The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy

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EU external relations law – Court of Justice of the European Union – Common Foreign and Security Policy – Judicial actors – International courts – Jurisdiction – EU law – Primacy – Damages – Infringements – Direct actions – Preliminary references – the Opinion procedure – Staffing – Future scenarios

CFSP–alone in a crowd

The Common Foreign and Security Policy (CFSP) remains a special area of Union law, and is a sub-order of the EU legal order,[1] in which 'specific rules and procedures' apply.[2] Its *lex imperfecta* status,[3] afforded to it by none other than the High Contracting Parties to the Treaties themselves, has long been seen as an outcast in what is increasingly a more structured primary law. The controlling and decision-making functions of CFSP lie squarely with the Member States through

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[1] C. Hillion and R.A. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) p. 112.

[2] Art. 24(1) TEU, second para.: 'The common foreign and security policy is subject to specific rules and procedures…'

[3] Opinion of AG Wahl in ECJ 19 July 2016, ECLI:EU:C:2016:212, *H* v *Council of the European Union*, paras. 38 and 45. *See also* R.A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy', 1 *European Papers* (2016) p. 439.

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the institution of the Council. In contrast, the Commission, the Parliament, and the Court all have different roles than what is otherwise afforded to them in non-CFSP fields.[4] Even the merited Citizens' Initiative does not apply to CFSP.[5] Given that the Citizens' Initiative is concerned with legislative matters, CFSP as a non-legislative field falls outside its scope, notwithstanding the *Efler* judgment.[6]

The Union's external objectives, set down in Article 21 TEU, are applicable across both CFSP and non-CFSP legal actions across the Treaties, regardless of their legal basis. Article 23 TEU within the CFSP chapter of the Treaties reinforces the overall Union objectives,[7] and thus, is read as one single Union legal order. There are a number of features of CFSP that set it apart from other areas of external relations law, and other sectoral areas of Union law more generally, but principally, its decision-making broadly requires unanimity within the Council. This choice to keep CFSP separate and distinct in the TEU, away from other areas of Union policies, has resulted in scenarios where a lack of consistency between CFSP and non-CFSP issues has arisen. Substantively and procedurally, this in turn has raised lingering questions of how sustainable, from a legal perspective, it is for CFSP to remain truly separate within the single Union legal order. With a deliberate choice to make Union decision-making in most areas of policy more institutionally pluralistic with the Treaty of Lisbon, CFSP managed to escape additional normalisation through the political process of treaty-amendment. It is assumed that this was done consciously to preserve, as far as practicable, the nature of CFSP in line with the spirit of the Treaty of Maastricht.

The EU prides itself on respecting and upholding the rule of law – an intrinsic value so predominant in the *raison d'être* of its fabric that it applies to all areas of Union law and policy. With such rule of law considerations so dominant in its constitutional and political structure, it is supported by other applicable traits that are also included within its deeply-layered foundations, including fundamental rights. Unlike nearly all other areas of Union policies, the Court has not been granted full jurisdiction in the CFSP. Article 24(1) TEU, in addition to Article 40

[4] Art. 24(1) TEU, second para.: '…The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.'

[5] M. Dougan, 'What Are We to Make of the Citizens' Initiative?', 48 *Common Market Law Review* (2011) p. 1807 at p. 1837.

[6] GC 10 May 2017, ECLI:EU:T:2017:323, *Michael Efler* v *European Commission*.

[7] Art. 23 TEU: 'The Union's action on the international scene, pursuant to this Chapter, shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1.'

TEU, and Article 275 TFEU,[8] exclude CFSP from the Court's jurisdiction, the only limited exceptions being the jurisdiction to decide on the delimitation of CFSP from non-CFSP, and on restrictive measures against legal entities.

The judicial protection function of the Court is an intriguing area of Union law, especially when questions concerning the Court's jurisdiction over particular measures arise that hinge upon the very limits of what the Treaties had specifically envisaged. The gaps in the Court's jurisdiction with regard to CFSP have long been highlighted, both in this *Review*,[9] and elsewhere.[10] Whilst the Treaty of Lisbon did much to correct this, significant gaps remain. Despite the Court's curtailed jurisdiction in CFSP matters, the Court has nonetheless been pivotal for external relations more generally on the non-CFSP spectrum, where the case law has 'developed incrementally, changing its emphasis in order to respond to the evolving constitutional order of the European Union and the changes in the European and international political landscape'.[11] The Court's function, *inter alia*, according to the Treaties, is to act in a manner that 'shall ensure that in the interpretation and application of the Treaties the law is observed'.[12]

Changes brought about by the Treaty of Lisbon were hugely significant for the field of CFSP, not only for the field as a constitutional specificity, but also for the restrictive measures regime. Although there has been some elaboration in the Treaties on the Court's jurisdiction, the latter remains largely excluded in CFSP matters. With the deletion of CFSP objectives, it can be initially construed, at least *prima facie*, that the area of CFSP is becoming more normalised. Yet how has this manifested itself since the Treaty of Lisbon came into effect? With the entry into force of the EU's Charter of Fundamental Rights (the Charter), it was thus anticipated that fundamental rights would play a greater role in how Union law and policy is drawn up, implemented, and overseen.

[8] Art. 275 TFEU: 'The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'.

[9] *See* R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', 5 *EuConst* (2009) p. 117 at p. 133.

[10] For example, *see* M.-G. Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy', 55 *International and Comparative Law Quarterly* (2006) p. 77; R. Gosalbo-Bono, 'Some Reflections on the CFSP Legal Order', 43 *Common Market Law Review* (2006) p. 337.

[11] P. Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture', 33 *European Law Review* (2008) p. 666 at p. 683.

[12] Art. 19 TEU.

Analysis post-Lisbon has shown that the attempted exclusion of the Court has not meant that it has no power.[13] In fact, since Lisbon, there have been a number of cases before the Court that can be considered constitutional CFSP cases. The issues involved in such constitutional cases – from the legal basis of international agreements, to the manner in which an issue arrives before the Court – may seem trivial. However, when such labels are peeled away, the jurisdiction issue pertaining to the Court is much more complex and prominent than it might first appear. This article demonstrates that the gradual approach by the Court, changing its jurisdiction in CFSP, has had dramatic effects on the manner in which judicial review and judicial protection is managed in the Union. It furthermore discusses whether jurisdiction of the Court is *prima facie* assumed to be a general principle of Union law in the post-Lisbon world of Union law. Moreover, it further ponders whether the Court may eventually completely undo the intergovernmental vision of CFSP that the Member States have consistently held, given the unbundling of the specific jurisdictional derogation that is occurring. This article argues that the Court, on a case-by-case basis, will eventually erode the jurisdictional derogation imposed on it with regard to CFSP. This insight emanates from the judicial decisions of the Court with a particular emphasis on post-Lisbon case law, and the overall treaty framework.

The jurisdictional CFSP cases

Five cases can be identified as being of significance for the Court's jurisdiction in the field of CFSP post-Lisbon, each dealing with a number of issues pertaining to the intricacies of the jurisdiction conferred upon the Court. The five cases – *Mauritius*,[14] *Eulex Kosovo*,[15] *Opinion 2/13*,[16] *H* v *Council*,[17] and *Rosneft*[18] – have all had jurisdiction of the Court as part of their deliberations.

Direct actions

It is from *Mauritius* that an understanding of the Court's view on its own jurisdiction can begin to emerge post-Lisbon. The Court said that Article 19 TEU

[13] *See* C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy', in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014).

[14] ECJ 24 June 2014, ECLI:EU:C:2014:2025, *European Parliament* v *Council of the European Union* ('*Mauritius*').

[15] ECJ 12 November 2015, ECLI:EU:C:2015:753, *Elitaliana SpA* v *Eulex Kosovo*.

[16] ECJ 18 December 2014, ECLI:EU:C:2014:2454, *Opinion 2/13*, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[17] ECJ 19 July 2016, ECLI:EU:C:2016:569, *H* v *Council of the European Union*.

