

The Single Market, the Rule of Law, and Access to EU Courts: Vigilance of Individuals before the EU Courts

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1. Introduction

Stephen Weatherill's academic writing and teaching have always placed internal market cases in their relevant social and historical context. He was well known at Oxford for quickly capturing the attention of his students with vivid examples. These ranged from a bottle of Cassis de Dijon labelled in German, which was evidence that the principle of mutual recognition established in a famous case has indeed enabled that French fruit liqueur to be sold in Germany,¹ to a football stadium sticker album, which set the scene for explaining the famous *Fratelli Costanzo* case on public procurement.² However, these legendary, colourful illustrations are just a small part of a broader approach to teaching, writing, and thinking about EU law in a way which takes account of the background, policy choices, and consequences of each case.

Stephen Weatherill's scholarship has sought to reveal legal norms in their full context so that his readers can grasp not only the importance of internal market rules and jurisprudence, but also their spillover effects on society and its values. His narrative demonstrates how free movement rules have profound effects on consumer protection, environmental standards, public health, personal names, morals, immigration, student standards, sports, fundamental rights, and possibly any other area of law and life. It also illustrates how intertwined the vigilance of

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¹ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42 (*Cassis de Dijon*).

² Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* ECLI:EU:C:1989:256.

individuals is with the constitutionalization of the EU legal order and poses questions on how far constitutionalization should go.

In the same vein, this chapter seeks to put the narrative of the building of the single market in the broader framework of the rule of law and the role of individuals in guarding it. Section 2 deals with Court of Justice of the European Union (CJEU) cases dealing with the rule of law and highlights that such questions arise in different types of judicial proceedings including preliminary reference procedures, infringement actions against Member States, and direct actions against EU institutions or bodies, where each of these procedures can be initiated by more than one type of actor. While there is already abundant scholarship and even daily blogging covering some of the high-profile cases, the present chapter seeks to reveal a relatively less well-known part of the rule of law jurisprudence which arises from actions brought by individual applicants to the General Court. It explains the relevance of individual actions in ensuring effective judicial review of possible rule of law violations within one Member State, in a third country, or even at the level of the EU itself, and which—without the vigilance of individuals—might not be brought to the attention of EU Courts. This section suggests that the access of individuals to EU Courts might be particularly relevant in situations of a rule of law failure potentially affecting other courts.

Section 3 elaborates on how building a single market and ensuring the rule of law requires individual access to the EU Courts through direct actions. Indeed, while many academic contributions focus on the cases brought by individuals in the context of the preliminary ruling procedure, individuals can also play an important role by bringing direct actions before the EU Courts highlighting potential rule of law violations.³ It is clear that the potential of such actions is highly dependent on individuals having access to the EU Courts, a possibility that centres on standing requirements and how they are interpreted. Against this background, this section examines some of the most recent cases on standing in fields related to the internal market, namely state aid law, public procurement, and the environment.

The chapter argues that the vigilance of individuals before EU Courts might now be as relevant for the rule of law as once the vigilance of individuals before national courts was for the building of the single market. In both cases, this vigilance points to possible violations of the most fundamental rules of the EU legal order which might otherwise pass under the radar. The novel contribution of this chapter lies in juxtaposing underexplored cases on the rule of law brought by individuals to EU Courts with the rules on the standing of individuals before EU Courts.

³ This point is perfectly illustrated by Case T-791/19 *Sped-Pro S.A. v Commission* ECLI:EU:T:2022:67. In that case, the applicant brought an action for annulment against an EU Commission decision, arguing, *inter alia*, that it failed to respect the requirements relating to the rule of law.

2. The Rule of Law as the Backbone of the Internal Market and the EU

The rule of law is essential for the functioning of the EU legal order, and in particular for internal market law. It is well known that EU internal market law has developed through a series of cases that arose before national courts. On the one hand, some of these cases, such as *Van Gend en Loos*,⁴ *Dassonville*,⁵ *Bosman*,⁶ and *Gebhard*,⁷ became famous due to ground-breaking preliminary references to the European Court of Justice (ECJ) where the Court interpreted the relevant Treaty rules. On the other hand, there are also a large number of cases where national courts have directly applied EU rules without needing to refer a question to the ECJ. These latter cases might not have become well known at the EU level, but they have significantly contributed to the proper application of EU law. Therefore, while we cannot know the total number of cases in which national courts have applied internal market rules, it is certainly not an overstatement to say that the internal market could not function properly if there were no well-functioning courts charged with giving effect to EU rules. The rule of law is a prerequisite of the internal market.

Until several years ago, the rule of law in the EU was mostly mentioned in the context of EU enlargement as one of the Copenhagen criteria for accession. It was often the case that accession negotiations were most difficult in that field. While accession negotiations entail thirty-five negotiating chapters, the European Commission (Commission) has been known to insist most fiercely on the chapter covering the quality of the judiciary. Thus, for example, in the case of the last accession negotiations, namely those on the Croatian accession, the chapter on the judiciary was the last one closed, and much later than those related to the internal market.⁸ One possible explanation for such an approach on the part of the Commission could be the following. On the one hand, for core EU policies such as free movement, it was not imperative to ensure the perfect application of EU law before accession, as any remaining problems could be 'fixed' later on. After accession, the Commission could have asked the Member State to improve its application of EU law, and possibly start infringement proceedings. Further, any individual could have invoked their free movement rights before a national court, asking it to set aside national rules that were in breach of EU law. On the other

⁴ Case 26/62 *NV Algemene Transport v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

⁵ Case 8/74 *Procureur du Roi v Dassonville* ECLI:EU:C:1974:82.

⁶ Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman* ECLI:EU:C:1995:463.

⁷ Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411.

⁸ Ch 1, 'Free Movement of Goods', was closed on 19 April 2010, while ch 23, 'Judiciary and Fundamental Rights', was closed on 30 June 2011.

hand, it was common wisdom at the time that the Commission could not do much to affect the national judiciary after accession. Despite the fact that the rule of law was a fundamental value of the EU legal order, it was often thought that the EU had very limited powers in that field and in controlling national judicial systems of Member States, except in extreme situations such as those leading to proceedings under Article 7 of the Treaty on European Union (TEU). This no longer applies. This chapter will not examine the tools at the disposal of the EU's non-judicial institutions for overseeing and enforcing rule of law compliance in the Member States, such as Article 7 TEU, which makes it possible to suspend membership rights in the case of a serious and persistent breach, the Rule of Law Framework,⁹ or budget conditionality.¹⁰ Instead, the chapter focuses on judicial control over the rule of law.

