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EU Cities Fighting for Cleaner Air with Low-Emission Zones within the EU's Single Market: Future Green Actors or 'Victims' of Procedural Constraints?**

Abstract

The 2015 Dieselgate scandal led to a substantial re-regulation of the EU's emission limits for vehicles. Parallel to that, several member states, especially major European capitals, introduced further environmental measures against air pollution. Among them there were low-emission zones to guarantee cleaner air in formal terms, but they had no vehicle-type approval competences within the single market. In the appeal case before the Court of Justice of the EU, the General Court's (GC) former judgment was set aside, the latter procedure was initiated by three EU capitals against the Commission's specific waiver. The capitals raised their concerns that the Commission's regulation effectively precluded their regulatory power to restrict the movement of certain highly polluting cars within their already created low-emission zones.

In contrast to the GC's approach in dealing with lack of the Commission's competence to issue such a waiver, the Court only referred to the non-fulfilment of the formal requirements by the capitals as plaintiffs, without dealing with the merits of the case. This formal approach goes back to the early days of European integration on restricting individuals' standing rights, while merely focusing on the lack of cities' type approval competences following the strict separation of EU policy areas. This article argues that there is a clear need to reconsider the Court's formal approach by adapting to the new realities of European integration. These realities include the emerging relevance of EU-level protection of fundamental rights in a more sector-neutral way. Additionally, a substantial 'green U-turn' can be identified at national level, as the courts are allowing a broader way of enforcing the green rights in the recent years.

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I Introduction

In the Judgment on Appeals brought by the Federal Republic of Germany (C-177/19 P), Hungary (C-178/19 P) and the Commission (C-179/19 P), the European Court of Justice (hereinafter: ECJ or Court) set aside the judgment of the General Court (hereinafter: GC) dating back to 2018. The GC's judgment annulled the Commission's regulation, which allowed a waiver for certain car emission limits specified by EU standards and reregulated after the Dieselgate scandal of 2015. According to three EU capitals as plaintiffs, this waiver by the Commission effectively precluded their regulatory power to restrict the movement of certain polluting cars within their already erected low emission zones. However, in its reasoning, the Court relied entirely on the non-fulfilment of the formal requirements by the capitals as plaintiffs without dealing with the merits of the case on the contested modification of emission targets by the Commission. In the background lie several rulings of the Court, commonly known as the 'Plaumann test', which introduced the restrictive criteria of individuals' standing rights. This article argues that the Plaumann test should be reinterpreted due to the emerging relevance of the EU-level protection of fundamental rights and guarantees in a more sector-neutral way. Moreover, the new green wave of litigation led to cases, in which the national courts reconsidered allowing a broader way to enforce the green rights.

II Diverse Interpretation of EU Capitals' LEZ Regulatory Powers

1 The General Court's Judgment on Annulment of the Commission's Waiver Provisions

The case concerned the EU's longstanding struggle to regulate the type-approval of light-duty vehicles while ensuring the stricter emission requirements for the protection of Union citizens' health. In this annulment action launched by the cities of Paris, Brussels and Madrid before the General Court (GC), the plaintiffs claimed that the Commission was not entitled to modify the nitrogen oxides (NOX) emission values by making them less stricter compared to the applicable Euro 6 standard.

A multi-layered set of EU norms has been enacted over the last decades to establish a harmonised framework for the approval of motor vehicles in order to facilitate their common registration, sale and entry into service, especially within the single market. According to Directive 2007/46, the car manufacturer is responsible for the (national) approval process

at the national regulatory authority, including all aspects of the approval process and also for ensuring conformity of production.

Several other provisions have also been added to the directive, concerned with technical details such as conformity requirements, including the Commission's emission requirements on the Euro 6 emission limits. The enforcement and supervision of the common EU provisions are mainly based on the activity of national-level authorities.

The shortcomings of this regulatory system, combined with the deficiencies of the enforcement side, were revealed during the so-called Dieselgate of 2015.[1] The software of several diesel-engine models of a number of car manufacturers could detect when the models were being tested and adjust the car's emissions accordingly to minimum requirements. The European Parliament's Inquiry Report pointed out faults, such as main failures in testing procedures, the fraudulent practice of using defeat devices, serious systemic concerns about the EU's type-approval and in-service conformity provisions and the lack of real EU-level powers related to enforcement and penalties for breaching the Directive.[2] However, the EU's response remained relatively weak and mainly focused on reformulating the existing related EU legislation.

