market Fertilisers SA v Commission, EU:T:2005:339, paragraph 52; judgment of the CJ of 13.9.2007 in case C-443/05 P, Common Market Fertilisers SA v Commission, EU:C:2007:511, paragraph 138.

– an act of general application being any act which applies to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner[44]. The form of an act is irrelevant – its subject matter and content are decisive[45]. Furthermore, the general application of a measure cannot be questioned by the fact that it is possible to determine more or less the number or even the identity of the persons to whom it applies at any given time, as long as it applies to those persons by virtue of an objective legal or factual situation defined by the measure concerned in relation to its purpose[46].

Natural or legal persons who are unable, by reason of the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU, directly challenge the EU acts of general application are not deprived of judicial protection against the application of such acts to them. Where responsibility for the implementation of those acts rests with the EU institutions, these persons may bring a direct action before the Courts of the European Union against the implementing measures under the conditions laid down in the fourth paragraph of Article 263 TFEU and, pursuant to Article 277 TFEU, in support of their action rely on the plea of illegality against an act of general application. Where the implementation of a European Union act belongs to the Member States, they may plead its invalidity before national courts and cause them to request a preliminary ruling from the Court of Justice pursuant to Article 267 TFEU.

A national court which considers one or more pleas raised by a party or of its own motion that an EU measure is unlawful to be well founded, must stay the proceedings and refer this matter to the Court of Justice for a preliminary ruling on the validity of that act, the Court alone having jurisdiction to rule on the legality of acts of EU law. Nevertheless, the legal writings emphasises that in such cases the plea of illegality is not based on Article 277 TFEU, but rather falls within the scope of general principles of law[47].

The plea of illegality usually allows to challenge an act of general application

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[44] See judgment of the CJ of 6.10.1982 in case 307/81, Alusuisse Italia SpA v Council and Commission, EU:C:1982:337, paragraph 9; order of the CJ of 26.10.2000 in case C-447/98 P, Molkerei Großbraunshain GmbH, EU:C:2000:586, paragraph 67; judgment of the CJ of 31.5.2001 in case C-41/99 P, Sadam Zuccherifici, Divisione della SECI – Società Esercizi Commerciali Industriali SpA, EU:C:2001:302, paragraph 24; judgment of the CJ of 11.6.1968 in case 6/68, Zuckerfabrik Watenstedt v Council, EU:C:1968:43, p. 605; judgment of the CJ of 15.1.2002 in case C-171/00 P, Libéros v Commission, EU:C:2002:17, paragraph 28 and the case-law cited; judgment of the CJ of 17.3.2011 in case C-221/09, AJD Tuna, EU:C:2011:153, paragraph 51 and the case-law cited; judgment of the CJ of 6.11.2018 in joined cases C-622/16 P to C-624/16 P, Scuola Elementare Maria Montessori Srl v Commission, EU:C:2018:873, paragraph 29; order of the General Court of 6.9.2011 in case T-18/10, Inuit Tapiriit Kanatami and Others v European Parliament and Council, EU:T:2011:419, paragraph 63.

[45] Judgment of the CJ of 3.9.2020 in case C-784/18 P, Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v Commission, EU:C:2020:630, paragraph 65 and the case-law cited.

[46] Judgment of the CJ of 6.6.2023 in joined cases C-212/21 P and C-223/21 P, EIB v ClientEarth, EU:C:2023:546, paragraph 98.

[47] C. Gaitanides: *Artikel 277*, op.cit., p. 1019.

(parental act) in case of lodging an action for annulment against a delegated act or an implementing act[48], in order to 'deprive' it of a legal basis, i.e. to demonstrate that it was adopted in infringement of law[49]. It is the expression of a general principle that an unlawful authorising measure renders the implementing measure illegal, even if that measure is not itself vitiated by defects in law[50]. The case-law of the Court has adopted a very liberal interpretation of this condition set out in Article 277 TFEU, by considering that a plea of illegality may be raised against any act which lays down in a general manner conditions substantiated in the individual measures, such as the internal rules of institutions[51]. The purpose of this functional interpretation is to protect the rights of the individual[52]. Similarly, the Court regards Commission decisions authorising or prohibiting a national aid scheme as acts of general application[53].

In this respect, it should be borne in mind that this plea cannot be raised against preparatory acts to another EU act (e.g. legally required opinions)[54]. A necessary condition for raising the plea is, in principle, the existence of an action before the CJEU, but it is possible to challenge the invalidity of an EU act before a national court hearing an action relating to a national decision having its legal basis in a Union act. In such a case, the issue may be the subject of a reference for a preliminary ruling[55].

The most interesting rulings of the Court are those delivered in the field of EU competition law. It is apparent from the case-law that the Commission's guidelines, even if they not constitute the legal basis of the measure concerned (the decision) they determine – in a general and abstract way – the procedure by which the Commission has bound itself to use in assessing the amount of fines imposed by that act and, consequently, ensure legal certainty for individuals and may therefore be the subject of the plea provided for in Article 277 TFEU[56].

