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Control over EU Institutions

Action for Failure to Act as a Legal Remedy

One of the basic tools for competence review provided for in the Treaty on the Functioning of the European Union is the action for failure to act set forth in Article 265. The author discusses the place of this action in the system of legal remedies of the European Union, the grounds for its admissibility, and the substantive legal requirements it must meet. In particular, the article presents the case law of the Court of Justice of the European Union in this area, as well as the elements that determine the effective employment of an action for failure to act.

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Introduction

This article concerns a selected aspect of the control over the institutions, bodies, offices and agencies of the European Union in the performance of their duties under EU law. The main purpose of this type of competence control is the action for failure to act provided for in Article 265 of the Treaty on the Functioning of the European Union, which may be brought by both public entities, i.e. Member States and EU institutions, as well as private entities, i.e. natural and legal entities[1]. This legal remedy is, in principle, a direct reflection of the action for annulment referred to in Article 263 TFEU. While the main purpose of

[1] Article 265 TFEU sets forth: "If the European Parliament, the European Council, the Council, the Commission, or the European Central Bank fails to act in breach of the Treaties, Member States and other institutions of the Union may bring an action before the Court of Justice of the European Union to have the breach established. This Article shall apply, under the same conditions, to bodies, offices, and agencies of the Union which fail to act. Such an action shall be admissible only if the institution, body, office, or agency concerned has first been called upon to act. If, within two months of such call upon it to act, the institution, body, office, or agency has not defined its position, the action may be brought within a further period of two months. Any natural or legal person may bring an action before the Court, under the conditions set out in the preceding paragraphs, alleging that one of the institutions, bodies, or agencies of the Union has failed to issue an act addressed to it, other than a recommendation or an opinion".

the action for annulment is to enable the Court of Justice of the European Union, hereinafter referred to as the "CJEU" or "Court", to exercise broad control over the incorrect or unlawful exercise of powers, the purpose of the action for failure to act is to examine the reasons for failure to fulfil obligations imposed by EU law. The Treaty provision does not specify type of obligations or legal acts (indicating general or individual acts) for the enforcement of which an action for failure to act may be brought. Article 265 TFEU refers only to failure to act in general or failure to adopt an act addressed to a person as grounds for bringing an action for failure to act. In practice, therefore, it can be used to combat inaction in all cases of failure to fulfil an obligation imposed by law, thus performing a typical function of control. Although the CJEU is not particularly inclined to uphold claims based on the grounds specified in Article 265 TFEU in its judgments, the mere call for action puts pressure on the mechanism of competence self-control. Unfortunately, the very nature of these grounds, in particular the consistent position of the CJEU that the mere presentation of a position by an EU institution gives an end to the state of inaction, does not seem to promote the effectiveness of control exercised by private entities.

It is therefore worth looking at both the scope of the Court's review, including the conditions set forth in Article 265 TFEU, and its practical consequences, which result from lodging an action for failure to act. The article is mainly based on an analysis of CJEU case-law, as the relatively brief description of actions for failure to act in Article 265 TFEU has yet to be clarified by the case-law of this judicial body. The article therefore cites the most important theses of the court's rulings, supplemented by the legal writings and the author's contribution.

Action for failure to act in the EU system of legal remedies

One of the pillars of the case-law of the Court of Justice of the European Union is the assumption that the Treaty on the Functioning of the European Union, in Articles 263, 277 and 267, establishes a comprehensive system of legal remedies and procedures ensuring the review of the legality of European Union acts, entrusting it to the EU courts[2]. *Prima facie*, it is clear that in referring to the pillars of the Treaty's protection of the rule of law, the CJEU omitted to refer to Article 265 TFEU, which stipulates the conditions for the application of an important means of control of EU institutions, namely the action for failure to act. It should be remembered that, from the point of view of third parties, an action for failure to act remains a legal remedy, but at the same time it is an instrument for monitoring the fulfilment of legal obligations by the EU institution, body, office or agency.

A strict (narrow) interpretation of the Court's case-law could therefore lead

[2] E.g. judgment of the Court of Justice of 26.3.2017 in Case C-72/15, *PJSC Rosneft Oil Company*, EU:C:2017:236, paragraph 66.

to the conclusion that Article 265 TFEU, which sets forth the conditions for lodging an action for failure to act, is merely a superfluous addition, a kind of irrelevant supplement to the complete system of legal remedies provided by the EU courts on the basis of action for annulment, plea of illegality, and preliminary rulings[3]. Eventually, it can be argued that the Court intended to establish two regimes of procedural remedies – one relating to the validity of the acts of EU law and another one concerning exclusively to the inaction of EU institutions.

However, it is worth considering whether the omission of this provision in judicial statements was intentional or whether it should simply be regarded as an "accident" in the administration of justice. The answer is not as clear-cut as it might seem at first glance. The interpretation of the purpose of this legal remedy is complicated, given both the function and the aim of this action and the Court's subsequent broader reference to the entire system of EU legal remedies, most often without specifying any concrete provision[4].

With reference to Articles 263, 267, and 277 TFEU, it is worth emphasizing that, as a rule, the purpose of the legal remedies set forth in these provisions is to correct or eliminate EU legal acts that have legal effects and are flawed due to their incompatibility with higher-ranking acts in the EU legal order, in other words, the incorrect exercise of the powers of EU institutions (or, rarely, national authorities applying EU law). Meanwhile, an action for failure to act should be seen as the other side of the coin of the existence of specific obligations in the EU legal order, i.e. a measure by which institutions are compelled to properly exercise their powers by providing for the obligation to take a specific action required by law, in particular the adoption of a legal act. It is therefore an important control function exercised in a dispersed manner by various entities within the EU legal order.

The failure to take into account actions lodged under Article 265 TFEU in the EU system of legal remedies in older case-law is incomprehensible, given that in its previous case-law the Court has emphasized the interrelationship between action for annulment and action for failure to act. For the purposes of both proceedings resulting from the lodging of these actions, the concept of acts having legal effects and analogous grounds for the standing of so-called non-privileged applicants was applied[5]. In one of its judgments, the Court clearly stated that the concept of the measure giving rise to the action is identical for

[3] The view on the supplementary function of action for failure to act is often referred to in legal writing – cf. A. Sikora: *Skarga na bezczynność [Action for failure to act]* [in:] N. Półtorak (ed.), *Ochrona prawna. System Prawa Unii Europejskiej*. Volume 5, Warsaw 2025, p. 650, MN. 442.

[4] Commencing with the judgment of the Court of Justice of 23.3.1993 in Case C-314/91, *Beate Weber v EP*, EU:C:1993:109, paragraph 8, the Court no longer refers to the specific provisions relating to legal remedies. However, it explicitly referred to Article 265 TFEU in the order of the General Court of 25 September 2019 in Case T-99/19, *Nathaniel Magnan v Commission*, EU:T:2019:693, paragraph 40.

[5] A. Türk: *Judicial Review in EU Law*, Edward Elgar Publishing 2025, pp. 415-416.

both legal measures, since the provisions on which they are based describe one and the same method of reference[6].

Nevertheless, the direct relationship between these remedies remains an open question, treating them as identical instruments, one of which – (action for annulment) relates to the incorrect exercise of powers, and the other – (action for failure to act) relates to the failure to exercise those powers. The best example of the inconsistency of this reasoning is the CJEU's opposition to the concept of simultaneous submission by the applicants of an action for annulment together with an action for failure to act, which would apply in the case of its annulment (in accordance with the concept that the institution failed to adopt a correct act without legal defects)[7]. However, the CJEU considered this concept to be a circumvention of the Treaty provisions that strictly define the grounds for bringing an action for annulment.