This new wave of regulations led to the replacement of the former New European Driving Cycle (NEDC) with the new real driving emission (RDE) testing cycle. However, the post-scandal measures also included the contested Regulation 2016/646 of the Commission.[3] This 2016 Regulation granted some kind of a technical waiver by the Commission regarding the limits prescribed by the Euro6 standard using applied correction coefficients based on statistical and technical uncertainties during RDE tests. This regulation had a crucial impact on the regulatory powers of the three capitals to ban or restrict certain cars within their low-emission zones (LEZ), as they could not include vehicle types meeting the NOX limits modified by the contested regulation.

The individuals – just like cities in this regard – in the actions for annulment before the CJEU only have restricted standing rights. The well-elaborated case law of the Court called the Plaumann test required individuals, as non-privileged plaintiffs, to have a direct and individual concern as standing requirements. Several judgments cited below in the case law elaborated on how direct and individual concern shall be interpreted.[4] These standing requirements have also been reformulated by the Lisbon Treaty. Lisbon's primary

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1 Marco Frigessi di Rattalma, Gabriella Perotti, 'European Union Law' in Marco Frigessi di Rattalma (ed), *The Dieselgate – A Legal Perspective* (Springer International Publishing 2017, Cham) 179–217. https://doi.org/10.1007/978-3-319-48323-8_11

2 European Parliament (2017): Report on the inquiry into emission measurements in the automotive sector [2016/2215(INI)].

3 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) [2016] OJ L 109.

4 Herwig C. H. Hofmann, Gerard C. Rowe, Alexander H. Türk, (eds), *Administrative Law and the Policy of the European Union* (Oxford University Press, Oxford, 2011) 829–841.

law, namely Article 263(4) TFEU[5] has broadened standing rights to a certain extent by eliminating the restrictive criteria of individual concern with regard to certain regulatory acts that only require private applicants (individuals) to have a direct concern. This applies to regulatory acts not entailing further implementing measures – even if these terms are subject to further reinterpretation cycles in the case-law.[6]

In its reasoning, the GC also dealt with the formal standing requirements in Article 263(4) TFEU. It was found that the actions of the cities were admissible as not requiring further implementing measures (paras 38–40), while it also pointed out the direct effect in the legal position of the three capitals. These capitals had already introduced a diverse set of measures including LEZs to fight air pollution within their territory. Moreover, these public entities' regulatory powers had been limited by the contested regulation as a clear direct effect (paras 74–76). The GC also concluded that traffic restrictions concerning the level of vehicle pollutants, adopted by public authorities that are emanations of the Member States, run counter to the requirements of EU law, insofar as they apply to vehicles compliant with the most recent standards and limits, and the Court held that that was indeed the case (paras 81–84). Additionally, the GC also pointed out Directive 2007/46 as the relevant legislative act, which prevented the public authorities of the Member States from prohibiting, restricting or impending the road movements of vehicles on grounds related to aspects of their construction and functioning covered by the Directive (paras 50–77).

As for the merits of the case, the GC noted that the Commission's contested regulation was adopted as a measure implementing Regulation No 715/2007, relying on the provisions of that regulation, which enable the Commission to determine the specific procedures, tests and requirements for type approval. As a result, the Commission had the power to adopt such measures related to the NOX emission limits (paras 112–114).

Nevertheless, the question to be answered was how broadly this regulatory power could be extended, notwithstanding the potential modification of the regulation by Union legislators. In this regard, the GC clarified that the Commission had no power to amend those emission limits in RDE tests by applying correction coefficients, especially by making it impossible to know whether the Euro 6 standard is complied with during RDE tests (paras 119–145). Consequently, the Commission did not have the power to amend the Euro6 emission limits for the new RDE testing cycles.

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[5] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202.

