

# The Action for Annulment – Article 263 TFEU

(Source: C. Tobler, J. Beglinger. Essential EU Law in Charts. 2nd „Lisbon“ edition. Budapest: Hvgorac, 2010, p. 101)

Opinion 1/08 (2009) of the ECJ: The choice of the appropriate legal basis provision has constitutional significance. Since the EU has conferred powers only, to proceed on an incorrect legal basis raises liability of invalidation of the act.

Two basic complaints:

## No legal basis / competence at all

Issue:

Division of competences between the Member States and the EU (vertical distribution of powers).

## Wrong legal basis / wrong procedure

Issues:

- Involvement of the various institutions (horizontal distribution of powers);
- Influence of the Member States in voting in the Council of Ministers.

Only one successful case so far:  
Tobacco Advertising (2000)

- Action brought by Germany against the Parliament and the Council of Ministers for the annulment of Directive 98/43/EC;
- ECJ annuls the directive;
- Reason for annulment: the directive did not sufficiently aim at the issues covered by its legal bases, namely free movement and competition.

Not successful:

Tobacco Advertising (2006) concerned a subsequent and less far-reaching directive 2003/33/EC.

E.g.

- Titanium Dioxide (1990), action brought by the Commission against the Council for having chosen the wrong EEC Treaty provision;
- EC Criminal Law (2005), action brought by the Commission against the Council for having chosen a EU Treaty provision instead of a EC Treaty provision as legal basis.

Access to the annulment procedure may be complicated for individuals.

## Indirect alternatives

- Question of validity in the preliminary ruling procedure;
- Plea of illegality during another procedure before the CJEU.

Regarding the relationship between these different possibilities.