The plea of illegality therefore may be raised in relation to all acts of general application, which must be interpreted broadly[57]. Such an approach has been

[48] A. Hinarejos: *Judicial Review* [in:] R. Schütze, T. Tridimas (ed.), *Oxford principles of EU Law. The EU Legal Order*, vol. I, Oxford 2018, p. 906.
[49] M.K. Karaygit, op.cit., p. 690.
[50] C. Gaitanides: *Artikel 277*, op.cit, p. 1017.
[51] Cf. K. Lenaerts, I. Maselis, K. Gutman, J.T. Nowak (eds.), *EU Procedural Law*, op.cit., pp. 446 and 447.
[52] As stated in J. Sirinellis, B. Bertrand, op.cit., p. 343.
[53] Joined Cases C-622/16 P to C-624/16 Pop.cit., paragraph 31.
[54] Judgment of the General Court of 22.1.2015 in case T-140/12 Teva Pharma BV and Teva Pharmaceuticals Europe BV v EMA, EU:T:2015:41, paragraph 53.
[55] Judgment of the CJ of 27.9.1983 in case 216/82, Universität Hamburg v Hauptzollamt Hamburg-Kehrwieder, EU:C:1983:248, paragraphs 10 and 12.
[56] Judgment of the CJ of 28.6.2005 in joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S and Others v Commission and HFB Holding and Others, EU:C:2005:408, paragraphs 36, 212 and 213.
[57] Judgment of the General Court of 2.10.2014 in case T-177/12, Spraylat GmbH v ECHA, EU:T:2014:849, paragraph 25.

developed in the case-law of the CJEU in staff cases. In this area, the Court has classified as acts of general application: the Staff Regulations, the Conditions of Employment, EPSO's opinion, the decisions laying down the conditions for the secondment of national experts (SNE decision)[58], or even the ECB's budget[59].

At the same time, the CJEU accepts the admissibility of a plea of illegality against irregularities vitiating the conduct of a competition – the fact that the competition notice has not been challenged within the time-limit does not prevent the applicant from relying on irregularities occurring in the course of the competition, even if those irregularities derive from the wording of the competition notice[60].

In the context of selection procedure, the applicant may, in an action brought against subsequent acts, plead the irregularity of earlier acts which are closely linked to them. In the case of such a procedure, interested parties cannot be required to bring as many actions as there are numbers of measures which adversely affect them[61].

The Court's approach in such cases comes from the special nature of the selection procedure, which is a complex administrative operation composed of successive and very closely linked decisions[62]. The case-law has emphasized that the criterion of a "direct legal connection" is similar to the criterion of "the close connection" applicable to procedures relating to competition notices which have been applied in support of an individual decision which is the subject of an action for annulment[63].

Finally, it is worth to point out an interesting issue, which has not been clearly settled by the case-law of the CJEU so far: to what extent a plea of illegality may be raised against acts of general application based directly on international law. To a certain extent, this subject matter was addressed in the judgment of the Court of First Instance of the European Union in case Ahmed Ali Yusuf v. Council and Commission, concerning the review of resolutions of the United Nations Security Council in light of *ius cogens*[64]. However, these issues were not explicitly addressed during the appeal proceedings before the Court of Justice. The second example were joined cases C-401/12 P and C-403/12 P, Council, the European Parliament and the Commission v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, in

[58] See, more broadly, the case-law cited in K. Lenaerts, I. Maselis, K. Gutman, J.T. Nowak, (eds.), *EU Procedural Law*, op.cit., p. 454.
[59] Judgment of the CST of 27.9.2011 in case F-98/09, Sarah Whitehead v ECB, EU:F:2011:156, paragraph 73.
[60] Judgment of the CJ of 8.3.1988 in case 64, 71-73 and 78/86, EU:C:1988:119, paragraph 15.
[61] Judgment of the CJ of 31.3.1965 in joined cases 12/64 and 29/64, Ernest Ley v Commission, EU:C:1965:28, p. 118.
[62] Judgment of the CJ of 11.8.1995 in case C-448/93 P, Commission v Noonan, EU:C:1995:264, paragraph 19.
[63] Judgment of the CJ of 16.3.2023 in case C-511/21 P, Commission v Ana Calhau Correia de Paiva, EU:C:2023:208, paragraphs 49 to 51.
[64] Judgment of the General Court of 21.9.2005 in case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission, EU:T:2005:331, paragraphs 276-282.

which the applicants requested a review of the compatibility of Regulation (EC) No 1367/2006[65] with Article 9(3) of the Aarhus Convention[66]. The Court recalled that the provisions of an international agreement can constitute a standard for review of acts of the European Union by way of a plea of illegality only if the nature and the broad logic of that agreement do not preclude it and those provisions appear, as regards their content, to be unconditional and sufficiently precise[67]. In this respect, the judges have indicated that Article 9(3) of the Aarhus Convention does not satisfy those conditions since it is subject to the adoption of national measures in order to ensure its effectiveness. Nor can the exceptions authorized by the CJEU be invoked but only in respect of specific acts implementing international obligations (like World Trade Organization – WTO obligations)[68]. Accordingly, this provision of the Aarhus Convention cannot constitute a model of review by means of a plea of illegality[69].