[6] Somssich Réka, 'Magánszemélyek kereshetőségi joga tíz évvel Lisszabon után: teljes vagy hiányos a jogorvoslati rendszer?' in Bartha Ildikó, Fazekas Flóra, Papp Mónika, Varjú Márton (eds), *Hatékony jogvédelem az Európai Unió jogában – Tanulmányok Várnay Ernő 70. születésnapja tiszteletére* (Társadalomtudományi Kutatóközpont 2021, Budapest) 102–125.

2 The Court's Judgment with Mere Focus on Inadmissibility Requirements

The Court's judgment on appeals originally brought by the Federal Republic of Germany (C-177/19 P), Hungary (C-178/19 P) and the Commission (C-179/19 P) interestingly focused on the admissibility requirements without paying further attention to the merits of the case.[7] Consequently, the Court exclusively dealt with the two cumulative elements of Article 263(4) TFEU, namely the direct effect on the cities combined with the analysis of the need for further implementing measures.

The Court's conclusion was that within the meaning of Article 263(4) TFEU the applicant cities had no direct concern in relation to Article 4(3) of Directive 2007/46.

The Court also analysed the Directive as a framework-type legislative act, laying down the general competences in the type approval processes, yet with a different outcome compared to that of the GC's argumentation.

Article 4(3) of the Directive 2007/46,[8] which was already repealed in 2018, formulated positive as well as negative obligations on type approval processes. According to subparagraph (1) 'Member States shall register or permit the sale or entry into service only of such vehicles […] as satisfy the requirements of this Directive'.

Additionally, subparagraph (2) formulates the negative side of the obligation, as 'They (Member States) shall not prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles' on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter.

The Court thoroughly analysed these provisions in the light of their wording and context as well as objectives – combined with their legislative history.

First, regarding the wording of the negative obligation (prohibition) on restricting the 'circulation on the road' of certain vehicles, the Court concluded that that provision covered not only the circulation of vehicles in the territory of a Member State but also other activities, such as the registration, sale and entry into service of vehicles. Therefore, these restrictions are meant to serve as a general barrier to access to the vehicle market without any intention of *'cherry picking'* certain elements, with the main focus on the prohibiting the circulation of certain vehicles (paras 83–84).

Second, the Court dealt with the context of the provision concerned. It stressed the complementary nature of the positive/negative obligations. Contrary to the interpretation adopted by the GC, the scope of the negative obligation cannot be wider than the scope of the positive obligation, as the positive side did not mention the '*circulation on the road*'

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[7] Joined Cases C-177/19 P to C-179/19 P *Federal Republic of Germany and Others vs. European Commission*, EU:C:2022:10.

[8] Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) [2007] OJ L 263/1.

of certain vehicles. Moreover, the applicant cities did not have any powers in relation to vehicles' type approval (paras 85–86).

Third, the objective pursued by Directive 2007/46 combined with its legislative history focused on the establishment of a uniform procedure for the approval of new vehicles and, by extension, on the establishment and functioning of the internal market without the objective of extending the scope of the legislation on vehicles' type approval (paras 87–93).

The Court also rejected the line of arguments that an action for failure to act or infringement proceedings may be brought against the related Member States without the measures adopted by the cities in line with the related clean air and environmental requirements. Therefore, the Court has dealt with the case's environment-related issues and single market-related regulatory powers of the cities instead of separated from each other (paras 94–103).

In the view of the Court, as a final conclusion, the GC erred in law, as the applicant cities had no direct concern in relation to the regulation, within the meaning of Article 263(4) TFEU. This interpretation leads us to whether the Plaumann test's formal requirements should be upheld, especially in the era of climate change-related challenges and the EU's green transition.

III Critical Remarks on the Court's Reasoning

1 Still Restrictive Approach Regarding Standing Requirements

The Court's judgment is a clear manifestation of its reluctance to introduce the extended way of individual judicial protection by reinterpreting the formal requirements of the Plaumann test, which has been enacted in the form of Article 263(4) TFEU as part of the EU's primary law.

Upholding the Plaumann test can be explained in different ways, including (1) the absence of CJEU competence to modify the test's requirements embedded in the TFEU, (2) the less strict 'approach' followed by the Court in certain policy areas, (3) the test's special role in reinforcing the fundamental structure of the European Union's judiciary.

