RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY
Rok LXXXVII – zeszyt 1 – 2025
https://doi.org/10.14746/rpeis.2025.87.1.01

I. ARTYKUŁY

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THE COURT OF JUSTICE OF THE EUROPEAN UNION: DO ALL ROADS LEAD TO LUXEMBOURG?[1]

TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ: CZY WSZYSTKIE DROGI PROWADZĄ DO LUKSEMBURGA?

Since its establishment in the early 1950s, the European Court of Justice, seated in Luxembourg, has played a key role in managing and developing the European integration architecture. Yet, with subsequent developments, the Luxembourg Court appears to have gained even more importance, particularly in the constitutionalization of the European integration process. Today, this has reached such an extent that one can ask whether all roads lead to Luxembourg rather than to the political EU institutions in Brussels and beyond, or to the capitals of the EU Member States. The present paper, based on an annual lecture in honour of Professor and Foreign Minister Krzysztof Skubiszewski, seeks to provide examples of areas where the case law of the Court has been particularly consequential and to explain why the Court has become more influential. However, the paper concludes by arguing that the role of the Court should not be overstated and that, in any case, its enhanced role is explained by many constitutional and legislative developments beyond the control of the Court itself. Moreover, the reader will be reminded that the Union's judicial system is not limited to the two Union Courts (the Court of Justice and the General Court) but that its backbone is formed by the national courts of the Member States.

Keywords: constitutionalization of the EU; EU judicial system; broadening of the scope of Union law; primacy and direct effect of EU law; fundamental rights

Europejski Trybunał Sprawiedliwości z siedzibą w Luksemburgu od początku swojego istnienia, tj. od lat pięćdziesiątych ubiegłego wieku, odgrywał kluczową rolę w tworzeniu i rozwijaniu struktur integracji europejskiej. Wydaje się jednak, że wraz z późniejszymi wydarzeniami Trybunał

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[1] The first draft of the paper was presented as The Skubiszewski Lecture 2024 on 7 October 2024 at the Faculty of Law and Administration of the Adam Mickiewicz University (Poznań, Poland).

RPEiS 87(1), 2025: 5–19. © WPiA UAM, 2025. ISSN (Online) 2543-9170 ISSN (Print) 0035-9629

zyskał jeszcze większe znaczenie, zwłaszcza w zakresie konstytucjonalizacji procesu integracji europejskiej. Obecnie osiągnęło to taki stopień, że można zadać pytanie, czy wszystkie drogi prowadzą do Luksemburga, a nie do politycznych instytucji UE w Brukseli i dalej, czy też do stolic państw członkowskich UE. Niniejszy artykuł, oparty na dorocznym wykładzie na cześć profesora i ministra spraw zagranicznych Krzysztofa Skubiszewskiego, ma na celu przedstawienie przykładów obszarów, w których orzecznictwo Trybunału miało szczególne konsekwencje, oraz wyjaśnienie, dlaczego Trybunał zwiększył swoje wpływy. Artykuł kończy się jednak stwierdzeniem, że rola Trybunału nie powinna być przeceniana i że w każdym razie wzrost jego roli można wytłumaczyć wieloma zmianami konstytucyjnymi i legislacyjnymi, na które sam Trybunał nie ma wpływu. Co więcej, należy pamiętać, że system sądowniczy Unii nie ogranicza się do dwóch sądów unijnych (Trybunału Sprawiedliwości i Sądu), ale jego trzon tworzą sądy krajowe państw członkowskich.

Słowa kluczowe: konstytucjonalizacja UE; system sądowy UE; rozszerzenie zakresu prawa Unii; pierwszeństwo i bezpośredni skutek prawa UE; prawa podstawowe

I. INTRODUCTION

This paper is based on an annual lecture in honour of Professor and Foreign Minister Krzysztof Skubiszewski, delivered at his Alma Mater, the Adam Mickiewicz University, Poznań. Professor Skubiszewski was an internationally renowned scholar of public international law, who took a particular interest in the law of international organizations, their competence, and their powers, including mechanisms for the peaceful settlement of international disputes. In this paper, I shall focus on the European Union (EU), a uniquely supranational organization, and more particularly on its judicial system, which constitutes a more far-reaching system for the settlement of disputes than what is customary in intergovernmental contexts.