Although the Court has repeatedly emphasized that the provisions of Article 265 TFEU cannot be strictly interpreted due to the principle of effective judicial protection[8], an action for failure to act is a legal remedy, whose potential remains rather untapped. Most often, proceedings initiated on this basis end with the action being declared inadmissible, and there is only one case of significance for the development of EU law in which, at the request of the European Parliament, the Court found that the Council of the European Union had failed to exercise its competence in the field of transport policy[9].

This paper analysing the elements of the aforementioned provision setting forth both the conditions for admissibility and the requirements for the effective lodging of an action for failure to act under EU law.

Finally, conclusions summarizing the system of review of EU legal acts (or rather the lack thereof) in this area will be presented.

In this article, I will generally refer to the inaction of EU institutions which are listed in Article 13 of the Treaty on European Union. However, bearing in mind the wording of the last sentence of the first paragraph of Article 265 TFEU, in accordance with which this provision also applies to *bodies, offices, and agencies of the* European *Union*, whenever I refer to EU institutions in this paper, this should also be understood as comprising such bodies, offices and agencies.

Grounds for bringing an action for failure to act

Conditions of admissibility

Privileged applicants

In accordance with the first sentence of the first paragraph of Article 265 TFEU, the possibility of bringing an action for failure to act applies only to the inaction of

[6] Judgment of the Court of Justice of 18.11.1970 in Case 15/70, *Amedeo Chevalley v Commission*, EU:C:1970:95, paragraph 6.

[7] Judgment of the Court of Justice of 10.12.1969 in joined Cases 10 and 18/68, *Società 'Eridania' Zuccherifici Nazionali and Others v Commission*, EU:C:1969:66, paragraph 17, second subparagraph.

[8] T-99/19, *Nathaniel Magnan v Commission*, paragraph 42.

[9] Judgment of the Court of Justice of 22.5.1985 in Case 13/83, *PE v Council*, EU:C:1985:220.

the European Parliament, the European Council, the Council, the Commission, or the European Central Bank, but the last sentence, which refers to EU bodies offices, and agencies, establishes the liability of all EU institutions, bodies offices, and agencies. However, this provision is not formulated in terms that allow for the broad interpretation – one may even find in legal writing the suggestion that private entities have broader possibilities to challenge the inaction than EU institutions and Member States[10]. Although, despite the unfortunate wording of Article 265 TFEU, this view does not seem to be well reasoned.

The first sentence of this provision refers to the rights of typical privileged applicants in EU law. Traditionally, under EU law, Member States and EU institutions have broad powers to bring actions before the Court (active legal standing), and therefore also to bring action for failure to act. Interestingly, legal writing indicates that this competence may be limited with regard to the Court of Justice of the EU, although this does not follow from the wording of Article 265 TFEU[11]. Similar doubts have been expressed as to the standing of the European Court of Auditors[12], but this does not appear to be well grounded view.

The specific nature of this type of action is further complemented by the indication that EU bodies, offices and agencies only have passive legal standing (actions may be brought against them). Whether they have active legal standing has not yet been clarified in the Court's case-law[13]. It should be noted that actions brought against other entities that do not have the status of a separate body office or agency should be attributed to the competent institution[14].

Non-privileged applicants (natural and legal entities)

The basic condition for the admissibility of an action for failure to act for non-privileged applicants is2, as a rule, to meet the so-called Plaumann test, i.e., demonstrating that the act in question concerns them individually and directly, developed for the purposes of an action for annulment (currently Article 263 fourth paragraph TFEU). Nevertheless, "legal interest and standing to sue are separate conditions of admissibility which a natural or legal person must satisfy cumulatively in order to bring an action for failure to act under the third paragraph of Article 265 TFEU"[15]. Despite this clear distinction, it has been noted in legal writing that the

[10] K.P.E. Lasok: *Lasok's European Court Practice and Procedure*, London 2017, p. 1233, MN 17.21.
[11] R. Barens: *Remedies and Procedures Before the EU Courts*, p. 337, MN. 8.04; Opinion of Advocate General Lenz of 7.2.1985, in Case 13/83, *EP v. Council of the EC,* EU:C:1985:53, point 2.1.2.1. For a different view, see K. Lenaerts, K. Gutman, J.T. Nowak (eds.), *EU Procedural Law*, p. 418, MN. 8.11.
[12] R. Barens: *Remedies and Procedures*…, op.cit., p. 337, MN 8.04. Differently K. Lenaerts, K. Gutman, J.T. Nowak (eds.), op.cit., p. 418, MN. 8.11.
[13] K. Lenaerts, K. Gutman, J.T. Nowak (eds.), op.cit., p. 419, MN. 8.12.
[14] With regard to the attribution of OLAF's activities to the EC, see the judgment of the General Court of the European Union of 22.6.2015 in Case T-690/13, EU:T:2015:519, paragraphs 14 and 15.
[15] Judgment of the Court of Justice of 23.11.2013 in joined cases C-596/15 P and C-597/15 P, *Bionorica SE and Diapharm GmbH & Co. KG v Commission,* EU:C:2017:886, paragraph 106.

the legal act must be of direct concern to the applicant and the legal interest may in many cases overlap and be extremely difficult to distinguish[16]. A consistent application of this approach would mean that privileged applicants would also be required to demonstrate such an interest.

Therefore, the general rule is the applicant is required to demonstrate his legal interest (*intérêt à agir*), which is the first and fundamental prerequisite for bringing an action before a court[17]. The legal interest of the applicant must be real and current and cannot relate to a future and hypothetical situation; with regard to the subject matter of the action, it must exist at the stage of filing the application, otherwise being not admissible, and until the court ruling is issued, under pain of discontinuation of the proceedings[18]. The result of the application should be to improve the situation of the applicant, including ensuring its own benefit[19], because if the examination of the application in accordance with the applicant's wishes cannot in any way benefit it, the Court will rule that there is no legal interest[20]. Private entities may therefore bring an action for failure to act in respect of any failure to take a position or adopts an act, but only in the following cases:

- where those persons would have been the addressees of the act which those institutions failed to address to them;
- where the omitted act would have had binding legal effects capable of affecting their interests by bringing about a distinct change in their legal position;
- here the act would have been a necessary preliminary act in a procedure capable of leading to an act that has binding legal effects in relation to them[21].

It should be noted that where the application concerns a regulatory act (any act of a non-legislative nature which does not require implementing measures), the applicant must only show that the act would affect them directly[22]. In order to assess whether the act contains implementing measures, it is necessary to consider the situation of the person invoking the right to bring an action and, secondly, to refer exclusively to the subject matter of the action[23]. In this respect, it is irrelevant

[16] See further comments by A. Türk: *Judicial Review*…, op.cit., pp. 268 and 269.
[17] Judgment of the Court of Justice of 4.6.2015 in Case C 682/13 P, *Andechser Molkerei Scheitz v Commission*, EU:C:2015:356, paragraph 27.
[18] Judgment of the CJEU of 17.9.2015, in case C-33/14 P, *Mory and Others v Commission*, EU:C:2015:609, paragraphs 56 and 57.
[19] Judgment of the Court of Justice of 17.4.2008 in Joined Cases C-373/06 P, C-379/06 P and C-382/06 P, *Flaherty and Others v Commission*, EU:C:2008:230, paragraph 25.
[20] Judgment of the Court of Justice of 23.11.2013 in joined cases C-596/15 P and C-597/15 P, *Bionorica SE and Diapharm GmbH & Co. KG v Commission*, EU:C:2017:886, paragraphs 85-87.
[21] Order of the General Court of 25.9.2019 in Case T-99/19, *Nathaniel Magnan v Commission*, EU:T:2019:693, paragraph 26.
[22] Order of the Court of Justice of 19.6.2023 in Case C-12/23 P, *Autoramiksas UAB v Commission*, EU:C:2023:495, paragraph 15.
[23] Judgment of the Court of Justice of 19.12.2013 in Case C-274/12 P, *Telefónica v Commission*, EU:C:2013:852, paragraphs 30 and 31.

whether these measures are of a mechanical nature[24].