First, the general rule of *'praetor ius facere non potest'* still prevails in the European Union's judiciary as well. Hence, the provisions of the Treaties, such as Article 263(4) TFEU are not to be amended by the ECJ.

However, the Court itself reinterpreted or extended the interpretation of the Treaties to safeguard the EU-level procedural requirements and guarantees, even concerning the formal requirements of the annulments. In the *Les Verts* judgment, the European Parliament's acts were acknowledged as the subject of annulments, as 'a complete system of legal remedies and procedures had to be guaranteed' within the EEC Treaty's rule of law requirements.[9] This

[9] Case C-294/83 *Parti écologiste «Les Verts» v European Parliament*, EU:C:1986:166. paras 22-23.

circle of reviewable acts has been further extended to EU agencies' acts in the *Sogelma* by referring to the procedural requirements towards a community-based on the rule of law.[10] In the Chernobyl judgment, the Court used a broader interpretation in order to include the European Parliament acting to protect its prerogatives.[11] According to Eliantonio and Stratieva the reinterpretation of the Treaties without formal amendment could confirm the rational choice theory. The Court acted in favour of the European Parliament as a mere redistributor of powers in line with the interests of the Member States. Its choice has been later endorsed by the Member States in the form of the next Treaty revision, which was extended to the EP. [12]

In general, the standing requirements as a provision of the TFEU cannot be considered as an absolute constraint, as the Treaties have been amended by the ECJ many times, even in relation to annulment procedures as described above. Moreover, the Court has always emphasized the role of citizens (even collectively) since its *Van Gend & Loos* judgment in order to enforce community law against the not necessarily loyal national administration.[13] Therefore, the EU uses the wider access to justice for citizens before national courts as a tool to facilitate the enforcement of EU law concerning several policy areas.[14] In contrast, the standing right of individuals (in this regard, cities or green NGOs also included) before the ECJ remained restricted.

Second, there are certain policy areas in which the ECJ followed a much more flexible approach to the test's formal requirements. This test was originally formulated in the Common Agricultural Policy (CAP) cases of the 1960s, which included technical details embedded in the regulatory acts of the Commission. Craig pointed out that the ECJ refused to broaden the individuals' standing rights in cases related to the CAP, since the Commission itself could not adopt a margin of discretion to the market measures.[15] In contrast, the ECJ started to take a more flexible approach in competition-related cases due to the preliminary

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[10] Case T-411/06, *Sogelma – Societá generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)*, EU:T:2008:419, para 37.

[11] Case C-70/88, *European Parliament v Council of the European Communities*, EU:C:1990:217, para 26.

[12] Mariolina Eliantonio, Nelly Stratieva: From Plaumann, Through UPA and Jégo-Quéré to the Lisbon Treaty: The Locus Standi of Private Applicants Under Article 230(4) EC Through a Political Lens (January 21, 2010), (2009) 5 (13) Maastricht Faculty of Law Working Paper 43–57.

[13] Bruno de Witte, 'The Impact of *Van Gend & Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in Court of Justice of the European Union in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg) 95–96; Joseph Weiler, 'Revisiting Van Gend & Loos: Subjectifying and Objectifying the Individual' in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg) 13–14.

[14] Bernhard W. Wegener, 'Rechtsschutz für gesetzlich geschützte Gemeinwohlbelange als Forderung des Demokratieprinzips?' HFR 2000, Beitrag 3, <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php? artikelid=35> accessed 5 August 2022.

[15] Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 (4) Oxford Journal of Legal Studies 507–537. https://doi.org/10.1093/ojls/14.4.507

administrative procedure before the Commission, where the procedural rights of the parties involved had been acknowledged in the case law of the Court and later by the EU's secondary legislation.[16] In general, the ECJ seemed to be less reluctant to guarantee standing rights for those parties who were involved in the preliminary administrative procedure-like phase before the Commission.[17]

As for the case concerned, in the environmental sector the standing rights of individuals, especially green NGOs, have not been acknowledged either,[18] even if this could be derived from the EU's international obligation as being a party to the Aarhus Convention[19]. The Convention, as a so-called mixed agreement, has been ratified by the EU, which resulted in the so-called Aarhus Regulation.[20] This latter normative act introduced an administrative procedure-like phase at EU level in environmental cases. However, due to the related case-law of the ECJ, NGOs were only entitled to challenge the EU acts based on the infringement of their procedural rights.[21] Even if the most recent amendment of the Aarhus Regulation[22] could lead to some positive changes, it is still up to the Court to reconsider broadening private plaintiffs' standing rights in environmental cases.

