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The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework

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Abstract

The Court of Justice of the European Union (CJEU) has refused to allow direct actions as a possible solution for the protection of rights that are not individualisable through public interest litigation. For 53 years it has held on to its interpretation of the standing criteria in (now) Article 263 TFEU, severely limiting access to justice for all but the most specific of cases. The criticism of this interpretation has been copious and strong, newly invigorated in recent years by arguments on the rule of law. This article aims not to add to the criticism but to offer a compelling explanation of the 'why' behind the Court's reasoning. By making use of a framework that addresses a supreme court's interpretative limits regarding *locus standi*, this article will not only shed light on the past but equally explain why the Court has chosen to reject public interest litigation, in a manner that might otherwise seem counter-intuitive.

Keywords

CJEU; Public Interest Litigation; Judicial Relations; Standing; Access to Justice

In recent years, there has been a change of focus in criticism of the Court of Justice of the European Union regarding its standing criteria. Where the *Plaumann* criteria have always been criticised by both academics and Advocates General, this criticism focused on the effect of the doctrine on the individual.¹ The new line of criticism focuses on the fact that the Court's interpretation of 'individually concerned' has an even more adverse effect on the public interest, by making public interest litigation (PIL) by way of direct actions an impossibility.

This article aims to offer a theory on the reason behind the Court's severely restrictive interpretation. Although it has been contested for 53 years,² the focus has largely been on the effects of this interpretation and why, sometimes how, it should be changed.³ The main premise of these arguments has always been that the Court is able to do so, if it would just set its mind to it.⁴ In their critique of the Court, most authors underestimate the nature of standing requirements. These

1 To give a full overview of the academic analysis would severely impact both the readability and the style requirements for this contribution, a good timeline can be found along these lines: Gerhard Bebr, *Judicial Control of the European Communities* (Stevens 1962); Ami Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) 11 *CMLRev* 191; H Rasmussen, 'Why Is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 *ELRev* 112; Anthony Arnall, 'Private Applicants and The Action For Annulment Under Article 173 Of The EC Treaty' (1995) 32 *CMLRev* 7; Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) 62 *Cambridge Law Journal* 77; Laurence W Gormley, 'Judicial Review – a New Dawn after Lisbon?', *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (2010); For an extensive overview of the discussion, please see the highly recommended: Roland Schwensfeier, 'Individual's Access to Justice under Community Law' (Diss, University of Groningen 2009).

2 Note 1 aims to give a decade by decade impression.

3 Exemplary of this discussion is the back and forth between Stein and Vinnig and Hjalte Rasmussen in: Eric Stein and G Joseph Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context' (1976) 70 *Am. J. Int'l L.* 219; Rasmussen (n 1).

4 And, as argued by Rasmussen (n 1), that not doing so is a result of its own internal desire to have everything remain as it is.

rules and traditions are the focal point of the culture and traditions of every legal order. As such, every apex constitutional court is not only limited by the literal requirements set out by the law, but sees its interpretative space as limited by a number of elements. This article aims to explain the CJEU's long-standing refusal regarding *locus standi* for the individual through the application of a theoretical framework that describes these limiting elements. The framework will equally make it clear why the current call for access for public interest cases will be even more difficult to answer than access for the individual.⁵

To that end, this article is structured in the following manner. Given the nature of the problem regarding public interest litigation, the first step will be to define what falls under this heading. It will be shown that part of the problem on debating this issue is the confusion of tongues on the term. Secondly, the origins of the CJEU's *Plaumann* doctrine will be discussed, as it is the root cause for the problems surrounding public interest litigation. It is then possible to describe the theoretical framework that can give an explanation for the Court's restrictive interpretation and apply it to the factual situation at the time of the *Plaumann* judgment. The subsequent section will explain how the specific characteristics of the public interest in a European context exacerbates the problem, making public interest litigation impossible. This will be followed by a discussion of how the realisation of this problem has led to a qualitative change in the criticism of the Court's case law. Finally, the last segment will be devoted to the moment in which a significant change has occurred in all four of the elements restricting the Court's interpretational possibilities and the reasons behind the limited judicial response. The conclusion will offer a compelling argument for the Court's current line of case law, which might seem counterproductive to the creation of a European approach to solve unindividualisable problems such as environmental issues.

PUBLIC INTEREST IN EUROPEAN CONTEXT

For a term that is used so frequently, in both every day and academic usage, the concepts of 'public interest' and 'public interest litigation' are ill-defined. Not unlike Justice Potter Stewart in his attempt to distinguish free speech from smut, we know it when we see it.⁶ This has led to a plethora of possibilities for what can be grouped under the heading. The results of a seminal conference on the topic are a prime example.⁷ Although the resultant book offers diverse study into the nature of 'public interest', it equally shows how each scholar perceives something of public interest within his or her own field. As one of the editors notes, the definition is drafted so as to encompass '[...] diffuse interests of a large number of people, such as in environmental protection, consumer protection, safety at work and anti-discrimination policies'.⁸

The idea is that by asserting the possibility of a public interest in all areas of European law, the Court can more easily grant standing by making use of the doctrines it has developed for each of these specific areas. As such, Arnall regarded the Court's approach in *Codorníu* as an opportunity.⁹ In *Codorníu* the Court of Justice and the Advocate General applied the standing criteria under what was

5 For the purposes of clarity, this article will often focus on the area of environmental protection, as it is arguably the area in which the formation of a pan-European polity has gone the furthest, leading to the creation of a number of highly organised NGOs that interact with the Union's institutions.

6 *Nico Jacobellis v. Ohio* 378 U.S. 184 (1964).

7 Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation before European Courts* (Nomos 1996).

8 Norbert Reich, 'Public Interest Litigation Before European Jurisdictions' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation before European Courts*, vol 2 (Nomos 1996) 6.

9 Case C-309/89 *Codorníu v Council* [1994] ECR I-1853.

then Article 173 EEC in relation to dumping cases and applied it to a case concerning a trademark.¹⁰ Gormley opined on the importance of the *AITEC* case¹¹ for the possibility for associations to be awarded standing, in this case in the field of state aid.¹² These are only two examples from a body of work that comprises discussions of almost every field of European law imaginable. This lack of a clear definition interferes with a coherent analysis of the actual problem. It is therefore necessary briefly to define PIL in a European context to understand how the nature of this concept causes difficulties in the judicial system of the EU.