Bearing in mind the difficulty of demonstrating that the failure to adopt the act affects the applicant directly and individually and of demonstrating that there is no need to adopt implementing measures, it will be extremely difficult for non-privileged applicants to obtain a favourable judgment as a result of an action for failure to act[25]. This approach dominating in Court's case-law will also prevent private applicants from effectively combating inaction in the issuance of acts of general application.

Other grounds for admissibility

Firstly, an action for failure to act must exclusively in all cases refer to the inaction on the part of EU institutions, and may never concern inaction on the part of EU Member States[26] or the European Court of Human Rights[27].

The second condition for the admissibility of an action for failure to act is that the EU institution, body, office or agency has not taken a position within two months of the date of the request (the so-called silence of the institution – pre-litigation procedure)[28].

Only after this period has expired does the application become admissible, in conjunction with the lack of response from the EU institutions or a response indicating that no action will be taken. Article 265 TFEU therefore establishes the obligation to carry out an explanatory procedure before initiating the actual dispute as one of the conditions for the admissibility of the action. Failure to call on the institution to take action will result in the action for failure to act being declared inadmissible[29], whereby the call must be addressed directly to the specific institution; it is not sufficient to direct it only in correspondence for information[30] and it must be made explicitly[31]. A similar situation will arise if the action is lodged before the expiry of this two-month period[32]. This period begins on the date of delivery of the request to the institution[33].

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[24] Judgment of the Court of Justice of 28.4.2015 in Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, EU:C:2015:284, paragraphs 41 and 42.
[25] This was pointed out by A. Türk: *Judicial Review*…, op.cit., p. 408.
[26] Order of the Court of Justice of 4.3.2010 in Case C-374/09 P, *Constantin Hersulescu v Romania*, EU:C:201:123, paragraphs 11 and 12.
[27] Order of the General Court of 4.4.2011 in Case T-133/11, *Fundația Pro Fondbis – 1946 Semper v ECtHR*, EU:T:2011:141, paragraph 6.
[28] It should be noted that this period is usually extended by 10 days due to distance.
[29] Order of the CFI of 26.11.2008, in Case T-393/06, *Makhteshim-Agan Holding BV and Others v ECPA*, EU:T:2008:531, paragraphs 48 and 49.
[30] Order of the General Court of 17.3.2015 in Case T-234/17, *Mammoet Salvage v Commission*, EU:T:2015:166, paragraph 33.
[31] Judgment of the Court of Justice of 20.3.1984 in Case 84/82, *Germany v Commission*, EU:C:1984:117, paragraph 23.
[32] Order of the General Court of 30.6.2011 in Case T-367/09, *Tecnoprocess Srl v Commission*, EU:T:2011:320, paragraph 53.
[33] Judgment of the General Court of 15.9.1998 in Case T-95/96, *Gestevisión Telecinco SA v Commission*, EU:T:1998:206, paragraph 90.

However, although the institution has two months to respond to the request, if it does so after the action was brought, it also initiates proceedings and renders the subject matter of the action for ceasing to exist[34]. Such a solution may, of course, lead to the situation that the institution would not exercise its powers until it receives a request under Article 265 TFEU[35].

The purpose of specifying in the above-mentioned provision the deadline for the institution to take action after the call has been made is to indicate to it that it remains in breach (in state of inaction) and to enable it to remedy the breach, as well as to define the moment at which the failure to act occurs. However, these objectives will only be achieved if the call is expressed with sufficient precision and clarity so that the institution concerned has a clear understanding of the content of the act to be adopted and is aware that the purpose of the colling upon it is to compel it to define its position[36]. It is important that the call is made by the entity lodging the action for failure to act[37]. Merely referring to the calls made by other entities is not sufficient – the action will be deemed inadmissible[38].

It should be noted that the call for action serves to define the subject matter of the dispute and, as a rule, it is not possible to go beyond the scope indicated in the call at a later stage[39]. However, there are also rulings in which the Court indicates that it is not necessary to maintain full consistency between the call and the application[40]. In any event, the allegations made in the notice and the action will be subject to judicial interpretation and may be clarified at later stages of the proceedings, provided that their substance remains unchanged[41]. Nevertheless, it is not allowed to extend the scope of the action to include new pleas not raised in the notice[42]. In such an action, the applicant may request not so much that the institution be ordered to adopt the omitted act, but only that it be declared, where appropriate, that it has infringed the Treaty by failing to take the requested measures in breach of its obligations – there is therefore no need

[34] Judgment of the Court of Justice of 24.11.1994 in Joined Cases C-15/91 and C-108/91, *Josef Buckl & Söhne OHG and Others v Commission*, EU:C:1992:454, paragraph 15.

[35] I. Daukšienė, A. Budnikas: *Has the Action for Failure to Act in the EU Lost its Purpose*?, "Baltic Journal of Law & Politics" No 7:2/2014, p. 213.

[36] Order of the SPI of 30.4.1999, in Case T-311/97, EU:T:1999:89, paragraph 35; ECJ order of 18.11.1999 in Case C-249/99 P, *Pescados Congelados Jogamar SL v Commission*, EU:C:1999:571, paragraph 18.

[37] Order of the General Court of 28.11.2023 in Case T-600/22, *ST v Frontex*, EU:T:2023:776, paragraph 15.

[38] Order of the CFI of 6.2.1997, in Case T-64/96, *Filippo de Jorio v. Council of the EU*, EU:T:1997:15, paragraphs 40 and 41.

[39] Judgment of the General Court of 10.3.2021 in Case T-245/17, *ViaSat, Inc. v Commission*, EU:T:2021:128, paragraph 38.

[40] Judgment of the General Court of 8.6.2000 in Joined Cases T-79/96, T-260/97 and T-117/98, *Camar srl and Tico srl v Commission*, EU:T:2000:147, paragraph 67.

[41] See, more broadly, the summary in the judgment of the General Court of 21.12.2022 in Case T-702/21, *Ekobulkos EOOD v Commission*, EU:T:2022:842, paragraphs 17-22.

[42] Order of the General Court of 10.1.2005 in Case T-209/04, *Spain v Commission*, EU:T:2005:2, paragraph 37, as clearly emphasized by the General Court.

to use the same wording as that contained in the notice[43].

Although there is no formal obligation to refer explicitly to Article 265 TFEU in the request, for procedural reasons in order to avoid any doubt as to the nature of the request, this solution is recommended[44], with an indication that it constitutes a preliminary step towards the initiation of legal proceedings[45]. Interestingly, the Court recognized the effectiveness of a call for action addressed to the Commission in the form of a European Parliament resolution and the adoption of a position by that institution in the form of a communication[46]. However, it should be remembered that the CJEU requires that the binding nature of the call be clearly stated in relation to its consequences, i.e., it must clearly announce the intention for filing of an action under Article 265 TFEU[47].

