

The Rules of Standing of the European Union: A Contextual Understanding

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ABSTRACT:

This thesis looks at the context surrounding the EU standing rules for the individual applicant. It seeks to build upon the extensive academic literature on this topic, by further exploring how far this context can explain and justify the approach taken towards the rules themselves, which have generally been considered to be restrictive in character. The analysis is conducted by reference to a selection of factors which represent part of the wider constitutional context.

The central arguments of this thesis are as follows: first, it is argued that that certain factors of the context (namely the underlying judicial strategy and the role of privileged applicants) go some way towards explaining the narrow approach taken. They also have some capacity (to a limited extent) to qualify one's perception of the rules' restrictive impact. This is outlined in Chapter Two. Then in the first part of Chapter Three, I consider the justificatory potential of these factors, exploring how far these elements are able to change the analysis as to whether or not the rules can be justified. It is argued that when they are judged against the standard of *effective judicial protection* as it emerges from some of the relevant cases then a possible, qualified justification can emerge. However, any such position is qualified by virtue of the various substantive and methodological difficulties with this approach.

Secondly, this thesis contends that when we look at the standard of *practical access to justice*, the rules remain unjustifiable (even when we see them with the benefit of the contextual factors identified); in this sense they remain '*overly narrow*'. Consequently, the final part of Chapter Three offers some qualified avenues of reform for amending this context and improving the practical impact of these standing rules for the individual applicant.

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AC	Appeal Cases
CJEU	Court of Justice of the European Union
CLJ	Cambridge Law Journal
CMLRev	Common Market Law Review
ECR	European Court Reports
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ELJS	European Journal of Legal Studies
ELRev	European Law Review
EPL	European Public Law
EU	European Union
JR	Judicial Review
LQR	Law Quarterly Review
MLR	Modern Law Review
PL	Public Law
OJ	Official Journal of the European Union
TFEU	Treaty on the Functioning of the European Union
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports
YEL	Yearbook of European Law

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A. CHAPTER ONE: THE CRITICISMS AND INITIAL THEMES

1. Introduction

(a) The Essential Problem¹

‘A legal system may possess an impressive range of procedural and substantive principles, for the review of governmental action, but these will be of scant comfort to those who cannot access the system because the standing rules are unduly narrow’²

Public law rules of locus standi denote, perhaps at their simplest level, who can bring judicial review challenges: as has been noted elsewhere, they form the ‘gateway’ which potential applicants have to use in order to enter the system.³ In the European Union (EU), these rules have generally been criticised by academics for their highly restrictive nature with respect to individual applicants.⁴

The narrow approach that the EU takes in allowing individual applicants into the courtroom is one that has important implications: a perceived inability to access judicial review and challenge the legality of European measures could conflict with the

¹ I am extremely grateful for the continued support and encouragement which Prof. James Goudkamp has given as a supervisor and throughout my academic career. I would also like to thank Prof. Alison Young for her supervisions on this topic.

² Craig, ‘*Standing, Rights, and the Structure of Legal Argument*’ [2003] 9 EPL 493, 505.

³ Craig and De Búrca, ‘*EU Law: Text, Cases and Materials*’ (6th Edn, 2015), 542.

⁴ A term here which refers to ‘*natural or legal persons*’ as noted in Article 263 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (‘TFEU’) with respect to the annulment action.

Union's claim that it is a 'community based on the rule of law'.⁵ Indeed, it would undermine the presence of effective judicial review if judicial scrutiny could be easily avoided, meaning that there were gaps in protection and the accountability of central institutions was reduced.⁶

Despite this, the Court of Justice of the European Union (CJEU) has been consistent in its interpretation of the scope of the standing rules, limiting the individual's role within EU judicial review. Therefore, a conceptual conflict emerges: the Court consistently takes a restrictive position, which is then consistently criticised by academic commentators. Therein lies the problem which motivates this research: are the academics right to treat these rules in such negative terms? Or is the CJEU merely acting irrationally and ignoring proposals that ought to be adopted?

(b) Aims and Initial Research Questions

This research looks at the standing rules for the individual applicant, their development in the Court's jurisprudence and their characterisation as being highly narrow and unjustifiable. This research seeks to try to explore the reasons which might explain why the EU takes this consistent position.

⁵ Case 294/83 *Parti écologiste 'Les Verts v Parliament'* [1986] ECR 1339, para 23; See also Case C-583/11 P *Inuit v European Parliament and Council of the European Union* EU:C:2013:625, para 91 and Case C-274/12 P *Telefónica SA v Commission* EU:C:2013:852, para 56.

⁶ Schwarze, 'Judicial Review in EC Law – some reflections on the origins and the actual legal situation' [2002] *International & Comparative Law Quarterly* 17, 17-18.

Specifically, this thesis focuses on the rules' context: it seeks to explore how far the context may explain and/or justify the approach taken towards the rules themselves.

The reasons for focusing on the context are simple and developed further below: like in any system, the rules of EU standing have not developed in a vacuum but the decision as to *who* can be a litigant and in what circumstances is (as has been acknowledged elsewhere) a product of a variety of political, institutional and procedural choices.⁷ It is these factors which must come to the forefront of one's assessment of the standing rules as a whole.

This thesis seeks to build on the extensive academic literature and its consideration of various contextual elements. When exploring the literature and the nature of this surrounding context, this thesis is guided by two broad, overarching questions:

- (i) Are the rules of standing for the individual really as *narrow* as presented in the literature?
- (ii) Are the rules of standing for the individual '*overly narrow*' or unjustifiably narrow?

In order to investigate these questions further, this project seeks to focus specifically on the explanatory and justificatory potential of this wider context.

⁷ See Dougan, '*The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*' [2003] ELRev 763, 791

(c) Argument Outline and Chapter Structure

At a general level, the central aim that this thesis seeks to address is *how far* the EU standing rules for the individual applicant can be explained, qualified or even justified when we look at certain elements of their context, or specifically, with the benefit of the contextual factors considered here.⁸

Broadly the argument is twofold. First, certain elements of the context go some way to at least *partially* explaining these rules: despite issues in the descriptive analysis, the underlying judicial strategy and the prioritisation of the role of privileged actors gives some scope to understanding why the EU restricts the role of the individual to bring direct actions. Equally, when we analyse these rules by focusing on the factors identified there is also the potential for some qualified justification to be advanced, particularly if we analyse them against the standard of *effective judicial protection* as it *could* be understood from some of the key cases of CJEU jurisprudence. However, there are various substantive and methodological issues with the outline of this standard.

Secondly, however, this thesis will contend that even when we look at these rules from the benefit of the context identified, the rules remain problematic and ultimately unjustifiable. Consequently, various different avenues for reform can be suggested, which seek to improve upon practical access to justice for the individual but which do

⁸ As noted below, no exhaustive attempt is made to consider the entirety of what may be considered the context surrounding these rules.

so by building upon what constitutional choices seem to emerge from the context identified.

With that in mind and more specifically, the thesis is structured in the following manner across three chapters.

Chapter One demonstrates the need for this research and particularly it emphasises the continued importance of this context in assessing how EU standing rules limit the role of the individual applicant. The Chapter explains the premises of the thesis and demonstrates the above points motivating the research, namely that: (i) there has been in the central cases, a consistently limited role envisaged for the individual in direct review and Article 263 TFEU, seen particularly through a restrictive interpretation of the scope of '*individual concern*' and (ii) that the academic literature has criticised this consistently in negative terms. This Chapter also goes further by exploring how some of the academic literature has considered the standing rules' context.

Chapter Two descriptively explores the explanatory *potential* of certain elements of the constitutional context. It argues that certain factors have some capacity to explain and qualify the precise degree to which the CJEU's approach can be seen as restrictive, given (for instance) the careful development of alternative routes to access justice for the individual applicant. To this extent, the wider context demonstrates that the EU standing rules are narrow but that one's perception of the precise extent of their narrowness could be qualified to a limited degree.

Chapter Three explores the justificatory potential of the contextual factors identified. It analyses whether EU standing rules for individual applicants, when seen within this wider context, are still unjustifiably narrow. The answer is that the rules still remain problematic even when viewed with the benefit of this focus on certain elements of the context. Although a limited, tentative justification could be offered if we analyse the system of rules against the principle of '*effective judicial protection*' which emerges from a small sample of CJEU cases, there are significant methodological and substantive issues with this approach. The focus therefore shifts on securing *practical* access to justice for the individual applicant. In particular, this requires considering how we can best reduce the impact of delays and costs within the system as well as eliminating gaps in protection. When judged against this practical standard, the rules, even after a contextual analysis, still fail to be justified in their current form. Consequently, a number of routes for reform are proposed which seek to improve access to justice within the system, by building upon the contextual framework identified.

(d) Contribution to the Debate

This research seeks to make a contribution to the debate in this area in the following three ways.

First, this thesis seeks to focus particularly on the explanatory and justificatory *potential* of the contextual factors identified. As noted below, it is not the contention

of this thesis that the context has been ignored by academia (see page 36) and it is also clear that a number of academics have already sought to qualify the restrictive presentation of the rules.⁹ The focus here is to both build on some of the contextual factors which have already been identified by scholars and to explore new points in an attempt to assess how far the traditional perception of these rules can be challenged.

Second, this thesis offers some initial thoughts for proposals which can improve the functioning of the constitutional context in order to enhance practical access to justice for the individual. It will be for others to develop the detail of these ideas but the ambition is to suggest some of avenues for reforming the system. Naturally it will still be possible for commentators to argue that the biggest obstacle to practical access to justice is the interpretation of *individual concern*. However, a key point of this thesis is the continued emphasis on placing the constitutional context at the core of the assessment.

Third, this thesis employs a number of discrete comparisons (for instance with the jurisprudence of the European Court of Human Rights (ECtHR) or English law) in order fully to refine the approach taken by the EU and to enhance our understanding of the descriptive context as well as the standard of assessment.

⁹ Enchelmaier, 'No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC' [2005] 24 YEL 173; Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' [2015] 34 YEL 5; to some extent also Harlow, 'Towards a Theory of Access for the European Court of Justice' [1992] YEL 213.

(e) Premises of the Research

(i) Purpose of Standing and the Relevance of Context

A central issue at the outset is *why* one should discuss the context at all.

The answer lies in one of the key premises of this thesis, which concerns the role of standing. Although this remains a contentious issue which could provide the topic of an entire project in itself, a more basic definition will be adopted here. Namely, that standing at a simple level represents a ‘filter’ which is designed to determine the ‘best-placed’ or appropriate litigant into the courtroom to challenge the measure.

This definition of the role of standing is supported by Miles who notes¹⁰ that standing should be based: ‘on a view about ... the appropriateness and legitimacy of different types of claimant or intervener asserting their concern for the particular issue’.¹¹

The question of *who* the appropriate litigant is in any one jurisdiction, is a context specific question: ‘appropriateness’ is a term whose meaning will change system by system. As has been alluded to elsewhere,¹² each jurisdiction will make a decision as to where they should set the threshold of standing only by engaging with a variety of

¹⁰ Miles, ‘*Standing in a Multi-Layered Constitution*’, Chapter 15 of Bamforth and Leyland, ed. *Public Law in a Multi-Layered Constitution*, 402.

¹¹ Some similarity with Craig, ‘*Administrative Law*’ (8th Edn, 2016) para 25-001: ‘Locus standi is concerned with whether a particular claimant is entitled to invoke the jurisdiction of the court’.

¹² See for instance Dougan (n 7), 791

factors,¹³ including for instance, the conception of the role of the individual within judicial review, the availability of different routes to accessing justice and different actors, as well the wider procedural framework. The ‘appropriate party’ is decided only by considering these factors and therefore, the rules of standing cannot be fully evaluated without appreciating these various issues. Indeed, it is this context which is to be examined and outlined within this thesis.

(ii) The Meaning of ‘Constitutional Context’

By ‘constitutional context’,¹⁴ one is primarily focusing here on how the Union and its system of review is ‘constituted’. In other words, as well as a brief nod to some political and institutional factors, the focus is on judicial strategy, the wider procedural framework and the differing role of privileged actors within the system. Additionally, as has already been alluded to, the focal point here will be on the role of the individual applicant and the action of annulment.

These factors are relevant to understanding why the EU formulates the standing rules and the individual applicant’s role; however no attempt is made to explore the entirety of the material factors which may be considered to represent the full constitutional context surrounding these rules. The approach is necessarily non-exhaustive given that space precludes an effective consideration of all relevant contextual factors.

¹³ Ibid.

¹⁴ Balthasar, ‘*Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the New Art. 263(4) TFEU*’ [2010] ELRev 542 alludes to a similar sort of reasoning when he refers to the ‘constitutional framework’ at page 547; however, the term ‘*constitutional context*’ is used more broadly here.

For instance, arguments of democratic theory will not be considered and AG Kokott's statement in *Inuit*¹⁵ that the 'absence of easier direct legal remedies available to individuals against legislative acts can be explained principally by the particularly high democratic legitimisation of parliamentary legislation'¹⁶ will not be examined. This is partly because it has already been considered by commentators such as Arnall¹⁷ but also because space in this thesis precludes an effective consideration of all these elements.

Instead the effort here will be to look at only a few particular elements (some of which have been hinted at or noted in the literature) and to see how far *these* can explain or justify the standing rules. The consequence of this is that I cannot make a bolder claim that on a full review of the context, the rules *are* positively explained or justified: I can only analyse the impact of the points considered.

¹⁵ Case C-583/11 P *Inuit v European Parliament and Council of the European Union* EU:C:2013:625.

¹⁶ Ibid. para 38.

¹⁷ See Arnall, 'Judicial Review in the European Union', ch. 15 in Arnall & Chalmers (eds.), 'The Oxford Handbook of European Union Law' (OUP, 2015); see also Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' [2008] 45 CMLRev 617, 678.

(iii) The Standards of Assessment: *Effective Judicial Protection* and *Access to Justice*

It is necessary to outline what is meant by phrases such as the rules of standing are ‘*narrow*’ and/or ‘*too narrow*’ (*unjustifiably narrow*): namely, what are the standards by which these terms are to be assessed.

From a methodological perspective, this would not lend itself to a quantitative analysis as such; a comparative overview of the statistics of the number of applications in the respective systems might arguably be less helpful, particularly within the EU context, where this would not account for the number of litigants who are deterred from claiming altogether.

Rather, the argument here is that within the EU judicial review context, when commentators criticise standing rules what they are really saying is either that *effective judicial protection*¹⁸ is not being sufficiently guaranteed and/or that there is *inadequate access to justice*.¹⁹ Although this often amounts to the same conclusion, here they will be treated as two distinct standards, especially given that the EU conceives of ‘*effective judicial protection*’ in a particular manner within the jurisprudence.²⁰

¹⁸ Case C-50/00 P, *Unión de Pequeños Agricultores (‘UPA’) v Council* [2002] ECR I-6677, Opinion of AG Jacobs, para 49; Craig (n 2), 499.

¹⁹ *UPA* (n 18), Opinion of AG Jacobs, para 43, 102; Case C-263/02 P *Jégo-Quéré v Commission* [2004] ECR I-3425, Opinion of AG Jacobs, para 21.

²⁰ See for further discussion Harding, ‘*Who goes to court in Europe? An analysis of litigation against the European community*’ [1992] *European Law Review* 105 at 105-106: there is less of a consideration of the motivations and position of litigants in a ‘subjective sense’ although there is an analysis of some of the practical issues facing litigants in Chapter Three.

Therefore, the two standards which could be used when assessing descriptively whether the rules of standing are narrow or, normatively, whether the overall system is too narrow are: (i) '*effective judicial protection*' as conceived of within the EU judicial review context and (ii) '*access to justice*'.

To refine further, '*access to justice*' is to be treated broadly and seen in practical terms. It refers here to the ability or ease by which an applicant can access substantively the justice which they seek. Therefore, it considers, inter alia, the certainty, speed, practical ease and number of opportunities by which the individual applicant can access the substantive remedies of justice (for instance, annulment). This treatment of the term is not dissimilar to the practical nature in which the term has been conceived of by other commentators.²¹

²¹ For instance Slepcevic, '*The Judicial Enforcement of EU Law through National Courts: Possibilities and Limits*' [2009] *Journal of European Public Policy* 16:3, 378, 381; Harlow (n 9); Bogojević (n 9) 8; Groussot, '*The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?*' [2003] *Legal Issues of Economic Integration* 30(3) 221.

2. General Outline of EU Law of Standing and Academic Criticism

Section two of this Chapter will give a brief indication of the landscape which motivated this research: it will outline the consistent focus in the CJEU jurisprudence on a limited role for the individual in direct review (evidenced particularly by a narrow definition of '*individual concern*') whilst also demonstrating the negative characterisation of these rules in the academic literature. Section three of this Chapter will consider the capacity of a contextual approach to impact our perception of the standing rules' restrictiveness.

(a) The Treaty Framework and Early Case Law

The rules of standing for the individual applicant to initiate direct review before the EU courts are found in Article 263 TFEU. This process is to be distinguished from indirect review which refers to the ability to challenge the measure before a national court and then seek a preliminary reference using Article 267 TFEU.²²

Article 263 TFEU distinguishes between privileged applicants and non-privileged applicants. The former, which includes the Council, Commission, European Parliament and Member States, have a much broader role as compared to the position for non-privileged applicants. Article 263(4) TFEU, which regulates non-privileged applicants, sets out that any natural or legal person can bring litigation in three circumstances: first

²² These provisions constitute the primary focus here of this thesis.

where the act is addressed to that person, second where the act is of 'direct and individual concern to them' or third with respect to 'a regulatory act which is of direct concern to them and does not entail implementing measures'.

The object of much of the criticism of the individual's position has been on the second element and particularly, the interpretation given in the case law to '*individual concern*'.²³ Although Chapter Three will consider the implications of the jurisprudence on the definition of '*direct concern*', the focus will primarily be on the former for now.

With respect to '*individual concern*', the seminal case is *Plaumann*²⁴ where the Court defined the term as follows:

'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'²⁵

The effect of this formulation was to establish a restrictive ambit for '*individual concern*' which has been consistently applied. The narrow ambit of the test is further evident from its factual application. In *Plaumann*, the Court found that the applicant was not individually concerned in accordance with the definition as he was affected by

²³ Ragolle, '*Access to justice for private applicants in the Community legal order: recent (r)evolutions*' [2003] ELRev 90, page 92 reflects this somewhat; Kornezov, '*Shaping the new architecture of the EU system of judicial remedies: comment on Inuit*' [2014] ELRev 251, 251.

²⁴ Case 25/62 *Plaumann v Commission* [1963] ECR 95.

²⁵ Ibid. 107.

the decision by 'reason of a commercial activity which may at any time be practised by any person'.²⁶ Equally, in later cases such as *Andres De Dios*,²⁷ the Court emphasised that even being part of a closed category of persons affected by the decision was not enough to demonstrate individual concern by itself but one also had to show that, 'the institution adopting the contested act must have been under an obligation to take account ... of the particular circumstances of those individuals'.²⁸

(b) Calls for Reform

The narrow *Plaumann* interpretation of '*individual concern*' raised difficulties²⁹ and is the focus of much of the academic and judicial criticism.³⁰ The structure of the critique tends, not exclusively, to focus on three aspects, as exemplified by AG Jacobs' Opinion in *UPA*³¹: first, that the direct review rules of standing for the individual are too narrow from the perspective of effective judicial protection; second, on the inadequacies of Article 267 TFEU indirect review as an alternative to remedy the problems with Article 263 TFEU; third, that the solution lies in reforming the interpretation of '*individual concern*'.

²⁶ Ibid.

²⁷ Case T-166/99 *Andres De Dios v Council* [2001] II-01857.

