

EU Constitutional Law: VII. The legality of acts — powers and limitation of powers

Source: Professor Herwig Hofmann, University of Luxembourg. herwig.hofmann@uni.lu.

Copyright: (c) Herwig C. H. Hofmann

URL: http://www.cvce.eu/obj/eu_constitutional_law_vii_the_legality_of_acts_powers_and_limitation_of_powers-en-2397f8d5-45da-454e-b61d-a4f4eba6c60f.html

Publication date: 10/09/2012

VII. The legality of acts: powers and limitation of powers

Criteria for the legality of acts under the TFEU and the TEU:

1) Substance:

- a) Adherence to the principles of Art. 5 TEU:
 - i. Legal basis of the measure in primary law or in a source of law at the level of primary law – principle of conferral.
 - ii. Compliance with the principle of subsidiarity
 - iii. Compliance with the principle of proportionality
- b) Compliance with
 - i. Fundamental rights / droits fondamentaux / Grundrechte
 - ii. General principles of EU law

2) Procedure:

- a) Compliance with procedural provisions (e.g. legislative procedures – see above VI)
- b) Statement of reasons / motivation / Begründung (Art. 296(2) TFEU and Art. 41(2)(c) CFR)

1) a) Adherence to the principles of Art. 5 TEU

- Principle of conferral of competences / principe d'attribution / begrenzte Einzelermächtigung (Art. 5(2) TEU).
- Principle of subsidiarity / subsidiarité / Subsidiarität (Art. 5(3) TEU) applicable where there is shared (i.e. non-exclusive) competence.
- Principle of proportionality / proportionnalité / Verhältnismäßigkeit (Art. 5(4) TEU): Proportionality is a 'general principle of EU law' and must be observed in legislation as well as in formal and informal implementation acts.

I) Principle of conferral

The principle of conferral - Art. 5(2) TEU – and its interpretation:

- a) Centre of gravity / centre de gravité / Schwerpunktregel
- b) 'Effet utile'
- c) Art. 352 TFEU
- d) Implied powers

Additional issues:

- e) Closer cooperation, flexibility
- f) External relations

Conferral

- The principle is enshrined in
 - Art. 4(1) TEU which clarifies that ‘competences not conferred upon the Union in the Treaties remain with the MS.’
 - Art. 5(2) TEU states that the ‘Union shall act only within the limits of the competences conferred upon it by the MS in the Treaties to obtain the objectives set out therein. Competences not conferred upon the Union in the Treaties shall remain with the MS.’
 - Both show that there is no ‘competence-competence’ of the EU.
- The ECJ supervises this principle, e.g.: Case C-376/98, *Germany v Parliament and Council (tobacco advertising)*, [2000] ECR I-8419.

Categories of conferred powers

Art. 2 TFEU:

1. Exclusive competence – full exclusion of MS activities, even in cases of in-activity of the EU (Art. 3 TFEU).
2. Shared competence – MS exercise their competence ‘to the extent’ the EU has done so or ceases to do so (Art. 4 TFEU). (generally, difficult questions of interpretation arise as to whether the EU has intended to fully regulate a matter, or whether only partial or minimum regulation of a matter was intended).
5. Competence to support, coordinate or supplement the actions of the MS (without harmonisation measures) (Art. 5 and 6 TFEU).

All matters which do not fall in one of these categories (e.g. direct taxation) – the MS are obliged to exercise these powers in the context of their general obligations under EU law (e.g. the principle of non-discrimination, the exercise of fundamental freedoms...).

EXCLUSIVE competences

The EU has exclusive competences in the following areas (Art. 3 TFEU):

- a) Customs Union;
- b) The establishing of the competition rules necessary for the functioning of the internal market;
- c) Monetary policy for the Member States whose currency is the Euro;
- d) The conservation of marine biological resources under the common fisheries policy;
- e) Common commercial policy.

Shared competences

The principal areas of shared competences between the EU and Member States (Art. 4 TFEU):

- a) Internal market;
- b) Social policy, for the aspects defined in the Treaty;
- c) Economic, social and territorial cohesion;
- d) Agriculture and fisheries, excluding the conservation of marine biological resources;
- e) Environment;
- f) Consumer protection;
- g) Transport;
- h) Trans-european networks;
- i) Energy;
- j) Area of freedom, security and justice;
- k) Common safety concerns in public health matters, for the aspects defined in the Treaty

Support measures

The EU is enabled to carry out actions to support, coordinate or supplement the actions of Member States in the following areas (art. 6 TFEU):

- Protection and improvement of human health;
- Industry;
- Culture;
- Tourism;
- Education, vocational training, youth and sport;
- Civil protection;
- Administrative cooperation.

