

THE EU'S RULE OF LAW AND THE JUDICIAL PROTECTION OF RIGHTS

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Abstract

The European Union is based on the rule of law, which ensures a complete system of legal remedies and procedures, as enshrined by the Court of Justice of the EU (CJEU). After the Treaty of Lisbon, the Union's values were laid down in the Treaty on the EU, and the EU Charter of Fundamental Rights is legally binding, reinforcing the effective judicial protection of rights. The CJEU guarantees the judicial protection of rights even in the Common Foreign Security Policy (CFSP).

Keywords: Rule of law, judicial protection of rights, the EU's values, the EU Charter of Fundamental Rights, complete system of legal remedies and procedures, the Treaty of Lisbon, constitutionalism, legality review, preliminary ruling, Common Foreign and Security Policy (CFSP), the right of privacy and the protection of personal data

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I. *Introduction*

The European Union (EU) has its own legal order, which differs from that of national and international law. Part of EU law is directly applicable and some measures including directives have a direct effect (which means that individuals can rely on them before national courts), without any ratification or transformation of measures. In 1963, the Court of Justice of the EU (CJEU) established such a principle of direct effect in Case 26/62 Van Gend & Loos.¹ In that case the CJEU noted that the subjects of the Community (now Union) legal order comprised not only Member States but also their nationals and therefore, Community (now Union) law not only imposed obligations on individuals, but also conferred upon them rights that became part

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¹ CJEU, Case 26/62 Van Gend & Loos, Judgment of 5 February 1963, ECLI:EU:C:1963:1.

of their legal heritage. At the beginning of the history of the EU, the CJEU recognised that individuals are subjects of EU legal order and the Treaty created individual rights that the national courts must protect.²

In Case 294/83 *Les Verts* in 1986, the CJEU held that the European Economic Community was based on the rule of law, inasmuch as neither its Member States nor its institutions could avoid a review of the question as to whether the measures adopted by them were in conformity with the basic constitutional charter, the Treaty.³ The CJEU considered the Community (now Union) as a body of law (*une communauté de droit, eine Rechtsgemeinschaft*). The rule of law is related to the judicial protection of individual rights as mentioned below, in a review of the legality of the measures. Lenaerts commented that the case was the very first time that the principle of the rule was defined as setting down the corresponding requirements of the judicial protection in the Community.⁴ Pech indicated that the rule of law has become an overarching and primary principle of Union constitutional law.⁵

The Treaty of Lisbon entered into force in December 2009. The Treaty amended the Treaty on the EU (TEU) and the Treaty establishing the European Community (TEC) substantially. After the Treaty of Lisbon, the Treaty on the EU laid down explicitly the EU's values: respect for human dignity, freedom, democracy, equality, the rule of law (*l'État de droit, Rechtsstaatlichkeit*) and respect for human rights (Article 2 TEU).⁶ The TEU positions explicitly the rule of law as one of the EU's values. Further, the EU Charter of Fundamental Rights has the same legal status as the TEU and the Treaty on the Functioning of the EU (TFEU) (former TEC).

This paper considers the rule of law in the EU. Firstly, it clarifies the characteristics of the EU's rule of law. Secondly, it explains the legal system that ensures the rule of law and its legal effects. Thirdly, it shows how the judicial protection of rights in the context of the rule of law was reinforced after the Treaty of Lisbon, using recent case law regarding the Common Foreign and Security Policy (CFSP).

II. *The Rule of Law in the EU*

1. Characteristics of the EU's Rule of Law and Legal Remedies and Procedures

The concept of 'the rule of law' is universally recognised as a fundamental value, but there is no universal agreement about what it actually means.⁷ The term 'the rule of law' is expressed as '*l'État de droit*' in French and '*Rechtsstaatlichkeit*' in German, and has a different historical

² Francis G. Jacobs, *The Sovereignty of Law*, 2007, Cambridge University Press, p. 39.

³ CJEU, Case 294/83 *Parti écologiste "Les Verts" v Parliament*, Judgment of 23 April 1986, ECLI:EU:C:1986:166, para. 23.