[18] ECJ 28 March 2017, ECLI:EU:C:2017:236, *PJSC Rosneft Oil Co* v *Her Majesty's Treasury*.

provides the Court general jurisdiction as a general basis. Such a categorisation, however, in order to have practicable effects, has to be given support merely beyond the political institutions. It is the Court that is charged with adjudicating on such given constitutional provisions, and ensuring that they are adhered to. Thus, any derogations imposed on this Article 19 TEU jurisdiction provision, such as Article 24 TEU and Article 275 TFEU are to be 'interpreted narrowly' according to the Court.[19] This 'jumping of the hurdle'[20] allowed the Court to deal with the non-CFSP issues and their applicability to CFSP, such as the relevance of Article 218 TFEU, relating to CFSP action. This initial proclamation by the Court would have 'far-reaching implications',[21] which ultimately paved the way for further clarification by the Court. However, *Mauritius* did not deal with jurisdiction on the substance of CFSP prescribed in Title V (General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy) Chapter 2 (Specific Provisions on the Common Foreign and Security Policy) of the TEU. A case with near identical pleadings to the *Mauritius* case, *Tanzania*,[22] was an inter-institutional dispute between the Parliament and the Council on yet another pirate-transfer agreement,[23] however jurisdiction did not feature in the same manner as it did in *Mauritius*. The fact that jurisdiction did not become a prominent issue in the proceedings in *Tanzania* is noteworthy in itself, as it proves that the Council had accepted that the Court's jurisdiction did extend to Article 218(10) TFEU,[24] and that it applied to both CFSP and non-CFSP international agreements. Read in conjunction with other cases, therefore, *Tanzania* contributed to the line of CFSP case law on the Court's jurisdiction.[25]

[19] *Mauritius*, *supra* n. 14, para. 70.

[20] G. De Baere and T. Van den Sanden, 'Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: The Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action', 12 *EuConst* (2016) p. 85 at p. 110.

[21] P. Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)', 52 *Common Market Law Review* (2015) p. 1379 at p. 1389.

[22] ECJ 14 June 2016, ECLI:EU:C:2016:435, *European Parliament* v *Council of the European Union* ('*Tanzania*').

[23] *See* D. Thym, 'Transfer Agreements for Pirates Concluded by the EU – a Case Study on the Human Rights Accountability of the Common Security and Defence Policy', in P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014); A. Ott, 'The Legal Bases for International Agreements Post-Lisbon: Of Pirates and The Philippines', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 739; A.P. Van Der Mei, 'EU External Relations and Internal Inter-Institutional Conflicts: The Battlefield of Article 218 TFEU', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 1051.

[24] Art. 218(10) TFEU: 'The European Parliament shall be immediately and fully informed at all stages of the procedure.'

[25] S.R. Sánchez-Tabernero, 'The Choice of Legal Basis and the Principle of Consistency in the Procedure for Conclusion of International Agreements in CFSP Contexts: Parliament v. Council

Another direct action on CFSP jurisdiction was *Eulex Kosovo*,[26] where EU external relations law and EU public procurement law wound up in a legal dispute. The General Court at first rejected the applicant's claim without addressing the question of whether the General Court even had jurisdiction in its Order.[27] On appeal, the Court said '[h]aving regard to the specific circumstances of the present case, the scope of the limitation, by way of derogation, on the Court's jurisdiction, which is provided for in the final sentence of the second subparagraph of Article 24 (1) TEU and in Article 275 TFEU, cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement'.[28] However, this point may have been moot here, given that the Council and the Commission did not object to the Court having jurisdiction.

Subsequent to this was *H* v *Council*,[29] which, like *Eulex Kosovo*, was an appeal of an Order of the General Court.[30] The case proved to be a profound example of the Court asserting jurisdiction in a staffing case with significant political ramifications. The Court's assertion of jurisdiction in this instance was more sensitive to the apprehensions of those concerned about a judicial vacuum in CFSP than it was in *Mauritius* and *Tanzania*. Whilst the Court in *H* v *Council* equated the European Defence Agency with a Common Security and Defence Policy mission – both have a CFSP legal basis – it can subsequently be questioned how far this jurisdiction justification would stretch for other similar entities if challenges arose in the future. This would be the case particularly for future EU missions with significant development cooperation aspects or non-CFSP actions at their heart.

With EU missions likely to be founded upon a CFSP legal basis, but their implementing actions having non-CFSP tasks, questions will arise over whether dual legal bases, or an exclusive non-CFSP legal basis, would be preferable from a legal perspective for future external action. The Court is unwilling to fully address the question of dual legal basis, despite it having been rarely used,[31] and so the questions remain to be fully probed. Despite this, *H* v *Council* was another step towards greater room for manoeuvre regarding jurisdiction for the Court by noting that CFSP is closely integrated within

(Pirate-Transfer Agreement with Tanzania)', 54 *Common Market Law Review* (2017) p. 899 at p. 919.

[26] *Elitaliana SpA* v *Eulex Kosovo*, *supra* n. 15.

[27] GC 4 June 2013, ECLI:EU:T:2013:292, *Elitaliana SpA* v *Eulex Kosovo*, para. 45.

[28] *Elitaliana SpA* v *Eulex Kosovo*, *supra* n. 15, para. 49.

[29] *H* v *Council of the European Union*, *supra* n. 17.

[30] GC 10 July 2014, ECLI:EU:T:2014:702, *H* v *Council of the European Union*.

[31] R.A. Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999) p. 302.

Union law,[32] thus being subject to the provisional tendencies and norms of the constitutional legal order.

Article 218(11) TFEU Opinion

Elsewhere, the (attempted) accession of the Union to the European Convention on Human Rights (ECHR) has also stirred up questions about the Court's jurisdiction in CFSP matters. Given that CFSP was still new to the Union legal order at the time of the first attempt to accede to the ECHR, CFSP featured little in the discussion.[33] When an Opinion was requested, the Court in *Opinion 2/94* dealt accession a swift blow by finding the EU had no competence to do so,[34] and therefore there was no need to address the CFSP issue. It was not until many years later that accession was attempted again, this time with the support of Article 6(2) TEU, and discussions leading to a Draft Accession Agreement.[35]

Again, an Opinion of the Court was requested under Article 218(11) TFEU. *Opinion 2/13* of the Court claimed it had 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters'.[36] Yet for the purposes of EU accession to the ECHR, it said 'it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.[37] One of the charges the Court opened itself up to on CFSP was that it interpreted its own jurisdiction over CFSP rather rigidly. Remarkably, its narrow and unspecific proclamation over its jurisdiction in *Opinion 2/13* can be seen against the backdrop that it nonetheless examined the Draft Accession Agreement anyway.[38]

[32] P. Van Elsuwege, 'Upholding the Rule of Law in the Common Foreign and Security Policy: H v. Council', 54 *Common Market Law Review* (2017) p. 841 at p. 850.

[33] Barring an honourable exception, S. O'Leary, 'Accession by the European Community to the European Convention on Human Rights—The Opinion of the ECJ', *European Human Rights Law Review* (1996) p. 362 at p. 366.

[34] ECJ 28 March 1996, ECLI:EU:C:1996:140, *Opinion 2/94*, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[35] Council of Europe and European Commission, 'Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights' (Council of Europe 2013) 47 + 1 (2013)008rev2.

[36] *Opinion 2/13*, *supra* n. 16, para. 251.

[37] *Opinion 2/13*, *supra* n. 16, para. 252.

[38] C. Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction', 22 *European Law Journal* (2016) p. 492 at p. 493; G. Butler, 'Attacking or Defending? Jurisdiction of the Court of Justice in the EU's Common Foreign and Security Policy', 19 *Europarättslig Tidskrift* (2016) p. 671 at p. 680.

Preliminary reference

Lastly, post-Lisbon, the Court in the *Rosneft* case was asked to answer the question of whether it had jurisdiction to hear a CFSP case sent to it through the preliminary reference procedure.[39] Restrictive measures usually arrive before the Court when judgments of the General Court are appealed. However, in *Rosneft*, the Court was dealing with a restrictive measures case that had arrived at the Court through the Article 267 TFEU preliminary reference procedure. This would not be unusual were it not for the provisions of the Treaties with regard to CFSP, and moreover, the jurisdiction of the Court envisaged in that policy. The Union's restrictive measures regime is two-fold. Firstly, a CFSP Decision is adopted on the basis of Article 29 TEU, and coupled with that is a non-CFSP Regulation adopted on Article 215 TFEU. In *Rosneft*, referred to the Court by the High Court of England and Wales, both the Decision and accompanying Regulation were challenged.

Actors who are subject to restrictive measures through the UN sanctions lists have often found themselves locked in a legal battle where the EU legal order competes with principles of public international law, and the rights and values for all contained in the EU's primary law.[40] The use of restrictive measures in the Union has increased over time, giving greater legal effect in the Union's legal order.[41] These have come within the remit of the Court as an institution, with direct actions to the General Court. It did not take long before the matter of individuals or legal entities taking their plight – being subject to a restrictive measures imposed on them at Union level – developed into an entire sub-area of Union law; one that required delicate attention in order to become fully acquainted with its nuances.[42] A 2006 judgment delivered by the General Court in the *Organisation des Modjahedines du peuple d'Iran* (*OMPI*) case[43] was the first successful annulment of a Council Decision within the CFSP sphere.[44] This was

[39] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury*, *supra* n. 18.