As the European Court of Justice has pointed out several times, for instance in Opinion 1/09 relating to a unified European patent litigation system,[1] the EU judicial system consists not only of the European Court of Justice, established in the early 1950s, and the General Court of the EU, established in the late 1980s, but also of the national courts of the EU Member States. Whilst the national judiciaries can in fact be seen as the backbone of the system (see, e.g. Rosas, 2012, p. 105, 2024, p. 35), my main focus here will be on the institution that the Treaty on European Union (TEU) refers to as the Court of Justice of the European Union (CJEU), consisting of both the Court of Justice and the General Court. I will look at the role of the CJEU, not with mixed feelings, but based on a mix of experiences, first as a university professor, then as a member of the Legal Service of the European Commission, then as a judge at the European Court of Justice for almost 18 years, and finally as the current President of the so-called Article 255 TFEU Panel, charged with assessing the suitability of candidates to serve as Judges and Advocate-Generals of the Court of Justice and the General Court.

[1] Opinion 1/09 (Draft agreement on the creation of a unified patent litigation system), EU:C:2011:123.

The title of this paper, of course, stems from the fact that the CJEU has been considered by many actors and commentators to play a crucial role in the shaping and development of European integration. In particular, it is deemed to be one of the creators, if not *the* creator, of the *constitutionalization* of the EU legal order.[2] Have the two Luxembourg courts even overtaken the role of the Member States, as the 'Masters of the Treaties', and the political institutions such as the Commission, the Council and the European Parliament, as the driving force of integration? Are all roads now leading to Luxembourg rather than to Brussels or the national capitals? The ensuing discussion will remain at a general level, referring to specific normative developments or individual cases as examples rather than analysing each in greater detail.

II. EU PROCEDURAL REMEDIES

As is well-known, the EU judicial system provides for a variety of procedural remedies, some of which are also open to actions by individuals (both natural and legal persons). Such direct actions – notably actions for annulment, actions for failure to act, and actions seeking compensation for damage[3] – are limited to acts and failures to act by Union institutions and bodies. If an individual is dissatisfied with the acts or omissions of national bodies, believing them to be in violation of Union law, there are basically two procedural avenues that can be explored.

First, an action may be brought before a national court, which may be invited to request a *preliminary ruling* from the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (TFEU), or, as the case may be, since the reform that entered into force on 1 October 2024, from the General Court.[4] Such preliminary rulings address questions concerning the interpretation of Union primary law or the validity or interpretation of secondary law, such as regulations and directives. It is up to the national judge to decide whether a preliminary ruling will be sought. However, in *Consorzio*, the ECJ ruled that if a court of last instance refuses to request a ruling, it must provide reasons.[5] A similar requirement may follow from the case law of the European Court of Human Rights, based on Article 6 of the European Convention on Human Rights (ECHR).[6] This Strasbourg case law is one of many examples of interaction between the European Court of Human Rights

[2] On the concept of the constitutionalization of the Union legal order see, e.g. Rosas and Armati (2018, pp. 1–4).

[3] See Articles 263, 265 and 268 and 340 of the Treaty on the Functioning of the European Union (TFEU).

[4] See Article 256(3) TFEU and Article 50b of Protocol No 3 on the Statute of the Court of Justice of the European Union annexed to the TEU, the TFEU and the Treaty establishing the European Atomic Energy Community.

[5] Case C-561/19, *Consorzio Italian Management*, EU:C:2021:799.

[6] See, e.g. ECtHR, judgment of 15 December 2022, Case of *Rutar and Rutar Marketing v Slovenia*, App. no. 21164/20; judgment of 14 March 2023, Case of *Georgiou v Greece*, App. no. 57378/18.

in Strasbourg and the Union Courts in Luxembourg, despite the fact that the EU has not yet been able to fulfil the commitment in Article 6(2) TEU, according to which the Union 'shall accede' to the ECHR.

Second, apart from preliminary rulings, an individual dissatisfied with proceedings at the national level, may submit a complaint to the European Commission, inviting it to start, under Article 258 TFEU, an *infringement procedure* against a Member State alleged to have failed to fulfil an obligation under EU law. Such infringement actions, as is demonstrated by two cases, *Commission v France* (2018) and *Commission v United Kingdom* (2024), may also be brought for an alleged failure of a national court of last instance to request a preliminary ruling from the European Court of Justice in situations where there was an obligation to refer.[7] That said, it remains within the European Commission's discretion to decide whether to institute infringement actions, and an action to review the legality of its decision would not be admissible before the Court of Justice.