⁴ Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in Miguel Poiares Maduro and Loïc Azoulay, *The Past and Future of EU Law*, Hart Publishing, 2010, p. 295, p. 303.

⁵ Laurent Pech, '“A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', *European Constitutional Law Review*, 6, 2010, p. 359, p. 361.

⁶ The word "rule of law (*l'État de droit, Rechtsstaatlichkeit*)" was inserted in Article 6 TEU by the Treaty of Amsterdam of 1997: cf. Pech, Note (5), *EuConst* 6 (2010), p. 364.

⁷ Jacobs, Note (2), p. 7.

background and tradition of usage in each country. However, all the expressions of the concept in Member States must have the same meaning under the context of EU law because all texts of TEU have equal primacy. As a result, the concept of the EU's rule of law cannot be identical to that in English law. Konstadinides commented that European Judges were called to interpret the EU's version of the rule of law, which contained new distinctive features.⁸ In fact, the CJEU has developed its own concept of 'the rule of law', which is characteristic of the EU's rule of law. Case law will be shown regarding the rule of law in the following.

In Case 294/83 *Les Verts* (1986)⁹, the CJEU used for the first time a description of the Treaty as the basic constitutional character of the Community, invoking the idea of the rule of law and giving an explicit account of what the rule of law requires.¹⁰ In that case, the CJEU held that in Articles 173 TEEC (now Article 263 TFEU) and 184 TEEC (now Article 277 TFEU), on the one hand, and in Article 177 TEEC (now Article 267 TFEU), on the other hand, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.¹¹

Furthermore, the CJEU made it clear that the Treaty, especially through the annulment procedure and preliminary ruling procedure, had established a complete system of legal remedies and procedures designed to permit the CJEU to review the legality of the EU measures. Lenaerts explained that the complete system of judicial protection would mean that sufficient legal remedies and procedures exist before the Union courts and the national courts so as to ensure judicial review of the legality of the acts of EU institutions, with the result that when the review of the legality of a Union act cannot be carried out directly by the Union courts for reasons of inadmissibility, it must somehow be brought before national courts, which will refer for a preliminary ruling on the validity of such act.¹²

In Case C-50/00 *P Unión de Pequeños Agricultores* (2002)¹³, the CJEU reconfirmed that the EC (now EU) is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law that include fundamental rights.¹⁴ Furthermore, the CJEU held that individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States.¹⁵ It clarified that the rule of law is linked with the judicial protection of rights. Furthermore, the CJEU held that a complete system of legal remedies and procedures is guaranteed through Article 173 TEC (now Article 263 TFEU) and Article 184 TEC (now Article 277 TFEU) and on the other hand, Article 177 TEC (now Article 267 TFEU).¹⁶ However, the CJEU also held that it is for Member States to establish a system of legal remedies and procedures that ensure respect for

⁸ Theodore Konstadinides, *The Rule of Law in the European Union*, 2017, Hart Publishing, p. 69.

⁹ CJEU, Case 294/83 *Parti écologiste "Les Verts" v Parliament*, Judgment of 23 April 1986, ECLI:EU:C:1986:166.

¹⁰ Jacobs, Note (2), pp. 43-44.

¹¹ CJEU, Case 294/83, Note (9), para. 23.

¹² Lenaerts, Note (4), p. 304.

¹³ CJEU, Case C-50/00 *P Unión de Pequeños Agricultores v Council*, Judgment of 25 July 2002, ECLI:EU:C:2002:462.

¹⁴ *Ibid.*, para. 38.

¹⁵ *Ibid.*, para. 39.