[40] For example, the *Kadi I* and *Kadi II* sagas. *See*, amongst others, J. Kokott and C. Sobotta, 'The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?', in Cremona and Thies, *supra* n. 13; G. De Búrca, 'The European Court of Justice and the International Legal Order After Kadi', 51 *Harvard International Law Journal* (2010) p. 1; M. Avbelj et al. (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

[41] *See* P.J. Cardwell, 'The Legalisation of European Union Foreign Policy and the Use of Sanctions', 17 *Cambridge Yearbook of European Legal Studies* (2015) p. 287.

[42] For example, C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press 2009).

[43] GC 12 December 2006, ECLI:EU:T:2006:384, *Organisation des Modjahedines du peuple d'Iran* v *Council of the European Union*.

[44] Notably, however, the General Court noted it did not have the jurisdiction to review the CFSP Common Position. C. Eckes, 'Case T-228/02, Organisation Des Modjahedines Du Peuple d'Iran v.

no blip, however, as *OMPI* set a precedent that was soon reaffirmed by the Court in subsequent judgments.[45]

There was much hope for what the Treaty of Lisbon – which extended the Court's jurisdiction to determine the legality of actions taken against legal entities – would do for judicial review of restrictive measures.[46] However, there was also concern about the extent that such conferred jurisdiction would do for the outstanding issues regarding the EU's restrictive measures regime. CFSP measures do not only concern individuals. Whilst CFSP can be used to impose restrictive measures, and thus could have ramifications for particular legal entities, this is not always the case. In fact, CFSP's grand purpose has instead been to gently coordinate Member State positions on the implementation of a *common* foreign policy, where possible. If the Court lacked the ability to provide a preliminary ruling with respect to CFSP, this could lead to 'unsatisfactory results such as the fragmentation of EU law'.[47]

In *Rosneft*, the Court's jurisdiction on the Council Decision was speculative and up for discussion, given it was adopted on a CFSP legal basis. Matters of CFSP, and the issue of whether they can be put forward through a preliminary reference, have arisen before. Pre-Lisbon, in *Segi*,[48] the Court dealt with the question of whether questions concerning a CFSP Common Position could make their way to the Court through a preliminary reference. On Common Positions, the Court said that the then Article 35(1) TEU (a subsequently abolished provision) 'does not enable national courts to refer a question to the Court for a preliminary ruling on a common position'. However, the Court did state that '[g]iven that the procedure enabling the Court to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council,

Council and UK (OMPI)', 44 *Common Market Law Review* (2007) p. 1117 at p. 1118. However, CFSP Common Positions no longer exist since the entering into force of the Treaty of Lisbon in December 2009, and thus, are now simply CFSP Decisions.

[45] GC 2 June 2009, ECLI:EU:T:2007:207, *Jose Maria Sison* v *Council of the European Union*, and GC 11 July 2007, ECLI:EU:T:2007:211, *Stichting Al-Aqsa* v *Council of the European Union*.

[46] *See* T. Gazzini and E. Herlin-Karnell, 'Restrictive Measures Adopted by the EU from the Standpoint of International and EU Law', 36 *European Law Review* (2011) p. 798.

[47] A. Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press 2009) p. 151.

[48] ECJ 27 February 2007, ECLI:EU:C:2007:116, *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*. *See* S Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments', 44 *Common Market Law Review* (2007) p. 883; C. Eckes, 'How Not Being Sanctioned by a Community Instrument Infringes a Person's Fundamental Rights: The Case of Segi', 17 *King's Law Journal* (2006) p. 144.

whatever their nature or form, which are intended to have legal effects in relation to third parties', by referring to *ERTA* and *France* v *Commission* for support of this viewpoint.[49] Therefore, the full issues relating to CFSP post-Lisbon, and the question of the Court's jurisdiction, were to be revisited in time.

The mutual non-encroachment of CFSP and non-CFSP through Article 40 TEU was a new provision – inserted by Lisbon – and can be seen as a form of a fightback against the Court ensuring maintenance of CFSP over non-CFSP. It was to be applicable *vice versa* and, as a result of pre-Lisbon judgments such as *Environmental Criminal Penalties*, was applicable to the former Third Pillar.[50] An important element of the *Rosneft* judgment was that the Court began to expand on the interpretation of Article 40 TEU – something it had shied from up to that point, despite the fact that in *Rosneft* there was no question of a violation of Article 40 TEU. The Court in *Opinion 2/13* protested that it had 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters'[51] – a statement which, although not fully qualified, had some level of truth to it. In fact, in *Mauritius* and *Tanzania*, the Court had indeed addressed certain jurisdictional questions when it asserted, at Parliament's first pleading, its jurisdiction to utilise its border-policing measures flowing from Article 40 TEU. It furthermore asserted jurisdiction when it stated that Article 218(10) TFEU applied to the Court's ability to ensure international agreement provisions are followed, regardless of which legal basis they had. However, it merely left it at that, and did not expand any further on Article 40 TEU. With *Rosneft*, however, the Court churned away a little bit further on the use of Article 40 TEU, and how it should be interpreted and applied in respect of its jurisdiction.

Alongside *Rosneft*, simultaneous proceedings were lodged at the General Court,[52] in addition to the Court through a preliminary reference from a national court.[53] When, as here, a case is lodged at both Union Courts, the General Court, under Article 54, paragraph 3 of the Court's Statute,[54] albeit in rather loose

[49] ECJ 31 March 1971, ECLI:EU:C:1971:32, *Commission of the European Communities* v *Council of the European Communities* (European Agreement on Road Transport) ('*ERTA*') and ECJ 20 March 1997, ECLI:EU:C:1997:164, *French Republic* v *Commission of the European Communities*.

[50] ECJ 13 September 2005, ECLI:EU:C:2005:542, Commission of the European Communities v Council of the European Union ('Environmental Criminal Penalties'). *See* D. Spinellis, 'Court of Justice of the European Communities: Judgment of 13 September 2005 (Case C-176/03, Commission v. Council) Annulling the Council Framework Decision 2003/80/JHA of 27 January 2003 on the Protection of the Environment through Criminal Law', 2 *EuConst* (2006) p. 293.

[51] *Opinion 2/13*, *supra* n. 16, para. 251.

[52] Case T-715/14, *Rosneft and Others* v *Council*.

[53] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury*, *supra* n. 18.

[54] Art. 54, para. 3 of the Statute of the Court of Justice of the European Union: 'Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may,

terminology, can stay its proceedings, thereby giving way to the Court to first issue its judgment. It could be argued that Rosneft had no choice but to seek judicial review of the restrictive measures via the national court, given it might not have had *locus standi* before the General Court. The lack of standing for legal entities seeking nullification of Union legal acts under Article 263 TFEU is certainly a problem with respect to Article 47 of the Charter.[55] As noted by the Court, national courts should consult the Court through the Article 267 TFEU preliminary reference procedure when proceedings are brought before a national court, when there are questions over whether that person can bring a direct action.[56] The Court deemed this an essential element of a 'complete system of legal remedies and procedures'.[57]

The applicant in *Rosneft* also sought access to documentation as part of the judicial protection claim, but this was dismissed by the Court.[58] This was based on the *TWD* jurisprudence,[59] in that if a person is within the scope of Article 263 TFEU to take a direct action to the Union's court, it cannot therefore plead invalidity through a preliminary reference. This is particularly so when a preliminary reference from a national court has been referred in which an applicant is deliberately attempting to avoid the time limit for taking a direct action.[60] Thus, the preliminary reference procedure cannot undermine the ability of the provision of direct actions within the Treaties. Collectively however, the Court ruled that, when taken together, Articles 19, 24, and 40 TEU, in addition to Article 275 TFEU, and Article 47 of the Charter, 'must be interpreted as meaning that the Court has jurisdiction to give preliminary rulings'.[61]

after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.'

[55] L. Pech and A. Ward, 'Article 47 – Right to an Effect Remedy and to a Fair Trial (Effective Judicial Remedies before the Court of Justice)', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) p. 1248.

[56] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury, supra* n. 18, para. 67. In doing so, it cited ECJ 15 February 2001, ECLI:EU:C:2001:101, *Nachi Europe GmbH* v *Hauptzollamt Krefeld*, paras. 35 and 36, and, ECJ 29 June 2010, ECLI:EU:C:2010:382, *Criminal proceedings against E and F*, paras. 45 and 46, as reference points.