For the sake of completeness, it should also be noted that a plea of illegality seeking a declaratory judgment alleging negligence on the part of the EU institutions by failing to include certain provisions in an individual act based on an act of general application (seeking a declaration that an individual act does not apply) will be considered devoid of purpose[70]. Similarly, there is no need to examine a plea of illegality where the basic act is annulled on the ground of other defects in law[71].

Link of the act of general application to an individual act

As a rule, the provisions of an act of general application which constitute the legal basis of individual decisions or have a direct legal connection with such decisions may be the subject of an objection of illegality[72].

The general principles of law require that there should be at least a minimum degree of relevance between the act of general application and the contested individual measure[73]. There is a proposition

[65] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6.9.2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (O.J. L 264 of 15.9.2006, p. 13, as amended).

[66] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus, Denmark on 25.6.1998.

[67] Judgment of the CJ of 13.1.2015 in joined cases C-401/12 P and C-403/12 P, Council, European Parliament and Commission v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, EU:C:2015:4, paragraph 54.

[68] ibid., paragraphs 58 and 59.

[69] ibid., paragraph 61.

[70] Judgment of the General Court of EU of 3.6.2014 in case T-155/13, Babak Zanjani v Council, EU:T:2014:605, paragraph. 52 and 53.

[71] Judgment of the CJ of 20.5.2008 in case C-91/05, Commission v Council of the European Union, EU:C:2008:288, paragraph 111.

[72] Judgment of the CJ of 28.101981 in joined cases 275/80 and 24/81, Krupp Stahl AG v Commission, EU:C:1981:247, paragraph 32.

[73] D. Sinaniotis, op.cit., p. 115.

formulated in legal writing, according to which in order to determine the admissibility of a plea of illegality the Court must examine, whether there is a possibility of entering into force of an individual measure in case an act of general application has been derogated from legal order[74]. However, the Luxembourg's judges have not so far decided to formulate a more general test in this field leaving it to the examination of the specific circumstances of each case.

It is interesting to note that the Court seems to interpret rather broadly the condition of relevance of other acts for the purposes of an individual measure, by encompassing all acts which played a role in the adoption of an individual measure, even if they do not formally constitute the legal basis for its adoption[75], refer to such an act[76] or have been transposed into national law[77]. It is also irrelevant that the provisions lay down only certain temporary regulations as long as they are of general nature[78].

It is also interesting to note some case-law which may suggest that the causal link necessary for the purpose of an action for damages is not identical with the causal link (condition of relevance) for the purposes of the plea of illegality. Such conclusions can be drawn from the judgment finding that there is no direct causal link between the EC's letters refusing to exercise its prerogatives under the EU regulation[79].

The CJEU has also underlined that guidelines laying down the procedure for calculating fines within the area of competition law, although do not constitute a direct legal basis for an individual decision, contain provisions of a general application and may therefore serve as a model for review through a plea of illegality[80], in particular if they determine in a general and abstract manner the way in which an EU institution has taken certain measures, for example, has concluded that an aid measure is compatible with the internal market[81].

The scope of a plea provided for in Article 277 TFEU must be limited to what is necessary to settle a particular case[82]. The general measure claimed to be illegal

[74] A. Barav, op.cit., p. 374.
[75] Judgment of the CFI of 25.10.2006 in case T-173/04, Jürgen Carius v Commission, EU:T:2006:333, paragraph 46.
[76] Judgment of the CFI of 14.6.2012 in case T-396/09 Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission, EU:T:2012:301, paragraph 75.
[77] Judgment of the CJ of 21.2.1984 in joined cases 140, 146, 221 and 226/82, Walzstahl-Vereinigung and Thyssen Aktiengesellschaft v Commission, EU:C:1984:66, paragraph 20.
[78] Judgment of the CFI of 27.10.1994 in case T-64/92, Bernard Chavane de Dalmassy and Others v Commission, EU:T:1994:260, paragraph 43.
[79] Judgment of the CFI of 10.4.2003 in joined cases T-93/00 and T-46/01, Alessandrini Srl and Others v Commission, EU:T:2003:110, paragraph 79.
[80] Judgment of the CFI of 29.11.2005 in case T-64/02, Dr Hans Heubach GmbH, EU:T:2005:431, paragraph 35.
[81] Judgment of the CFI of 20.9.2011 in joined cases T-394/08, T-408/08, T-453/08 and T-454/08 Regione autonoma della Sardegna v Commission, EU:T:2011:493, paragraph 209.
[82] Judgment of the General Court of 23.9.2020 in joined cases T-77/18 and T-567/18 VE v ESMA, EU:T:2020:420, paragraph 56.

must be directly or indirectly applicable to the case which is the subject of the action and there must be a direct legal connection between the contested individual measure and the general measure in question. The existence of such a link may be inferred, *inter alia*, from the finding that the measure challenged in the main proceedings is based essentially on a provision of the measure of general application whose legality is disputed[83]. Such an approach seeks to prevent purely objective disputes concerning the legality of measures of general application initiated by individuals[84].