If the judgment of the Court of Justice finds a violation of Union law, and that judgment is not respected by the Member State, it is again for the Commission to decide whether it will return to the Court and ask the latter to impose financial sanctions (a lump sum and/or a penalty payment) against that Member State. The Treaties do not set any maximum level for such sanctions. In a recent case, *Commission v Hungary*, the Court of Justice ordered the respondent State to pay a lump sum of EUR200 million and penalty payments totalling EUR1 million per day until the date of compliance with the initial judgment.[8] If the lump sum or penalty payment is not paid, it may be offset against EU funding allocated to the Member State concerned.

The availability and frequent use of the procedural remedies referred to above, along with the broad competence and powers held by the two Union Courts in Luxembourg, explain in part the generally held view that the Union Courts play an important role in the workings of the EU and in shaping what could be called its constitutional structure. Together with the European Parliament, the European Commission and the European Central Bank, the Union Courts can be seen as part of the more 'federal' – or, if you prefer, 'federative' – branches of the EU, as compared to the Council, the European Council and intergovernmental cooperation between the 27 Member States. But how important have the Union Courts become as players in the furtherance of the European integration process? In the following, I shall make some observations that will, hopefully, contribute to reflection around that question.

III. AN AMERICAN EXCURSION

Let me make a small detour to the United States and, in particular, the status and role of the US Supreme Court. Why have I chosen the US Supreme

[7] Case C-416/17, EU:C:2018:811; Case C-516/22, EU:C:2024:231.

[8] Case C-123/22, EU:C:2024:492.

Court for comparison? There are, of course, considerable differences between American federalism and the European integration process, the latter being of a much more recent origin and still displaying significant intergovernmental features (notably in the area of Common Foreign and Security Policy – CFSP). However, the constitutional significance and dynamism of the case law of these two courts also offer interesting points of comparison.

As early as 1835, Alexis de Tocqueville, a well-known observer of the US constitutional system, described the Supreme Court in his *Democracy in America* as follows:

> In the hands of seven federal judges rest unceasingly the peace, prosperity, the very existence of the Union. Without them, the Constitution is a dead letter. To them, the executive power appeals in order to resist the encroachments of the legislative body; the legislative, to defend itself against the undertakings of the executive power; the Union, to make the states obey; the states, to repulse the exaggerated pretensions of the Union; public interest against private interest; the spirit of conservation against democratic instability: Their power is immense, but it is a power of opinion. (p. 245)

If de Tocqueville were to study democracy in Europe today, could he argue that the role of the US Supreme Court, as he described it, is now shared – or has even been taken over – by the European Court of Justice? If one compares the US constitutional situation in the first half of the nineteenth century with the EU situation of today, one might be tempted to say that the Luxembourg Courts play a more important role. This is because, particularly before the American Civil War, the US constitutional system was quite fragile, and this included respect for the rulings of the Supreme Court. Despite de Tocqueville's lofty description of the role of the Supreme Court, the sub-federal states and their courts often declined to follow decisions and rulings from Washington (see, e.g. Pohjankoski, 2016, p. 326, 2024, pp. 111–120).

It was only gradually that the federal government and the federal courts managed to assert their predominance. Today, although debates persist over the relationship between the sub-federal states and the Union, as well as on the question of where ultimate sovereignty lies, the US constitutional system appears more stable – or at least less unstable – than that of the EU, which remains in flux and the subject of fierce debate. That said, recent developments in the US, in particular the presidential elections in 2016, 2020 and 2024, suggest that the situation with regard to democracy and the rule of law is far from ideal (Rosas, 2023, pp. 25–26).

IV. SPECIAL FEATURES OF THE EU CONSTITUTIONAL STRUCTURE

The initial EEC Treaty (the Treaty of Rome) of 1957 is a curious blend of general principles and objectives alongside more detailed provisions, with many questions left unanswered in the Treaty text. The subsequent treaty developments, including the Single European Act and the Treaties of Maas-

tricht (1992), Amsterdam (1997), Nice (2001) and Lisbon (2007) have certainly clarified some issues, but many questions have been left to the case law and some still await clarification. The result is that the European Court of Justice is faced with a constitutionally fuzzy collection of values, principles, objectives and rules of various sorts – some very general, others quite detailed in nature (see, e.g. Rosas & Armati, 2018). Especially concerning general values, principles, objectives and competences – in short, the constitutional structure – there is a plurality of opinions on how to interpret and apply these norms or how to develop them in the future. The Court, whether it likes it or not, is thus not only confronted with economic, administrative and technical questions but also has to perform some of the functions of a constitutional court.