The above mentioned authors make use of an interpretation of 'the public interest' that is functionally equivalent to 'the common good'.¹³ Under that interpretation, all areas of law can benefit from PIL, where it can be a remedy for malfeasance regardless of the complainant. It is equally in line with the American origins of the term. The term 'public interest litigation' was coined by Justice Louis Brandeis, and referred to the nature of the *lawyer* who would advocate a cause not related to the corporate, lucrative interest.¹⁴ Within his meaning, this could be any area of the law, from anti-trust to taxation - all could benefit from lawyers pursuing the common good. It was through the rise of the civil rights movement that public interest lawyers and that cause became synonymous. Yet, even when the successes of PIL are famous and numerous, standing in the United States still requires a personal scope. Litigation often starts with an engineered trigger,¹⁵ be it Rosa Parks refusing to give up her seat on a bus,¹⁶ the owners of property near national parks that are in danger of urban development¹⁷ or the search for a same-sex couple with tax issues.¹⁸

Public interest litigation as associated with its American origin is therefore better exemplified by the *Defrenne* case than by the above mentioned examples;¹⁹ a case where a lawyer sacrificed time and knowledge for the public good, combined with a case of rights infringement that can be limited to the scale of the individual.²⁰ In the US context, the public interest is, in effect, still the defence of a personal right or injury, the result of which may have an effect on the greater good. In principle, the standing requirements of the Union do not differ in this regard. The problem in European law is that of the true public interest, an interest that cannot be distilled to a single point of conflict in the form of an applicant. Therefore, it is proposed that for the current discussion, public interest should be defined as those rights that are not individualisable. Rights that are individualisable can when bundled be seen as a collective interest, which merits other considerations.²¹ The effect of this

10 Anthony Arnall, 'Challenging Community Acts - An Introduction' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts* (Nomos 1996) 46. It must be noted that, at least here, Arnall draws conclusions based on the phrasing of the A-G and Court of certain terms that could equally, or perhaps even more so, be interpreted as stating that this case dealt with a specific set of circumstances.

11 Cases T-447-449/03 *AITEC* et al. v. Commission [1995] ECR II-1971.

12 Laurence W Gormley, 'Public Interest Litigation and State Subsidies' in Hans-W Micklitz and Norbert Reich (eds), *Public Interest Litigation Before European Courts*, vol 2 (Nomos 1996).

13 *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd* [1981] UKHL 2 (UKHL (1981)).

14 Louis D Brandeis, 'Opportunity in the Law, The' (1905) 3 *Commw. L. Rev.* 22, 28.

15 Alec Stone Sweet and Thomas L Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' (1998) 92 *AmPolSciRev* 63.

16 *Browder v. Gayle*, 142 F. Supp. 707 (1956).

17 *Sierra Club v. Morton* 405 U.S. 727 (1972).

18 *United States v. Windsor* 133 S.Ct. 2675 (2013).

19 Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

20 In the case of *Defrenne*, Eliane Vogel Polsky actively sought out a 'victim' of gender discrimination because she believed it would be possible to rely on European Law directly before the Belgian Tribunal de Travaux and Conseil d'Etat. It is a prime example of strategic litigation where the federal law of higher order is used directly to circumvent or dismiss the lower laws of the federation's members. For a full account, see: Catherine Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996).

21 Mark Dawson and Elise Muir, 'One for All and All for One? The Collective Enforcement of EU Law' (2014) 41 *LIEI* 215.

definition is that the traditionally purely economic interests in the cases mentioned by Micklitz fall outside the scope of this treatise. The reason that they cannot be individualised lies in the nature of the act and poses a question not unknown in other legal orders. Consider the plight of unindividualisable rights, such as certain environmental rights, for which, by the nature of the right, neither the applicant nor the contested act, will ever be granted standing.

INDIVIDUALISATION AS A PILLAR OF STANDING

The problem in European law lies with the interpretation of Article 263 TFEU and its earlier incarnations, in which individualisation takes pride of place.²² Although the power of the Court to review acts is sweeping in scope, the precise extent of this power depends on the class of applicants. It is clear from the wording of the Article that there are three categories of applicants:²³ the privileged in the form of Council, Commission, Parliament and Member States that can ask for the review of every measure, no matter whether it affects them or not;²⁴ semi-privileged applicants are the European Central Bank Committee of the Regions and Court of Auditors, these are only enabled to request the review of acts that affect their prerogatives; finally, natural and legal persons as addressees of an act or when directly and individually concerned by said act.²⁵

The focus of criticism of the Court for its interpretation of the standing criteria relates almost exclusively to this last category of applicants. It is this category of applicants, encompassing citizens, companies and NGOs, that has the most limited capabilities both regarding the acts they can have reviewed and the hurdles they need to cross actually to be granted standing before the Court. Both Advocates General²⁶ and legal scholars agree that the problem originates with the Court's interpretation of the term 'individual concern' that stems from the now infamous *Plaumann* ruling, dating from 1963.²⁷

In that case, a clementine importer from Germany requested the review of a Commission decision that denied the German state the possibility of applying a more advantageous tariff for citrus fruit. The Court ruled that *Plaumann & Co* was not individually concerned by the decision addressed to the

22 Article 173 EEC and Article 230 EC.

23 Four if one were to make a divide in the category based on whether dealing with a regulatory act or not.

24 This includes legislative acts.

25 It goes beyond the scope of this article to go into the nature of the acts that can be requested to be reviewed by natural and legal persons, although the Article specifically mentions '[...] an act addressed to that person or which is of direct and individual concern to them', thereby no longer making use of the earlier specifications of decisions or decisions in the form of a regulation. Technically, this means that all acts, including legislative acts, can be demanded to be reviewed by the Court by natural or legal persons, however, clearly, this would be difficult to reconcile with the direct and individual concern requirements. The Article in its current incarnation is in line with the case law, which clearly did not put too much stake on the nature of an act once the aforementioned requirements were met.

26 For instance, the Opinion of A-G Lagrange in one of the first cases: *Joined Cases 16 and 17/62 Producteurs de Fruits v Council* [1962] ECR 471: 'Such is the system that the jurist, for his part, might find unsatisfactory, but which the Court is bound to apply. This is not the place to justify the system. One might observe only that it is coherent and that serious arguments can be put forward to justify it'.

