PLAUMANN WITHERING: STANDING BEFORE THE EU GENERAL COURT UNDERWAY FROM DISTINCTIVE TO SUBSTANTIAL CONCERN

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Direct access to the EU General Court for annulment of certain EU legal acts presupposes that the applicant is individually concerned. Longstanding case law has defined 'individually' as distinctive and unique. This formal definition has often been criticised for substantially restricting access to justice. The present contribution takes this criticism further, arguing first, that under cover of the formal criterion of distinctiveness, practices have emerged that are uncertain and inconsistent sometimes rather tending towards substantive criteria. And second, that insofar as the criterion is taken literally, it provokes the paradoxical effect that the more serious and therefore widespread the damage resulting from a legal act is, the less legal protection of rights is granted – a situation that has become virulent with climate change. For several reasons, indirect access via national remedies combined with the referral of validity questions to the European Court of Justice is no effective substitute. The article submits, based on a reflection on principles of legal protection, that individual concern should not be defined formally as distinctive but rather be defined materially as a personal and severe concern. Furthermore, the article discusses the doctrinal implications of such a new definition and shows how the risk of opening the floodgates for actions could be managed.

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INTRODUCTION

Proceedings launched by individuals aiming at the annulment of EU legal acts can in principle be brought directly to the General Court (GC). [1] Standing for such actions is regulated by Art. 263 (4) TFEU.[2] This provision distinguishes three variants of contested legal acts and related standing requirements: legal acts having an addressee who may in this quality file the action (first variant), general executive acts not entailing implementing measures that require direct but not individual concern on the side of the applicant (third variant), and other legal acts that require both direct and individual concern (second variant). Such other legal acts can be individual acts having effects on third persons and general legal acts of legislative and executive nature, the latter with the exclusion of the self-implementing ones of the third variant.

Since the Plaumann judgment of 1963 the CJEU has understood individual concern very narrowly as requiring concern that is differentiated from that of all other persons.[3] Critics of this restrictive definition have argued that it

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1 Art. 256 (1) [1] TFEU. Appeals would be heard by the European Court of Justice (ECJ) (Art. 256 (1)[2]. Terminologically it should be noted that the GC and ECJ together form the Court of Justice of the EU (CJEU) (Art. 19 TEU). I will speak of the CJEU when referring to both the GC and ECJ, and of the GC or ECJ if indicating differences of competences, opinions, or practices.

2 The paragraph reads: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

3 ECJ Case C-25/62 *Plaumann v Commission* EU:C:1963, 217. The formula reads: 'Persons other than those to whom a decision is addressed may only claim to be 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 distinguishes them individually just as in the case of the person addressed.'

blocks the many persons who are personally and seriously harmed by EU legal acts from access to the GC.[4] The CJEU responded that any broadening of the definition would require a change of the treaty text and open a floodgate of actions. Any gap of direct access could be made good by actions before national courts and the possibility of referring questions to the ECJ in accordance with Art. 267 TFEU. In return, critics argued that not all member states provide adequate remedies. Still, the CJEU has persisted in its opinion. Scholars have since largely acquiesced through somewhat positivistic search for patterns in the massive body of case law. Thus, case clusters were identified, that were granted or denied standing. Notably, standing was accepted for 'closed shops' and vested interests of actors such as in anti-dumping, subsidy and competition law,[5] but denied in areas of regulation of more diffuse interests such as in environmental protection.

My impression is that commentators, be they defenders, opponents or neutral observers, agree on two observations: They believe that the distinctiveness criterion actually guides the case law (be it to their satisfaction or discontent); and they believe that the loss for those who are denied access can be tolerated, considering the indirect route to the ECJ via referral

[4] Case C-50/00 *P Unión de Pequeños Agricultores v Council of the EU* ECLI:EU:C:2002:197 Opinion of *AG Jacobs*; Matthias Kottmann, 'Plaumanns Ende: Ein Vorschlag zu Art. 263 Abs. 4 EUV', (2010) 70 *ZaöRV* 547, 563; Michael Rhimes, 'The EU courts stand their ground: why are the standing rules for direct actions still so restrictive?' (2016) 9 *Eur J Legal Stud* 103, 151-163; Paul Craig and Grainne de Búrca, *EU Law. Text, Cases and Materials* (OUP 7th ed 2020), 551-564; Ioanna Hadjiyianni, 'Judicial protection and the environment in the EU legal order: missing pieces for a complete puzzle of legal remedies', (2021) 58 *CMLR* 777-812.

[5] Koen Lenaerts, Ignaz Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2014) paras. 7.97-7.134; Craig (n 4); Albertina Albors-Llorenz, 'Judicial protection before the Court of Justice of the European Union', in Catherine Barnard, Steve Peers (eds.) *European Union Law* (OUP 3rd ed 2020), 298-303; Jonathan Wildemeersch, *Contentieux de la légalité des actes de l'Union européenne. Le mythe du droit à un recours effectif* (Editions Bruylant 2019), paras 299-306 ; Wolfram Cremer in Christian Calliess and Matthias Ruffert (eds.) *EUV. AEUV* (CH Beck 6th ed 2022), Art. 263, paras 33-53.

procedure. By contrast, my hypothesis is that 'Plaumann' does not work at all but is a disguise under which inconsistent and paradoxical, but also auspicious solutions have emerged. On the basis of this analysis an alternative interpretation of individual concern including implications for the referral procedure will be developed. Part I contains this analysis, part II a reform proposal.

The article aims first and foremost to make a conceptual contribution, which will be illustrated throughout the piece utilising the *Carvalho* case.[6] This case concerns an action that was brought by 10 families and an association who were engaged in peasant agriculture and adapted tourism, living in different regions of the EU and even in Kenya and Fiji. They claimed that they already at present suffered serious health and economic damage as a result of climate change, and that this was partly due to the greenhouse gas emissions allowed by certain EU legal acts.[7] Alleging these acts to violate their fundamental rights and certain provisions of the Paris Agreement on climate protection they applied for annulment of the relevant provisions.[8] The GC and, on appeal, the ECJ rejected the action as inadmissible holding that the plaintiff families were not individually concerned by the challenged legal acts.

[6] Case T-330/18 *Carvalho and Others v EP and Council* EU:T:2019:324 para 33 et seq; upheld on appeal by Case C-565/19 *Carvalho v EP and Council* EU:C:2021:252 para 77.

[7] These were Directive (EU) 2018/410 amending Directive 2003/87/EC on the emissions trading system (ETS), Regulation (EU) 2018/842 on contributions to climate action by Member States (CAR), and Regulation (EU) 2018/841 on emissions and removals by land use, land use change and forestry (LULUCF).

[8] See in more detail Gerd Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 *TEL* 137-164; the application and appeal are accessible at https://peoplesclimatecase.caneurope.org/de/downloads/.

I. Analysing direct and indirect access to the CJEU

In this part I will examine, first, how the CJEU makes use of the Plaumann formula in its case law (1.), and then, whether national remedies combined with referrals to the ECJ compensate for any gaps in direct access to the GC (2.).

1. *Direct access to the General Court*

As stated, my hypothesis is that the Plaumann formula barely has any guiding effect anymore. Although an enormous body of case law has emerged, it is far from clear how 'distinctiveness" should be understood. One way of testing its consistency is to examine whether and how distinctiveness is found in the factual world or defined by legislation. There are two different approaches, facts- and rights-based, which correspond to two different doctrinal traditions in EU Member States regarding the function of court review. This ranges from the German concept of protection of rights of the individual 'subject' of a state to the French concept of 'objective' legal oversight over administrative bodies.[9] Both approaches were accepted as equivalent in determining access to justice in environmental matters in Art. 9 (2) of the Aarhus Convention of 1998.[10] Distinctiveness would be identified in the factual interests approach by looking at the effects of the contested act, and in the rights based approach by examining if the contested act breaches an individual right.[11]

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[9] Jean-Marie Woehrling, 'Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen' [1985] *Neue Zeitschrift für Verwaltungsrecht* 21, 23; Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts*, (10th edn, C.H.Beck 1973), 184-194; Bernard Stirn and Yann Aguila, *Droit public francais et européen* (3rd edn, Presses de Sciences Po et Dalloz 2021), 731-740.

[10] Convention on access to information, public participation in decision-making and access to justice in environmental matters of 1998.