In this area, it may be worth referring again to the adoption of an act having legal effects (a reviewable act). The legal consequences would be relatively straightforward if Article 265 TFEU referred only to a failure to act or, perhaps, a failure to adopt an act. However, the state of inaction on the part of the institution ends when it presents its position.

Therefore, if the institution takes a specific position towards the applicant, including the issuing of an explicit negative act (a refusal to adopt an act), the applicant may file an action for annulment (Article 263 TFEU) against that act or against the decision to refuse to adopt it[48]. However, this action will only be admissible if the negative act of the institution produces specific legal effects (it is a reviewable act)[49].

In other respects, it appears that a party may attempt to challenge the position of an institution which, in its opinion, does not respond explicitly to its request or if its response constitutes a hidden refusal, by means of an action for failure to act

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[43] T-245/17, *ViaSat, Inc. v Commission*, EU:T:2021:128, paragraph 38.

[44] Judgment of the CFI of 18.9.1992 in Case T-28/90, *Asia Motor France SA and Others v Commission*, EU:T:1992:98, paragraph 28, as pointed out by the CFI

[45] Order of the CFI of 30.4.1999 in Case T-311/97, *Pescados Congelados Jogamar SL v Commission*, EU:T:1999:89, paragraph 37.

[46] Judgment of the Court of Justice of 5.9.2023 in Case C-137/21, *PE v Commission*, EU:C:2023:625, paragraph 28.

[47] Judgment of the Court of Justice of 12.5.2022 in Case C-430/20 P, *Christoph Klein v Commission*, EU:C:2022:377, paragraphs 49 and 50.

[48] A. Zawidzka, M. Taborowski: *Skarga na bezczynność instytucji wspólnotowych [Action for failure to act by Community institutions]*, "Palestra" No. 3-4/2004, p. 218; O. Due: *Legal Remedies for the Failure of European Community Institutions to Act in Conformity with EEC Treaty Provisions*, "Fordham International Law Journal", vol. 14, No. 2/1990, p. 356 – although the authors refer to the previous wording of Article 265 TFEU (i.e. Article 232 TEC), the theses contained in the studies are still valid; Order of the General Court of the European Union of 8.3.2019 in Case T-156/18, R.A. *Legutko and T.P. Poręba v EP*, EU:T:2019:150, paragraph 42, Opinion of Advocate General Y. Bot of 12.9.2013 in Case C-63/12, EU:C:2013:547, paragraph 79; order of the General Court of 30.1.2020 in Case T-293/18, *Latvia v Commission*, EU:T:2020:29, paragraph 21.

[49] Order of the CJEU of 19.6.2023, in Case C-12/23 P, *Autoramiksas UAB v Commission*, EU:C:2023:495, paragraph 20.

(Article 265 TFEU)[50]. The assessment of the position presented by the institution is a legal issue subject to judicial review[51].

Court's case-law in this area is not yet clearly defined, but the choice of the appropriate legal remedy should be based largely on an analysis of whether the decision refusing to take action relates to an obligation under EU law or whether the applicant is merely mistaken in believing that such an obligation exists[52].

With regard to non-privileged applicants (natural and legal persons), the treaty provision also requires to show legal interest as an additional condition for admissibility. In this regard, the Court's case-law had to address the problem of whether private entities have standing to bring an action for failure to act in respect of the non-adoption of an act addressed to a third party which, if adopted, would be of individual and direct concern to the applicant. The Court opted for a broad interpretation of procedural rights in the concerned circumstances, confirming the requirements of the existence of a legal interest in such cases[53].

Finally, it is worth mentioning that the TFEU does not specify any deadline for submitting an action for failure to act against an EU institution. In accordance with the settled case-law, it must be done within a reasonable period of time which, however, begins to run after it becomes apparent in the course of working consultations that the institution does not intend to take any action at all[54]. Therefore, failure to bring an action for failure to act within a reasonable period of time may also render the inadmissible[55]. However, the introduction of such a requirement, which is not provided for in the Treaty, has been criticized in the literature as lacking legal basis and violating the principle of legal certainty[56]. Of course, the Court's approach, derived from the general principles of EU law seems to be well reasoned, but the practical problem that arises in such circumstances is that the party does not know when the time limit for bringing an action begins to run and when it expires.

The response to the calling upon the institution is, in accordance with the Treaty, taking a position by the institution. It

[50] Judgment of the General Court of 12.12.2007 in Case T-308/05, *Italy v Commission*, EU:T:2007:382, paragraph 60. Specifically in the context of refusal, see the judgment of the Court of Justice of 5.9.2023 in Case C-137/21, *PE v Commission*, EU:C:2023:625, paragraphs 39-41, with reference to the interinstitutional context in the EU.

[51] Order of the Court of Justice of 16.1.2020 in Case C-634/19 P, *CJ v CJEU*, EU:C:2020:474, paragraph 29.

[52] See, for example, the order of the General Court of 26.10.2023 in Case T-244/23, *E. Tomac v Council*, EU:T:2023:685, paragraph 35.

[53] C-68/95, T. *Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, paragraph 59.

[54] Judgment of the Court of Justice of 16.2.1993 in Case C-107/91, *ENU v Commission*, EU:C:1993:56, paragraphs 23 and 24. Reference to reasonable time limits for taking action is part of established case-law, cf. M. Pechstein: *Artikel 265* [in:] M. Pechstein, C. Nowak, U. Häde (eds.), *Frankfurter Kommentar EUV. GRC. AEUV*, Vol. 4, Mohr Siebeck 2017, p. 641.

[55] Judgment of the Court of Justice of 6.7.1971 in Case 59/70, *Netherlands v Commission*, EU:C:1971:77, paragraphs 19 and 22-24.

[56] See T. Hartley: *The Foundations of European Union Law*, Oxford 2014, pp. 404 and 405; A. Türk: *Judicial Review*…, op.cit., pp. 398-399.

should be borne in mind that the main purpose of proceedings initiated on the basis of an action for failure to act is to avoid a situation where the institution that is inactive evades its obligations and judicial sanctions by remaining silent, or by adopting a strategy of postponing its response, providing an evasive answer, or providing an answer that is insufficiently binding on the entity which called upon the institution to take an action[57]. The position must be presented in a clear and unambiguous manner. Simply sending a letter indicating that the matter is still being examined cannot be considered as such an action[58]. In this regard, the Court emphasizes that it is important to examine two conditions: whether the institution's position was presented within two months and whether it was delivered to the person making the request – it is therefore a very important date in terms of meeting procedural requirements[59]. Any contacts between the institution and the applicant after the receipt of the formal notification from the institution does not prevent compliance with the time limits laid down in Article 265 TFEU[60]. The Court also considers official any letters sent outside the institution without a typical reservation that it is not to be the official position, rejecting the argument that such letters merely represent the position of a specific employee[61]. They may also take electronic form, e.g. an e-mail[62]. In practice, however, the CJEU accepts the presentation of a position even after the expiry of this time limit[63]. The only sanction in such a case is usually the attribution of costs to the institution[64]. This approach has been criticized in legal writing as contrary to the proper administration of justice, as it encourages institutions to present their positions as late as possible, just before the judgment is to be delivered[65]. Nevertheless, this approach meets the fundamental objective of the proceedings set out in Article 265 TFEU, which is to end the period of inaction on the side of the institution.

The legal literature notes that the presentation of a position by an institution may take the following forms[66]:

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[57] See Opinion of Advocate General Mischo of 26.5.1988, in Case 377/87, *PE v Council of the EC*, EU:C:1988:264, paragraph 12.

[58] Judgment of the CFI of 7.3.2002 in Case T-212/99, *Intervet International BV v Commission*, EU:T:2002:63, paragraph 61.