27 See for a more historical overview: Mariolina Eliantonio and Nelly Stratieva, 'From *Plaumann*, through *UPA* and *Jégo-Quéré*, to the Lisbon Treaty: The Locus Standi of Private Applicants under Article 230(4) EC through a Political Lens' [2009] *Maastricht Faculty of Law Working Paper 1*.

State.²⁸ For an applicant to be individually concerned, so the Court concluded, a party must show that he or she was affected:

[...] 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.²⁹

The Court has seen fit to elaborate on what could differentiate an applicant to such an extent that he or she could be found to be individually concerned. Most of these clarifications have focused on the rights of specific economic actors who are affected by those areas of European law that have had the greatest impact. Problematic situations regarding dumping,³⁰ state-aid,³¹ and competition cases³² have been resolved by individualising the applicants in a number of ways. It has been through these cases that the CJEU injected basic tenets of good governance and the rule of law in the European legal order. The creation of the concept of 'general principles';³³ the use of procedural rights and safeguards;³⁴ the insertion of basic rights protection;³⁵ all these concepts are now either seen as a logical part of the *acquis* or have been constitutionalised in the Treaty proper.³⁶ Yet these innovations also demonstrated the crux of the matter in relation to true public interest cases. The Court can only use these to establish the nature of an applicant as approaching that of an addressee of a measure, through distinguishing him or her from any other applicant.³⁷ Applicants who defend the interests of us all can never stand out. The concept of *locus standi* in European law is based on remedying the most personal of connections between Union and the individual. Where that connection is deemed to be even slightly more nebulous, the act in question is in effect deemed to be of such a nature that it is incontestable.³⁸

THE CONCEPT OF INTERPRETATIVE SPACE

The concept of 'individual concern', as interpreted by the Court, has given rise to criticism in broadly four categories. Two of these are formal in nature: (1) the fact that (then) Article 173 EEC was

28 It did not go into the question of the importer being directly concerned because, the Court reasoned, if the applicant was not individually concerned a further investigation would not be necessary as the demands of direct and individual concern are cumulative.

29 Case 25/62 Plaumann *et al* v Commission [1963] ECR 95.

30 Case C-358/89 Extramet Industries SA v Council [1991] ECR I-2501.

31 Case 169/84 COFAZ v Commission [1986] ECR 391.

32 Case C-198/91 William Cook plc v Commission [1993] ECR I-2487.

33 Joined Cases 7/56 and 3/57 to 7/57 Dineke Algera v Common Assembly of the ECSC [1961] ECR 53.

34 Famously in *Extramet* (n 30) but see the similar reasoning in Case 264/82 Timex Corporation v Council & Commission [1985] ECR 849 (paras. 14-15).

35 Developed from the general principles (see n 33 at p. 55) in Case 29/69 Erich Stauder v Stadt Ulm [1969] ECR 419, often cited in one breath with Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission [1974] ECR 491.

36 Art. 6 para 3 TEU 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

37 Notably *Codorniu* (n 9) demonstrates the coming together of individualisation and creative reasoning through most of the means mentioned above.

38 This is in part due to the fact that the clause 'direct and individual concern' is not only used to define the position of the applicant but also the nature of the contested act. Schwensfeier (n 1) 47; apart from this point, it is clear that the standing criteria are not exotic, as can be seen from the comprehensive study: Mariolina Eliantonio and others, 'Standing up for Your Right(s) in Europe' (Directorate General for Internal Policies - Policy Department C: Citizens' Rights and Constitutional Affairs 2012) Study PE 462.478.

interpreted so differently from its ECSC predecessor, Article 33; (2) the assumption that the Court is merely exercising docket control. The other two are of a more substantive nature: (3) the argument that the approach to 'individual' is illogical;³⁹ (4) the lack of adherence to fundamental human rights in the current interpretation. In all of these categories, the premise is that the defect is due to the Court's case law rather than the actual wording of (now) Article 263 TFEU. Do these criticisms succeed in elucidating and thus remedying the role of the Court in this problem?

The statement that any court is applying docket control is in itself not remarkable. Almost all legal orders make use of a form of docket control as a means of judicial management. When applied to the European situation, the complaint is meant to illustrate a seemingly random or even biased element that is introduced.⁴⁰ This observation clashes with the fact that the Court has, over the years, taken a progressive approach to the aforementioned rights and principles in the European legal order⁴¹ and used them when possible to individualise parties. Similarly, arguments to the effect that the Court does not take sufficient account of certain human rights seem to forget that it was that same Court that introduced them into an economically focused Treaty system. The 'lack of logic' argument equally lacks convincing weight. When looking at the examples of the early sugar cases,⁴² it may seem at first glance to be indeed remarkable that one producer will be deemed to have met the standing requirements, where a producer in a similar situation has not. Yet this is easy criticism to make from the national perspective, where acts are categorised and administrative law as a field has taken flight. This argument neglects the fact that in these 'illogical' situations, the Court is trying to remain within the boundaries not unlike those in, for instance, France, where the possibility of review of an act draped in democracy is severely limited.⁴³ The Court, however, has to do so without the benefit of carefully categorised and qualified acts. The impetus for this contribution is therefore the fact that the scholarship on access to justice and the CJEU's approach to standing does not engage with the place that standing requirements have in a constitutional order. One can conclude that the criticism has therefore not been particularly helpful in defining if and how the Court could remedy the issue of standing. This contribution therefore aims to offer a theoretical underpinning that offers a more constructive manner in which to critique the problem of, for instance, the public interest in EU law.

The onus is ever placed on the Court, which indeed is rarely willing to engage with these criticisms,⁴⁴ even when levelled by its own Advocate General.⁴⁵ Yet it should be remarked that in a few instances it has done so with the notable caveat that:

While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding

39 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (4th edition, OUP Oxford 2007) 512.

40 Arnall (n 10) 51; See also: Laurence W Gormley, 'Judicial Review in EC and EU Law—Some Architectural Malfunctions and Design Improvements?' (2001) 4 *Camb. YBELS* 167 in which the author infers a managerial approach.

41 See the remarkable reasoning in *Chernobyl* that laid the groundwork for *Les Verts*, Case 70/88 European Parliament v. Council [1990] ECR I-2041.

42 Cases 10 & 18/68 *Società 'Eridania' Zuccherifici Nazionali and others v Commission* [1969] ECR 459.

43 L Neville Brown and John S Bell, *French Administrative Law* (5th edition, Oxford University Press 1998) 157; Catherine Elliott, Catherine Vernon and Eric Jeanpierre, *French Legal System* (Pearson Education 2006) 226.