²⁸ Ibid. para 54; Arnall, '*Private Applicants and the Action for Annulment Since Codorniu*' [2001] 38 CMLRev 7, 34.

²⁹ Craig and De Búrca (n 3), 509.

³⁰ Peers & Costa, '*Judicial Review of EU Acts after the Treaty of Lisbon*' [2012] European Constitutional Law Review 82, 85.

³¹ *UPA* (n 18).

First, AG Jacobs criticised the difficulties with the present restrictive interpretation of the term '*individual concern*' and the consequent failure to satisfy the principle of effective judicial protection.³² Craig³³ also argued that the Court's interpretation meant that it was 'literally impossible for an applicant to succeed, except in a very limited category of retrospective cases'.³⁴ He notes an apparent paradox which emerges: if there is greater commercial activity, then this means a lower chance of obtaining standing; consequently, the more people who require judicial review and access to justice, the lower probability of them being able to acquire it.³⁵

Second, and simultaneously in light of the deficiencies of direct review rules of standing, AG Jacobs and other critics have argued that the preliminary reference procedure was equally unable to guarantee effective judicial protection³⁶ in the alternative, due to a number of practical problems. For instance, there is the system's discretionary nature combined with the inadequacy of national court powers due to the limitations in *Foto-Frost*.³⁷ AG Jacobs noted³⁸ that contrary to the principle of effective judicial protection, the applicant has no right of access to the CJEU or a right to decide whether a reference is made.³⁹ This critique is sometimes combined with other criticisms: for instance, the citation of a number of procedural difficulties with the system, like the greater likelihood of extra delays and costs associated with the

³² Ibid, Opinion of AG Jacobs, para 37 and 49.

³³ Craig (n 2).

³⁴ Ibid. page 494.

³⁵ Ibid. page 499; *UPA* (n 18), Opinion of AG Jacobs, para 59.

³⁶ *UPA* (n 18) para 37-40.

³⁷ Case 314/85 *Foto-Frost* [1987] ECR 4199.

³⁸ *UPA* (n 18), Opinion of AG Jacobs.

³⁹ Ibid. para 42 and para 102; also Arnall, '*Judicial Review in the European Union*', ch. 15 in Arnall & Chalmers (eds.), '*The Oxford Handbook of European Union Law*' (OUP, 2017), 399.

system due to the fact that the applicant has to go through national courts first.⁴⁰ Additionally, another criticism focuses on legal certainty⁴¹: Arnall argues that legal certainty is undermined by the likelihood of each referring national court 'asking slightly different questions'.⁴² Moreover, a further recurring criticism of the use of indirect review as an alternative to direct review is that in some cases it would be difficult to challenge the measure indirectly where there were no implementing measures, meaning that the applicant would be forced to break the law in order to challenge the measure.⁴³

Third, in light of all these criticisms, a common proposal for reform of the EU rules of standing for the individual is to improve and broaden *direct review* by reinterpreting '*individual concern*' in favour of a test based on '*substantial adverse impact*'. This was endorsed by Craig⁴⁴ and AG Jacobs⁴⁵ who has argued that such a test represents the best solution to ensure effective judicial protection in direct review.⁴⁶ Part of the premise of this proposal in AG Jacobs' Opinion is that direct action proceedings are 'generally more appropriate for determining issues of validity than reference proceedings'.⁴⁷

⁴⁰ UPA (n 18), Opinion of AG Jacobs, para 42 and Craig (n 2), 502; Balthasar (n 14) 547; Craig and De Búrca (n 3), 535.

⁴¹ UPA (n 18), Opinion of AG Jacobs, para 48 and 102.

⁴² Arnall (n 28), 50.

⁴³ UPA (n 18), Opinion of AG Jacobs, para 43 and 102; Dougan (n 7), 789. See also Dougan (n 17), 676.

⁴⁴ Craig (n 2) and Craig, '*EU Administrative Law*' (3rd Edn, 2018), 341 - 342.

⁴⁵ Ibid. para 59-60.

⁴⁶ Arnall (n 28), 52 framed the test in terms of 'adversely affected'.

⁴⁷ UPA (n 18), Opinion of AG Jacobs, para 45 (emphasis added), see also 46 - 47; Balthasar (n 14), 547 'direct challenge appears to be a more appropriate procedure for the ECJ to rule on the validity of EU legislative acts'. For more discussion see also Arnall (n 39) 398-399; Ragolle (n 23), 92.

(c) CJEU Response and Lisbon Treaty Amendments

However, in response to these critiques, the CJEU has defended the status quo, keeping a narrow ambit for the individual applicant in direct review. This has manifested itself in at least two ways: a reaffirmation of the *Plaumann* interpretation and the narrow conceptualisation of the Lisbon Treaty amendment to Article 263(4) TFEU.

First, the CJEU has rejected the above criticisms and upheld the *Plaumann* definition. In *UPA*,⁴⁸ the Court dismissed AG Jacobs' proposal and emphasised that there was already a 'complete system of remedies'⁴⁹ to ensure judicial review, with the availability of direct review being complemented by the possibility of indirect review in the national courts.⁵⁰ The Court equally emphasised the role of the Member States in guaranteeing protection,⁵¹ before ultimately concluding that the proposed interpretation, though possible, would require Treaty reform on behalf of the Member States.⁵² Equally, in *Jégo-Quéré*,⁵³ the CJEU rejected another proposal to change the interpretation of '*individual concern*' on similar grounds.⁵⁴ Craig has criticised the Court's rejection, saying that it is not precluded by the 'bounds of normal Treaty interpretation'.⁵⁵ Equally, he posits an underlying 'floodgates' style concern⁵⁶ on behalf

⁴⁸ *UPA* (n 18).

⁴⁹ *Ibid.* para 40.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* para 42.

⁵² *Ibid.* para 45.

⁵³ *Jégo-Quéré* (n 19).

⁵⁴ *Ibid.* para 30 and 32.

⁵⁵ Craig (n 2), 505 and Craig (n 44), 341.

⁵⁶ Alluded to in *UPA* (n 18), Opinion of AG Jacobs in relation to the Council and Commission position, para 73.

of the Court which he criticises, saying that there is ‘no reason why such a change should necessarily involve any dramatic net increase in the overall number of challenges ... [because the proposed reinterpretation would] shift some of these cases back to the realm of direct challenge, and away from indirect challenge’.⁵⁷

Second, although the Lisbon Treaty sought to address some of these criticisms by amending Article 263(4) TFEU and creating an exception whereby ‘*individual concern*’ was not required where there was ‘a regulatory act which is of direct concern to them and does not entail implementing measures’, the CJEU has applied this exception restrictively, thereby keeping the narrow scope for the individual.

In *Inuit*,⁵⁸ the Court confirmed the General Court’s definition of ‘*regulatory act*’ as not covering legislative acts.⁵⁹ AG Kokott noted that there was no call for a reassessment of ‘*individual concern*’⁶⁰ and as with above, the Court emphasised the EU’s ‘complete system of remedies’.⁶¹ Then in *Telefónica*,⁶² Craig points to the ‘broad interpretation’ given to the term ‘implementing measure’,⁶³ which he argues can be seen from the fact that even though the Commission decision in contention was addressed specifically to the Member State and ‘not binding on other persons’,⁶⁴ the Court found that to enact this decision there would inevitably be some *consequent* implementing measures.⁶⁵ It

⁵⁷ Craig (n 2) 506.

⁵⁸ *Inuit* (n 5).

⁵⁹ Ibid. para 61.

⁶⁰ Ibid. Opinion of AG Kokott, para 89.

⁶¹ *Inuit* (n 5) para 92.

⁶² *Telefónica* (n 5).

⁶³ Craig, ‘UK, EU and Global Administrative Law: Foundations and Challenges (The Hamlyn Lectures)’ (Cambridge University Press, 2015), 475.

⁶⁴ *Telefónica* (n 5), para 34.

⁶⁵ Ibid. para 35.

was *these* inevitable but ultimately subsequent measures which were found to be 'implementing measures entailed by the decision',⁶⁶ meaning the exception in Article 263(4) would not apply.⁶⁷

The problem with this exception's interpretation for critics is that the CJEU's narrow position means that the test will remain difficult to satisfy.⁶⁸ Where the amendment in Article 263(4) TFEU is unavailable, Craig notes that the individual 'will still need to show individual concern as that term has been interpreted in *Plaumann* and subsequent cases. This means that direct challenge in such cases will continue to be extremely difficult'.⁶⁹

What is clear from the above is that the CJEU has continued to defend the standing rules as they are: the Court has refused to reinterpret '*individual concern*' and it has interpreted the new Lisbon Treaty amendment in a narrow fashion.

⁶⁶ Craig (n 63), 475.

⁶⁷ Ibid. See Craig (n 44) 344 – 345 for more recent case law. He notes that 'This broad interpretation of implementing measure has been confirmed in subsequent cases', although he notes that a 'more limited reading was adopted in *Tilly-Sabco*' (Craig cites Case T-397/13 *Tilly-Sabco v European Commission*, EU:T:2016:8).

⁶⁸ Ibid.

⁶⁹ Craig (n 44), 344.

3. The Importance of Context and the Academic Literature

The above sub-section has demonstrated both the Court's consistently restrictive stance and the broad three-stage traditional academic criticism in response that the direct review rules are too narrow to offer effective judicial protection, that the indirect mechanism is an inadequate alternative and that therefore, *direct* review ought to be reformed by reinterpreting '*individual concern*'.

The rest of this Chapter performs two functions: first it gives some brief insight into the importance of the constitutional context and how certain contextual elements *could*, subject to further exploration and analysis within this thesis, affect our perception of the standing rules; in this way it sheds some light on the value that this research has. Secondly, it outlines some of the ways in which the context has already been considered by academia.

(a) The Importance of the Constitutional Context

An explicit focus on the wider factors and underlying choices which make up the constitutional context remains a crucial exercise and it has the potential to go some way towards impacting our perception of the standing rules. This becomes clear when we consider some of the criticisms noted above.

(i) Effective Judicial Protection and Direct Review

A key criticism of direct review concerned how it related to the concept of *effective judicial protection*. There are two points to note here.

First, regarding the standard of assessment (to be explored more in Chapter Three), it is not undoubtedly clear that the concept of *effective judicial protection* as developed in some of the key CJEU jurisprudence necessitates a conclusion that the present EU rules are inadequate. Indeed as will be shown and subject to the qualifications below (see pages 96 - 105), in *some* of the relevant case law,⁷⁰ the notion remains somewhat ambiguous in places.

Secondly and more fundamentally, in response to the criticism that it is too difficult for the individual applicant to challenge general measures through direct review, it is clear that a focus on a contextual approach continues to remain central to our understanding of the rules and their impact.

From a comparative perspective, as has been noted by the Commission,⁷¹ it is clear that various legal systems restrict in some capacity the ability to challenge general legislative measures, and therefore the fact that the individual cannot *automatically* challenge a measure which affects him or her, is not *in itself* an overwhelming cause

⁷⁰ This is alluded to Rhimes, 'The EU Courts Stand Their Ground: Why are the Standing Rules for Direct Actions Still So Restrictive?' [2016] ELJS 103, 157: 'Most of the conclusions reached by the courts in relation to the right to effective judicial protection are simply expressed by reference to a common mantra, rather than properly reasoned and explained'. See also 160 – 161.

⁷¹ Noted in the Commission arguments in *Jégo-Quéré* (n 19), para 24.

for concern.⁷² Indeed, as Enchelmaier has noted, if Union regulations were to correspond to parliamentary statutes, it is 'by no means clear that in all Member States, or even in a majority of them, it is possible to challenge such legislation in the courts'.⁷³

Therefore, as commentators have noted, the discussion is not about whether or not there is an automatic ability to challenge but the *degree* to which different systems restrict different entities from being able to challenge these measures.⁷⁴ It is here that the wider context becomes crucial. The degree to which any jurisdiction restricts the ability of applicants to challenge general legislative measures and *who* can challenge them is a value choice for each system dependent on their constitutional context. It may be (as explored below) that some explanation could be found in the role of Member States and privileged applicants, whose broad position contrasts with the narrow role of the individual in *direct* review.⁷⁵ This delineation may reflect the fact that the EU prioritises the Member States and central institutions as the primary actors within the overall scheme: it reflects the constitutional choice as to *who* the appropriate party is.

This is why Craig's apparent paradox above may not be as paradoxical as it first seems: although the greater the commercial activity, the lower degree of likelihood of individuals obtaining standing, that says nothing as to whether *any* of those individuals

⁷² Alluded to in the Commission's arguments in *UPA* (n 18), Opinion of AG Jacobs, para 28.

⁷³ Enchelmaier (n 9) 207.

⁷⁴ Point alluded to by Balthasar (n 14), 547: 'the discussion about the scope of art. 263(4) TFEU is not about whether legislative acts can be challenged at all, but only whether they can be challenged directly'. See also Rhimes (n 70), 156.

⁷⁵ Alluded to *Inuit* (n 5) Opinion of AG Kokott, para 37.

are the most *appropriate* individuals to conduct that review within the EU system. Indeed, the constitutional context demonstrates that the EU limits the role of the individual in this regard in direct review but expands the role of the privileged applicant. Of course, the mere presence of these bodies does not necessarily mean that the standing rules should no longer be perceived as being too restrictive. The degree to which this element and others can explain and justify the rules will be considered in Chapters Two and Three respectively, but it suffices here to just highlight the fact that these elements need to *continue* to occupy a central place in the analysis.

(ii) Criticisms of the Preliminary Reference Procedure and Proposals for Reform

The importance of the constitutional context and its capacity to *impact* upon our perception of the standing rules is equally apparent when looking at some of the criticisms of the preliminary reference procedure and the proposals for reform.

For instance, this emerges from a discussion of whether direct challenge is the '*appropriate*' forum for reforming the system of judicial review.⁷⁶ Although critics like AG Jacobs discuss the wider context surrounding these rules, it is worth re-emphasising that in principle (and without engaging in the merits of, for instance, AG Jacob's points here) the determination of the '*appropriate*' forum engages the underlying choices and constitutional priorities. Indeed, focusing on the contextual choices may potentially

⁷⁶ See *UPA* (n 18), Opinion of AG Jacobs, para 45 and para 63; Balthasar (n 14), 547.

shed some light on why indirect review operates in this way. For instance although the discretionary nature of the system is often criticised,⁷⁷ it may be that part of the reason for these aspects of the system may lie in the constitutional context and particularly in the fact that the political dynamic between the centralised institutions and the Member States requires a greater degree of flexibility and autonomy for the latter.⁷⁸

To emphasise, it is not suggested here that the academic literature ignores the constitutional context or that the literature criticises indirect review only on practical grounds (or even that such practical concerns may not be central to the debate, see Chapter Three).⁷⁹ Equally it may be that on analysis, the practical issues with indirect review still mean that it is an inadequate alternative to direct review and that reform of the latter is required.⁸⁰ However the point here is merely to highlight that when considering the best routes for reform and whether one should proceed with reinterpreting *Plaumann* and changing direct review, one needs to *continue* having these underlying choices firmly in mind. As Enchelmaier notes ‘the reform proposal is fully convincing only on the basis of AG’s criticism of the existing system – which one may or may not share’.⁸¹

⁷⁷ See page 26 above.

⁷⁸ Alluded to by Enchelmaier (n 9), 201.

⁷⁹ See Stein & Vining in ‘*Citizen Access to Judicial Review of Administrative Action in Transnational and Federal Context*’ [1976] 70 *American Journal of International Law* 219, 233: ‘this avenue ... is particularly appropriate to the symbiotic Community system’. See also Dougan (n 7), 791.

⁸⁰ See Chapter 3 for further discussion.

⁸¹ Ibid. 208.

(b) Appreciation of the Context in the Academic Literature

It should be emphasised at the outset that it is manifestly clear that the academic literature already considers certain elements of the constitutional context when analysing these standing rules: it is not the case that a contextual analysis has been fully ignored or misunderstood in the presentations of the rules within the secondary material.

To give but a few examples, Craig considers the context surrounding the standing rules in a number of his works,⁸² including extensive discussions of indirect review⁸³ as well as a consideration of the role of privileged applicants⁸⁴ and the procedural dimension.⁸⁵ Dougan also acknowledges the constitutional context in his work,⁸⁶ the difficulties with the focus on indirect review and the possible problems with 'obliging the Member States to liberalise their own rules of standing at the domestic level ... [since] After all, national rules on standing will often embody fundamental social and cultural choices about the nature and purpose of administrative law'.⁸⁷ Further, Enchelmaier⁸⁸

⁸² Arguably much of Craig (n 44) can be seen as reflecting a contextual analysis, whereby the standing rules are analysed as one aspect of the wider set of choices and rules which represent the administrative law of the European Union. More specifically see Chapter 11 entitled 'Access' where Craig considers both 'access to the original decision-making process ... [and] access to judicial review where a party seeks to challenge such norms' (332).

⁸³ Craig (n 44), for instance see pages 339 – 340.

⁸⁴ See also in Craig and De Búrca (n 3) 514 – 515.

⁸⁵ See Craig (n 44) Chapters 22 – 23 but for a more specific instance, see Craig (n 44), 737 with respect to 'damages and annulment'.

⁸⁶ See for a specific instance Dougan (n 17), 678 where he considers the ability to judicially review in light of arguments concerning the democratic legitimacy of legislation in domestic systems: 'When that argument, is transplanted into the particular constitutional context of European integration, it probably begins to run against recognising any special treatment as regards access to justice for acts of the Union legislature, whose institutions clearly do not enjoy the same degree of democratic legitimacy as their domestic counterparts'

⁸⁷ Dougan (n 7), 791

⁸⁸ Enchelmaier (n 9), 201 – 203, 207.

considers the role of the national courts and its connection with ideas of subsidiarity as does Bogojević.⁸⁹ These are but a few examples from a wide literature which deals with this topic.⁹⁰ Some of it will be addressed in the subsequent Chapters but inevitably, given the contextual elements which form the focus of *this* thesis, many will not.

The way in which this thesis seeks to build upon the literature lies partly in the choice of which contextual elements to focus upon (some of which have been considered to differing degrees in the commentary) and in the refinement and development of these issues (for instance see the section on *partial judicial subsidiarity* below). Even though some of these factors have been explored or hinted at by various commentators, this thesis continues to advocate for placing these contextual elements at the centre of the analysis in order to consider their ability to explain or justify the rules.

⁸⁹ Bogojević (n 9), for a specific instance see 25.

⁹⁰ For other examples, see for instance Arnall (n 17); Rhimes (n 70), 156; Harlow (n 9).

4. Chapter Summary

This Chapter has sought to outline the central argument of this thesis and the premises underlying it. Additionally, the ambition has been briefly to present part of the CJEU jurisprudence on Article 263 TFEU and *individual concern* as well as the academic criticisms in order to demonstrate the conceptual conflict motivating this research: namely, that although the rules on individual standing have been treated by the academic literature as being narrow and unjustifiably so, the Court has consistently retained them.

However, this Chapter has also sought to go further by highlighting some of the places in which the academic literature considers the constitutional context as well as noting the importance of a contextual approach and its continuing capacity to affect one's perception of the standing rules.

It is this potential which will be explored further in the next two Chapters, where this thesis will seek to look at the explanatory and justificatory impact of the contextual factors identified.

B. CHAPTER TWO: THE CONSTITUTIONAL CONTEXT

1. Premises and Structure

(a) General and Specific Aims of Chapter

If Chapter One sought to shed some light on the reasons for focusing on the constitutional context and to give an initial indication of its potential to impact upon our perception of the standing rules, then this Chapter seeks to properly identify and explore the specific contextual factors which lie at the heart of this thesis. The Chapter seeks to descriptively place the rules within the contextual framework and to explore how far these factors can explain why the CJEU conceives of the role of the individual for direct review narrowly.