What are the features inherent in the Luxembourg Court's tasks, jurisdiction and powers that explain why the Union judicial system – and the role of the Court of Justice in particular – has assumed such a crucial role in the Union edifice? As I have already mentioned, compared with international courts such as the International Court of Justice, the Law of the Sea Tribunal, or the World Trade Organization dispute settlement system, the Court of Justice of the European Union is charged with dealing with a plurality of procedural remedies, including the powers to impose considerable financial sanctions on Member States. It is also empowered to impose fines and penalty payments on private undertakings for violation of Union competition and digital markets law.[9] These procedural remedies are inherent in the system, and the right to instigate them does not depend on the consent of both parties. The importance of these procedural remedies, of course, also hinges on the scope, nature and content of the legal rules to be applied. It is to this substantive question that I shall now turn.

V. BROADENING OF THE INTEGRATION AGENDA

With respect to the scope, nature and content of EU law, we have seen a remarkable development. The integration process started quite modestly with the supranational management of coal and steel production but, after a string of Treaties and Treaty amendments, it now extends to practically all areas of law, including, albeit to a limited extent, a common defence policy.[10] If we compare the areas of Community competence before the Treaty of Maastricht of 1992 with the areas of the exclusive, shared, parallel, coordinating

[9] See Articles 23 and 24 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003], OJ L 1/1; Articles 74 and 76 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), [2022], OJ L 277/1; Articles 30 and 31 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), [2022], OJ L 265/1. See also Article 261 TFEU.

[10] See Articles 42–46 TEU on common defence policy.

and supplementary competence of the Union following from the Treaties of Maastricht, Amsterdam, Nice and Lisbon,[11] we will see that the last 30 years of so have brought about radical change. One factor contributing to this development has been the emergence, from 1969 onwards,[12] of EU fundamental rights and their development, culminating in the EU Charter of Fundamental Rights, which entered into force in 2009.

True, the Union has to respect the principle of conferral, under which, to quote Article 5(2) TEU, 'the Union shall act only within the limits of the competence conferred upon it by the Member States to attain the objectives set out therein.' But if we look at the two main Treaties of today, the TEU and the TFEU, supplemented by a number of Protocols, it becomes clear that a lot has already been so conferred. From a more limited beginning, consisting mainly of the four economic freedoms, competition and state aid law, and agriculture, the remit of Community law had already started to expand in the 1970s and 1980s, to encompass social affairs, environmental protection, transport, energy, taxation, and other areas.

From the outset, the common principles, objectives and rules providing for Union competence have, in most cases, been interpreted by the CJEU. It should certainly be recognized that the nature of Union competence varies and is, in some cases, of a secondary nature. Yet even the rules on supplementary competence or competence to coordinate Member States' policies may require interpretation by the Union Courts in Luxembourg. The area of economic policy, where Union competence is weaker than with respect to monetary policy, offers an example. In particular, the distinction between economic and monetary policy has been elucidated in important case law of the Union Courts.[13] In this context, reference should also be made to the Banking Union, which has already triggered a rich body of case law relating, inter alia, to the competence of the relevant Union institutions and bodies and the role of the national banking authorities in the overall structure (see, e.g. Rosas, 2024, pp. 54–56).

Apart from monetary and economic policy and the Banking Union, examples of areas of Luxembourg case law which would have been almost unthinkable before the Treaty of Maastricht include the sub-areas of the so-called *Area of Freedom, Security and Justice*, namely asylum and immigration law, judicial cooperation in civil matters and judicial cooperation in criminal matters. These subjects – particularly asylum and immigration, and criminal law – concern issues that were traditionally reserved for States and national sovereignty. Yet, the common rules are now quite detailed, and judgments rendered by the European Court of Justice are almost a daily occurrence.[14] Of the various areas of law adjudicated by the Court of Justice, the Area of Free-

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[11] On these different categories of Union competence, see Rosas and Armati (2018, pp. 22–25).

[12] Case 29/69, *Stauder*, EU:C:1969:57. On the case law and other fundamental rights developments after the judgment in *Stauder*, see, e.g. Rosas (2017a, p. 7).