44 Ludwig Krämer, 'Environmental Justice in the European Court of Justice', *Environmental Law and Justice in Context* (1st edn, Cambridge University Press 2009) 209.

45 *Ad. n 25 Case C-50/00P UPA* [2002] ECR I-06677.

Treaty and never amended as to its principles, it is for the Member States [...] to reform the system currently in force.⁴⁶

Furthermore, the Court keeps reiterating its opinion that there exists a 'complete system of legal remedies'.⁴⁷ Apparently the Court itself is aware of the critique, is clearly not afraid to bring about change, and yet it does not move. Rather than giving reasons focusing on what the Court is doing wrong, research should focus on the 'why?' behind this immovable object, thereby facilitating the imagining of a possible fulcrum and lever.

Four Elements that Shape the Interpretative Space

It is submitted that in fact the Court does not see the interpretative freedom to widen the scope of its standing criteria. In all legal orders, the most important element that defines the standing criteria is in essence the relationships that exist between the formative institutions and the state. This is why the role of standing in judicial review is of such interest. More than any other single point of law, it can tell the story of a state's DNA. See, for example, the long history of the French limitations to judicial review out of fear of the return of judge-made law, a trauma from the days of the *ancien regime*.⁴⁸ Or the German system of administrative law, based on the protection of the rights of the individual, a reaction to the dark days in the middle of the twentieth century.⁴⁹ Each system outlines the relationship between the legislature, the executive and the citizen. In each system, the role of the judiciary describes the relative weight of each of these actors in relation to each other.

These relations are governed by more than merely the written law. They evolve over time and indeed in France,⁵⁰ Germany⁵¹ and England,⁵² the standing regime has changed significantly with the passing of years. This has often happened without any formal changes to codified principles, but rather through the case law of the courts themselves. Yet what compels these courts to change a rule of such a fundamental nature? What makes them decide that they have the authority to do so at that point of change? Lastly, what restrains that authority?

It is proposed that we can describe the relationship that governs a (supreme) court's freedom of interpretation of the rules of standing on the basis of four elements.⁵³ These four elements describe the field of tension that is a court's interpretative space. These elements equally indicate the relative weight of the actors within the *res publica*. These elements can be summarised as:

- **The constitutional relationship**; the constitutional possibilities for legal challenges in a formal sense
- **Federalism**; the existence and extent of a federal system within the state

46 Case C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677 para 45.

47 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1139.

48 Edwin Borchard, 'French Administrative Law' 133, 135; C Sumner Lobingier, 'Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model' (1942) 91 *University of Pennsylvania Law Review and American Law Register* 36, 39.

49 Peter Bucher, *Der Verfassungskonvent auf Herrenchiemsee*, vol 2 (Harald Boldt Verlag 1981).

50 Philippe Manin, 'The Nicolo Case of the Conseil D'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law Over, Subsequent National Statute Law' (1991) 28 *CMLRev* 499.

51 B Muller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law: Judgment of the Court of 12 May 2011 -- Case C-115/09 Trianel and Judgment of 8 March 2011 -- Case C-240/09 Lesoochranarske Zoskupenie' (2011) 23 *JEL* 505.

52 Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *MLR* 859.

53 David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *MLR* 44.

- **Guiding principles;** ideals set out in constitution or other documents of equal status
- **Fundamental Rights;** the existence of fundamental rights in the constitutional order, possibly through treaties or other international obligations.

These elements were first found in David Feldman's work on the comparison of diverging developments in the judiciaries of the Commonwealth countries. Yet they can be put to an even more illustrative use. By developing these four elements and using them as a theoretical framework on the interpretative space for (supreme) courts, it is possible to give shape to that space.

The constitutional relationship is largely found in the written requirements for applicants laid down in the law and the meaning assigned to them by the legislator.⁵⁴ The constitutional relationship defines the basic conditions that an applicant will need to fulfil in order to be eligible to have her or his complaint heard. In general, there are three approaches to these requirements: an interest based approach, a personal rights approach and the *actio popularis*. In general, the interest based approach, where only an interest in the act under review needs to be demonstrated is seen as more permissive than the personal rights approach, where the infringement of a right needs to be demonstrated. The *actio popularis*, where any party can ask for the review of an act, is very rare. The federalist or centralist tendencies of a state define the balance between central and decentralised government and the relationship that these institutions have to the applicant. In a federal system, an applicant can ask for the protection of his or her federal rights, whereas a centralist state will not have this added layer of protection. The guiding principles of a state can often be found in the preamble or formative articles of a constitution and set out the aspirations of the state. They aim to define the state's nature. In this sense, Germany aims to foster friendly relations with its neighbours⁵⁵ and Canada adheres to the concept of 'Peace, Order and Good Governance'.⁵⁶ This cannot only help as an important teleological tool, but in some cases a court will be able to award standing on the basis of a government acting against its constitutional nature and limits.⁵⁷ Finally, fundamental rights not only logically shape the interpretative space because they create rights and obligations but they are of interest as they can enter into the constitutional order through international treaties, creating radical shifts.

Through the application of this framework, the following section will paint the picture of the interpretative space as it existed for the CJEU at the inception of the EEC and how it has developed. For the purposes of this contribution, the four elements that shape the interpretative space will be briefly described for the period during the *Plaumann* case, to shed light on the reasoning behind this seminal case. The section following this explanation will explain how the interpretative space limits PIL. The last period described will deal with the period after 2009, in which all of these elements have undergone change.

54 Or, of course, the constitutive body, which need not be a formal legislator. See the US Constitution of 1787, the French Constitution of 1791, or the Paulskirche Constitution of 1849, none of which were drafted by the formal legislative body at the time.

55 '[...] von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen.' - preamble *Grundgesetz für die Bundesrepublik Deutschland* (1949).

56 As per section 91 of the Constitution Act, 1867.

57 Famously in Germany the BVfG had to rule on peacekeeping operations, see: Markus Zockler, 'Germany in Collective Security Systems-Anything Goes?' (1995) 6 *EJIL*. 274.