The CJEU has special jurisdiction to review the procedural aspects of decisions of the Council or the European Council based on Article 7 TEU.¹¹ However, jurisprudence in the field of the rule of law is being developed through virtually all possible types of judicial procedures.

The door for judicial control over rule of law issues was opened in the landmark case *Associação Sindical*.¹² In 2016, Portugal's Supreme Administrative Court referred a question to the Court of Justice concerning a temporary reduction of judges' salaries introduced within the framework of the country's austerity measures seeking to cut public expenditure.¹³ The national court inquired whether the lowering of judicial salaries which was 'imposed unilaterally and on an ongoing basis by other constitutional authorities and bodies' was contrary to the 'principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, in Article 47 of the [Charter] and in the case-law of the Court of Justice'.¹⁴ While, at the time, it might not have been clear whether national rules on judicial salaries were within the scope of EU law, the Court took the opportunity to clarify that EU law was indeed applicable. It relied on Article 2 TEU listing the rule of law as a fundamental value of the EU legal order, in conjunction with Article 19 TEU on effective legal protection in the fields covered by EU law, as well as with Article 47 of the Charter guaranteeing the fundamental right to an effective remedy. It held that these provisions give the Court the jurisdiction to review the functioning of the judicial systems in the Member States, as such control was considered essential

⁹ Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014)0158 final.

¹⁰ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

¹¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2008] C115/47, art 269.

¹² Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

¹³ *ibid* para 2.

¹⁴ *ibid* para 18.

for the proper functioning of judicial cooperation in the EU.¹⁵ The Court emphasized that it would be contrary to EU law if courts were under any hierarchical constraints or subordinated to other bodies.¹⁶ While the Court did not find that there was any violation, since reducing salaries was a general measure applying to a large proportion of the public sector as part of the austerity measures and was of temporary duration,¹⁷ the case became a landmark one for rule of law adjudication.

Ever since, there has been a steady increase in the number of rule of law cases reaching the CJEU. The following sections present CJEU jurisprudence by systematizing it based on three different types of procedures through which they reached the Court. Each of the parts is further subdivided into two subparts depending on who initiated the type of procedure. The section thus covers, first, infringement procedures—initiated by the Commission or by a Member State (section 2.1); secondly, preliminary references—from the Member State concerned and from another Member State (section 2.2); and, thirdly, actions for annulment—brought by privileged or unprivileged applicants (section 2.3). An explanation will be provided on how this last type of procedure, namely those brought by unprivileged applicants, has a significant potential in drawing the attention of EU Courts to possible violations of the rule of law either at the national or at the EU level. Similarly, as in the development of the internal market, the vigilance of individuals complements the activities of EU institutions in safeguarding EU law.

2.1 Infringement Procedures Concerning the Rule of Law

Rule of law violations can be the object of infringement procedures initiated on the basis of Articles 258 and 259 TFEU. On the one hand, infringement procedures are one of the main tools that the Commission has at its disposal as the guardian of the Treaties when it considers that a Member State has failed to fulfil its Treaty obligations. Under Article 258 TFEU, if the violation of the obligations arising under EU law has not been remedied through an extra-judicial procedure, the Commission is authorized to bring a case against the Member State concerned before the Court of Justice. On the other hand, the right to seek the fulfilment of obligations under the Treaties was also given to Member States. Article 259 TFEU can be used by a Member State to start a procedure against another Member State if it alleges a violation of EU law. Each of these types of infringement procedure has also been used in the field of the rule of law.

As regards actions brought by the Commission, in recent years there have been a significant number of actions challenging the new Polish rules relating to

¹⁵ *ibid* para 43.

¹⁶ *ibid* para 44.

¹⁷ *ibid* paras 46–51.

the functioning of national courts. For example, in Case C–619/18 *Commission v Poland*, the Commission successfully challenged Polish legislation lowering the retirement age of judges, including those of the Supreme Court, and giving the country’s president the discretionary power to extend certain judges’ period of service.¹⁸ In Case C–791/19 *Commission v Poland*, the Commission successfully pleaded against several Polish rules relating to disciplinary proceedings against judges.¹⁹ In a pending case, C–204/21, the Commission is challenging certain Polish rules concerning the functioning of ordinary courts, which has already led to two orders imposing interim measures.²⁰ These cases have been discussed in detail in numerous academic publications and will thus not be analysed here.²¹

In addition to these cases brought by the Commission, the rule of law is also beginning to be invoked in infringement proceedings initiated by an individual Member State against another. For example, Case C–457/18 *Slovenia v Croatia* concerned a border dispute between these two Member States.²² Ever since the two countries became independent, they have disputed some parts of the joint border. Thus, prior to Croatia’s EU accession, they committed to entrusting an arbitral tribunal with the resolution of the dispute. Later, when the arbitration process was compromised due to unpermitted collusion and instruction between the Slovenian arbiter and the Slovenian government, Croatia withdrew from the arbitration process. In contrast, Slovenia merely replaced its arbiter, so the arbitral tribunal continued its procedure and delivered a decision, the arbitral award. Croatia considered that it was not bound by this decision and that there was no obligation to implement it. In reaction, Slovenia initiated infringement action before the Court of Justice against Croatia, which, in the meantime, had acceded to the EU. Among other things, Slovenia argued that by not implementing the decision of an arbitral tribunal, Croatia had violated the rule of law.²³ This case shows that it is theoretically possible to interpret the rule of law very broadly. However, the Court of Justice found that it had no jurisdiction for deciding border disputes between two Member States or conflicts arising from an arbitration agreement, as these were regulated by international and not EU law.²⁴ In contrast, for disputes between Member States

¹⁸ Case C–619/18 *Commission v Poland* ECLI:EU:C:2019:615.

¹⁹ Case C–791/19 *Commission v Poland* ECLI:EU:C:2021:596.

²⁰ Case C–204/21 R *Commission v Poland* ECLI:EU:C:2021:593; Case C–204/21 R *Commission v Poland* ECLI:EU:C:2021:878.

²¹ See eg Marco Antonio Simonelli, ‘Thickening Up Judicial Independence: The ECJ Ruling in *Commission v Poland* (C-619/18)’ (*European Law Blog*, 8 July 2019) <<https://europeanlawblog.eu/2019/07/08/thickening-up-judicial-independence-the-ecj-ruling-in-commission-v-poland-c-619-18/>>; Laurent Pech, ‘Protecting Polish Judges from Political Control’ (*Verfassungsblog*, 20 July 2021) <<https://verfassungsblog.de/protecting-polish-judges-from-political-control/>> accessed 19 October 2023; Renáta Uitz, ‘The Price of Thrashing the Rule of Law: EC Requests CJEU to Impose Financial Sanctions on Poland’ (*Bridgenetwork*, 10 September 2021) <<https://bridgenetwork.eu/2021/09/10/cjeu-financial-sanctions-poland/>> accessed 19 October 2023.