Dieselgate did not lead to substantial changes in terms of establishing an administrative procedure-like phase in relation to road transport either. The Union legislator focussed instead on providing some increased powers for the Commission, combined with the creation of an implementation forum inside the Commission's structures, while new requirements towards national authorities were formulated.[23] Nevertheless, no new EU road transport agency has been created, even if such a proposal was initiated by the European Parliament in light of the

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[16] In state aid law see as most recent case-law reference Case C-99/21 P, *Danske Slagtermestre v European Commission*, EU:C:2022:510, para 55.

[17] Richard Whish, *Versenyjog* (HVG-ORAC Kiadó 2010, Budapest) 242–281; Tihamér Tóth, *Az Európai Unió versenyjoga* (Complex Kiadó 2007, Budapest) 605.

[18] Katalin Gombos, Orsolya Johanna Sziebig, *Az európai környezetvédelmi szabályozás legújabb irányai* (Ludovika Egyetemi Kiadó 2021, Budapest).

[19] *United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, signed 25 June 1998, UNTS 2161 (entered into force 30 October 2001)

[20] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[21] Justice and Environment: Public Guidance on Practical Application of the Request for Internal Review (Regulation 1367/2006/EC), 2011; [http://www.justiceandenvironment.org/_files/file/2011%20RIR%20Guide%20final.pdf]; accessed: 25th February 2015.

[22] Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ L 356, 8.10.2021, 1–7).

[23] Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC.

three already existing other EU agencies for the maritime, railway and air traffic sectors.[24] Instead of creating an administrative procedure-like phase and the related EU-level actor, these type-approval competences have been kept in the realm of the Member States. Consequently, the stricter interpretation of the Plaumann test might prevail in this sector as well.

The Plaumann test's vague nature is also related to the sectoral logics of EU law, combined with the EU-level direct and Member State-level indirect implementation models. The shift towards EU-level direct implementation and the extension of administrative procedure-like phases led to the more flexible interpretation of the Plaumann test in some policy areas. Even after scandals like Dieselgate, vehicle type approval as a policy area belongs to those sectors to which the implementation by EU actors, or at least the spectrum of administrative procedure-like phases, have not been extended. The administrative procedure-like phases related to environmental policy have been reregulated by the amendment of the Aarhus Regulation. However, it is not yet clear whether these amendments will result in any kind of 'green turn' related to the Plaumann test.

Third, the rationale for upholding Plaumann's requirements could also be based on the diverse structures and mandates within the system of the European judiciary. Back in 1980, Rasmussen concluded by investigating the case law of the Court that upholding the test was about to shape a European system of appellate jurisdiction. Therefore, the Plaumann test's restrictive interpretation was intended to keep most of the cases initiated by individuals at the level of the Member States.[25] According to Eliantonio and Stratieva, this motive of the ECJ is confirmed by the historical institutionalism theory, referring to the growing self-interest of the Court regardless of the Member States, as the Court might protect itself against the overload of litigation over individuals' restricted standing rights.[26] Structurally, Leanerts also referred to the later creation of the Court of First Instance, which could also be seen as a preliminary filter, while its competences have kept on broadening since its establishment.[27] This theory can also be justified by the failed attempt to reinterpret the Plaumann test by the GC (Court of First Instance) in the *UPA* and *Jégo Quéré* cases.[28] According to Pilafas, the ECJ's intention was clearly in these later judgments to keep the primary judicial level of individuals' rights' protection at the level of the Member States instead of broadening the direct standing rights before the Court.[29]

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[24] Szegedi László, 'The Crisis Management of the 'Dieselgate' – Transboundary (and) Crisis Driven Evolution of EU Executive Governance with or without Agencies?' (2018) (21) Európai Tükör 85–100.

[25] Hjalte Rasmussen, 'Why is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 European Law Review 122–127.