[11] It should be noted that in the *de facto* approach the relevant interests include not only purely factual ones (such as human well-being or financial income) but also ones that are accepted or even made a right by law (such as the right to health or

It appears that the CJEU oscillates between the two approaches. Moreover, insofar as either of the approaches is applied there is no internal consistency. This can be explained by the formal character of the distinctiveness test which has an innate trend towards substantial application thus either abandoning formality or paradoxically denying legal protection when harm is serious and wide-spread.

A. Individual concern relating to factual interests

The applicant families in *Carvalho* alleged that they were differently concerned by climate change and the EU legal acts contributing to it. Some applicants were farmers, others hotel owners. Some were harmed by drought, others by floods, by melting snow and ice, or by heat waves. More generally what distinguished them from many other professions was the fact that their livelihoods were heavily dependent on reliable weather conditions.

The ECJ denied them standing reasoning that:

> the fact that the appellants, owing to the alleged circumstances, are affected differently by climate change is not in itself sufficient to establish the standing of those appellants to bring an action for annulment of a measure of general application such as the acts at issue.[12]

The court thus accepted that the applicants were differently affected, but this did not lead it to grant standing. *Prima facie* this violates the judicial syllogism because the rule 'if there is a difference in concern, then there is standing', applied to the fact 'there is a difference in concern', logically commands to grant standing. However, by adding that the fact (difference in concern) is

land property). But such legal basis stems from general laws that are not specifically related to the regulatory problem at stake. This problem is dealt with by that legal act (such as an environmental or business regulation) the implementation of which is the object of court review. In the rights-based approach this legal act would be examined as a potential source for individual rights.

[12] Case C-585/19 *Carvalho v EP and Council* (n 6) para 41.

'in itself' not sufficient the court inserted into the rule an additional condition. But it did not explain what that is.

One way to find that criterion might be a look at the case of the fishing company *Jégo-Quéré v the European Parliament and Council*.[13] In that case an EU regulation restricting fisheries was challenged for adverse effects on the applicant. The company argued that it was singled out from all other actors potentially concerned because it was the only one fishing in the regulated zone that was affected by the prescribed minimum net opening which was to let the protected species, young hake, escape but was too wide to catch the company's target fish, whiting. One would expect that this is a clear case of 'peculiar attributes" or 'differentiating circumstances" in the sense of the Plaumann formula.[14] But the ECJ declined propounding another criterion which is that the company was only an example of a type, i.e. an actor affected 'in the same way as any other economic operator actually or potentially in the same situation."[15] This is understandable in respect of legal logic since in terms of the applicable general legal act, all the individuals concerned (and even if there is only one of them) are only cases of application of an abstract-objective type.[16] But by applying such criterion the court switches from factual effects to legal evaluation. It therefore dismisses the factual approach contradicting its own cherished Plaumann formula.

[13] Case C-263/02 P *Jégo-Quéré* ECLI:EU:C:2004:210 paras 4-6.

[14] See above fn 3.

[15] Case C-263/02 P *Jégo-Quéré* (n 13) para 46. See as further instances ECJ Case C-583/11 P *Inuit Tapiriit Kanatami v EP and Council* EU:C:2013:625 para 73 ('any trader'); Case T-16/04 *Arcelor v EP and Council* ECLI:EU:T:2010:54 para 107 ('any other operator or […] producer'); Case C-244/16 P *Industrias Químicas v Commission* EU:C:2018:177 para 91 ('objective quality as importer').

[16] Cf. Ota Weinberger, *Rechtslogik* (2nd edn, Duncker & Humblot 1989), 252: 'If a general norm proposition commands that every subject x has the duty to realize p, then the single subject xi of the quantification universe has this duty [...].' (my translation from German)

Of course, the purely factual identification of 'peculiar attributes" and 'differentiating circumstances" could open the often-feared floodgate for actions because in the real world a myriad of differences exist. In an attempt to avoid this the CJEU sometimes looks for particularly grave effects on concerned persons. For instance, in state aid law, a company that has 'conclusively shown' that the aid may 'substantially' affect its 'position on the [...] market'[17] was accepted as individually concerned, and likewise in anti-dumping law a company whose 'business activities depend to a very large extent on those imports and are seriously affected by the contested regulation'[18], as well as in merger law a company whose 'position in the market […] provide it with a sufficient basis to justify the description of potential competitor".[19] Upon closer scrutiny this orientation implies that the comparative view imbedded in the formal 'distinctiveness' test vanishes and a substantial orientation that looks at severity for the individual actor creeps in. 'Plaumann' thus loses its determinative influence.

Still, the court has not developed criteria against which the seriousness of concern can be measured. This may be due to the fact that the court does not fully engage in the substantial concept. Compare, for instance, the severity of the impact on the farmers in *Carvalho*, who claimed that their land is becoming uncultivable as a result of climate change, with the exporters of photocopiers to the EU in *Nashua Corp,* the profit of which was reduced from estimated average 14,6 % to 5 % as calculated aim of the contested EU antidumping regulation.[20] The farmers were not considered to be individually affected, but the exporters of photocopiers were. The applicants in *Carvalho* who were existentially harmed would have been a perfect example for severe harm, but to accept that would have implied

[17] Case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757, para 55; see similar ECJ Case C-169/84 Cofaz ECLI:EU:C:1986:42 para 28.

[18] Case C-358/89 *Extramet* ECLI:EU:C:1992:257 para 17.

[19] Case T-114/02 *Babyliss v Commission* ECLI:EU:T:2003:100 para 106.

[20] Joined Cases C-133/87 and C-150/87 *Nashua Corp. v Council*, ECLI:EU:C:1990:115, [1990] ECR I-767 para 17.

abandoning the construct of 'any other economic operator'. In contrast, if the formal approach with its focus on singular effects is retained, the paradox emerges that the more catastrophic and wide-spread such effects are, the less legal protection is granted.[21] More appropriate criteria must be found. Such criteria will be discussed in part II.

B. Individual concern relating to rights

An alternative construction of standing is to understand 'individual concern" not as effects on factual interests but as infringement of individual rights.[22] When applying this approach, two steps must be taken: the individual right must be derived from legislation, and it must be alleged to have been violated. Such an individual right will be based on the act, be it of ordinary, constitutional or international law, against which the contested act is assessed. Such rights can provide a *status negativus* in the sense that the authority must desist from an action, or a *status positivus* in the sense that it must take an action.[23] For instance, in cases concerning subsidies, a

[21] It should be noted that such extreme though wide-spread effects may not only result from general legal acts, as it was in *Carvalho*, but can also arise from individual acts (or their omission), a major example being *Danielsson v Commission*. A resident of Tahiti, Ms Danielsson, applied at the GC for an interim measure ordering the Commission to prohibit France to test an atomic bomb the fall-out of which would hit her island. The President of the GC, Antonio Saggio, rejected the application on the perplexing ground that while the applicants might suffer personal damage this would not distinguish them individually since any person residing in the area in question could be affected. ECR T-219/95 R *Danielsson v Commission* [1995] ECR 3052, para. 71. See Art. 158 Rules of Procedure of the GC for the competence of the GC President. The French government was well aware of the disastrous consequences. See Sébastien Philippe, Tomas Statius, *Toxique: Enquête sur les essais nucléaires francais en Polynésie* (Presses Universitaires de France 2021).

[22] Forsthoff (n 9)

[23] Forsthoff (n 9) 184-186. While in the interest based concept of standing is just a question of court procedure, in the rights based approach the right is considered to materially shape the relationship between the individual and the public authority (i.e. to desist from or to do something) and to be procedurally armoured

competitor may positively claim that the Commission shall order repayment, or a beneficiary may negatively claim that the Commission desists from such order. Often the pertinent law does not expressly establish a right. Then, interpretation of the text is needed exploring whether it aims at serving the general public interest or – in addition - the interests of individuals benefitting from it.[24]

The CJEU has on occasion interpreted laws as protecting individuals and thereby creating rights for them. This is clearly the case when the persons and facts in question are listed by name or are otherwise clearly identifiable in that act. An example of this is *BRF SA, SHB Comércio de Alimentos SA* where the applicants were listed directly in an EU regulation as being entitled to import meat and challenged a subsequent act delisting them.[25] Such cases are rare, however, and the CJEU usually must determine through interpretation whether provisions are general or individualizing. For instance, in *Extramet,* the ECJ, accepting standing, regarded as individualising the rather abstract rule that an anti-dumping duty may be imposed if dumping causes material injury to an existing branch.[26] By contrast, in *Jégo-Quéré* the ECJ, denying standing, qualified as abstract-objective the quite specific regulation of fishcatch from a limited area south of Ireland, the size of vessels, hours at sea, and minimum net openings.[27]

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by a right to seek court review. See on the related doctrinal controversy Hans Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre* (Mohr/Siebeck 1965) 146-272.