²² Case C–457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65.

²³ *ibid* para 1.

²⁴ *ibid* paras 103–08.

relating to EU law, the Court's jurisdiction would have been mandatory; had the dispute between Slovenia and Croatia concerned EU law, they would not even have been permitted to entrust settlement to an arbitral tribunal.²⁵ Thus, while one sees from this case that the concept of violation of EU standards of rule of law cannot be stretched so far as to cover disagreements on areas not covered by EU law, the case nevertheless remains relevant for this chapter in showing that Member States have the opportunity to challenge another Member State's rule of law violations related to EU law before the Court of Justice.

2.2 Preliminary References Concerning the Rule of Law

National courts have always played an important role in the development of EU law. Under Article 267 TFEU, any court or tribunal of a Member State may request the Court of Justice to give a ruling on the interpretation or validity of EU law, if that ruling is necessary for deciding a case pending before that national court. This system allows each national judge, regardless of the national hierarchy of courts, to directly communicate with the Court of Justice. This mechanism has been crucial in the development, interpretation, and application of EU law, and the same is true today in the rule of law domain.

First, a number of preliminary references have been initiated by national courts inquiring whether certain measures adopted by their own Member State were in accordance with EU law. Most prominently, several preliminary references came from Poland, and in several of these the Court found incompatibility with EU law. For example, in *AK*, the Court elaborated on which factors raised doubts as to the independence of the Disciplinary Chamber of the Polish Supreme Court entrusted with deciding cases concerning the retirement of Supreme Court judges.²⁶ In *AB*, the Court clarified which circumstances render problematic a new Polish rule preventing appeals on decisions on judicial appointments.²⁷ In *WB*, the Court stated that it was not compatible with EU law to permit a minister of justice to second judges to higher criminal courts where those secondments could be terminated by the minister at any time and without stating reasons, since such a system entailed the risk of political control.²⁸ Furthermore, examples exist of references from the other Member States inquiring about the compatibility of their national rules with EU law. For instance, in a case from Malta, a national court

²⁵ Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* ECLI:EU:C:2018:158; Case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345 (*MOX Plant*).

²⁶ Case C-585/18 *AK (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982.

²⁷ Case C-824/18 *AB v Krajowa Rada Sądownictwa (Nomination of Judges to the Supreme Court—Appeal)* ECLI:EU:C:2021:153.

²⁸ Joined Cases C-748/19–754/19 *Criminal Proceedings against WB* ECLI:EU:C:2021:931.

sought an interpretation under EU law regarding the prime minister's involvement in the appointment of judges, but the Court held that this was not contrary to EU law when the procedure also involved 'an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister'.²⁹ In a case from Romania, a national court inquired about the compatibility with EU law of a rule preventing national courts from examining whether national legislation held constitutional by a national constitutional court was in accordance with EU law.³⁰

Secondly, due to the fact that there is significant trans-European judicial co-operation and mutual interconnectedness between courts in different EU Member States, national courts started expressing concern about possible rule of law violations in other Member States. There were several such references in relation to the European Arrest Warrant (EAW).³¹ While Member States have rules about the non-extradition of their own citizens, they can surrender their nationals to another Member State on the basis of an EAW, which is a legal mechanism made possible thanks to the mutual trust between the Member States and their respective judiciaries. However, when this trust eroded as a consequence of measures taken by the executive or legislative branch in some Member States which affected the functioning of courts in those states, national judges of other Member States started doubting whether they should indeed issue EAWs. In the *LM* case, the Irish court enquired whether it was obliged to surrender a defendant to Poland if it had doubts about the rule of law in that country.³² The Court held that in cases where a national court called upon to execute an EAW 'has material ... indicating that there is a real risk of breach of the fundamental right to a fair trial ... on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary' there is no immediate obligation to execute an EAW.³³ Instead, that judicial

authority must determine, specifically and precisely, whether, having regard to [the sought person's] personal situation, ... the nature of the offence ... and the factual context ... , and in the light of the information provided by the issuing Member State ... , there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.³⁴

²⁹ Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311, para 73.

³⁰ Joined Cases C-357/19, 379/19, 547/19, 811/19, and 840/19 *Euro Box Promotion* ECLI:EU:C:2021:1034. Other preliminary references from Romania were at issue in Joined Cases C-83/19, 127/19, 195/19, 291/19, 355/19, and 397/19 *Asociația 'Forumul Judecătorilor Din România'* ECLI:EU:C:2021:393.

³¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States—Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

³² Case C-216/18 PPU *LM* ECLI:EU:C:2018:586.

³³ *ibid* para 79.

³⁴ *ibid*.

It thus follows from *LM*, as well as from *Openbaar Ministerie*, that a national court can refuse to issue an EAW under two cumulative conditions: first, if there is objective evidence of the risk of a breach of the right to a fair trial due to systemic or generalized deficiencies concerning the independence of the judiciary, and, secondly, if such deficiencies are liable to have an actual impact on the situation of the person concerned if she is surrendered to the judicial authorities.³⁵ The Court's case law is consistent in that there is no *carte blanche* for judicial authorities not to surrender a person sought by an EAW,³⁶ but exceptions exist in limited situations related to rule of law violations.

2.3 Actions for Annulment and the Rule of Law

Direct actions provided for by Article 263 TFEU give the CJEU jurisdiction to review the legality of legal acts adopted by EU institutions and bodies at the initiative of either privileged applicants, such as the EU institutions themselves or Member States, or on the basis of challenges brought by non-privileged applicants, namely natural or legal persons. In the field of the rule of law, both these groups have brought relevant cases, so this subsection will briefly examine both types. However, greater attention will be paid to the relatively unnoticed role that individuals can have in indicating to the CJEU possible rule of law violations.

As regards cases brought by privileged applicants, there have been several prominent decisions regarding the rule of law and, thus far, these have concerned challenges against EU acts in this area. For example, in Case C-650/18 *Hungary v Parliament*, Hungary brought an action for annulment based on Article 263 TFEU against the European Parliament's Resolution inviting the Council to determine whether there was a clear risk of breach by Hungary of EU values under Article 7(1) TEU. Hungary argued, inter alia, that there was not a sufficient majority for the adoption of the contested Resolution since abstentions were not considered in determining whether a two-thirds majority voted in favour. The Court disagreed with this argument and upheld the Resolution. In two other cases brought by privileged applicants, the so-called *Budget Conditionality* cases, Hungary and Poland challenged Regulation 2020/2092 introducing budget conditionality, ie making use of EU funds subject to compliance with rule of law principles.³⁷ The applicants argued that the Regulation lacked an appropriate legal basis and circumvented the procedure laid down in Article 7 TEU, and thus that the institutions exceeded their powers and violated the principle of legal certainty. The Court dismissed

³⁵ Joined Cases C-354/20 PPU and 412/20 PPU *Openbaar Ministerie* ECLI:EU:C:2020:1033.