[59] Judgment of the General Court of 27.1.2000 in Joined Cases T-194/97 and T-83/98, *Eugénio Branco, Ld[a] v Commission*, EU:T:2000:20, paragraph 55.

[60] Order of the CFI of 6.5.1997, in Case T-195/95, *Guérin Automobiles v Commission*, EU:T:1996:36, paragraph 20.

[61] Judgment of the General Court of 30.9.2003 in Case T-26/01, *Fiocchi Munizioni SpA v Commission*, EU:T:2003:248, paragraph 91.

[62] Order of the General Court of 27.6.2019 in Case T-1/19, *CJ v CJEU*, EU:T:2019:465

[63] Judgment of the Court of Justice of 1.4.1993 in Case C-25/91, *Pesqueras Echebastar SA v Commission*, EU:C:1993:131, paragraph 11.

[64] See, for example, the judgment of the Court of Justice of 8.7.1970 in Case 75/69, *Ernst Hake & Co. v Commission*, EU:C:1970:65, paragraph 11.

[65] I. Daukšienė, A. Budnikas: *Has the Action for Failure*…, op.cit., p. 217 and the literature cited therein.

[66] R. Barens: *Remedies and Procedures*…, op.cit., p. 346, MN 8.26.

1) adoption of the requested act – in which case the action becomes inadmissible[67];
2) failure to express a position, instead of which a procedure is initiated, including a legislative procedure, in respect of the act on which it remained inactive[68] – in this case, the action becomes inadmissible;
3) refusal to adopt the requested act, indicating the reasons why it should not be adopted or that it does not have the competence to adopt it[69];
4) informing, with due justification, that it will not take action in response to the request addressed to it, but if such information does not end the period of inaction, it may be subject to review by the CJEU in proceedings initiated by an action for failure to act[70];
5) adopt an act other than the one that was the subject of the call[71];
6) expressing an opinion on part of the arguments presented in the call, without commenting on the rest – in which case the action is only partially admissible[72].

Substantive grounds for the action

Inaction of an institution

An action for failure to act is based on the assumption that the unlawful inaction of the institution whose conduct is being reviewed allows the Court to be requested to declare that the failure to act is contrary to the Treaty if the institution concerned has not remedied that failure. The effect of such a declaratory judgment is that the institution against which the action is brought is required to take all necessary measures to comply with the judgment, without prejudice to the non-contractual liability of the EU[73].

An action for failure to act is an autonomous legal remedy, and the judgment delivered as a result of such an action is purely declaratory in nature, merely establishing that there has been a breach of EU law[74]. At the same time, the applicants often fail to note that in proceedings based on Article 265 TFEU, the CJEU does not have the power to order EU institutions to take specific actions and such an approach is grounded in the separation

[67] Judgment of the General Court of 7.10.2009, in Case T-420/05, *Vischim Srl v. Commission*, EU:T:2009:391, paras. 253 and 254.
[68] Judgment of the General Court of 24.1.1995 in Case T-74/92, *Ladbroke Racing Deutschland GmbH v Commission*, EU:T:1995:10, paragraph 44; judgment of the General Court of 12.12.2007 in Case T-308/05, *Italy v Commission*, EU:T:2007:382, paragraph 61.
[69] Order of the General Court of 17.12.2010 in Case T-245/10, *Verein Deutsche Sprache eV v Council of the EU*, EU:T:2010:555, paragraph 15.
[70] Judgment of the Court of Justice of 27.9.1988 in Case 302/87, *EP v Council*, EU:C:1988:461, paragraph 17; judgment of the General Court of 16.12.2015 in Case T-521/14, *Sweden v Commission*, EU:T:2015:976, paragraph 44.
[71] See, for example, the judgment of the Court of Justice of 19.11.2013 in Case C-196/12, *Commission v Council*, EU:C:2013:753, paragraphs 25-30.
[72] Judgment of the General Court of 24.1.1995 in Case T-74/92, *Ladbroke Racing Deutschland GmbH v Commission*, EU:T:1995:10, paragraph 56.
[73] Judgment of the Court of Justice of 12.7.1988 in Case 383/87, *Commission v Council*, EU:C:1988:388, paragraph 9.
[74] R. Barens: *Remedies and Procedures*…, op.cit., p. 336, MN 8.02.

of judicial and administrative-legislative functions[75].

The reference developed in the Court's case-law to other legal remedies in the EU legal order is relatively interesting. It is worth mentioning the thesis developed in German doctrine, according to which an action for failure to act is subsidiary in nature, i.e. it is available to a party only to the extent that it is not entitled to other legal remedies provided for in EU law[76]. Although the Court's case-law does not explicitly confirm this approach, such conclusions may nevertheless be drawn for practical reasons, i.e. the legal structure of this action.

First of all, the CJEU has noted a special link between an action for failure to act and an action for annulment – older rulings have explicitly emphasized that they constitute one and the same type of legal remedy[77]. However, this assumption has so far resulted in a similar approach to the standing to bring such actions for the purposes of their admissibility[78]. Nevertheless, this relationship does not imply a direct link between these two legal remedies[79]. This approach, although counterintuitive, is a consequence of the fact that the concept of an action for failure to act has been "watered down" by indicating that inaction ends not only with the moment of taking of action required by EU law, but also with the presentation of a position by the institution concerned. Furthermore, it should be noted that while an action for failure to act will usually concern a failure to adopt a legal act, it may also concern a whole range of other activities resulting from obligations imposed by EU law[80].

In this context, it should be emphasized that the inaction of an institution is defined as a failure to act or failure to take a position, and not as a failure to adopt an act other than that which the applicant considered be desirable or necessary[81]. The applicant's dissatisfaction with this turn of events is of no legal significance[82]. It should also be emphasized that the purpose of an action for failure to act is not to obtain public condemnation of an institution for failing to take the action it was required to take, but to compel it to take

[75] Order of the General Court of 22.5.2019 in Case T-754/18, *Hochmann Marketing GmbH v EP*, EU:T:2019:364, paragraph 9.
[76] Ch. Gaitanides: Artikel 265…, op.cit., p. 919.
[77] Judgment of the Court of Justice of 18.11.1970 in Case 15/70, *Amedeo Chevalley v Commission*, EU:C:1970:95, paragraph 6; Order of the General Court of 29.1.2020 in Case T-541/19, *Harry Shindler v Council of the EU*, EU:T:2020:28, paragraph 25.
[78] K. Lenaerts, K. Gutman, J.T. Nowak (eds.), op.cit, pp. 416 and 417, n. 8.09.
[79] Judgment of the CJEU of 9.12.2004, in Case C-123/03 P, *Commission v Greencore Group plc*, EU:C:2004:783, paragraph 46; ECJ order of 19.6.2023 in Case C-12/23 P, *Autoramiksas UAB v Commission*, EU:C:2023:495, paragraph 21.
[80] See, for example, failure to review the sanctions list – judgment of the General Court of 21.3.2014 in Case T-306/10, EU:T:2014:141, paragraph 107.
[81] Judgment of the Court of Justice of 19.11.2013 in Case C-196/12, *Commission v Council of the EU*, EU:C:2013:753, paragraph 22.
[82] Order of the General Court of 16.9.2015 in Case T-620/14, *Diapharm GmbH & Co. KG v Commission*, EU:T:2015:714, paragraph 25.

the action, including action resulting from the enforcement of a judgment[83].

Nevertheless, an action for annulment remains the closest equivalent to the action for failure to act in the EU legal system.