However, this Chapter goes further than merely seeking to demonstrate the degree to which some of these factors may explain the rules of standing as they pertain to the individual. It also explores and suggests that some of these factors may have the ability to impact our perception of just how narrow the rules are. By highlighting (amongst other aspects) the number of alternative routes available for individuals directly and indirectly to access justice, this Chapter will answer the first research question by saying that from the perspective of the individual applicant, these standing rules are still narrow but the precise scope of their narrowness *may*, to a limited extent, be qualified.

This notwithstanding, this Chapter will also argue that there are clear limitations to the explanatory potential of the contextual elements identified. For instance, although the procedural elements which have been outlined could *theoretically* explain why the standing rules are restrictive, neither of the factors examined here are practically able to due to the flaws in the descriptive presentation. Better explanations may lie within the wider '*procedural framework*' but an inherent limitation of this thesis is that space precludes an effective and comprehensive appraisal of *all* relevant contextual elements. In this Chapter, this thesis hopes to identify certain elements forming part of the wider constitutional context and consider their ability to explain why the EU takes a restrictive approach. The value in this exercise lies in showing where a contextual approach can continue to assist in shaping our perception of these rules and it will be for others to explore further the full panoply of relevant elements which may or may not explain the approach taken.

(b) Standard of Assessment

As noted in Chapter One, there are two standards by which I am assessing the standing rules: the EU conception of '*effective judicial protection*' and access to justice.

In this Chapter, part of the exercise will be to consider the extent to which the contextual factors impact our perception of the standing rules' restrictiveness and affect the breadth of those rules. In order to do this, the standard of assessment will be access to justice rather than '*effective judicial protection*'. Conversely in Chapter

Three, the justificatory exercise will be conducted in relation to both of these standards.

The rationale for this lies in the difference between the two standards: here '*access to justice*' is perhaps a more neutral term which thus lends itself more easily to an analysis of the width of standing rules, given that it leads to a clear practical question (whether the rules improve the applicant's ability to substantively access justice or not, in light of certain factors such as speed and certainty for instance). Conversely, the EU conception of '*effective judicial protection*' is a theory which needs to be fully defined before it can be used in evaluation. Otherwise one runs the risk that, without definition, the term can be used to justify whichever position one is advocating (eg. AG Jacobs or the CJEU in *UPA*⁹¹).

To demonstrate, the phrase '*fewer procedural hurdles in the EU allows greater effective judicial protection in the EU*' is a conclusion which is problematic because it does not unpack what the theory requires. Whereas the phrase '*fewer procedural hurdles in the EU allows the applicant to gain access more easily to the substantive remedies desired*' is a more neutral, descriptive phrase that can stand on its own.

⁹¹ *UPA* (n 18).

2. The Contextual Factors

The three contextual factors that form the primary focus of this thesis are: (a) elements of the procedural framework, (b) partial judicial subsidiarity, (c) the wide role for Member States and privileged applicants. It will be explored how far these factors can explain the stance taken towards the standing rules.

As suggested above, there are a variety of other factors which could form the subject of this analysis. For instance, there are numerous economic and political contextual elements which could go some way to explaining the standing rules' formulation. An example being the historical context⁹² and the idea that the *Plaumann* test can somewhat be seen as a product of its time, when the focus of wider EU competence was primarily economic, before the Union expanded its competences.⁹³ A further potential explanatory factor for the narrowness of the rules is their novel nature in the international legal context, as has been noted by a number of commentators⁹⁴ including Stein and Vining who have said that 'the very notion of an individual having independent standing to sue before an international tribunal is little short of revolutionary'.⁹⁵

⁹² Alluded to by Stein & Vining (n 79) and Arnall (n 39) 400.

⁹³ An example being the implications of the analysis of Stein & Vining (n 79) 241.

⁹⁴ Alluded to by Feldman in '*Public Interest Litigation and Constitutional Theory*' [1992] 55 MLR 44, 55 where he says: 'Another compelling reasoning in the Community's constitutional ethic for restricting individual standing is that the European Community originates in international law, where states and not individuals have legal personality'; Harlow (n 9) 218, 230. See Fisher, Lange & Scotford, '*Environmental Law Text, Cases, and Materials*' (1st Edn, 2013), 372.

⁹⁵ Stein & Vining (n 79) 222. A similar point was made by Bogojević (n 9) 8 where again the ability of individuals to have standing to sue is an exceptional aspect of the system.

However, none of these factors change the perception of the factual narrowness of the rules nor do they contest the conclusion that the rules are in themselves restrictive. They merely give a variety of reasons which might explain how the CJEU interpretation of the standing rules for the individual developed in such a narrow fashion. Further AG Jacobs has previously said that the novelty of the rules in the international legal order has ‘no relevance’⁹⁶ with respect to the interpretation of the standing rules given the development of the system beyond a ‘system of intergovernmental cooperation’.⁹⁷

Consequently, the focus of this Chapter will be to consider the three primary elements identified (which have to differing degrees been considered in the literature) and see how far each has the potential to explain and qualify the perception of the standing rules and their restrictiveness. It will be argued that the notions of *judicial subsidiarity* and the role of the Member States and privileged applicants go some way towards explaining the rules to a qualified degree (and indeed part of the effort of this Chapter will be at refining these concepts); there are however much greater difficulties in using the procedural elements highlighted here to fully explain the rules.

⁹⁶ *UPA* (n 18), Opinion of AG Jacobs, para 78.

⁹⁷ *Ibid.*

(a) Elements of the Procedural Framework

In this subsection, I seek to explore the interaction between the wider procedural context and the standing rules in an effort to explore *how far* the former can explain the approach taken in the latter. More specifically, given the vast array of elements which could legitimately be classed as forming part of the '*procedural framework*', I will focus on two aspects here: the degree to which there are other formal procedural filters in the system and the EU's approach towards granting an annulment following a successful action.

The argument is twofold: that the wider EU procedural context could *theoretically* explain the narrow approach to standing rules but that neither the 'prima facie absence of other filters' or the 'EU's remedial approach' can practically do this.

First, the procedural context has the capacity to *theoretically* explain the narrow ambit of the standing rules and a brief look at these two elements demonstrates this. For instance, if there was a total absence of other formal filters, this would mean that the rules of standing would have the primary task of limiting the number of claims. Equally, Article 264(1), when seen in *isolation*, gives the impression of remedial rigidity: that the EU takes a more rigid approach to the granting of remedies, with less discretion available for the Court to deny the individual applicant of the substantive remedy at the final instance. From an access to justice perspective, therefore, one can readily see how these elements *could* explain the approach towards standing and affect our perception of them because although the standing rules are restrictive, this is off-set

by more applicant-friendly aspects of the procedure: the individual has fewer other hurdles to surpass compared to some other systems and they are more assured of gaining the substantive remedy sought for, once they get to this stage.

However the second argument is that as a matter of practice, neither of the two procedural elements identified can explain the standing rules because on a descriptive level, it is not quite right to say that there are no other filters or that there is remedial rigidity: for instance, there are other procedural mechanisms which have the effect of limiting the overall number of claims and there is actually a great deal of remedial discretion and flexibility evident within the wider jurisprudence. Therefore if we want to find an explanation for the rules' restrictiveness within the procedural context, one will have to look elsewhere.

A discrete comparison with English law will help demonstrate these points further: English law is often considered to have broad standing rules for the individual⁹⁸ but it also has various other formal filters (such as the requirement for permission) and it employs a flexible approach towards granting remedies. At first blush, the EU appears at the opposite end of this spectrum: narrower standing rules but fewer other hurdles and relative remedial rigidity. However it is through a comparison with English law that

⁹⁸ Lewis in '*Judicial Remedies in Public Law*' (5th Edn 2014) para 11-003 quotes Rose LJ when he notes 'There has been 'an increasingly liberal approach to standing on the part of the courts' over recent years'. Also noted by Harlow, '*Public Law and Popular Justice*' [2002] 65 MLR 1 noted the development of this approach and for instance at 4, the decision in *R v IRC, ex parte National Federation of Self-Employed* [1982] AC 617 and Lord Diplock's comments at 644. Craig (n 11) para 25-020 also notes this latter case and development, saying that 'There are a number of cases in which the courts have treated the IRC decision as a liberalisation of the pre-existing standing rules'.

one can see the descriptive flaws in this presentation: actually the EU does employ other filters and it bears elements of discretion which are again similar to English law.

English law is of course a particular jurisdiction and the absence or presence of certain characteristics could not on its own explain why the EU takes the stance it does. Equally, I am not seeking to analyse whether the English rules of standing are positively explained by the other elements of its procedure. Instead a discrete look at English law and the *prima facie* contrasts which are evident, allows one to see the theoretical possibilities of a contextual analysis more broadly but also the practical inability of these two factors to fully explain the approach taken in EU law.

It may be wondered what the purpose is of looking at these procedural elements, if ultimately they are incapable of explaining why the standing rules are narrowly formulated. The reason is that through this exploration one can see precisely how procedural elements can interact with the standing rules and how a close analysis of the two could *theoretically* explain the approach taken to the latter: in other words, the *potential* of a contextual analysis. Even if the answer does not lie with the two elements identified here, the reasoning explored here will allow others to continue searching for the procedural elements which may practically explain the CJEU's restrictive stance towards standing rules. For instance, close analysis of costs or the approach to damages may or may not provide better answers.

What this analysis does is to show the theoretical potential and limitations of a contextual approach, rather than providing the definitive factor which can wholly explain the position taken.

(i) The Explanatory Potential of these Procedural Elements in Theory

In order to demonstrate the theoretical capacity of the procedural framework to explain and qualify the perception of the standing rules' narrowness, these two elements need to be illustrated further on a descriptive level.

(A) Prima Facie Absence of Other Formal EU Filters

The first procedural characteristic that could theoretically explain why the EU takes a stricter approach to the standing requirements for the individual lies in the degree to which there is an absence of other formal procedural filters: in other words, if standing *were* the primary hurdle facing an applicant, then a narrower ambit is readily explicable, it being the primary mechanism which can filter out claims. Moreover, our perception of the rules' restrictiveness could therefore change upon this analysis: the overall effect on access to justice is qualified if there are fewer formal hurdles in the EU.

The EU's prima facie apparent lack of other filters can be contrasted with English law, which, *inter alia*, has its own particular formal procedural filters limiting the overall

number of claims⁹⁹ and which can significantly affect an individual's ability to access justice: an example is the division between the *permission* and *full hearing* stages.

It is clear that this procedural distinction between the permission and full hearing stages can have a real impact in terms of filtering the overall number of claims. The permission stage is 'primarily concerned to exclude hopeless cases'¹⁰⁰ and indeed Bondy and Sunkin¹⁰¹ have argued that there has been a noticeable decrease in the number of applicants who are successful at the permission stage from 71% of claimants in 1981 to 22% in 2006.¹⁰² This trajectory seems to be confirmed by more recent statistics and in particular the Civil Justice Statistics Quarterly presented by the Ministry of Justice.¹⁰³ Although Bondy and Sunkin note that the overall picture may be more nuanced,¹⁰⁴ it is clear that this stage clearly does have an effect on the number of litigants passing through the system indeed does impact access to justice.

The use of English law here as a comparator needs to be carefully qualified: this distinction with the permission and full hearing stage is peculiar to English law and therefore the absence of this mechanism cannot alone explain why the standing rules in the *EU* are narrowly formulated.

⁹⁹ Alluded to by Schiemann, '*Locus Standi*' [1990] PL 342, 342.

¹⁰⁰ Lewis (n 98), para 11-002; see also *R v Monopolies and Mergers Commission Ex. p. Argyll Group Plc* [1986] 1 WLR 763, 773.

¹⁰¹ Bondy & Sunkin, '*Accessing Judicial Review*' [2008] PL 647; at 649, they note that this is 'particularly perplexing given ... the trend to greater liberality of access in relation to other aspects of judicial review' (at footnote 4: 'In particular in relation to standing')

¹⁰² Ibid. 648; noted by Craig (n 11) para 27-044.

¹⁰³ Civil Justice, Statistics Quarterly, England and Wales, (January to March 2016), Ministry of Justice Statistics Bulletin https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527018/civil-justice-statistics-january-march-2016.pdf, at 16.

¹⁰⁴ Bondy and Sunkin (n 101), 666.

However, the comparison serves the purpose of demonstrating more broadly that the presence or absence of other procedural filters has the capacity to change our perception of the standing rules, from an access to justice perspective: although standing rules may seem wide or narrow, their relative narrowness needs to be assessed by seeing how far there are other similar filters within the system and in terms of the overall impact on an individual litigant's ability to access justice. Therefore in English law, although there are liberal standing rules, their width is qualified by the fact that they are just one of the many gateways that an individual has to face. Conversely, and on *prima facie* analysis (see below), although the EU standing rules may appear narrow, their relative restrictiveness *could* be explained if there *was* a lack of other comparable filters given their role as the primary limiting filter.¹⁰⁵

(B) The EU's Approach to Remedies

The second procedural characteristic that *could* theoretically explain the EU's restrictiveness towards the standing requirements for individuals lies in the approach the EU takes towards remedies.

If a system is more rigid in its approach to remedies (for instance with a stricter conception of what *invalidity* means and with less discretion being available to the court to deny a successful applicant the substantive remedy at the conclusion of the

¹⁰⁵ See also Rhimes (n 70), 156 – 157

proceedings) then this can again change our assessment of the standing rules: the rules may seem narrow but once an individual has surpassed them and succeeded on the action, then the applicant can be more certain of obtaining the remedy. Therefore from an access to justice perspective, the certainty or ease by which a remedy could be obtained following a successful annulment action could potentially explain why the rules are more narrow. Conversely a wider set of standing rules may be off-set by a more flexible approach to the remedies: although an applicant can show standing more easily, the remedial flexibility means that they have a less certain capability of achieving substantive justice and thus can be denied the remedy they sought *after* they have won on the merits.

Identifying this dynamic between the approach to remedies and standing is not novel. It is rather a reflection of (for instance) the comments made by Lord Carnwath in *Walton*:¹⁰⁶

‘on the issue of discretion, which in practice may be closely linked with that of standing ... In this respect, I see discretion to some extent as a necessary counterbalance to the widening of rules of standing’¹⁰⁷

The approach here is to consider this interaction in the EU context and again a brief consideration of the English law approach is helpful (given that the English position on standing is much wider).

¹⁰⁶ *Walton v The Scottish Ministers* [2012] UKSC 44, para 103.

¹⁰⁷ *Ibid.* para 103; a similar statement also noted by Lord Reed at para 95.

At a first glance, the approach which is taken within the EU *may* reflect one of remedial *rigidity* thereby providing the basis for an explanation to the standing rules' restrictive quality. In particular, this impression may be given by a narrow look at the particular wording of Article 264(1) TFEU:

'If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void ...'

The first paragraph does not allow for any remedial flexibility: if the annulment action is successful then the Treaty stipulates that the Court is required to annul the measure and in this sense, as Craig notes: 'the general principle is that nullity is retroactive'.¹⁰⁸ There are of course exceptions to this principle, which will be explored below, beyond this more rigid starting point.

Prima facie, this could be contrasted with the flexibility inherent in English law. Again, the general starting point is that a finding of invalidity with respect to an administrative measure is retrospective and therefore void *ab initio*.¹⁰⁹ However, as Lewis notes, there are three broad qualifications to this principle¹¹⁰ First, the measure's invalidity has to 'be established',¹¹¹ in this sense, Lewis means that the act must be proved to be invalid through the proper judicial procedure.¹¹²

¹⁰⁸ Craig (n 44), 729.

¹⁰⁹ Craig (n 11) para 24-011; Lewis (n 98) para 5-006-5-007.

¹¹⁰ Lewis (n 98) para 5-007.

¹¹¹ Ibid.

¹¹² Lewis (n 98) para 5-009. Similar to Craig (n 11) para 24-011 that '*void*' is a 'relative not absolute concept'.

Second, the court retains wide discretion as to the remedies and can *deny* the remedy to an applicant who has been successful on the merits.¹¹³ A recent example of such discretion cited by Forsyth¹¹⁴ is that of *R (Hurley and Moore)*¹¹⁵ where Elias LJ found that it would not 'be a proportionate remedy to quash the regulations themselves',¹¹⁶ citing in particular the 'administrative chaos' which would otherwise be caused.¹¹⁷

Third, there is also the notion of '*prospective overruling*', described by Arden LJ as a 'term to cover any technique by which a court places an explicit limit on the retrospective effect of its decision'.¹¹⁸ Although the contours of this concept are still emerging, various commentators have cited numerous cases which demonstrate that the 'courts are prepared to contemplate this sort of remedial flexibility'.¹¹⁹ For instance, *In re Spectrum Plus Ltd*¹²⁰ where Lord Nicholls noted that 'even in respect of statute law, they do not lead to the conclusion that prospective overruling can never be justified as a proper exercise of judicial power'.¹²¹ The potential availability of this doctrine undermines the general starting point taken towards the concept of invalidity noted above.

¹¹³ Ibid. para 5-007; noted also by Forsyth, '*The Rock and the Sand: Jurisdiction and Remedial Discretion*' [2013] JR 18:4, 360, 360.

¹¹⁴ Ibid. 365.

¹¹⁵ *R (Hurley and Moore) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201.

¹¹⁶ Ibid. para 99.

¹¹⁷ Ibid.

¹¹⁸ Arden LJ in '*Prospective Overruling*' [2004] 120 LQR 7.

¹¹⁹ Lewis (n 98) para 5-029, who cites *R v Panel on Take-overs and Mergers Ex. p. Datafin* [1987] QB 815, although at para 5-007 he does not frame it precisely in these terms; Forsyth (n 113), 374.

¹²⁰ *In re Spectrum Plus Ltd* [2005] UKHL 41.

¹²¹ Ibid. para 39.

Prima facie therefore, one can see how the flexibility present in the approach to granting the remedy could explain and affect the assessment of the standing rules. The wording of Article 264(1) (when seen in isolation) gives the impression of remedial rigidity and therefore greater certainty of obtaining the remedy of annulment for an applicant who has passed the standing requirements and succeeded on the action (as compared to the converse in English law).

(ii) The Practical Inability of these Two Elements to Explain The Approach Taken

The above has sought to show how two particular aspects of the procedural context could theoretically explain and impact our understanding of the standing rules and their restrictiveness.

However, the primary problem with the above analysis is that the EU does not neatly reflect the descriptive characterisation which has been hinted at above. It is not wholly accurate to say either that there are no other procedural filters or that the EU approach to remedies is rigid. In particular with regards to the remedial approach, it would be a flawed exercise to infer rigidity from the wording of Article 264(1) without fully exploring the wording of Art. 264(2) as well as the various other elements of flexibility within the system. This will be the task of below where it will be shown that the reality of the descriptive law is one of the main reasons why neither of these elements can practically explain why the EU takes a restrictive approach to standing.

(A) Other EU Filters or Procedural Obstacles

Even if the EU does not have formal filters in the same way as (for instance) the English permission stage, a brief examination of the wider EU jurisprudence shows the presence of procedural hurdles which may have the same functional impact.