[26] Eliantonio, Stratieva (n 12) 43–57.

[27] Koen Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union' (2007) 44 (6) Common Market Law Review 1650–1658. https://doi.org/10.54648/COLA2007138

[28] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462.; Case C-263/02 P, *Commission of the European Communities v Jégo-Quéré & Cie SA*., EU:C:2004:210.

[29] Christos Pilafas, *Individualrechtschutz durch Nichtigkeitsklage nach EG-Recht – Unter besonderer Berücksichtigung des Wettbewerbsrecht* (Nomos Verlag 2006, Baden-Baden) 256.

In contrast to these intra-institutional conflicts of the early 2000s, the GC has somewhat adopted the Court's restrictive approach in recent years with some exceptions.[30] The GC had declared the Brussels Capital Region's action for annulment inadmissible, which was later confirmed by the Court as not being directly concerned by the contested regulation renewing the approval of the active substance 'glyphosate'. Similar to the case concerned, the Court referred to the lack of competence of the Brussels Capital Region to 'establish product standards' compared to the federal level, which did have this kind of competence under national law.[31]

In terms of the special structure of the European judiciary and of intra-institutional issues, the judgment of the three capitals fits into the line of the *UPA* and *Jégo Quéré* cases to some extent, since the GC's judgment has been set aside based on the formal concern of inadmissibility, while the Court did not even touch on the merits of the case.

To summarise, the Plaumann test, as a fundamental element of the European – or more precisely EU-level – judiciary, cannot be seen as a static interpretation tool in the Court's case-law, as the Court itself also started to take a much more flexible approach to the test's formal requirements. These modifications have been justified in order to guarantee a complete system of legal remedies and procedures, to reflect the changing nature of EU integration, including the dynamics of implementation competences. Even if the Plaumann test still prevails, the more recent 'green shift' of national judiciaries might lead to the Court's reconsideration of the Plaumann requirements.

2 Judicial Activism of the National Courts in the Recent 'Green' Cases

The Court's reasoning tended to focus on the sectoral categorisation of the directive's specific competence provisions by using the interpretative toolbox of analysing their wording, context and objectives. This led to the conclusion of inadmissibility with a narrow focus on the nature of the competence provisions. The high number of recently introduced LEZs relates to the dilemma that such restrictions are applied by cities as environmental measures for reducing emissions in the targeted urban areas. However, these zones in practice restrict the usage of vehicles without the city concerned having type approval or market access competencies within the single market.[32] Moreover, the action dealt with a waiver as a further extension of less stringent pollution requirements, originally restricted to address the fraudulent practices of the Dieselgate.

Regarding the broader inclusion of environmentally relevant aspects, a further concern over the Court's interpretation originates from the new wave of climate change-related strategic litigation. Several courts, inside and outside the EU, have already started to follow

[30] Somssich (n 6) 121.

[31] Case C-352/19 P *Région de Bruxelles-Capitale v European Commission*, EU:C:2020:978.

[32] Justyna Bazylińska-Nagler, 'Harmonization of automobile emission standards under EU law' (2021) 11 (4) The Lawyer Quarterly 585–594.

a much 'greener' approach, as presented below, which makes the Court's approach even more restrictive.

Considering the implementation deficit of environmental interests, or more precisely environmentally relevant interests, new enforcement strategies have emerged.[33] Cities have become key actors of multi-level climate governance, not just at EU level but globally as well.[34]

This involvement also includes an increased number of climate change-related court cases initiated by cities, which has 'grown to a point where litigation is considered by many as a governance mechanism for addressing climate change'.[35] Potential plaintiffs from cities and NGOs form alliances to share the resources and capacities required as part of strategic litigation, while city networks could also be more active as green actors. Most of the recent cases are mainly initiated to compensate damages based on corporate actors' contribution to global warming. New lawsuits against major oil companies have been initiated in the USA since 2017 to seek compensation for the related damages.[36] An alliance of 14 French local governments and 5 NGOs filed a complaint against the energy company Total in January 2020.[37] From the side of the plaintiffs, the case concerned before the ECJ involving three EU capitals facing the same dilemma also fits this global tendency of building up an alliance of cities.

