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The Power of Procedure

Fundamental Rights in the Action for Annulment before EU Courts

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1.1 INTRODUCTION

As an order construed on compliance with fundamental rights, the EU has a specific interest in upholding fundamental rights: on the one hand, respect of fundamental rights enhances the EU's moral aspirations and legitimacy in the face of Member States' claim to supremacy over fundamental rights protection; on the other hand, compliance with fundamental rights by the EU sets the standards for Member States that are deviating from those guarantees.[1] The action for annulment before the EU Courts has a central role to play in this context. All EU acts should respect EU fundamental rights as higher law of the EU.[2] Through the action for annulment, applicants may challenge EU law on grounds of breaches of fundamental rights and achieve one of the following outcomes. First, an EU act may be found to be compatible with EU fundamental rights. Alternatively, EU acts may be declared as incompatible with EU fundamental rights and thus annulled.

Compliance with fundamental rights can be assessed with reference to issues of substance or procedure: for instance, the content of an EU act may breach an EU fundamental right (substantive compliance); similarly, respect of fundamental rights should occur with reference to the procedures used to adopt EU acts (procedural compliance).[3] Accordingly, different fundamental rights of a more substantive (e.g., privacy, freedom of expression) or procedural

[1] This becomes especially relevant following the rule of law backsliding in some EU Member States.

[2] Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU), art 6.

[3] See Darren Harvey, 'Process-oriented federalism in the EU: A (partial) response to critiques of process review advocacy in the EU' (2021) 46(4) European Law Review 460.

(right to an effective remedy, good administration, etc.) nature may be invoked to contest EU law.[4] In conjunction with the annulment, EU courts signal to EU institutions the obligations they must follow to respect fundamental rights, concerning both the procedure for the adoption of EU acts as well as their content.[5] Therefore, the annulment review has both a cathartic and a regulatory function. It is cathartic insofar as it can expunge from the EU legal order EU acts that are unlawful because they are non-compliant with EU fundamental rights. It is also regulatory insofar as it determines the obligations of EU institutions that are to be respected to honour compliance with fundamental rights.

This chapter investigates the approach of the EU judicature to the protection of fundamental rights through the action for annulment. After providing an overview of the EU model of judicial review (Section 1.2) and the rules governing the action for annulment (Section 1.3), the chapter delves into the case law and sheds light on the limits surrounding the protection of fundamental rights in the context of the action for annulment. Due to the division of competences between the General Court and the Court of Justice to review EU acts, the chapter explores the case law of these two courts separately, in Sections 1.4 and 1.5, respectively. The analysis showcases the influence of EU procedural fundamental rights in shaping the procedural duties of EU institutions.

This finding highlights the power of procedure in the EU constitutional architecture. By moulding the procedural obligations of EU institutions in the adoption of EU measures, the EU courts have enhanced the rule of law pedigree of the EU and ensured the respect of individual fundamental entitlements in the adoption of EU measures. The centrality of procedural fundamental rights issues in the judicial review of EU law is a direct reflection and consequence of the plethora of procedures that constellate the EU governance. Applicants have used the action for annulment to contest the procedures used by EU institutions to adopt EU measures and, more rarely, their substance. A shift in such a procedure-focused paradigm may occur if a more *substantive* contestation of EU law, based on fundamental rights pleas that do not focus on procedure, emerges.

[4] However, procedural fundamental rights can also be relied upon to challenge the content of an act, rather than its adoption. For instance, an EU act laying down procedural rules may be found to contravene the right to a fair trial.

[5] Malu Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Janneke Gerards and E Brems (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017).

1.2 THE EU JUDICIAL REVIEW MODEL: AN OVERVIEW

Across Europe and beyond, courts have become guardians of the law. They have been entrusted with the duty to scrutinise measures adopted by regulators and legislators and to ensure compliance with the Kelsenian pyramid of legal sources. The core values dominating this model are those of coherence and hierarchy. Coherence of legal orders derives from the compatibility of all secondary measures (or *praemissa minor*) with higher law (*praemissa maior*). Describing this phenomenon, Lustig and Weiler wrote, 'It is hard to find a constitution drafted in the last century that has not adopted some variant of this model [i.e. judicial review].'[6] They observed that a judicial review–centric model 'was conquering the democratic world . . . becoming part of democratic ontology – what it is to be a democracy'. Judicial review has been defined as an 'unqualified public good' based on a 'double faith': first, the faith in a 'higher law' composed of norms protecting individual rights and liberties against tyrannies – including tyrannies of democratic majorities – and binding legislatures; second, the faith in courts as the most efficient guarantee for the effectiveness and enforcement of such higher law.[7]

Among the 'higher law' sources, fundamental rights have progressively acquired an increasing importance.[8] Fundamental rights protection is one of the elements of the constitutionalism born out of the conflicts affecting the world in the last century. Fundamental rights express the essential values of a society.[9] Not all societies will necessarily protect the same fundamental rights and thus values, meaning that varying protections accordingly emerge. Hence, scrutinising public bodies' actions and measures in light of fundamental rights contributes towards ensuring that those entities comply with the essential choices on which the social contract is built.[10] No less important is an additional function of fundamental rights–based judicial review: it contributes towards fighting abuses of power by public authorities. This latter function translates into the imposition of negative and positive duties on public bodies, a list of 'dos and don'ts' that are compatible with the enjoyment of essential

[6] D Lustig and Joseph H H Weiler, 'Judicial review in the contemporary world – retrospective and prospective' (2018) 16(2) International Journal of Constitutional Law 315, 316.

[7] Ibid 316.

[8] See, for instance, David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (Oxford University Press 2007) 102.