For instance, the EU's restrictive approach to the time limits for direct actions demonstrates this. Article 263(6) provides that 'the proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'. As Lenaerts, Maselis and Gutman¹²² have noted there are exceptions which can be raised where the time limits have been exceeded but 'these exceptions are strictly interpreted'.¹²³

The impact of a strict application of these rules is clear: they represent a further procedural hurdle that the individual applicant has to surpass in order to challenge the measure. Of course, the nature of this hurdle may be different to the English law distinction between the permission and full hearing stage. However the point here is not a like for like comparison or even to overly focus on the nature of the filter itself: rather the point here is to note that it is descriptively incorrect to say there is an

¹²² Lenaerts, Maselis & Gutman, '*EU Procedural Law*' (1st Edn, 2014)

¹²³ Ibid. para 7.208; the authors cite Case C-73/10 P *Internationale Fruchtimport Gesellschaft Weichert v Commission* [2010] ECR I-11535, para 41 ('no derogation from the application of the European Union's rules on procedural time-limits may be made save where the circumstances are quite exceptional'). Lenaerts, Maselis & Gutman (n 122) also cite Case C-266/10 P *Seacid v European Parliament and Council* [2010] ECR I-133, Summ. Pub., para 30

absence of *any* further filters in the EU (which could therefore explain the standing rules).

(B) The Flexibility Evident in the EU's Approach to Remedies

It is also not possible to say that the EU's approach to remedies is overly rigid and certainly one would not be in a position to infer this merely by looking at Article 264(1) in isolation. The reality is that the EU takes a more flexible approach with how it grants annulment, a point which is demonstrated further by a brief comparison with English law and some of the similarities there. This is demonstrated by various facets of the system.¹²⁴

Firstly, Article 264(2) gives the Court more flexibility. The provision says:

'However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive'

As Craig has noted the function of Article 264(2) is to 'qualify the extent of the nullity'¹²⁵ and that it has 'helped the EU Courts to deal with the problems of retroactive nullity, since it embodies an explicit discretionary power to determine that certain effects of a

¹²⁴ As noted by (for instance), Craig (n 44)

¹²⁵ Craig (n 44), 729

void measure shall be definitive'.¹²⁶ A recent restatement of this provision's purpose can be found in *European Parliament and Commission v Council*:¹²⁷

'on grounds of legal certainty, the effects of such an act may be maintained, in particular where the immediate effects of its annulment would give rise to serious negative consequences for the persons concerned and where the lawfulness of the act in question is contested [on certain grounds]...' ¹²⁸

The discretionary nature of the power afforded to the Court undermines any remedial certainty which the successful individual applicant may have.

Secondly, the flexibility with which the EU treats the remedial regime is also highlighted by Craig in terms of how the EU courts 'determine the effects of an error on the overall validity'¹²⁹ and he cites the decision in *Limburgse Vinyl*.¹³⁰ The CFI noted that a previous decision had been annulled on:

'account of a procedural defect affecting only the manner in which it was finally adopted by the Commission. Since the procedural defect occurred at the final stage of the adoption of the 1988 decision, the annulment did not affect the validity of the measures preparatory to that decision, before the stage at which the defect was found...' ¹³¹

¹²⁶ Craig (n 44), 735

¹²⁷ Joined Cases C-103/12 and C-165/12 *European Parliament and Commission v Council* ECLI:EU:C:2014:2400

¹²⁸ Ibid. para 90. See also the examples cited by Craig (n 44) 730, including Joined Cases C-402/05 P and C-415/05 P *Kadi* ECLI:EU:CU:2008:461 and Case C-378/00 *Commission v EP and Council* [2003] ECR I-937, para 73 – 77.

¹²⁹ Craig (n 44) 729

¹³⁰ Cases T-305-307, 313-316, 318, 325, 328 – 329 and 335/94 *Limburgse Vinyl Maatschappij NV and others v Commission* [1999] ECR II-931

¹³¹ Ibid. para 189 (and see para 193). Craig also cites other decisions such as Case C-51/92 P *Hercules Chemicals NV v Commission* [1999] ECR I-4235.

Equally, a more flexible approach emerges, as noted by Craig,¹³² from the EU's power to grant partial annulment as outlined in *Commission v Département du Loiret and Scott SA*¹³³ in certain circumstances.

Thirdly, further evidence of the EU's remedial flexibility emerges from a slightly different context than annulment. The CJEU has evolved an ability to 'impose temporal limitations on its own judgments'¹³⁴ in certain situations in order to limit the impact of its interpretations of the law.¹³⁵ As commentators such as Forsyth¹³⁶ have noted, this can be seen as representing an example of *prospective overruling*, the notion as mentioned above. Forsyth¹³⁷ specifically cites the Court's decisions in *Barber*¹³⁸ and *Defrenne*¹³⁹ in this context. In the former decision the Court noted:¹⁴⁰ 'overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes'.¹⁴¹ Some similarity can be identified between the Court's approach in these cases and the English notion of *prospective overruling* which was defined by Lord Nicholls as referring to 'a shorthand

¹³² Craig (n 44), 729.

¹³³ Case C-295/07 P *Commission v Département du Loiret and Scott SA* [2008] ECR I-9363, see in particular (as Craig notes *ibid.* paragraphs 103 - 106). See also Case C-244/03 *France v Parliament and Council* [2005] ECR I-4021, paragraphs 12 - 13.

¹³⁴ Lewis (n 98), 5-034. Forsyth (n 113), 375; Lewis (n 98), para 5-034. By way of support for this, Lewis cites Case 43/75 *Defrenne v SABENA* [1976] ECR 455; Craig (n 44) also uses somewhat similar terminology at 735 - 736 to refer to the Article 264(2) TFEU jurisprudence.

¹³⁵ See also Lenaerts, Maselis & Gutman (n 122), para 6.34

¹³⁶ Forsyth (n 113), 375.

¹³⁷ *Ibid.*

¹³⁸ Case C-262/88 *Barber v Guardian Royal Exchange* [1990] ECR I-1944.

¹³⁹ *Defrenne v SABENA* (n 134); see also Lewis (n 98), 5-034

¹⁴⁰ Forsyth (n 113), 375.

¹⁴¹ *Barber* (n 138), para 44.

description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions'.¹⁴² The comparison with English law is significant: prospective overruling was used above as an example of the remedial flexibility evident in English law. Therefore it follows that the presence of similar mechanisms in EU law is again evidence of flexibility in the EU approach.

All of these elements of remedial flexibility undermine the degree to which a successful individual applicant can be certain of obtaining the full annulment remedy at the conclusion of the proceedings: it thereby undermines the degree to which this can represent a clear explanation for the rules themselves.

(iii) Summary

This subsection of the thesis has sought to explore how far the procedural context of the European Union could explain the restrictive approach taken towards the standing rules for the individual applicant. Inevitably, constraints of space have meant that I need to focus broadly on two elements: the presence of other filters and control mechanisms and the degree of remedial rigidity or flexibility in granting an annulment after proceedings have finished.

¹⁴² *In re Spectrum Plus Ltd* (n 120), para 8.

The above has sought to show that in theory, *if there was* an absence of further filters and a rigid approach towards granting remedies then this could go some way to explaining the standing rules, as well as having an impact on our perception of their restrictiveness from an access to justice perspective.

However the flaws in the descriptive presentation undermine the practical reality with which either of these points *could* explain the approach to standing: the EU has various other filters and allows for a great deal of flexibility at the remedial stage. A discrete comparison with English law shows both the explanatory potential of a contextual approach and the difficulties with either of these specific elements being able to definitively explain why the EU takes a restrictive stance towards the rules of standing.

It may still be that the wider procedural framework could explain the standing approach and this thesis has sought to show here how these elements could interact with each other. However a much broader analysis of the relevant procedural elements would need to be conducted in order to make that assertion here.

(b) Partial Judicial Subsidiarity

The limitations in the explanatory capacity of the procedural elements identified lead one to focus on other factors making up the constitutional context. This subsection of the thesis seeks to explore how far the presence of *partial judicial subsidiarity* within the CJEU jurisprudence can explain the narrowness of the standing rules. There are two central points to this analysis.

First, through an emphasis on Article 267 TFEU and the role of national courts, it is clear that the Court does demonstrate an underlying approach which resembles *judicial subsidiarity* concerns. This does have the potential for partially explaining why the direct review rules are narrowly construed but it also has a limited impact on one's perception of their narrowness from an access to justice standard, because it sheds light on the alternative opportunities which the individual applicant is encouraged to use to obtain substantive remedies.

Second, this analysis must be qualified (although to a lesser extent than with the procedural discussion above) because the notion of *judicial subsidiarity* which exists within the CJEU jurisprudence can be refined. Through a comparison with the ECtHR case law, it is clear that the CJEU notion is one of *partial judicial subsidiarity* because there is a fundamental absence of a '*positive empowerment*' rationale within the CJEU case law: national courts neither have the full powers to act regarding the claims in question nor are they considered best placed for the task.

Both the fact that the notion is *partial* and the fact that the underlying elements of indirect review have been extensively analysed by certain commentators undermine the degree to which this analysis can really radically change our perception of the rules.

(i) Existence of Judicial Subsidiarity

Looking at the central CJEU jurisprudence on standing, a clear emphasis on *judicial subsidiarity* concerns can be seen through the consistent encouragement and facilitation of the indirect review mechanism. This element of the constitutional context could help explain why direct review rules of standing for the individual are so narrowly construed. It also has the capacity to impact our perception of the rules' narrowness.

Before demonstrating the presence of *judicial subsidiarity* in these cases, it is worth noting the relationship of my analysis with the previous work of commentators in the field. It is not the case that this phenomenon has not been noted by some commentators: for instance, evidence of this notion has been explored recently by Bogojević who, particularly with respect to environmental law, argued in favour of 'viewing access to justice through the prism of judicial subsidiarity'.¹⁴³ Equally, Enchelmaier also mentions *subsidiarity* in response to the arguments made by AG Jacobs in *UPA*¹⁴⁴ concerning the role of national courts.¹⁴⁵

¹⁴³ Bogojević (n 9) 8, 25 for instance.

¹⁴⁴ *UPA* (n 18), Opinion of AG Jacobs.

¹⁴⁵ Enchelmaier (n 9), 202; equally Carozza in '*Subsidiarity as a Structural Principle of International Human Rights Law*' [2003] 97 American Journal of International Law 38, 56 argues that 'a certain degree of subsidiarity is implicitly reflected in the existing fundamental rights law of the

I agree with Bogojević's approach in at least two ways. First, that the CJEU 'does not explicitly uphold, or refer to judicial subsidiarity'¹⁴⁶ and indeed the task here is to consider evidence of an approach which bears resemblance to *judicial subsidiarity* or, using Bogojević's terms, 'gives expression to judicial subsidiarity'.¹⁴⁷ Second and consequently, that evidence of an expression of this concept will be demonstrated, as Bogojević¹⁴⁸ also notes, through a development of the *national court* routes to access justice.

However, my work diverges from the academic commentary and seeks to build upon it in the following ways. First, unlike Bogojević who focuses in large part on environmental law (even though she considers some of the recent cases such *Inuit*¹⁴⁹ and *Telefónica*¹⁵⁰), the approach here is to identify the presence of *judicial subsidiarity* within the jurisprudence mentioned in Chapter One. Second, my work critically refines the notion and argues that the cases reflect a '*partial*' form of judicial subsidiarity.

Further, it would go too far to suggest that the *critics* of the standing rules themselves ignore the elements which underlie judicial subsidiarity and as noted above, the

European Union'. Peers & Costa (n 30) 95 also mention 'judicial subsidiarity', however they argue that it 'points in the opposite direction' and at 102, 'towards greater centralisation of the control of the validity of EU acts'. See also Müller, 'Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law' [2011] Journal of Environmental Law 505, 506.

¹⁴⁶ Bogojević (n 9), 7. Enchelmaier (n 9) 202 also looks for the presence of the 'same considerations' rather than explicit statements as such.

¹⁴⁷ Bogojević (n 9), 11.

¹⁴⁸ Ibid. and at 20. At 7, she says: 'the CJEU construes the described 'direct' judicial venues narrowly, and the 'indirect' judicial paths broadly'.

¹⁴⁹ *Inuit* (n 5).

¹⁵⁰ *Telefónica* (n 5).

possibility of indirect review has been extensively analysed and acknowledged within the academic literature. This acknowledgment means that a focus here on indirect review cannot be presented as a ‘new route’. However, as Bogojević alludes to, it is not always the case that this is framed in terms of *subsidiarity* (although some of these instances have been noted here):

‘the CJEU construes the described “direct” judicial venues narrowly, and the “indirect” judicial paths broadly. ... To EU lawyers, this is a straightforward finding and a well known image of the EU legal order as a multi-level governance regime. Framing these issues from the perspective of judicial subsidiarity, however is both novel and meaningful. It is novel in the sense that judicial subsidiarity is rarely, if ever, mentioned or analysed in any relevant scholarly debates, or invoked in any corpus of EU law’¹⁵¹

The task of this analysis is to explore how far this notion can go towards explaining the approach taken in the standing rules. In light of these points, the key concern of this sub-section is to show evidence of this constitutional context within the central jurisprudence. There are two points which descriptively demonstrate the presence of *judicial subsidiarity* type concerns in these cases.

First, as Bogojević notes,¹⁵² there is the consistent position that it is the Member States, rather than the centralised Union courts, who have the key responsibility of ensuring the right to effective judicial protection. For instance, the Court stated in *UPA*¹⁵³:

¹⁵¹ Bogojević (n 9) at 7; see also page 20.

¹⁵² Ibid.

¹⁵³ *UPA* (n 18).

‘it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection’¹⁵⁴

In the next paragraph, the Court supplements this position by saying it is incumbent upon Member States to facilitate this protection by formulating their domestic procedural rules so as to permit ‘natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application’.¹⁵⁵ Therefore, *judicial subsidiarity* concerns are seen through this two-fold approach, repeated by the CJEU elsewhere:¹⁵⁶ the Court gives ultimate responsibility to local actors (rather than centralised bodies) to ensure protection and then prescriptively requires national courts to make the necessary amendments to effectuate this alternative opportunity to access justice.¹⁵⁷

Second, a clear focus on *judicial subsidiarity* type concerns comes not only from the CJEU’s emphasis of the availability of national court routes per se,¹⁵⁸ but through the wide scope envisaged for the Article 267 procedure, as contrasted with the narrow scope of direct review.¹⁵⁹ This is demonstrated by *UPA*¹⁶⁰ and the statement that individuals could challenge ‘before the courts the legality of any decision or other

¹⁵⁴ Ibid. para 41.

¹⁵⁵ Ibid. para 42.

¹⁵⁶ See *Jégo-Quéré* (n 19), para 31-32 and *Inuit* (n 5), para 100; see more recent affirmation of the *Inuit* paragraphs in Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117, para 34.

¹⁵⁷ Albers-Llorens, ‘Remedies against the EU institutions after Lisbon: an era of opportunity?’ [2012] CLJ 507, 515.

¹⁵⁸ Case T-238/14 *EGBA, RGA v. Commission* ECLI:EU:T:2016:259, para 41; *UPA* (n 18), para 40; *Telefónica* (n 5) paras 57 and 59 and Opinion of AG Kokott, paras 52, 53, 76 – 78.

¹⁵⁹ Similar to *Bogojević* (n 9), 20: ‘[judicial subsidiarity] is clearly expressed in steps taken by the CJEU to make it easier for individual applicants to bring cases before national courts’.

¹⁶⁰ *UPA* (n 18).

national measure'.¹⁶¹ There are numerous further examples of this within the case law¹⁶² and the position was illustrated clearly by AG Elmer in *Atlanta*¹⁶³:

'Individuals have only a limited scope for bringing an action under Article 173 of the Treaty for a review of the legality of Community legal measures ... individuals are to a greater extent entitled to bring actions before the national courts against legal measures affecting them'¹⁶⁴

Similar to Bogojević's analysis,¹⁶⁵ what the CJEU does in these earlier cases is to preserve a much wider scope for indirect review. From an access to justice perspective, this is important because one can see the CJEU's efforts to widen the applicants' ability to substantively access justice through *this* route rather than through direct review.

Overall, the effect of this consistent encouragement and facilitation of indirect review is to show the presence of *judicial subsidiarity* concerns within the central case law. The underlying emphasis on national courts helps explain why the CJEU narrowly conceives of the role of the individual in direct review but it also (to a limited extent) qualifies one's perception of the restrictive nature of these standing rules from an access to justice perspective, by highlighting the CJEU's efforts consistently to facilitate¹⁶⁶ and expand alternative opportunities for individuals to substantively access justice.

¹⁶¹ Ibid. para 42 (emphasis added); *Jégo-Quéré* (n 19) para 32.

¹⁶² *Telefónica* (n 5) para 59; *Inuit* (n 5) para 94-95.

¹⁶³ Case C-465/93 *Atlanta* [1995] ECR I-3761.

¹⁶⁴ Ibid. Opinion of AG Elmer, para 22.

¹⁶⁵ Bogojević (n 9), 7: 'the CJEU construes the described 'direct' judicial venues narrowly, and the 'indirect' judicial paths broadly'.

¹⁶⁶ Ibid. at 14 alludes to this point at footnote 57: 'Article 267 TFEU is seen to 'facilitate access to justice' via national courts'.

(ii) Refinement and Qualification of Judicial Subsidiarity: A Partial Concept

However, this element of the constitutional context and its explanatory power needs to be refined and qualified further. The nature of the CJEU doctrine which emerges from a comparative appraisal with the ECtHR jurisprudence is that the CJEU merely exhibits a *partial* form of *judicial subsidiarity*. The reason being that there is no ‘*positive empowerment*’ rationale or philosophy within the CJEU case law here, comparable to the approach underlying the ECtHR elaboration of subsidiarity.

By ‘*positive empowerment*’ rationale, I refer to the presence of an *attitude* and the conferral of *substantive powers*.¹⁶⁷ The term thus refers to both (i) an underlying assumption that local actors (here the domestic courts) are best or well placed to conduct the judicial task and (ii) the substantive conferral of the full powers on these local bodies to execute the judicial function in question.

This argument is important because it qualifies the degree to which *judicial subsidiarity*, as a contextual factor, can really be seen as offering *real* or *fully developed* alternative opportunities to access justice, thereby changing any perception of the standing rules’ narrowness. The effect of this refinement is not to suggest that alternative opportunities to access justice are not encouraged: it merely limits the scope of said opportunities and qualifies the extent to which it can fully explain the approach taken.

¹⁶⁷ There is some potential similarity in the use of the terms ‘*positive*’ and ‘*negative*’ within this context with Carozza (n 145), 56.

The structure here will be firstly to demonstrate the presence of a '*positive empowerment*' rationale within the ECtHR conceptions of subsidiarity. Secondly, the absence of such a rationale in the CJEU approach shows how the doctrine is *partial*. Thirdly, it will be shown briefly that the reason for this lies in the Court's concern with uniformity.

(A) Nature of the ECtHR Approach

At the outset, it should be noted that comparing the CJEU and ECtHR jurisprudence is not without pitfalls given the fact that, for instance, ECtHR subsidiarity is formulated with respect to both national *courts* and *institutions* rather than just domestic courts. However, to avoid these difficulties, the analysis here is more general, looking at how each jurisdiction treats local actors in order to refine the CJEU approach.

In light of this, the ECtHR conception of subsidiarity demonstrates the distinct presence of the '*positive empowerment*' rationale: namely, the two-fold position that national courts are largely well placed to conduct the review and the substantive conferral of the powers to the national courts in order to achieve this.

Mowbray has offered a detailed historical study¹⁶⁸ of subsidiarity's evolution in the ECHR. He argues that there has been a persistent emphasis on the requirement for

¹⁶⁸ Mowbray, '*Subsidiarity and the European Convention of Human Rights*' [2015] Human Rights Law Review 313.

‘applicants to exhaust domestic remedies before initiating proceedings at Strasbourg’¹⁶⁹ as well as the margin of appreciation doctrine.¹⁷⁰ This in part shows the substantive conferral of discretion and powers onto the local courts, thus demonstrating the ‘*positive empowerment*’ rationale. However, it is within the reasoning of some of the central cases mentioned by Mowbray, that this rationale is fully demonstrated.

