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Department of International and European Law, Faculty of Law,
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AS A LEGAL ARGUMENT BEFORE THE COURT OF JUSTICE
OF THE EUROPEAN UNION

INTRODUCTION

At least since the seminal decision in *Parti écologiste “Les Verts” v European Parliament*¹, it has been generally assumed that the European Union is 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 Treaties². The respect for the rule of law has found its way into the values of the Union (viz. 2 TEU)³, and the decision itself has been hailed as no less than a classic case on EU law as a whole⁴. Against this background, this paper aims to assess the force of such a concept as a legal argument before the Court of Justice of the European Union. The author resolves to find whether the rule of law possesses a legal added value in a strictly legal sense — for instance, as a heading under an action for annulment, either alone or in support of other arguments (e.g. a fundamental right or the citizenship of the European Union, either by way of

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¹ Judgment of the Court of 23 April 1986, Case 294/83 *Parti écologiste “Les Verts” v European Parliament*, EU:C:1986:166, para 23, hereinafter “*Les Verts*”.

² Opinion of the Court of 18 December 2014, no 2/13, EU:C:2014:2454, para. 163; the original decision that referred to just “the Treaty”, has been expanded to include “the Treaties”, encompassing the entirety of binding Union law, including general principles of Union law, international agreements and secondary law.

³ OJ C 202 (2016), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC>.

⁴ K. Lenaerts, “The Basic Constitutional Charter of a Community Based on the Rule of Law”, [in:] M. Maduro, L. Azoulai (eds.), *The Past and Future of EU Law — the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford 2010, pp. 295–316.

interpretation or direct applicability). As such, the research question of this paper is to assess whether a claim with an argument based on the rule of law developed by the claimant have any significant force, as to the probability of succeeding on merits before the CJEU.

To this end, as to the question of methodology, a descriptive approach is taken, and attention is given to the case-law of the Court. Such an approach mandates that the analysis should reflect — to the best possible extent — the current state of the law of the European Union (for it is that particular legal order which is at issue herein). To further this, the present paper contains a quantitative and a qualitative overview of the jurisprudence of the Court that would enable to discern the juridical content of the “rule of law” in the law of the European Union, as interpreted by the CJEU, while allowing to outline the boundaries of application of the concept in question. Lastly — despite the fact that the ambit of this paper remains firmly descriptive — the conclusions present herein are accompanied by recommendations *de lege lata* and *de lege ferenda*. As such, however, such departures from positivist⁵ inclinations of the author are clearly indicated where appropriate. This paper takes account of the law as it stood on 20th May 2016.

I. THE POSITION OF THE RULE OF LAW UNDER PRIMARY UNION LAW

This section aims — albeit briefly — to examine the foundations of the rule of law in primary law of the Union, along with relevant legal bases it possesses under it, before moving on to address its use before the CJEU. The rule of law has been mentioned in the Preamble to the Treaties as developed from the cultural, religious and humanist inheritance of Europe, from which inspiration has been drawn by the Member States. In addition, the attachment to the rule of law has been confirmed therein. The place where the rule of law first appears outside that Preamble, at the level of the Treaties and the Charter of the Fundamental Rights of the European Union (CFR), and, purportedly, the legal basis for the rule of law in the Union, is Article 2 TEU. According to that provision, the Union is founded on certain values that include, *inter alia*, the rule of law. Furthermore, Article 21(2) (b) TEU would have it that the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to, among other things, consolidate and support the rule of law. While Article 263 TFEU and Article 14.2 of Protocol no. 4 echo the rule of law in the sense of a legal norm, the concept proper is found again (and for the last time) under the Preamble to the Charter of the Fundamental Rights of the European

⁵ R. Cryer et al., *Research Methodologies in EU and International Law*, Oxford-Portland, Oregon 2011, p. 39.

Union (CFR), given that — according to it — the Union is based on the principles of democracy and the rule of law.

As such, there is no express competence for the Union to legislate on the issue of the rule of law⁶. Rather, it is framed as an inspiration, a value or a principle of the Union. According to R. Geiger, the rule of law in the sense of Article 2 TEU belongs to principles of free democracy and can be further divided into lawfulness of public administration, legal security, legal certainty, protection of legitimate expectations, non-retroactive effect of penal laws and principle of proportionality⁷. The view that the rule of law in the Union is connected with democracy is shared by K. Lenaerts and P. van Nuffel⁸. S. Magniameli in turn stresses that the rule of law is a structural principle of the Union, which presupposes other principles, that is legitimate expectations, invalidity of retroactivity, effective judicial review, and legal certainty. According to that author, the rule of law derives directly from the assertion of constitutionalism in the more advanced European legal traditions. The implementation of the principle at issue — according to him — implies two different spheres of action: limitations to the exercise of public power on the one hand, and protection of individual positions to which freedom and rights are linked, on the other⁹. It may be further added that there is (perhaps surprisingly) scarcely any written primary law on the issue in question as to accession of 2004 Member States, 2007 Member States and Croatia to the Union¹⁰.

It is therefore evident that — legally speaking — most, if not almost all, of the juridical contents of the rule of law come from unwritten sources of Union law, over which the Court of Justice of the European Union (CJEU) presides. To that end, and to the extent that Article 2 TEU has been relied on by applicants so far, the CJEU seems reluctant to exercise independent review on the basis of it.

⁶ A state that is shared in regard to EU fundamental rights in general, cf. P. Craig, G. de Búrca, *EU Law — Text, Cases, Materials. Sixth Edition*, Oxford 2015, p. 393.

⁷ R. Geiger [in:] *idem, European Union Treaties*, D. Khan, M. Kotzur (eds.), München 2015, pp. 15–16.

⁸ K. Lenaerts, P. van Nuffel, *European Union Law*, London 2011, p. 739.

⁹ S. Magniameli [in:] *idem, The Treaty on the European Union — A Commentary*, H. Blanke (eds.), Berlin-Heidelberg 2013, pp. 131–133.

¹⁰ In regard to the “2004 Member States”, which includes *Rzeczpospolita Polska*, advanced EUR-LEX search (as of 16.05.2016) shows 41 entries that mention accession and the rule of law at the same time; the 2003 Accession Treaty does not contain a reference to the rule of law at all (cf. <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1463392980926&uri=CELEX:02003T0000-20040501>); no additional acts to that Treaty show a mention of the rule of law, according to a EUR-LEX search). The number is similar in relation to Bulgaria and Romania (51); no mention has been made in 2005 Accession Treaty (<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1463400127453&uri=CELEX:12005S/TXT>) and its additional acts. Likewise, the 2013 Treaty on accession of Croatia to the Union itself does not address the issue, as it only appears twice in passing in the 2011 Opinion of the Commission on the favourableness of Croatian accession (<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1463391161136&uri=CELEX:12012J/TXT>). Text search in turn shows 20 instances of the “rule of law” having been raised in the context of the 2013 enlargement.