[57] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury, supra* n. 18, para. 67.

[58] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury, supra* n. 18, paras. 126–130.

[59] ECJ 9 March 1994, ECLI:EU:C:1994:90, *TWD Textilwerke Deggendorf GmbH* v *Bundesrepublik Deutschland*. *See* M.G. Ross, 'Limits on Using Article 177 EC', 19 *European Law Review* (1994) p. 640.

[60] *TWD Textilwerke Deggendorf GmbH* v *Bundesrepublik Deutschland*, *supra* n. 59, para. 18.

[61] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury, supra* n. 18, para. 81.

The implications of jurisdiction

This collection of jurisdictional CFSP cases post-Lisbon, *Mauritius*, *Opinion 2/13*, *Eulux Kosovo*, *H* v *Council*, and *Rosneft*, have all had the collective impact of blurring the boundaries between when the Court has, and does not have jurisdiction, in and amongst the lingering questions that are yet being asked of the Court. Accordingly, these cases have not yet established limits to the Court's jurisdiction when CFSP is present. The Court has thus had to indirectly adopt a standpoint regarding its jurisdiction in CFSP: are derogations on its jurisdiction exceptions to the rule of assumed jurisdiction, or conversely, are derogations the rule, with jurisdiction needing to be actively asserted?

With the Court's determination that curtailment of its jurisdiction in the CFSP is to be narrow, it meant that the Court views its own jurisdiction as the rule, rather than the exception. This *de facto* frames the Court's viewpoint on CFSP as not being explicitly a sub-order as is sometimes assumed. Article 19 TEU is strong in terms of providing the Court with a mechanism to assert jurisdiction in CFSP whereas other articles appear to water it down. Given the post-Lisbon case law to date, the jurisdiction of the Court could even be regarded as a general principle of Union law. The increased jurisdiction of the Court in CFSP cases has increased the breadth of judicial review in the Union, and more specifically, the possibilities for judicial protection for legal entities on the receiving end of restrictive measures. The Court has been accused before of side-stepping its role in respect of some social policy cases.[62] It does not stand charged with the same issue here in CFSP. Given that an assertion of jurisdiction in CFSP may not have been totally foreseen by the drafters of the Treaties, there are odious implications to the Court's actions – given that all actions have consequences.

The Court usually has sufficient flexibility to refuse to answer questions – jurisdictional or otherwise. For instance, in the many instances in which the Court is asked to address the gaps left by the drafters, it can determine a certain path by expanding upon its own reasoning or, alternatively, it can construct a path diplomatically by simply answering the question it has been posed. It can do this by dismissing a case by Order, without having to delve into fully-rounded reasoning. In *Opinion 2/13*, even though by appearances the Treaties did not allow the Court to judicially review CFSP issues, this did not prevent the Court from commenting and critiquing the manner in which CFSP and the jurisdiction of the Court is constructed in the Treaties. In *Rosneft*, the Court determined that preliminary references from national courts were permissible in CFSP cases.

[62] *See* L. Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez', 49 *Common Market Law Review* (2012) p. 1841.

Part of the rationale for allowing CFSP cases to arise during this Article 267 TFEU procedure may have been to ensure there was a judicial remedy available to the litigant, although it could also be argued that the litigant's judicial remedy was the direct action lodged at the General Court.[63]

Accordingly, the Court had options in *Rosneft*: it could have dismissed the case. The Court could have then allowed the direct action at the General Court to proceed, and if the General Court issued an Order to the effect that the litigant did not have legal standing, this could be appealed to the Court, since standing is a point of law. Therefore, the *Rosneft* case on jurisdiction might have eventually ended up at the Court anyway, and the question of whether the Article 267 TFEU preliminary reference procedure could be applied to CFSP cases could be dealt with another time. In *Rosneft*, however, the Court totally ignored this approach. Given the Court's line of jurisdictional CFSP cases, it is unsurprising that the Court did not sidestep the question of jurisdiction, and was satisfied to affirm the existence of its jurisdiction.

Opening-up of forum shopping

Forum shopping can be defined as, 'unfairly exploit[ing] jurisdictional or venue rules to affect the outcome' of a case.[64] It is akin to cherry picking, and could be a new development in CFSP as a result of *Rosneft* and the Court's assertion of jurisdiction for challenges of a CFSP Decision through a preliminary reference. With the transfer of jurisdiction of CFSP cases to the Court through the preliminary reference procedure, and the possibility of forum shopping between the Court and the General Court, the concept of forum shopping in restrictive measures cases could emerge, and therein lies the potential for the role of the General Court in direct actions in restrictive measures cases to be undermined. Thus, if forum shopping is to occur in future, what can the Court do to alleviate it? Forum shopping is not new in Union law in a horizontal sense, as the issue potentially arose as a result of the *Masterfoods* case.[65] However, forum shopping between different national courts in Member States never materialised.[66] Forum shopping on a vertical level as a result in *Rosneft* is much more problematic.

Litigants, if they have the option, choose their battleground based on a number of factors including the ability to plead a case in their favour, but also the timeframe a court or tribunal needs to render a decision. This is not to say that

[63] Case T-715/14, *Rosneft and Others* v *Council*.

[64] F.K. Juenger, 'Forum Shopping, Domestic and International', 63 *Tulane Law Review* (1989) p. 553 at p. 553.

[65] ECJ 14 December 2000, ECLI:EU:C:2000:689, *Masterfoods Ltd* v *HB Ice Cream Ltd*.

[66] I. Maher, 'Competition Law Modernization: An Evolutionary Tale?' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law*, 2nd edn (Oxford University Press 2011) p. 733.

the litigant in the *Rosneft* case was necessarily forum shopping, but rather that the judgment has potentially set the stage for future cases: an individual chamber of the General Court handling a case can take a decision to stay proceedings, allowing the Court to deal with a preliminary reference case on its docket first. Therefore, a scenario could develop in which the Court, in a future *Rosneft*-esque case, might prefer to dismiss it or, alternatively, encourage parties to take a direct action to the General Court. Pre-Lisbon, the avenues for challenging the Union's restrictive measures through a preliminary reference were also dealt with in *Segi*,[67] challenging a Common Position. After that judgment, similar concerns about forum shopping arose. Here, the question was whether national courts should hear cases brought by legal entities subject of restrictive measures determined by their residence, or by their citizenship,[68] if they were even Union citizens at all. However, this issue never arose given the abolition of Common Positions by the Treaty of Lisbon shortly thereafter.

The possibility of forum shopping would thus *de facto* deprive the General Court of a sizeable portion of its docket. It remains to be seen if and how forum shopping will manifest itself in future cases. With the reform of the General Court that proceeded in 2015,[69] resulting in Regulation 2015/2422,[70] tucked away in Article 3(2) is an obligation imposed on the Court to report to the political institutions on institutional reform. Namely, the Regulation stated that '[b]y 26 December 2017, the Court of Justice shall draw up a report for the European Parliament, the Council and the Commission on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU. The report shall be accompanied, where appropriate, by legislative requests.' With the General Court increasing in size to more than 50 members, there is the possibility that it will have to be given a greater say in the overall functioning of the Court as an institution. There has been discussion since as far back as the Treaty of Nice[71] on the possibility of having the General Court handle certain preliminary references sent from national courts. This is now incorporated in Article 256(3) TFEU. Those provisions have never been acted upon, and it is the Court alone that still hears Article 267 TFEU preliminary references from national courts.

[67] *Segi, Araitz Zubimendi Izaga and Aritza Galarraga* v *Council of the European Union*, *supra* n. 48.

[68] C Eckes, 'Sanctions against Individuals: Fighting Terrorism within the European Legal Order', 4 *EuConst* (2008) p. 205 at p. 212.

[69] For a critical view, *see* A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System', 54 *Common Market Law Review* (2017) p. 129.

[70] L 341/14. Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 Amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

[71] E. Regan, 'The Treaty of Nice', 6 *The Bar Review* (2001) p. 205 at p. 206.

With the impending deadline, the Court has undertaken work on the report: consultation with stakeholders has commenced, and a clear narrative has emerged regarding the ability of the General Court to hear preliminary references referred by national courts. The Commission, and agents of Member States who regularly appear before the Courts, have expressed opposition to having Article 267 TFEU preliminary references reapportioned to the General Court. Furthermore, there is also the hazard of national constitutional and supreme courts of Member States, and other lower instance national courts, no longer referring cases to the Court through the Article 267 TFEU preliminary reference procedure, because they would want the interpretation of Union law to be given by the Court of Justice – a final instance court.