For instance, in *Handyside v UK*¹⁷¹ the Court noted:

‘The institutions created by it [the Convention] make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements’¹⁷²

This passage demonstrates both aspects of the ‘*positive empowerment*’ rationale. First, it accords substantive primacy to the domestic courts within the ECHR judicial review process through the principle of the exhaustion of domestic remedies. Second, the phrase underlined reflects the normative positive view that national courts are in the *best position* to conduct judicial review. This embodies the philosophy of ‘*positive empowerment*’ within the judicial subsidiarity doctrine.

¹⁶⁹ Ibid. 339.

¹⁷⁰ Ibid.

¹⁷¹ *Handyside v UK* [1976] Application No. 5493/72, mentioned by Mowbray (n 168), 322.

¹⁷² *Handyside* (n 171), para 48 (emphasis added).

This sentiment is reflected in a number of cases:¹⁷³ for instance, in *James v United Kingdom*¹⁷⁴ or *A and Others v United Kingdom*,¹⁷⁵ where the Court noted that:

‘national courts should initially have the opportunity to determine the questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries’¹⁷⁶

The presence of this ‘*positive empowerment*’ rationale underlying the ECtHR conception of subsidiarity in the judicial context is clear.

(B) Comparison with the CJEU Approach: *Partial* Judicial Subsidiarity

However, this ‘*positive empowerment*’ rationale is largely absent from the CJEU conceptualisation of *judicial* subsidiarity: national courts are not given the necessary judicial capabilities to perform judicial review to its full degree and simultaneously, there is an underlying assumption that national courts are *not capable* of conducting this task compared to the CJEU. This means that this contextual factor can be better

¹⁷³ Some further examples also noted by Mowbray (n 168), 322: *Goodwin v UK* Application No 28957/95, Merits and Just Satisfaction, 11 July 2002, para 85.

¹⁷⁴ *James v United Kingdom* [1986] 8 EHRR 123, para 46 as noted by Von Staden in ‘*The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*’ [2012] 10 International Journal of Constitutional Law 1023, 1041.

¹⁷⁵ *A and Others v United Kingdom* [2009] Application No 3455/05, also noted by Mowbray (n 168), 326.

¹⁷⁶ *Ibid.* para 154.

characterised as '*partial*' *judicial subsidiarity*¹⁷⁷ and it is here that this thesis most clearly diverges from Bogojević and Enchelmaier: the statement that the CJEU 'allocates judicial powers to resolve judicial matters closer to the applicants'¹⁷⁸ is misleading because the CJEU only concludes disputes at this level where the national courts do not invalidate the measures.

The absence of the '*positive empowerment*' rationale is best evidenced by the decision in *Foto-Frost*.¹⁷⁹ First, there is the substantive limitation that national courts do not have the power to invalidate EU measures.¹⁸⁰ Second, there is the negative perception of the national courts' ability to act in these situations promulgated by both AG Mancini and the CJEU. The Court noted that 'the Court of Justice is in the best position to decide on the validity of Community acts'¹⁸¹ and AG Mancini went further:

'to review the validity of Community measures is a delicate task necessitating perfect knowledge of the relevant provisions, which are often drafted in an unpalatable, even esoteric jargon, or of economic data to which there is no ready access ... Therefore, what is involved is a task for which the national court is ill equipped or, in any case, very much less well equipped than the Court of Justice'¹⁸²

¹⁷⁷ In this respect, the thesis diverges from Peers & Costa (n 30), 95 who mention the principle of 'judicial subsidiarity' but who argue that the *Foto-Frost* decision implies that 'this train has already left the station' (rather than the more partial refinement of the doctrine which I advance here).

¹⁷⁸ Bogojević (n 9), 25; similarly framed by Enchelmaier (n 9), 203.

¹⁷⁹ *Foto-Frost* (n 37).

¹⁸⁰ Ibid. para 20.

¹⁸¹ Ibid. para 18.

¹⁸² Ibid. page 4219 (emphasis added).

This stance conflicts with the CJEU's attitude at paragraph 14 where the Court noted that national courts are permitted to: 'consider the validity of a Community act and ... [if the invalidity grounds are 'unfounded'] they may reject them, concluding that the measure is completely valid'.¹⁸³

The difference between this approach and that of the ECtHR or traditional theoretical presentations is clear. Whereas in the ECtHR case law, the substantive elements of subsidiarity include the requirement that applicants exhaust all domestic remedies, the CJEU heavily restricts the powers afforded to the domestic courts. Equally, whereas the ECtHR positively highlights the ability of the lower actors to perform the functions in question, within the CJEU there is a clear ceiling on the perceived capability of the national courts.

The hallmarks of this *partial judicial subsidiarity* approach can also be seen in other contexts. For instance, with regards to interim relief in indirect review, the CJEU emphasises the role of the national courts by permitting them to suspend European law temporarily but their power is limited by making the grounds for the granting of such suspension narrow and difficult to satisfy. The conditions noted in *Atlanta*,¹⁸⁴ which developed the position in *Zuckerfabrik*,¹⁸⁵ set a high threshold¹⁸⁶ (for instance, where the national court '*entertains serious doubts as to the validity of the Community act*'¹⁸⁷). In a similar manner to *partial* subsidiarity, the Court therefore decentralises

¹⁸³ Ibid. para 14.

¹⁸⁴ *Atlanta* (n 163).

¹⁸⁵ Case 143/88 *Zuckerfabrik* [1991] ECR I-415.

¹⁸⁶ *Atlanta* (n 163), para 51; *Craig* (n 44) 727.

¹⁸⁷ Ibid.

some of the powers to the national courts but retains a degree of central authority through making those powers difficult to engage with.

The partial nature of the CJEU approach therefore qualifies the degree to which this contextual factor can change the perception of the narrowness of the standing rules and it qualifies how far this factor really has the potential to explain the standing rules. As noted above, the presence of indirect review is a point noted by other scholars, but the reconceptualization here of a *partial* notion has the clear effect of limiting the extent to which there are real, comprehensive opportunities for the individual to access justice in the national courts.

(C) Rationale for this Approach: Uniformity

The rationale for *partial* judicial subsidiarity approach lies in the CJEU's explicit concern with ensuring the *uniformity* of the legal system.

This is again demonstrated by the reasoning in *Foto-Frost*, where the Court emphasised that the 'requirement of uniformity is particularly imperative when the validity of a Community act is in question'.¹⁸⁸ The importance of this rationale within this case law is also reflected in the *Zuckerfabrik* decision when the Court emphasised

¹⁸⁸ *Foto-Frost* (n 37), para 15; this point was reflected by Weiler & Haltern in 'The Autonomy of the Community Legal Order – Through the Looking Glass' [1996] 37 Harvard International Law Journal 411, 433.

that ‘such uniform application is a fundamental requirement of the Community legal order’.¹⁸⁹

It is clear that this rationale helps ensure that judicial subsidiarity is only partial here: a degree of decentralisation combined with a general retention of control on behalf of the centralised adjudicative bodies.

(iii) Summary

This section has argued that a focus on *judicial subsidiarity* has the potential to go some way towards explaining the direct review rules of standing for the individual applicant: namely that there is this continued emphasis *and* facilitation by the CJEU on the role of the national courts within the process of indirect review which contrasts with the narrow rules. Equally, the expansion and encouragement of alternative routes for individuals to access justice, thereby also somewhat qualifies one’s perception of the rules’ narrowness.

However, although this factor can explain and have a limited impact on one’s perception of the rules’ restrictiveness, the extent of this factor’s ability to this do is in itself qualified. Firstly, the underlying elements of this subsidiarity (in particular the nature of indirect review) has been noted elsewhere. Secondly and more importantly, looking at the ECtHR, it is clear that the CJEU conceptualisation of *judicial subsidiarity* is *partial* in nature due to the absence of the ‘*positive empowerment*’ rationale. The

¹⁸⁹ *Zuckerfabrik* (n 185), para 26.

extent of the alternative opportunities to access justice noted above is therefore qualified because although there is an emphasis on the national courts, such an approach comes without both the full conferral of powers which one would expect to be conferred in order to carry out this function and without the emphasis on the courts' ability to carry out this task.

(c) Wider Role for Member States and Privileged Applicants

The third principal element of the constitutional context which has the potential for explaining the individual standing rules is the wide role envisaged for the Member States and privileged applicants, as evidenced through Article 263 TFEU. This has the capacity to help explain why, by contrast, the individual's role is so limited in direct review. It also can affect our perception as to how far the rules can be considered to be narrow because this role reveals alternative, indirect methods for the individual to access justice.

Two principal propositions will be examined: first, that Member States and privileged applicants have this wider role¹⁹⁰ and subsequently, how this approach compares to other jurisdictions like English law.

(i) The Nature of this Role

There is a juxtaposition¹⁹¹ within the standing rules and Article 263 TFEU between the role envisaged for privileged applicants who can challenge measures more broadly and the individual who is restricted by the fourth paragraph.¹⁹² The wide scope of access for privileged applicants has been emphasised at various points in the jurisprudence,¹⁹³ for instance in *Inuit*¹⁹⁴:

¹⁹⁰ Harlow (n 9) 218.

¹⁹¹ Alluded to by Harlow (n 9) 228.

¹⁹² Alluded to in *Inuit* (n 5) Opinion of AG Kokott, para 37.

¹⁹³ *UPA* (n 18), Opinion of AG Jacobs, para 69.

¹⁹⁴ *Inuit* (n 5)

‘Next, Article 263 TFEU makes a clear distinction between the right of the European Union institutions and Member States to institute proceedings, on the one hand, and the right of natural and legal persons to do so, on the other’¹⁹⁵

The impact of these wide standing rules is that these privileged applicants can theoretically challenge all forms of legislative measures.¹⁹⁶ This role is important for my analysis because it has the potential to explain why the individual’s role in direct review is restricted by contrast: the individual is not considered the constitutionally appropriate body to *directly* challenge general measures in such broad range of situations but the privileged applicants *are*. However, this role also has the potential to have a limited impact on our perception of how far the individual standing rules are really narrow because from an access to justice perspective, individuals indirectly benefit¹⁹⁷ from these larger bodies’ ability to litigate these provisions on their behalf, either at their instigation or independently.

Indeed, this capacity was somewhat noted by the Court in *Netherlands v Ten Kate Holding Musselkanaal BV*¹⁹⁸ where the Court concluded *inter alia*:

‘Community law does not impose any obligation on a Member State to bring an action for annulment or failure to act for the benefit of one of its citizens. Community law does not,

¹⁹⁵ Ibid. para 53; this position is immediately contrasted in the subsequent paragraph with the scope of natural and legal persons to institute proceedings. See Tridimas and Gari, ‘*Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001 – 2005)*’ [2010] ELR 131 in terms of how this operates: at 172 (during the relevant period)

¹⁹⁶ Craig and De Búrca (n 3), 514.

¹⁹⁷ As acknowledged by the ECtHR in *Bosphorus v Ireland* [2006] 42 EHRR 1, para 163.

¹⁹⁸ Case C-511/03 *Netherlands v Ten Kate Holding Musselkanaal BV* [2005] ECR I-8979 (noted Craig and De Búrca (n 3), 514)

however, in principle preclude national law from containing such an obligation or providing for liability to be imposed on the Member State for not having acted in such a way¹⁹⁹

The Member States' capacity to challenge measures in the 'public interest' in this regard has been acknowledged by Harlow²⁰⁰ who said that: 'it might be argued that pluralist representation of the public interest is ensured through the doctrine of privileged access to the Court by Member States and Community institutions'.²⁰¹ Indeed litigation brought in relation to the 'public interest', perhaps combined with wide standing rules to facilitate this, is a concept which has been noted by a number of commentators.²⁰²

(ii) Similarities with Other Systems

The constitutional choice of having public bodies or institutions challenge measures more broadly, perhaps in the public interest, whilst restricting the ability of the individual applicant to litigate (at least directly in the EU) draws parallels with other jurisdictions.²⁰³ This dynamic is somewhat analogous with English law, particularly the traditional role of the Attorney General and the nature of the relator claim (especially *before* the liberalisation of the standing rules for individuals²⁰⁴). The relator claim

¹⁹⁹ Ibid. para 32.

²⁰⁰ Harlow (n 9).

²⁰¹ Ibid. 218 where she also notes a number of different elements to this characterisation including intervention rules.

²⁰² For example Harlow (n 9); Miles, '*Standing under the Human Rights Act 1998: theories of rights enforcement and the nature of public law adjudication*' [2000] CLJ 133; Cane, '*Standing up for the Public*' [1995] PL 276, 276; it is in light of this literature that this terminology will be used.

²⁰³ See also Albers-Llorens (n 157), 519.

²⁰⁴ De Smith's Judicial Review (8th Edn 2018), para 2-016; Harlow (n 9) 214.

refers, as Craig notes, to the ability of the Attorney General to ‘proceed at the relation of an individual complainant where she does not possess the requisite interest to bring a case in her own name’²⁰⁵ and the distinction between the roles of the Attorney General and individual within the public law process was explained in *Gouriet*²⁰⁶:

‘a fundamental principle of English law [is] that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown’²⁰⁷

The comparison is clear: the privileged applicants have a broader role in the EU system analogous to the Attorney General and they are capable of litigating broader measures independently or on behalf of the individual whose position is more restricted in direct review. This comparison has been noted by Harlow, who looks at the Member States more broadly²⁰⁸: ‘When he acts as relator, or intervenes to take over or halt criminal proceedings, it would be correct to describe the Attorney General as a “privileged applicant”’.²⁰⁹

(iii) Qualifications and Potential Underlying Explanations

There are a number of qualifications to this element’s ability to explain the narrow position taken towards standing rules.

²⁰⁵ Craig (n 11) para 25-009.

²⁰⁶ *Gouriet v Union of Post Office Workers* [1978] AC 435.

²⁰⁷ Ibid. Lord Wilberforce, 477.

²⁰⁸ Harlow (n 9), 218.

²⁰⁹ Ibid. 214.

Firstly, it ought to be noted that this conception of the role of the privileged applicant and the relator action parallels is somewhat undermined by the fact that there is limited detailed elaboration of this role by the CJEU. Perhaps there is some move towards such an approach when AG Kokott in *Inuit*²¹⁰ (also noted by Kornezov²¹¹) highlights the possibility of an individual being:

‘free to write to the competent authority ... to request confirmation that the requirement or ban in question is not applicable to him. A negative decision by the national authority could then be challenged before the national courts, where the invalidity of the contested Regulation could be pleaded’²¹²

However, this point does not necessarily undermine the argument unduly because the task here is to identify potential explanatory reasons within the constitutional context which might further one’s understanding of the approach taken.

Second, it is again not suggested that the Member States and privileged applicants’ role is ignored by academic commentators and in this regard, this factor also has a limited impact on our perception of the rules’ narrowness because it does not represent the ‘finding’ some new element not previously identified.

²¹⁰ *Inuit* (n 5), para 120.

²¹¹ Kornezov (n 23), 261.

²¹² *Inuit* (n 5), para 120. Equally see Case C-511/03 *Netherlands v Ten Kate Holding Musselkanaal BV* (noted Craig and De Búrca (n 3), 514), (n 198) para 32.

Third, it is also clear that outlining the presence of this potential, alternative route for individuals to access justice indirectly clearly does not mean that the rules become justifiable or not overly restrictive: indeed whether or not any of these contextual factors impact the justificatory analysis is the focus of Chapter Three and will depend on a number of factors, including how practical this option actually is. However, the emphasis here in Chapter Two is merely to point out that the nature of this contextual factor and to go some way to exploring its explanatory potential.

Fourth, and perhaps as a result of the lack of a comprehensive elaboration of this element by the CJEU, the precise reasons which may or may not motivate this constitutional choice are not entirely beyond doubt. For instance, it may be reflective of the underlying political tensions²¹³ and as Bogojević notes, the standing rules ‘enables the EU institutions and the Member States to maintain a “quasi-monopoly” in litigating directly before the EU courts ... As such standing requirements in the EU context reflect a deeper interest in maintaining the delicate balance between the Member States’ and the Commission’s regulatory powers at the EU level’.²¹⁴

In summary, it has been argued that this element of the constitutional context has the potential to go some way towards explaining the narrowness of the direct review standing rules for the individual. Indeed the individual’s restricted position might be more explicable when seen in juxtaposition with the wider role of privileged applicants because it is the latter who are seen as the more constitutionally appropriate litigant

²¹³ Alluded to by Bogojević (n 9)

²¹⁴ Bogojević (n 9), 21

to challenge general measures more broadly. This also, subject to the qualifications noted, could impact our perception of the precise narrowness of the standing rules because individuals can indirectly obtain justice by having these bodies act independently or on their behalf to challenge broader measures. This thereby ensures that even *if they personally* do not directly review such measures, they are nevertheless judicially reviewable by bodies within the system.

3. Chapter Summary

The ambition of this Chapter has been to outline the specific contextual factors which lie at the heart of this thesis and to explore how far they can explain the narrow direct review rules of standing. With particular reference to underlying concepts of judicial subsidiarity and the role of privileged applicants, it can be seen that certain elements of this context have some capacity to shed light on why a narrow approach has been taken. This analysis has also shown (in relation to the first research question) that although the standing rules for the individual are narrow, these elements could, to a limited degree, qualify the perception of the rules' restrictiveness from an access to justice perspective, by showing the various alternative routes to access justice for the individual litigant.

However, this Chapter also highlights the clear limitations and difficulties which this explanatory exercise faces: the procedural context may well indeed hold the answers but neither of the precise factors which have been the focus of this examination fulfil the task. Indeed, to properly consider the wider procedural framework requires a comprehensive analysis of all the relevant issues, a task which is beyond the scope of this work. Although better opportunities may lie with *judicial subsidiarity* and the role of privileged applicants, the analysis has shown that the former is clearly a partial concept in how it has developed in the CJEU framework. More fundamentally, the ability of these factors to *change our perception* of the rules' restrictiveness is all qualified by the fact that these are not *new* factors but have been somewhat part of the academic debate already, even if the focus here may differ in some ways.

What this Chapter has not done is to normatively consider how this constitutional context affects the overall justificatory assessment of the standing rules: namely whether the rules of standing for the individual are still unjustifiably narrow. This will form the focus of the third Chapter.

C. CHAPTER THREE: EFFECTIVE JUDICIAL PROTECTION AND ACCESS TO JUSTICE CONCERNS

This thesis explores how far a contextual analysis (and the elements identified here) can explain and justify the EU standing rules for the individual applicant. Chapter Two descriptively explored the explanatory potential of certain factors, concluding that *partial judicial subsidiarity* and the *role of privileged applicants* have some capacity to go some way towards explaining the approach taken.

Chapter Three explores whether these contextual factors have any potential to impact the justificatory analysis of the system as a whole: can a focus on these contextual factors change the normative evaluation as to whether the standing rules for the individual are *too narrow*?

There are three broad sections to this Chapter.

The first part assesses the rules of standing against the principle of *effective judicial protection* as it is defined in the CJEU jurisprudence. It argues that when looking at some of the central cases, it is possible to interpret a central underlying priority as focusing on ensuring the *possibility of review*. If the standard is defined in this way, then it is far from clear that the standing rules fail to meet the requirements of this principle, because factors like the role of privileged applicants ensures that review is theoretically available. However, there are a number of methodological and

substantive difficulties with the elaboration of the standard in this way, including the fact that a broader look at the case law (beyond but perhaps even including some of the core cases) demonstrates a focus on '*practical*' effective judicial protection.