³⁶ See also eg Case C-268/17 AY ECLI:EU:C:2018:602.

³⁷ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

the actions by finding that the Regulation's conditionality mechanism was within the power conferred by the Treaties on the European Union to establish 'financial rules' relating to the implementation of the Union budget.³⁸ Further, it held that the procedure based on Article 7 TEU and the one provided for by the Regulation pursued different aims and had distinct subject matter, since the Regulation served only the protection of the budget.³⁹

In addition to direct actions brought by privileged applicants seeking annulment of acts of general application, rule of law issues are also increasingly arising in direct actions initiated by individuals challenging acts of individual application. In these cases, individuals often seek to draw the attention of the CJEU to rule of law violations which might otherwise escape judicial review at the EU level. In the first instance, the EU General Court, having jurisdiction for actions brought by natural and legal persons, is asked to conduct indirect control of rule of law compliance in three different types of situation—in a Member State, in a third country, or at the EU level.

The first subtype of this rule of law review in individual actions concerns alleged non-compliance with the rule of law by a Member State. For example, in *Trajektna luka Split*, the applicant brought an action against the Commission's decision rejecting his complaint that alleged certain breaches of competition law. In the case before the General Court, the applicant sought the annulment of the Commission's decision, arguing, inter alia, that 'the Commission ... erred in its finding that the national courts "appear[ed] to be well placed to handle the matters raised"'.⁴⁰ Further, the applicant claimed that:

[A]s the Commission did not yet have any experience of the ability of the Croatian national courts to deal with such a case, the Republic of Croatia being a relatively new member of the European Union, [the Commission] ... was required to examine their ability in greater depth, since no national court had yet applied EU competition law.⁴¹

The General Court rejected these arguments by finding that Croatia had met the Copenhagen Criteria for EU membership which 'require the candidate State, inter alia, to have ... the ability to implement effectively the rules, standards and policies forming the EU legal framework'.⁴² In the General Court's view, this meant that 'the ability of the Croatian courts to apply EU law cannot be called into question as a matter of principle'⁴³ and that 'the applicant has not produced

³⁸ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, paras 133, 139, and 153.

³⁹ *ibid* paras 173 and 177–79.

⁴⁰ Case T-70/15 *Trajektna luka Split v Commission* ECLI:EU:T:2016:592, para 44.

⁴¹ *ibid* para 52.

⁴² *ibid* para 53.

⁴³ *ibid* para 54.

any specific evidence to demonstrate the inability of the Croatian courts to assess the situation at issue.⁴⁴ This case is relevant because it shows that there is prima facie trust in the national courts of Member States. However, in situations where there is evidence that a court cannot be trusted, EU institutions would be obliged to react.

More recently, in *Homoki*, the applicant invoked a rule of law violation in Hungary. This access to documents case concerned a European Anti-Fraud Office (OLAF) investigation into possible corruption in the installing of public lights in Hungary. OLAF conducted an investigation, and the final report was distributed to the Member State concerned. Mrs Homoki, a representative of civil society, asked for access to this report, but OLAF rejected it based on several reasons, including protection of the investigation, commercial interests, and personal data. The applicant challenged this refusal before the General Court. She argued, inter alia, that the aims invoked by OLAF needed to be balanced with the superior public interest. In her view, access should have been granted because ‘there [was] ... an overriding interest ... which justify[ed] ... disclosure of the document requested, given that the Hungarian national authorities did not carry out any substantive investigation into the public lighting projects, despite the fact that OLAF, in the course of its investigation, had revealed significant instances of maladministration.’⁴⁵ In the applicant’s view, the overriding public interest in disclosure existed because ‘it cannot be expected that the Hungarian authorities will conduct an examination on the substance as regards the serious abuses found by OLAF.’⁴⁶ Thus, in essence, the applicant was invoking the failure of the Hungarian authorities to comply with the rule of law.⁴⁷ This argument was amplified by the applicant’s stance that it was particularly important to disclose the report to a non-governmental organization (NGO), bearing in mind the important role civil society has in guarding EU values, and this position was also bolstered with reasons connected to tackling corruption.⁴⁸ The General Court did not engage in a balancing exercise and in assessing superior public interest, but instead decided the case on the basis of another plea in law. It found that since all the procedures which followed the OLAF report were already closed, it was no longer possible for OLAF to rely on the general presumption that the objectives of the investigative activities could be undermined. It thus annulled the refusal decision on that basis. The case nonetheless remains interesting from a rule of law perspective because it shows how EU Courts can be asked to rule on the legality of an EU act on the basis of whether that act has taken account of rule of law compliance in a Member State. As a consequence, the vigilance

⁴⁴ *ibid* para 55.

⁴⁵ Case T-517/19 *Andrea Homoki v Commission* ECLI:EU:T:2021:529, para 35, translated into English by the authors.

⁴⁶ Action brought on 19 July 2019–*Homoki v Commission*, T-517/19, in relation to the 8th plea.

⁴⁷ Case T-517/19 *Andrea Homoki v Commission* (n 45), para 35.

⁴⁸ *ibid* para 38.

of individuals brings to the EU Courts cases which indirectly require assessment of the rule of law observance in the Member States.

The second subtype of rule of law review in actions brought by individuals concerns alleged non-compliance with the rule of law by a third country. In a number of cases on restrictive measures, the EU Courts have been asked to check whether the Council has considered various aspects connected to the rule of law, including the functioning of courts in a third country.