[9] See, for instance, Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 83. Similarly, Raz states that 'the specific role of rights in practical thinking is . . . the grounding of duties in the interests of other beings'; Joseph Raz, *The morality of freedom* (Clarendon Press 1986) 180.

[10] Bilchitz (n 8).

legal entitlements. The idea that fundamental rights impose limits on the action of public authorities is a crucial manifestation of the rule of law.[11] As rightly remarked by Lustig and Weiler, 'judicial review became a hallmark of the very notion of the rule of law. . .'.[12]

This judicial review model based on the centrality of courts, fundamental rights, and the protection of the rule of law also applies to the EU. First, courts are of the essence in the EU legal order: they have a specific constitutional role linked to the effective application of EU law. Under the combined reading of Article 19 TEU and Articles 263 and 267 TFEU,[13] the Treaties set out a system of 'complete remedies' according to the EU courts that entrust national and EU courts with effective application of EU law. As explained in *Opinion 1/17*,

> In order to ensure that those specific characteristics and the autonomy of the legal order thus created are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law . . . it is for the national courts and tribunals and the Court to ensure the full application of that law in all the Member States and to ensure effective judicial protection, the Court having exclusive jurisdiction to give the definitive interpretation of that law.[14]

The jewels in the crown of the EU remedies system are the preliminary reference procedure,[15] which allows the Court of Justice of the EU (CJEU) a form of indirect review of national law against EU law, and the action for annulment, which empowers EU institutions and bodies, Member States, and individuals to challenge the legality of EU law before the CJEU,[16] including its compliance with EU fundamental rights.

Second, while the founding Treaties did not contain any specific protection for fundamental rights, the centrality of these rights in the EU legal architecture currently stems from several provisions. For instance, Article 2 TEU recognises that the respect of fundamental rights is one of the founding values of the EU, while Article 6 TEU acknowledges the binding nature of the

[11] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 187 and ff.

[12] Lustig and Weiler (n 6) 316.

[13] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU); Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECLI:EU:C:2002:462, para 40.

[14] Case *Opinion 1/17* [2019] ECLI:EU:C:2019:341, para 111, emphasis added.

[15] TFEU, art 267.

[16] The General Court operates as a court of first instance; its judgments can be appealed against before the Court of Justice.

Charter of Fundamental Rights of the European Union (the Charter)[17] and attributes the status of general principles of EU law to the rights guaranteed by the European Convention of Human Rights (ECHR). Additionally, Article 51 of the Charter indicates that the EU institutions, bodies, offices, and agencies of the Union are subject to compliance with the Charter, with due regard for the principle of subsidiarity. But the impact of EU fundamental rights goes as far as shaping even traditionally inter-governmental areas of law, such as EU foreign policy. As an example, the declaration on Articles 75 and 215 TFEU establishes that 'the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities' concerned by EU foreign policy measures.

Third, the connection between judicial review and the rule of law in the EU legal order can be traced from the seminal *Les Verts* judgment.[18] In that case, the CJEU held that the 'European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaties'. It follows that the judicial scrutiny over EU measures in light of EU fundamental rights via the action for annulment is a manifestation of the EU understanding of the rule of law.

1.3 THE ACTION FOR ANNULMENT IN EU LAW

1.3.1 *Pleas*

The action for annulment is governed by several rules. Five are grounds for judicial review before the EU judicature: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, and misuse of powers.[19] These grounds reflect a Kelsenian model of hierarchy of norms, where EU secondary measures can be scrutinised against higher norms, including EU fundamental rights. They also indicate that the invalidity of EU law in light of EU fundamental rights can emerge in the context of the adoption or the application of EU measures. Hence, fundamental rights–based judicial review in the EU has a clear potential to significantly influence the conduct of EU institutions.

[17] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR).
[18] Case C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166.
[19] TFEU, art 263.

1.3.2 *Standing*

Applicants are divided into three categories: privileged, semi-privileged, and non-privileged.[20] The privileged applicants – being the Member States, the European Parliament, the Council, and the Commission – are allowed to bring an action for annulment without proving any interest on their side (they can do it simply in the interests of legality).[21] Other institutions such as the Court of Auditors, the European Central Bank, and the European Committee of the Regions have limited power to bring an action for annulment, 'for the purpose of protecting their prerogatives'.[22] One may wonder whether EU institutions or Member States should be able to challenge EU law in light of EU fundamental rights. Member States and EU institutions may in principle invoke fundamental rights protection in the absence of indications to the negative in the Treaties. However, criticisms have been raised.[23] Finally, natural and legal persons – the most likely applicants to allege violations of fundamental rights – are non-privileged applicants subject to rather stringent admissibility conditions. In particular, they can challenge (a) acts addressed to them, (b) acts not addressed to them but of direct and individual concern, and (c) regulatory acts of direct concern to them that do not entail implementing measures. In addition, Article 275 TFEU specifies that the addressees of restrictive measures adopted by the Council on the basis of Title V, Chapter 2 TEU can challenge those measures through the action for annulment.

The classification of applicants and the relevant standing rules reflect the peculiar function of the action for annulment in the EU legal order. The broader leeway given to the EU institutions and Member States to challenge EU law is linked to the role of these entities to represent the public interest. It is for this reason that individuals have more stringent standing requirements; in turn, these settings allow the *general* interest enshrined in EU legislation to prevail over *individual* claims. Such standing rules have implications on the ability to challenge EU law in light of EU fundamental rights. Fundamental rights are conceptualised by many authors first and foremost as individual

[20] Ibid

[21] See Case C-45/86 *Commission v Council* [1987] ECLI:EU:C:1987:163, para 3; Case T-369/07 *Latvia v Commission* [2011] ECLI:EU:T:2011:103, para 33.

[22] TFEU, art 263.