The possible illegality of a measure of general application on which an individual measure is based cannot lead to the annulment of the measure of general application, but only of the applicable individual measure[85]. Article 277 TFEU is intended to protect the litigants against the application of an unlawful act of general application, without thereby calling into question the act of general application itself, which is final on the expiry of the time limits laid down in Article 263 TFEU. Thus, a judgment declaring an act of general application inapplicable has the force of *res iudicata* only with regard to the parties to the dispute which gave rise to that judgment[86].

In this regard, it is worth noting another situation which may be relatively common in the context of the application of EU law, in particular after the entry into force of the Treaty of Lisbon. It relates to the EU regulatory acts,[87] which entail issuing of implementing measures – in such cases judicial protection may be applied twofold. In circumstances in which the acts are adopted by bodies, EU offices or agencies intended to produce legal effects towards third parties and natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU, directly challenge the EU act, those persons may bring a direct action against the implementing measures and raise the plea provide for in Article 277 TFEU by claiming they incompatibility with the basic act[88]. The decisive factor is the legal situation of the applicant, it is irrelevant that the act in question entails issuing of implementing measures for that matter in relation

[83] Judgment of the General Court of 12.9.2018 in case T-788/16, Dominique De Geoffroy v European Parliament, EU:T:2018:534, paragraph 80.

[84] J. Sirinellis, B. Bertrand, op.cit., p. 343.

[85] Judgment of the General Court of 23.9.2020 in Joined Cases T-77/18 and T-567/18 VE v ESMA, EU:T:2020:420, paragraph 56.

[86] Judgment of the General Court of 24.10.2018, Elia Fernández González v Commission, T-162/17 RENV, EU:T:2018:711, paragraph 57.

[87] "(...) the concept of regulatory act within the meaning of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts. Therefore, a legislative act can only be the subject of an action for annulment by a natural or legal person if it is of direct and individual concern to that person" – see order of the General Court of 6.9.2011 in Case T-18/10, Inuit Tapiriit Kanatami…, op.cit., paragraph 56.

[88] Judgment of the CJ of 13.3.2018 in case C-384/16 P, European Union Copper Task Force v Commission, EU:C:2018:176, paragraphs 36 and 37.

to other entities[89]. In this respect, the Court has explained that it is essential to refer exclusively to the subject-matter of the action and that, where an applicant seeks only partial annulment, only any implementing measures which that part of the act may entail must be taken into consideration[90]. Moreover, the mere fact that the EU act entails implementing measures does not preclude that act from producing certain defined legal effects with regard to individuals[91]. The CJEU has also underlined that a plea of illegality against an act of general application in respect of which the individual decision does not constitute an implementing measure is inadmissible[92].

On the other hand, if implementing measures are adopted by a Member State, private individuals and entities may plead their invalidity before the national courts and cause them to refer a question to the CJEU for a preliminary ruling under Article 263 TFEU[93]. Such a model of challenging acts shall in most cases apply to directives which are being transposed into national law. Obviously, the question remains which remedy is available to natural and legal persons where the courts of a Member State though do not make a reference for a preliminary ruling.

With regard to the issue of the CJEU's jurisdiction in CFSP – (Common Foreign and Security Policy) matters, it should be stressed that the Court does not consider Article 275 TFEU as an obstacle to raising a plea of illegality against any decision of the Council of the European Union, no matter whether an act of a general or of an individual application, does not preclude the possibility of challenging – within the pleading modifying the form of order sought the legality of a provision of general application in support of an action for annulment of an individual restrictive measure[94]. Nevertheless, it should be demonstrated that the entity concerned is individually and directly concerned by a specific provision of the decision[95].

A similar situation should apply to EU acts relating to restrictive measures against specific persons, including the freezing of their funds. Such acts resemble both

[89] Judgment of the CJ of 28.4.2015 in case C-456/13 P, T that is L Sugars Ltd and Sidul Açúcares Unipessoal Lda v Commission, EU:C:2015:284, paragraph 32. The implementing measures should be understood in a broad sense and not only strictly as implementing acts within the meaning of Article 291 TFEU.

[90] Judgment of the CJ of 19.12.2013 in case C-274/12 P, Telefónica SA v Commission, EU:C:2013:852, paragraph 31.