To date, the CJEU has also had the opportunity to comment on the mutual relationship between actions for failure to act and preliminary rulings. The Court has clearly rejected the concept, not expressly provided for in EU law, that national courts could refer questions for a preliminary ruling in order to determine whether EU institutions become in a state of inaction[84]. The Luxembourg judges thus ruled that it is not possible to circumvent the direct action route by referring to the way of preliminary ruling.

Similarly, the Court ruled on a preliminary question concerning the liability of a Member State for not bringing an action for failure to act in the interests of private individuals. The CJEU emphasized that EU law does not impose such an obligation on Member States, but does not preclude national regulations of this kind[85]. The only obligation incumbent on national courts by way of EU law is to compel national courts, as far as possible, to interpret and apply domestic procedural rules governing the exercise of legal remedies in such a way that allows natural and legal persons to challenge in court any decision or other national measure relating to the application of EU acts of general application by raising the plea of the illegality of such an act. Similar situation arise as a result of failure to act which they consider to be contrary to EU law[86].

The Court also clearly distinguished the objectives of an action for failure to act based on Article 265 TFEU from infringement proceedings against a Member State (Article 258 TFEU). The purpose of the latter proceedings is not to condemn the institution, but to compel it to take an action required by EU law[87]. However, it is not clear why the principle of condemning a breach of law is not the one of the main objectives of proceedings brought under Article 265 TFEU[88]. This is the CJEU's view that once the institution – a party to the proceedings has adopted the act that is the subject of the dispute or has presented its position, the subject matter of the dispute disappears, which results in the proceedings being discontinued[89]. However, it should be noted that this

[83] Order of the General Court of 28.3.2006 in Case T-451/04, *Mediocurso – Estabelecimento de Ensino Particular, Lda v Commission*, EU:T:2006:95, paragraph 25.

[84] Judgment of the Court of Justice of 26.11.1996 in Case C-68/95, *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, EU:C:1996:452, paragraph 53; Judgment of the Court of Justice of 11.6.2024 in Case C-601/22, *Umweltverband WWF Österreich and Others*, EU:C:2024:595, paragraph 41.

[85] Judgment of the Court of Justice of 20.10.2005 in Case C-511/03, *Ten Kate Holding Musselkanaal BV and Others*, EU:C:2005:625, paragraph 32.

[86] ibid., paragraph 29.

[87] T-451/08, *Mediocurso – Estabelecimento de Ensino Particular Lda v Commission*, paragraph 25.

[88] This was pointed out by A. Türk: *Judicial Review…*, op.cit., p. 405.

[89] Judgment of the General Court of the European Union of 19.5.2011, in Case T-423/07, *Ryanair Ltd v Commission*, EU:T:2011:226, paragraph 26.

approach does not favour the proper administration of justice – in practice, when an institution presents its position, the proceedings conducted under Article 265 TFEU are discontinued, and the party is left to initiate further proceedings in the same case, this time on the basis of Article 263 or 340 TFEU.

In this regard, it should be noted that the Court ruled that it does not have jurisdiction under Article 265 TFEU to declare an act or omission of an institution unlawful for the purposes of non-contractual liability under Article 340 TFEU[90]. Similarly, in this case it is difficult to understand why the CJEU is unwilling to allow a declaration of unlawfulness for the purposes of other EU and national court proceedings in the way of preliminary ruling procedure. This would certainly create pressure on the EU institutions to act. On the other hand, however, a mere finding of unlawfulness on the part of an institution for failing to present its position would not be of great benefit to the applicants.

The relatively rare use of an action for failure to act may also result from the fact that, in theory, an action for damages may in practice lead to the same results as an action for failure to act (unlawfulness of failure to act), while at the same time providing benefits in the form of compensation for the applicant[91]. Furthermore, Court's case-law shows that a tacit refusal to repeal a legal act cannot be challenged by means of an action for failure to act, as this would constitute a circumvention of the requirements relating to an action for annulment[92]. Similarly, failure to adopt a legally required act fulfils the conditions for an action for failure to act and would constitute a circumvention of the law and implying that a negative decision, which is the subject of an action for annulment[93]. It is also not allowed to arbitrarily transform an action for failure to act into an action for annulment and *vice versa*[94].

Indication of the act to be adopted

At the beginning of the process of shaping the analysed case-law of the CJEU, the Luxembourg judges formulated a view in accordance with which the concept of an act used in Article 265 TFEU is, in principle, synonymous with the one used in relation to an action for annulment (current Article 263 TFEU)[95]. According to this assumption, in doctrinal terms, only acts that have legal effects or those that do not directly have such effects, but whose failure to adopt may lead to such legal effects[96],

[90] T-451/04, *Mediocurso – Estabelecimento de Ensino Particular, L da v Commission*, paragraph 27.
[91] See also O. Due: *Legal Remedies*…, op.cit., p. 351.
[92] Judgment of the ECJ of 10.12.1969, in joined cases 10 and 18/68, *Società 'Eridania' Zuccherifici Nazionali and others v. EC*, EU:C:1969:66, paragraph 17.
[93] Judgment of the Court of Justice of 13.7.2004 in Case C-27/04, *Commission v Council of the EU*, EU:C:2004:436, paragraphs 34 and 35.
[94] Judgment of the General Court of 18.9.1992 in Case T-28/90, *Asia Motor France SA and Others v Commission*, EU:T:1992:98, paragraph 43.
[95] Judgment of the Court of Justice of 18.11.1970 in Case 15/70, *Amedeo Chevalley v Commission*, EU:C:1970:95, paragraph 6.
[96] For a more detailed analysis in this regard, see A. Türk: *Judicial Review*…, op.cit., pp. 388-394.

may be the subject of an action for failure to act. The wording of the first paragraph of Article 265 TFEU may give some grounds for assuming that privileged complainants have the right to bring an action for failure to act in all cases, even if the actions or omissions of the institution do not have binding legal effects. This may be indicated by the fact that the first paragraph of Article 265 TFEU refers only to failure to act, which is a very broad concept covering both failure to adopt a legal act and failure to take any action required by EU law.

This concept would not apply to non-privileged complainants, who must first demonstrate their legal interest and, moreover, as the third paragraph of Article 265 TFEU refers only to the right to challenge one of the institutions, bodies, offices, or agencies of the Union has failed to adopt an act addressed to them, other than a recommendation or an opinion. This has given rise to the view expressed in legal literature that non-privileged applicants have limited standing to bring an action[97].

However, such a distinction has not been explicitly formulated in the Court's case-law.

Although the legal writing emphasizes that the CJEU has never departed from referring to concepts developed for the purposes of actions for annulment (Article 263 TFEU)[98], but in light of the development of case-law concerning so-called preparatory acts, this seems to be a rule subject to numerous exceptions. It is worth taking a closer look at how the Court approaches the concept of reviewable act in the EU legal order[99]. It is settled case-law that a breach of the duty to act in the case of non-privileged applicants refers to a concept similar to that of relative unlawfulness, i.e., an act which an institution was obliged to adopt would have to have binding legal effects and specifically in relation to the applicant concerned[100]. However, it should be noted that the reasoning in this case is highly hypothetical, as the act was not actually adopted. The Court refers to an act that should have been adopted and which, in principle, would have had specific content. Meanwhile, as emphasized in the case-law relating to actions for annulment, the actual content of a specific act is decisive for the subject matter of the dispute. The case-law attaches particular importance here to the need to describe in detail the

[97] Ch. Gaitanides: *Artikel 265*..., op.cit., p. 923.

[98] R. Barens: *Remedies and Procedures*..., op.cit., p. 341, MN 8.13.