As of the time of writing, Article 2 TEU as amended by the Treaty of Lisbon has been invoked 60 times, to no avail¹¹. In particular, the General Court has been unwilling to apply Article 2 TEU alongside 21 TEU and the CFR in *Iran Insurance Company*¹², *Post Bank Iran*¹³, *Front Polisario*¹⁴ and *Izsák-Dabis v Commission*¹⁵. Similarly, it has not been accorded any independent legal value by the Court of Justice in *Pańczyk*¹⁶, *Kamberaj*¹⁷, *Pringle*¹⁸ and *Yumer*¹⁹. Additionally, the Civil Service Tribunal has been reluctant to analyse its legal effects for individuals in *BA v Commission*²⁰, notwithstanding the fact that it had been expressly invoked by the party (and the question of direct effect appeared relevant).

Therefore, having in mind that neither *Les Verts* itself nor Article 2 TFEU provide any relevant systematic insight (apart from equivocal being based on the concept at issue), it would follow that a scrutiny of case-law of the Court pertinent to the issue of the rule of law is required to elucidate its status of a “core principle” at the heart of the system of judicial protection in the European Union²¹.

¹¹ Cf. http://eur-lex.europa.eu/search.html?qid=1463429596785&DTS_DOM=ALL&DB_MENTIONING=12008M002&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL (16 May 2016). Additional 6 applications (*sans* any decisions) are found where 2 TEU (2012 consolidation) is selected http://eur-lex.europa.eu/search.html?qid=1463429766596&DTS_DOM=ALL&DB_MENTIONING=12012M002&type=advance&lang=en&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=EU_CASE_LAW.

¹² Judgment of the General Court of 3 May 2016, case T-63/14 *Iran Insurance Company v Council of the European Union*, EU:T:2016:264, para. 83.

¹³ Judgment of the General Court of 3 May 2016, case T-68/14 *Post Bank Iran v Council of the European Union*, EU:T:2016:263, para. 83.

¹⁴ Judgment of the General Court of 10 December 2015, case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council of the European Union*, EU:T:2015:953, para. 165. It should be added that this particular decision invites criticism on several grounds (see, to that end, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CN0104>) and would possibly be set aside on appeal.

¹⁵ Judgment of the General Court of 10 May 2016, case T-529/13 *Balázs-Árpád Izsák and Attila Dabis v European Commission*, EU:T:2016:282, para. 84.

¹⁶ Order of the Court of 12 June 2014, case C-28/14 *Ryszard Pańczyk v Dyrektor Zakładu Emerytalno-Rentowego Ministerstwa Spraw Wewnętrznych i Administracji w Warszawie*, EU:C:2014:2003, para. 25.

¹⁷ Judgment of the Court of 24 April 2012, case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233, para. 55.

¹⁸ Judgment of the Court of 27 November 2012, case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, EU:C:2012:756, para. 87.

¹⁹ Order of the Court of 17 July 2014, case C-505/13 *Levent Redzheb Yumer v Direktor na Teritorialna direksia na Natsionalna agentsia za prihodite — Varna*, EU:C:2014:2129, para. 24 and operative part.

²⁰ Judgment of the Civil Service Tribunal of 5 December 2012, case F-29/11 *BA v European Commission*, EU:F:2012:172, para. 89.

²¹ K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, p. 3.

II. THE RULE OF LAW IN THE JURISPRUDENCE OF THE CJEU

II.1. QUANTITATIVE ANALYSIS OF THE CONCEPT

For the purposes of that elucidation, the entirety of case-law (that is, 744 instances) that references the rule of law²², amounts to 636 judgments, 107 orders and an Opinion, as of the time of writing. 123 decisions among those 744 rulings have been identified to reference the “rule of law” in the sense presented above, either as reasons for the adopted decision or *obiter*²³. Quantitatively speaking, 28 (23%) of these 123 cases have amounted to the CJEU ignoring the argument altogether (i.e. not addressing it at all). In 95 cases there was some consideration of the subject; in 31 (25%) cases the applicant was not successful as to the claim, 43 cases (35%) yielded a general statement of principle and 21 cases (17%) amounted to a success of the applicant that advanced an argument based on the rule of law²⁴.

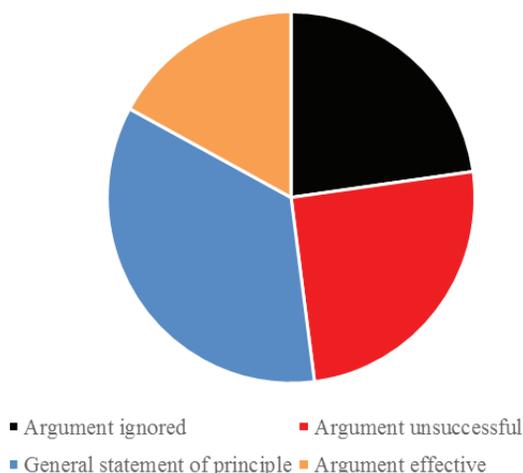


Figure 1. Rule of law as an argument before the CJEU

Source: the author's own research, see footnote 25

²² Viz. http://eur-lex.europa.eu/search.html?textScope=ti-te&lang=en&SUBDOM_INIT=ALL_ALL&DTS_DOM=ALL&CASE_LAW_SUMMARY=false&type=advanced&andText0=%22rule+of+law%22&DTS_SUBDOM=EU_CASE_LAW&qid=1463481196274&sortOne=DD&sortOneOrder=desc (17 May 2016). Opinions of AGs were excluded on grounds that they are in essence preparatory, and as such are not definitive statements of law.

²³ A preponderant amount of case-law referenced the “superior rule of law” as professed in the *Bergaderm* line of case-law, thus being irrelevant for the purposes of the present analysis.