[23] Sara Poli, 'The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy' (2022) 59 (4) Common Market Law Review 1045.

entitlements,[24] building on the idea that individuals have some fundamental protection against abuses. Hence, while it may be possible that public bodies seek to protect fundamental rights because they are connected to a collective interest or general policy, individuals remain the most likely parties to complain about fundamental rights violations. While the EU has not expressly espoused this theory, the Charter of Fundamental Rights indicates that Charter rights are individual rights.[25] It follows that the restrictive standing rules for natural and legal persons inevitably limit the ability of those applicants to pursue fundamental rights claims against EU institutions.

In particular, as correctly observed by Krajewski,[26] the standing system before EU courts favours the ability of economic operators, who are often the addressees of individual decisions adopted by the EU institutions, to challenge EU measures. By contrast, NGOs or individuals who may be interested in protecting fundamental rights that are not directly connected to economic interests de facto have a harder time proving their standing requirements under Article 263 TFEU.[27] It follows that the litigation brought before the EU courts through the action for annulment may consider fundamental rights issues but mainly those that are invoked by economic operators. As will be illustrated in Section 1.4, most of the EU fundamental rights pleas are indeed raised in the context of challenges against EU sanctions.[28] The mismatch between standing rules and the strengthened role of individuals – not just economic actors – in the EU law governance appears as the reflection of the path dependency between the original structure of the Treaties, the focus on economic freedoms, and the more limited EU competences. Under the founding Treaties, the enhanced role of the Member States to contest Community measures reflected the more circumscribed areas in which Community law operated. Yet with the advancement of EU legislation and the broader impact that EU measures have on individuals' interests, the question is whether reform of standing rules is necessary to reflect this transformation in the EU governance.

[24] See, among others, Aileen McHard, 'Reconciling Human Rights and the Public Interest' (1999) 62 Modern Law Review 671; Denise Meyerson, 'Why Courts Should not Balance Rights Against the Public Interest' (2007) Melbourne University Law Review 873, 874.

[25] The Preamble of the Charter states '[The Union] places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'.

[26] Michał Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021).

[27] Ibid 77.

[28] See Section 1.4.2.

There is also another constraint to the protection of EU fundamental rights through the action for annulment. Only EU acts provided with legal effects 'vis-à-vis third parties' can be reviewed by EU courts. The EU judicature has recently interpreted this concept in a rather stringent way, meaning that only acts that are legally binding according to the intentions of their authors can be challenged.[29] This latest jurisprudence seems to restrict the ability to challenge EU law.[30] In previous cases, the EU courts had indeed repeatedly established that any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'challengeable acts' for the purposes of Article 263 TFEU.[31]

It is clear that the action for annulment could be a crucial instrument to review the lawfulness of EU action in light of EU fundamental rights. However, it is also evident that many of the procedural rules governing this action constrain the ability to review EU law in light of EU fundamental rights. These settings raise questions about the ability of EU Courts to effectively patrol the protection of fundamental rights in EU governance. In order to assess how fundamental rights are applied in the context of this action, several parameters need to be considered. First, there is a dialectic relationship between the General Court and the Court of Justice. While at first instance the former has competence to review pleas based on facts and law, on appeal the latter can only review pleas of law and cannot engage in complex factual assessments.[32] As a result, the General Court is in charge of interpreting most of the cases against EU institutions involving pleas based on breaches of fundamental rights, the Court of Justice hearing only a narrower fraction of appealed cases.

Second, the fundamental rights pleas raised by the parties before the EU judicature shape the ways in which EU courts use EU fundamental rights in the action for annulment. Whether applicants tend to raise complaints about the procedures followed by the EU institutions, or instead the substance of EU acts, moulds the nature of the EU jurisprudence and the role of fundamental rights in the judicial review of EU law.

[29] Giulia Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: A Plea for a Liberal-Constitutional Approach' (2020) 16 European Constitutional Law Review 466

[30] See also Merijn Chamon in this volume, Chapter 14.

[31] See, to that effect, Case C-22/70 *Commission v Council. European Agreement on Road Transport (ERTA)* [1971] ECLI:EU:C:1971:32, paras 39 and 42, and Case C-599/15 *Romania* v *Commission* [2017] ECLI:EU:C:2017:801, para 47 and the case law cited.

[32] Giulia Gentile, The ECJ as the EU Court of Appeal (2020) 13(1) Review of European Administrative Law 73, 76.

Third, there is another parameter worth mentioning: due to its competence to review both facts and law, the General Court can more easily identify violations of EU fundamental rights. That court can verify the factual background to cases and can therefore assess, for instance, whether the procedures followed by EU institutions to adopt EU measures are compliant with fundamental rights. By contrast, as mentioned, the Court of Justice's competence is limited to pleas of law, and it therefore may need to develop more sophisticated legal tests to assess compliance with fundamental rights. How the two courts establish violations and apply the relevant judicial tests determines the power of fundamental rights review in the EU. An exploration of the jurisprudence of these two courts is therefore necessary to assess how EU fundamental rights are protected through the action for annulment.

1.4 THE GENERAL COURT

This section analyses the case law of the General Court. It first provides some numerical evidence on the actions for annulment involving fundamental rights, such as their admissibility and the extent of annulment of EU acts before the General Court (Section 1.4.1). The analysis then progresses with a study of the case law and demonstrates the centrality of procedural fundamental rights in the actions for annulment before the General Court.

1.4.1 *Some Numerical Evidence*

According to Curia, between 1 December 2009 and 31 December 2022, the total number of actions for annulment brought before the General Court amounted to 7,586.[33] Of those actions, 1,307[34] led to the annulment of EU acts, while 1,100 cases were dismissed on inadmissibility grounds.[35] The number of annulment actions brought in the same period that involved

[33] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022.

[34] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022.