[91] Judgment of the CJ of 18.10.2018 in case C-145/17 P, Internacional de Productos Metálicos SA v Commission, EU:C:2018:839, paragraph 54.

[92] Therefore, it is not allowed to challenge any general act unrelated to an implementing measure/individual decision. See judgment of the General Court of 17.12.2020 in case C-601/19 P, BP v FRA, EU:C:2020:1048, paragraph 30.

[93] Judgment of the CJ of 3.10.2013 in case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament, Council and Commission, EU:C:2013:625, paragraph 93.

[94] Judgment of the General Court of 28.1.2016 in case T-331/14, Mykola Yanovych Azarov v Council of the EU, EU:T:2016:49, paragraph 62.

[95] See, more broadly, the analysis in M.T. Karayigit, op.cit., pp. 696 and 697.

measures of general application in that they prohibit addressees determined in a general and abstract manner, *inter alia*, from making available funds and economic resources to persons and entities named in the lists contained in their annexes and a bundle of individual decisions affecting those persons and entities[96].

Eligible parties

According to the general principle of EU law, EU measures are presumed to be lawful, therefore it is for all subjects of EU law to recognise their validity[97]. Therefore, only the court is entitled to refuse to apply a provision of an act of general application, since that jurisdiction is not vested in the EU institutions and bodies, even in the course of the proceedings managed by them[98].

As a rule, a plea of illegality may be raised in any proceedings before the CJEU as a subsidiary remedy, nevertheless it follows from its substance that it must be connected to the pending main proceedings. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any act of general application in support of any action, the act claimed to be illegal must be applicable, directly or indirectly, to the case which is the subject of the action[99]. It is therefore an ancillary plea, the fate of which depends on the solution adopted in the main proceedings. Consequently, in the event that the plea provided for in Article 277 TFEU is raised against an inappropriate act (which is not the subject of the main proceedings), even if it is well founded, it will be rejected[100]. It also follows that Article 277 TFEU does not constitute an independent right of action and cannot be raised in the absence of an independent right of action in main proceedings[101].

This remedy is generally raised as the subsidiary head of action by the parties[102], though a number of such pleas may be raised in the scope of a single main action[103]. Therefore, it is not as a rule open to a party which has not exercised its right to bring an action for annulment of an individual decision within the prescribed time limit and then raises a plea seeking a refusal to apply that act to it, especially if it is a privileged

[96] Judgment of the CJ of 23.4.2013 in joined cases C-478/11 P to C-482/11 P, Laurent Gbagbo and Others v Council of the European Union, EU:C:2013:258, paragraph 56.
[97] Judgment of the CJ of 28.1.2016 in case C-514/14 P, Éditions Odile Jacob SAS v Commission and Others, EU:C:2016:55, paragraph 40.
[98] Judgment of the General Court of 27.10.2017 in case T-787/14 P, ECB v Maria Concetta Cerafogli, EU:T:2016:633, paragraph 49.
[99] Judgment of the CJ of 8.9.2020 in joined cases C-119/19 P and C-126/19 P, Commission v Francisco Carreras Sequeros and Others, EU:C:2020:676, paragraph 68.
[100] Judgment of the General Court of 9.9.2011 in case T-475/07, Dow AgroSciences Ltd v Commission, EU:T:2011:445, paragraphs 177, 178 and 184.
[101] Judgment of the CJ of 5.3.2020 in case C-69/19 P Credito Fondiario SpA v Single Council. Single resolution, EU:C:2020:178, paragraph 61.
[102] See judgment of the CFI of 14.10.2008 in case T-390/08, Bank Melli Iran v Council of the European Union, EU:T:2009:401, paragraph 21, second indent.
[103] Judgment of the CFI of 19.10.2006 in case T-311/04, José Luis Buendía Sierra v Commission, EU:T:2006:329, paragraph 42, second indent.

applicant[104]. However, several Advocates General have pointed out to the fact that the action for annulment, should at first be used, would amount to concluding that a privileged applicant could never invoke a plea of illegality[105]. On the other hand, the fact that the Member States may rely on Article 277 TFEU means that the act in question does not apply to the whole legal order of the Member State[106]. A lively academic debate took place on the possibility for privileged applicants (i.e. the Member States and the EU institutions) to invoke a plea of illegality which could bring an action for annulment in virtually any case[107]. One of the doctrinal stances presupposes that reliance on a plea of illegality by those entities would have the effect of circumventing the fulfilment of conditions relating to an action for annulment. The arguments challenging the admissibility of such a plea with regard to the Member States include the possibility of challenging any European Union act by invoking any plea of illegality, also the effects of raising such a plea are more extensive had it been made by a private entity and the influence of the Member States on the decision-making process[108]. Nevertheless, legal defects in an act may appear visible after the adoption of implementing measures, and there are no rules preventing a Member State from raising such a plea, especially when they may concern its citizens. The participation in the EU decision-making process should not affect the legal defects of the act. Moreover, the Member States' impact on the process of adoption of the act, with regard to delegated acts in particular, might be purely illusory. Similarly, it is difficult to agree with the line of argument that the EU institutions protect the interest of the Union as a whole, whereas the function of a plea provided for in Article 277 TFEU is to protect only the interests of private individuals.