Even if serious consideration were given to reapportioning certain Article 267 TFEU preliminary reference cases to the General Court, there would still be some remaining practical difficulties to consider. The working procedures between the Court and the General Court have subtle but significant differences. The General Court is largely a fact-based court, and a much larger part of its procedure is completed in writing without an oral hearing. The Court, on the other hand, nearly always operates by an oral hearing[72] at which parties may be given an opportunity to reply to observations made by other parties to the case. Accordingly, simply transferring an Article 267 TFEU preliminary reference case to the General Court would not be as straightforward as it might seem. Rather than assessing the types of case that come through a preliminary reference, it might instead be more fruitful to look at what other types of cases coming before the Court could potentially be transferred to the General Court. Non-preliminary reference cases could be moved to the General Court, including infringement actions taken by EU institutions against Member States, or *vice versa*. Whether the Court makes use of the opportunity to utilise its power to suggest a legislative request for change – as it is entitled to do under Article 281 TFEU – will be eagerly anticipated. Yet, Regulation 2015/2422 confines itself to asking the Court about the transfer of preliminary reference cases, and does not extend to the other types of cases it hears.

Given that the Court has – or at the very least had – strict *locus standi* requirements,[73] it has been suggested that – against the backdrop of the reform of the General Court and its increased judicial resources – it should loosen the standing rules under Article 264(4) TFEU through judicial interpretation,[74]

[72] Although, they are not obligatory. *See* A. Rosas, 'Oral Hearings before the European Court of Justice', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 596 at p. 598.

[73] For the short and long history, *see* H. Rasmussen, 'Why Is Article 173 Interpreted Against Private Plaintiffs?', 5 *European Law Review* (1980) p. 112; F. Jacobs, 'Access by Individuals to Judicial Review in EU Law: Still an Issue of Concern?', in H. Koch *et al.* (eds), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing 2010).

[74] *See* D. Sarmiento, 'The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 1.

although this interpretation would need to be shared by the Court, too. Questions about the appropriate forum for dealing with questions of Union law – should they be dealt with through a direct action provided for in Article 263 TFEU, or through the preliminary reference procedure in Article 267 TFEU – will continue to linger.

A desire for jurisdiction

The Court has long had to fill out the gaps with regard to its own jurisdiction – as categorically conferred by primary law – in order to be able to answer questions of Union law. This is particularly so given the 'pillarisation' of the Union that emerged from the Treaty of Maastricht, the Treaty of Amsterdam[75] and, ultimately, the Treaty of Lisbon.[76] It could be inferred that, with Lisbon, the assumed jurisdiction of the Court, unless stated otherwise, would continue unabated, as would seem to follow from the jurisdictional CFSP cases cited above. Yet, another implication is that the Court has an opaque opportunity to amend what it sees as hurdles to an effective legal order. In *Opinion 2/13*, the Court flagged CFSP and its own lack of jurisdiction as a key element that, in its view, makes EU accession to the ECHR unworkable under present Treaty arrangements.

Another way of examining one of the jurisdictional CFSP cases, the *Rosneft* judgment, is as an indirect response to the Court's own *Opinion 2/13*.[77] Under the Article 218(11) TFEU procedure, the Commission had requested an Opinion of the Court to determine if the Draft Accession Agreement it had negotiated with its Council of Europe partners complied with the Union's own Treaties.[78] *Opinion 2/13* highlighted a breadth of issues that, from the Court's perspective, posed difficulties that undermined the autonomy of the legal order.[79] One problem the EU must

[75] A. Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam', 35 *Common Market Law Review* (1998) p. 1273; N. Fennelly, 'Jurisdiction of the Court of Justice Following the Entry into Force of the Treaty of Amsterdam' (1999) European Parliament: Liberty, Security, Justice: An Agenda for Europe, Working Document, Civil Liberties Series, LIBE 106 EN 19.

[76] For the most comprehensive study, *see* Hinarejos, *supra* n. 47.

[77] *See* E. Gill-Pedro and X. Groussot, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?', 35 *Nordic Journal of Human Rights* (2017) p. 258 at p. 273.

[78] Council of Europe and European Commission, *supra* n. 35.

[79] *Opinion 2/13*, *supra* n. 16. For a selection of literature, *see* B. de Witte and Š. Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court', 40 *European Law Review* (2015) p. 683; S. Douglas-Scott, 'Autonomy and Fundamental Rights: The ECJ's Opinion 2/13 on Accession of the EU to the ECHR', 19 *Europarättslig Tidskrift* (2016) p. 29; L. Halleskov Storgaard, 'EU Law Autonomy versus European

resolve before even considering accession to ECHR at any point in the future is therefore – as it is obligated to do by Article 6(2) TEU[80] – to address the issues the Court highlighted with the legal setup of CFSP.[81]

Opinion 2/13 noted that, notwithstanding exhaustive positions on the Court's own jurisdiction in CFSP not being expressed, for the purpose at hand, 'certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court…'.[82] In this way, subsequent CFSP cases such as *Rosneft* could contribute to the Court's prior jurisprudence without creating an explicit need for treaty amendment, as was popularly thought necessary for EU accession to the ECHR. With the Court now beginning to fill out the jurisdictional gaps – such as allowing jurisdiction on staffing issues based upon a CFSP legal basis, as it did in *H* v *Council*; and in CFSP cases introduced through Article 267 TFEU preliminary references – post-*Opinion 2/13* jurisprudence can point to the Court's efforts to address issues it felt needed attention before accession to the ECHR could proceed in future, if at all. That said, an explicit Treaty amendment may still ultimately be necessary to overcome the CFSP hurdle in EU accession discussions.

Use of the Charter of Fundamental Rights

Article 51(1) of the Charter ensures that all EU institutions are within the remit of the Charter,[83] including at all stages of the CFSP decision-making process and

Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR', 15 *Human Rights Law Review* (2015) p. 485; P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?', 38 *Fordham International Law Journal* (2015) p. 955; L.F.M. Besselink et al., 'A Constitutional Moment: Acceding to the ECHR (or Not)', 11 *EuConst* (2015) p. 2; T. Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable?', 11 *EuConst* (2015) p. 239; A. Łazowski and R.A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', 16 *German Law Journal* (2015) p. 179; J. Polakiewicz, 'Accession to the European Convention on Human Rights (ECHR) – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13', 36 *Human Rights Law Journal* (2016) p. 10.

[80] Art. 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.'

[81] *See*, N. Neuwahl, 'Editorial Comment: Opinion 2/13 on the Accession of the European Union to the European Convention on Human Rights – Foreign Policy Implications', 20 *European Foreign Affairs Review* (2015) p. 155; G. Butler, 'The Ultimate Stumbling Block? The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights', 39 *Dublin University Law Journal* (2016) p. 229.

[82] *Opinion 2/13*, *supra* n. 16, para. 252.

[83] Art. 51(1) of the Charter: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the

implementation. Given that CFSP actions with legal effect – particularly restrictive measures – are, by Union law, implemented by national organs of EU Member States, the Charter is applicable to a large portion of the operative components of CFSP. The Court in *Åkerberg Fransson* reinforced this, when it affirmed that '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law'.[84] In early restrictive measures case law – before the Charter became a binding instrument – it was essential under Union law that legal entities had recourse to national judicial procedures in order to guarantee sufficient legal protection. From as far back as *Salgoil*, it was determined that such protection should be 'direct and immediate',[85] and that the guarantee of a Union right stemming from the Treaties, which Member States must provide, flows from the jurisprudence of the Court.[86] Yet, an air of caution resounded in the solemn proclamation of Parliament, Council, and Commission,[87] over how far the Charter should be applied to the Union's external relations policies.[88]

The Court in *Rosneft* took no issue with invoking Article 47 of the Charter to support the argument that the Court possessed jurisdiction, and thus exercised it.[89] The breadth of the Charter's reach has still not been determined, despite *Rosneft*. Its limits are still 'shrouded in mist',[90] but there are now clear takeaways from the very existence of the Charter that can be felt in the CFSP sphere of external relations. The number of instances in which the Charter is used is generally on the increase,[91] and therefore, so is the likelihood that the continued

Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'

[84] ECJ 7 May 2013, ECLI:EU:C:2013:105, *Åklagaren* v *Hans Åkerberg Fransson*, para. 21.

[85] ECJ 19 December 1968, ECLI:EU:C:1968:54, *SpA Salgoil* v *Italian Ministry of Foreign Trade, Rome*.

[86] H.C.H. Hofmann, 'Article 47 – Right to an Effect Remedy and to a Fair Trial (Specific Provisions) (Meaning)', in S. Peers et al., *supra* n. 56, p. 1212.