²⁴ It must be added that a certain subjective element necessarily has become involved with the above data, as cases had to be divided between the categories; for instance, cases that involved a successful challenge as to a preliminary issue involving the rule of law were generally considered not

In relative terms, given the above, an argument based on the rule of law has only 17% chance of succeeding. It is perhaps puzzling *why* only such a number of cases would fall within this category in a Union *allegedly* “based on the rule of law”. At the same time, it is equally troubling that this percentage is lower than that of the ignored cases. In absolute terms, general statements of principle were the most common response from the CJEU. Taken together, almost half of the time (60 instances, 48%), the outcomes were “negative” for the applicant, in that he or she was either ignored or judged unsuccessfully²⁵.

II.2. QUALITATIVE ANALYSIS OF THE CONCEPT

Following the quantitative overview of the jurisprudence of the Court presented above, it appears important to review the identified decisions as to their merits on the concept of the rule of law (i.e. the 95 of them that contain any dictum on the issue). It would allow to find the legal status of “the rule of law”, in the sense of a legal norm (if any), legal contents thereof, primary context in which it appears, other legal norms to which it appears to be linked, and, for the sake of completeness, purported legal contents which it does not actually have. Admittedly, the category of decisions that omit the issue altogether (that is, 28) do not yield to this kind of descriptive review, as they do not contain any material to analyse.

The principal issue to be addressed must necessarily be the systematization of the rule of law, i.e. determining the place occupied by it in the system of EU law. As mentioned above, the decision in *Les Verts* contains surprisingly little *systematic* statements of principle. No specific source of law of the Union, or rather the EEC, as it then was, has been cited — for example, as a general principle of law of the EU. It also follows from the scrutiny of case-law that the CJEU has been somewhat reluctant to address this issue later on, for the gathered amount of decisions has not considered it at large. However, in a trio of judgments, the Court of First Instance — and then the General Court — have ruled in *Sogelma v EAR*²⁶, *Evropaïki Dynamiki v EMSA*²⁷ and in *Italy v EESC*²⁸ on this precise issue,

as “unsuccessful” even where the applicant ultimately failed, but either as general statements (where there was some kind of response from the Court but the rule of law did not serve as a crux for the case), or as a successful challenge (where the case itself was a preliminary issue that has ultimately failed in another decision). Therefore, the above results are a “favourable” interpretation of the concept.

²⁵ The entirety of discerned data may be accessed at <https://1drv.ms/u/s!AtgX1eqd2-6r7grmeG6u1MBD18nQ> (7 September 2016).

²⁶ Judgment of the Court of First Instance of 8 October 2008, case T-411/06 *Sogelma — Società generale lavori manutenzione appalti Srl v European Agency for Reconstruction (AER)*, EU:T:2008:419, para. 37.

²⁷ Judgment of the General Court of 2 March 2010, case T-70/05 *Evropaïki Dynamiki — Proïgmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Agence européenne pour la sécurité maritime (EMSA)*, EU:T:2010:55, para. 65.

²⁸ Judgment of the General Court of 31 March 2011, case T-117/08 *Italian Republic v European Economic and Social Committee (EESC)*, EU:T:2011:131, para. 31.

stating that there is a “general principle to be elicited from that judgment”. It would have to be inferred — according to the CFI/GC — that the norm alluded to in *Les Verts* is indeed a general principle of law of the Union, and as such, primary law thereof. It has been pointed out therein that the contents of that principle amount to a requirement that any act adopted by a body of the European Union, which is intended to have legal effects vis-à-vis third parties, must be amenable to review by the Courts. It would therefore appear that the thrust of the concept in question is firmly procedural and linked with access to justice and effective judicial review. Moreover, the principle may, in itself, function as a ground for successful review of legality, as *Poland v Commission (C-336/09 P)* shows²⁹.

A careful review of case-law allows for a number of cases to be identified that contribute to this procedural understanding of the rule of law under Union law. The ambit of these cases is to bring various legal or quasi-legal acts of Union institutions, agencies and bodies within the jurisdiction of the CJEU.

In *Arizmendi*³⁰ the General Court affirmed that a reasoned opinion issued by the Commission under Article 258 TFEU, while not intended to produce binding legal effects and therefore not susceptible to an action for annulment, is amenable to review for the purposes of the action for damages (268 and 340 TFEU), for it may, owing to its unlawful content, cause harm to third parties. According to the General Court, it cannot be precluded that the Commission would cause harm to persons who have entrusted it with confidential information by disclosing this information in a reasoned opinion, or that a reasoned opinion could contain inaccurate information about certain persons likely to cause them harm.

In *Athinaiki Techniki AE v Commission (C-521/06 P)*³¹, *Brink's Security*³², *EWRIA*³³ and *Intrasoft International*³⁴ the Court of Justice at first, joined by the CFI (as it then was before the Treaty of Lisbon came into force) and afterwards by the GC in three latter decisions, considered that letters from the Commission may constitute acts open to review. On their own, letters are not binding. However, they may define the legal position of an individual, and as such, may be then treated as decisions addressed to the applicant.

²⁹ Judgment of the Court of 26 June 2012, case C-336/09 P *Republic of Poland v European Commission*, EU:C:2012:386, para. 19 and 36.

³⁰ Judgment of the General Court of 18 December 2009, joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Jean Arizmendi and Others v Council of the European Union and European Commission*, EU:T:2009:530, para. 67.

³¹ Judgment of the Court of 17 July 2008, case C-521/06 P *Athinaiki Techniki AE v Commission of the European Communities*, EU:C:2008:422, para. 45.

³² Judgment of the Court of First Instance of 9 September 2009, case T-437/05 *Brink's Security Luxembourg SA v Commission of the European Communities*, EU:T:2009:318, para. 75.

³³ Judgment of the General Court of 17 December 2010, case T-369/08 *European Wire Rope Importers Association (EWRIA) and Others v European Commission*, EU:T:2010:549, para. 33.

³⁴ Judgment of the General Court of 13 October 2015, case T-403/12 *Intrasoft International SA v European Commission*, EU:T:2015:774, para. 30.

A number of cases are related to the workings of the European Parliament. The case of *Ashley Neil Mote*³⁵ concerned a waiver of parliamentary immunity of an MEP, carried out by the European Parliament against the MEP's wishes. According to the CFI, a waiver goes beyond the internal organisation of the Parliament, since the decision makes it possible for proceedings to be brought against that Member in respect of the matters identified. *Ashley Neil Mote* referenced an earlier case, *Weber v Parliament*³⁶ as a leading authority; the latter case — concerning refusal of an end-of-service allowance for an MEP — established that “measures which relate only to the internal organization of the work of the Parliament cannot be challenged in an action for annulment”. These would include measures of the Parliament which either do not have legal effects or have legal effects only within the Parliament as regards the organization of its work and are subject to review procedures laid down in its Rules of Procedure³⁷. Neither the waiver of parliamentary immunity nor a refusal of allowance fell within that category. The order for interim measures in *Rothley*³⁸ further added that a decision of the EP amending its Rules of Procedure that dealt with internal investigations by the European Anti-Fraud Office (OLAF) within the Parliament does constitute a reviewable act, even if its ambit were to be internal. Moreover, a dissolution of a parliamentary group also belongs to that category (*Front National*³⁹).