¹⁶ *Ibid.*, para. 40.

the right to effective judicial protection in accordance with the principle of sincere cooperation in Article 5 TEC (now Article 4 (3) TEU), and that national courts are required to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables national and legal persons to challenge before the courts the legality of any decision or other national measures relative to the application to them of an EU act of general application.¹⁷ This means that the ‘complete’ system of legal remedies and procedures in the EU can only be completed with the sincere cooperation of the Member States through Article 4 (3) TEU.¹⁸ Alemanno criticised that in the Court’s logic, if the system is ‘complete’ because of 267 TFEU, the obligation is on the Member States to adapt their national remedies and procedures in accordance with Article 4 (3) TEU, rather than for itself to revise its interpretation of Article 267 (4) TFEU, in order to ensure judicial protection.¹⁹ In this “complete” system of legal remedies and procedures, national courts are obliged to function as EU “courts” under Article 4 (3) TEU. Lenaerts indicated that national courts as the “juge de droit commun” contribute to the coherence of the European judicial system at the interface between national procedural rules and the full effectiveness of Community Law.²⁰

In Joined Cases C-402/05 P and C-415/05 P Kadi (2008)²¹, the CJEU confirmed that the Community (now Union) is based on the rule of law and that the Treaty establishes a complete system of legal remedies and procedures designed to enable the CJEU to review the legality of EU acts, referring to Case 294/83 *Les Verts*. The CJEU held that the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system that is not to be prejudiced by an international agreement.²²

Since Case 294/83 *Les Verts*, the CJEU has repeated that the EU is based on the rule of law and the EU Treaties establish a complete system of legal remedies and procedures for the review of the legality of EU acts. Furthermore, the CJEU indicated the EU’s rule of law is related in particular to the effective protection of rights. This understanding regarding the rule of law enables the CJEU to give remarkable judgments such as in Joined Cases C-402/05 P and C-415/05 P Kadi in order to protect fundamental rights. The EU’s rule of law protects individual rights by ensuring a complete system of legal remedies and procedures. This system needs though the sincere cooperation of Member States, especially national courts that function as EU ‘courts’.

2. The Legal System to Ensure the Rule of Law and Legal Effect

The rule of law requires the review of legality of EU acts by EU institutions. In Case

¹⁷ *Ibid.*, paras. 41-42.

¹⁸ Lenaerts pointed out this gap, Koen Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’, *CMLRev.* 44, 2007, p. 1625, pp. 1627-1629.

¹⁹ Alberto Alemanno, ‘What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*’, in Miguel Poiares Maduro and Loïc Azoulay, *The Past and Future of EU Law*, Hart Publishing, 2010, p. 324, p. 331.

²⁰ Lenaerts, Note (18), *CMLRev.* 44, 2007, pp. 1645-1646.

²¹ CJEU, Joined Cases C-402/05 P and C-415/05 P Kadi and Barakat v Council and Commission, Judgment of 3 September 2008, ECLI:EU:C:2008:461, para. 281.

²² *Ibid.*, para. 316.

294/83 *Les Verts*, the CJEU referred to annulment procedures (Articles 263 and 277 TFEU) and preliminary ruling procedures (Article 267 TFEU). However, there are other possibilities of application of the rule of law. In addition, there are some different legal effects.

(1) Annulment procedure (Article 263 TFEU)

Article 263 TFEU is related to the annulment of EU measures. According to Article 263 all EU acts are subject to review by the CJEU. If the action is well founded, the CJEU shall declare the act concerned to be void (Article 264 TFEU). The CJEU can also declare only a part of the act to be void (Article 264 TFEU). Even if the period laid down in Article 263 expires, any party may, in proceedings in which an act of general application is adopted by EU institutions, plead incidentally the grounds specified in Article 263 TFEU in order to invoke before the CJEU the inapplicability of that act (Article 277 TFEU).

(2) Preliminary ruling procedure (Article 267 TFEU)

(a) Invalidity

Article 267 TFEU lays down a preliminary ruling procedure, where the CJEU not only interprets EU law, but also reviews the validity of the EU measures, based on questions from national courts. For example, in *Joined Cases C-293/12 and C-594/12 Digital Rights Ireland*, the CJEU held that directive 2006/24/EC on the retention of data generated or processed is invalid because the directive is incompatible with Article 7, 8 and 52 (1) of the EU Charter of Fundamental Rights.