[24] Such reasoning is rooted in German law where the norm that aims at protecting individuals is called Schutznorm (protective norm). For an exemplary case see BVerwG Case 4 C 74/78, BVerwGE 68, 58 (60).

[25] Case T-429/18 *BRF SA, SHB Comércio de Alimentos SA v Commission,* ECLI:EU:T:2020:322 para 48.

[26] Case C-358/89 *Extramet* (n 18) paras 15-16; similar for trade arrangements between EU and overseas territories Case T-47/00 *Rica Foods v Commission* EI:T:2002:7, paras 41-42, and for anti-subsidy measures Case 191/82 *Fediol v Commission* [1983] ECR 2914 para 31.

[27] Case C-263/02 P *Jégo-Quéré* (n 13) paras 4 and 5.

While these examples concern material rights, there is a longer tradition dealing with procedural rights. Thus, in the European Coal and Steel Community (ECSC) heavy industry and their associations were entitled to bring actions (Article 33 (2) ECSC Treaty) as a closed shop of players who cooperated or competed with each other. When the European Economic Community (EEC) extended its primary clientele to any economic branch, legal standing was narrowed by the requirement of direct and individual concern (Art. 173 (2) ECT). The ECJ and later also the GC considered as individually concerned those who were in some way formally acknowledged as participants in the relevant decision-making procedure, thus forming a closed class. This applies, for example, in competition law to those companies that had applied for measures to prevent cartels or abuse of a dominant position.[28] In the area of state aid law, it applies instead to those who are considered parties in the control procedure[29], while in the area of anti-dumping to those who can apply for proceedings to be carried out.[30] In fisheries law it applies to those who participate in the setting of catch quotas via their regional fisheries councils (RACs).[31]

With the turn towards the 'Europe of the citizens', initiated by the then Commission President Jacques Delors and realised by both the Single European Act of 1987 and the Maastricht Treaty of 1992, the club model became inappropriate. The closed shop of cooperating and competing players is not isolated. It has a significant impact on third parties who claim consumer protection, environmental protection, healthy working conditions, social security, gender equality and so on. Since these persons tend to be affected in greater numbers rather than individually, the club or closed class model excludes them, even though they are often affected at least as severely as the club members.

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[28] Recognised since Case 26/76 *Metro v Commission* [1977] ECR 1876, para. 13. See further Lenaerts/Maselis/Gutmann (n 5), para 7.43.

[29] Case C-521/06 P *Athinaiki Techniki v Commission* EU:C:2008:422, para 36.

[30] Case 191/82 *Fediol v Commission* [1983] ECR 2914, para 29.

[31] Case C-355/08 P *WWF-UK v Council* EU:C:2009:286, paras 44-45.

One might expect in this situation, that distinctiveness would be accepted as a reason for standing at the very least if the invoked individual right – be it material or procedural – were a fundamental right.[32] However, the CJEU has been hesitant to accept this. In *Carvalho,* the claimants, in addition to alleging harm as factual concern, submitted that the contested climate legislation interfered with their fundamental rights to health, occupation and property. The ECJ responded that 'the claim that the acts at issue infringe fundamental rights is not sufficient in itself to establish that the action brought by an individual is admissible.'[33] The court thereby accepted that the applicants' fundamental rights might have been infringed, but, as was the case with the interest-based approach, the court again added an 'in itself', apparently having an additional condition in mind, which it did not disclose.

Arcelor v EP and Council might provide an answer as to what this additional condition is. The applicant, a steel producer, alleged that the EU emissions trading scheme infringed its fundamental rights to property, occupation and equal treatment.[34] The court acknowledged that fundamental rights must be observed by legislation but when testing standing it looked at the effects of the contested act on the applicant's economic situation inquiring if they distinguished the applicant from other enterprises, finding that they did not because many other companies were also affected. This means, however, that the court switched from the rights-based to the interest-based approach which considers the factual effects of the contested act. Had it continued with the rights-based approach, the court would have had to acknowledge that distinctiveness is given with the very existence of a right of an individual person. The inquiry in this case into the factual effects is thus inconsistent with a rights-based approach.

There may be some merit to the concern that a rights-based approach to the granting of standing, in which right holders are individualised per se, could

[32] Cf. Paul Craig, *EU Administrative Law* (OUP 2006) 346.
[33] Case C-565/19 Carvalho v EU (n 6), para 48.
[34] Case T-16/04 *Arcelor v EP and Council* (n 15) para 75.

flood the GC with cases. Some filtering criteria must be found, but they need to provide access in cases of grave concern, regardless of whether few or many persons are affected. Imagine a legal act with direct expropriatory effect on numerous persons, such as, for instance, the annulment of patents for certain products, the closure of an environmentally hazardous business branch[35], or the driving ban for a type of combustion engine, all regulations that imaginatively may in future emerge to mitigate climate change. Should the persons affected be excluded from legal protection, simply because there are many of them? Criteria reasonably tailoring access will be discussed in Part II.

2. National action plus referral to the ECJ: a substitute for direct access?

In response to allegations of gaps in direct access to the GC, the CJEU has pointed to the possibility of national legal protection, arguing that together the domestic and the EU levels form a complete system of remedies and procedures.[36] Anyone wishing to challenge an EU legal act could seek legal protection before national courts, which might then refer a pertinent question to the ECJ, and is obliged to do so if it is a court of last instance.[37] This response was also reiterated by the GC in *Carvalho*.[38]

Several objections have been raised against this view. First, national law does not always provide appropriate remedies. In response, the ECJ refers in general to the duty of the member states under Art. 5 TEC (now – somewhat

[35] This consequence had been alleged by the applicant in *Arcelor* (n 15) although the interference did not consist of an explicit prohibition of activity but of a cost burden. This difference would of course have to be examined at the merits stage.

[36] Case C-50/00 P *Unión de Pequenos Agricultores* ECLI:EU:C:2002:462, para 40. The system also includes the incidental testing under Art. 277 TFEU of a legislative act in actions challenging an executive act based on the same.

[37] ECJ Case C-263/02 P *Jégo-Quéré* (n 13), para 30.

[38] Case T-330/18 *Carvalho and Others v EP and Council* (n 6), para 53. The ECJ did not return to the issue on appeal (Case C-565/19).

more specified - Art. 19 (1) (2) TEU) to provide appropriate remedies.[39] However, it evades any verification whether this really happens.[40] This is understandable, because national remedies are often anchored in the respective legal history and culture, which cannot be easily evaluated and possibly set aside by the ECJ. But this does not alter the fact that appropriate remedies are lacking.[41] Second, the direct action before the GC is better suited to dig into factual issues than the preliminary procedure before the ECJ, which concentrates on legal questions. The ECJ has largely refused to address this problem. In *Carvalho*, for instance, the claim that the EU climate protection acts were insufficient to reduce greenhouse gas emissions would have required in depth evidential inquiry.[42] More generally, and seldomly considered: Art. 6 (3) TEU should be consulted as transmission belt requiring

[39] ECJ Case C-50/00 P *Unión de Pequenos Agricultores* (n 36), para 42. The ECJ has recently strengthened its push to allow standing for national actions indirectly challenging EU legal acts (see ECJ Case C-873/19 DUH ECLI:EU:C:2022:857); but this only concerns acts of environmental law and actions of NGOs, not of individuals.

[40] Ibid para 43; Case C-263/02 P *Jégo-Quéré* (n 13), paras 31-33.

[41] It is true that some authors have proposed constructs for national remedies that would enlarge access to references to the ECJ. Wildemeersch (fn 5) paras 716-749 derives from Art. 19 TFEU a conclusive obligation of the member states legislators and courts to establish a declaratory action on the validity of an EU legal act; similarly, Bernhard Wegener, 'Rechtsstaatliche Mängel und Vorzüge der Verfahren vor den Gemeinschaftsgerichten' (2008) *Europarech*t Beiheft 3, 45 et seq, proposes an application for declaration that a legal relationship based on the EU legal act is non-existent due the latter's nullity. But these constructs will hardly be accepted by national courts.