As for the EU-related trend of new *'green'* litigation, the judicial review against air quality plans regulated by Directive 2008/50 could also gain momentum in recent years.[38] In Germany, a new wave of lawsuits has been initiated in the 'fight for clean air' – as a result of different elements, namely, (1) the extended right of NGOs to act before the courts, utilised by the German NGO Deutsche Umwelthilfe (DUH), which led to dozens of air quality cases; (2) combined with the striking failure to adopt alternative measures to reduce NOX concentration significantly; (3) the German administrative courts handled the legal cases filed by the DUH by placing great emphasis on health protection and

[33] Viktor Glied, Attila Pánovics, *Fenntartható fejlődés és környezetpolitika a 21. században – Egy paradigmaváltás küszöbén* (Kontraszt Plusz Kft. 2022, Pécs) 166.

[34] Christina Bakker, 'Are cities taking center stage? The emerging role of urban communities as 'normative global climate actors' (2020) 3 Italian Yearbook of International Law Online 81–106. https://doi.org/10.1163/22116133-03001006

[35] Setzer Joanna, Byrnes Rebecca, 'Global trends in climate change litigation: 2020 snapshot' (2020) London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, <Global-trends-in-climate-change-litigation_2020-snapshot.pdf (lse.ac.uk)> accessed 28 July 2022.

[36] Bakker (n 34) 101.

[37] The tribunal ruled in favour of the 5 NGOs and 14 local authorities by confirming its jurisdiction, rejecting the Total's attempt to bring the dispute before the commercial court (Order of the Tribunal Judiciaire de Nanterre of 18 January 2021).

[38] Delphine Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2021) 30 (1) Review of European, Comparative & International Environmental Law (RECIEL) 34–45. https://doi.org/10.1111/reel.12336

compliance with European law.[39] This third element can also be demonstrated by the German Federal Administrative Court's judgments of 2018.[40] These confirmed the legal possibility for German municipalities to introduce driving bans/restrictions on cars, even based on national regulations originally meant to serve as the basis for federally common road transport signals of car type categories.[41] In contrast to the ECJ's reasoning, this step by the German judiciary required some judicial activism in terms of the legal basis. Additionally, the German Federal Constitutional Court has not dealt with the merits of complaints submitted against the municipalities' driving bans/restrictions.[42] The French courts in 2019 opened a different form of strategic litigation in form of state liability cases, as they confirmed that a link must be drawn between state liability and air quality plans as 'prescribed by Directive 2008/50'.[43]

However, the direction of these cases only partly refers to the extension of driving bans or restrictions, while an alternative form of compensation case has also become a more integral part of enforcing green rights. In light of the more deliberative national approaches presented above, the Court's reasoning in the case concerned seems even more rigid. The ECJ's own case-law has become highly relevant at national level, guaranteeing very wide access to the courts, while having its most positive effects by introducing the obligation to provide access and remedies that did not exist before in national law.[44] Additionally, the 'complete system of legal remedies' envisaged by the abovementioned case law can hardly be achieved with this restrictive approach by the Court – especially if this new tendency of strategic green litigation will become even more common at national level.

IV Conclusions and Further Lessons to Be Learned

The Court's reasoning in the present case cannot be seen as a surprise in light of its elaborated case law over the last decades. Only the procedural constraints elaborated in cases initiated by other types of individual plaintiffs have been applied to the cases brought

[39] Annette Elisabeth Töller, 'Driving bans for diesel cars in German cities: The role of ENGOs and Courts in producing an unlikely outcome' (2021) 7 (2) European Policy Analysis 486–507. https://doi.org/10.1002/epa2.1120

[40] Rainer Schenk, 'Dieselfahrzeuge raus aus den Städten? – Das Urteil des BverwG' (2018) 5 Juris 202–207; Constantin Beye, 'Die Voraussetzungen zur Anordnung von Verkehrsverboten für Diesel-Kraftfahrzeuge Zugleich eine Einordnung und Bewertung der Urteile des BVerwG v. 27.2.2018 – 7 C 26.16 und 7 C 30.17' (2018) 6 Zeitschrift für das Juristisches Studium 528–539.