According to the text of Article 267 TFEU, national courts make a preliminary ruling before the CJEU and only national courts at the last instance are obliged to seek a preliminary ruling before the CJEU. However, in *Case 314/85 Foto-Frost in 1987*²³ the CJEU made clear that even national courts that are not in the last instance have to bring the matter before the CJEU, if the act in question is concerned with the validity of that act, declaring that Article 267 TFEU gives the Court exclusive jurisdiction to declare void an act of a Community institution. The coherence of the system requires that where the validity of an EU act is challenged before a national court the power to declare the act invalid must also be reserved to the CJEU.²⁴

(b) Precluding national legislation

The EU's rule of law is not only related to the invalidity or inapplicability of EU acts, but also related to precluding national legislation. For example, in *Joined Cases C-203/15 and C-698/15 Tele 2 Sverige AB*²⁵, the CJEU held that Article 15 (1) of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, read in the light of Articles 7, 8 and 11 and Article 52(1) of the EU Charter, must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

²³ CJEU, *Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost*, Judgment of 22 October 1987, ECLI:EU:C:1987:452.

²⁴ *Ibid.*, para. 17.

²⁵ CJEU, *Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB*, Judgment of 21 December 2016, ECLI:EU:C:2016:970.

(3) Infringement procedures (Article 258, 259 and 260 (2) and (3) TFEU)

Jacobs used the infringement procedure as an example of application of the rule of law to Member States.²⁶ There are four infringement procedures in the EU (Article 258, 259, 260(2) and (3) TFEU). In the case of 260 (2) and (3) TFEU, the CJEU can impose penalties on Member States, if they do not comply with EU law. The problem lies in there being no means of execution of decisions of the CJEU. There is no provision in cases, where a Member State does not comply with the decision of the CJEU or does not pay a penalty according to Article 260 (2) TFEU. This concern has arisen because of the situations in Hungary and Poland.

(4) Opinion (Article 218 (11) TFEU)

According to Article 218 (11) TFEU, a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the CJEU as to whether a draft agreement is compatible with TEU and TFEU. The Commission asks the opinion of the CJEU, if the EU has exclusive competence for concluding an agreement²⁷ or which legal basis is appropriate for concluding an agreement.²⁸ Furthermore, the Court opinion system contributes to ensuring the rule of law. In Opinion 1/15 on the draft agreement between Canada and the EU on the transfer of Passenger Name Record data the EP asked for the opinion of the CJEU, on the envisaged agreement with the provisions of the Treaties (Article 16 TFEU) and the EU Charter (Article 7, 8 and 52 (1)) as regards the right of individuals to the protection of personal data. The CJEU declared that the draft agreement is incompatible with Article 7, 8 and 21 and Article 52 (1) of the EU Charter and gave an opinion on how the draft agreement must be amended. This means that the legality of the draft agreement can be reviewed. The legal effect of the opinion is to stop the conclusion of the agreement in question and to allow renegotiation with the third country concerned.

III. *Reinforcement of Judicial Protection of Rights after the Treaty of Lisbon*

1. **Changes after the Treaty of Lisbon**

The judicial protection of rights is reinforced by the Treaty of Lisbon, especially through the provisions of EU values and the EU Charter of Fundamental Rights. Facing those changes, the CJEU gives positive judgments to ensure the judicial protection of rights.

Article 2 TEU provides EU's values including the rule of law. In Joined Cases C-203/15 and C-698/15 *Tele2 Sverige*, the CJEU held that the right to freedom of expression guaranteed in Article 11 of the EU Charter, constitutes an essential foundation of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the EU is founded.²⁹ Those values are also used as political principles in the Union's external action. Article 21 TEU lays down that EU's action shall be guided by principles such as the rule of law, democracy, and

²⁶ Jacobs, Note (2), p. 36.

²⁷ Ex. CJEU, Opinion 2/15, FTA between the EU and Singapore, Opinion of 16 May 2017, ECLI:EU:C:2017:376.

²⁸ Ex. CJEU, Opinion 2/00, Cartagena Biosafety Protocol, Opinion of 6 December 2001, ECLI:EU:C:2001:664.