[42] It is true that the ECJ does have the right to investigate those facts that are relevant for judging the validity of the contested legal act, but is rarely proceeds accordingly, see Lenaerts/Maselis/Gutman (n 5), para 24.23. For an example see Case C-616/17 Blaise, ECLI:EU:C:2019:800, in which the court when assessing the authorisation of Glyphosate only addressed legal issues although the true problem was the factual basis of the risk assessment. For further examples and an outspoken critique see Case C-352/19 P *Région de Bruxelles-Capitale v Commission*, ECLI:EU:C:2020:588, Opinion of AG *Bobeck*, paras 137-147, and Case C-177/19 P *FRG v Ville de Paris u.a.,* ECLI:EU:C:2021:476, Opinion of AG *Bobeck* para. 108.

that Art. 263 (4) TFEU must be read in the light of the European Convention on Human Rights (ECHR), and more specifically its Art. 34 which establishes the principle of access to justice in cases of violations of human rights.

In addition to these well-established critiques, it is also worth considering that the detour via national procedures causes useless delays and additional costs. Particularly whenever the complaint exclusively addresses the validity of the contested EU legal act, not the modalities of its implementation.[43] This was salient in *Carvalho*, because the applicants, if denied access to the GC, were remanded to file actions in 27 member states forcing a reduction quota on each of them so that the sum could equal the envisaged EU-wide reduction. Furthermore, referrals to the ECJ cannot be expected and may even be inadmissible whenever the contested EU legal act only aims at a minimum harmonisation. Minimum harmonisation means that member states can go further. In *Carvalho,* the remaining member states' competence resulted from the very content of the challenged three legal acts as well as from Art. 193 TFEU, considering that the acts were based on Article 192 TFEU. In such cases, domestic courts will be asked to decide whether the member states are obliged to go further, such as reducing emissions deeper than required by EU law. The courts will routinely have to answer this question by applying national constitutional law, in particular national fundamental rights, hence not the rights found in the EU Charter of Fundamental Rights.[44]

[43] *AG Jacobs* (n 4) paras 41-42. In the related judgment, the ECJ only partially addresses the objections of AG Jacobs, in a manner that appears disrespectful to me.

[44] Interpreting the applicability of the CFR on member states measures related to EU secondary law, the ECJ distinguishes between minimal harmonisation where the member states retain their genuine competences and regulatory regimes where they are given powers by Union law to take implementing measures. The CFR is applicable in the second situation, but not the first. See Joined Cases C-609/17 and 610/17 *Terveys* ECLI:EU:C:2019:981 paras. 49-50. See further Richard Král and

There are thus several well-established reasons why national referrals do not constitute a realistic substitute for direct access to the GC. As a matter of fact, there have been no referrals for review of EU climate change to date and they have commonly not even been considered.

How to cope with the gap will be discussed in part II.

II. Reinterpreting individual concern

The mantra-like recital of the Plaumann formula has disguised how the case law has developed its own criteria. These criteria however lack methodological consistency. They also tend to replace the formal test of distinctiveness by a substantial test of seriousness of concern, which, while commendable, is not yet sufficiently circumspective, raising concerns about unequal treatment of potential claimants, and refuses legal protection the more massive and wide-spread adverse effects are. In this section, I will propose a different understanding of individual concern basing this on core principles that should guide judicial protection. I will first outline the relevant principles (1.), propose a definition of individual concern (2.), examine aspects of its practical application (3.) and explain how such direct access to the GC could be coordinated with indirect access to the ECJ (4.).

1. *Principles of access to judicial review*

Several principles may be considered pertinent in the determination of who should have standing before a court, but I consider the following five to be particularly important in the case of access to the CJEU: legal certainty, judicial protection of rights, separation of powers, multilevel subsidiarity, and equal treatment. I will introduce them in turn and shortly indicate their effects on the findings of my analysis.

Petr Mádr, 'On the (in)applicability of the EU Charter of Fundamental Rights to national measures exceeding the requirements of minimum harmonisation directives' (2021) 46 *ELR* 81.

A. Legal certainty

Legal certainty is not explicitly stated in the treaties but inherent in the rule of law (Art. 2 TEU). It is also supported by the principle of consistency of the legal order which is binding also for the EU judiciary (Art. 13 TEU). In *Heinrich* the ECJ formulated it to require that 'Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.'[45] My analysis of the case law has made it clear that the methodological ambiguity of the distinctiveness criterion prevents individuals from ascertaining their rights to legal protection and thus defies legal certainty.

B. Judicial protection of rights

The most important principle certainly is the guarantee of effective judicial protection. It ensures access to EU or Members States courts for the protection of rights guaranteed by EU law. This principle is enshrined in Art. 47 (1) CFR and Art. 19 para 1(2) TFEU. Since Art. 47 (1) CFR and Art. 263 (4) TFEU are both rules of primary law, they should be interpreted in concordance with each other.[46] The question then is whether the distinctiveness criterion infringes on Art. 47 (1) CFR insofar as it blocks access to justice for individuals that suffer personal and serious harm. The answer depends on the definition of 'rights' 'guaranteed by the law of the Union'. The term 'rights' certainly embraces individual rights expressly or implicitly established by law. In addition, interests – at least those accepted by law – should also be included in the term.[47] Considering this, legally

[45] Case C- 345/06 (Heinrich) ECLI:EU:C:2009:140, para 44.

[46] See the somewhat laconic observation of AG Jacobs in Case C-263/02 P *Commission v Jégo-Quéré* ECLI:EU:C:2003:410 para 45 that 'it clearly follows from the Court's judgment in Unión de Pequeños Agricultores that the traditional interpretation of individual concern, because it is understood to flow from the Treaty itself, must be applied regardless of its consequences for the right to an effective judicial remedy." (My emphasis)

[47] Hans D. Jarass, *Charta der Grundrechte der Europäischen Union* (3rd edn, CH Beck 2016) Art 47 paras 6-8.

accepted interests and legally established rights can hardly be excluded from judicial protection simply because they are not distinctively affected in the narrow Plaumann sense.

It is true that when applying the principle of judicial protection, account must be taken of the scarcity of judicial resources, or of what is called judicial economy. While that consideration is not explicitly mentioned in the treaties it is implied in the very institution of the EU judiciary that the flooding with actions of the EU courts must be avoided. However, other than sometimes insinuated by the CJEU[48] it has no prevalent status but assists in giving the legal protection principle concrete shape. As will be explained there are procedural tools that help to ensure this.

C. Separation of powers

According to the principle of separation of judicial, legislative and executive powers, courts should practice judicial self-restraint because the legislative and the executive branches dispose of more direct democratic legitimation. One should nonetheless acknowledge that courts contribute some genuine legitimation by providing a forum for reasoned argumentation and independent, unbiased deliberation that differs from political and administrative decision-making patterns.[49] Considering this, my impression is that courts are unable to fully fulfil their function when individual concern is identified by formal comparison rather than substantive reflection.

D. Multilevel subsidiarity

Although subsidiarity as laid out by Art. 5 TEU does not apply to the competencies of the judiciary, its basic idea can also be used as guidance for

[48] Cf the frequent expression of fear that without the Plaumann doctrine Art. 263 (4) would become meaningless. See cites (n 12) and (n 32).

[49] See on legitimation through principled reasoning Ronald Dworkin, *Taking rights seriously* (Harvard UP 1978), 22-31, 184-205, and on legitimation through deliberative proceedings see Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992), 272-291.

the relationship between national and EU courts.[50] While subsidiarity is most often understood as limiting EU competences[51], it also has an enabling aspect as expressed in the Latin notion of 'subsidium' (like in 'subsidy'). In that line the principle encourages the EU to make use of competences when objectives 'can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Art. 5 (3) TFEU). Relying on this activating aspect of the subsidiarity principle I submit that the gaps found in the 'complete system' of direct and indirect access to the EU judiciary are reasons for facilitating direct access to the GC.

E. Equal treatment

The right to equal treatment (Art. 20 CFR) also applies to the judiciary (Art. 51 (1) CFR). It appears that the generous acceptance of standing for actors in competition cases encroaches upon the equality principle when compared with the reluctance to grant standing in other areas, including environmental cases. The prevention of action flooding may be considered as justification of differentiation but one can ask why it should be 'necessary' (Art. 51 (1) CFR) to accept the risk of flooding in competition cases but not in other cases, and especially in environmental ones which are at least as urgent. Moreover, unequal treatment can also be seen in the conditions of access to the reference procedure. Persons alleging invalidity of an EU legal act have different chances to reach the ECJ depending on the standing rules of their Member State. This may lead to litigation strategies that shop for those fora that are most open for individual or class action. Open Member States like the Netherlands or Ireland may even become a hub for such actions.

[50] Konrad Walter, *Rechtsfortbildung durch den EuGH* (Duncker & Humblot 2009), 260.