[99] This is precisely the case in the order of the General Court of 24.9.2009 in Case T-228/08, *Grzegorz Szomborg v Commission*, EU:T:2009:463, paragraph 16; order of the General Court of 4.7.1994 in Case T-13/94, *Century Oils Hellas AE v Commission*, EU:T:1994:77, paragraph 14; order of the CFI of 26.9.1996 in Case T-167/95, *Hedwig Kuchlenz-Winter v Council of the EU*, EU:T:1996:172, paragraph 20; order of the CFI of 10.7.2001 in Case T-191/00, *Werner F. Edlinger v Commission*, EU:T:2001:183, paragraph 23; order of the General Court of 16.9.2009 in Case T-354/09, *Goldman Management Inc. v Commission*, EU:T:2009:439, paragraph 7.

[100] Judgment of the Court of Justice of 28.3.1978 in Case 90/78, *Granaria BV v Council and Commission*, EU:C:1979:85, paras. 12-14. Similarly, with regard to the draft regulation, see the order of the CFI of 15.5.1997, in Case T-175/96, *Georges Berthu v Commission*, EU:T:1997:72, paragraph 22;

act failed to be adopted. This is particularly important if the authorization to adopt it lies, as it were, at the intersection of the competences of different EU institutions[101]. In practice, the Court recognizes the applicant's interest if the adopted legal act could be challenged by him/her by an action for annulment[102].

Furthermore, in view of the need to provide effective legal protection to disadvantaged parties, the Court allows actions for failure to act to be brought against the non-adoption of so-called intermediate (preparatory) acts, which by their very nature cannot produce legal effects, as only final acts can do so. Inaction in relation to the adoption of such an act may be the subject of an action under Article 265 TFEU only in exceptional cases, where the act in question is a preparatory act constituting a prerequisite for the conduct of proceedings which are to result in a final and legally binding act[103].

The category of the so-called preparatory acts has been significantly expanded in the area of competition law, including State aid law. In this case, it concerns the possibility of providing legal protection against information from the European Commission, in which it informs potential complainants that there are no grounds for considering actions submitted to that institution and invites them to put forward comments within a specified time limit. Information of this kind is not considered a final preparatory act[104]. After receiving comments from interested parties, the Commission may initiate an investigation or finally reject the complaint. Interested parties may bring an action for annulment against this decision, provided they have a legal interest[105]. If the institution fails to take such a decision within a reasonable period of time[106], it would be possible to bring an action for failure to act[107]. Interestingly, the CJEU recognizes the right of the complainant to seek legal remedies before national courts, including claims for damages, where the EC has refused to take action on the matter covered by the complaint[108].

The condition for private entities to demonstrate a legal interest, i.e. to indicate that a specific act concerns them individually and directly, results from the inability to lodge an action for failure

[101] See, for example, the judgment of the Court of Justice of 22.5.1985 in Case 13/83, *PE v Council*, EU:C:1985:220, paragraph 32.
[102] Ch. Gaitanides: *Article 265*..., op.cit., p. 921.
[103] Order of the General Court of 25.9.2019 in Case T-99/19, *Nathaniel Magnan v Commission*, EU:T:2019:693, paragraph 25.
[104] Judgment of the General Court of 14.5.1997 in Case T-77/94, *VGB and Others v Commission*, EU:T:1997:70, paragraph 87.
[105] Judgment of the Court of Justice of 18.11.2010 in Case C-322/09 P, *NDSHT v Commission*, EU:C:2010:701, paragraphs 53 and 54.
[106] T-167/04, *Asklepios Kliniken GmbH v Commission*, paragraphs 82-91.
[107] *A contrario*, see the order of the General Court of 5.3.2024 in Case T-529/23, *YU v Commission*, EU:T:2024:157, paragraph 27.
[108] Judgment of the Court of Justice of 19.3.1997 in Case C-282/95 P, *Guérin Automobiles v Commission*, EU:C:1997:159, paragraph 39.

to act in the case of failure to adopt acts of general application[109]. Previous attempts to demonstrate that an act of general application, in certain specific circumstances (as in the case of acts in the field of trade policy), may at the same time directly concern the applicant due to his individual situation and may therefore be the subject of an action for failure to act[110], to have been unsuccessful[111].

As a rule, an action for failure to act cannot be brought to challenge a failure to issue recommendations or opinions[112]. Nevertheless, the Court allows actions for failure to act to be brought against any preparatory act (including a non-binding act) whose adoption is a prerequisite for the adoption of the final act[113]. Consequently, an action for failure to act may be admissible in relation to acts for which an action for annulment would not be admissible[114]. Moreover, non-binding acts of this kind are usually equated by judges with the expression of an opinion by the institution concerned[115].

It should also be clearly emphasized that even if the Court renders a judgment in favour of the applicant as a result of an effective action for failure to act, it does not have competence to order an EU institution to take specific action, such as making a payment[116].

Nevertheless, the legal writing emphasizes that while actions for failure to act are of rather limited application across EU law as a whole, they play a significant role in the area of competition law and State aid as a means of protecting the procedural rights of natural and legal persons[117]. The fundamental weakness of this legal remedy stems largely from the fact that the presentation of a position by an institution generally renders an action for failure to act inadmissible or lacking relevance. However, it is difficult to make an unambiguous assessment of this judicial approach. While it seems justified in relation to certain actions, such as an attempt to force an institution to operate its websites in a specific language[118], the

[109] See, for example, the judgment of the Court of Justice of 26.10.1971 in Case 15/71, *C. Mackprang jr. v Commission*, EU:C:1971:98, paragraph 4; order of the General Court of 13.1.2005 in Case T-184/04, EU:T:2005:7, paragraph 15.

[110] Judgment of the General Court of 8.6.2000 in Joined Cases T-79/96, T-260/97 and T-117/98, *Tico Srl and Others v Commission and Council of the EU*, EU:T:2000:147, paragraph 82.

[111] Judgment of the Court of Justice of 10.12.2002 in Case C-312/00 P, *Commission v Camar Srl and Others*, EU:C:2002:736, paragraphs 77 and 78.

[112] Order of the General Court of 10.7.2001 in Case T-191/00, *Werner F. Edlinger v Commission*, EU:T:2001:183, paragraph 22.

[113] Judgment of the Court of Justice of 23.11.2013 in Joined Cases C-596/15 P and C-597/15 P, *Bionorica SE and Diapharm GmbH & Co. KG v Commission*, paragraph 53; order of the General Court of 9.1.2012 in Case T-407/09, *Neubrandenburger Wohnungsgesellschaft mbH v Commission*, EU:T:2012:1, paragraph 40.

[114] Judgment of the Court of Justice of 27.9.1988 in Case 302/87, *PE v Council*, EU:C:1988:461, paragraph 16.

[115] Judgment of the General Court of 26.9.2013 in Case T-164/10, *Pioneer Hi-Bred International, Inc. v Commission*, EU:T:2013:503, paragraph 26.

[116] See, for example, judgment of 1.4.1993 in Case C-25/91, *Pesqueras Echebastar SA v Commission*, EU:C:1993:131, paragraph 14.

[117] R. Barens: *Remedies and Procedures*..., op.cit., p. 337, n. 8.03.

[118] T-245/10, *Verein Deutsche Sprache eV v Council of the EU*, paragraph 17.

inability to compel that institution to adopt a legal act (which is required by EU law) must be considered a significant drawback. The CJEU's approach, according to which a claim for damages provides private entities with a significant level of protection is not without its flaws. Monetary compensation does not always replace the adoption of regulations necessary for the functioning of enterprises. Therefore, there are the view in the literature that the case-law on actions for failure to act has departed from the original function that this legal remedy was supposed to fulfil[119].