Consequently, the second part of this Chapter will focus on '*practical access to justice*'. It will argue that when measured against this standard, the rules are still unjustifiable. The EU system of review leads to a number of access to justice problems for the individual, in part due to the narrowness of the standing rules; if the constitutional context fully addressed these problems then one could justify the standing rules as a whole by saying that the problems facing the individual are solved following a contextual analysis. However, that is not the case: each of the contextual elements represent theoretically legitimate means of formulating access to justice routes but ones which do not realistically address the practical access to justice problems facing the individual litigant, in particular issues of delay and gaps in protection. Therefore the standing rules remain '*overly narrow*'.

This Chapter concludes by proposing a number of different avenues for reform. Similar to the approach alluded to by Bogojević,²¹⁵ the aim is to improve practical access to justice for the individual by largely working within the parameters of the contextual factors identified. This approach follows from the central argument above: if certain factors can be used to go some way towards explaining the rules and these elements

²¹⁵ Bogojević (n 9), 25.

represent a series of theoretically legitimate choices in principle, then any attempts to reform these rules should also arguably seek to operate within said context.

1. Effective Judicial Protection

The purpose of this section is to explore how far the justificatory analysis of the direct review standing rules changes when we focus on the contextual elements identified in this thesis: does an emphasis on *partial judicial subsidiarity* and the *role of privileged applicants* have any bearing on the overall conclusion that the standing rules fail to provide *effective judicial protection*?²¹⁶

The argument here is twofold: first, a possible limited justification can be advanced when one looks at the thematic emphases of some of the relevant cases, namely the prioritisation of the *availability of judicial review*. Judged against this standard, it is far from clear that the standing rules (when viewed alongside these contextual factors) do not meet this standard. Secondly, however, there are a number of methodological and substantive difficulties with this approach: as one expands the case sample, it is clear that the principle does demonstrate a broader focus on the *practicality* of such review.

This section is split into three parts: the first will outline the standard from a core sample of relevant cases on the topic; the second will apply this standard to the standing rules; the third will show the methodological and substantive difficulties with the standard outlined in section one.

²¹⁶ See for reference the conclusions emphasised by AG Jacobs in *UPA* (n 18), para 49 and by Craig (n 2), 499. See also for further reference the analysis of Rhimes, 'Do the EU's rules on standing square up to the principle of effective judicial protection?' UK Human Rights Blog [10 October 2016]

(a) Limited Outline of the Standard

In order to demonstrate the standard which emerges from the CJEU jurisprudence on the principle of *effective judicial protection*, one needs to look at how the CJEU conceptualises the principle and what the requirements of the notion are.

The primary focus for the case sample used to infer this standard is, not exclusively, the jurisprudence highlighted by AG Kokott in *Inuit*.²¹⁷

‘The right to an effective remedy is recognised as a general principle of law at EU level (Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] ECR 1651, para 18; the Unión de Pequeños case [2003] QB 893, para 39; the Jégo-Quéré case [2005] QB 237, para 29; Unibet (London) Ltd v Justitiekanslern (Case C-432/05) [2007] ECR I-2271; [2008] All ER (EC) 453, para 37; Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225; [2008] ECR I-6351, para 335; and DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (Case C-279/09) [2010] ECR I-13849, para 29) and now enjoys the status of a fundamental right of the European Union under article 47 of the Charter of Fundamental Rights.’

The reason for rooting my case sample in AG Kokott’s list is that these cases²¹⁸ are authority for the principle’s very existence within the *standing* or Article 263 TFEU context.²¹⁹ Therefore, an analysis of how the concept is treated within *these* cases provides good evidence as to the relevant standard of effective judicial protection.

²¹⁷ *Inuit* (n 5), Opinion of AG Kokott, para 106.

²¹⁸ Some of which have been considered by Arnall, ‘*The principle of effective judicial protection in EU law: an unruly horse?*’ [2011] 36 ELRev 51, 54–55 and 69.

²¹⁹ Noting however that there are methodological problems with identifying the standard (see below)

At the outset, a few preliminary methodological issues should be noted. Firstly, it is clear that this analytical exercise could give rise to a problem of circularity: of deriving the standard from the standing cases mentioned in Chapter One like *UPA*,²²⁰ then narrowly reapplying them to the standing rules to justify a conclusion that there is no potential incompatibility. To avoid this, I am using a wider data sample to infer the standard than merely these cases and I am applying the standard which emerges to the wider system.

Second, it is also clear that this a small and limited case sample: picking a few cases here is inevitably going to provide a small snapshot of the wider panoply of case law relevant to this theme. Consequently, a wider case sample is being adopted but inevitably the constraints of space limits the analysis: this thesis hopes to highlight key thematic emphases from selected cases noting that it represents a small proportion of the relevant jurisprudence on the topic.

With those points in mind, it is the argument of this first sub-section, that the principle of *effective judicial protection* (as reasoned in some of these seminal cases) shows a concept whose contours are ambiguous, with an apparent thematic emphasis on the *availability* of review. Again, to stress, this analysis is limited by the qualifications noted below.

²²⁰ *UPA* (n 18).

(i) Lack of an Exhaustive or Detailed Positive Definition

A clear point which emerges from the cases mentioned by AG Kokott²²¹ is that the CJEU fails to offer a detailed positive definition or indeed comprehensive guidance as to what the principle may require.²²² For example, the Court in *Johnston*²²³ expressed the principle broadly, focusing on its *existence* per se rather than establishing general criteria relevant to its application. This ambiguous approach is apparent in *Unibet*²²⁴ and has been commented on by observers, with Arnall noting that ‘when it comes to the exercise of its own powers the Court seems uncertain about how much weight to give that principle’.²²⁵

This ambiguity is also compounded by the instances where the concept is merely defined *negatively* by reference to what would not count as *effective judicial protection*. In *Unibet*,²²⁶ the Court stated that the imposition of administrative penalties or the requirement to breach the rules in question to gain access to the system *would certainly not* satisfy the principle of effective judicial protection.²²⁷ Alternatively, in *Kadi*²²⁸ the Court specified that *effective judicial protection* did not

²²¹ *Inuit* (n 5), Opinion of AG Kokott, para 106.

²²² Rhimes (n 70), 160 – 161.

²²³ Case 222/84 *Johnston v Chief Constable of the Royal Constabulary* [1987] QB 129, para 18.

²²⁴ Case C-432/05 *Unibet (London) Ltd v Justitiekanslern* [2007] ECR I-2271, para 37. Subject to qualifications below, see also the possibility of a further example in Case C-226/99 *Siples v Ministero delle Finanze* [2001] ECR I-277, para 17.

²²⁵ Arnall (n 218), 69. Also worth noting is the potential difference in the CJEU’s approach as compared to that of the ECtHR in the ECHR jurisprudence: see Harris, O’Boyle & Warbrick, ‘*Law of the European Convention on Human Rights*’ (3rd Edn 2014), 768-769 and Bamforth, ‘*Articles 13 and 35(1), subsidiarity and the effective protection of European Convention Rights in national law*’ [2016] EHRLR 501, for instance at 503-504.

²²⁶ *Unibet* (n 224), para 64.

²²⁷ *Ibid.* para 64.

²²⁸ *Kadi* (n 128).

require the Community authorities: ‘to hear the applicants before their names were included for the first time in the list set out in Annex I to that Regulation’²²⁹; this negative approach is also reflected in *Inuit*.²³⁰

(ii) Nature of the Analysis and Availability of Review

It would appear that a key thematic emphasis in the cases highlighted is on there being the *mere possibility of judicial review* at all.²³¹

Looking at the factual application of the principle, in both *Johnston*²³² and *Unibet*²³³, the analysis was arguably centred on whether there was the possibility of judicial review proceedings *at all* rather than the degree to which the protection was afforded. In *Johnston*²³⁴ the Court noted that a measure like article 53(2) of the Sex Discrimination (Northern Ireland) Order 1976:

‘allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in article 6 of the directive’²³⁵

²²⁹ Ibid. para 341.

²³⁰ *Inuit* (n 5) para 105.

²³¹ Somewhat reflected in Leczykiewicz, ‘Effective judicial protection’ of human rights after Lisbon: should national courts be empowered to review EU secondary law?’ [2010] ELRev 326, Footnote 117.

²³² *Johnston* (n 223).

²³³ *Unibet* (n 224).

²³⁴ *Johnston* (n 223).

²³⁵ Ibid. para 20.

Similarly, the Court noted in *Unibet*²³⁶ that since a decision by the Swedish Government would be judicially reviewable here:

‘such judicial review proceedings, which would enable Unibet to obtain a judicial decision that those provisions are incompatible with Community law, constitute a legal remedy securing effective judicial protection of its rights under Community law’²³⁷

Equally in *Kadi*,²³⁸ the Court implied that the principle of *effective judicial protection* would entail the presence of some sort of review, given that ‘restrictive measures such as those imposed by the contested Regulation [could not] escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism’.²³⁹

What emerges from these statements is that one of the primary emphases in the reasoning is on the *presence* of judicial review being available.²⁴⁰

Furthermore, aside from focusing on the availability of review, the more limited nature of the analysis is also borne out in other cases away from those mentioned by AG Kokott and which specifically concern the principle of *effective judicial protection* in the context of national standing rules. For instance, the Court in *Mono Car Styling*²⁴¹ addressed whether having certain conditions attached to the individual’s ability to raise

²³⁶ *Unibet* (n 224).

²³⁷ Ibid. para 61.

²³⁸ *Kadi* (n 128).

²³⁹ Ibid. para 343 (emphasis added).

²⁴⁰ See also potentially the analysis in terms of a ‘legal remedy’ in Case C-185/97 *Coote v Granada Hospitality Ltd* [1998] ECR I-5199, para 24.

²⁴¹ Case C-12/08 *Mono Car Styling* [2009] 3 CMLR 47

complaints was compatible with (inter alia) the right to effective judicial protection.²⁴²

The Court noted the broad statement (similar to the above) that effective judicial protection is a ‘general principle of Community law’²⁴³ before holding that:

‘whilst it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection ...’²⁴⁴

Again, the Court proceeded with a limited analysis which concluded that there was no infringement of the principle. This is a point which has been noted by Krommendijk who found that the ‘ECJ merely concluded, without substantiation, that a national procedure whereby workers’ representatives can ensure an employer’s compliance with information and consultation obligations under secondary EU law as well as an individual right of action “is of such a nature as to ensure effective judicial protection”’.²⁴⁵

Subject to the qualifications made below and looking at these central cases, certain provisional conclusions can be advanced about how *effective judicial protection* is conceptualised and developed. In this small sample from a small selection of the cases, it would appear that the Court displays a lack of definitional clarity about the contours

²⁴² Ibid. para 46

²⁴³ Ibid. para 47

²⁴⁴ Ibid. para 49; the Court cites the decisions in Case C-13/01 *Safalero* [2003] I-08679 (see para 50) and Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757 (see para 22 – 26).

²⁴⁵ Krommendijk, ‘*Is there light on the horizon? The distinction between “Rewe effectiveness” and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte*’ [2016] 53 Common Law Market Review 1395, 1410

of this principle and the nature of its analysis often focuses on the *presence* of review being available. This would suggest, *prima facie*, that the standard to be attained is a relatively lower one.

(b) Application of the Standard

If one focuses on the thematic emphases from this small case sample, then it is far from clear that the standing rules (when seen within the light of the contextual factors highlighted above) fail to satisfy this principle. In particular the focus of much of the analysis above within the cases cited seems to be on the *presence and availability* of review rather than the *practical* nature of that review.²⁴⁶ As a result of this standard, the practical problems associated with the present system of review, might not render the rules unjustifiable when they are seen alongside the contextual elements, such as the role of privileged applicants.

To demonstrate this further, it might be argued that there are cases where there is a practical gap²⁴⁷ in protection for the individual meaning that review is not possible and this limited threshold is not met. Following the restrictive interpretation in *Inuit*²⁴⁸ and *Telefónica*²⁴⁹ of the Lisbon Treaty exception in Article 263(4) TFEU, Craig has outlined²⁵⁰

²⁴⁶ Leczykiewicz (n 231), footnote 117.

²⁴⁷ Albors-Llorens (n 157), 509.

²⁴⁸ *Inuit* (n 5).

²⁴⁹ *Telefónica* (n 5).

²⁵⁰ Craig, '*EU Administrative Law*' (2nd Edn, 2012), 317; in the updated version (Craig (n 44)), Craig considers this on 344 – 346: 'direct challenge ... will continue to be extremely difficult. Applicants will have to proceed indirectly via Article 267 TFEU and the Lisbon reforms have done nothing to address the difficulties with this method of challenge identified by Advocate General Jacobs in the *UPA* case'

the situation that individual applicants will still have to demonstrate '*individual concern*' meaning that they might, in some cases, again be forced to break the law in order to challenge legislative measures in front of the national courts.

However, this *practical* inability for the individual to directly challenge measures does not mean that the standing rules conflict with the legal standard of *effective judicial protection* in the above cases, when we focus on the contextual factors highlighted above. For instance, the wide role for Member States and privileged applicants specifically ensures that there is no *conceptual* gap in protection: in principle, EU legislative measures can be challenged by these bodies independently or on behalf of the individual. The practicality or difficulties of this avenue are less key at this moment, primarily because of the emphases in the cases profiled: in other words, the focus on the theoretical presence of review.

To this limited extent, the possibility of some tentative justification for these rules could be advanced. However as seen below, this argument is limited.

(c) Qualifications and Limitations

There are a number of substantive and methodological qualifications that need to be made to, respectively, the conclusions advanced above and the nature in which the examination was conducted.

(i) Substantive Qualifications

(A) Nuances in the Cases Profiled: a Potentially Higher and More Detailed Standard

The narrow scope of the case sample and the broad level of the analysis somewhat undermines the arguments advanced above. Specifically, looking at the detail of the cases which were examined above, it is not entirely clear that that the principle of effective judicial protection does evidence such a low and vague standard, with a primary focus on the availability of review. Indeed some of the cases show a more demanding and prescriptive standard.

For instance, in *Kadi*, one could argue that the Court sets a more prescriptive standard by requiring authorities to ‘communicate those grounds’²⁵¹ which have led the individual to be subject to restrictive measures ‘as swiftly as possible after that decision’.²⁵² Equally, another example is where the Court held in *Heylens*²⁵³ that the principle ‘must be able to cover the legality of the reasons for the contested decision’²⁵⁴. Further one could look at the prescriptive outline of the principles regarding the availability of legal aid in *DEB*²⁵⁵:

²⁵¹ Ibid. para 336.

²⁵² Ibid.

²⁵³ Case 222/86 *Heylens and Others* [1987] ECR 4097.

²⁵⁴ Ibid. para 15.

²⁵⁵ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-13849, paras 60–62.

‘the principle of effective judicial protection, as enshrined in art. 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer’²⁵⁶

What is clear from the above, is that it is certainly possible to interpret these selected cases as requiring a higher standard from the principle.²⁵⁷ This also may be true of some of the cases dealing with the national rules of standing (see pages 102-103 below).

(B) Wider Case Sample: a Focus on *Practical* Nature of Review

Equally, the analysis above is also undermined when the case law sample is widened. Specifically, looking at some of the broader range of cases dealing with national provisions relating to ‘access to court’²⁵⁸ more widely, it is clear (as has been alluded by commentators such as Rhimes²⁵⁹) that the concern is not just with ensuring the *availability of any review* but with ensuring effective judicial protection in a *practical* sense. An example of this comes from the analysis of AG Cruz Villalón in *Samba Diouf*²⁶⁰:

‘If we examine the right to effective judicial protection solely from the point of view of access to the courts ... recourse to the courts should be effective, both in the sense that it must be legally

²⁵⁶ *DEB* (n 255) para 59

²⁵⁷ See Rhimes (n 70), 160 – 161

²⁵⁸ Craig and De Búrca (n 3), 245 and similarly Lenaerts, Maselis & Gutman (n 122), 111 for the cases cited.

²⁵⁹ See for example Rhimes (n 216) and Rhimes (n 70) at 162 regarding the mere existence of ‘indirect actions ... [being] insufficient’; Lenaerts, Maselis & Gutman (n 122), 111

²⁶⁰ Case C-69/10 *Samba Diouf* ECLI:EU:C:2011:524

capable of securing reparation, where appropriate, for the loss complained of, and in the sense that it must be a practical remedy, that is to say, that its pursuit must not be subject to conditions that make it impossible or extremely difficult to exercise'²⁶¹

Again, this concern is apparent in the earlier decision of *Alassini*²⁶². One of the issues was whether 'the establishment of a mandatory settlement procedure ... [as] a condition for the admissibility of actions before the courts'²⁶³ was compatible with the principles of equivalence, effectiveness and effective judicial protection. Following, inter alia, a detailed discussion of the practical features of such a procedure²⁶⁴, the Court concluded that these principles did not preclude in this context:

'national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties ...'²⁶⁵

What is clear is that there is a real focus on the practical operation of this system and therefore the analysis with respect to effective judicial protection clearly has a practical dimension. A further example, noted by commentators such as Rhimes²⁶⁶, comes from

²⁶¹ Ibid, Opinion of AG Cruz Villalón, para 43 (emphasis added); see also para 66 and see also Case C-418/11 *Texdata Software GmbH* ECLI:EU:C:2013:588, para 80.

²⁶² Cases C-317-320/08 *Alassini* EU:C:2010:146, see also Craig and De Búrca (n 3), 245

²⁶³ Ibid. para 46

²⁶⁴ Ibid. see discussion across para 53 – 57; see also Craig and De Búrca (n 3), 245

²⁶⁵ Ibid. para 67

²⁶⁶ Rhimes (n 70) 161 who notes the 'searching inquiry the CJEU would expect of national courts'; see Rhimes (n 216).

the earlier decision in *Levez*²⁶⁷ where the Court demonstrated its approach towards ‘effectiveness’ (even though it is not framed in terms of *principle of effective judicial protection* the tenor of the reasoning is still relevant to the present discussion). The Court focused on practicality (for instance) when it considered the argument that the applicant could have had alternative recourse to the United Kingdom county courts to claim compensation.²⁶⁸ The Court noted that one had to consider:

‘whether, in order to fully assert rights conferred by Community law before the county court, an employee in circumstances such as those of Mrs Levez will incur additional costs and delay by comparison with a claimant who ... may bring an action before the Industrial Tribunal, which is simpler and, in principle, less costly’²⁶⁹

Rhimes has noted with particular focus on indirect review, that ‘the CJEU’s restrictive approach to standing rules could clearly not survive the scrutiny it required of the domestic courts in *Levez*. According to the CJEU’s own standards, simply pointing to the existence of indirect actions is insufficient’.²⁷⁰

This represents a small snapshot of what could be considered the potentially relevant cases.²⁷¹ The point here (given the constraints of space) is merely to demonstrate, for

²⁶⁷ Case C-326/96 *Levez* [1999] 2 CMLR 363

²⁶⁸ Ibid. para 35 – 36; see also Rhimes (n 216)

²⁶⁹ Ibid. para 51; see Craig and Búrca (n 3), 248 – 249, Rhimes (n 70) 162; Arnall (n 218) at 57.

²⁷⁰ Rhimes (n 70), 162.