[41] Schenk (n 40) 207.

[42] Order of the German Federal Constitutional Court of 1 October 2019 in cases 1 BvR 1789/19, 1 BvR 1799/19, 1 BvR 1800/19, 1 BvR 1801/19, 1 BvR 1802/19, 1 BvR 1803/19, 1 BvR 1804/19, 1 BvR 1805/19, 1 BvR 1898/19.

[43] Judgments of Tribunal Administratif de Paris of 4 July 2019 in cases n° 1709333, n° 1810251 and n° 1814405.

[44] Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 (2) Review of European Administrative Law 5–34. https://doi.org/10.7590/187479819X15840066091222

by cities/capitals, which can be considered as a prevailing procedural constraint for them. Moreover, this element also precludes cities from becoming future green actors in action for annulment cases before the ECJ.

Theoretically, the dilemma refers to the two overlapping areas of EU law, namely type approval of vehicles as an internal market provision in collision with air quality/environmental measures, while the effectiveness of EU law as one of the main functions of the ECJ must be safeguarded as well. In a broader context, this dilemma, combined with the prevailing Plaumann test, also highlights the potential role of the ECJ within the ever-changing framework of integration.

At the beginning of European integration, the ECJ/CJEU had a pivotal role, to a great extent an activist role, in shaping the fundamental doctrines of EC law. The judgments on *Van Gend en Loos* or *Costa v. ENEL* can be considered as the cornerstones of the European legal framework, which have only been later incorporated into the Treaties. In this regard, the general rule of *'praetor ius facere non potest'* has not been strictly applied. Later, the ECJ/CJEU has reinterpreted or extended the interpretation of the Treaties to safeguard EU-level procedural guarantees and rights. Nevertheless, the Plaumann test still restricts the direct standing rights of individuals as non-privileged plaintiffs, among them cities. This has been upheld in the case concerned – regardless of the fact that their regulatory powers have been restricted by the Commission's waiver. The reinterpretation of the test's formal requirements could lead to a more sector-neutral approach from the side of the CJEU in order to guarantee 'a complete system of legal remedies and procedures' as envisaged by the Court itself in its *Les Verts* judgment. This sector-neutrality might become even more substantial, along with the increasing relevance of effective judicial protection as being bindingly codified in the Charter of Fundamental Rights (Article 47 CFR) and laid down by Article 19(1) TEU. Moreover, the CJEU's sector-specific set of guarantees elaborated in its CFR-related case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance.[45]

The former crisis management steps might provide a proper basis for possible adaptation techniques by the CJEU to the new realities of European integration.[46] In the evaluation of the management of the 2008 financial crisis, the CJEU had three different options in social rights-related debates on the crisis management reforms, where the EU only had weak competences. As Barnard concluded, these options included (1) following the old rules of integration (collision doctrines) or (2) the 'old rules-lite' with a focus on the procedural review

[45] Catherine Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform' in Paul Craig, Gráinne de Búrca, (eds), *The Evolution of EU Law* (Oxford University Press 2021, Oxford, 678–720) 697–698. https://doi.org/10.1093/oso/9780192846556.003.0021; Widdershoven (n 44) 5–34.

[46] Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 (2) Oxford Journal of Legal Studies 325–353. https://doi.org/10.1093/ojls/gqv002

(3) or total judicial abstinence.[47] Transport policy, just like the environmental affairs, as overlapping areas in the present case, are shared competences between the EU and Member States. However, it seems that Court followed an approach that combined the old rules, the mere procedural review, with total judicial abstinence. Nevertheless, the EU's Green Deal also marks a new area, in which green policies might become much more horizontal, with a potential effect on each EU policy area. Even by formally upholding the Plaumann test, which has been done by the GC, the Court could have reconsidered a more deliberative application of the related formal requirements to deal with the merits of the case on the contested modification of emission targets by the Commission. Just like the new wave of strategic green litigation at the national level, this interpretation model of old rules or even 'old rules-lite' could lead to a moderate green turn by the Court. This could be a sign of adaptation, not just to the new realities of European integration, but to the global fight against climate change as well.

[47] Catherine Barnard, 'Van Gend & Loos to(t) the future' in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg, 117–123) 120–123.