Breach of the obligation to act

Article 265 TFEU indicates that an action for failure to act is conditional on the existence of an obligation on the part of the institution concerned to act, in the sense that the alleged failure to act by that institution is contrary to the Treaty[120]. The obligation to act must exist at the time when the call upon the institution is made, even if it was subsequently repealed or replaced by other legal provisions[121].

While some judgments indicate that a general reference to a breach of the Treaty is sufficient[122], there is no doubt that this provision also covers breaches resulting from secondary EU law[123], general principles of law[124], or international agreements to which the EU is a party[125].

Two conclusions logically follow from this wording. Firstly, a provision of EU law must establish the competence of an institution to act, e.g. to adopt a specific act[126]. Secondly, the competence to act must take the form of a legal obligation[127], and this power cannot be discretionary in nature[128]. In the latter case, an action for failure to act will generally be inadmissible[129], which significantly affects the effectiveness of this legal remedy. Nevertheless, an action for failure to act would be admissible if the institution exceeded the scope of its discretion[130]. Thirdly, the effects of inaction by an institution are

[119] I. Daukšienė, A. Budnikas: *Has the Action for Failure*…, op.cit., p. 210.
[120] Order of the General Court of 26.10.2023 in Case T-244/23, *Eugen Tomac v Council*, EU:T:2023:685, paragraph 28.
[121] Order of the General Court of 25.4.2023 in Case T-562/19 RENV, *Christoph Klein v Commission*, EU:T:2023:225, paragraphs 19-23.
[122] Judgment of the Court of Justice of 10.12.1969 in Joined Cases 10 and 18/68, *Società 'Eridania' Zuccherifici Nazionali and Others v Commission*, EU:C:1969:66, paragraph 15.
[123] Judgment of the Court of Justice of 5.9.2023 in Case C-137/21, *EP v Commission*, paragraph 64.
[124] Judgment of the Court of Justice of the European Union of 20.9.2011, in joined cases T-400/04, T-402/04 to T-404/04, *Arch Chemicals, Inc. and Others v Commission*, EU:T:2011:490, paragraph 59.
[125] See also the order of the General Court of 14.12.2021 in Joined Cases T-161/21 and T-161/21 *AJ and Raymond Irvine McCord v Commission*, EU:T:2021:910, paragraph 40.
[126] Order of the General Court of 12.11.1996 in Case T-47/96, *SDDDA v Commission*, EU:T:1996:164, paragraph 40.
[127] Order of the General Court of 25.9.2019 in Case T-99/19, *Nathaniel Magnan v Commission*, EU:T:2019:693, paragraphs 48 and 50.
[128] Order of the General Court of 16.11.2009 in Case T-354/09, *Goldman Management Inc. v Commission*, EU:T:2009:439, paragraphs 6-8.
[129] However, the CJEU sometimes points to obvious unfoundedness, see, for example, the order of the General Court of 26.10.2023 in Case T-244/23, *Eugen Tomac v Council of the EU*, EU:T:2023:685, paragraphs 30 and 36.
[130] Judgment of the Court of Justice of 5.9.2023 in Case C-137/21, *EP v Commission*, paragraph 69.

susceptible for review, if not explicitly regulated in EU law. For example, an action for failure to act would be ineffective in relation to an opinion of the European Parliament, which is regulated in Article 294(7)(a) TFEU.

It is irrelevant that the performance of the legal obligation encounters objective difficulties[131] or that the failure to act has no practical consequences in legal transactions[132]. Furthermore, an action for failure to act cannot includes a request to the Court to adopt an act that has not been adopted due to the institution's failure to act. In its judgment, the CJEU will only find a declaratory breach of the obligation imposed by EU law[133].

Summary

It is worth pointing out the most important conclusions from the analysis of CJEU case-law relating to actions of failure to act. A quantitative analysis of the cases before the Court alone, i.e., the majority of cases dismissed or concluded with decisions of inadmissibility, suggests that the action for failure to act is an "undervalued' legal remedy. This is due to a number of factors.

Firstly, the action based on Article 265 TFEU intended as a direct counterpart to the action for annulment (Article 263 TFEU), has in principle been rendered ineffective. The very fact that the presentation of the institution's position ends the proceedings concerning inaction means that the claiming party usually has only the satisfaction of obtaining a decision, without any specific legal effects. In order to achieve specific results, it is usually necessary to initiate again another proceedings, either by bringing an action for annulment (in order to challenge the institution's negative decision) or by bringing an action for damages to obtain specific compensation.

Secondly, unclear case-law distinguishing between proceedings based on Article 265 and Article 263 TFEU means that parties usually bring both actions at the same time, which seems to be mutually exclusive, but is a manifestation of procedural prudence[134]. These proceedings show clear similarities, but also vary significantly. However, the Court has so far refused to clearly define these boundaries, pointing out that "the question of the admissibility of an action for failure to act is separate from the question of whether an act adopted by the EU institution concerned, putting an end to its failure to act, can be the subject of an action for annulment"[135].

Thirdly, the possibility of bringing an action for failure to act is particularly important for the protection of the rights of

[131] Judgment of the Court of Justice of 22.5.1985 in Case 13/83, *EP v Council of the EC*, EU:C:1985:220, paragraph 48.
[132] T-521/14, Sweden v Commission, paragraph 75.
[133] Judgment of the General Court of 8.6.2000 in Joined Cases T-79/96, T-260/97 and T-117/98, *Camar Srl and Tico srl v Commission and Council of the EU*, EU:T:2000:147, paragraph 67.
[134] C-62/24 P, *ST v Frontex*, paragraph 1.
[135] Judgment of the Court of Justice of 24.3.2022 in Case C-130/21 P, *Lukáš Wagenknecht v Commission*, EU:C:2022:226, paragraph 37.

private entities. In view of their interests, it would be desirable for the proceedings under Article 265 TFEU to offer the possibility of obtaining at least a declaratory ruling on violation of EU obligation, so that natural and legal persons could obtain a useful outcome that would be useful for the benefit of other proceedings. However, it is not possible at the moment and in combination with the restrictive interpretation of the applicant's legal interest, actions for failure to act very rarely result in a judgment favourable to them or their arguments are not judicially review at all, as the CJEU finds the action inadmissible.

Finally, it should be noted that actions for failure to act have now become solely an instrument for the protection of procedural rights in selected areas of EU law, with particular emphasis on State aid law.

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ABSTRACT

Action for Failure to Act as a Legal Remedy – Control of EU Institutions

The article relates to a selected aspect of a competence control of institutions, bodies and organisational units of the European Union with regard to their obligations set forth in EU legal acts. The basic objective of this type of control is a complaint about a failure to act, laid down in Article 265 of the Treaty on the Functioning of the European Union. Such a complaint may be made by both public law entities, i.e. member states and European institutions, as well as private entities – natural and legal persons. This legal protection measure is in fact a direct reflection of a complaint about an act to be void, laid down in Article 263 of the Treaty. The basic objective of the complaint is broadly understood control by the Court of Justice of the European Union relating to incorrect and incompliant with the law realisation of the mandate, while the complaint about inactivity aims to control the reasons for a failure to meet the obligations laid down in the EU law. The author discusses the position of complaint in the system of European Union's legal protection measures, the admissibility making complaints and material and legal requirements that it should meet. The article presents, in the first place, the judicature of the Court of Justice of the European Union in the area, as well as the elements that are critical for a complaint to be considered.

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