[13] Case C-370/12, *Pringle*, EU:C:2012:756; Case C-62/14, *Gauweiler*, EU:C:2015:400; Case C-493/17, *Weiss*, EU:C:2018:1000.

[14] For more details about legislative and case law developments, see, e.g. Rosas and Armati (2018, pp. 177–204).

dom, Security and Justice has for some time accounted for the highest number (more than 10 per cent of all such areas).[15]

Without going into the relevant case law concerning the Area of Freedom, Security and Justice in any greater detail here, one general observation is that this case law, including in the less controversial sub-area of judicial co-operation in civil matters[16] tends to reinforce the idea – already reflected in the Treaties and secondary law – that there is a marked difference between external and internal borders. The Treaties even refer to the Area of Freedom, Security and Justice, as well as the internal market, as areas 'without internal frontiers'.[17] The case law of the Court of Justice has further underscored the distinction between the internal and the external. Another general observation is the particular relevance and importance of fundamental rights, as recognized in the EU Charter of Fundamental Rights, in the Area of Freedom, Security and Justice.[18]

The concept of *EU citizenship* is an example of a topic which was introduced by the Treaty of Maastricht but further clarified and developed through case law. Two aspects can be highlighted. In the so-called *Ruiz Zambrano*[19] line of case law, even persons who have never exercised their EU right to free movement may be protected against expulsion to third countries, if that would entail that they will be prevented from using their rights derived from Union citizenship. And in another line of case law, starting with Rottmann[20], the Court of Justice has held that while regulating nationality belongs to the realm of Member States' competence, if deprivation of nationality would lead to loss of Union citizenship as well (since the nationality of a Member States is a precondition for enjoying Union citizenship), Union law may intervene and curtail the competence to regulate nationality. These two lines of case law thus have reinforced what the *Court asserted already in Grzelczyk*, namely that Union citizenship constitutes 'the fundamental status of nationals of Member States' and not something that should be discarded easily.[21]

The *prohibition of discrimination* offers another example of an area that has seen many developments in both written law and case law. Article 21 of

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[15] Court of Justice of the European Union, *Annual Report 2023*: Statistics concerning the judicial activity of the Court of Justice (Luxembourg 2024), 7–8.

[16] This concerns, inter alia, the Brussels I and Brussels II regulations relating to jurisdiction and the recognition and enforcement of judgments, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments, [2012], OJ L 351/1 with later amendments; Council Regulation (EU) 2019/1111 of June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), [2019], OJ L 178/1.

[17] See Article 3(2)TEU and Article 26(2) TFEU. This does not imply a complete absence of internal border controls, see also Articles 67(2) and 77 TFEU.

[18] On developments in legislation and case law concerning the Area of Freedom, Security and Justice, see, e.g. Rosas and Armati (2018, pp. 177–204).

[19] Case C-34/09, EU:C:2011:124.

[20] Case C-135/08, EU:C:2010:104.

[21] Case C-184/99, EU:C:2001:458. See also Rosas and Armati (2018, pp. 141–156).

the EU Charter of Fundamental Rights prohibits all forms of discrimination, including with respect to non-EU citizens, but its applicability at the national level is in principle limited by the general requirement, contained in Article 51(1) of the Charter, which stipulates that it applies only when 'implementing' Union law.[22] However, in the field of non-discrimination, this limitation does not play a major role due to the existence of elaborate Union legislation, including two fairly general non-discrimination directives of 2000 as well as gender non-discrimination legislation.[23] In this way, many cases concerning discrimination based on, inter alia, age, disability, religion and sexual orientation have come before the European Court of Justice, generating case law that, again, would have been unthinkable, say, thirty years ago.[24]

Turning to the external side, *EU external relations* have developed considerably since the 1990s.[25] There is an abundance of case law on Union external competence (for instance, whether it is exclusive, shared, or parallel) and on the procedures to be followed when entering into international commitments (see, e.g. Rosas, 2017b, p. 365).[26] While Member States still retain some freedom of action and all purport to have their own foreign policy, this space for manoeuvre has been constrained by developments in written law and case law. The Luxembourg Court has also been called upon to control the exercise of the EU Council's and Parliament's decision-making powers, particularly in the field of EU sanctions, referred to in the TFEU as 'restrictive measures' (a topical example being the many sanctions packages adopted against Russia as a response to its war of aggression against Ukraine)[27].