The activities of the OLAF returned for review in *Planet AE v Commission*⁴⁰. The order in question had to consider the so-called “early warning” anti-fraud “alerts” (that, inter alia, resulted in suspending the conclusion of a contract) and the registration of an entity in a “warning” list by the OLAF, without it being heard with regard to the reasons for its registration. It has been held that such measures were in fact decisions determining the applicant's legal position, even where no act had been communicated to the applicant.

Another instances of an irregular act have been found in the trio of judgments mentioned above that related to the status of the “rule of law”. The earliest decision, *Sogelma v EAR*, concerned the cancellation of a tender procedure by the European

³⁵ Judgment of the Court of First Instance of 15 October 2008, case T-345/05 *Ashley Neil Mote v European Parliament*, EU:T:2008:440, para. 29.

³⁶ Judgment of the Court of 23 March 1993, case C-314/91 *Beate Weber v European Parliament*, EU:C:1993:109, para. 8.

³⁷ On the other hand, an agreement between the EP and the Commission on communication of confidential information has been considered to be an “internal” measure; see order in T-236/00 *Stauner*, para. 58 and 59.

³⁸ Order of the President of the Court of First Instance of 2 May 2000, case T-17/00 R *Willy Rothley and Others v European Parliament*, EU:T:2000:119, para. 54.

³⁹ Judgment of the Court of First Instance of 2 October 2001, joined cases T-222/99, T-327/99 and T-329/99 *Jean-Claude Martinez, Charles de Gaulle, Front national and Emma Bonino and Others v European Parliament*, EU:T:2001:242, para. 48.

⁴⁰ Order of the General Court of 13 April 2011, case T-320/09 *Planet AE v European Commission*, EU:T:2011:172, para. 51.

Agency for Reconstruction, a body endowed with legal personality and established by a regulation with the aim of implementing then-Community assistance, inter alia, to Serbia and Montenegro. It has been held that cancellation amounts to a decision that is open to challenge, regardless of the fact that it was a Union agency that has taken it⁴¹. In turn, *Evropaiki Dynamiki v EMSA*⁴² referred to a refusal to accept a tender by the European Maritime Safety Agency, awarding the contract to another tenderer. The GC further added that “decisions which are adopted by EMSA in public procurement procedures and are intended to have legal effects vis-à-vis third parties are acts open to challenge”⁴³. Lastly, *Italy v EESC* related to annulling a vacancy notice (hardly a legal act) that was adopted by the European Economic and Social Committee, which is not an institution mentioned under Article 263 TFEU. At any rate, these cases also confirm that acts of EU agencies remain within the jurisdiction of the CJEU⁴⁴.

Another example of acts open to review has been found in decisions of the Court of Justice in *Kadi*⁴⁵ and *Kadi II*⁴⁶, wherein the Court stressed that an international agreement (specifically, the Charter of the United Nations) may not alter the distribution of powers under the EU Treaties and may not render EU implementing international measures for that agreement (that is, in those cases, regulations adopted to give effect to Security Council resolutions under Chapter VII of the Charter of the United Nations) exempt from review. As such, the Court found itself competent to review those acts. The case of *Evropaiki Dynamiki v EIB*⁴⁷ concerned a decision by the Management Committee of the European Investment Bank,

⁴¹ The case made reference to an order of the CFI of 19 October 2007 in T-69/05 *Evropaiki Dynamiki v EFSA*, EU:T:2007:314, para. 53, wherein the CFI refused to adjudicate the case, but alluded *obiter* that the decision is “without prejudice to the right of the applicant to contest, if necessary, in separate proceedings the lawfulness of the decision to cancel the call for tenders”. No express mention of the rule of law has been made in that order, however.

⁴² Judgment of the General Court of 2 March 2010, case T-70/05 *Evropaiki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Agence européenne pour la sécurité maritime (EMSA)*, EU:T:2010:55, para. 64.

⁴³ Para. 67 therein.

⁴⁴ As such, it appears that the decision in C-160/03 *Spain v Eurojust*, commonly relied on in the above cases by the defendants, is no longer good law; while the claim thereunder has been ineffective, it may have been justified by the state of EU and Community law and the limitation of jurisdiction of the Court, as they were in regard to AFSJ before the Treaty of Lisbon came into force. For other examples of these past limitations of review, see C-355/04 P *Segi*, para. 48, and T-228/02 *Organisation des Modjahedines du peuple d’Iran*, para. 47.

⁴⁵ Judgment of the Court of 3 September 2008, joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, para. 281.

⁴⁶ Judgment of the Court of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518, para. 66.

⁴⁷ Judgment of the General Court of 20 September 2011, case T-461/08 *Evropaiki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Investment Bank (BEI)*, EU:T:2011:494, para. 47.

taken against the applicant. The decision taken, amounting to “rejecting a tender submitted by a person and awarding the public contract in question to another person”, was not envisaged under Article 271 TFEU in relation to the EIB. The applicant claimed annulment and, in an ancillary manner, damages. Both claims have been held admissible.

Finally, it has been held that acts that have been amended *ex nunc*, with the applicant still being affected, constitute acts open to be annulled, apart from acts capable to form the basis for an action for damages. In *Shanghai Excell*⁴⁸ this was explicitly affirmed, due to the reason that the opposite would be

tantamount to admitting that acts adopted by the institutions whose temporal effects are limited and which will expire after an action for annulment have been brought but before the Court is able to give the relevant judgment would be excluded from review by the Court, unless they had given rise to the payment of sums of money.

The approach was confirmed in *Westfälisch-Lippischer Sparkassen- und Giroverband*⁴⁹, as well as in *Abdulrahim*⁵⁰ and *Ayadi*⁵¹ handed down by the Court of Justice, in regard to CFSP and restrictive measures directed at persons suspected of terrorism.