[35] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022.

fundamental rights pleas was around 830 cases,[36] while those that included mentions of a general principle of EU law totalled 582;[37] 130 actions for annulment that included mentions of 'fundamental rights' were dismissed.[38] In the same period, the General Court granted the annulment of EU law in 312 cases involving fundamental rights arguments, either raised by the parties or by the General Court.[39] Therefore, the percentage of cases involving fundamental rights and entailing an annulment (partial or total) equates to 4.1% of the total number of cases initiated in the relevant period and 64% of the total number of annulment decisions. It may be comfortably stated that the quantitative influence of EU fundamental rights in the jurisprudence of the General Court is relatively limited compared to the total number of annulment cases initiated before the General Court. Yet most of the annulment decisions appear to include pleas based on fundamental rights.

Interestingly, effective judicial protection is one of the central fundamental rights in the EU case law. A rough estimate indicates that about 30% of the cases leading to annulment of EU measures before the General Court included a plea based on effective judicial protection. The dominance of this general principle of EU law and its relevant Charter provisions reflects the constitutional ethos of the EU, according to which access to courts to enforce EU law is one of the pillars of the EU version of the rule of law.

Other fundamental rights that have received special attention in the jurisprudence of the General Court are the right to good administration, the right

[36] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'.

[37] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'general principle'.

[38] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'.

[39] Search terms used on InfoCuria: Court = 'General Court'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'. This number also includes cases that involved pleas based on 'general principles of EU law'.

to property,[40] the right of defence,[41] the presumption of innocence,[42] the proportionality of penalties,[43] and the *ne bis in idem*.[44] In several cases, the General Court has raised fundamental rights pleas of its own motion.[45] The rights to privacy, data protection, equal treatment, access to documents, and non-discrimination have appeared in a handful of cases.

Overall, the most invoked and cited fundamental rights are those relating to procedural issues. This distribution of fundamental rights–based pleas influences the General Court's case law and the type of positive and negative obligations it imposes on EU institutions: procedure triumphs in the action for annulment. This finding leads to two observations. First, justice in EU litigation is shaped via procedural arguments; second, private applicants do not tend to contest EU measures on their substance but rather on issues of procedure. The focus on procedural matters is a symptom of a justice culture concentrating on procedural fairness, which demands opportunities for participation from the parties involved in procedures.[46]

The influence of procedural fundamental rights in reviewing EU measures emerges even more clearly from a qualitative perspective. Indeed, the General Court's case law suggests that the influence of fundamental rights in the action for annulment can be incisive and bear significant consequences for the EU institutions.

1.4.2 *The Influence of Procedural Rights in the General Court's Jurisprudence*

The weight of procedure emerges powerfully from the General Court's case law in a number of areas. First and foremost, EU procedural fundamental rights shape the very duties of EU courts. For instance, the EU courts are themselves required to comply with the principle of effective judicial protection, meaning that the action for annulment should offer an effective

[40] Case T-302/19 *Yanukovych v Council* [2021] ECLI:EU:T:2021:333.

[41] Case T-105/19 *Louis Vuitton Malletier v EUIPO – Wisniewski (Représentation d'un motif à damier)* [2020] ECLI:EU:T:2020:258.

[42] Case T-381/14 *Pshonka v Council* [2016] ECLI:EU:T:2016:361.

[43] Case T-56/09 *Saint-Gobain Glass France and Others v Commission* [2014] ECLI:EU:T:2014:160.

[44] Case T-144/07 *ThyssenKrupp Liften Ascenseurs v Commission* [2011] ECLI:EU:T:2011:364.

[45] Case T-117/07 *Areva and Others v Commission* [2011] ECLI:EU:T:2011:69.

[46] Joel Brockner and Others, 'Culture and Procedural Fairness: When the Effects of What You Do Depend on How You Do It' (2000) 45(1) Administrative Science Quarterly 138; K van den Bos, H A M Wilke, E A Lind, 'When Do We Need Procedural Fairness? The Role of Trust in Authority' 75(6) Journal of Personality and Social Psychology 1449.

remedy to scrutinise the action of the EU.[47] This protection, however, does not entail that the limitation to standing deriving from the presence of a legal interest in bringing proceedings against an EU act should be disapplied. On the contrary, the General Court clarified that the standing rules are instrumental in ensuring access to court and the proper administration of justice.[48]

Another area in which the right to effective judicial protection is extensively invoked and applied is the review of EU sanctions. Restrictive measures or 'sanctions' are an essential tool of the EU's Common Foreign and Security Policy. They are used by the EU as part of an integrated and comprehensive policy approach, involving political dialogue, complementary efforts, and the use of other instruments at its disposal. Addressees of these measures are entitled to challenge them through the action for annulment via the combined reading of Articles 275 and 263 TFEU.

The approach to the judicial review of sanctions was drastically transformed with the *Kadi* judgment issued by the Court of Justice, further discussed below. In that decision, the Court of Justice established two principles:[49] first, that the EU legal order is bound to respect EU fundamental rights in its external policies, even when implementing UN resolutions imposing sanctions;[50] second, the EU judicature should carry out a full judicial review of the ways in which the EU institutions, and especially the Council, draw up lists including the addressees of sanctions.[51] These principles have profoundly shaped the praxis of the General Court in its review of EU sanctions. Since that judgment, the General Court has consistently held that it must ensure effective judicial review concerning these measures.[52]

The judicial review of EU sanctions especially focuses on the procedure followed to adopt these measures. In this context, the General Court evaluates the statement of reasons and the evidence provided by the Council. In the *Aisha Muammer*[53] case, the General Court clarified that the question of the appropriateness of the statement of reasons is different from whether the evidence used by the Council is correct.[54] The appropriateness of the