For example, the General Court was recently asked in *Ben Ali* to annul Council decisions imposing restrictive measures on the applicant.⁴⁹ Namely, in the aftermath of political events that unfolded in Tunisia in 2010 and 2011, the Council adopted Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities.⁵⁰ This decision was intended to reaffirm ‘full solidarity and support with Tunisia and its people in their efforts to establish a stable democracy, the rule of law, democratic pluralism and full respect for human rights and fundamental freedom’⁵¹ and ‘to adopt restrictive measures against persons responsible for misappropriation of Tunisian State funds and who are thus depriving the Tunisian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country.’⁵² The Council was charged with establishing and amending the annex to the Decision listing persons whose assets were to be frozen, and it periodically renewed the Decision. In the case at issue, Ben Ali challenged the parts of the Council renewal Decisions 2018/141 and 2019/135 concerning his listing. He argued, inter alia, that the Tunisian authorities had not taken any procedural steps concerning him since 2011 and it was indeed confirmed before the General Court ‘that none of the documents relating to the state of the proceedings in Tunisia which were communicated to the Council before it adopted [the contested] Decisions ... shows that there was any procedural activity relating specifically to the applicant.’⁵³ It was thus necessary for the Council to verify whether ‘[t]he absence of such activity over a period of seven or eight consecutive years’ can ‘be justified by particular circumstances specific to the case ... or ... specific to the applicant himself.’⁵⁴ However, the General Court found that the Council had failed to verify ‘whether, as the applicant asserts, he has never been heard, or invited to a hearing, and has never been the subject of any investigative measures, and if that were the case, why he has not been the subject of such measures until now.’⁵⁵ The General Court confirmed that the ‘Council cannot merely contend ... that it is required only to verify that there is an ongoing

⁴⁹ Case T-151/18 *Ben Ali v Council* ECLI:EU:T:2020:514.

⁵⁰ Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia [2011] OJ L28/62.

⁵¹ *ibid* recital 1.

⁵² *ibid* recital 2.

⁵³ Case T-151/18 *Ben Ali v Council* ECLI:EU:T:2020:514, paras 138 and 139.

⁵⁴ *ibid* para 139.

⁵⁵ *ibid*.

judicial investigation' so that the 'Council committed an error of assessment in considering that it was not required to carry out additional verifications' into the state and progress of the judicial proceedings which were ongoing for such a long time.⁵⁶ Thus, the case is relevant as it shows how individual actions can oblige EU Courts to examine whether an EU institution has sufficiently verified the proper application of the rule of law standards in a third country.

Finally, the third subtype of rule of law review in individual actions relates to alleged non-compliance with the rule of law at the EU level. Unlike in the previous two groups of cases, where the applicant argues that an EU institution breached EU law for not taking account of certain rule of law deficiencies in a Member State or in a third country, in these cases the issue is whether the EU itself has violated its own rule of law standards. A number of such cases concern judicial control over the rule of law standards in the appointment or termination of a mandate of the highest offices in the EU judicial structure. For example, a number of academics posed the question of whether the rule of law was endangered at the Union level when Advocate General Eleanor Sharpston's mandate ceased before the end of the six-year period to which she had been appointed as a consequence of acts adopted in relation to Brexit. However, the Court found that the acts in question were not acts of EU institutions, but rather were adopted by the representatives of the governments of the Member States exercising the powers of those states which were not subject to the review of the CJEU.⁵⁷

Cases concerning the appointment of European prosecutors were also discussed in academic discourse and in the media as relevant for the EU's adherence to its own rule of law standards.⁵⁸ In *Mendes de Almeida*⁵⁹ and *Verelst*,⁶⁰ the applicants challenged the Council Implementing Decision on the appointment of European Prosecutors.⁶¹ According to Council Regulation 2017/1939, European prosecutors are appointed by the Council following a reasoned opinion of a selection panel.⁶² Both of the applicants in these cases had been shortlisted for the position of European prosecutor, and the selection panel had ranked each of them first among the three candidates from their respective Member State. While for most European prosecutors, the Council appoints the candidates with the highest

⁵⁶ *ibid* paras 156 and 158.

⁵⁷ Case C-684/20 P *Sharpston v Council and Representatives of the Governments of the Member States* ECLI:EU:C:2021:486, Order of 16 June 2021; Case C-685/20 P *Sharpston v Council and Representatives of the Governments of the Member States* ECLI:EU:C:2021:485, Order of 16 June 2021.

⁵⁸ See eg Miguel Poiaras Maduro, 'Open Letter to the European Parliament: Call Out the EU Council on Its Rule of Law Hypocrisy' (*Euronews*, 4 October 2020) <www.euronews.com/my-europe/2020/10/03/open-letter-to-the-european-parliament-call-out-the-eu-council-on-its-rule-of-law-hypocrisy>.

⁵⁹ Case T-75/21 *Mendes de Almeida v Council* ECLI:EU:T:2021:424.

⁶⁰ Case T-647/20 *Jean-Michel Verelst v Council* ECLI:EU:T:2022:5.

⁶¹ Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office [2020] OJ L244/18.

⁶² Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L283/1, art 16.

ranking, in relation to three Member States, including those of the applicants, it departed from the ranking by selecting other persons from the shortlist. The applicants asked for a judicial review of the Council Decision, and in particular for a review of the statement of reasons. While the General Court found that the action in *Mendes de Almeida* was inadmissible as being time barred, and that the one in *Verelst* was unfounded, the cases remain relevant as they show that EU Courts have the task of checking that the EU itself adheres to its rule of law standards.

To conclude, this section has shown that rule of law issues can arise in three different types of proceedings, where each can be initiated by two types of applicants. While there is already abundant academic literature on most of these sorts of disputes, there has not been any writing on the potential of direct actions for bringing to the EU Courts possible rule of law violations, not just at the EU level, but also in Member States and third countries. The task of this section was to show that such actions are increasingly gaining importance for verifying rule of law standards in the Member States, in third countries, and at the EU level. Thus, ensuring that the vigilance of individuals is accompanied by the proper application of the standing criteria is relevant for the rule of law. The following section will examine the most recent EU Court cases with relevance to standing.

3. Standing of Individual Applicants before the EU Courts

Individuals can bring direct actions before the EU Courts provided that certain 'standing' requirements are satisfied. In this section, we analyse how the EU Courts have interpreted these standing requirements in recent case law in a number of important fields related to the internal market: state aid, public procurement,⁶³ and the environment. We also analyse the situation of a particular type of private applicant which has played an important role in bringing claims before the EU Courts in recent times: subnational entities. It will become clear that, while the EU Courts have shown signs of willingness to interpret standing requirements more flexibly in some fields, this has not happened in others.

3.1 State Aid

In the field of state aid, it is clear that EU Commission decisions declaring an aid measure incompatible with the internal market can be challenged, particularly by the aid beneficiary and by the Member State concerned.⁶⁴ However,

⁶³ On public procurement law as a subdiscipline of EU internal market law, see Stephen Weatherill, 'EU Law on Public Procurement: Internal Market Law Made Better' in Sanja Bogojević, Xavier Groussot, and Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing 2018).

⁶⁴ See eg Joined Cases T-778/16 and 892/16 *Ireland v Commission* ECLI:EU:T:2020:338.

what happens if the Commission decides not to open a formal investigation procedure after an aid measure has been notified to it, meaning that the state aid measure is approved? According to settled case law, such decisions can be challenged by any ‘interested party’ within the meaning of Article 1(h) of Regulation 2015/1589,⁶⁵ ie any Member State and any person, undertaking, or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings, and trade associations.