Apart from admissibility — which appears to be the main area of application for the concept in question — the principle of the rule of law has influenced several other “procedural” issues. In *Granaria BV*⁵² and *Commission v Greece (63/87)*⁵³ the Court added that the principle in question also imposes upon all persons subject to EU law the obligation to acknowledge that regulations (or, in the latter case, “measures” in general) are fully effective, so long as they have not been declared to be invalid by a competent court⁵⁴. The case of *ETF*⁵⁵ connected the duty to state

⁴⁸ Judgment of the Court of First Instance of 18 March 2009, case T-299/05 *Shanghai Excell M&E Enterprise Co. Ltd and Shanghai Adepteck Precision Co. Ltd v Council of the European Union*, EU:T:2009:72, para. 56.

⁴⁹ Judgment of the General Court of 17 July 2014, case T-457/09 *Westfälisch-Lippischer Sparkassen- und Giroverband v European Commission*, EU:T:2014:683, para. 140.

⁵⁰ Judgment of the Court of 28 May 2013, case C-239/12 P *Abdulbasit Abdulrahim v Council of the European Union and European Commission*, EU:C:2013:331, para. 53.

⁵¹ Judgment of the Court of 6 June 2013, case C-183/12 P *Chafiq Ayadi v European Commission*, EU:C:2013:369, para. 51.

⁵² Judgment of the Court of 13 February 1979, case 101/78 *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten*, EU:C:1979:38, para. 5.

⁵³ Judgment of the Court of 7 June 1988, case 63/87 *Commission of the European Communities v Hellenic Republic*, EU:C:1988:285, para. 10.

⁵⁴ However, this must be viewed as not absolute, as i.e. *Zuckerfabrik Süderdithmarschen*, — *Atlanta* (interim measures before national courts in regard to validity of an EU act), *Skoma-Lux* (untranslated legal acts) and *Heinrich* (secret, unpublished parts of a legal act) lines of case-law show. See also C-51/10 P *Technopol*, para. 68 and 76.

⁵⁵ Judgment of the Court of First Instance of 8 September 2009, case T-404/06 P *European Training Foundation (ETF) v Pia Landgren*, EU:T:2009:313, para. 109.

reasons (now found under Article 296 TFEU) with the rule of law. According to the CFI, a requirement that an institution should state the reasons for its decisions is “inseparable from the court’s power to review the validity of such decisions and that power must be guaranteed, in a Community based on the rule of law, under equivalent conditions, to all persons subject to the law who exercise their right to judicial protection”. A number of competition law cases — dealing with administrative procedure prior to judicial proceedings and the issue whether an applicant is bound by his pleas thereunder — stated, beginning with *Knauf Gips*⁵⁶, that an action may not be precluded, save where there is an express legal basis for such a restriction, due to the Union being based on the rule of law⁵⁷.

Furthermore, there have been several decisions that addressed the relationship between different sets of proceedings, in and outside the Court. As such, a pending case in another jurisdiction (i.e. American) is not a ground for refusing to consider a review of a merger⁵⁸. Similarly, the case of *PKK and KNK*⁵⁹ stressed that *lis pendens* in a related but distinct case may not render an application to the Court inadmissible. An appeal from that case, *Osman Ocalan*⁶⁰ added that an applicant association, along with its leader, may, despite its striking-off of a national register, challenge restrictive Union measures still directed at it. It may also issue powers of attorney regardless of that striking-off. Furthermore, *Éditions Odile Jacob SAS*⁶¹ submitted that a party to proceedings before the CJEU is not precluded from making a legal characterisation of a plea in law that is different from that which it made in another case; it is also not precluded from either lodging submissions

⁵⁶ Judgment of the Court of 1 July 2010, case C-407/08 P *Knauf Gips KG v European Commission*, EU:C:2010:389, para. 91.

⁵⁷ Other decisions include: judgment of the General Court of 27 September 2012, case T-361/06 *Ballast Nedam NV v European Commission*, EU:T:2012:491, para. 48, judgment of the General Court of 12 July 2011, case T-132/07 *Fuji Electric Co. Ltd v European Commission*, EU:T:2011:344, para. 159, judgment of the General Court of 15 September 2011, case T-234/07 *Koninklijke Grolsch NV v European Commission*, EU:T:2011:476, para. 40, judgment of the General Court of 6 October 2015, case T250/12 *Corporación Empresarial de Materiales de Construcción v Commission*, EU:T:2015:749, para. 52, judgment of the Court of 11 July 2013, case C-439/11 P *Ziegler SA v European Commission*, EU:C:2013:513, para. 57.

⁵⁸ Judgment of the Court of First Instance of 28 September 2004, case T-310/00 *MCI, Inc. v Commission of the European Communities*, EU:T:2004:275, para. 33 and 61.

⁵⁹ Order of the Court of First Instance of 15 February 2005, case T-229/02 *Kurdistan Workers’ Party (PKK) and Kurdistan National Congress (KNK) v Council of the European Union*, EU:T:2005:48, para. 44. While the order in question was set aside in so far as it had dismissed the application of Osman Ocalan on behalf of the Kurdistan Workers’ Party (PKK), this particular paragraph has been explicitly endorsed by the Court of Justice (viz. C-229/05 P *Osman Ocalan* below, para. 103).

⁶⁰ Judgment of the Court of 18 January 2007, case C-229/05 P *Osman Ocalan, on behalf of the Kurdistan Workers’ Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union*, EU:C:2007:32, para. 112.

⁶¹ Judgment of the General Court of 5 September 2014, case T-471/11 *Éditions Odile Jacob SAS v European Commission*, EU:T:2014:739, para. 50.

more than once, or before the actual action, provided that they are lodged before the prescribed deadline for bringing proceedings (*Stichting Natuur en Milieu and Pesticide Action Network Europe*)⁶². The rule of law features in the duty of the Commission not to discriminate between the parties and investigate a State aid case diligently and impartially, which is also associated with the right to good (sound) administration⁶³. Lastly, the rule of law has been identified to prohibit illegal measures to form basis of a criminal conviction (*E and F*)⁶⁴ and to preclude a simultaneous enforcement of two conflicting judgments in one Member State (*Italian Leather*)⁶⁵. A general statement that “it is in the very nature of European Union law that the rules of which it is comprised might be declared invalid” has been offered by the Court of Justice in regard to the rule of law⁶⁶.

Apart from the above, the concept of the “rule of law” has also been raised *obiter*, either to highlight a particular element of the rule of law or to connect it with another norm of law of the Union. As such, separation of State powers is a characteristic of the rule of law⁶⁷; it creates an entitlement to effective judicial protection⁶⁸. Access to justice through the Court ensures the rule of law⁶⁹ and judicial review is inherent to it⁷⁰. Supporting the rule of law is seen as an objective of general interest⁷¹. The

⁶² Judgment of the General Court of 14 June 2012, case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission*, EU:T:2012:300, para. 20.