[87] C 364/1. Charter of Fundamental Rights of the European Union (2000/C 364/01).

[88] For example, *see* J. Wouters, 'The EU Charter of Fundamental Rights – Some Reflections on Its External Dimension', 8 *Maastricht Journal of European and Comparative Law* (2001) p. 3.

[89] Art. 47 of the Charter (Right to an effective remedy and to a fair trial): 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

[90] 'Editorial: After Åkerberg Fransson and Melloni', 9 *EuConst* (2013) p. 169 at p. 171.

[91] G. De Búrca, 'The Domestic Impact of the EU Charter of Fundamental Rights', 49 *Irish Jurist* (2009) p. 56.

jurisdictional optimisation of the Court will have an effect on how CFSP is interpreted. It can thus be asked whether the Court's use of Article 47 as an additional justification for asserting jurisdiction over the Charter is justified. The reading of Article 47 of the Charter can be said to be 'best apprehended as securing a set of substantive rights that are essential to the administration of justice'.[92] Article 47 of the Charter was invoked in *Rosneft*, but not to the same extent as in *H* v *Council*. Article 51(2) of the Charter states that the Charter 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'. With this in mind, it would seem that the Charter as a whole could have a delimiting effect *vis-à-vis* the Union's external relations.

One reading of Article 51(2) of the Charter could be that the Court through its interpretation should not use the Charter to deviate from the expressly exempted jurisdiction the Court has with regard to CFSP.[93] An alternative reading might suggest that the Charter, read in conjunction or in the spirit of the Articles in the TEU and TFEU, provides guidance on how they should be interpreted. In fact, the Court noted that Article 47 of the Charter does confer jurisdiction, but nevertheless, 'the principle of effective judicial protection … implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly'.[94] This reading would broaden the effect of the Charter in external relations, including CFSP.

Lingering questions on the Court's jurisdiction and CFSP

The five jurisdictional CFSP cases discussed above have all collectively contributed to putting the jurisdiction of the Court in CFSP under the microscope. The limits of the Court's jurisdiction in CFSP will continue to be questioned. In light of the jurisdiction CFSP cases, and the Court's assertion of jurisdiction in them, more questions seem to have been raised than answered. This is by no means a negative development, as it assumes that the Treaties will eventually level the differentiation between CFSP and non-CFSP, despite the specific limitation imposed on the Court.

The second of the two legal instruments – adopted using Article 215 TFEU and presently used to implement restrictive measures – provides little to no discretion for the Commission and the High Representative to deviate from the first legal instrument. There is potential for a restrictive measures case scenario in which a

[92] A. Ward, 'Remedies under the EU Charter of Fundamental Rights', 19 *Europarättslig Tidskrift* (2016) p. 15 at p. 24.

[93] K. Lenaerts and J.A. Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in Peers et al., *supra* n. 56, p. 1572.

[94] *PJSC Rosneft Oil Co* v *Her Majesty's Treasury*, *supra* n. 18, para. 74.

CFSP Decision is taken by Member States meeting as the Council under Article 29 TEU, but the Commission refuses to provide for a non-CFSP Regulation under Article 215 TFEU. Such a potential conflict will raise questions about the effectiveness of sanctions within the EU legal order, and furthermore cast doubt over the judicial protection offered to legal entities subject of restrictive measures.

This in turn raises questions about how far the jurisdiction of the Court stretches in CFSP, much the same way it was originally questioned how far the Court's jurisdiction extended generally. The Court's case law over the decades in different types of case, whether generated by direct actions or preliminary references, has displayed a consistent line of thought. According to that view, there was initially a *compétence d'attribution* – the Court was specifically provided jurisdiction. The questions it was asked to resolve, however, seemed to approach the Court as if inherent jurisdiction were actually the norm,[95] in line with how national courts approach legal issues that arise on their own dockets in national jurisdictions. Questions continue to be asked regarding whether the Union's mode of foreign policy has sufficiently merged into the overall system of the Union's external relations, or whether this still remains intact as a distinct field of law and policy. The Treaties have still not completely dealt with the precision of the Court's jurisdictional situation in a number of specified areas.

Primacy

The Treaties have still not handled or attempted to address the issue of primacy of CFSP.[96] The European constitutional system has been careful when declaring which principles do or do not apply to sensitive policy areas such as CFSP. Notwithstanding the doctrine of primacy as pronounced by the Court as far back as *Costa* v *ENEL*, in that 'the Treaty … could not … be overridden by domestic legal provisions …',[97] the application of primacy of CFSP is not entirely clear, given there is no case law to look to,[98] despite the very concept of primacy being re-stated by the Court.[99]

[95] A. Arnull, 'Does the Court of Justice Have Inherent Jurisdiction?', 27 *Common Market Law Review* (1990) p. 683 at p. 700.

[96] M. Cremona, 'The Union's External Action: Constitutional Perspectives', in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution: Commentary on the Treaty establishing a Constitution for Europe in the light of the travaux préparatoires and future prospects* (Bruylant 2007) p. 1194.

[97] ECJ 15 July 1964, ECLI:EU:C:1964:66, *Flaminio Costa* v *E.N.E.L.*

[98] P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency', 47 *Common Market Law Review* (2010) p. 987 at p. 989.

[99] ECJ 9 March 1978, ECLI:EU:C:1978:49, Amministrazione delle Finanze dello Stato v Simmenthal SpA. *See* J.A. Usher, 'The Primacy of Community Law', 3 *European Law Review* (1978) p. 214.

When the Treaty of Lisbon put an end to the pillar structure, it might have been assumed that the principle of primacy of Union law would stretch beyond the former first pillar areas and begin to cover what were formerly the second and third pillars. Yet, such an assertion would have been false. Although the pillar structure was abandoned, CFSP remains an area with special decision-making rules – the Council's unanimity rules. Primacy as a constitutional principle never formally made it into the Union's primary law as a specific textual element,[100] but it is now contained in a specific Declaration annexed to the Treaties.[101] It can even be said that the formal absence of primacy in the Treaties is meant to preserve some level of national constitutional identity for the superior courts of Member States.[102] Primacy exists to ensure that EU legal actions are applicable in national law. However, primacy will perhaps not apply to all CFSP Decisions as a result of CFSP questions that could previously not be sent through a preliminary reference[103] although after *Rosneft* this is now possible – the Court has jurisdiction to declare the primacy of CFSP Decisions over national law.

This is an important matter that hinges on a question of competence. Article 2(4) TFEU states '[t]he Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy…', but does not strictly apportion it the exclusive, shared or supporting competences defined in Articles 3-6 TFEU. Although it is difficult to pin a label on CFSP, it has to fit somewhere in the spectrum of competences. Roughly speaking, it could be said to be a shared competence. In CFSP, competences are non-pre-emptive,[104] in a shared manner. Thus, while Member State actions implementing their own foreign policy can run

[100] Although it was put into the Constitution for Europe. *See* P. Cramér, 'Does the Codification of the Principle of Supremacy Matter?', in J. Bell and C. Kilpatrick (eds.), *Cambridge Yearbook of European Legal Studies 2004–2005: Volume 7* (Hart Publishing 2006). The treaty never made it into force, and was abandoned in the Treaty of Lisbon, barring a note in a Declaration. For a healthy discussion on primacy in the context of the Constitution for Europe, *see* 'Editorial: The CFSP under the EU Constitutional Treaty? Issues of Depillarisation', 42 *Common Market Law Review* (2005) p. 325.

[101] Declaration (No. 17) concerning primacy: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.'

[102] J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) p. 186.

[103] M. Cremona, 'The Two (or Three) Treaty Solution: The New Treaty Structure of the EU', in A. Biondi *et al.* (eds.), *EU Law after Lisbon* (Oxford University Press 2012) p. 53.

[104] Declaration (No. 13) concerning the common foreign and security policy, and Declaration (No. 14) concerning the common foreign and security policy.

concurrently to Union actions,[105] the principle of sincere cooperation – which covers both CFSP and non-CFSP external relations – applies.[106] Article 24(3) TEU obliges the Members States to act, in their individual capacities, in such a manner that they 'shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area'.[107] Without the Court's judgment in *Rosneft*, it would be left up to national courts to deal with the primacy of CFSP legal acts and national law, with no possibility for the Court to clarify. One consequence of this is that national courts might tend to interpret primacy the same way they interpret international law generally,[108] which could easily differ from the way a Union Court might interpret it. If the various national courts adjudicate differently on whether to apply the doctrine of primacy, this would not bode well for a coherent EU legal order.