²⁷¹ For instance, see more developed outline of the principle and what effective review ‘entails’ Case C-430/10 *Gaydarov* ECLI:EU:C:2011:749, para 41; see also Case C-93/12 *ET-Agrokonsulting-04* ECLI:EU:C:2013:432, para 60 – 61 and in particular the considerations of the practical elements of the system at paragraphs 50 – 58; see more recently Case C-73/16 *Puškár* [2018] 1 CMLR 44, see para 69 – 76 in particular, again with respect to the nature of the practical and procedural elements relevant to the circumstances in question.

the purposes of outlining the relevant legal standard laid down by the principle of *effective judicial protection*, that when one expands the case law sample, it is clear that the principle is also concerned with ensuring effective judicial protection in a *practical* rather than merely abstract sense (as has been alluded to by commentators).²⁷² This therefore undermines the degree to which one can say that contextual elements, like the role of privileged applicants, renders the standing rules potentially justifiable.²⁷³

(C) Specific Sectors & A Higher Standard

Further, a wider look at the case law also shows the principle's ability to set a more demanding standard in certain areas of the jurisprudence (and this has also been alluded to by a number of commentators).²⁷⁴ A good example, which has also been discussed in the literature, is how the principle of effective judicial protection has impacted national standing rules within the field of environmental law.²⁷⁵ Lenaerts, Maselis and Gutman note:

'Under the impulse of the Aarhus Convention and the principles of effective judicial protection and effectiveness the Court of Justice has developed a line of case-law providing for more relaxed standing conditions for such [non-governmental] organisations when acting within the scope of Union law'²⁷⁶

²⁷² For instance, Rhimes (n 216); Rhimes (n 70) 162.

²⁷³ Ibid. and Rhimes (n 70), 160.

²⁷⁴ For some examples of the outline of the approach in different areas see for instance Arnulf's (n 218) discussion at 63 – 69 and also for further discussion see Krommendijk (n 245) at 1412.

²⁷⁵ Bogojević (n 9) and in particular 18; see also Müller (n 145) 506; see also more generally Fisher, Lange & Scotford (n 94) at 379 – 383 and 392 – 393.

²⁷⁶ Lenaerts, Maselis and Gutman (n 122), para 4.18.

The decision of the Court in *Lesoochranarske zokupenie VLK*²⁷⁷ demonstrates this more demanding approach with respect to NGOs in the environmental law context. The case concerned, in particular, the nature of Article 9(3) of the Aarhus Convention.²⁷⁸ The Court found:

‘it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives to be met in order to bring administrative or judicial proceedings in accordance with the objectives of article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by European Union law, so as to enable an environmental protection organisation, such as the association, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law’²⁷⁹

The impact of this decision has been noted by Bogojević who suggested that in ‘some instances both substantive and procedural national laws ... were amended so as to comply with EU law and guarantee environmental NGOs access to national courts’.²⁸⁰

The wider approach towards NGOs in the environmental context has been noted by other commentators with respect to other aspects of the environmental jurisprudence.²⁸¹ For instance, in *Djurgården*²⁸² which concerned, inter alia, a domestic

²⁷⁷ Case C-240/09 *Lesoochranarske zokupenie VLK* [2011] ECR I-1285, cited by Bogojević (n 9), 18; Müller (n 145) 515; Lenaerts, Maselis and Gutman (n 122) para 4.18.

²⁷⁸ *Lesoochranarske* (n 277); para 21-23

²⁷⁹ Ibid. para 51; cited by Bogojević (n 9), 18

²⁸⁰ Bogojević (n 9), 18

²⁸¹ For instance see Müller (n 145) discussion more generally.

²⁸² Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2010] 1 CMLR 36

law which restricted the relevant NGOs who could participate in the ‘review procedure’ on the basis of their size.²⁸³ Although the principle of effective judicial protection was not mentioned specifically, one can see the Court’s more demanding approach towards ensuring review when it found that in interpreting Article 10a of Directive 85/337, ‘national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs which include environmental protection associations, are to be entitled to bring actions before the competent courts’.²⁸⁴

This is again a small selection of what could be the relevant case law.²⁸⁵ Looking at these cases, the central point here however is to show that at least in this sphere, the principle of effective judicial protection (particularly as shown in *Lesoochranárske*) and the Court’s more general approach towards ensuring review has the capacity to impose much more demanding requirements, with the effect of changing and shaping the national standing rules.

This is also potentially borne out in some of the more general cases dealing with national standing rules away from the environmental sphere (space precludes an effective examination of all relevant sectors). As has been noted elsewhere,²⁸⁶ the Court in *Verholen*²⁸⁷ found, looking at the principle of effective judicial protection and

²⁸³ Ibid. para 19 and 40

²⁸⁴ Ibid. para 45, noted also by Bogojević (n 9), 19

²⁸⁵ See for instance Fisher, Lange & Scotford (n 94) Chapter 10 and Case C-243/15 *Lesoochranárske zoskupenie VLK* ECLI:EU:C:2016:838

²⁸⁶ Lenaerts, Maselis and Gutman (n 122), para 4.17

²⁸⁷ C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757

before noting it was in ‘principle, for national law to determine an individual’s standing and legal interest in bringing proceedings’²⁸⁸ that the ability to rely on the Directive in question was ‘not confined to individuals coming within the scope *ratione personae* of the directive, in so far as the possibility cannot be ruled out that other persons may have a direct interest in ensuring that the principle of non-discrimination is respected as regards persons who are protected’.²⁸⁹ The Court, through the principle of effective judicial protection, has therefore demonstrated its ability to impact access to review.

The significance of this discussion for my analysis is as follows. Firstly, this acts as a general substantive qualification to the position that the principle of effective judicial protection imposes a low and easily attainable standard: clearly the principle’s approach in certain sectors limits this view. Secondly, this adjustment in these sectors will inevitably qualify how the reforms are presented at the end of this Chapter. The proposals at the end of this Chapter are broadly framed, ‘one-size fits all’ ideas designed to address some underlying issues highlighted in this thesis. However if EU law has evolved to have imposed greater demands on national legal systems in certain areas to facilitate access to justice (as the environmental case law seems to indicate), then such broad solutions may not be necessary or even appropriate for different areas. There is insufficient space in this thesis to fully tailor proposals in this way and as such these broad solutions must inevitably be qualified.

²⁸⁸ Ibid. para 24

²⁸⁹ Ibid. para 23; see discussion across para 22 – 26.

(ii) Methodological Qualifications

Coupled with the substantive difficulties with the analysis noted above, there are a number of methodological issues.

First, it is difficult to conclude precisely *which* cases to focus on in order to outline what the appropriate standard of *effective judicial protection* is or should be: for instance, should one seek to distinguish between how the principle applies to the EU's remedies as set down in the Treaties rather than those of the national courts and if so the question is where should this line be drawn. This is a distinction that has been noted elsewhere by commentators.²⁹⁰ The above analysis has been (somewhat inevitably given the constraints of space) general, choosing to bring out key themes from the jurisprudence from a broad selection of relevant cases.

Secondly, a further difficulty, noted by Krommendijk,²⁹¹ is the degree to which there is a distinction between the principle of *effective judicial protection* and the more general principle of '*effectiveness*', this being one of the qualifications to national procedural autonomy. Krommendijk suggests a number of doctrinal differences between the two concepts²⁹² noting however that these differences 'are not always easy to make in practice, and they do not seem considerable ... [and that] Despite these differences,

²⁹⁰ Craig (n 2), 499 and Arnall (n 218), 69; as Rhimes (n 70) notes at 160.

²⁹¹ Krommendijk (n 245); see also Safian, '*A Union of Effective Judicial Protection, Addressing a multi-level challenge through the lens of Article 47 CFREU*', King's College London, February 2014, page 3 – 4 and Lenaerts, Maselis and Gutman (n 122) para 4.05.

²⁹² Krommenndijk (n 245) at pages 1404 – 1408.

the ECJ has not been very careful in clearly distinguishing between both principles'.²⁹³

The above examination has sought to focus primarily on the principle of *effective judicial protection* in a broad sense, although noting some of the themes arising from cases where *effectiveness* was considered.²⁹⁴

(d) Summary

By way of a summary, the above analysis has sought to show the following points.

First, looking at *some* of the centrally relevant cases, it seems that there is a thematic emphasis within them on ensuring the *availability of judicial review*. Looking at this in isolation and to this qualified extent, if one applied this standard to the standing rules and their contextual elements (as identified in this thesis) then it is possible to offer a limited justification.

Secondly, however, this argument and any attempt at this justification is highly limited: primarily the standard identified is not reflective of the wider case law. Within the primary cases profiled, it is not entirely clear that there is no focus or consideration on the *practical* nature of such review. Furthermore, by expanding the case sample, one can see not just that the principle of effective judicial protection comprises this concern as to the practical reality of the review envisaged but also that the principle is nuanced,

²⁹³ Ibid. at 1408.

²⁹⁴ Krommenndijk (n 245) notes also (Ibid. at 1416) later '*The question, however, is whether this distinction also matters in practice?*'

with it being able to set a higher and more prescriptive standard as evidenced in some of the environmental case law highlighted (this is significant for the proposals of reform). Finally, there are a number of methodological difficulties with this approach.

It should be emphasised that the principle of *effective judicial protection* remains a small part of the analysis of this thesis and therefore the constraints of space mean that I am unable to outline precisely what the principle requires in a comprehensive and exhaustive way, beyond the outline analysed above (the focus on the themes of a few relevant cases but with an acknowledgement of the broad approach from a wider case sample and the demands in different areas). Consequently, I'm not proposing to analyse whether the standing rules can be justified against a principle of effective judicial protection which focuses more on the practical nature of such review. Additionally, it should be noted that the next part of this Chapter focuses on *practical* issues facing the individual litigant: this is not to say that *effective judicial protection* and *access to justice* are the same (much more detailed analysis would be needed to explore that and space precludes a consideration of the differences and nuances here) but it is just to say that some of the practical issues will be considered further below.

2. Practical Access to Justice

Given the difficulties with outlining the relevant standard of *effective judicial protection*, the constraints of space and the fundamental substantive limitations to any possible tentative justification which could be made, it is clear that a different standard should be endorsed. As such, and in order to move away from these issues, the standard of assessment will be on *practical access to justice* in order to further explore the justificatory potential of a contextual analysis.

It is when the rules are measured against a normative framework which prioritises practical access to justice that the picture becomes even clearer: the rules of standing, even when viewed with the benefit of the contextual factors identified, cannot be justified as they are. In particular, they fail to address adequately two significant practical access to justice problems facing the individual²⁹⁵: (i) procedural problems of delay within the process²⁹⁶; (ii) remaining gaps in protection and the lack of full or realistic alternative opportunities to access justice. These may not be the only practical problems facing the litigant (and space precludes an exhaustive consideration of all possible relevant points) but they are the ones that will represent the focus of this analysis. As shown below, these problems (particularly the latter) are caused or exacerbated by the narrowness of the direct review standing rules.

²⁹⁵ This approach is certainly non-exhaustive and space precludes exploring fully other practical problems facing the individual.

²⁹⁶ Bogojević (n 9), 22 alludes to this.

The reasoning of this justificatory analysis is as follows. The standing rules as they pertain to the individual could be justified on practical grounds if it could be shown that these problems were adequately addressed by elements of the constitutional context: in other words, if the presence of aspects of the procedural framework, *partial* judicial subsidiarity or a wide role for privileged applicants meant that these two problems were solved. However, that does not seem to be the case. Two arguments in this subsection will develop this further.

When one looks at the constitutional context, the elements profiled here (particularly *partial judicial subsidiarity* and the *role of privileged applicants*) provide a conceptually valid approach of formulating access to justice in theory. This is important because it shows both that the EU is not taking a wholly irrational approach and that the contextual framework is viable and therefore worth reforming, rather than unsatisfactory and meriting elimination altogether.

However, each contextual element fails to satisfy the demands of practical access to justice: they do not address one or both of the practical considerations noted below, or to the extent that they do, the approach is not realistic. To this extent, and viewed from this perspective, the rules of standing remain *overly narrow*.

This subsection will first consider some general preliminary issues and then I will look at the contextual elements and demonstrate that their approach is theoretically legitimate but that they fail to address these practical considerations.

I will not be looking at the procedural framework elements identified above given the inability of either point to explain the standing rules (as above).

(a) General Points of Scope

(i) Defining 'Access to Justice'

'Access to justice' is defined here in a more neutral and practical manner consistent with the approach in Chapter Two. Consequently, there is no attempt to consider a fully exhaustive account of what an *access to justice* theory is or should be within the EU context, primarily because space precludes such an enterprise. Additionally, I am not adopting the legal standard which emerges from the ECtHR Article 6(1) jurisprudence, since the ECtHR already found in *Bosphorus v Ireland*²⁹⁷ that the EU system meets the demands of such a standard.

The reason for focusing on practical considerations lies in the fact, consistent with Craig's statement on page 11, that normative evaluations of a system of standing rules should aim to reflect what the situation is like for the individual on the ground²⁹⁸ rather than merely conducting the discussion at an abstract level. Of course to focus on practicality is not novel in itself: for instance, commentators like AG Jacobs²⁹⁹ have also highlighted practical issues in relation to the system.

²⁹⁷ *Bosphorus* (n 197), para 165.

²⁹⁸ See also Harding (n 20)

²⁹⁹ *UPA* (n 18), Opinion of AG Jacobs, para 42.

(ii) Nature of the Practical Problems

There are at least two principal practical problems facing the individual applicant which represent the central considerations focused on here.

The first concerns issues of delay. It is clear that the EU judicial process of review is lengthy in nature as the statistics demonstrate³⁰⁰ (see also page 111-112). It is somewhat difficult to suggest how long a supranational process like that represented in the EU *should* take and therefore this inevitably qualifies the criticism that the process is too long. However, that does not detract from the fact that the length of time can place a significant practical burden on the individual who has to endure this process,³⁰¹ especially where that applicant is a private citizen rather than a group.

Secondly, a pressing problem for the individual applicant concerns the presence of *practical* gaps in protection which seem to result directly from the scope of the direct review standing rules. As previously noted on page 94 and by Craig,³⁰² the narrowness of these rules will mean that there will continue to be cases where the individual cannot show '*individual concern*' to directly challenge the provision; equally the narrow interpretation of the Lisbon Treaty exception will ensure that some measures are not susceptible to indirect challenge in the national courts, leading to an overall gap in

³⁰⁰ Court of Justice of the European Union, 'Annual Report 2016 Judicial Activity' [2017], 82. See also Rhimes (n 70) 160.

³⁰¹ See also Stein & Vining (n 79), 241.

³⁰² For instance see Craig (n 44) 344; also noted by Peers & Costa (n 30), 99.

protection. Chapter Two has highlighted mechanisms³⁰³ such as the role of privileged applicants which could provide theoretical alternative routes to access justice: however, the task below is to see how far these solutions found in the context are realistic and practically viable for the individual.³⁰⁴

(b) The Contextual Elements

(i) Partial Judicial Subsidiarity

In theory, the concept of *judicial subsidiarity* could present a normatively legitimate approach but the CJEU *partial* conceptualisation fails to practically achieve these access to justice benefits and therefore requires amendment.

An approach which bases itself on *judicial subsidiarity* could hypothetically derive conceptual legitimacy from the many advantages which it offers to the individual to access justice. For instance, litigation at the national court level which is facilitated by *judicial subsidiarity* gives the individual an opportunity to access justice closer to home (as has been noted by commentators³⁰⁵) as an alternative to direct review. This could lead to a reduction in the overall cost (as Bogojević alludes to)³⁰⁶ and the time taken to conduct the process for the individual applicant. This is also illustrated from a brief comparative point that the average time taken for a preliminary reference in the EU in

³⁰³ The term used in a similar sense to how Miles (n 202), 162 frames the issue of “‘public interest’ law-enforcement mechanisms’.

³⁰⁴ Dougan (n 17) has noted this ‘problem of access to justice’ at 676.

³⁰⁵ Bogojević (n 9), 25; Enchelmaier (n 9) 203.

³⁰⁶ Bogojević (n 9) 21.

2015 was 15.3 months and for a direct action, 17.6 months³⁰⁷ whilst in the English judicial review system, of 'the 82% of cases lodged in 2015 classed as closed, the mean timeliness has fallen to 183 days'.³⁰⁸ Although this may not represent the approach in every Member State, it shows the general point that for the individual, it is likely to be quicker and cheaper to challenge the measure in their national court rather than to directly or indirectly go to Luxembourg.³⁰⁹

However, these access to justice arguments only pertain to *full* subsidiarity not *partial* and again fail to satisfy the demands of practical access to justice noted above.

First, the practical advantages of cost and delay reduction are only possible where the individual applicant actually has a chance of their dispute being resolved at the national court level: the partial nature of CJEU judicial subsidiarity and the rule in *Foto-Frost*³¹⁰ means that in many cases this is not possible and that individual applicants will inevitably still have to go to Luxembourg.³¹¹

Secondly, the presence of *partial judicial subsidiarity* as developed by the CJEU does not give applicants realistic or full opportunities to access justice but only a partial one, whereby litigation is conducted closer to home only where the EU measure being challenged is not invalidated. Due to the absence of the '*positive empowerment*'

³⁰⁷ Court of Justice of the European Union, 'Annual Report 2016 Judicial Activity' [2017], 100.

³⁰⁸ Ministry of Justice Statistics Quarterly January to March 2016, 18. The Report adds a qualification at 17.

³⁰⁹ Enchelmaier (n 9), 203 has noted other institutional benefits. See Usher, '*Direct and individual concern – an effective remedy or a conventional solution?*' [2003] ELRev 575, 586 and 600.

³¹⁰ Ibid.

³¹¹ A point alluded to in *UPA* (n 18), Opinion of AG Jacobs, para 41-42.

rationale, the applicant can only achieve justice at the national court level in *some* but *not all* of the cases: it is *partial* because where there will be invalidation of the provision, it will always be done at the Luxembourg level.

Consequently, the present approach in terms of *partial* judicial subsidiarity continues to be problematic from a practical access to justice perspective and in order to fully realise this opportunity to access justice, *full judicial subsidiarity* might be required.

(ii) Wide Role for Member States and Privileged Applicants

Having a wide role for the privileged applicants and Member States to challenge EU measures more broadly (perhaps challenging measures in the '*public interest*') also represents a conceptually legitimate means by which to formulate access to justice rules (particularly in the fact that it ensures that all acts are reviewable *in theory*). However, although there may be no *conceptual* gap in protection, a look at how such a mechanism operates demonstrates that a *practical* gap remains.

On the one hand, the limited conceptual legitimacy of this contextual element is supported by two important aspects: (i) the fact that this role for the privileged applicants has already met the ECtHR legal standard of access to justice; (ii) that such a role finds parallels in various jurisdictions.

First, the ECtHR in *Bosphorus v Ireland*³¹² specifically relied on the role of the Member States and privileged applicants in order to find that there was no incompatibility between ECHR access to justice and the system of review in the EU. The Court found that: 'actions initiated before the ECJ by the Community institutions or a Member State constitute important control of compliance with Community norms to the indirect benefit of individuals'.³¹³ Although I am not using this standard as to define the term 'access to justice', the point here is merely to make the more limited conclusion as to the recognised theoretical legitimacy of having a system which relies on Member States to litigate more broadly.

Second, the legitimacy of this EU approach can be seen from the presence of comparable structures in other jurisdictions. Aside from the role of the Attorney General³¹⁴ in English law which has already been acknowledged in Chapter Two, a comparison can also be made with the role of Contracting States within the ECHR. Miles has noted Article 33 ECHR which states: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party'.³¹⁵ The analogy with the ECtHR must be qualified because (for instance) although the individual has a narrow role in direct review, the individual (as noted above) has a much wider role in indirect review. However, what is particularly relevant is Miles' point³¹⁶ that there is the wider role of the Contracting

³¹² *Bosphorus* (n 197).

³¹³ Ibid. para 162-164.

³¹⁴ *Gouriet* (n 206), per Lord Wilberforce, 477.

³¹⁵ Article 33 ECHR; Miles (n 202) 140.

³¹⁶ Ibid. 162-163.