[51] Idem, 261 et seq.

2. Individual concern redefined

My core suggestion for a way forward is that individual concern should be defined not as distinct but as a personal and severe concern. This has already been proposed by several other commentators.[52] My contribution is to have based it on new aspects of analysis, relate it to a number of principles of legal protection, and explain its practical implications in more detail.

In conceptual terms, the change of definition involves a change from a formal to a material criterion. This means that the individualisation of concern is not to be found in distinctiveness but rather in severity of adverse effects. The formal concept compares affected persons and looks for uniqueness of harm. It cares for those who stand out. In contrast, the material concept looks for personal harm and evaluates this in relation to a person's ordinary life conditions. By requiring this to be personal it excludes action for others. By requiring it to be severe it concentrates on those who are not just cursorily but seriously affected, such as if their health is impaired, their employment endangered, their land devastated, etc. It may well be that in order to determine levels of severity comparisons with other persons' fates are helpful, but such exercise will only be 'distinctiveness light', not uniqueness in the restrictive Plaumann sense.

Admittedly, the notions 'personal' and 'severe' entail interpretation and thus discretion for the judge. But that can be fettered by considerations to be developed by court case law. After all, courts of the many national legal orders that apply the two criteria have been able to perform this task.[53] Some more concrete implications of the proposed definition will now be discussed. This will be done with particular regard to actions challenging those measures that have effects on a multitude of persons. Such measures can be

[52] Outstanding AG Jacobs (n 4) paras 59-99. See also Craig/de Búrca (n 4); Cremer (n 4) para 53; Winter (n 8) 159.

[53] See, e.g., national reports on France, Italy and Sweden in Umweltbundesamt (ed.) *The legal debate on access to justice for environmental NGOs*, Texte 99/2017.

individual acts (concerning effects on third parties) as well as general executive and legislative acts.

3. Personal and severe concern concretised

The following questions appear to be crucial for putting the concept in more concrete shape:

- Should 'individual concern' be based on an interest or a right? (A)
- Should standing for actions contesting legislative acts be treated restrictively? (B)
- Should 'individual concern' be substantial or procedural? (C)
- How should a multitude of individual actions be dealt with? (D)

A. Should 'individual concern' be based on an interest or a right?

States relying on rights-based standing appear to be more restrictive than states with the interest-based approach.[54] Indeed, standing would be denied if the relevant legal norm solely aims at the protection of the general interest while it may de facto have severe effects on personal interests. However, the rights-based approach can also be more permissive. Notably, in relation to procedural rights it can happen that rights of participation are legally granted without a material interest being affected, such as if the general public is entitled to comment on a project. My suggestion is that EU courts should continue to apply both concepts. But the two should be clearly defined and interrelated in the following manner:

- *Interests as 'concern'*

Member state legal systems that rely on interests do nevertheless not grant standing in case of any interference with an interest but require that certain

[54] See national report on Germany in Umweltbundesamt (2017) (n 53). On the UK see Carol Harlow, Richard Rawlings, *Law and Administration* (CUP 2nd ed 2006) 548-574.

qualifying conditions must be given. A variety of criteria are employed in that respect such as that the affected interest must be 'substantial' or 'legally accepted', and/or that the interference must be 'personal', 'specific', 'direct', 'sufficient', 'legitimate' etc.[55] These different notions can be condensed to the very two suggested here: personal and severe concern.[56] As already stated, personal concern shall mean that the claimant must be affected him/herself. He/she can therefore not bring an 'altruistic' action on behalf of others.[57] Severe concern can be divided into two steps: that the affected interest is significant and the kind of interference serious. For instance, human health is certainly a significant interest but only seriously harmed if a disease is caused.

As already stated, the CJEU has to some extent already adopted the substantive orientation of 'individual concern' without characterising it as abandoning Plaumann.[58] The move towards open replacement of Plaumann would therefore not be a radical step as it is sometimes perceived. Another advantage of the reformed definition is that personal and severe concern can be related to the factual effects of the contested act. The difficult question how the individualisation of concern is to be expressed by the relevant act would not arise.

The new definition would also have a beneficial effect on the inner-administrative complaint procedure concerning environmental law cases.

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[55] For France: 'affectation suffisamment spécial', 'directe et certaine' (C.E. 29. März 1901, Casanova, Rec. 333); for England and Wales: 'sufficient interest' (Supreme Court Act 1981 ch. 54 sec. 31 (3); for Spain: 'un derecho o interés legitimo' (Art. 19 para 1 (a) Ley 29/1998 reguladora de la Jurisdicción Contentioso-administrativa); for Poland: 'legal interest' (Art. 50 § 1 Act on Administrative Court Proceedings). For examples of related court case law in various European countries see *GA Cosmas* Opinion of 23.9.1997 in Case C-321/95 P (Greenpeace v Commission), ECLI:EU:C:1997:421, para 105.

[56] On concepts referring to a legal or legitimate basis of interests see n. 11.

[57] This is only conceded in legal systems which allow for an *actio popularis*, such as in Portugal (see Art. 55 (1) (f) with Art. 9 (2) Code of Administrative Procedure of Portugal).

[58] Text to n 17-19.

The procedure has previously only been accessible for NGOs but was recently opened for individuals. In order to be entitled to file a complaint, applicants must 'prove that their rights have been impaired as a result of the alleged violation of environmental law and that they are directly affected by such impairment in comparison with the public'. [59] The reference to rights signals a rights-based construction of standing, whereas 'directly affected [...] in comparison with the public' sounds a bit like a codification of Plaumann but is open for fresh interpretation.

- *Rights as 'concern'*

In a rights-based concept it should be made transparent how rights are identified. As explained above, their source would be the act which is applied to assess the validity of the contested act. An individual right is easy to identify if it is named as such, like in the case of the right of access to information.[60] In most cases, however, rights must be construed by interpretation of legal texts. As mentioned above[61], in German law the so-called protective norm test (Schutznormtest) serves as a hermeneutic tool. Traditionally, the test was applied restrictively but under the influence of the CJEU the protective scope was extended to groups or classes of individuals.[62] In this open form the protective norm test may also serve as a tool of

[59] Insertion of an Article 11(1a)(a) into Regulation (EC) No 1367/2006 by Article 1(3) of Regulation (EU) 2021/1767, [2021] OJ L 356, 8.10.2021, p. 1.

[60] Art. 15 (3) TFEU and Art. 2 (1) Regulation (EC) 1049/2001, [2001] OJ L 145, 31.05.2001, p. 42.

[61] BVerwG (n 24).

[62] See e.g. Case C-237/07 *Janecek* ECLI:EU:C:2008:447 paras 35-39 where the court was satisfied with 'public health' in general as protective scope of the air quality standards; the decision was accepted by BVerwG Case 7 C 21.12, BVerwGE 147, 312, para 46. See also ECJ Case C-535/18 *IL et al. v Land Nordrhein-Westfalen* ECLI:EU:C:2020:391 paras 130-132 where the court found the general protection of groundwater to provide legitimate users of groundwater with subjective rights; the decision was accepted by BVerwG Case 9 A 5.20, BVerwGE 170, 378 paras 43-45. See also BVerwGE 119, 329 (333-334) for including the precautionary principle into the protective scope of the law although hitherto precaution was categorised as serving the public interest, not individuals.

identifying rights established by EU law. While such a right is first and foremost material in the sense of structuring the relationship between the individual and the government, it is armoured by a procedural right to seek judicial protection against government failure.[63] The procedural right can be qualified by criteria that aim at filtering access to courts, including personalisation and seriousness of the violation of the right. Overall, the applicant must give reasons that the right exists, that she belongs to the holders of the right, and that her right is seriously interfered with.

Particular reflection on direct access to the GC is apposite when an EU legal act is alleged to interfere with a fundamental right. Fundamental rights first and foremost guide legislators in the sense that they place limitations and requirements on the creation of ordinary legal acts, including the creation of subjective rights. However, as said, Art. 263 (2) TFEU by referring to the treaties as applicable norms does acknowledge that direct access to the GC must be possible also for actions alleging the violation of fundamental rights. The question is then what filters could prevent that every slight negative effect on a fundamental right can be submitted to the GC. I believe the same criteria can be used as those proposed for rights based on ordinary law: the applicant must substantiate that the scope of a fundamental right is affected, that he or she is a holder of the right individually or as part of a group or class, and that the right is severely interfered with. Still, two more preconditions may be added reflecting the subsidiary character of fundamental rights. First, applicants should be required to first search regular legislation for rights and only if that is fruitless rely on fundamental rights.[64] Second, as interferences with fundamental rights can be justified for reasons of public interests or of other persons' fundamental rights, applicants should be required to substantiate that no such proportionate reasons exist.