THE INTERPRETATIVE SPACE SINCE PLAUMANN

Although authors have hailed the success of the constitutional development of the European legal order,⁵⁸ the earliest days of the project were fraught with ideological difficulties. At the time of the drafting of the Treaty of Rome, the original ideal of a federal Europe was increasingly becoming a lost dream rather than a vision for the future. The result was a bare-bones framework that was of a decidedly economic nature. Even though the German delegation present at the negotiations pushed for a more federal approach, including a strong federal court, the institutional arrangements ended mostly in a system after the French system of administrative law, with only minor concessions.⁵⁹ Where in a federal context a supreme court has far reaching powers to preserve the boundaries and rights laid down by the agreements in the constitution, the system of the Treaty of Rome was distinctly silent.⁶⁰ Indeed, it was the Court itself that would cut through this Gordian knot in the famous *Van Gend en Loos* and *Costa v ENEL* cases.⁶¹

Given the nature of the fledgling EEC, it is not surprising that no mention was made of any grand overarching ideal in relation to human rights or the furtherance of peace in the world. Where the German preamble to its Constitution speaks of Germany's obligation to maintain friendship with other people and secure the peace,⁶² the preamble to the Treaty of Rome only hopes that the sharing of resources will lead to peace. Human rights were deemed to be covered by the newly created European Convention on Human Rights and were deliberately left out of the Treaty text. The only rights that did find their place were such rights as the right to equal pay.⁶³ It should be noted that these rights were mostly constructed to prevent any unfair competition between Member States, such as the use of women as low cost labour.

In this context, the role of the Court was extensively discussed. France, which had opposed the creation of a court since the days of the ECSC treaty, did not agree with the liberal interpretation the Court had given to standing under Article 33 ECSC.⁶⁴ The fact that industry had such relatively easy access to the Court had never fitted well with the French concept of the European project. Article 173 EEC was explicitly given a limited meaning as opposed to its ECSC counterpart.⁶⁵ The negotiating delegations were of the opinion that the opening of the standing requirements by the Court of Justice had gone too far.⁶⁶ A more limited approach was explicitly and carefully drafted to disallow overly wide access to the Court of Justice. This is perhaps best reflected in the Spaak Report, which followed the Messina Conference as a further concretisation of the plans towards the EEC. In the

58 Probably most famously Weiler: 'Transformation of Europe, The' (1990) 100 *Yale L.J.* 2403.

59 Dokumente Zum Europäischen Recht - Band 2: Justiz (Bis 1957). Available online:

<http://www.springer.com/law/international/book/978-3-540-63498-0> [accessed 8 October 2014].

60 For an overview of the struggles of early American comparative scholars in defining a federal jurisdiction, see: Peter Hay, 'Federal Jurisdiction of the Common Market Court' (1963) 12 *AmJCompL* 21; Jerry L Mashaw, 'Federal Issues in and about the Jurisdiction of the Court of Justice of the European Communities' (1965) 40 *TuLLRev.* 21.

61 Morten Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' (2012) 21 *Contemporary European History* 375.

62 'By the will to fulfill to guarantee the liberty and the rights of humans, to arrange the community and economic life in social justice and to serve social progress, to promote the friendship with other people and to secure the peace, the German people gave themselves this condition.' - Preamble German Basic Law 1949

63 Article 119 EEC: 'Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers'.

64 Gerhard Bebr, *Rule of Law Within the European Communities* (Institut d'Etudes Européennes de l'Université Libre de Bruxelles, 1965).

65 Barav (n 1) 191.

66 Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 *Contemporary European History* 339, 246.

report, whose focus was on the ways in which market integration could take place, the paragraph on the Court read:

La Cour, qui sera celle de la C.E.C.A., sera chargée de statuer sur les plaintes concernant des violations du traité par les Etats ou les entreprises et sur les recours en annulation contre les décisions de la Commission européenne, sans avoir le pouvoir d'y substituer une décision nouvelle.⁶⁷

There is explicitly no mention of judicial recourse for individuals and the powers of the Court are further limited by the fact that it cannot substitute a decision by the Commission through a ruling. The Court of Justice was, for all intents and purposes, increasingly an administrative court in the French tradition, with an instruction not to travel the road it had gone down before. As such, the constitutional relationship between the Court, the institutions and the citizens was explicitly limited.

When *Plaumann* came before the Court, it found its interpretative space severely limited. It could not interpret federal safeguards to such an extent that the clementine importer could be granted standing, nor could it invoke overarching policy principles or human rights that could be used to give a more encompassing reading of the text. Perhaps most importantly, the Court knew that the drafters had given a very specific meaning to the text of Article 173 EEC, all the key people working in the sphere of the Court, be that on the bench or behind the scenes, had played an active part in the drafting of the Treaty and the creation of the institutions. The individual supplicant will only make it to the top of the Kirchberg when the case affects him or her in the most direct of manners.

THE IMPOSSIBILITY OF PUBLIC INTEREST

The real fact that the dogma of 'individual concern' poses difficulties for those interests that face the impossibility of individualisation became clear from a series of cases beginning with the famous *Greenpeace* case. In this first case in which an Environmental NGO (ENGO) contested an act of the Commission, two things became clear. For one, the Community had matured to the point that measures were taken outside of the field of market regulation that were clearly of an administrative law nature. Second, these measures were not easily qualifiable through the traditional approach of the Court as they did not produce an effect that could be brought down to a single applicant. In this case, which dealt with funding for the construction of a coal-fired power plant, the Court relied on earlier case law: associations will be granted standing if their procedural interests have been affected or when their members are each individually concerned.

Greenpeace illustrates how EU standing requirements are ill-suited for the pursuance of public interest litigation.⁶⁸ Although the facts of the case are problematic, it is clear that the Commission's act under the European Structural Fund has no personal scope in relation to specific inhabitants or economic operators, it is equally clear that the nature of the act is not within the domain of the legislative measures traditionally cordoned off from judicial interference. The *Greenpeace* case was a

67 'The Court, which will be that of the ECSC, will be responsible for ruling on complaints of violations of the treaty by states or businesses and on appeals against decisions of the European Commission, without the power to substitute a new decision', thereby following the French notion of an administrative court with limited judicial discretion. *Rapport des Chefs de Delegation aux Ministres des Affaires Etrangères*, 2 B p. 25 (Spaak Report).

68 See for further cases: T-117/94 *Associazione Agricoltori della Provincia di Rovigo* a.o. v Commission [1995] ECR II-455, on appeal C-142/95 P *Associazione Agricoltori della Provincia di Rovigo* a.o. v Commission [1996] ECR I-6669; T-219/95 R *Danielsson et al.* v Commission [1995] ECR II-3051.

clarion call that awakened the different actors to the fact that the European project had evolved to such an extent that public interest litigation had a possible place in it.