²⁹ Joined Cases C-203/15 and C-698/15, Note (25), para. 93.

human rights.³⁰

The EU Charter of Fundamental Rights was declared solemnly by EU institutions in Nice, France in 2000. However, Member States did not agree to make the Charter legally binding. After the Treaty of Lisbon, the EU Charter was made legally binding and has the same legal position as the TEU and the TFEU. The EU 'constitution' is composed of those three documents. The top of the hierarchy of EU legal order is the EU 'constitution'. The review of the legality of EU acts is based on that hierarchy. For example, in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, the CJEU held that by adopting Directive 2006/24/EC on the retention of data generated or processed, the EU legislature (the European Parliament and the Council) had exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52 (1) of the EU Charter.³¹ Article 7 EU Charter lays down the right of privacy and Article 8 provides the right to the protection of personal data while Article 52 (1) is related to the principle of proportionality. This means that EU measures that are not compatible with the EU Charter (the EU 'constitution') are invalid.

2. Guarantee of Judicial Protection of the Rights

The EU charter lays down new fundamental rights such as the right to privacy and the right to the protection of personal data. In addition, Article 47 of the EU Charter provides the right to an effective remedy and to a fair trial. According to Article 47, 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal...'. The importance of those rights is indicated in recent case law of the CJEU. In fact, the CJEU has made remarkable decisions at a high level of protection regarding Article 7 and 8 of the EU Charter.³²

The Treaty of Lisbon amended the TEU and the TEC substantively and the EU Charter became legally binding. Further, it changed the three existing pillars, too. In the past before the Treaty of Lisbon, the CJEU had only limited jurisdiction for the third pillar, the field of police and judicial cooperation in criminal matters. The CJEU held that the fact that, by virtue of Article 35 EU, the jurisdiction of the CJEU is less extensive under Title VI of the TEU than it is under the TEC, and the fact that there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI, does nothing to invalidate that conclusion.³³ After the Treaty of Lisbon, the EU has still only limited competence in the field of the Common Foreign and Security Policy (CFSP) and the CJEU has

³⁰ Yumiko Nakanishi, 'Political Political Principles in Article 21 TEU and Constitutionalism', *Hitotsubashi Journal of Law and Politics*, Vol. 42. 2014, pp. 11-23; Yumiko Nakanishi, 'Mechanisms to Protect Human Rights in the EU's External Relations', in Yumiko Nakanishi (ed.), *Contemporary Issues in Human Rights Law: Europe and Asia*, Springer, 2018, pp. 3-21.

³¹ CJEU, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, Judgment of 8 April 2014, ECLI:EU:C:2014:238, para. 69.

³² Ex. CJEU, Joined Cases C-293/12 and C-594/12, Note (31); Case C-131/12 *Google v AEPD*, Judgment of 13 May 2014, ECLI:EU:C:2014:31; Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů*, Judgment of 11 December 2014, ECLI:EU:C:2014:2428; Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, Judgment of 6 October 2015, ECLI:EU:C:2015:650; Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB*, Judgment of 21 December 2016, ECLI:EU:C:2016:970; Opinion 1/15, Draft agreement between Canada and the EU on transfer of passenger name record data, Opinion of 26 July 2017, ECLI:EU:C:2017:592.

³³ CJEU, Case C-105/03, *Pupino*, Judgment of 16 June 2005, ECLI:EU:C:2005:386, para. 35.

no jurisdiction in principle for the CFSP (Article 24 (1) TEU). Elsuwege pointed out that the key question was what type of acts precisely evade the Court's control and how this could be reconciled with the general assertion in Article 2 TEU that the EU is a Union based upon the rule of law and the right to an effective remedy as guaranteed under Article 47 of the Charter.³⁴ Is there no complete system of actions and procedures in the field of the CFSP?

Recent case law is presented in the following.