(aa) The choice of the legal basis

- If a measure may have several legal bases which require different decision-making procedures, its main objective or 'centre of gravity' (a notion developed by the ECJ; see, for example, Cases C-42/97 *EP v. Council* [1999] ECR I-869; C-155/91 *Waste Disposal* [1993] ECR I-939; C-300/89 *Titanium dioxide* [1991] ECR I-2867) must be determined.
- After the entry into force of the Treaty of Lisbon, this issue is important to distinguish the following legal basis problems:
 - between Art. 114 TFEU and Art. 352 TFEU (the latter being subsidiary to the former).
 - between a legal basis in the TFEU and one in the context of the CFSP in the TEU (but see Art. 40 TEU) for an example, see case C-91/05 *Small Arms* [2008] ECR I-3651.
 - Between legal basis in the TFEU, which provide for differing institutional participation of the ECB, Committee of Regions etc.

(bb) 'Effet utile'

- The ECJ adopts a teleological method when interpreting the TEU and TFEU based on the idea of *effet utile* (effectiveness).
 - This allows the provisions laid down in the Treaties to be properly applied (see e.g. the ECJ's interpretation of the instrument of the directive as provided for under Art. 288 TFEU *infra*).
 - If there are several possible interpretations for a provision set out in a Treaty, the interpretation is chosen which gives the EU rules full force and effect.

(cc) Article 352 TFEU

- Art. 352 TFEU:

‘If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.’
- This article confers on the Council the power to act where the objective of such is defined but the means are not explicitly provided for by the TEU. It has been used, for example, as the legal basis for adoption of legislation establishing administrative agencies in the EU.

(aa) Implied powers

- Origin of the principle under the ECSC
 - When an Article stated a goal but did not provide for the explicit methods by which it was to be attained, the Article was interpreted as giving the powers required for the implementation of the necessary measures (since ECJ Case 8/55 *Fédéchar* of 29 November 1956).
- EC Treaty:
 - The ECSC's approach was implemented in what is now Art. 352 TFEU.
 - 'implied powers' approach was then used to define external powers of the EU in instances where internal powers already exist. See Case 22/70 *AETR (ERTA)* [1971] ECR 263, Case C-469/98 *Commission v. Finland* [2002] ECR I-9627 (*open skies*).
- TFEU:
 - In **Art. 3(2) TFEU**: the EU shall have exclusive competences:
 - 'for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope

(ee) Flexibility and enhanced cooperation

- Treaty provisions on enhanced cooperation:
 - Art. 20 TEU,
 - Art. 326-334 TFEU.
- The Schengen *acquis* was integrated by a protocol annexed to the Treaty of Amsterdam into the framework of the EU between thirteen Member States with reference to enhanced cooperation.
- Other examples of an existing ‘two-speed’ Europe:
 - Articles 139-144 TFEU: € currency (adopted by those Member States which met the relevant criteria and had not requested ‘opt-out’ status).
 - Closer cooperation outside EU structures in the defence field, for example Eurocorps (joint military forces from various Member States).

(II) External relations

- EU external competences, legal basis:
 - In TEU:
 - Provisions on the EU's Common Foreign and Security Policy as well as the Common Security and Defence Policy Art. 23-46 TEU
 - In TFEU:
 - Art. 3.(1e) and 206-207 TFEU (Common commercial policy – exclusive EU competence)
 - Art. 217 TFEU association agreements
 - Others: Art. 191(4) TFEU environment; Art. 219 TFEU agreements on an exchange-rate system for the euro in relation to the currencies of third states;
 - Art. 208-211 TFEU development cooperation;
 - Art. 215 TFEU (trade sanctions as measure to enforce CFSP) see Case C-84/95, *Bosphoros Hava* [1996] ECR I-3953.

External relations

Effect:

- Art. 216(2) TFUE declares agreements to be ‘binding upon the institutions of the Union and its MS’
- However, agreements are only directly binding insofar as they are intended to have direct effect – see the problem of direct applicability of WTO law in the EU
- There are areas of ‘mixed competences’ where both the EU and the MS external competence (see opinion 1/94, *WTO* [1994] ECR I-5267).

ii) The principle of subsidiarity

- Art. 5(3) TEU :

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the EU shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the MS, either at a central level or at a regional or local level, but can rather, by reason of the scale or the effects of the proposed action be better achieved at Union level’;

- National Parliaments are called to ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the Protocol no.2 on the application of the principles of subsidiarity and proportionality.