This open-ended definition has been given broad interpretation by the EU Courts. The case law has recognized that not only direct but also indirect competitors of the state aid beneficiary can challenge the Commission’s decision not to open a formal procedure. To that purpose, the indirect competitor must demonstrate that its interests could be adversely affected by the grant of the aid.⁶⁶ For instance, in *Deutsche Lufthansa*,⁶⁷ the Commission had approved, without opening a formal investigation procedure, the operating aid granted by the German authorities to Frankfurt-Hahn Airport. Lufthansa challenged this aid because it made it possible for Frankfurt-Hahn Airport to remain operational, and, consequently, for Ryanair, the main airline operating from that airport, to compete with Lufthansa in the Frankfurt region. The General Court ruled that even though Lufthansa was not a direct competitor to the state aid beneficiary, its competitive position was affected by the aid which would indirectly assist one of its main competitors in the region.⁶⁸ The General Court concluded, therefore, that Lufthansa had standing to challenge the aid measure.⁶⁹

The EU Courts have even recognized the status of interested parties where the applicant was not an indirect competitor of the aid beneficiary, but where its interests were affected in another way. For instance, the Court has recognized that trade unions could be interested parties where their interests or those of their members might be affected by the granting of aid,⁷⁰ and the same was true for holders of subordinated debt in a bank that received state aid from the Italian government.⁷¹ Similarly, the Court ruled that an association defending the interests of German motor sport was an interested party in relation to the sale of the Nürburg ring complex—which includes a world-famous race track—a transaction alleged to involve state aid.⁷²

⁶⁵ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU [2015] OJ L248/9.

⁶⁶ See, to that effect, Case C-83/09 P *Commission v Kronoply and Kronotex* ECLI:EU:C:2011:341, paras 63–65.

⁶⁷ Case T-218/18 *Deutsche Lufthansa v Commission* ECLI:EU:T:2021:282, unpublished.

⁶⁸ *ibid* paras 39–55.

⁶⁹ *ibid* para 56.

⁷⁰ See, to that effect, Case C-319/07 P 3F v *Commission* ECLI:EU:C:2009:435, para 33.

⁷¹ Case T-161/18 *Braesch v Commission* ECLI:EU:T:2021:102.

⁷² Case C-647/19 P *Ja zum Nürburgring v Commission* ECLI:EU:C:2021:666, para 66.

In contrast to these cases where the EU Courts accepted the applicant's arguments that it constituted an 'interested party', there is also case law showing that this concept has its limitations. The recent *CAPA* judgment may serve to illustrate the point.⁷³ The case concerns a challenge brought by a French association of fishermen against a Commission decision not to raise objections against a French measure subsidizing wind farms. The fishermen had argued that the aid measure had a negative impact on their activities since they could no longer fish in the areas where the farms were constructed. The General Court ruled that the fishermen and the operators of the wind farms were not indirect competitors since they did not use the same resources. The mere fact that these activities took place in the same geographic zones was not sufficient to make the fishermen's association an interested party.

3.2 Public Procurement

An evolution in the interpretation of the standing criteria is also apparent in the field of public procurement, as illustrated by the *Leonardo/Frontex*⁷⁴ judgment. Frontex, the European Border and Coast Guard Agency, had issued a tender for surveillance services by drones. The tender documents stipulated that the drones were to satisfy a number of criteria, in terms of, *inter alia*, payload. According to the applicant in the case (a manufacturer of drones), these criteria were discriminatory because they excluded smaller drones, such as the one manufactured by the applicant, which allegedly would be able to carry out the surveillance services requested without satisfying all the mandatory requirements. Since it was clear that the applicant did not have any chance of winning the tender, it decided not to participate.

The interesting question was whether the applicant had standing to challenge the tender criteria before the General Court. Typically, such actions are brought by a company that participated in the tender against the decision rejecting its tender and awarding the contract to a competitor. In such circumstances, the applicant has a legal interest in bringing the annulment action, because the annulment would give rise to a new tender procedure—in which it could potentially win the tender—or, alternatively, to pecuniary damages.⁷⁵

In *Leonardo/Frontex*, by contrast, the applicant did not participate, so it was not immediately apparent whether it had a legal interest in challenging the allegedly discriminatory criteria contained in the tender documents. The ECJ had already decided, in *Amt Azienda*, that, in the context of national public procurement procedures, it would be too much to require an undertaking allegedly harmed by

⁷³ Case T-777/19 *CAPA v Commission* ECLI:EU:T:2021:588.

⁷⁴ Case T-849/19 *Leonardo v Frontex* ECLI:EU:T:2022:28.

⁷⁵ See Case T-126/13 *Direct Way and DW Worldwide v Parliament* ECLI:EU:T:2015:819, para 44.

discriminatory tender specifications to submit a tender before being able to challenge such specifications.⁷⁶ The General Court ruled that this case law could also be applied, *mutatis mutandis*, in the context of European public procurement proceedings. However, its conditions were not satisfied *in casu* because the applicant had not proven that the tender conditions were discriminatory and had made it impossible for it to submit a tender.

The General Court's ruling that the reasoning used in the *Amt Azienda* case judgment is also applicable in the context of European public procurement procedures is an important step forward in terms of judicial protection. Indeed, where an undertaking has no chance of being awarded the contract precisely because of the presence of allegedly discriminatory specifications, it would be unreasonable to require it to participate in the tender—investing considerable time and resources—before it could challenge these specifications. Such a requirement would be tantamount to denying the right to effective judicial protection. Moreover, in order to obtain a speedy and effective judicial remedy, it is of the utmost importance that the undertaking be allowed to bring the action as soon as possible and already before the contract is awarded.

3.3 Subnational Entities

An evolution in the interpretation of the standing requirements is also clear when it comes to actions brought by subnational entities, such as regions or cities. In recent cases, such entities have played a leading role in challenging EU rules in, for instance, the field of environmental norms.⁷⁷ However, unlike Member States, subnational entities are not considered to be 'privileged applicants', which means that actions brought by them must satisfy the same criteria as those brought by private applicants, in particular those relating to direct and individual concern. The interesting question here is to what extent subnational entities can challenge EU measures that have an impact on the exercise of their competences.

In order to determine whether that is the case, the EU Courts have laid down a specific test. Indeed, according to settled case law, subnational entities are concerned by an EU act when they are entrusted with autonomous powers and the EU act prevents those entities from exercising those powers as they see fit.⁷⁸ While

⁷⁶ Case C-328/17 *Amt Azienda Trasporti e Mobilità* ECLI:EU:C:2018:958, para 47 and the case law cited.