(1) Case C-362/14 Schrems (2015)³⁵

In Case C-362/14 Schrems, an Irish court requested the CJEU to make a preliminary ruling related to the interpretation, Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and to the validity of Commission Decision 2000/520/EC on the adequacy of the protection by the safe harbor privacy principles. The CJEU held that EU legislation involving interference with the fundamental rights guaranteed by Articles 7 and 8 of the EU Charter must lay down clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data.³⁶ Further, the CJEU indicated that legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him/her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the EU Charter.³⁷ Furthermore, the CJEU emphasised that the very existence of an effective judicial review designed to ensure compliance with the provisions of EU law is inherent in the existence of the rule of law.³⁸ Finally, the CJEU held that the Commission Decision in question is invalid in the light of the EU Charter.

In this case, the CJEU combined three elements: fundamental rights in Article 7 and 8 of the EU Charter, the right to effective judicial protection in Article 47 of the EU Charter and the rule of law. This combination (the EU Charter and the rule of law) enables the CJEU to ensure a high level of protection of fundamental rights.

(2) Case C-455/14 P H v Council, Commission and EUPM (2016)³⁹

In Case C-455/14 P H is an Italian magistrate who was seconded to the European Union Police Mission (EUPM) in Bosnia and Herzegovina by decree of the Italian Minister of Justice of 16 October 2008 in order to perform certain duties. Then, H had her secondment extended twice until 31 December 2010 by decree of that Minister. H was redeployed for operational reasons to the post of 'Criminal Justice Advisor' by a decision made on 7 April 2010, signed by the Chief of Personnel of the EUPM. H brought an action against the EUPM before a regional administrative court in Italy for annulment of that decision. In parallel, H brought an action

³⁴ Peter Van Elsuwege, 'Upholding the rule of law in the Common Foreign and Security Policy: H v. Council', *CMLRev.* 54, 2017, p. 841, p. 842.

³⁵ CJEU, Case C-362/14 Maximilian Schrems v Data Protection Commissioner, Judgment of 6 October 2015, ECLI:EU:C:2015:650.

³⁶ *Ibid.*, para. 91.

³⁷ *Ibid.*, para. 95.

³⁸ *Ibid.*, para. 95.

³⁹ CJEU, Case C-455/14 P H v Council, Commission and EUPM, Judgment of 19 July 2016, ECLI:EU:C:2016:569.

before the General Court for annulment of contested decisions. The General Court held that it lacked jurisdiction to hear action and dismissed it as inadmissible. H appealed before the CJEU.

In principle, the CJEU does not have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions (Article 24 (1) TEU and Article 275 TFEU). The CJEU confirmed this principle.⁴⁰ However, it pointed out that Article 24 (1) TEU and Article 275 TFEU introduce a derogation from the rule of general jurisdiction and therefore they must be interpreted narrowly.⁴¹ Further, the CJEU held that, as was apparent from Article 2 TEU and Article 21 TEU, to which Article 23 TEU, relating to the CFSP refers, the EU was founded, in particular, on the values of equality and the rule of law.⁴² Recognizing the EU's values in Article 2 TEU and Article 21 TEU, the CJEU made clear that the values, especially the rule of law should be applied for the EU even in the CFSP. Elsuwege commented that of particular significance was the combined reference to the EU's foundational values set out in Article 2 TEU (as part of the "common provisions of the EU Treaty") and Articles 21 and 23 TEU in order to conclude that those values are fully applicable in relation to CFSP actions. Furthermore, it indicated that the very existence of effective judicial review designed to ensure compliance with the provisions of EU law is inherent in the existence of the rule of law.⁴³ The CJEU confirmed the strong connection between the review of the legality and the rule of law, referring to the Case Schrems.