It remains to be seen how far the Court will go in extending the primacy of a CFSP act over national law, although recent jurisprudence gives some indication. For example, *Opinion 2/13* said that primacy is one of the 'essential characteristics [that] have given rise to a structured network of principles, rules and mutually interdependent legal relations'.[109] Yet such a proclamation of CFSP primacy over national acts would be a 'significant shift in the balance of power',[110] calling CFSP decision-making into question. However, with such a view, a contrary argument could be made. Given the Treaties are otherwise rather descriptive with regard to CFSP, and that they contain no text or language on the non-applicability of

[105] Other such policies of a parallel nature include development cooperation and humanitarian aid: A. Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge University Press 2016) p. 29.

[106] *See* E. Neframi, 'The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations', 47 *Common Market Law Review* (2010) p. 323; C. Hillion, 'Mixity and the Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing 2010). Albeit, the duty was originally considered more flexible in practice: *see* S. Hyett, 'The Duty of Co-Operation: A Flexible Concept', in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet and Maxwell 2000).

[107] Art. 24(3) TEU furthermore states, '… The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.'

[108] G. De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) p. 203.

[109] *Opinion 2/13*, *supra* n. 16, para. 167.

[110] E. Denza, 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order – Volume 1: Constitutional and Public Law, External Relations* (Hart Publishing 2004) p. 269.

primacy in CFSP, it is therefore perfectly conceivable that primacy would apply. Since primacy is not expressly excluded, it could be found to apply.

Damages

The issue of damages in CFSP has still not yet been fully probed. The very existence of damages as a legal remedy within the sphere of Union law has had immense effect. Damages, by their nature, in turn affect actors' behaviour with respect to obligations that stem from Union law.[111] The very nature of CFSP and its constitutional structure set the requirements and threshold to be met before damages apply, in practice, very high. The Court has shown restraint by shying away from pronouncements on how the lawfulness of Union actions is compatible with international law.[112] However, there is much more scope for action when the Union has not followed its own internal law. Article 268 TFEU and Article 340 TFEU govern damages and the contractual liability of the Union.[113] However, the extent to which this applies to CFSP is unclear given the aforementioned limited jurisdiction of the Court in CFSP. Accordingly, it could thus be interpreted that allowances for damages brought against the Union exist – for whatever kind of action.[114] This reveals another void in the system of judicial protection provided by the Treaties. Yet, the role that Member States play, given their potential involvement in CFSP actions, must also be considered. Given that liability for unlawful actions can be shared between the Union and Member States,[115] the role of the Court would be starkly

[111] *See* I.S. Forrester, 'L'Europe Des Juges. Recent Criticism of ECHR and ECJ Judgments, the American Debate on Judicial Activism versus Judicial Restraint', in C. Baudenbacher and E. Busek (eds.), *The Role of International Courts* (German Law Publishers 2008).

[112] A. Thies, *International Trade Disputes and EU Liability* (Cambridge University Press 2013) p. 76.

[113] Art 268 TFEU: 'The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340', and Art. 340 TFEU: 'The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them'.

[114] K. Gutman, 'Liability for Breach of EU Law by the Union, Member States and Individuals: Damages, Enforcement and Effective Judicial Protection', in A. Łazowski and S. Blockmans (eds.), *Research Handbook on EU Institutional Law* (Edward Elgar 2016) p. 445.

[115] *See generally*, W. Wils, 'Concurrent Liability of the Community and a Member State', 17 *European Law Review* (1992) p. 191; furthermore, P. Craig, *EU Administrative Law*, 2nd edn (Oxford University Press 2012) pp. 698-702.

different from the role played by national courts, as damages attributed by Member State actions could only be apportioned by national authorities (such as national courts).

The General Court has to date taken a narrow view as regards the potential for damages.[116] Whilst being awarded damages may be possible, applicants have not had much success to date in CFSP.[117] However, the question of how damages might be applicable as a result of CFSP acts beside restrictive measures – for example, as a result of Common Security and Defence Policy missions and so forth – remains open and will eventually need to be addressed. In such a scenario, it is likely that jurisdiction to rule will have to be settled before the Court addresses the substance of a question of damages. Damages can be tied to fundamental rights, which are also protected by the primary law of the Union. But to what extent could damages apply? Actions for damages have not always been found admissible, particularly if they have been disguised as an action for annulment.[118] Individuals could be affected by EU activity of an operational capacity by actions that are formulated upon a CFSP legal basis,[119] for instance if errors in CFSP Decisions are copied into EU measures, that is, non-CFSP legal acts. However, this may not be an issue in practice, and therefore further debate about it may be moot.

The Constitution for Europe – that never made it into force – would have led to the further development of CFSP law,[120] yet it still would not have resolved the issue of damages.[121] The foreseen lack of damages available in CFSP is comparable to how, in the old pillar system, it stood alongside the third pillar (Justice and Home Affairs) – another area in which damages did not apply. It was not for a lack of trying, however, as the Court affirmed in both *Gestoras* and *Segi* that it lacked this jurisdiction.[122] However, the Treaty of Lisbon changed this, and was seen as a

[116] For example, *see* GC 7 June 2004, ECLI:EU:T:2004:171, *Segi* v *Council of the European Union*; GC 28 May 2013, ECLI:EU:T:2013:273, *Mohamed Trabelsi* v *Council of the European Union*, para. 48, where the General Court said the claim was damages was 'manifestly inadmissible'; and, GC 17 February 2012, ECLI:EU:T:2012:82, *Habib Roland Dagher* v *Council of the European Union*.

[117] Hillion, *supra* n. 13, p. 51.

[118] W. Van Gerven, 'The Legal Protection of Private Parties in the Law of the European Economic Community', in F.G. Jacobs (ed.), *European Law and the Individual* (North Holland 1976) p. 14.

[119] A. Thies, 'General Principles in the Development of EU External Relations Law', in Cremona and Thies (eds.), *supra* n. 13, p. 150.

[120] See M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', 40 *Common Market Law Review* (2003) p. 1347.

[121] K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', 31 *European Law Review* (2006) p. 287 at p. 314.

[122] ECJ 27 February 2007, ECLI:EU:C:2007:115, *Gestoras Pro Amnistía, Juan Mari Olano Olano and Julen Zelarain Errasti* v *Council of the European Union*, and *Segi, Araitz Zubimendi Izaga and Aritza Galarraga* v *Council of the European Union, supra* n. 48. The damages points by the Court here

'great step forward'.[123] Now in the 'depillarised' Union, the third pillar has been fully absorbed into the Union's system of judicial protection. Still, the manner in which it is applicable to the former second pillar, CFSP, remains unclear. The Court could have addressed this in *Opinion 2/13*, given that one of the intervening Member States claimed that, by their reading of the Treaties, the Court did not have the applied jurisdiction 'to rule on claims in non-contractual liability in which compensation is sought for damage resulting from a CFSP act or measure…'.[124] Yet the Court chose not to address the matter in its Opinion, and it thus remains to be settled.

Staffing

One of the post-Lisbon jurisdictional CFSP cases, *H* v *Council*, concerned the Court's ability to render judgment in a staffing case at a Common Security and Defence Policy mission. Such a discussion feeds into a broader determination of how the Court can be involved in the operation of the European External Action Services.[125] The issue of staffing in Common Security and Defence Policy missions, or in other bodies established on a CFSP legal basis, is another area where the extent of the Court's jurisdiction has yet to be clarified. At its very basis, it could be asked whether staffing matters escape the Court's protection given their CFSP legal basis, and thus, fall into the jurisdictional carve-out; or whether staffing matters merely constitute a normal prerogative of Union and are a non-CFSP activity of the Union. In *Jenkinson*,[126] the General Court appeared to disavow its jurisdiction over another Common Security and Defence Policy mission case, seemingly unaware of the *H* v *Council* judgment delivered earlier the same year – certainly a blotch on its record. Even more startling was that the Order was not appealed to the Court.

What the Court did in *H* v *Council* was to equate the staffing arrangements in the European Defence Agency[127] – in which it was specifically conferred staffing jurisdiction by a CFSP Decision – to a Common Security and Defence Policy mission founded upon a CFSP legal basis. A forthcoming staff case before

are 'practically identical'; K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', 44 *Common Market Law Review* (2007) p. 1625 at p. 1630.

[123] K. Gutman, 'The Evolution of the Action for Damages against the European Union and Its Place in the System of Judicial Protection', 48 *Common Market Law Review* (2011) p. 695 at p. 701.

[124] *Opinion 2/13*, *supra* n. 16, para. 133.

[125] M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill 2016) p. 188.

[126] GC 9 November 2016, ECLI:EU:T:2016:660, *Liam Jenkinson* v *Council of the European Union*.