While the Court has recognized some special characteristics of the Common Foreign and Security Policy (CFSP),[28] it has at the same time curtailed the scope for upholding differences between CFSP affairs and other areas of EU law. This includes the question of the jurisdiction of the CJEU itself in the area of the CFSP. While the Treaties provide only for limited jurisdic-

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[22] On Article 51(1) of the Charter, see, e.g. Rosas (2013, p. 97). For an example of a recent case, see, e.g. Joined Cases C-554/21, C-622/21 and C-727/21, *Financijska agencija and Others* EU:C:2024:594, paras. 31–33.

[23] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000], OJ L199/86; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2001], OJ L2/42. See also Belavusau and Henrard (2019).

[24] This case law is so extensive and detailed that the reader is referred to the existing literature, such as Rosas and Armati (2018, pp. 171–174); Belavusau and Henrard (2019).

[25] There is an abundance of literature on the development of EU external relations law. Just to name one example, see Kuijper et al. (2013). For a focus on the case law, see Butler and Wessel (2022).

[26] For an example of a recent judgment, see Case C-551/21, *Commission v Council* EU:C:2024:281, declaring illegal the previous practice of the Council to designate the person empowered to sign an agreement on behalf of the EU, holding that the power to sign international agreements belongs to the Commission.

[27] On EU sanctions against third countries in general, see Paasivirta and Rosas (2002, p. 207). On the Russia sanctions and the possibility of using frozen Russian assets as part of the sanctions to compensate for the damage caused to Ukraine, see, e.g. Rosas (2023, p. 337).

[28] On the CFSP see Blockmans and Koutrakos (2018).

tion in this field, the Court has restricted such exclusions of judicial review, stressing the importance of the rule of law and, in this context, the principle of effective judicial protection.[29] The most recent judgment was given on 10 September 2024,[30] in which the Court upheld its jurisdiction with regard to individual measures which 'cannot be related directly to the political or strategic choices made within the framework of the CFSP'. Incidentally, this broadening of the Court's jurisdiction might pave the way for EU accession to the European Convention on Human Rights – a long-standing saga with many ups and downs.[31]

As is well known, this emphasis on the *rule of law* and the principle of *effective judicial protection* is not limited to the area of EU external relations but has become a central piece of recent CJEU case law more generally. The judgment that opened the door for a wider use of the concept of the rule of law, as expressed in Article 2 TEU, and the principle of effective judicial protection, expressed in Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights, was the so-called Portuguese judges' salary case.[32] The constitutional effect of that judgment has been to apply the principle of effective judicial protection, including the principle of independence and impartiality of judges, to a whole range of national courts and tribunals. It has also addressed a number of related issues, such as the systems for appointing judges, their salaries and pensions age, disciplinary procedures against judges, and the obligation of courts to disapply rulings from other national courts deemed to be in contravention of Union law (Rosas, 2023, p. 919).[33] The case law is based on a distinction, referred to above, between the conditions for applying the Charter at the national level (which is limited to situations of 'implementing' Union law) and a lower threshold for applying the principle of effective judicial protection, as recognized in Article 19(1), second subparagraph, TEU.

While it is not possible here to explore all the intricacies of the recent and rich case law concerning the judiciary of Hungary, Poland, and Romania in particular (see, e.g. Pech and Kochenov, 2021), it should be emphasized, on the one hand, that the basic competence to create and develop a national judicial system rests with the Member States, but on the other, that the exercise of that competence has become curtailed in many ways by the case law of the European Court of Justice.

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[29] See, e.g. Case C-72/15, *Rosneft*, EU:C:2017:236; Case C-134/19, P *Bank Refah Kargaran v Council*, EU:C:2020:793; Case C-872/19, P *Venezuela v Council*, EU:C:2021:507.

[30] Joined Cases C-29/22 P and C-44/22 P, *KS and KD v Council and Others*, EU:C:2024:725.

[31] In Opinion 2/13 (Draft agreement on the accession of the European Union to the European Convention on Human Rights), EU:C:2014:2454, the Court ruled a draft accession agreement to be incompatible with Union law.

[32] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C :2018:117.

[33] To name but two examples, see Case C-585/18 et al., *AK and Others*, EU:C:2019:982; Case C-791/19, *Commission v Poland*, EU:C:2021:596.