Based on this understanding, the CJEU held as follows: Contested decisions are admittedly set in the context of the CFSP. Those decisions relate to an operational action of the EU decided upon and carried out by the CFSP. However, such a circumstance does not necessarily lead to the jurisdiction of the EU judiciary being excluded. In the present case, the EU judiciary has jurisdiction, in accordance with Article 270 TFEU, to rule on all actions brought by EU Staff Regulations during the period of their secondment to the EUPM and fall within the jurisdiction of the EU judiciary.⁴⁴ Furthermore, the CJEU held that the General Court and the Court of Justice had jurisdiction to review EU acts and that jurisdiction stemmed as regards the review of the legality of those acts, from Article 263 TFEU and, as regards actions for non-contractual liability, from Article 268 TFEU, read in conjunction with Article 340 (2) TFEU, taking into account Article 19 (1) TEU and Article 47 of the EU Charter.⁴⁵ Finally, the CJEU set aside the order of the General Court.

In this case, the CJEU indicated that the rule of law as one of the EU's values, and the review of legality as its concretization would be applied for the acts of the CFSP, although it is limited to acts of staff management, taking into account Article 19 (1) TEU and the right to an effective remedy in Article 47 of the EU Charter.

(3) C-72/15 PJSC Rosneft Oil Company (2017)⁴⁶

The CJEU has exceptional jurisdiction to monitor compliance with Article 40 TEU and to

⁴⁰ Ibid., para. 39.

⁴¹ Ibid., para. 40.

⁴² Ibid., para. 41.

⁴³ Ibid., para. 41.

⁴⁴ Ibid., paras. 43-44.

⁴⁵ Ibid., para. 58.

⁴⁶ CJEU, Case C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, Judgment of 28 March 2017, ECLI:EU:C:2017:236.

review the legality of certain decisions as provided for by Article 275 (2) TFEU. EU Treaties do not explicitly recognise the possibility of national courts referring to a preliminary ruling according to Article 267 TFEU regarding the CFSP. In this case C-72/15 *Rosneft*, the CJEU accepted it. Therefore, Henze and Jahn commented that the CJEU eliminated the gap in effective judicial protection in the CFSP, interpreting the so-called carve-out clause in Article 24 (1) subpara. 2 sentence 5 alt. 1 TEU narrowly and the so-called claw-back clause in Article 24 (1) subpara. 2 sentence 5 alt. 2 TEU widely in combination with Article 275 (2) TFEU.⁴⁷

The CJEU held in the following:

First, the CJEU confirmed that as was apparent from Article 2 TEU and Article 21 TFEU to which Article 23 TFEU, relating to CFSP, refers, one of the EU's founding values is the rule of law, referring to C-455/14 P.⁴⁸ Second, the CJEU emphasised that Article 47 of the EU Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article and that the very existence of effective judicial review designed to ensure compliance with the provisions of EU law is of the essence of the rule of law.⁴⁹ Third, the CJEU held that while, admittedly, Article 47 of the EU Charter could not confer jurisdiction on the Court, where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly.⁵⁰ Further, the CJEU held that since the purpose of the procedure that enables the CJEU to give a preliminary ruling is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19 (1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by Article 275 (2) TFEU.⁵¹ Finally, the CJEU indicated that the necessary coherence of the system of judicial protection requires, in accordance with settled case-law, that when the validity of EU acts is raised before a national court or tribunal, the power to declare such acts invalid should be reserved under Article 267 TFEU and the same conclusion is imperative with respect to decisions in the field of the CFSP where the Treaties confer on the Court jurisdiction to review their legality.⁵²

3. Analysis

After the Treaty of Lisbon, the EU's values including the rule of law are laid down in Article 2 TEU and Article 21 TEU and the EU Charter, of which Article 47 provides the right to effective remedy, is legally binding. Recent case law mentions the above reference to Article 47 of the EU Charter and the rule of law. In Case *Schrems*, the CJEU made clear that the very

⁴⁷ Thomas Henze and Jannika Jahn, 'Zum Urteil des EuGH in der Rs. *Rosneft*, C-72/15', *EuZW* 2017, p. 506 and p. 508.

⁴⁸ Case C-72/15, Note (46), para. 72.

⁴⁹ *Ibid.*, para. 73.

⁵⁰ *Ibid.*, para. 74.

⁵¹ *Ibid.*, para. 75.