⁷⁷ See eg the action for annulment brought by the Brussels Capital region against the Commission's renewal of the approval of 'glyphosate'. Case T-178/18 *Région de Bruxelles-Capitale v Commission* ECLI:EU:T:2019:130, unpublished; Case C-352/19 P *Région de Bruxelles-Capitale v Commission* ECLI:EU:C:2020:978.

⁷⁸ While this test was mostly developed by the General Court, it has recently also been accepted by the ECJ. A similar test has been applied in other situations (see eg Case C-872/19 P *Venezuela v Council* (*Whether a third state is affected*) ECLI:EU:C:2021:507, para 69).

in some judgments this test is used to establish individual concern, in others it is used for the purposes of establishing direct concern or even direct and individual concern.⁷⁹ Arguably, the test is relevant for determining both direct and indirect concern.⁸⁰

Applying the test is straightforward where the EU measure is an individual decision notified to the subnational entity concerned, such as (in particular) a negative Commission decision following the notification of a local or regional aid measure.⁸¹ In such circumstances, the Commission decision has the consequence that the region concerned cannot grant the aid it had envisaged and, therefore, cannot exercise its competences as it sees fit. The same is true where the Commission refuses a regional deviation from common EU rules under the procedure set out in Article 114(6) TFEU.⁸²

By contrast, it is much less clear how to apply the test in the case of EU measures of general scope. Importantly, recent case law does not exclude the possibility of subnational entities challenging such acts.⁸³ That being said, the fact remains that, so far, all such actions have failed to pass the admissibility threshold. A case in point is the well-known *Ville de Paris* case, which concerns an action brought by the cities of Paris, Brussels, and Madrid against the new emissions standards introduced by Regulation 2016/646.⁸⁴ While the General Court found the action to be admissible, the ECJ disagreed, judging that the applicants did not satisfy the direct concern criterion.⁸⁵ More particularly, the ECJ found that the contested provision in the Regulation did not limit the exercise of the powers of the applicant cities in relation to the protection of air quality.

The relevance of this case stems from the fact that it recognizes the right of subnational entities to challenge EU measures of general scope.⁸⁶ Recognizing that subnational entities can be directly and individually concerned by general EU measures in fields in which they have autonomous competences is, arguably, in line with Article 4(2) TEU, which states: ‘The Union shall respect the equality

⁷⁹ See eg for direct concern: Joined Cases C–177/19 P–179/19 P *Germany and Hungary v Commission and Commission v Ville de Paris* ECLI:EU:C:2022:10, para 72; for individual concern: Case T–167/13 *Comune di Milano v Commission* ECLI:EU:T:2018:940, para 34; for direct and individual concern: Case T–214/95 *Vlaams Gewest v Commission* ECLI:EU:T:1998:77, para 29.

⁸⁰ See in this sense Case C–352/19 P *Région de Bruxelles-Capitale v Commission* ECLI:EU:C:2020:588, Opinion of AG Bobek, para 61.

⁸¹ See eg Case T–167/13 *Comune di Milano v Commission* ECLI:EU:T:2018:940.

⁸² Joined Cases T–366/03 and 235/04 *Land Oberösterreich v Commission* ECLI:EU:T:2005:347.

⁸³ In contrast to earlier case law. See eg Case T–66/19 *Vlaamse Gemeenschap and Vlaams Gewest v Parliament and Council* ECLI:EU:T:2019:848, para 40.

⁸⁴ Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) [2016] OJ L109/1.

⁸⁵ See, respectively, Joined Cases T–339/16, 352/16, and 391/16 *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid v Commission* ECLI:EU:T:2018:927 and Joined Cases C–177/19 P–179/19 P *Germany and Hungary v Commission and Commission v Ville de Paris* ECLI:EU:C:2022:10.

⁸⁶ See Koen Lenaerts and Nathan Cambien, ‘Regions and the European Courts: Giving Shape to the Regional Dimension of Member States’ (2010) 35 *European Law Review* 609.

of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Indeed, in a number of Member States, competences in certain important fields of shared EU competences now pertain to subnational entities such as regions and communities in Belgium.

Crucially, in order to have standing, a subnational entity must demonstrate that the EU measure prevents it from exercising its autonomous powers as it sees fit. The extent to which this will allow such entities to challenge general EU measures will hinge on the precise interpretation of the expression 'as they see fit', which will need to be clarified in future case law. Obviously, not just any impact on the region's field of competences will be sufficient to demonstrate individual concern. Accordingly, the EU Courts have rightly held in a number of cases that the condition of individual concern was not satisfied because the region in question was merely relying on the general interest it may have in obtaining a result that is favourable to the economic prosperity of the region.⁸⁷ If, however, it is required that the EU measure make it *impossible* for entities to exercise their powers—as the *Ville de Paris* judgment suggests—they could challenge only those EU measures that either require them to entirely abstain from using their powers, or oblige them to use those powers in a very specific manner. A less strict interpretation has been put forward by Advocate General Michal Bobek, who has argued that it may be sufficient that the EU measure significantly alters the manner in which the subnational entity can lawfully make use of those powers.⁸⁸

3.4 Environmental Cases

Environmental issues are one of the most pressing issues of our time. At the EU level, their importance is illustrated by the adoption of the ambitious Green Deal, which gives the impetus for EU action in different fields with a view to making the EU's economy climate-neutral by 2050.⁸⁹ It is clear from precedents in a number of Member States that national courts have an important role to play in environmental matters. A well-known example is the judgment of the Dutch Supreme Court in which it confirmed the order issued by a lower court according to which the Dutch state was obliged to reduce greenhouse gas emissions by 25 per cent by

⁸⁷ See, eg, order of 16 June 1998, Case T-238/97 *Comunidad Autónoma de Cantabria v Council* ECLI:EU:T:1998:126, para 49; Case C-142/00 P *Commission v Nederlandse Antillen* ECLI:EU:C:2003:217, para 69.

⁸⁸ Joined Cases C-177/19 P–179/19 P *Germany and Hungary v Commission and Commission v Ville de Paris* ECLI:EU:C:2021:476, Opinion of AG Bobek, para 86.