⁶³ Judgment of the Court of First Instance of 6 March 2003, joined cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission of the European Communities*, EU:T:2003:57, para. 167, order of the President of the Court of First Instance of 4 April 2002, case T-198/01 R *Technische Glaswerke Illmenau GmbH v Commission of the European Communities*, EU:T:2002:90, para. 85, order of the President of the Court of 18 October 2002, case C-232/02 P(R) *Commission of the European Communities v Technische Glaswerke Ilmenau GmbH*, EU:C:2002:601, para. 85.

⁶⁴ Judgment of the Court of 29 June 2010, case C-550/09 *Criminal proceedings against E and F*, EU:C:2010:382, para. 60.

⁶⁵ Judgment of the Court of 6 June 2002, case C-80/00 *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, EU:C:2002:342, para. 48.

⁶⁶ Judgment of the Court of 14 June 2012, case C-533/10 *Compagnie internationale pour la vente à distance (CIVAD) SA v Receveur des douanes de Roubaix and Others*, EU:C:2012:347, para. 30.

⁶⁷ Judgment of the Court of 22 December 2010, case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, EU:C:2010:811, para. 58.

⁶⁸ Judgment of the General Court of 24 March 2011, joined cases *Freistaat Sachsen and Land Sachsen-Anhalt (T-443/08) and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH (T-455/08) v European Commission*, EU:T:2011:117, para. 55. See also, to the same effect, orders in T-174/11 *Modelo Continente Hipermercados*, para. 32, and T400/11 *Altadis*, para. 50.

⁶⁹ Judgment of the Court of First Instance of 17 July 1998, case T-111/96 *ITT Promedia NV v Commission of the European Communities*, EU:T:1998:183, para. 60.

⁷⁰ Judgment of the Court of 11 September 2008, joined cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others*, EU:C:2008:488, para. 80.

⁷¹ Judgment of the General Court of 27 February 2014, case T-256/11 *Ahmed Abdelaziz Ezz and Others v Council of the European Union*, EU:T:2014:93, para. 199.

CJEU has also ruled on connections of “rule of law” in regard to other norms of law. In *Zwartveld*⁷² it held that within the (then) Community based on the rule of law, relations between the Member States and the Union are governed by sincere cooperation. *Schrems*⁷³ highlighted that effective judicial review is inherent in the rule of law, while *Hotel Cipriani*⁷⁴ and *Randa Chart*⁷⁵ pointed out that the rule of law presupposes observance of sound administration as the general principle of law of the Union. *Poland v Commission* (C-335/09 P)⁷⁶ and *Poland v Commission* (C-336/09 P)⁷⁷ ventured that the rule of law, being a “very foundation” of the Union, requires that the new Member States are to be treated on the basis of equality with the old Member States, which is expressly provided for by Article 4(2) TEU. As such, for the former, a period for bringing a claim under 263 TFEU only starts to run after the date of accession to the Union. Lastly, procedural fairness is required to be observed by rule of law⁷⁸. It is perhaps puzzling that no obvious juridical connection with legal certainty or rights of defence⁷⁹ has been observed, given that the rule of law is viewed as inextricably linked to them in the doctrine⁸⁰. *Weltimmo*⁸¹ added that the power to impose penalties for breach of the protection of personal data outside the territory of a Member State where a supervisory authority is based is restricted by the rule of law. Moreover, the rule of law invites a flexible interpretation of the requirement for correspondence between the administrative complaint and

⁷² Order of the Court of 13 July 1990, case C-2/88 *Imm J. J. Zwartveld and others*, EU:C:1990:315, para. 17.

⁷³ Judgment of the Court of 6 October 2015, C-362/14 *Maximillian Schrems v Data Protection Commissioner*, EU:C:2015:650, para. 95: “[...] the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law”.

⁷⁴ Judgment of the Court of First Instance of 28 November 2008, joined cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani SpA and Others v Commission of the European Communities*, EU:T:2008:537, para. 210.

⁷⁵ Judgment of the General Court of 16 December 2015, case T-138/14 *Randa Chart v European External Action Service*, EU:T:2015:981, para. 112.

⁷⁶ Judgment of the Court of 26 June 2012, case C-335/09 P *Republic of Poland v European Commission*, EU:C:2012:385, para. 49.

⁷⁷ Judgment of the Court of 26 June 2012, case C-336/09 P *Republic of Poland v European Commission*, EU:C:2012:386, para. 37.

⁷⁸ Judgment of the General Court of 21 October 2015, case T-664/13 *Petco Animal Supplies Stores, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, EU:T:2015:791, para. 33.

⁷⁹ The Court does recall “principle of legality” requiring “clarity of law” in C-501/11 P *Schindler Holding et al.*, para. 57, referring to T-138/07 *Schindler Holding*, para. 96 and C-413/08 P *Lafarge*, para. 94, but neither of these earlier decisions referred to the rule of law or legality. As such, the reasoning of the Court in C-501/11 P does not seem to be consistent.

⁸⁰ Cf. T. Tridimas, *The General Principles of EU Law*, Oxford 2006, p. 242; H. Hofmann, G. Rowe, A. Türk, *Administrative Law and Policy of the European Union*, Oxford 2011, pp. 72 and 204.

⁸¹ Judgment of the Court of 1 October 2015, case C-230/14 *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság*, EU:C:2015:639, para. 56.

the legal action in staff cases⁸². Under CFSP, it has been found that adoption of measures intended to advance — *inter alia* — the rule of law in the rest of the world may legitimately be the subject of a decision based on Article 29 TEU⁸³. Furthermore, the rule of law precludes the application of a general rule of administrative confidentiality vis-à-vis the Court of Justice⁸⁴ and precludes the Commission from circumventing the intentions of Union legislature⁸⁵. A notably rare statement of principle on the rule of law as a *substantive* standard connected with effective judicial protection, although admittedly *obiter*, may be found in *Advocaten voor de Wereld VZW v Leden van de Ministerraad*⁸⁶.