[63] See for this distinction text to n 9.

[64] On the related discussion in German law see Ferdinand Kopp, Wolf-Rüdiger Schenke *VwGO* (27th edn, Beck 2021), § 42 paras 117-123.

B. Should standing for actions contesting legislative acts be treated restrictively?

Some legal systems provide a direct action that allows individuals to challenge the constitutionality of legislative acts. Others only provide indirect court review, such as through incidental checking by ordinary courts or by referral to a constitutional court.[65] This means there is no common principle of member state traditions concerning a direct constitutional action against legislative acts. Contrastingly, the EU treaties did introduce such action, albeit in a peace-meal and maybe not profoundly reflected way. This happened because 'acts' in the sense of Art. 263 (4) TFEU came to also include legislative acts[66], and the possible pleas under Art. 263 (2) TFEU include the 'infringement of the treaties', a term that came to embrace the CFR. A constitutional complaint before the ECJ does not exist. Proposals for a related reform was discussed in the Constitutional Convent but finally rejected. Any new design was left to be developed by the CJEU based on the wording of Art. 263 (4) TFEU.[67]

Within that framework it may be claimed that a Plaumann-like narrow interpretation of individual concern regarding legislative acts suggests itself for reasons of the separation of powers.[68] This principle advises that law-making in the interest of the general public is relegated to the democratic political sphere while legally determined individual cases are for the judiciary. One might question whether the institutional edifice of the EU can really be understood as being based on the traditional division of powers,

[65] For an overview see *AG Jacobs* (n 4) para 89.

[66] Case C-583/11 *Inuit Taipiri Kanatami v EP and Council* (above fn 15) para 56. The development was propelled when the ECJ recognised that the action for annulment also lies against acts of the EP, see Case 294/83 *Les Verts v EP*, ECLI:EU:C:1986:166, ECR 1986, 1357 paras 20-26.

[67] The statement of the then ECJ President Iglesias may have been influential in this direction: : "It seems to us that it is preferable to protect fundamental rights in the framework of existing remedies." (Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003, CONV 636/03, para 22).

[68] Approving *AG Kokott*, Opinion in ECJ C-583/11 P *Inuit Taipiri Kanatami v EP and Council* (n 15) para 38.

and even if that principle was applied to the EU level as well, it remains to be seen what precise effects it would have on legal standing. In any case it would not legitimise or call for the narrow version of the Plaumann formula. After all, according to Art. 51 CFR, fundamental rights apply to all EU institutions and thus also to those possessing direct democratic legitimacy. Parliamentary preponderance is therefore perfectly compatible with a more open interpretation of individual concern.

C. Should 'individual concern' be substantial or procedural?

There is no doubt that individual concern can be found in the infringement of substantive interests or rights. Concerning procedural interests or rights, the situation is more complicated. On the member states level, concepts vary depending on the value states place on procedure. In the English tradition, for example, procedural requirements set by statute or natural justice are considered an essential component of reasonable decisions with a value in and of itself. This means that procedural failure in principle renders decisions unlawful.[69] In the German tradition, by comparison, the compatibility of decisions is determined by the material standards of the relevant law. This implies that procedures are considered to serve as tools for substantive legality implying that procedural failure is of relevance only if the applicant proves that also a material right of hers is affected.[70]

Within this conceptual field of tension, CJEU case law on member state administrative procedures can be categorised as tending towards the English

[69] Jonathan Forsythe, William Wade, *Administrative Law* (12th edn, OUP 2021), 405-407.

[70] BVerwG Case IV C 50.71, BVerwGE 44, 235 (239); BVerwG Cases 7 C 55 and 56.89, BVerwGE 85, 368 (373-375);cf. Eberhard Schmidt-Assmann, 'Der Verfahrensgedanke im deutschen und europäischen Verwaltungsrecht', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann, Andreas Voßkuhle (eds) *Grundlagen des Verwaltungsrechts* (2nd edn, CH Beck 2012), 497 (paras 64-65).

'eigenvalue' concept.[71] By contrast, concerning EU administrative procedures, the CJEU is still influenced by the closed shop or club model.[72] However, since the development of the EU to a community of citizens, the range of interests for which procedural positions should be acknowledged must be extended beyond a club of economic actors. In what way this should be done is first of all a question to be answered by the legislator. In any case, however, the CJEU will have to develop criteria for fair and effective participation of both interested and affected parties. For instance, it could build on the distinction between the participation of the public and the public concerned that is common in environmental licensing procedures such as in environmental impact assessment.[73]

Furthermore, it has to be clarified to what extent participation rights lead to review only with regard to the procedural mistakes or also with regard to the substantive legality of the contested act. In *Eurofer,* the ECJ opted for the first view.[74] By contrast, Art. 9 (2) of the Aarhus Convention provides full review even if the failure alleged at the admissibility stage is only procedural.

D. How could a multitude of individual actions be dealt with?

The proposed definition of individual concern will make many persons eligible for standing if the adverse effect is massive. This causes the risk that the courts will be flooded with actions. However, case law could be developed to concretise the severity of concern. Substantive and procedural means would be available. In substance, there are various heuristic dimensions that may be drawn on, including: degrees of harm (superficial, serious, lasting, reversible, etc.), legitimate expectations (vested interests vs

[71] See e.g. Case C-72/12 *Altrip* EU:C:2013:712, paras 52-53 on the question of irrelevance of procedural failure.

[72] Text to n 28-31.

[73] Article 6 (2) and (3) Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2012] OJ 2012 L 26/1

[74] Case T-381/11 *Eurofer v Commission* EU:T:2012:273, para 35.

newcomers), cognition (degree of certainty of harm), causality (cause – effect – intervening factors), and time (imminent vs future interference).

Furthermore, various means and circumstances already exist that reduce court case-loads, including: even if many persons are severely affected, only a few will really have the courage to publicly expose themselves as claimants; NGOs that support an action usually select exemplarily affected persons for lawsuits; the filing of lawsuits is bound to deadlines, in the EU this means putting together facts and legal arguments within 2 months after the entering into force of the challenged legal act; proceedings are costly; the GC can by order decide that an action is bound to fail without any further steps in the proceedings;[75] the GC can join a high number of similar lawsuits or deal with them through model proceedings; questions once decided are usually not brought up again; an action is inadmissible if subject to *res iudicata;* and finally and importantly, the number of the GC judges has since 2015 been increased from one to two per member state.[76]

Even more effective than these procedural tools would be if actions brought by associations – also known as collective actions or class actions – were accepted. Such actions could bundle cases by individuals affected and thus reduce the caseload for the CJEU. However, according to standing case law such actions are only admitted under one of three circumstances which are if the association had particular participation entitlement in the pertinent decision-making procedure, if the association's own rights were encroached upon, or if its members were individually concerned themselves.[77] All of these requirements reflect the singularity criterion of the Plaumann formula. They obviously do not fit the type of action in the interest of collectives.

The action brought by associations would be useful not only if there is a great number of similar individual concerns but also if individuals are under

[75] Art. 126 Rules of Procedure of the General Court.

[76] Art. 48 Statute of the CJEU.

[77] Standing case law, see, for example, Case T-173/98 *Unión de Pequeños Agricultores v Council*, ECLI:EU:T:1999:296, ECR 1999, II-3359, para 47.

risk only stochastically.[78] A case in point is the probability of a disaster caused by climate change. It is predictable with high confidence that such disaster will occur within a certain time span, but not precisely where that will happen.

It is true, that concerning environmental policy, EU law has somewhat facilitated legal recourse by associations. Regulation (EC) 1367/06 provides non-governmental environmental protection organisations with the possibility of an intra-administrative appeal against individual decisions, which, following the intervention by the Aarhus Compliance Committee,[79], was recently extended to general executive acts.[80] However, this is of little help for the access to court review. Only the decision of the executive EU institution on the complaint can be challenged while the original decision becomes final. It is then up to the executive institution whether to revoke or modify the same.[81] Moreover, the inner-administrative complaint procedure remains closed concerning legislative acts. This is due to the fact that the reform was entirely aimed at alignment with the Aarhus Convention, in particular its Art. 9 (3), which is not applicable to legislative acts.