VI. DIRECT EFFECT, PRIMACY AND FUNDAMENTAL RIGHTS

There are three fundamental transversal principles which run through both the case law relating to the principle of effective judicial protection and the Court's case law more generally, namely the principles of direct effect, primacy, and fundamental rights. All three originated in the 1960s, with the seminal judgments in *van Gend & Loos*, *Costa v ENEL* and *Stauder*.[34] Recent case law[35] demonstrates that this trinity of principles lies at the heart of the Union's constitutional structure and that the role and function of each of the three principles, and the interaction between them, continues to be a matter of dynamic case law. With respect to direct effect, there seems to be a broadening of the scope of legal norms which are recognized as having direct effect. Primacy continues to be asserted without exception by the CJEU but it has been clarified that its full effect depends on direct effect. As for fundamental rights, key issues remain the applicability of the EU Charter at national level, the interaction between the Charter and national constitutional fundamental rights, and the vertical direct effect of certain Charter provisions (Rosas, 2025).

The principle of primacy of Union law, vigorously defended by the Union Courts,[36] has, of course, met with resistance from some national courts. The basic rationale of the principle of primacy is linked to the principles of uniform application of Union law and the principle of equality of Member States. If you wish to have common rules, you cannot have 27 different sets of them. If national law were to prevail over Union law, there could be, at worst, 27 different sets of rules to apply.

Yet, some constitutional courts (German, Czech, Polish, Romanian) and supreme courts (Denmark) have expressed reservations or even voiced opposition to the principle of primacy of Union law. One well-known case is the German Constitutional Court's ruling in *Weiss*, in which it held that a decision of the European Central Bank and a judgment of the European Court of Justice in 2018[37] were *ultra vires* and could not be implemented in Germany. After the Central Bank provided more information, the German Constitutional Court did not press the point, and after the German Government declared its unconditional commitment to the principle of primacy, the European Commission decided to withdraw an infringement action it had initiated against Germany. Unlike some of the rulings of the Polish Constitutional Court, the final outcome of the German Constitutional Court's Weiss decision was virtu-

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[34] Case 26/62, EU:C:1963:1; Case 6/64, EU:C:164:66; Case 29/69, EU:C:1969:57.

[35] See, e.g. Joined Cases C-357/19 et al., *Euro Box Promotion*, EU:C:2021:1034 and C-107/23 PPU, *Lin*, EU:C:2023:606.

[36] The foundations were, of course, laid with the judgments in Case 6/64, *Costa v ENEL*, EU:C:1964:66; Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970;114; Case 106/77, *Simmenthal*, EU:C:1978:49. For references to more recent relevant case law, see, e.g. Rosas and Armati (2018, pp. 64–68); Lelup and Spieker (2024, p. 913).

[37] Case C-493/17, *Weiss*, EU:C:2018:1000.

ally negligible (see Rosas, 2024, pp. 21–22). If one takes into account that such incidents are not very frequent, and have mostly concerned very special situations, the principle of primacy, as upheld by the Union Courts, is still alive and kicking. It is, in fact, an essential prerequisite for the Union's survival.

It should be added that while the Union institutions must, as required by Article 4(2) TEU, respect the national identity of the Member States, this obligation – like any other obligation following from the Treaties – does not constitute any carve-out from the principle of primacy. Respect for national identity constitutes one among numerous substantive obligations which, in the last resort, it is incumbent upon the Union Courts to uphold. Moreover, respect for national identity must take place within the framework of the EU's constitutional structure, including what the Court has branded the constitutional identity of the Union itself.[38]

The future of the principle of primacy, as well as of the other fundamental principles of Union law – such as direct effect and fundamental rights – and the various substantive obligations arising from Union law, does not hinge exclusively on the two Union Courts in Luxembourg. At least as important is the role played by national courts in the application and interpretation of Union law. As noted above, the European Court of Justice has observed (e.g. in Opinion 1/09 relating to a uniform patent litigation system[39]), that the Union judicial system consists of both the Luxembourg Courts and the national courts of the 27 Member States. In this respect, despite the instances referred to above, where the interaction between the Luxembourg Courts and national courts has not functioned as it should, the overall picture has, in my view, improved over the years. In any case, compliance with the rulings of the Luxembourg Courts today is better than during the first 70 to 80 years of the US federal judicial system, as analysed above.