Last but not least, it is important to consider that the rule of law does *not* enable the applicant to undertake certain recourse to it. In *Unión de Pequeños Agricultores (C-50/00 P)*⁸⁷, *Philip Morris*⁸⁸, *Sniace*⁸⁹, *Iberdrola*⁹⁰, *Kanatami (C583/11 P)*⁹¹ and *Telefonica*⁹² the concept has been found to neither extend the availability of the action for annulment nor provide a remedy to require a specific performance and

⁸² Judgment of the Civil Service Tribunal of 1 July 2010, case F-45/07 *Wolfgang Mandt v European Parliament*, EU:F:2010:72, para. 115 and 116.

⁸³ Judgment of the General Court of 22 April 2015, case T-190/12 *Johannes Tomana and Others v Council of the European Union and European Commission*, EU:T:2015:222, para. 93.

⁸⁴ Order of the Court of First Instance of 19 June 1996, joined cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke GmbH, Eurofer ASBL, Arbed SA, Cockerill-Sambre SA, Thyssen Stahl AG, Unimétal — Société française des aciers longs SA, Krupp Hoesch Stahl AG, Preussag Stahl AG, British Steel plc, Siderurgica Aristrain Madrid SL and Empresa Nacional Siderurgica SA v Commission of the European Communities*, EU:T:1996:85, para. 69.

⁸⁵ Order of the President of the Court of 24 September 1996, joined cases C-239/96 R and C-240/96 R *United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities*, EU:C:1996:347, para. 73.

⁸⁶ Judgment of the Court of 3 May 2007, case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261, para. 45. The rareness of such an approach to the rule of law in *actual jurisprudence* of the Court is noted by A. Bogdandy in *idem, Principles of European Constitutional Law*, J. Bast (eds), Oxford and München 2010, p. 29.

⁸⁷ Judgment of the Court of 25 July 2002, case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462, para. 38 and 41. For early cases, see also orders in C-447/98 P *Molkerei*, para. 40, and T-370/02 *Alpenhain-Camembert-Werk and Others*, para. 72.

⁸⁸ Judgment of the Court of First Instance of 15 January 2003, joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc and Others v Commission of the European Communities*, EU:T:2003:6, para. 123. See also C-131/03 P *R.J. Reynolds and Others*, para. 30.

⁸⁹ Judgment of the Court of First Instance of 14 April 2005, case T-141/03 *Sniace, SA v Commission of the European Communities*, EU:T:2005:129, para. 40.

⁹⁰ Judgment of the General Court of 8 March 2012, case T-221/10 *Iberdrola, SA v European Commission*, EU:T:2012:112, para. 43.

⁹¹ Judgment of the Court of 3 October 2013, case C583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, EU:C:2013:625, para. 93.

⁹² Judgment of the Court of 19 December 2013, case C-274/12 P *Telefónica SA v European Commission*, EU:C:2013:852, para. 57.

to issue directions to EU bodies. This is especially true in regard to an action for annulment of a genuine directive not being available for an individual⁹³. Similarly, the rule of law does not extend the availability of the action for damages (*Gestoras pro Amnistia*)⁹⁴. It also does not affect any alleged failure to act outside existing remedies; there is no possibility of requiring the Commission to undertake action as against third states infringing the rule of law, even specifically in relation to alleged continuous infringements directed at the applicant (*Mugraby*)⁹⁵. Similarly, the action for failure to act may not be used on grounds of the rule of law to require the Commission to use the procedure envisaged under Article 7 TEU⁹⁶. The rule of law (and Article 2 TEU) may not also be used to challenge the implementation of an international agreement concluded by the Member States by way of a regulation, where the Union has not acted and has no exclusive competence (*Spain v Parliament and Commission (European Patents)*)⁹⁷. A Member State is neither exempt from liability under 258 TFEU, should it plead *force majeure* due to a need of institutional internal reform for the purposes of ensuring the rule of law⁹⁸, nor free from liability for infringement on EU law and damages to be awarded before its courts, on alleged grounds of *res judicata* purportedly flowing from the rule of law⁹⁹. It may not alter the validity of a composition of the General Court, where compositions are permitted by Statute and Rules of Procedure¹⁰⁰, or require a body to supply an applicant with a full text of a decision, where the individually con-

⁹³ Order of the Court of 7 December 1988, case 160/88 *Fédération européenne de la santé animale and others v Council of the European Communities*, EU:C:1988:535, para. 8 and 14.

⁹⁴ Judgment of the Court of 27 February 2007, case C-354/04 P *Gestoras Pro Amnistia, Juan Mari Olano Olano and Julen Zelarain Errasti v Council of the European Union*, EU:C:2007:115, para. 48 (although the case refers to the state of affairs before Treaty of Lisbon came into force).

⁹⁵ Order of the Court of 12 July 2012, case C-581/11 P *Muhamad Mugraby v Council of the European Union and European Commission*, EU:C:2012:466, para. 68.

⁹⁶ Order of the Court of First Instance of 10 July 2001, case T-191/00 *Werner F. Edlinger v Commission of the European Communities*, EU:T:2001:183, para. 4 and 25, order of the Court of First Instance of 2 April 2004, case T-337/03 *Luis Bertelli Gálvez v Commission of the European Communities*, EU:T:2004:106, para. 17.

⁹⁷ Judgment of the Court of 5 May 2015, case C-146/13 *Kingdom of Spain v European Parliament and Council of the European Union*, EU:C:2015:298, para. 32.

⁹⁸ Judgment of the Court of 6 July 2000, case C-236/99 *Commission of the European Communities v Kingdom of Belgium*, EU:C:2000:374, para. 21 and 23.

⁹⁹ Judgment of the Court of 30 September 2003, case C-224/01 *Gerhard Köbler v Republik Österreich*, EU:C:2003:513, para. 23; this case skirted the boundary between “ineffective” and “being ignored”, as the Court did address the question of *res judicata* (which was the crux of the plea), but did not consider rule of law in general, as raised by the French Republic. A similar situation appeared in C-210/00 *KCH*, para. 27, as to “fundamental principles of criminal law inherent in the principle of the rule of law, namely, the principle of *nulla poena sine culpa* (no punishment without fault), the principle of proportionality and the principle of non-discrimination”, raised by the applicant and considered by the Court, but without reference to the rule of law.

¹⁰⁰ Judgment of the Court of 2 October 2003, case C-182/99 P *Salzgitter AG v Commission of the European Communities*, EU:C:2003:526, para. 20, 23 and 36.

cerned applicant has not requested it himself or herself within a reasonable time limit after acquiring knowledge of existence of such a measure¹⁰¹. The rule of law also does not, in principle, affect the remuneration of Union servants, provided that conditions of employment offered to the applicant meet the minimum social requirements applying in any State governed by the rule of law¹⁰².