The second line of arguments in the legal writings was based on the idea that Member States cannot rely on the plea provided for in Article 277 TFEU if they have not exercised their right to bring an action for annulment, unless there are sound reasons for not taking such an action within the time-limit[109]. Interestingly, a different line of reasoning was presented with regard to the powers of the EU institutions, which were entitled to such an allegation only in well-defined cases and when the proceedings concerned only their own interests[110].

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[104] Judgment of the CJ of 12.10.1978 in case 156/77, Commission v Belgium, EU:C:1978:180, paragraphs 20 and 21. See, however, the debate in the literature which turned towards the initial period of activity of the CJEU – R.H. Lauwaars: *Lawfulness and Legal Force of Community Decisions*, Leiden 1973, pp. 277-284.

[105] Opinion of Advocate General Bot delivered on 31.1.2008 in case C-442/04, Kingdom of Spain v Council of the European Union, paragraphs 61 and 62.

[106] For the first time, G. Bebr, op.cit., p. 197; see also examination of the academic views of V. Luszcz, *Plea of Ilegality*…, op.cit., p. 354.

[107] See also R.H. Lauwaars, op.cit., pp. 276-283.

[108] A. Barav, op.cit., p. 371.

[109] D. Sinaniotis, op.cit., p. 109.

[110] ibid.

Consequently, the Court has admitted – but not openly – the possibility for privileged applicants to raise such a plea, even though it was a single judgment relating to a specific entity such as the European Central Bank[111]. Nevertheless, such an exclusion should be formulated explicitly by the Court, particularly in light of the academic debate, which allows for such a possibility, under certain conditions and in respect of directives and regulations[112] (with the exception of measures addressed to the Member States individually)[113]. Indeed, the Court has consistently recognised that in principle, where the addressees of a decision have not exercised their right to bring an action for annulment within the prescribed time limit, the plea they rely on under Article 277 TFEU is inadmissible, whether in relation to privileged[114] or non-privileged applicants[115]. The same applies to such matters in the context of infringement proceedings relating to the Member States' failure to implement directives. The Court has consistently held that, "in the absence of a provision of the TFEU expressly permitting it to do so, a Member State cannot properly plead the unlawfulness of a directive addressed to it as a defence in an action for failure to fulfil obligations based on its failure to implement that directive"[116].

The general principle of prior exhaustion of action for annulment also applies to individuals (non-privileged applicants), both in direct actions before the CJEU[117] and in preliminary ruling proceedings in which the question of the validity of an EU act has been raised[118]. However, the Court underlined that this principle does not apply to damages proceedings based on Article 340 TFEU, given the autonomous nature of an action for damages[119].

Moreover, when the plea of illegality is raised in national proceedings, the Court has again found it necessary to take into account very functional approach to the effects of a preliminary ruling on the

[111] Judgment of the CJ of 10.6.2023 in case C-11/00, Commission v ECB, EU:C:2003:395, paragraphs 73-78. Although it is possible to take note of academic writings, the CJEU has accepted this solution only in relation to the ECB, Martinez Capdevila: *The Action for annulment, the Preliminary Reference on Validity and the Plea of Illegality: Complementary or Alternative means*, "Yearbook Of European Law", vol. 25/2006, p. 459.

[112] See, more broadly, the summary of the debate on the subject in L. Prete, B. Smulders: *The Coming of Age of Infringement Proceedings*, "Common Market Law Review" No 1/2010, pp. 45-46.

[113] As regards the decision see judgment of the CJ of 31.3.1965 in case 21/64, Macchiorlati Dalmas, EU:C:1965:30, p.187.

[114] Judgment of 22.10.2002 in case C-241/01, National Farmers' Union v General Secretariat of the Government, EU:C:2002:604, paragraph 39.

[115] Judgment of the CJ of 30.1.1997 in case C-178/95, Wiljo NV v Belgii, EU:C:1997:46, paragraphs 23 and 24.

[116] Judgment of the CJ of 5.3.2015 in case C-502/13, Commission v Grand Duchy of Luxembourg, EU:C:2015:143, paragraph 56.

[117] Judgment of the CFI of 13.9.1995 in joined Cases T-244/93 and T-486/93, TWD v Commission, EU:T:1995:160, paragraph 103; judgment of the CJ of 9.3.1994 in case C-188/92, TWD Textilwerke Deggendorf GmbH v RFN, EU:C:1994:90, paragraph 26.