VII. EPILOGUE: JUDGING THE JUDGES?

The tasks and powers incumbent upon the Union Courts carry with them important responsibilities. Apart from the Treaty and secondary law provisions regulating their status and tasks, the legitimacy of the Luxembourg Courts depends on the quality of their work. Not only the outcome but also the reasoning of their decisions is of utmost importance. My personal view, I must confess, is that the way judgments and other decisions are reasoned is, by and large, satisfactory. Opting for a system, known inter alia from the UK, of very voluminous and detailed judgments, including different individual opinions in almost essay-like style, would not necessarily be helpful for the reader. That said, one can certainly find Luxembourg decisions which contain passages

[38] Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, e.g. paras. 127, 232–235. See also Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98.

[39] See Opinion 1/09 (Draft agreement on the creation of a unified patent litigation system), EU:C:2011:123.

where the reasoning could have been strengthened. As with any courts, there is always room for improvement.

Let me also say a word about the EU system for appointing judges and advocates general to the Court of Justice and the General Court. The appointment process may, of course, be crucial for securing judicial qualifications, independence and impartiality. Before the Treaty of Lisbon, each Member State Government proposed a candidate, who was then appointed almost automatically 'by common accord of the governments'. The Lisbon Treaty, however, introduced the requirement that an appointment should only take place 'after consultation of the panel provided for in Article 255'.[40] This so-called 255 panel has the task of 'giving an opinion on candidates' suitability' to perform the duties of judge or advocate general at the Union Courts. The panel, which I have the honour of chairing, has taken this task seriously and had established a procedure consisting of written materials, a hearing of the candidate and internal deliberations. Roughly 20 to 25 per cent of the panel's opinions have been negative. They have, so far, always been followed by the Member States – in other words, candidates who have received an unfavourable opinion have not been appointed by common accord, and the government concerned has then proposed another candidate, who has had to go through the same procedures leading to an opinion of the panel.

Quite recently, there has been a vivid debate on the role of the panel, conducted mainly in the digital forum EU Law Live. Some scholars have argued that the review undertaken by the 255 panel has been too intense and that the panel should normally endorse a candidate proposed by his or her government. While time does not allow for a detailed discussion of this issue, it is my conviction – and I think it is shared by my colleagues on the panel, the majority of whom are national judges or former judges – that the panel should continue to assess the suitability of candidates for the two Luxembourg Courts. In any case, the requirements of the rule of law speak in favour of maintaining systems, whether at Union or national level, which ensure that the appointment of judges is based on professional criteria with a view, inter alia, to ensuring fulfilment of the principles of judicial independence and impartiality.[41]

Last but not least, what is my answer to the title of this paper: Do all roads lead to Luxembourg? My observations have hopefully shown that the Luxembourg Courts perform an increasingly important function not only in the EU judicial system but also in European integration in general. That said, one should not overstate this role. The most important parameters continue to be set by the basic Treaties, which, in most cases, can be established and amended only by the unanimous approval of all Member States. Secondary

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[40] Article 255 TFEU is supplemented by Council Decision 2010/124/EU of 25 February 2010 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, [2010] OJ L 50/18. See also the Seventh Activity Report of the panel provided for by Article 255 of the [TFEU], adopted on 25 February 2022 (Luxembourg, Publication Office of the European Union, 2022).

[41] The relevance of national procedures for selecting candidates to become members of the Union Courts is discussed in Case C-119/23, *Valančius*, EU:C:2024:653.

law, often enacted by the EU Council and the European Parliament together, continues to play a crucial role in shaping and regulating the integration process. So my own conclusion would be: while many roads lead to Luxembourg, other equally or more important roads lead to the seats of the political institutions and the capitals of the 27 Member States. Moreover, the national judicial systems play a crucial role within the overall EU judicial system, and current and future developments in case law will depend on how well the Union legal and judicial systems and the corresponding national systems interact.

Author contributions / Indywidualny wkład autora (CRediT): **Allan Rosas** – 100% (Conceptualization / Konceptualizacja; Investigation / Przeprowadzenie badań; Writing – original draft / Pisanie – pierwszy szkic; Writing – review & editing / Pisanie – recenzja i edycja).

Conflict of interest / Konflikt interesów: The author declares no conflict of interest. / Autor nie zgłosił konfliktu interesów.

Funding / Finansowanie: The author declares no institutional funding. / Autor oświadczył, że nie korzystał z finansowania instytucjonalnego.

The use of AI tools / Wykorzystanie narzędzi AI: The author declares no use of AI tools. / Autor oświadczył, że nie korzystał z narzędzi AI.

Data availability / Dostępność danych: Not applicable. / Nie dotyczy.

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