ASSESSMENT AND CONCLUSIONS

It follows *de lege lata* from the above data that the ambit of the principle is firmly procedural, facilitating access to the Court of Justice of the European Union, in the sense that review is declared possible¹⁰³. However, it does not render such a possibility more *probable*, as normal (i.e. stringent) rules on standing apply¹⁰⁴. It does not normally affect the possibility of a success on merits, as it is concerned with access to the Court, not with a certain substantive standards of legality, unless where the claim is procedural, e.g. where the claim made by the applicant has been declared inadmissible. Crucially, it neither requires EU institutions to make use of Article 7 TEU nor forces them to take action where there have been (alleged) infringements of law elsewhere. Nothing in the case-law suggested that the rule of law in the sense referred to in *Les Verts* (or under Article 2 TEU, for that matter) could be invoked against a Member State before the Court of Justice.

Moreover, the data does not support any notion that the rule of law would enhance¹⁰⁵ either a separate or connected legal argument based on some other norms of EU law, such as fundamental rights or EU citizenship, save perhaps effective judicial protection (*Schrems*). However, at large, even effective judicial protection is corroborated no more than *obiter*, as the CJEU has not accorded any *material* enhancement to that general principle of EU law¹⁰⁶.

¹⁰¹ Judgment of the Court (Third Chamber) of 14 May 1998, case C-48/96 P *Windpark Groothusen GmbH & Co. Betriebs KG v Commission of the European Communities*, EU:C:1998:223, para. 23 and 25.

¹⁰² Order of the Civil Service Tribunal of 12 November 2008, case F-88/07 *Juan Luis Domínguez González v Commission of the European Communities*, EU:F:2008:141, para. 88.

¹⁰³ A “procedural” dimension of the “rule of law” is also noted by M. Avbelj [in:] *idem*, *Constitutional Pluralism in the EU and Beyond*, J. Komárek (eds), Oxford-Portland, Oregon 2012, p. 399.

¹⁰⁴ Which has already been called a “judicial death” of *Les Verts*, cf. A. Alemanno, *Les Verts v Parliament* [in:] M. Maduro, L. Azoulai (eds), op. cit., p. 331, and, in an opening statement, being first and foremost „important for its symbolic rather than doctrinal message”, cf. N. Walker, *Opening or Closure? The Constitutional Intimations of the ECJ*, *ibid.*, p. 333.

¹⁰⁵ Cf. P. Craig, G. de Búrca, op. cit., p. 887, on “bolstering” existing rights by EU citizenship.

¹⁰⁶ This may be viewed — in an EU context — as a confirmation of an approach in the doctrine positing that, descriptively speaking, “rule of law” in the substantive sense is no more than a laudable slogan (cf. M. Loughlin, *Foundations of Public Law*, Oxford 2010, p. 312).

Therefore, by way of a conclusion, the answer to the research question of this paper would be that the principle at issue has significance for the claimant within the remit of the procedural boundaries outlined above — i.e. it is primarily concerned with availability of review. If the crux of the legal issue were to be the existence of judicial review by the Union Courts, the principle would be of use for the applicant. However, outside such a remit, the applicant would probably not be aided any further thereby.

De lege ferenda it may be submitted that a Union based on the rule of law ought not to allow applicants to substantively succeed with rule of law only 17% of the time. Rather, the rules on standing should be relaxed to reflect this general principle — in that successful judicial review on merits must be not only *possible*, but also *probable* where an infringement occurred. At the same time, this review must be in line with the principle of effective judicial protection — there should have been, and still needs to be, a more pronounced connection between the rule of law and *the quality* of review that is supposed to be *effective as to the substantive standard*. There have been submissions to the effect that values of the Union — of which the rule of law forms part — are to be treated as “primordial”, above even primary law¹⁰⁷, but so far, this statement is not supported by current case-law¹⁰⁸.

That dimension may be changed — albeit out of court — with the advent of the “New EU Framework to strengthen the Rule of Law”, developed by the European Commission¹⁰⁹. This framework — a communication, and as such, a non-binding *soft law* act — is, according to the Commission, supposed to be “complementary” to Article 7 TEU. The Framework has already sparked controversy, as the Legal Service of the Council found it to be in breach of the principle of conferral¹¹⁰. Nevertheless, the Commission has initiated the procedure against the Republic of Poland¹¹¹ for repeated and continuing infringement on the rule of law in regard to the Polish Constitutional Tribunal. It remains to be seen whether this would anyhow advance the substantive dimension of the rule of law, especially in the unlikely event of a decision of the Court under Article 269 TFEU.

¹⁰⁷ A. Rosas, L. Armati, *EU Constitutional Law — an Introduction*, Oxford-Portland, Oregon 2010, p. 42.

¹⁰⁸ In fact, one of the cases in the “Argument ignored” category had an express argument under Article 2 TEU and the lack of any meaningful review on part of the Court in that regard (cf. judgment of the Court of 1 March 2016, case C-440/14 P *National Iranian Oil Company v Council of the European Union*, EU:C:2016:128, para. 68 and 77). Those cases were omitted from the text by virtue of yielding to an analysis on merits as to their reasoning (given that there were none present); such an analysis (inherently non-descriptive) would run the risk of being deemed *argumentum ex silencio*.

¹⁰⁹ COM/2014/0158 final/2, available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158R\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158R(01)&from=EN) (19 June 2016).

¹¹⁰ Available at <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf> (19 June 2016).

¹¹¹ http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm (19 June 2016).

KONCEPCJA UNII OPARTEJ NA RZĄDACH PRAWA JAKO ARGUMENT PRAWNY PRZED TRYBUNAŁEM SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ

Streszczenie

Niniejsza praca ma na celu rozważenie koncepcji Unii opartej na rządach prawa, obecnej w prawie Unii Europejskiej, w ramach orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej. Autor podejmuje się analizy ilościowej oraz jakościowej i oceny wskazanego zagadnienia, katalogując ponad 120 poszczególnych orzeczeń Trybunału odnoszących się do „rządów prawa” w powyższym znaczeniu (w tym rozważając 95 przypadków, w których omawiane zagadnienie zostało rozważone co do istoty). W ten sposób pytanie badawcze niniejszej pracy brzmi — czy twierdzenie procesowe i argumentacja oparte na „rządach prawa” mają jakiegokolwiek szczególne znaczenie dla skarżącego co do prawdopodobieństwa uzyskania korzystnego rozstrzygnięcia przed Trybunałem?