All in all, the CJEU cannot permanently ignore the need for collective interests to have access to court review. In this respect, only standing for an action by NGOs can help. Individual concern would then be interpreted to extend to an NGO that fulfils certain organisational conditions, and the statutory aim of which is affected by the contested law.

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[78] In *Greenpeace* the GC dismissed the application referring to the Plaumann formula, but could have raised the question if the collective nature of the interests affected by the project did not suggest to admit a class action. See: Case T-585/93 *Greenpeace v Commission* [1995] ECR II-2209 paras 51, 59-66.

[79] Advice of the Aarhus Convention Compliance Committee ACCC/M/2017/3 and ACCC/C/2015/128 accessible at https://unece.org/env/pp/cc/accc.m.2017.3_european-union and https://unece.org/env/pp/cc/accc.c.2015.128_european-union. Accessed 17 April 2023.

[80] Amendment of Article 2(1)(g) and (h) of Regulation (EC) No 1367/2006 by Article 1(1) of Regulation (EU) 2021/1767, [2021] OJ L 356, 8.10.2021, p. 1,

[81] Case T-177/13 *TestBioTech v Commission,* ECLI:EU:T:2016:736, paras 41-46.

E. Reference procedure

Since EU legal acts are mainly executed by the member states, but partly also by the EU, it has to be decided at which level which legal remedies should be made available. In this respect, the CJEU propagates the concept of a complete system of remedies divided between the two levels, assigning an important role to the preliminary reference procedure in reaction to the narrowness of the Plaumann formula. However, as critique - including this contribution – has proven, access to national courts and referral procedures is not adequately ensured, and the system defended by the CJEU has serious gaps.

Looking for explanations for why the CJEU defends the system approach playing down its gaps, one is tempted to see a hidden agenda. It may be that in the realm of individual actions, the ECJ aims at acquiring a function as constitutional court. The GC would then primarily be a court for the review of executive action or inaction by EU institutions while the ECJ itself would be responsible for the review of EU legislative acts. However, as the ECJ cannot be approached directly by individuals, it must wait for referrals from national courts. In order to promote that agenda, it urges member states to liberalise standing rules before national courts[82] and at the same time narrows direct access to the GC by the restrictive interpretation of individual concern.[83] If this assumption is correct, however, such an agenda is not supported by the present constitutional order. That order assigns to the GC the role of a court for EU citizens who shall have direct access to legal protection, including, if upcoming, the test of constitutionality of all EU legal acts.

[82] See e.g. Case C-432/05 *Unibet* ECLI:EU:C:2007:163 para 42; Case C-873/19 DUH (n 39).

[83] Such narrow interpretation is not only practiced concerning 'individual concern' but also concerning 'direct concern' in the context of self-executing general executive acts. This too has the effect of hindering direct access to the GC shifting actions to national courts and the possibility of referrals to the ECJ. See the related critique of *AG Bobeck* (n 42).

It is therefore appropriate to look for a concept that does not one-sidedly narrow direct access to the GC but objectively strives for best legal protection in the multilevel structure of the EU. Such a concept could be derived from the above-mentioned subsidiarity principle including its activating aspect. In that line my suggestion is that the competence of national or EU jurisdiction should be distributed according to the *sedes materiae*, or the main seat of the legal problem.

When the implementation of the EU legal act is carried out by the member states, and the problem is located within the implementation itself, *sedes materiae* is located at the national level. In these cases, the CJEU should be seen as an instance of harmonisation of national court practices. This harmonisation function justifies why the ECJ can be called upon for the authentic interpretation of EU legal acts (Art. 267 TFEU) and why in relation to national courts it has a monopoly of annulment of such acts. *Sedes materiae* also explains that, when interpreting direct concern within the meaning of Art. 263 (4) TFEU, the CJEU focuses on whether the legal act by itself changes the legal position of those concerned and leaves no discretion for any implementing measure.[84]

On the other hand, when the implementation is carried out by the member states, but the problem comes from the EU legal act itself, *sedes materiae* is located at the EU level. If the EU legal act itself is considered null and void and this question determines the dispute, no adequate clarification of the problem can be expected from domestic litigation. Then the reference to national legal protection is a superfluous detour unreasonably burdening the parties and the national judiciary.[85]

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[84] Standing case law, see, for example, as an application in environmental law, Case C-321/95 P *Greenpeace v Commission* [1998] ECR I-1651.

[85] A telling example is the case brought to the Irish High Court by Friends of the Irish Environment (FIE) challenging a Council Regulation that fixes the fishing opportunities for certain fish stocks. As the Court noted, the primary purpose of the application was to secure a reference to the ECJ as to the legality of the

This idea has indeed been recognised by the opening up of the third variant of Art. 263 (4) TFEU, the removal of individual concern as requirement for standing in case of self-enforcing executive acts. At the moment however, this has been done only very formally, by making the direct action abstractly dependent on the absence of implementing measures instead of looking at the substantial *sedes materiae.* National legal action is also unhelpful when applicants do not question the implementing act but rather the underlying legislative act. In *Carvalho,* for example, the applicants could have waited for the yearly decision of member states fixing the quantity of emission allowances to be allocated to the companies participating in the emissions trading system. However, as those quantities are precisely predetermined by the pertinent EU Directive, the national court would have had no room for its own factual or legal checking of the member state's decision. National action contesting the member state's decision if available at all would therefore have been superfluous and circuitous.

In conclusion, the *sedes materiae* concept warns against restricting direct access in view of the disappointing auspices of referrals. Direct access must be enabled where national remedies involving referrals are ineffective. If direct access is refused in such cases this must be regarded to constitute a breach of the guarantee of effective judicial remedy under Art. 47 CFR. That is a strong argument in favour of defining 'individual concern' more broadly, and most appropriately as personal and serious concern.

Regulation (judgment of 8 February 2022, Case [2022] IECH 64, no. 3). One could extend the logic of sedes materiae to the case where the EU legal act is implemented by the Commission or the Council. If the problem lies in the manner of implementation, the GC of course is the proper instance to review. However, the GC is also competent if the problem lies in the legal act itself. It therefore is both an administrative and constitutional court. Should that be changed and referral from the GC to the ECJ or even direct access to the ECJ be introduced this would certainly require a textual change of the relevant treaty provisions.

F. Interpretation competence and its textual limits

The interpretation of 'individual concern' as personal and serious has raised the question if that would transcend the competence of the CJEU as a court. The CJEU took position on that question at various occasions including in *Carvalho* in which the applicants had strongly argued in favour of reinterpretation along the lines elaborated in this article. The ECJ stated as follows:

> the appellants cannot ask the Court of Justice to set aside such conditions, which are expressly laid down in the FEU Treaty, and, in particular, to adapt the criterion of individual concern as defined by the judgment in Plaumann, in order that they may have access to an effective remedy.[86]

Thus, the Court expressed that it had no authority to adjust 'Plaumann' because that would mean changing the text of the treaty. But the applicants did in no way ask the Court to set aside the text of the TFEU. To imply that appears to amount to a breach of the procedural right to be heard.

Nonetheless, the court might think 'Plaumann' is stonewalled as a matter of primary law. It might infer this from the drafting history of the treaties. At Lisbon, the TFEU, took over the wording for Art. 263 (4) from the draft Constitution, so the drafting history of the latter can be referred to when interpreting the former. The focus on standing in debates on the draft Constitution was on the situation that general executive acts which, without implementing acts, directly change the legal situation of affected persons cannot be challenged by them for lack of uniqueness of concern. The reference to national legal protection would be unsatisfactory because in the absence of a challengeable implementing act, those affected would have to breach the legal act provoking a sanction against which they could appeal to a national court, which could then refer the question of the validity of the legal act to the ECJ.[87] In order to avoid this unacceptable detour, the

[86] Case C-565/19 *Carvalho v EP and Council* (n 9) para 76, corresponding to standing jurisprudence, cf Case C-297/20 *P Sabo* ECLI:EU:C:2021:24 paras 33-34.

[87] See the concise account of that dubious consequence by AG Jacobs (n 4) para 43.

requirement of individual concern was removed for general executive acts (called regulatory acts) which do not entail implementing measures.[88]

However, these considerations were rather ad hoc, they did not build on a thorough analysis of the shortcomings of the system of legal protection.[89] It cannot be concluded from them that the CJEU was barred from continuing playing its genuine role as interpreter of primary law. It is more correct to infer that the Convention addressed one specific problem that was virulent at the time, but left other problems to be addressed by further jurisprudence.[90] According to the final report of the Secretariat of the European Convention, the discussion group on the Court of Justice followed members who favoured to adopt – as the President of the Court had suggested - a restrictive approach in relation to proceedings by private individuals against legislative acts (where the condition 'of direct and individual concern' still applies) and a more open approach as regards

[88] See, *inter alia*, Case C-244/16 P *Industrias Químicas v Commission* (n 28) paras 39-42.