The debate initiated by *Greenpeace* came to a head by the circumstances of the *UPA* and *Jégo-Quéré* cases.⁶⁹ In these cases, issues of problems with individualisation and the role of rights, especially the right to an effective remedy, were laid bare by the opinion of Advocate General Jacobs.⁷⁰ Triggered by his extensive analysis of the problems,⁷¹ the Court of First Instance proposed a different reading of the term 'individual concern' than traditionally used by the ECJ.⁷² Although the particulars of the cases and the intra-institutional fight that ensued are not particularly relevant for the thesis put forward in this contribution, the episode did contribute a valuable element to the discussion. Jacobs opened the floor to a wider discussion on justice and the role of the rule of law and fundamental rights within the scope of European law as, in his opinion, the Court did not adhere to these principles.⁷³

The Opinion was remarkable, not least due to the role that the Court has played in the development of rights and the rule of law. Even before there was any discussion of Europe's accession to the ECHR, it was the Court of Justice that found and enforced human rights within the European legal order through the concept of 'general principles'.⁷⁴ The Court subsequently made use of these rights where it could to individualise certain applicants when possible, without crossing the line towards a rights-based standing criterion; an option that exists in, for instance, Germany and was explicitly dismissed when the Court was created. It should also be kept in mind that although the CJEU has made use of the case law from the Strasbourg court in its discovery and interpretation of human rights, the right to fair trial and an effective remedy as set out in the ECHR have always been interpreted in such a way as to allow a wide diversity of standing regimes.⁷⁵

Similarly, the introduction of the concept of the Rule of Law came through the Court's ruling in *Les Verts*. The Advocate General's opinion makes it clear that he considers this term to have a far-ranging effect, as would be expected from a scholar in the Common Law tradition. However, the continent does not have such an extensive legal tradition in relation to the Rule of Law, which is reflected in the subtle differences in the wording of the different language versions of the case. The differences in meaning between Rule of Law, *rechtsgemeinschaft*, *communita di diritto* and *rechtsgemeenschap*, combined with the explanation given by the Court leads to the conclusion that the Court gives an expansive reading of the principle of legality, not intending to insert a new theoretical standard.⁷⁶ Jacobs, however, was of the opinion that the system did not ensure the right

69 T-173/98 *Union de Pequenos Agricultores v Council* [1999] ECR II-3357, C-50/00 P *Union de Pequenos Agricultores v Council* [2002] ECR I-6677; T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365, C 263/02 P *Commission v Jégo-Quéré et Cie SA* [2004] ECR I-3425 *UPA* dealt with the effects of a Regulation that aimed to reorganise the market for olive oil products. *Jégo-Quéré* dealt with a Commission Regulation that laid down the mesh sizes of fish netting.

70 C-50/00 P *Union de Pequenos Agricultores v Council* [2002] ECR I-6681.

71 An opinion that is still widely cited and perhaps is his most famous contribution to EU law, see in his Festschrift: Takis Tridimas and Sara Poli, 'Locus Standi of Individuals under Article 230(4): The Return of Euridice?', *Making European Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Edward Elgar Publishing Ltd 2008).

72 *Ad n* 70. To quote Jacobs: 'In my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests'.

73 For a very thorough overview of the affair, see: Christopher Brown and John Morijn, 'Case C-263/02 *Commission Jégo-Quere & Cie SA*' (2004) 41 CMLRev 1639.

74 Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* (1974) ECR 491 para. 13.

75 As would become clear in the *Bosphorus* ruling. *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1.

76 Laurent Pech, "'A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *EuConst* 359, 365.

to an effective remedy, nor did it ensure the existence of the Court's oft asserted '[...] complete system of remedies'.⁷⁷

The Opinion has been the rallying call for authors on public interest litigation, especially in the field of environmental law, which has undergone the greatest developments within the European project. Authors have taken the argument to heart and published extensively, pushing for a change in the Court's interpretation.⁷⁸ However, these arguments come from the wish of the authors to bring about the level of environmental protection that they feel is needed. The mere wish for wider interpretation of standing to protect the environment⁷⁹ does not take into account the nature of the acts undertaken by the EU and the limits that nature imposes on the Court. In most cases, no further reasoning is given except the aforementioned general principles and rights that need protection by the Court. But as demonstrated earlier in relation to individual rights, the fact that certain constitutional elements exist does not automatically ensure a relationship between those rights and the applicant in a manner that ensures *locus standi*. Reductive reasoning like the aforementioned is, as Waldron warns us,⁸⁰ 'outcome-related reasoning' and the value thereof, no matter how noble the aspiration, is negligible and not conducive for change.

In reality, there were only small shifts in the EU's legal order through the introduction of the wish for a high level of environmental protection⁸¹ and the acceptance of the Court's case law on human rights by way of the Council Conclusions.⁸² These changes are hardly enough to cause a significant shift in the four elements to allow for an interpretative shift by the Court.

2009, DIE VERWANDLUNG?

In 2009, significant changes to the four elements that create the interpretative space of the CJEU came into effect. First and foremost, the entry into force of the Treaty of Lisbon brought the most significant change to the wording of Article 263 TFEU to date. Second, the Aarhus Convention formally entered into force in the European legal order.⁸³ Last, the Charter of Fundamental Rights, incorporating a right to effective judicial protection has gained the status of primary law.⁸⁴ Although these changes superficially seem to address the criticism of the interpretation of the Court, the extent to which they actually shape the interpretative space will be of the essence.

77 As first mentioned in *Les Verts* para 23.

78 See, for instance: Nicolas de Sadeleer, Gerhard Roller and Miriam Dross, *Access to Justice in Environmental Matters and the Role of NGOs: Empirical Findings and Legal Appraisal* (Europa Law Publishing 2005); Ludwig Krämer, 'The Environmental Complaint in EU Law' (2009) 6 *Journal for European Environmental & Planning Law* 13; C Poncelet, 'Access to Justice in Environmental Matters--Does the European Union Comply with Its Obligations?' (2012) 24 *JEL* 287.

79 Krämer (n 43) 209.

80 Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) *Yale L.J.* 1346.

81 As can be seen from the additions made by the Treaty of Amsterdam to (then) Article 100 (a) ensuring that all measures undertaken by the Commission will take as a base a high level of environmental protection. An enactment of the statement under the new preamble.