[47] CFR, art 1; See, by analogy, Case T-437/05 *Brink's Security Luxembourg v Commission* [2009] ECLI:EU:T:2009:318, para 71 and the case law cited.
[48] Case T-19/06 *Mindo v Commission* [2011] ECLI:EU:T:2011:561, paras 97 and 98.
[49] Case C-402/05 P and C-415/05 P *Kadi Al Barakaat* [2008] ECLI:EU:C:2008:461.
[50] Ibid paras 281 to 284.
[51] Ibid para 326.
[52] See, for instance, Case T-426/21 *Nizar Assad* [2023] ECLI:EU:T:2023:114, para 70.
[53] Case T-322/19 *El-Qaddafi v Council* [2021] ECLI:EU:T:2021:206.
[54] Case C-417/11P *Council v Bamba* [2012] ECLI:EU:C:2012:718.

statement of reasons is measured against several requirements. First, the statement cannot be a general stereotypical formulation.[55] Second, it must be appropriate to the act at issue and the context in which it was adopted. It must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given, and the interest that the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations.[56] Third, the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context that was known to that person and which enables them to understand the scope of the measure.[57] Hence, whether the addressee of EU sanctions had the genuine opportunity to learn the reasons underpinning the adoption of those measures is crucial in the assessment of the lawfulness of the statement of reasons.

Separate from the assessment of the appropriateness of the statement of reasons is the judicial review of the factual basis on which the sanctions were imposed. The EU standard of effective judicial protection entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.[58] The scrutiny of the evidence used allows the General Court to exercise an extensive review of the material used by the Council to impose sanctions. In so doing, the General Court is able to ensure procedural fairness and ultimately avoids the creation of a hyper-securitised approach to the sanction regime that disregards fundamental rights entitlements.

Compliance with fundamental rights in the area of EU sanctions goes as far as demanding that the Council verify that third countries in support of which sanctions are imposed have complied with fundamental rights, and especially guarantees of effective judicial protection. In *Klymenko v Council*,[59] the General Court held that the Council cannot conclude that the adoption or maintenance of sanctions against individuals rests on a sufficiently solid factual basis before having itself verified whether the rights of defence and the right to effective judicial protection were observed at the time of the

[55] Ibid para 82.
[56] Ibid para 83.
[57] Ibid para 84.
[58] Ibid para 102. See also Case T-303/19 *Yanukovych* [2021] ECLI:EU:T:2021:334; Case T-295/19 *Klymenko v Council* [2020] ECLI:EU:T:2020:287.
[59] Case T-274/18 *Klymenko v Council* [2019] ECLI:EU:T:2019:509.

adoption of the decision by the third state in question on which it intends to rely.[60] Namely, mere reliance on documents provided by the third state that illustrate compliance with fundamental rights is not sufficient to discharge the duty to verify compliance with effective judicial protection by the third country. This means that even when the information on the basis of which sanctions are imposed is provided by a member of the Council of Europe, EU institutions have to conduct an ad hoc verification of compliance with EU fundamental rights by that state. Moreover, through its statement of reasons, the Council must clearly identify the grounds on which it considers that the third country has complied with the fundamental right in question.[61] It follows that effective judicial protection requires the Council to engage in a thorough analysis of the evidence submitted to it as a legal basis for the adoption of sanctions to be included in the statement of reasons to the addressees.

The General Court has also detailed the obligations stemming from the principle of effective judicial protection for EU and national institutions in other fields of law. As an example, effective judicial protection imposes specific duties on EU institutions in the field of competition. These obligations go as far as requiring the EU Commission to examine whether the national authorities involved in competition proceedings may be in breach of the rule of law due to a lack of independence. In *Sped-Pro S.A.*,[62] the General Court held that the Commission is required to verify compliance with the right to an effective remedy by Polish national authorities in the context of competition investigations in light of the *Minister for Justice and Equality case*.[63] The General Court's reasoning was as follows. Since the relationship between national and EU authorities in the competition field is governed by the principles of sincere and loyal cooperation and mutual trust, similarly to the EU and national authorities operating in the field of the EU Area of Freedom, Security and Justice, it follows that in the competition law field as well there is a presumption of compliance with EU law and especially fundamental rights by national institutions, except in extraordinary circumstances.[64] When a case falls within the competence of national authorities, the Commission should assess whether the interests of the complainants can be

[60] See Case C-258/20 *Klymenko* v *Council* [2021] ECLI:EU:T:2021:52, para 68 and the case law cited; Case T-195/21 *Klymenko v Council* [2021] ECLI:EU:T:2021:925, para 70.
[61] *Klymenko* v *Council* (n 59) paras 70 and 73.
[62] Case T-791/19 *Sped-Pro S.A. v Commission* [2022] ECLI:EU:T:2022:67.
[63] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586.
[64] Ibid para 88.

effectively safeguarded by national authorities[65] in compliance with the principle of effective judicial protection and therefore the rule of law.[66] This assessment is to be carried out especially in jurisdictions where the EU judicature has identified a breach of the rule of law.

Another procedural fundamental right extensively considered in the General Court's case law is the right to good administration enshrined in Article 41 of the Charter. This provision gives rise to several sub-rights, such as the right to be heard,[67] the right of access to personal files,[68] the obligation to give reasons,[69] and the right to damages for losses caused by EU institutions,[70] among others. The General Court has moulded these sub-rights to enhance fairness in the EU administration's operations. The *ADDE v Parliament*[71] case offers a valuable illustration of this point. The General Court established that the principle of impartiality deriving from Article 41 of the Charter requires members of the Bureau of the European Parliament, a body responsible for matters relating to the European Parliament's budget, administration, and organisation, to ensure an appearance of impartiality.[72] Hence, the expression of comments on social media against a specific party would undermine the impartiality guarantees of the Bureau and breaches Article 41 of the Charter. Similarly, in the context of the procedures for the marketing of new pharmaceutical products, the experts hired by the Commission should be impartial and not display any conflict of interest. As held in *Pharma Mar v Commission*,[73] the requirement of impartiality to which the EU institutions, bodies, offices, and agencies are subject also extends to experts consulted in that regard.[74] In order to show that the organisation of an administrative

[65] Ibid para 89.