⁸⁹ See 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions—The European Green Deal' COM (2019) 640 final.

the end of 2020.⁹⁰ Similar judgments ordering national governments to take more ambitious measures were rendered by courts in other Member States, including in France, Belgium, and Germany.⁹¹

The question arises whether individual applicants can also enforce environmental rights before courts at the EU level. A number of recent actions shed light on this question.⁹² A noted example is the so-called *People's Climate Case*, brought by a number of families from various Member States and third countries active in the agricultural or tourism sectors, as well as a Swedish association representing young indigenous Samis.⁹³ The applicants argued that the EU's legislative package regarding greenhouse gas emissions was not sufficiently ambitious and, therefore, infringed their fundamental rights. The General Court ruled that the applicants did not have standing, since they were not individually concerned by the contested provisions. It held that, while it is true that the effects of climate change may be different for one person than for another, this was not sufficient to distinguish the applicants from other individuals who are affected by climate change.⁹⁴ The ECJ confirmed the judgment of the General Court, thereby rejecting the applicants' request to give a more lenient interpretation of the individual concern requirement.⁹⁵ The ECJ had adopted a similarly strict interpretation of the individual concern condition in another environmental case decided a few months earlier.⁹⁶

One may question whether the current case law in the field of environmental matters succeeds in guaranteeing the right to effective judicial protection in a field of such capital importance. Under the current interpretation, it is difficult to see how an individual applicant could successfully bring an admissible action before the General Court against EU legislative measures concerning environmental matters.

While it is true that the conditions for admissibility of annulment actions are laid down in the Treaties, and that the EU Courts do not have jurisdiction to alter

⁹⁰ For an English summary of the judgment, see 'Dutch State to reduce greenhouse gas emissions by 25% by the end of 2020' (20 December 2019) <www.hogeraad.nl/actueel/nieuwsoverzicht/2019/december/dutch-state-case-reduce-greenhouse-gas-emissions/>.

⁹¹ For an overview, see 'Climate Claims against Governments in Europe' (16 July 2021) <www.clearygottlieb.com/-/media/files/alert-memos-2021/climate-change-litigation-in-europe-increasing-judicial-scrutiny-over-state-climate-policies.pdf>.

⁹² See also the discussion in Marc Willers, 'Climate Change Litigation in European Regional Courts: Jumping Procedural Hurdles to Hold States to Account?' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021).

⁹³ Case T-330/18 *Carvalho v Parliament and Council* ECLI:EU:T:2019:324, unpublished.

⁹⁴ *ibid*; see also Case C-565/19 P *Carvalho v Parliament and Council* ECLI:EU:C:2021:252, unpublished.

⁹⁵ *ibid*. For a discussion, see Lena Hornkohl, 'The CJEU Dismissed the People's Climate Case As Inadmissible: The Limit of Plaumann is Plaumann' (*European Law Blog*, 6 April 2021) <<https://europeanlawblog.eu/2021/04/06/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann/>>.

⁹⁶ Case C-297/20 P *Sabo v Parliament and Council* ECLI:EU:C:2021:24, unpublished.

them, their interpretation can evolve. Consequently, it might be possible for the EU Courts to modify their interpretation of these conditions, particularly by departing from the strict *Plaumann* case law,⁹⁷ without necessarily rendering these conditions meaningless. Would it not make sense to recognize that, while climate change will affect all of us, some individuals are more severely affected by reason of their particular circumstances? Should it not be possible for private applicants to bring actions against the EU if the latter were to fail to adopt the necessary measures to achieve its ambitious climate goals? A less restrictive interpretation of the standing requirements might allow the EU Courts to play a more important role in direct actions challenging measures involving the environment and climate change, similar to the roles played by courts in the Member States.⁹⁸ That said, one must not overlook the fact that the ECJ has issued important judgments on environmental standards in the context of the preliminary ruling procedure⁹⁹ or in infringement actions brought by the EU Commission.¹⁰⁰

4. Conclusion

Individual applicants have always had a pivotal role in building and safeguarding the EU legal order. This has been true both for individuals pleading before national courts, and also for those seeking access to EU Courts. Stephen Weatherill's academic work in the field of the EU internal market has been essential for developing and understanding the narrative about the vigilance of individuals and the EU legal order.

This chapter has sought to stress that, similarly to other fields of EU law which have previously been developed through case law, individual applicants have a crucial role in safeguarding the rule of law in the European Union. Indeed, individual applicants have different procedures at their disposal to bring before the EU Courts

⁹⁷ Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17; according to the classic interpretation of the individual concern condition first given in this judgment, persons other than those to whom a decision is addressed are individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishing them individually just as in the case of the person addressed.

⁹⁸ It is worth noting in this context that the recent revision of the Aarhus Regulation (Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L264/13)) failed to address the issue of standing before the EU Courts. For a discussion, see Ioanna Hadjiyianni, 'Access to Justice in Environmental Matters in the EU Legal Order—Too Little Too Late?' (*European Law Blog*, 4 November 2020) <<https://europeanlawblog.eu/2020/11/04/access-to-justice-in-environmental-matters-in-the-eu-legal-order-too-little-too-late/>>.

⁹⁹ See eg Case C-900/19 *One Voice and Ligue pour la protection des oiseaux* ECLI:EU:C:2021:211.

¹⁰⁰ See eg Case C-559/19 *Commission v Spain (Deterioration of the Doñana natural area)* ECLI:EU:C:2021:512.

possible rule of law violations in the Member States, in third countries, or at the EU level itself—violations which would otherwise escape judicial review.

The possibilities for individual applicants to bring direct actions before the EU Courts—possibilities which we believe are sometimes overlooked in academic literature on the rule of law—are heavily dependent on the standing criteria and the way these are interpreted. Traditionally, these criteria have been interpreted rather restrictively, but an evolution can be discerned in recent case law towards wider interpretation.¹⁰¹ One factor contributing to this change may be the recent enlargement of the EU General Court—almost doubling its number of judges—which should provide it with an increased capacity to scrutinize a wider range of EU measures in different fields.¹⁰²

While it is true that the same tendency is not apparent to the same extent in all fields discussed, this should not necessarily be viewed as problematic. Perhaps a 'functional' interpretation of the standing criteria is required, depending on the area of law concerned. In some fields, the General Court is better placed to develop the law which would justify a broader interpretation of the standing criteria. By contrast, in other fields, the ECJ may be better placed, meaning that a more restrictive interpretation of the standing criteria may be justified, given the ECJ's jurisdiction to issue judgments in the context of the preliminary ruling procedure or in infringement actions.

¹⁰¹ It must be emphasized that a number of the General Court judgments discussed in this chapter are appealed before the ECJ, so it remains to be seen whether the ECJ will follow the reasoning of the General Court.

¹⁰² While the General Court historically had one judge per Member State, the Statute of the Court of Justice of the European Union—since its amendment by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L341/14)—provides in its art 48 for a gradual increase in the number of judges: art 48(c) states that '[t]he General Court shall consist of two Judges per Member State as from 1 September 2019'. As a consequence of Brexit, the current total number of General Court judges is slightly lower than twice the number of judges before its enlargement.