[89] See the summary of the negotiations by Kottmann (n 4) 547 (560). Cf. also the very summary character of the Cover Note from the Praesidium to the Convention on the Court of Justice and the High Court, CONV 734/03, p. 20, accessible at https://www.europarl.europa.eu/meetdocs_all/committees/conv/20030520/734000en.pdf, Accessed 17 April 2023.

[90] As a side note I believe that it would basically have been better if the third variant of Art. 263 (4) TFEU had not been introduced at all. With the deletion of 'individual concern', the struggle about individual concern is now infecting the remaining criterion of direct concern, and, paradoxically, in a way that liberalises distinctiveness. See Joined Cases C-622 to 624/16 P *Scuola Elementare Maria Montessori v European Commission and others*, EU:C:2018:873 para 50 and Case C-461/18 P *Changmao Biochemical Engineering* EU:C:2020:979 paras 62-77, as commented by Roberto Caranta, 'Knock, and it shall be opened unto you: Standing for non-privileged applicants after Montessori and for a Commission anti-dumping regulation' (2021) 58 *CMLR* 163-186 (esp. 174). More generally, the introduction of the 3rd limb has solved only one problem, and this too radically, leaving the other problems unsolved. Instead, the fora of the Convention and in the Lisbon negotiations should have encouraged the CJEU to reconsider with a fresh mind what individual concern should mean.

proceedings against regulatory acts.[91] Only the CJEU can break with this cautious attitude which blocks evolutionary reconsideration.

In other areas the CJEU has not been shy to interpret indeterminate legal concepts very freely and sometimes even against the clear wording. As widely known, prominent examples include: *van Gend*, in which the ECJ derived subjective rights of market participants from the then Art. 12 EECT, although the provision clearly spoke of interstate rights and obligations[92], *Grad*, in which the ECJ assumed the direct effect of directives, although Art. 189 (3) EEC clearly required national transposition of directives.[93] Other examples are *Francovich*, in which the ECJ created an entirely new legal basis for member state liability for failure in transposing directives[94], and – closer to the question of standing – *Les Verts,* in which the ECJ allowed actions for annulment against acts of the European Parliament, contrary to the wording of then Art. 173 (1) EEC.[95] In contrast, it seems arbitrary for the CJEU to suddenly deny its competence of interpretation in the case of Art. 263 (4) TFEU and its application to violations of fundamental rights.

On the contrary, it can even be stated that it is the CJEU that seizes a role of authorship of the treaty when presenting the restrictive interpretation as the only possible one. With the term individual concern, the TFEU introduced an indeterminate legal concept, the interpretation of which was entrusted to the CJEU. The court cannot therefore pretend that there are no other options for interpretation.

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[91] Secretariat of the European Convention, Final report of the discussion circle on the Court of Justice of 25 March 2003 (CONV 636/03), para 22. For the statement of President of the Court, Gil Iglesias, see n 67.

[92] Case 26/62 *van Gend en Loos* [1963] ECR 2 pp. 24-27.

[93] Case 9/70 *Grad* [1970] ECR 826, para 5; see the detailed reasoning by *AG Roemer*, in Case 9/70 (Grad) [1970] ECR 1070, opinion by AG Rozmze pp. 848-850.

[94] Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5403, paras 33-40.

[95] Case 294/83 *Les Verts v EP* [1986] ECR 1357, paras 20-26.

Conclusion

For almost 60 years now, individual concern, which is the precondition for standing of individuals applying at the GC for annulment of EU legal acts, has been defined by the CJEU as distinctive concern. The present analysis offers three major findings:

First, a closer look at the pertinent case law reveals that the criterion has little guiding effect. Under its cover judicial practice has generated a variety of other criteria but without combining them to a structure. Unclarities persist as to whether the relevant concern is a factual interest or a subjective right. Insofar as factual interests are considered as relevant it is unclear why they shall become irrelevant if belonging to a type of concern. Insofar as subjective rights are used, criteria on how to derive rights from determinative acts are missing. If rights are drawn from fundamental rights, it is unclear what special conditions should apply in order to base standing on them. Overall, these unclarities have put potential applicants in a situation of legal uncertainty.

Second, to the extent that standing has nevertheless been granted, the criteria applied have been of substantive character, albeit under cover of the formal rhetoric of distinctiveness. Insofar as a comparative perspective has been applied, distinctiveness has only been used in a light version. The CJEU has rather looked at particularly burdensome effects but not required them to be unique.

Third in other cases the formula has been applied with rigour leading to denial of standing. In consequence this has created deprivation of judicial protection for many persons who were personally and severely concerned. Moreover, when adverse effects are of a catastrophic nature – such as by climate change - the paradox emerges that the more serious and widespread the damage is, the less judicial protection is granted.

The resulting gaps in direct access cannot be made good by national actions combined with referrals to the ECJ. The national remedies may pose

unacceptable hurdles or not be available at all, the referral procedure is badly suited for evidential proceedings about complex facts, and referrals are not admissible when national courts decide whether a member state shall go further than a minimally harmonising EU act.

It seems that the dogmatic invocation of the Plaumann formula has kept the CJEU from reconsidering the legal principles that should guide the design of direct and indirect access to the CJEU. This article identified the following principles as the most important to be jeopardised by the Plaumann-based case law: Legal certainty, judicial protection of rights, separation of powers, coordination of the EU and member states levels of judicial functions, and non-discriminatory access to courts. Considering this, I submit – as others have already done - that individual concern should be defined not as distinct but as personal and severe concern. This involves a change from a formal to a material criterion. The individualisation of concern is not found in formal distinctiveness but rather in the substance of adverse effects. Requiring concern to be personal excludes action for others, and the requirement that concern must be severe concentrates judicial protection on those who are not just cursorily affected. With this approach the court will still in some cases conduct severity comparisons with other persons' situations, but such exercise will only apply distinctiveness 'light', not uniqueness in the restrictive Plaumann sense.

Concerning the referral procedure under Article 267 TFEU I recommend proceeding according to the *sedes materiae* principle, conducting legal procedures at the seat of the main problem. If the main problem lies in the national implementation of a legal act, national legal protection is appropriate and referral to the ECJ has a harmonising function; if it exclusively lies in the legal act itself, national legal protection is a useless detour and direct action should be permitted. Still, the *sedes materiae* criterion cannot be used to introduce additional admissibility requirements without the text of the treaties being changed, but it serves as a good reason to define individual concern more openly, namely as personal and serious concern,

with a view to facilitate direct access to the GC. Concerning the doctrinal reorientation corresponding to these proposals it was argued that this would be within CJEU's judicial competence. It would neither exceed the textual limits nor disregard the historical background of Art. 263 (4) TFEU.

I close this contribution with three remarks on a more theoretical level. First, the substantive definition of individual concern would allow and urge the CJEU to take position on massive adverse effects like climate change and resume competence that, after *Carvalho,* has wandered to the European Court of Human Rights (ECtHR). This court is now confronted with a number of cases which were relinquished to the Grand Chamber,[96] a move that indicates the importance the ECtHR attaches to climate change effects.

Second, the hurdles erected before judicial protection have kept the CJEU from developing the fundamental rights doctrine further. With more open doors, the traditional focus of fundamental rights as shields against governmental interference (called negative obligations) can be sided by developing rights further as swords protecting societal interests (called positive obligations). Such doctrinal evolution is much needed if the EU wishes to be a Union of citizens and not only of the market.

Third, and as a final reflection one may wonder whether the resistance of the CJEU, and in particular of the ECJ is truly a matter of argumentation or rather a simple exercise of power, considering the thought provoking definition of power proposed by Karl W. Deutsch as being 'the ability to afford not to learn'.[97] The question is then: if the court refuses to learn, what factors have influenced its power and thus its ability and affordance to continue not to learn? Obviously, that is rather an issue not for legal doctrine but for sociological study – which is beyond the present contribution.

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[96] *Duarte Agostinho v Portugal and 32 Others,* ECtHR App. no 39371/20; *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, App. no. 53600/20; Carème c France, App. no. 7189/21. [Cases are ongoing at the time of writing].

[97] Karl W. Deutsch, *The nerves of government. Models of political communication and control* (The Free Press 1966), 111.