[118] Judgment of 15.2.2001 in case C-239/99, Nachi Europe GmbH and Hauptzollampt Krefeld, EU:C:2001:101, paragraph 40.

[119] Judgment of the General Court of 18.9.2014 in case T-168/12, Aguy Clement Georgias and Others v Council of the EU and Commission, EU:T:2014:781, paragraphs 33 and 34.

non-application of a specific act of EU law. Indeed, the CJEU has declared that, although the preliminary ruling in this matter is formally addressed to a specific national court, it is binding with regard to the annulment of an EU act on other national courts[120]. The legal writing emphasises that a similar mechanism should apply to the plea raised under Article 277 TFEU[121].

As regards this case-law, it should be noted that it departs from the literal wording of Article 277 TFEU: "without prejudice to the expiry of the time limit (...), any party may (...) invoke the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act". However, in the case-law of the CJEU there is a preference for functional interpretation of this provision with the emphasis on the primacy of the principle of legal certainty. According to the settled case-law, a decision adopted by the EU institutions which has not been challenged by its addressee within the prescribed period is final. This is intended to ensure legal certainty within the European Union and to prevent it from being constantly called into question[122]. This plea might be admissible only exceptionally if there were doubts as to the admissibility of an action against the act[123] or the act contained such particularly serious and manifest defects that it could be categorised as a non-existent one[124]. However, it must be borne in mind that acts tainted by an irregularity which gravity is so obvious that they cannot be tolerated by the EU legal order are treated as having no legal effect, even provisional, and must be regarded as legally non-existent. For reasons of legal certainty, the gravity of the consequences of declaring the non-existence of an act of an EU institution means that is limited only to extreme cases[125].

However, there is no doubt that this approach of the CJEU is at odds with the procedural economy of the proceedings pending before that institution. As a result of this line of case-law, potential parties to the proceedings have nothing more to do than bring preventive actions for annulment in an attempt to challenge acts of a general application that may affect them[126].

Procedural matters

In the event that the plea of illegality is inadmissible, in theory there is nothing to prevent it from being raised subsequently in other proceedings. Nevertheless,

[120] Judgment of the CJ of 13.5.1981 in case 66/80, SpA International Chemical Corporation v Amministrazione delle finanze dello Stato, EU:C:1981:102, paragraph 13.
[121] M. T. Karayigit, op.cit., p. 705 and literature cited therein.
[122] Judgment of the CJ of 22.10.2002 in case C-241/01, National Farmers' Union, EU:C:2002:604, paragraph 33.
[123] Judgment of the CFI of 22.4.2004 in case T-343/02, Roland Schintgen v Commission, EU:T:2004:111, paragraph 26; judgment of the CJ of 2.7.2009 in case C-343/07, Bavaria NV and Bavaria Italia Srl v Bayerischer Brauerbund eV, EU:C:2009:415, paragraphs 40-45.
[124] Judgment of the CJ of 30.6.1988 in case 226/87, Commission v Greece, EU:C:1988:354, paragraph 16; judgment of the CJ of 11.10.2016 in case C-601/14, Commission v Italy, EU:C:2016:759, paragraph 33.
[125] Judgment of the CJ of 5.10.2004 in case C-475/01, Commission v Greece, EU:C:2004:585, paragraphs 19 and 20.
[126] A. Ward: *Judicial Review and the Rights of Private Parties in EU Law*, Oxford, 2007, p. 323.

it has been observed in legal writing that it is very common to equate the sole declaration of inadmissibility of the plea by the CJEU with, which is obviously unfounded, a declaratory decision on the invalidity of the contested provision[127].

The plea of illegality, if upheld, does not have *erga omnes* effect – the formal repeal of the act (annulment) and its elimination from the EU legal system[128]. Its sole purpose is to declare that a measure of general application is inapplicable, that is to say, in practice, the annulment of an individual measure based on a general measure[129] or – in the case of a general measure of dual nature – its inapplicability to the legal position of an individual. However, the Court points out that the EU institutions are obliged to take all measures to ensure compliance with the effects of a judgment annulling an individual measure, including the application of a general act with the exclusion of the challenged provision, by adopting another measure of individual application without the defect of law[130]. If, before a delivery of the judgment, the institution which adopted the act of general application amends it, the changed provisions of the act will also be taken into consideration by the Court[131]. That obligation extends to any act adopted on a validly challenged legal basis following the application of Article 277 TFEU.

Finally, with regard to procedural issues, it should be noted that in order to be effective, the plea provided for in Article 277 TFEU must be formulated in the application, and the mere dismissal of that application cannot be regarded as a matter of fact or of law which has come to light in the course of the proceedings[132]. Therefore raising a plea in the reply will cause it inadmissible, since it is the application which delimits the scope of the dispute before the Court[133]. The only exceptions in this regard are allowed only if the plea of illegality is based on infringement of the public policy (*un grief d'ordre public*)[134].