[66] Accordingly, the General Court evaluated whether the Commission had carried out a detailed scrutiny of the evidence submitted by the complainant and held that the Commission had only carefully considered one of the arguments presented by the complainant. The conclusion of the Court was that the Commission had failed to comply with the duty to state reasons under EU law. Ibid para 130 and ff.

[67] CFR, art 41(2)(a).

[68] Ibid art 41(2)(b).

[69] Ibid art 41(2)(c).

[70] Ibid art 41(3).

[71] Case T-48/17 *ADDE v Parliament* [2019] ECLI:EU:T:2019:780.

[72] Ibid para 58 and ff.

[73] T-594/18 *Pharma Mar v Commission* [2020] ECLI:EU:T:2020:512.

[74] See Case T-74/08 *Now Pharm v Commission* [2010] ECLI:EU:T:2010:376, para 88 and the case law cited; see also Case T-603/16 *Brahma v Court of Justice of the European Union* [2018] ECLI:EU:T:2018:820, para 149. Accordingly, the fact that the opinion issued is not binding on the authority responsible for adopting the decision is not in itself such as to relieve the body that issued the opinion from its obligation to observe the principle of impartiality (see, to that effect, Case T-26/15 P *Commission v Hristov* [2016] EU:T:2016:390, para 46).

procedure does not ensure sufficient guarantees to exclude any legitimate doubt as to possible bias, it is not necessary to prove lack of impartiality. A legitimate doubt which cannot be dispelled is sufficient in that respect.[75] In that case, the General Court further established that the right to be heard in advance of any decision adversely affecting the interests of a party must be ensured even where the applicable rules do not expressly provide for such a formality.[76] The right to be heard is thus a general obligation to be ensured in all fields of EU law where EU institutions adopt decisions having adverse implications on the addressees, regardless of the presence of EU secondary rules detailing the relevant procedures.

Beyond rights of a procedural nature, the General Court has on occasion heard cases alleging the breach of more substantive rights, such as the principle of equal treatment. A notable case on this principle is *Italian Republic v European Commission*.[77] In that case, the principle was interpreted to require the European Commission to ensure equal treatment of candidates from a linguistic standpoint in selection procedures. This means that limitations of the choice of the second language used in competitions are discriminatory.[78]

All in all, the General Court has offered a remarkable contribution to the interpretation of fundamental rights in the EU while enhancing procedural fairness in the EU. The significant role of the General Court in the interpretation and application of EU fundamental rights is further strengthened by comparison with the jurisprudence of the Court of Justice.

1.5 THE COURT OF JUSTICE

This section analyses the case law of the Court of Justice. It first provides some numerical evidence on the actions for annulment involving fundamental rights, such as their admissibility and the extent of annulment of EU acts before the Court of Justice, as well as the fundamental rights used to challenge any EU measures and first instance decisions (Section 1.5.1). The analysis then progresses with a study of the case law and summarises the approach to fundamental rights protection adopted by the Court of Justice on appeal.[79]

[75] *Pharma Mar v Commission* (n 73) para 68.

[76] See, to that effect, Case C-277/11 *M* [2012] ECLI:EU:C:2012:744, para 86, and Case T-48/17 *ADDE v Parliament* [2019] ECLI:EU:T:2019:780, para 89 and the case-law cited.

[77] Case T-437/16 *Italy v Commission* [2020] ECLI:EU:T:2020:410.

[78] Ibid para 88.

[79] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment';

1.5.1 *Some Numerical Evidence*

Moving on to the Court of Justice, in the same period of reference (1 December 2009 and 31 December 2022) the Court delivered 1,761 decisions[80] in the form of judgments or orders on appeal against General Court's decisions in actions for annulment. Of those, around 230 orders and judgments include references to 'fundamental rights'[81] or 'general principle'.[82] Only 17 appeals were successful, either totally or partially;[83] 13 appeals involving fundamental rights pleas were successful, corresponding to 0.6% of all appeals against an order or a judgment issued in an action for annulment and 76% of the total number of successful appeal decisions issued by the Court of Justice. Three cases including pleas based on fundamental rights were dismissed on admissibility grounds.[84] Hence, the Court of Justice has, in most cases, tended to side with the interpretations of EU fundamental rights provided by the General Court. Such an alignment further means that it is virtually impossible to win an appeal before the Court of Justice. Overall, the

Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'.

[80] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment', 'Appeals'; Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022.

[81] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Text = 'fundamental rights'. It should be noted that not all first instance decisions delivered by the General Court were appealed against.

[82] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment', 'Appeals'; Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'general principle'.

[83] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'.

[84] Search terms used on InfoCuria: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period = 'from 01/12/2009 to 31/12/2022'; Procedure and result = 'Actions for annulment'; Case status = 'Cases closed'; Documents = Documents published in the ECR: Judgments – Orders; Documents not published in the ECR: Judgments – Orders (All); Period from 01/12/2009 to 31/12/2022; Text = 'fundamental rights'.

quantitative presence of fundamental rights in the Court of justice's jurisprudence on appeal appears even less substantive than in the General Court's case law. Yet the Court of Justice has made powerful use of fundamental rights in specific circumstances. What is more, recent rule of law saga cases signal a potential new direction towards more substantive pleas (and therefore contestation) of EU law.