Subsidiarity

- Further details of its application in:
 - Protocol no. 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality
 - Interinstitutional Agreements on procedures for implementing the principle of subsidiarity.
- Effects:
 - The application of the principle of subsidiarity may both have the effect of extending or of limiting EU powers.

Subsidiarity and judicial review

- ECJ has to date never declared a measure void for breach of subsidiarity
 - see cases: C-84/94, *Working Time Directive*, [1996] ECR I-5755; C-233/94, *Deposit Guarantee Schemes*, [1997] ECR I-2405; C-376/98, *Germany v EP and Council (tobacco advertising)*, [2000] ECR I-8419; C-377/98, *Biotechnological Inventions*, [2001] ECR I-7079
- The ECJ even stated that ‘An express reference to that principle [subsidiarity] cannot be required’ in the preamble or the text of the legislative act
 - see C-233/94, *Deposit Guarantee Schemes*, [1997] ECR I-2405, para. 28

Subsidiarity and MS Parliaments

- Protocol no. 2 to the Lisbon Treaty on the application of the principles of subsidiarity and proportionality:
 - contains a mechanism aimed at involving national Parliaments in the decision-making of the EU, especially for the identification of the level – European or national – which is better placed to act.
 - Requires that:
 - The Commission, forwards its draft legislative acts not only to EP and Council, but also to National Parliaments (art. 4), and states the reasons for the adoption of such action in terms of both subsidiarity and proportionality (art. 5).

Subsidiarity and MS Parliaments

- Procedure:
 - Each MS has two votes (for two chambers of parliaments in two-chamber countries).
 - If MS Parliaments consider that the Commission's draft proposal *does not comply* with the principle of subsidiarity, within eight weeks they can send a reasoned opinion to the Presidents of the EP, the Council and the Commission, explaining the reasons of their position (art. 6).
 - Where that position is supported by at least one third of the MS Parliaments, the Commission is bound to reconsider the draft proposal (so-called yellow-card procedure); however, the Commission retains the final power to decide to maintain, amend or withdraw the draft, provided that it states the reasons of its decision (art. 7.2).

Subsidiarity and MS Parliaments

- Procedure (cont.)
 - When MS Parliaments' reasoned opinions represent at least a simple majority of the MS, the Commission must reconsider the proposal and, if it decides to maintain it, must state the reasons why it considers that the proposal *complies with* the principle of subsidiarity (so-called orange-card procedure). Such reasoned opinion is submitted to the EP and Council and if, by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the two institutions are of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration (art. 7.3).
 - The ECJ has jurisdiction over actions based on art. 263 TFEU brought by Member States in the event a legislative act infringed upon the principle of subsidiarity (art.8). MS may establish that their parliaments have the right to request such procedures.

iii) The principle of proportionality

- Art. 5(4) TEU:
‘The content and form of Union’s action shall not exceed what is necessary to achieve the objectives of the Treaties.’
- Note:
 - Unlike subsidiarity, this principle is applicable to all types of powers.
 - ECJ had long adopted the proportionality test as general principle of EU law (and former EC law) before it was introduced into the Treaties.
 - It exists in most legal systems. The ECJ’s notion has been imported from German law, the Common Law equivalent would be the principle of reasonableness.

ECJ's interpretation of the proportionality test

- Referred to in almost every case which applies to a review of measures (well defined e.g. Case C-189/01 *Jippes and Others* [2001] ECR I-5689; C-331/88 *Fedesa and Others* [1990] ECR I-4023):
 1. Firstly, 'measures adopted by Community [EU] institutions' may '**not exceed the limits of what is appropriate and necessary in order to attain the objectives** legitimately pursued by the legislation in question.'
 2. Secondly, 'when there is a choice between several appropriate measures recourse must be had to the **least onerous**,' and
 3. finally, 'the disadvantages caused must **not be disproportionate** to the aims pursued.' (C-189/01 *Jippes and Other* [2001] ECR I-5689 para 81)

1) b) Fundamental Rights and General Principles of Law

a. Article 6 EU

b. Sources of Fundamental Rights:

- From *Stork* to *Stauder* and others – early methodology now represented in Art. 6 (3) TEU.
- Art. 6(1) TEU – the Charter of Fundamental Rights
- Art. 6(3) TEU – The European Convention Fundamental Rights

c. General Principles of Law

i) Protection of Fundamental Rights in the EU

a. Article 6 EU

b. Sources of Fundamental Rights:

- From *Stork* to *Stauder* and others – early methodology now represented in Art. 6 (3) TEU.
- Art. 6(1) TEU – the Charter of Fundamental Rights
- Art. 6(3) TEU – The European Convention

(a) Art 6(1) TEU

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, **which shall have the same legal value as the Treaties.**

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Art. 6(2) and (3) TEU

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

(b) Sources of Fundamental Rights

- (i) From *Stork* to *Stauder* and others – early methodology now represented in Art. 6(3) TEU. Methodology developed by the ECJ – now enshrined in Article 6(3) TEU: Fundamental Rights as General Principles of EU Law.
- (ii) Art. 6(1) TEU – the Charter of Fundamental Rights
- (iii) Art. 6(3) TEU – The European Convention

(i) Early Development – E(E)C

Why did the Treaty of Rome contain

- no bill of rights and
- no explicit provision for judicial review based on fundamental human rights?

Case 1/58, *Stork & Co. v High Authority of the European Coal and Steel Community*, [1959] ECR 17, para 4:

“Under Article 8 of the treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law.

Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (...) [in this case fundamental rights provisions].”

Further Development

Why did the ECJ avoid to address fundamental rights in *Stork* and why did it later, in *Stauder*, begin changing its approach?

See: Case 26/69, *Stauder*, [1969] ECR 419:

- “the fundamental human rights” are “enshrined in the general principles of Community law” and are “protected by the Court.”

The ECJ in C- 46/87 *Hoechst* [1989] ECR 2859 restated that EC law may not be interpreted in a manner which would be inconsistent with the fundamental rights protected by EC law.

Early methodology

Case 44/79 *Hauer* [1979] ECR 3727, paras 14, 15:

“As the Court declared in (...) *Internationale Handelsgesellschaft*, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself.”

The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.”

ECJ *Hauer*

Para 15: “The Court also emphasized in the judgment cited, and later in *Nold*, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures;

that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the MS, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community;

Pros and cons of the original approach (now Art. 6(3) TEU)

- Advantages:
 - Flexibility to develop the law as the legal system is evolving
 - Logic approach: If MS delegate powers to the EU level, they delegate powers in the context of their legal framework, i.e. powers which are not designed to breach fundamental rights.
 - The extent and the limits of fundamental rights protection can be adapted by the ECJ on a case by case basis in order to suit the specificities of the EU legal order.
- Disadvantages:
 - Lack of transparency for citizens to know which rights are protected under which circumstances.
 - Legal uncertainty about a right until it has been successfully litigated.

(ii) Art. 6(1) TEU

Art. 6(1) TEU declares that the Union recognises the rights, freedoms and principles set put in the **Charter of Fundamental rights of the EU** (...) as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.'

Charter of Fundamental Rights

A solution to the problems of transparency with respect to fundamental rights?

- was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7.12.2000, as adapted in 2007.
- The rights therein are based, in particular, on the rights and freedoms recognised by the
 - ECHR,
 - the constitutions of the MS,
 - the Council of Europe's Social Charter,
 - the Community Charter of Fundamental Social Rights of Workers and
 - other international conventions to which the European Union or its Member States are parties.

Charter of Fundamental Rights

- The charter recognises both:
 - substantial rights (e.g. Art. 1-19 Charter of Fundamental Rights of the EU)
 - procedural rights (e.g. Art. 41 Charter of Fundamental Rights of the EU).
- It is addressed to the institutions and bodies of the EU (Article 51(1)) and is thus applicable to Member States' bodies only where they implement EU law.
- The minimum protection is always at least the level afforded by the ECHR (Article 52(3)). More extensive protection is possible.

Charter of Fundamental Rights

Substantive rights:

- Art. 11 Freedom of Expression and Information / Liberté d'expression et d'information / Freiheit der Meinungsäusserung und Informationsfreiheit.
- Art. 12 Freedom of Assembly and of Association / Liberté de réunion et d'association / Versammlungs- und Vereinigungsfreiheit.
- Art. 13 Freedom of the Arts and Sciences / Liberté des arts et des sciences / Freiheit von Kunst und Wissenschaft.