82 OJ 1977 C 103/1 Council Declaration on Democracy, EC Bulletin 3 1978 p.5.

83 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 38 ILM 517 (1999), as approved by the Union by way of Decision 2005/370/EEC OJ L-124

84 Arguably, the Lisbon Treaty has equally caused for a change in the federal nature of the Union through, for instance, the defining of exclusive and shared competences in relation to subsidiarity. Though of interest, these changes have not yet seen use in the field of public interest litigation. This will be discussed in the author's forthcoming doctoral thesis on this subject. See until that time: R Schütze, 'Subsidiarity After Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68 *CLJ* 525.

The most obvious element to have changed is the manner in which the Treaty of Lisbon has added a new category of applicants. Although the article largely remains the same, the paragraph on the possibilities for natural and legal persons now 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.⁸⁵

This innovation was a result of the discussion circle at the Intergovernmental Conference for the Constitution for Europe. During the negotiations on a constitutional document for the European Union, a broad discussion took place on all elements of European law. Within the discussion circle on the future of the Court, the issue of standing was naturally discussed, but the solutions proffered differed widely.⁸⁶ The main problem seems to have been an agreement on what the actual problem was that needed to be resolved. On the one hand, there was a camp that, in the line of Jacobs's comments, wanted to see far-reaching change of the fundamental underpinnings of the Article, some suggesting the need for a rights-based approach to judicial review.⁸⁷ On the other, the narrow view of the problem dealt with the situation in *Jégo-Quéré*,⁸⁸ the one situation in which this camp was of the opinion that an actual denial of justice may have taken place. The result was the creation of a clause that is difficult to see out of the context of the original idea behind the Constitution. Under the Constitution, the number and nature of European acts was supposed to be reduced and simplified.⁸⁹ The concept of the 'regulatory act' would have created a category that was brought to light by *Jégo-Quéré*, an act by an Institution that created an immediate real world effect without the intercession of another body. Setting the mesh size of netting, placing chemical agents on lists, these are types of administrative acts that have a direct relationship with those affected by them. Although this seems a clear concept, the clear categorisation of acts did not transfer from the Constitution into the Treaty of Lisbon,⁹⁰ resulting in the necessity of interpretation by the Court on what a 'regulatory act' comprised post-Lisbon.

Lisbon also changed the status of the Charter of Fundamental Rights of the EU. Where the status of the document had been vague since its inception in 2000, the Treaty of Lisbon elevated the Charter to the status of primary law, reaching equivalence in legal status to the Treaties themselves. The Charter formally implements a number of human, social and economic rights into the EU legal order, amongst which is Article 47 guaranteeing the right to an effective remedy and a fair trial. Article 47 aims to consolidate Article 6 and 13 of the Convention into one article and as such, the Article needs to be interpreted in line with the case law by the Strasbourg Court on fair trial.⁹¹ One of Jacobs's main points in the *UPA* opinion was the fact that even though the Charter did not have a formal status, the rights stated therein should at least be indicative of the Union's intentions. The Court answered the Advocate General's argument by referring to the Articles in the Convention and to its case law with regard to the Member States, but the effect seemed limited to these mere remarks. The fact that the Charter now has the same status as the Treaties makes it an enforceable right rather than a guiding light.

⁸⁵ Article 263 (4) TFEU, emphasis added.

⁸⁶ See the final report for the Intergovernmental Conference by Circle I: CONV 636/03.

⁸⁷ See the Draft Articles for Part Two on the Court of Justice: CONV 734/03 p.21

⁸⁸ See *supra* n 35. Against the *UPA* formula, it is impossible for a member state to create an implementing act in situations where the Commission prescribes a certain (technical) norm or standard.

⁸⁹ Article I-33, Treaty Establishing a Constitution for Europe OJ C 310, 16.12.2004 p.26.

⁹⁰ Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

⁹¹ See: Explanation on article 52 Explanations Relating To The Charter Of Fundamental Rights OJ 2007 C-303/02

While Lisbon was dawning on the horizon, the Union had committed itself to the obligations laid down by the Aarhus Convention, a ground-breaking international agreement that seeks to help citizens in the enforcement of their environmental rights. As such, it is built on three 'pillars' that aim to facilitate this, the rights of: access to information; access to decision making procedures; and access to justice. Whilst the first two pillars have been implemented with, arguably, relative ease, the third pillar has caused a lot of problems within the European system of judicial protection.⁹² The premise of the rights of access to justice within the meaning of the Convention is the idea that every person should be able to have acts that affect his or her direct environment reviewed by an independent body. Not only that, but the Aarhus Convention explicitly creates a role for NGOs in this process, obliging signatory states to make it possible for them to have access to justice when the protection of the environment is their statutory goal.⁹³

CHANGES IN ELEMENTS ≠ CHANGES IN INTERPRETATIVE SPACE

Given the changes discussed above, one would be forgiven for assuming that the Court's interpretative space has changed to such an extent as to create a possibility for the Court to be more lenient regarding PIL, at least when involving the environment. However, the opposite seems to have happened. In recent case law, the Court has held on to its classical interpretation, gainsaying the claims of environmental organisations to their rights. Where NGOs have tried to rely on the Aarhus Convention directly, it has stated that it is not possible to do so due to the nature of the Convention as it is not sufficiently clear to rely on.⁹⁴ It has made use of the unclear situation of the term 'regulatory act' to limit its interpretation to the most literal meaning possible.⁹⁵ Even the term 'direct concern', which was underdeveloped before Lisbon, has now been given a new lease on life.⁹⁶ Where in earlier cases the Court would not place too great an emphasis on the term, accepting a party to be directly concerned when the member state giving actual effect to the contested measure did not have any discretion in its application, now even the collection of fines or tariffs will mean that the applicant is not directly affected by the underlying EU act.

This may seem remarkable, yet closer inspection through the lens of the theoretical model may offer an explanation. The shift in the elements that form the Court's interpretative space may have been far less great than assumed on first inspection. The changes to the text of the Treaty have explicitly considered the problems faced by both the individual applicant and public interest litigants. And while the regulatory act was deemed to offer solace for the individual, the plight of, for instance, NGOs was deemed to fall outside the scope of the Treaty.⁹⁷ The Explanations to the Charter make clear that it is not the intent of Article 47 to change the system of judicial protection within the EU.⁹⁸ The Aarhus Convention states that it allows for the rights it aims to grant to be achieved within the legal framework already in place in the signatory states. In proceedings brought by NGOs against

92 Regulation 1367/2006/EC OJ L-264.

93 Art.2 paragraph 5 Aarhus Convention.

94 Case C-401/12 P Council v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht and Case [2015] C-404/12 P Council v Stichting Natuur en Milieu and Pesticide Action Network Europe [2015].