1.5.2 *Circumscribed, Yet Not Inconsequential: Procedural Fundamental Rights Reviews before the Court of Justice*

As already mentioned, *Kadi*[85] is an example of the transformative power of procedural fundamental rights in the context of the judicial review of EU measures. In that case, the Court of Justice established that it is the duty of the EU judicature, in accordance with the powers conferred by the Treaties, to ensure the full review of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order. The scope of the judicial review before the EU judicature also covers EU measures designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[86] In particular, effective judicial review allows the EU courts to exercise oversight of the action of EU institutions in the adoption of sanctions and thus to accordingly identify duties for those bodies to ensure compliance with fundamental rights. It follows from *Kadi* that compliance with EU fundamental rights is a requirement of the EU constitutional arrangement and binds the action of EU institutions even in the field of foreign policy.[87] The protection of fundamental rights in the EU via judicial review is linked to the autonomy of EU law.[88]

Since the seminal *Kadi* saga, the Court of Justice has further detailed the procedural obligations deriving from the EU fundamental rights in the adoption of EU sanctions. On the one hand, the Court of Justice has delineated the scope of the judicial review to be carried out by EU courts; on the other hand, it has also identified the duties imposed on other EU institutions when adopting EU sanctions. For example, in the appeal in *French Republic v*

[85] Case C-399/06 P and C-403/06 P *Hassan and Ayadi v Council and Commission* [2009] ECLI:EU:C:2009:748.
[86] See also, to that effect, Case C-548/09 P *Bank Melli Iran v Council* [2011] ECLI:EU:C:2011:735, para 105.
[87] *Kadi* (n 49).
[88] Ibid.

People's Mojahedin Organization of Iran (PMOI),[89] the question was whether the General Court had committed an error in law by holding that the Council had not established that the contested decision had to be adopted urgently. Such evidence would have exempted the Council from the obligation to notify the addressee of the measure, PMOI, of the new evidence adduced against it. Consequently, the exercise of the right to be heard was also excluded. Therefore, the case concerned both the way in which the General Court had conducted its review at first instance, as well as the evidentiary requirements imposed on the Council to support the exemption from a novel notification to the addressee of a sanction.

The Court of Justice recalled that the requirement to notify the addressee of the sanction before the imposition of the measure derives from the right of defence as protected under Article 41 of the Charter.[90] It then distinguished two scenarios: the adoption of an initial decision to include an individual in a sanction list and the decision to maintain an individual on such a list. In the case of an initial decision to freeze funds, the Council is not obliged to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely to include that person or entity's name in the sanction list. The Council can notify the person or entity concerned of the grounds and afford the right to be heard at the same time as, or immediately after, the decision is adopted.[91] The absence of a duty to notify before the adoption of a sanction list is an exception to the fundamental right of defence that is justified by the need to ensure that the freezing measures are effective. However, this situation is to be distinguished from the adoption of a decision maintaining an individual in a sanction list. In this latter case, the surprise effect is no longer necessary to preserve the effectiveness of the sanction regime. Therefore, the adoption of such a measure must, in principle, be preceded by notification of the incriminating evidence to allow the person or entity concerned an opportunity of being heard. These principles were applied at first instance by the General Court, which found that the Council had violated the right of defence of the addressee of the measure extending the inclusion in the sanction list. The Court of Justice thus confirmed the assessment carried out by the General Court and concluded that the latter had not committed an error in law in stating that the Council had not proved the urgency of the

[89] Case C-27/09 P France v People's Mojahedin Organization of Iran [2011] ECLI:EU:C:2011:853.
[90] Ibid para 66.
[91] Ibid para 61.

situation as a justification not to notify the new material and evidence to the addressee of the sanction.

But the relevance of effective judicial protection in the EU judicial review of EU law encounters a limit when confronted with the wording of Article 263 TFEU, which refers only to acts adopted by EU bodies in a broad sense. The latest decision on the tensions between the reviewability of EU acts and the individual right to effective judicial protection is the *Sharpston* case.[92] Following the withdrawal of the UK from the EU, former Advocate General Sharpston saw her role terminated. She later challenged decision (EU) 2020/1251 of the Representatives of the Governments of the Member States of 2 September 2020 appointing Advocate General Rantos to replace her at the Court. One of the arguments submitted by Ms Sharpston was that the impossibility of challenging the measure at stake deprived her of the right to effective judicial protection enshrined in Article 47 of the Charter. Having lost at first instance before the General Court, she appealed before the Court of Justice, which agreed with the General Court and confirmed the inadmissibility of the action because the decision to nominate a new Advocate General was not an EU act but rather an act of the Member States. For the purposes of our analysis, we can therefore observe that the Court of Justice, like the General Court, is reluctant to broaden the scope of Article 263 TFEU under the aegis of effective judicial protection.

Due to the Court of Justice's competence in reviewing pleas of law, the impression emerging from its jurisprudence is that breaches of fundamental rights are subject to more legally structured tests compared to the review carried by the General Court. In this context, Article 52 of the Charter is of relevance. This provision articulates a multi-layered assessment to evaluate the lawfulness of limitations to fundamental rights in the EU. Limitations are lawful under a fourfold requirement: first, restrictions to fundamental rights should be provided for by law; second, they should respect the essence of Charter rights; third, they should respect proportionality; fourth, they should be necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. But the application of this provision in the action for annulment is still under development. For instance, the relationship between the protection of the essence and principle of proportionality is unclear and not rigidly drawn in the EU case law, although a trend seems to emerge whereby the two assessments appear separate, as per the wording of Article 52 of the Charter.

[92] Case C-685/20 P *Sharpston v Council and Representatives of the Member States* [2021] ECLI:EU:C:2021:485.