States which shows the ‘existence of various “public interest” law-enforcement mechanisms’.³¹⁷

However, despite the conceptual legitimacy of this approach, again this fails on a practical analysis. The availability of privileged applicants to challenge measures more broadly either independently or on behalf of the individual cannot be practically justified as a complete solution because it is questionable how realistic this opportunity to access justice is in practice, meaning that a *practical* gap in protection for the individual remains.

For instance, the individual has to contend with the significant practical difficulty of actually trying to persuade Member States or European central institutions to bring this litigation at all. At root, the concern is that these bodies may lack the objectivity required to perform this role effectively on behalf of the individual: the privileged applicants are not specifically designed to represent the individual as a litigant. As Miles has commented in the comparable context of ECHR human rights claims, ‘a state is unlikely to pursue a case where its own interests would be jeopardised by so doing’.³¹⁸ This concern somewhat chimes with Harlow’s view on the theoretical problems with depending on Member States in this regard to fill the gap in protection, particularly in that it ‘suggests an old-fashioned and undemocratic equation of government with public interest’.³¹⁹ It seems perhaps unrealistic to rely on some of the very same bodies

³¹⁷ Ibid. 162.

³¹⁸ Miles (n 202), 140. See also the analogous reasoning in *Djurgården-Lilla* (n 282) at 51 with respect to the proposal of smaller NGOs contacting larger associations to ‘ask them to bring an appeal’.

³¹⁹ Harlow (n 9), 246.

who may have helped draft the legislative measure under scrutiny to also then vigorously challenge them on behalf of the individual. Equally, in practical terms, the individual may find it difficult to compel a privileged applicant to challenge a measure on their behalf in the absence of national or EU bodies specifically designed to act on behalf of the individual in this manner. As a result, the practical gap in protection will remain and issues will continue to go unlitigated.

In summary, although the role of privileged applicants might be conceptually viable, it cannot lead one to saying that the rules of standing as a whole can be justified because it fails to adequately address these practical concerns and in practical terms, leaves a gap in protection for the individual.

3. Proposals for Reform

The above elements are theoretically legitimate but ultimately they do not lead to the system of standing rules being justified when they are viewed against the standard of *practical access to justice*. Specifically, one can see the continued problems which the individual applicant faces, particularly concerns of delay and a practical gap in protection. This shows the limits of a justificatory analysis and therefore it is clear that when assessed practically, the standing rules remain '*overly narrow*' in their present form.

Therefore, the question is how can one improve the present framework so that it comes closer to meeting these practical access to justice concerns?

A key point is that such proposals should operate within the constitutional context identified and seek to improve it (an approach similar to Bogojević³²⁰). If one did not prioritise the context, then one runs the risk (in theory) of suggesting proposals for reforming standing which are inappropriate and which conflict with the underlying philosophical, procedural and political forces which have animated the CJEU's approach. Equally the previous section has emphasised that in principle, the contextual elements represent a valid theoretical framework to operate within.

Therefore, the above question could be reframed as two questions:

³²⁰ Bogojević (n 9), 21, 22 – 24 and 25.

- (i) How can we reduce the impact on access to justice for the individual applicant which comes from the delay of the process but which finds some compatibility with the overall context identified?
- (ii) How can we minimise, within the context, the practical gap in protection so as to ensure that there is real access to justice for the individual applicant either directly or indirectly through other means of representation?

There are three broad avenues for reform which are suggested here: (a) a development of *full* judicial subsidiarity within the EU; (b) an improvement in the nature of the ‘public interest representation’ mechanisms³²¹; (c) an enhanced role for groups. Below represents various avenues for future reform rather than detailed proposals: space precludes an exhaustive appraisal of each suggestion and indeed there is some indication of some potential pitfalls. However, the ambition of this section is to lay the groundwork for improving the system of standing rules working within the constitutional context identified. Each of the three avenues will address either respectively or together the problems of delay and gaps in protection facing the individual.

As noted above (page 103), these are broad proposals which, given the constraints of space, are not tailored to different sectors and areas of EU law. As the discussion of the

³²¹ Harlow (n 9), 213; Miles (n 202), 162.

principle of *effective judicial protection* has highlighted, EU law may have a greater impact in different areas in terms of ensuring access to justice. The consequence being that the same solutions may not be required across the entirety of the EU law landscape. For instance, the approach towards non-governmental organisations in the environmental law context (highlighted above at pages 100-103) may or may not render the need for greater group litigation less pressing in this area. This naturally qualifies the force of these proposals and is an issue which would need careful consideration if these ideas were developed further.

(a) Full Judicial Subsidiarity

One method of improving access to justice on a practical level as identified above would be to develop a conceptualisation of *full* judicial subsidiarity within the CJEU case law rather than *partial*. This would help to reduce delay by giving individuals a realistic and complete opportunity to substantively access justice at the national court level as an alternative to direct review. Therefore, this would constitute an improvement to the constitutional context which could ultimately help lead to the rules of standing being seen as justifiable.

The next issue is what this proposal would look like in practice. Given how the latter term has been defined, this would necessarily imply abandoning the rule in *Foto-*

Frost.³²² However, how does one give expression to this conception of *full subsidiarity* without sacrificing the uniformity of the judicial order?³²³

The response is that even assuming there is a theoretical conflict between the notions of *subsidiarity* and *uniformity* (which is by no means certain³²⁴), various practical proposals can be countenanced which retain a sense of uniformity whilst also giving expression to *full judicial subsidiarity* by increasing the role of the national courts.

One proposal would be to focus on maintaining uniformity through an appeals system, supplemented by a notification procedure (*'appeals plus notification'*).³²⁵ The possibility of using an appellate system was countenanced by AG Mancini in *Foto-Frost*³²⁶ but ultimately discounted on the grounds, *inter alia*, that 'it is never certain that an appeal will be brought by the relevant national authority'.³²⁷ To address such criticism, this proposal could require that national courts notify the Commission every time a measure is invalidated with the effect being that the decision is delayed for a short period (perhaps two months) until the Commission has been notified and decides *itself* whether or not to appeal. If the Commission does not appeal, then it can put a notice in the Official Journal which says that the measure is invalid and *at that point*, it becomes binding and erga omnes for all states. Such a proposal would have the advantage of allowing the Commission the ultimate decision on whether a measure is

³²² Ibid.; Leczykiewicz (n 231), 339 notes a qualification in this regard.

³²³ A competing concern noted by Leczykiewicz (n 231) 347.

³²⁴ Leczykiewicz (n 231) has undermined this at 347 and Carozza (n 145), 76 also alludes to this.

³²⁵ This is different to the approach canvassed by Leczykiewicz (n 231) in the human rights context at 343 and 347.

³²⁶ *Foto-Frost* (n 37).

³²⁷ Ibid. Opinion of AG Mancini, 4219; similar argument in *Zuckerfabrik* (n 185), Opinion of AG Lenz, 488.

disapplied but it would allow national courts a strengthened role, assuming that the Commission would not seek to challenge every measure.

This proposal is not immune from criticisms based on access to justice grounds: one point of concern is *which* domestic court would be able to invalidate the EU measure. For instance, if the invalidating power was vested in the final court of each system, then this could be costly and time-consuming for the individual applicant. However, the converse of allowing *every* national court to invalidate EU measures could lead to the Commission being swamped by such decisions.

(b) Privileged Applicants and Attorney General

An alternative method of improving access to justice but operating within the constitutional context identified, would be to improve the operational functionality of having privileged applicants or macro-public bodies litigate in relation to or on behalf of the public interest. This would seek to address the gap in protection arising from the practical difficulty of expecting privileged applicants to take a wider role as a litigant on behalf of the individual.

One such proposal could be to create a new *EU Attorney General* as a separate privileged actor whose role was specifically designed to represent the broader individual interest through ‘relator’ type actions. Harlow alludes to this concept briefly although she frames it within a discussion of amendments to the role of the Advocate General:

'The Advocate General ought also to be able to refer to the Court questions of law of public interest. The problem of general Community acts out of reach of private parties could then be overcome by the equivalent of the English 'relator' action or Attorney General's reference.'³²⁸

The individual applicant could petition this Attorney General to challenge the measure in question on their behalf. In this way, one could develop AG Kokott's suggestion,³²⁹ the difference being that this separate body would be unencumbered by the potential conflict of interest which a Member State might face when deciding whether to bring a broader 'public interest' claim. In so doing, this proposal would address some of the failings of the present mechanism, in particular the concern as to lack of objectivity.

This notwithstanding, there are a number of issues with this proposal. For instance, one is whether *refusals* by the Attorney General to bring litigation would be judicially reviewable, the concern being that such a situation could generate significant complexity and numerous claims. Equally, other criticisms may centre around the cost of creating such a position, combined with the absence of any political will for further reform given the tone of the assessment in cases like *Inuit*³³⁰ following the Lisbon Treaty. Additionally, Harlow gives somewhat a sense of this: 'One would not wish to change the role of the Advocate General or to imperil his objectivity'.³³¹

³²⁸ Harlow (n 9) 248.

³²⁹ *Inuit* (n 5), Opinion of AG Kokott, para 120.

³³⁰ *Inuit* (n 5) for instance, para 92.

³³¹ Harlow (n 9), 248; in a different context, Cane (n 202), 278 has also voiced similar objectivity concerns with the role of the Attorney-General.

(c) Group Litigation

Enhancing the role of group litigation and involvement within the EU judicial system could help mitigate the consequences of delay for the individual applicant³³² and also reduce the practical gap in protection. Again this proposal is suggested at a broad level of generality, noting that nuances in different areas may render this approach unnecessary in some places (see page 103).

Given the financial and procedural burden of engaging in potentially lengthy EU litigation, the individual is likely to benefit both directly and indirectly from the availability of larger organisations litigating on their behalf or independently.³³³ For instance, Harlow has commented on the benefits of group litigation by suggesting that ‘Individuals need financial and moral support when faced with rich and powerful opponents’³³⁴ and equally Craig has noted in this regard that groups ‘will normally have greater resources than any individual’.³³⁵ Therefore, greater group involvement could alleviate some of the access to justice problems for the individual by pushing the costs and procedural burden of the process onto bodies which can absorb them more effectively. Additionally, as Harlow suggests the presence of greater group litigation could help reduce the gap in protection by ensuring that wider interests are litigated.³³⁶

³³² Arnall (n 218) somewhat implies the positive impact of groups at 68.

³³³ See the Opinion of AG Sharpston in *Djurgården-Lilla* (n 282) at para 59 in the context of environmental law and the Aarhus Convention: ‘The individual is protected by acting in a group and the group is collectively strengthened by its individual members’

³³⁴ Harlow (n 9), 246.

³³⁵ Craig (n 11) para 25-048.

³³⁶ Harlow (n 9), 246; Cane (n 202), 277.

However, there are at least two difficulties with the present rules which impede greater group involvement: (i) the restrictive meaning of *direct concern*³³⁷ and (ii) the lack of differentiation within the standing rules for different groups.³³⁸

With respect to the meaning of direct concern, its case law interpretation makes it more difficult for groups to bring litigation. The interpretation of the term has been established in a number of cases but has been summarised by AG Kokott in *Telefónica*³³⁹:

‘an applicant must be considered to be directly concerned if, first, the contested measure of the European Union directly affects his legal situation and, secondly, it leaves no discretion to its addressees, who are entrusted with the task of implementing it’³⁴⁰

In her Opinion in *Inuit*³⁴¹ she also noted that one has to also consider the EU act’s: ‘factual effects on that individual, such effects must be more than merely indirect’.³⁴²

This interpretation has the impact of limiting a greater degree of group involvement to thereby reduce the gap in protection: it restricts a group’s ability to represent issues on behalf of individuals³⁴³ and this was demonstrated by the General Court position in

³³⁷ Fisher, Lange & Scotford (n 94) note also at 373 that ‘it was utterly clear that public interest groups could never be found to have “individual concern”’

³³⁸ Similar to Harlow’s concern at (n 9), 231.

³³⁹ *Telefónica* (n 5), Opinion of AG Kokott.

³⁴⁰ Ibid. para 59.

³⁴¹ *Inuit* (n 5).

³⁴² Ibid. para 72 (emphasis added).

³⁴³ Feldman (n 94), 55. The difficulties of group litigation have been noted also by Arnall (n 28), 52 at footnote 212 but also (cited in Arnall’s piece) by the House of Lords Report, ‘*EU Charter of Fundamental Rights*’ in Session 1999-2000, 8th Report, HL Paper 67, para 132.

Inuit.³⁴⁴ Indeed, as AG Kokott notes,³⁴⁵ it is the requirement that the applicant must demonstrate that his or her legal situation is ‘directly affect[ed]’ that ‘serves here ... to rule out the *actio popularis*’.³⁴⁶ The solution to this particular problem in order to facilitate greater group litigation may therefore be to seek to liberalise the interpretation of *direct concern*.

Second, a further suggestion made by Harlow³⁴⁷ concerns the fact that within the standing rules, there is an inadequate differentiation between groups and individual citizens:

‘For standing purposes, groups are implicitly subsumed either in the rights of “natural” or of “legal” persons, the latter being, as we have already seen, equated with individuals.’³⁴⁸

This represents, as Harlow acknowledges, a further restriction on access to justice because it ensures that all groups, regardless of their respective ability to represent differing interests, are subject to the same restrictive standing rules.³⁴⁹ A more concise distinction between these groups, perhaps along the lines of Harlow’s suggestion,³⁵⁰ could therefore facilitate access to justice, allowing for greater participation from groups who could litigate in relation to the public interest.³⁵¹

³⁴⁴ Case T-18/10 *Inuit v European Parliament and Council of the European Union* ECLI:EU:T:2011:419.

³⁴⁵ *Telefónica* (n 5) Opinion of AG Kokott.

³⁴⁶ *Ibid.* para 61.

³⁴⁷ Harlow (n 9); see also Cane (n 202), 276 where he calls for a clear distinction in the rules of standing generally between applicants seeking to show ‘personal standing’ and ‘representative standing’.

³⁴⁸ *Ibid.* 230.

³⁴⁹ Harlow (n 9), 231.

³⁵⁰ *Ibid.* 241.

³⁵¹ Harlow (n 9), 246-247.

As a final note, it could be argued that a problem with this proposal to enhance the role of groups is whether it actually fits into the constitutional context identified above: in particular the fact that the narrow direct review rules of standing were developed in relation to both natural citizens and legal persons. In response, the focus on groups represents a potential intellectual compromise: a conceptual reconciliation between a narrow role for citizens in direct review and a wide role for privileged applicants.³⁵² For instance, larger groups can operate in a similar manner to a privileged applicant by being able to shoulder the practical burden of litigation, even if in conceptual terms, their role is more limited as a private actor.

³⁵² In this respect, it bears some similarity, by analogy, to the reasoning of AG Sharpston in *Djurgården-Lilla Värtans Miljöskyddsförening* (n 282) at para 63 who noted that although the Aarhus Convention rejected introducing an *actio popularis*: ‘precisely because that course was rejected, the authors of the Aarhus Convention decided to strengthen the role of non-governmental organisations promoting environmental protection. That formula was adopted in an attempt to steer a middle course between the maximalist approach of the *actio popularis* and the minimalist idea of a right of individual action available only to parties having a direct interest at stake’

4. Chapter Summary

This Chapter has sought to explore how far the contextual elements identified have the potential to change the justificatory analysis of the standing rules as a whole. It has demonstrated that a qualified and tentative justification could be found if one assesses the rules against the principle of '*effective judicial protection*' but only if one focuses on the thematic emphasis on the availability of review in some of the central cases. Indeed, once the case sample is expanded, it is clear that the principle is more nuanced and does consider the practical dimension of such review, therefore undermining the degree to which this position can be maintained.

Furthermore, this Chapter has shown that if one evaluates the rules from the perspective of securing *practical* access to justice for the individual applicant, in particular with respect to delays and practical gaps in protection, then it is clear that the rules of standing still remain unjustifiable. The broader constitutional context represents a conceptually legitimate method of formulating access to justice routes in theory but ultimately it does not provide solutions to the problems which are in part created by the narrow direct review rules of standing.

As such various avenues of reform have been suggested to improve the rules' ability to secure practical access to justice for the individual but which does so whilst largely operating *within* and improve the constitutional context identified.

D. Concluding Thoughts

This research has sought to look at the context surrounding the rules of standing for the individual applicant in direct review proceedings as interpreted by the CJEU. It has sought to explore how far these rules can be explained and justified when we evaluate them with reference to certain contextual factors.

The central argument has been as follows: some elements (in particular *partial judicial subsidiarity* and the prioritisation of the role of privileged actors) go some way towards explaining the restrictive approach taken by the EU; the procedural framework might have the capacity to in theory but the elements identified here are unable to on a descriptive level. Further, it has been argued that a limited justification *could* be advanced if the rules are analysed against the principle of *effective judicial protection* as defined in some of the key cases, but ultimately any such position is heavily qualified due to methodological and substantive difficulties in the analysis. Indeed, when the rules are analysed against the standard of *practical access to justice*, the contextual factors identified do not render the standing rules justifiable and as such, some avenues for reform were suggested.

This was borne out across the three Chapters. Chapter One explored the premises of this thesis and the issues motivating it whilst Chapter Two analysed the explanatory potential of the constitutional context with reference to the factors identified. It demonstrated that certain factors have the capacity to partially explain the position taken and that they can have a limited impact on one's perception of the rules'

restrictiveness: to this extent, the rules remain narrow but one's view of their precise narrowness may be qualified. Chapter Three explored the justificatory potential of these factors with regards to the standards of assessment suggested, ultimately concluding that the rules remain '*overly narrow*' in their present form.

This thesis has sought to substantially contribute to and build upon the discussion in this field by focusing on certain elements of the constitutional context (as have been noted before) surrounding the rules of standing as they pertain to the individual and to explore their potential. It has sought to employ discrete comparisons in order to reflect on the nature of this wider context but it has not offered an unqualified view or one which seeks to overlook the practical difficulties facing the individual.

It might be objected that this focus on practicality merely takes the reader on a circular journey, ultimately canvassing a position not too dissimilar to the practical criticisms of these rules voiced by commentators such as AG Jacobs in *UPA*. However, despite any specific differences between my approach and the academic literature, to anyway dismiss my research in this way would be to overlook the importance of this 'journey'. The most important emphasis of this thesis is its advocacy of a contextual approach: the repeated emphasis of the need to evaluate these standing rules from the starting point of a proper understanding of this constitutional context in order to fully understand why the rules have developed in this way and how justifiable they are. As has been noted, it is not the case that previous scholars have failed to do this but it is argued here that this should remain at the core of our analysis. Furthermore, there is a strong instrumental reason for doing this: if hypothetically one was to ignore the

context when assessing standing rules, one would run the risk of drafting proposals which may be totally unsuitable to the European judicial framework. In this vein, this thesis has sought to sketch out briefly some areas for reform, building upon these elements. Space precluded a full examination of these issues but it is part of the hope of this project, that observers of these rules will consider in more detail how to build upon these proposals and improve the system in a way which conforms with these contextual elements.

It may be that even following a contextual analysis of these rules, one might retain the view that the biggest problem facing an individual from an access to justice perspective is the restrictive interpretation of '*individual concern*' and that therefore direct review should be nevertheless expanded. This notwithstanding, it is the ambition of this thesis, that commentators will *continue* to root their descriptive and normative analyses in a proper consideration of the wider context of these standing rules. As has been acknowledged, standing represents, in many ways, the 'gateway' which applicants have to pass through to enter the system,³⁵³ but generally, one can only really understand and evaluate the true nature of the hurdle faced by the individual, if we take a step back and see the full picture.

³⁵³ Craig and De Búrca (n 3), 542.

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