95 Case C-583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council [2013].

96 Case T-312/14 Federcoopesca v Commission the term has had such a negligible role that it did not warrant discussion in the preceding sections.

97 Final Report of the Discussion Circle on the Court of Justice, CONV 636/03 (2003). However, it should be noted that they can form part of the proceedings before the CJEU when part of the proceedings in the preliminary reference proceedings as a third party intervention. Cf. Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources et al. [2014] not yet reported.

98 Art. 52 para 2 Charter and the corresponding text in the Explanations: '[...] such rights remain subject to the conditions and limits applicable to the Union law on which they are based, and for which provision is made in the Treaties'.

the Union before the body that was instituted by the Convention to ensure compliance of its signatories, the ACCC, the Institutions have remained firm in their insistence that it makes correct use of this clause.⁹⁹ Furthermore, the Institutions have made their opinion clear that almost all environmental measures fall into the category of 'legislative act', a category exempt from the 'Access to Justice' provisions in Aarhus. Last, but certainly not least, the declaration upon approving the Aarhus Convention by the EU explicitly refers to the fact that it does so on the understanding that the system of judicial protection will not be affected.¹⁰⁰ Again, the Court finds its interpretative space severely restricted.

It has, however, found a solution to its dilemma. Within the four elements of the theoretical framework, the Court has had the most space regarding the federal nature of the Union. Although at its inception, it was explicitly not federal in nature, certain elements have given the Union at least a federal character. The preliminary reference procedure, and the manner in which the Court has developed it is one of those elements. In recent years, the Court has proactively enforced the Aarhus Convention when the possibility arose through the references of Member States' courts. This is especially astonishing as these rulings go against the grain of the principle of procedural autonomy,¹⁰¹ perhaps one of the last areas free from European interference.¹⁰² Some have called this judicial subsidiarity,¹⁰³ but it is submitted that in fact the Court is making use of its freedom in the interpretation of the federal nature of the Union to bring to fruition finally the complete system of remedies it has always envisioned. By securing the rights of public interest organisations to bring a case before the national courts¹⁰⁴ and by strengthening the obligations under the preliminary reference procedure,¹⁰⁵ the CJEU is able to create a judicial structure through which it can effectuate rights and enforce EU and member state obligations, without stepping over the boundaries in place regarding direct action.

CONCLUSION

The use of the theoretical framework of four elements that shape the interpretative space to illustrate the Court of Justice's limits when interpreting the standing requirements offers a compelling argument regarding the Court's well documented reticence in relation to access for public interest litigants. It has been demonstrated that the Court's power as the final arbiter of the

99 'Submissions of the European Commission, on behalf of the European Community, to the Aarhus Convention Compliance Committee concerning communication ACCC/C/2008/32' p.10.

100 '[...] the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention' Declaration upon approval of the Convention. Available online: http://www.wipo.int/wipolex/en/other_treaties/details_notes.jsp?treaty_id=261 [accessed 14 October 2016]

101 JH Jans, S Prechal and RJGM Widdershoven (eds), *Europeanisation of Public Law: Second Edition* (2nd edition, Europa Law Publishing 2015).

102 Michal Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States', *The European Court of Justice and the Autonomy of Member States* (Intersentia 2012).

103 George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *ColumLR* 331; Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' (2015) 34 *YEL* 5.

104 As illustrated in, for instance, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun* genom dess marknämnd [2009] ECR I-9967 and Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255 in which the Court of Justice ordered far reaching changes to respectively Swedish and Slovak procedural law on standing requirements in order to conform with the relevant European regulation implementing the Aarhus Convention. In both cases the Court of Justice interprets the Regulation in the light of the purposes of the Convention, achieving a more judicial result than the Aarhus Convention Compliance Committee would be able to achieve.

105 Case C-160/14 *João Filipe Ferreira da Silva e Brito and Others v Estado Português* [2015] (not yet reported)

Treaty has, from the inception of the European project, been limited when it comes to all applicants. The framework reveals how the Court has been creative in finding ways to individualise applicants whilst remaining within the limits these elements set. In doing so, it has proven to give a better explanation for the Court's behaviour and a useful tool for analysis. The rise of public interest litigation as a response to the growth of the European Union into a legal order that goes beyond its merely economic origins has offered a challenge. Although changes have taken place as a response to this development, these changes are mostly superficial in nature and have in fact done nothing for the interpretative space of the Court. The Court's seemingly unflinching approach to 'individual concern' is therefore logical when seen through the lens of the framework.

The logical extension of this conclusion is that the Court will only see the possibility for change when the Treaty is redrafted with the explicit will of the drafters to allow for unindividualisable rights to be defended. This is in part a particularity that exists within the European constitutional order, in which primary law cannot be directly changed through other legislation, be it international treaties or secondary law. However, this assumption underestimates the role of the other elements. The fact that the Court is now building on the role of the preliminary reference procedure is more remarkable than one might assume at first glance. For the longest time, the Court has stated that the procedure as it exists in Article 267 TFEU was not a remedy.¹⁰⁶ However, in the face of changing circumstances, the Court has developed the one element in which it has had the least limitations: the federal nature of the judicial system.

The effects of this development are difficult to predict. On the one hand, the possibilities of defending these interests both regarding national rules and Union measures have increased due to the Court's case law. This effect has been reached whilst still complying with the wishes of Member States and Institutions to keep the balance as it has always stood. On the other hand, the more formal criticisms already mentioned by Jacobs remain valid. The cost, both monetary and in time, to an ENGO before it can actually have an act by the Union and its Institutions reviewed, is substantial. The application of the Court's intervention is also limited to the field of environmental law; when social rights increase in importance this process will have to take place again. Equally, this approach hinders the formation of a pan-European NGO movement. This not only hinders the pooling of knowledge and resources but has been argued to be less efficient.¹⁰⁷ Although the final conclusion of this contribution has to be that the Court is making the best use of its severely limited interpretative space, this conclusion also has to come with the *obiter dictum* that this would not be necessary if the constitutive parties in the European legal order would realise that the nature of the Union has changed, and PIL has a place in it.

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¹⁰⁶ Case C-283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415 para. 9

¹⁰⁷ Carol Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1.