Proportionality still has a dominant place due to case law path-dependencies and the influence of the Strasbourg case law.[93]

An example in point is *Stichting Al-Aqsa*.[94] In that case, the applicant appealed against the General Court's judgment confirming the lawfulness of restrictive measures. One of the pleas raised concerned an alleged violation of the fundamental right to property due to the asset freeze entailed by the restrictive measure. After the Court of Justice recalled that the right to property under European Union law does not enjoy absolute protection, it also stated that the exercise of that right may be restricted, provided that those restrictions correspond to objectives of public interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance (or essence)[95] of the right so guaranteed. In its assessment, the court followed a proportionality assessment. First, it evaluated the presence of an objective of general interest[96] and, subsequently, its legitimacy.[97] It next assessed the necessity of the asset freeze and then the proportionality of the maintenance of the appellant on the list at issue. Concerning this latter issue, the court held that this measure was proportionate due to the presence of a periodic review.[98] Proportionality can therefore take over the evaluation of the protection of the essence, which loses its autonomy as a legal test.

Moreover, cases such as *Schindler Holding Ltd*[99] further showcase that, in parallel to EU standards of protection, the ECHR is still exercising significant influence, even after the entry into force of the Charter. In that judgment, the Court of Justice recalled that, while the rights protected by the Convention constitute general principles of EU law, and Article 52(3) of the Charter requires rights contained in the Charter that correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the Convention does not bind the EU until its accession. The fundamental right issue raised in the case concerned whether the imposition of criminal penalties in the context of competition proceedings by the European Commission was incompatible with Article 6 ECHR. Recalling

[93] Takis Tridimas and Giulia Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 German Law Journal 794.
[94] Case C-539/10 P *Al-Aqsa v Council and Pays-Bas* [2012] ECLI:EU:C:2012:711.
[95] Tridimas and Gentile (n 93).
[96] *Al-Aqsa v Council and Pays-Bas* (n 94) para 123.
[97] Ibid para 124.
[98] Ibid para 129.
[99] Case C-501/11 P *Schindler Holding Ltd vs European Commission* [2013] ECLI:EU:C:2013:522.

the *Menarini* judgment,[100] the Court of Justice held that 'entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR in so far as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR'.[101] Hence, the Court of Justice seeks alignment with the Strasbourg court as far as possible while retaining the autonomous interpretation of EU fundamental rights.

Remarkably, the rule of law saga has, to a certain extent, allowed for a more substantive contestation of EU measures. Article 2 TEU creates a web of fundamental principles that constitute the backbone of the EU legal order. They are the principle of non-discrimination, pluralism, and the rule of law, among others. They are all directly or indirectly linked to fundamental rights. In *Hungary v European Parliament and Council of the EU*[102] and *Poland v European Parliament and Council of the EU*,[103] Hungary and Poland challenged the Rule of Law Conditionality Framework, which connects the disbursement of the EU budget in favour of Member States to the respect of the rule of law. In addition to pleas concerning the division of competences, the Member States challenged the notion of rule of law used by the EU institution in the Conditionality Framework.[104] In particular, it was argued that the contested regulation breaches the principles of legal certainty and legislative clarity on the ground that the concepts in that regulation, on the basis of which a Member State may be found to have breached the principles of the rule of law, have no uniform definition in the Member States. Therefore, the case required the Court of Justice to articulate the EU notion of the rule of law and not merely to assess whether the procedures followed by EU institutions to adopt the Rule of Law Conditionality Framework complied with procedural rights. The Court observed that the Commission had relied on a variety of reports and that the framework included an evidence-based approach. Additionally, the States affected by the framework can initiate dialogue

[100] *Menarini Diagnostics Srl v Italy* App No 43509/08 (ECtHR, 27 September 2011).
[101] Ibid para 34.
[102] Case C-156/21 *Hungary v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:97.
[103] Case C-157/21 *Poland v European Parliament and Council of the European Union* [2022] ECLI:EU:C:2022:98.
[104] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I (Rule of Law Conditionality Framework).

and cooperation with the Commission. All these factors meant that the notion of rule of law used in the framework did not breach the principle of legal certainty.

All in all, the Court of Justice has exercised a central role in ensuring that EU measures comply with EU fundamental rights, by complementing the jurisprudence of the General Court. Also before the Court of Justice procedure triumphs. Whether more substantive contestation of EU law in light of EU fundamental rights emerges remains to be seen. A step in that direction are the cases initiated by Hungary and Poland concerning the Rule of Law Conditionality Framework.

1.6 PROCEDURE OVER SUBSTANCE (THUS FAR): CONCLUDING REMARKS

The chapter has undertaken a journey through the jurisprudence of EU courts delivered in the context of actions for annulment. First, it has highlighted the strengths and the weaknesses of the action for annulment to protect fundamental rights. Limitations to the ability to ensure the full potential of fundamental rights judicial review in the EU are the stringent standing requirements for individuals and narrow notion of reviewable acts. Second, the chapter has observed that procedural fundamental rights dominate the EU case law. This is because parties have invoked procedural fundamental rights to challenge EU law but also due to the inclination of the EU judicature to rely on those fundamental rights. The centrality of procedure gives rise to observations concerning the areas of contestation of EU measures: parties mainly criticise the procedures followed by EU institutions in adopting EU measures and whether the latter afford any form of procedural guarantees. Hence, what applicants seem to be interested in is the ability to engage in participatory dynamics that can shape the adoption of EU law. A step towards more substantive contestation of EU measures appears in the recent *Hungary v European Parliament and Council of the EU* and *Poland v European Parliament and Council of the EU* cases. In these cases, the substantive contestation stems from different visions of the meaning and implications of the rule of law in the EU. Substantive contestation of EU measures is welcome and reflects the maturity of the EU legal order, where pluralism of fundamental rights inevitably creates debates as to what EU fundamental rights mean.