On the other hand, it is also possible to find some case-law referring in a rather flexible manner to the formulation of a plea of illegality, which also allows it to be raised implicitly[135]. Nevertheless, when examining the admissibility of a plea of illegality, by analogy with the action for annulment, the applicant's interest in

[127] J. Sirinellis, B. Bertrand, op.cit., p. 346.
[128] C. Gaitanides: *Artikel 277*…, op.cit., p. 1017.
[129] D. Sinaniotis, op.cit., p. 123.
[130] Judgment of the CJ of 20.3.1984 in joined Cases 75 and 117/82, C. Razzouk and A. Beydoun v Commission, EU:C:1984:116, paragraph 19.
[131] Judgment of the CFI of 8.10.1992 in case T-84/91 Mireille Meskens v European Parliament, EU:T:1992:103, paragraphs 76-78.
[132] Judgment of the CJEU of 15.5.2008 in case C-442/08, Kingdom of Spain v Council of the European Union, EU:C:2008:276, paragraph 23.
[133] Judgment of the CFI of 27.9.2005 in joined Cases T-134/03and T-135/03, Common Market Fertilisers SA v Commission, EU:T:2005:339, paragraph 51.
[134] Judgment of the CST of 29.9.2009 in joined Cases F-69/07 and F-60/08, O v Commission, EU:F:2009:128, paragraph 71.
[135] Judgment of the General Court of 15.9.2016 in case T-348/16, O.V. Yanukovych v Council of the EU, EU:T:2016:508, paragraph 57.

bringing proceedings is also examined, which presupposes that the plea of illegality should be capable of procuring an advantage for the party relying on it (*de procurer un bénéfice à la partie qui l'a soulevé*) [136] and it must be vested and present at the date on which the action was brought[137].

Summary

The examination carried out in this paper has revealed the absence of a uniform approach to the plea of illegality by the Court, which makes it difficult to comprehend this legal institution, and, therefore, its practical application in proceedings. Moreover, legal writings relatively often raise the issue of the consistency of the interpretation of the plea set out in Article 277 TFEU in the context of the CJEU's declaration on a comprehensive system of legal remedies in the EU[138]. It is no use removing the time-limit for raising a plea of illegality, if the person or entity concerned have never been entitled and would not be entitled to plead the illegality of an act of general application. The current case-law of the CJEU leads to the conclusion that the sole purpose of the plea provided for in Article 277 TFEU is to create specific compensation for the legal situation of individuals who have limited *locus standi* in the context of an action for annulment,[139] and it should not be overlooked that this plea may also be raised in other proceedings before the Court of Justice.

It is apparent from the analysis of the case-law that there is no clear understanding of the extent to which a plea of illegality influences other proceedings. Initially, the departure from the literal interpretation Article 277 TFEU raises the question of the justification for the precedence of functional interpretation over literal interpretation. It is clear that judgments of the CJEU are neither uniform nor provide a clear reasoning for the rules introduced or for the available exceptions. First and foremost, the arguments put forward in favour of the stability of the EU legal system are unconvincing as the rulings based on plea of illegality are merely incidental and have effects only with regard to the parties to the proceedings. The requirement, which does not follow expressly from the wording of the provision, that an action for annulment must be brought before declaring the exception referred to in Article 277 TFEU admissible does not, in my view, have a strong axiological basis. Furthermore, it is not consistently applied and the rules relating to the possibility for Member States to invoke a plea of illegality seem so vague that virtually every scholar expresses his own view in that regard.

[136] Judgment of the CFI of 29.11.2006 in case T-135/05, Franco Campoli v Commission, EU:T:2006:366, paragraph 132.
[137] Judgment of 16.3.2023 in joined cases C-439/20 P and C-441/20 P, Commission and Council EU v Jiangsu Seraphim Solar System Co. Ltd, EU:C:2023:211, paragraph 77.
[138] M. T. Karayigit, op.cit., p. 690.
[139] Similarly, K. Scheuring, *Art. 277* [in:] D. Kornobis-Romanowska, J. Łacny (eds.), *Treaty on the Functioning of the European Union. Commentary*, vol. 3, Warsaw 2012, p. 525.

Moreover, an analysis of the case-law clearly shows that in areas where the Court's approach is much more liberal, as in the staff cases, that remedy is used much more frequently than in proceedings brought by other persons and entities.

The absence of clear and precise criteria for the use of a plea of illegality does not encourage transparency and effective judicial protection, for private individuals in particular. There is an increasing number of judgments connected with the review of delegated and implementing acts, as well as implementing measures adopted by other EU bodies, institutions and units. It remains to be seen whether this is the area in which the plea of illegality will reveal the full extent of its possibilities when it comes to review the legality of European Union measures.

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Key words: plea of illegality, act of general application, review for legality, application to the CJEU, legal interest, Article 277 TFEU

I would like to thank R. Gąszczyk and M. Nowacki for valuable comments.

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