Charter of Fundamental Rights

- Art.15 Freedom to Chose an Occupation / Liberté professionnelle / Berufsfreiheit.
- Art. 16 Freedom to Conduct a Business / Liberté d'entreprise / Unternehmerische Freiheit.
- Art. 17 Right to Property / Droit de propriété / Eigentumsrecht.
- Art. 20 Equality before the Law / égalité en droit / Gleichheit vor dem Gesetz.
- Art. 21 Non-discrimination / Nichtdiskriminierung.
- Art. 27 Workers Right to Information and Consultation / Droit à l'information et consultation des travailleurs / Recht auf Unterrichtung und Anhörung.

Charter of Fundamental Rights

- Art. 28 Collective Bargaining and Action /
Négociation et actions collectives /
Kollektivverhandlungen und -massnahmen.
- Art. 29 Access to Placement Services / accès aux
services de placement / Zugang zu
Arbeitsvermittlung.
- Art. 30 Protection in the Event of Unjustified
Dismissal / Protection en cas de licenciement
injustifié / Schutz bei Ungerechtfertigter Entlassung.
- Art. 31 Fair and Just Working Conditions /
Conditions de travail juste et équitable / Gerechte
und Angemessene Arbeitsbedingungen.
- Art. 33 Family and Professional Life / Vie familiale et
professionnelle / Familien- und Berufsleben.

Charter of Fundamental Rights

- Art. 36 Access to Services of General Economic Interest / accès aux Services d'intérêt économique général / Zugang zu Dienstleistungen von Allgemeinen Wirtschaftlichen Interesse.
- Art. 37 Environmental Protection / Protection de l'environnement / Umweltschutz.
- Art. 38 Consumer Protection / Protection des consommateurs / Verbraucherschutz.

Charter of Fundamental Rights

Procedural rights:

Art. 41 Right to Good Administration / Bonne administration / Gute Verwaltung

- Fair and impartial treatment of a dossier within reasonable time.
- Hearing before a decision.
- Access of a person to his or her file.
- Right to receive reasoned decisions.
- Right to damages / réparation des dommages causés par les institutions / Schadenersatz.

Charter of Fundamental Rights

- Art 42 Access to Documents / Zugang zu Dokumenten.
- Art 47 Right to an Effective Remedy and a Fair Trial / Recours effectif et à accéder à un tribunal impartial / Wirksamer Rechtsbehelf und Unparteiisches Gericht.
- Art 50 *'ne bis in idem'*

UK and Poland Opt-Out

Union citizens in Poland and the UK are disadvantaged due to the fact that their governments negotiated a special set of rules commonly referred to as ‘opt out’ in protocol No. 30 to the Treaty of Lisbon:

- Article 1: ‘[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’
- Article 1 (2): ‘for the avoidance of doubt’, in particular finds that ‘nothing in Title IV of the Charter’ dealing with social rights ‘creates justiciable rights applicable to Poland or the United Kingdom.’

(III) Art. 6(2) TEU – Convention

- Art. 6(2) TEU: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.’
- Result:
 - EU can join as member of the ECHR.
 - ECHR in Strasbourg will have the power to review EU legal acts for their compliance with the ECHR.
 - The role and effect of the ECHR in the EU legal order remains to be defined. However, the ECJ has been reluctant to accept direct effect of international public law in the EU.

II) Other General principles of EU law

- Alongside the rights outlined in the Charter of Fundamental Rights of the EU, the ECJ has developed an extensive body of case-law on the '**general principles of EC law**'. It has accepted, *inter alia*, the right to:
 - Proportionality (see above, Article 5 TEU).
 - Fair procedure, including a fair hearing (*audi alteram partem*).
 - Protection of legitimate expectations (with particular regard to the retroactive effect of EU legal acts).
 - Prohibition of double sanctions for one offence (*ne bis in idem*, see e.g. Case 14/68 *Walt Wilhelm* [1969] ECR 1).
 - Confidentiality of external legal advice...

2) Statement of reasons

- Obligation defined in Article 296 TFEU (for all types of act and specifically in Article 41(2) CFR for acts addressed at individuals.
 - Reasoning is therefore a condition for legality of all EU legal acts, no matter what its nature is;
 - see, for example, case C-233/94 *Germany v. Parliament and Council (Deposit Guarantee)* [1997] ECR I-2405.
- Whether the reasoning is sufficient, is analysed by the ECJ against the criteria of whether they:
 - enable the Court to review the acts legality with particular regard to the:
 - choice of the legal basis and
 - compliance with the principles of subsidiarity and proportionality.
 - Proper exercise of the discretionary powers.