⁵² *Ibid.*, para. 78.

existence of an effective judicial review designed to ensure compliance with the provisions of EU law is inherent in the rule of law. In Case H and Case Rosneft, the CJEU confirmed its jurisdiction for the field of the CFSP, referring to the judgment in Case Schrems. This means that the combination between the rule of law as one of the EU's values in Article 2 TEU and the right to effective judicial remedy in Article 47 of the EU Charter gives reasons to extend the jurisdiction of the CJEU and as a result, enables the CJEU to protect fundamental rights effectively.

IV. *Concluding Remarks*

In Case 294/83 *Les Verts*, the CJEU guaranteed the individual concerned ('*Les Verts*') the right to review the legality, insisting that the Community (now Union) is based on the rule of law. At that time though, it was not envisaged that the EP would be accused and a measure by the EP could be annulled. The CJEU changed provisions in the Treaty substantially, although the change was inserted in the Treaty later through amendment of the Treaty. In Case 294/83 *Les Verts*, the CJEU clarified that the Treaty has established a complete system of legal remedies and procedures designed to permit the CJEU to review the legality of EU acts. This judgment in Case 294/83 *Les Verts* has become a leading case for the rule of law, in particular, the judicial protection of fundamental rights. This Judgment has been repeated for example in Case C-5/00 *P Unión de Pequeños Agricultores* and Joined Cases C-402/05 *P* and C-415/05 *P Kadi*. In Case C-5/00 *P*, the CJEU indicated that the system of legal remedies and procedures is completed with the sincere cooperation of Member States and national courts are thus obliged to guarantee judicial protection of rights as the EU 'courts'.

In Case 294/83 *Les Verts*, the CJEU referred to Articles 263, 277 and on the other hand, 267 TFEU from the viewpoint of individuals. However, there are other means of ensuring the rule of law: Infringement procedures (Article 258, 259, 260 (2) and (3) TFEU) and Court Opinion (Article 218 (11) TFEU). These means not only include declaring the invalidity of EU acts, but also the imposition of penalties, precluding national legislation and preventing conclusion of an international agreement as legal effects based on those means. The principle of the rule of law applies not only to EU institutions, but also to Member States. As an aside, in Case Court Opinion 1/15 on the draft agreement between Canada and the EU on the transfer of Passenger Name Record data,⁵³ it is remarkable that the EP asked an opinion before the CJEU to guarantee the protection of fundamental rights.

After the Treaty of Lisbon, the rule of law was laid down as one of the EU's values in Article 2 TEU and the EU Charter of Fundamental Rights was made legally binding with the same legal position as the TEU and TFEU. The EU charter is a part of the EU 'constitution'. Facing these changes, the CJEU has guaranteed judicial remedy, referring to the rule of law in Article 2 TEU and the right to effective judicial protection in Article 47 of the EU Charter. The CJEU does not have jurisdiction in principle in the field of the CFSP. However, the CJEU has extended its jurisdiction to ensure the right to judicial protection in the CFSP. In Case C-72/15 *Rosneft*, the CJEU accepted its jurisdiction for a preliminary ruling regarding the CFSP issues, although the Treaties do not provide for such a possibility explicitly. The CJEU has changed

⁵³ CJEU, Opinion 2/15, FTA between the EU and Singapore, Opinion of 16 May 2017, ECLI:EU:C:2017:376.

the Treaties substantially.

This paper discusses the EU's rule of law. EU Treaties have established a complete system of legal remedies in the EU with the cooperation of national courts as the EU 'courts'. The CJEU has guaranteed effective judicial protection of rights, based on the rule of law and the EU Charter. But what about the rule of law in EU Member States? Currently, the rule of law is in danger, especially in Poland, because the national judicial system is being damaged by national legislation. It is necessary to discuss how the rule of law can be guaranteed in EU Member States effectively.⁵⁴

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⁵⁴ Ex. Armin von Bogdandy/Carlino Antpöhler/Michael Ioannidis, 'Protecting EU Values-Reverse Solange and the Rule of Law Framework', *Max Planck Institutes for Comparative Public Law & International Law, Research Paper No.* 2016-04.