[127] L 245/17. Council Joint Action 2004/551/CFSP of 12 July 2004 on the Establishment of the European Defence Agency.

the General Court may provide a chance for the Court to redeem itself: the *KF* case[128] involves a challenge to an internal staffing action by the European Union Satellite Centre, which was established in 2001 upon a CFSP legal basis.[129] The jurisdiction of the General Court to provide a judgment in *KF* is dependent upon the Court as an institution having jurisdiction. Whilst Article 11(6) of the CFSP Decision specifically granted the Court jurisdiction over European Defence Agency staffing disputes,[130] no such jurisdiction was specifically conferred upon the Court in the current European Union Satellite Centre staffing arrangements,[131] or by its predecessors.[132] The judgment of the Court in *H* v *Council* could mean that the General Court may assert jurisdiction in *KF*.

The jurisdiction of the Court in staff-related questions and its relationship with CFSP may appear to be trivial matters, but they are immensely important for the overall special character of CFSP that the High Contracting Parties have long sought to observe. In fact, the intricacy and complexity of these arrangements requires a high level of expertise and, looking forward, specialised chambers dealing with such intricate issues might be needed. Whilst specialisation of the General Court has not been the model opted for in the immediate future, it might return to specialised status in future,[133] although this reform may be some time away.

In light of the increasing size and capabilities of Common Security and Defence Policy missions, staffing issues are likely to continue to arise, as will the legal complexity of the jurisdiction of the Court. In response to piracy off the east African coast, the Union launched *Operation Atalanta* (EUNAVFOR) in 2008 to combat such activity,[134] and to protect core European interests and support third states in such endeavours. It subsequently launched its second naval mission,

[128] Case T-286/15, *KF* v *CSUE*, pending.

[129] L 200/5. Council Joint Action of 20 July 2001 on the Establishment of a European Union Satellite Centre (2001/555/CFSP).

[130] L 266/55. Council Decision (CFSP) 2015/1835 of 12 October 2015 Defining the Statute, Seat and Operational Rules of the European Defence Agency.

[131] L 276/1. Council Decision 2009/747/CFSP of 14 September 2009 Concerning the Staff Regulations of the European Union Satellite Centre.

[132] L 39/44. Staff Regulations of the European Union Satellite Centre'; 'L 235/28. Staff Regulations of the European Union Satellite Centre.

[133] *See* the views of one member of the General Court in U. Öberg *et al.*, 'On Increased Specialisation at the General Court of the European Union', in M. Derlén and J. Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing, forthcoming).

[134] L 301/33. Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Somali Coast.

Operation Sophia (EUNAVFOR Med) in 2015,[135] in response to 'irregular' migrants crossing the Mediterranean. Such grand Common Security and Defence Policy missions in turn reveal staffing issues that may in turn end up before the Union's judiciary, where its jurisdiction to rule will be questioned once again.

Infringements

Infringement actions by Member States for failure to comply with CFSP also do not lie within the ambit of the Court's jurisdiction.[136] Treaty infringements are dealt with under Articles 258 TFEU, Article 259 TFEU, and Article 260 TFEU. Infringements may be initiated at both the Union level[137] and by other Member States,[138] and the Commission has a specific role in CFSP that is 'defined by the Treaties'.[139] Furthermore, even if the Commission was not excluded *per se*, Article 260(3) TFEU implies that infringements brought to the Court are to be of a legislative nature. Therefore, given CFSP's non-legislative status, it furthermore would be excluded.

In practice, however, a Member State failing to fulfil its obligations flowing from a CFSP Decision would be rare, given that the vast majority of cases must be taken unanimously. In fact, the Treaties – as their starting point in CFSP – demand unanimity, save for certain stated exceptions. The lack of infringement proceedings is also underlined with regard to the duty of sincere cooperation that is applicable in CFSP, with Article 24(3) TEU, third paragraph, stating that '[t]he Council and the High Representative shall ensure compliance with these principles', and not the Commission, or the Court.

The future of jurisdiction in CFSP

CFSP continues to be a remarkable, although a limited and delicate instrument.[140] The Court is known to have more extensive jurisdiction than

[135] L 122/31. Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR Med). *See* G. Butler and M. Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea', 85 *Nordic Journal of International Law* (2016) p. 235.

[136] G. De Baere, 'European Integration and the Rule of Law in Foreign Policy', in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) p. 369.

[137] Art. 258 TFEU.

[138] Art. 259 TFEU.

[139] Art. 24(1) TEU, second para.

[140] B. McDonagh, *Original Sin in a Brave New World: The Paradox of Europe: An Account of the Negotiation of the Treaty of Amsterdam* (Institute of European Affairs 1998) p. 113.

other typical international tribunals.[141] The Union's system of judicial protection, depending on one's perspective, must apply the law as given, yet taking into account the entire body of Union law that the Court itself has been instrumental in developing over previous decades. Judicial control might seem absurd when decision-making is conducted by unanimity, but considering that the decision-making takes place in the Council – within a single institution of the Union – the prospects and realisation of judicial review appear more plausible. Keeping CFSP within the ambit of a judicial check is a norm that any self-respecting entity that prides itself on certain values, be they internal or external, would respect.[142]

The constitutionalising process as regards CFSP is ongoing, with the Court playing an important role. Given that the Treaties have not been substantially overhauled in many years, there is some hazard that treaty-stagnation will become entrenched. The semi-permanent revision process that has been in operation for many years,[143] whilst offering political actors a chance to alter their preferences for how the primary law should be changed, has become devalued due to a lack of political will. Accordingly, it may be the Court – as the judicial actor – that, in future, takes up the helm of legal change by envisaging a dynamic, interpretative approach to Union law. CFSP and the jurisdictional questions of the EU judiciary are not confined solely to matters of restrictive measures. As seen, they can arise in the modern context of international agreements as happened in *Mauritius* and *Tanzania*, or in staffing issues at a Common Security and Defence Policy mission as in *H* v *Council*, or even in transparency and access-to-documents cases going back to the 1990s, as in *Svenska Journalistförbundet* and *Hautala*.[144] Therefore, Union legal acts in CFSP alone, along with the Court's carved out position, have raised issues concerning effective legal protection in the Union as a whole. It was in the *Mauritius* judgment that the Court proclaimed that Article 24 TEU and Article 275 TFEU, the provisions that are exempt from the Court's jurisdiction, 'must…be interpreted narrowly'.[145] From that post-Lisbon point of departure, the Court has continued to liberate the jurisdictional derogation placed upon it in CFSP. However, certain pre-Lisbon events remain relevant. The *Smart Sanctions*

[141] W. Feld, *The Court of the European Communities: New Dimension in International Adjudication* (Martinus Nijhoff Publishers 1964) p. 34.

[142] For example, *see* Art. 21 TEU for the general provisions on the Union's external action.

[143] *See* B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process', in P. Beaumont *et al.* (eds.), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

[144] GC 17 June 1998, ECLI:EU:T:1998:127, *Svenska Journalistförbundet* v *Council of the European Union* and GC 19 July 1999, ECLI:EU:T:1999:157, *Heidi Hautala* v *Council of the European Union*, followed on appeal in ECJ 6 December 2001, ECLI:EU:C:2001:661, *Council of the European Union* v *Heidi Hautala*.

[145] *Mauritius*, *supra* n. 14, para. 70.

judgment of the Court effectively removed the potential for Article 75 TFEU to be used as a legal basis for combatting terrorism,[146] and in practice, has found restrictive measures to be based upon Article 215 TFEU, following a CFSP Decision. This 'CFSP-ising',[147] has thus effectively rendered Article 75 TFEU a lame duck. *Rosneft* could potentially have done something similar, in that it could subsequently be found to weaken Article 215 TFEU. It remains to be seen whether future restrictive measures will require a solely CFSP legal basis or are based on both CFSP and non-CFSP legal instruments. However, *Rosneft* may have had the inadvertent consequence of emptying Article 215 TFEU of its substance.

The constitutionalising process in CFSP continues – by judicial decision rather than by political compromise. Rather than becoming a sectoral area of Union law that is venturing into the unknown, CFSP's future direction will see it slowly settle into its natural state: with ordinary external relations on a non-CFSP legal basis, and with full judicial review and protection. Thus, the actions of the Court would appear to be normalising CFSP, despite its separateness in the Treaties. CFSP is part of the Union legal order, with its objectives not solely confined to itself, but shared across all matters of external action,[148] predicated upon a single institutional framework.[149] It was predicted that with the derogations placed upon the Court's jurisdiction, and the re-assertion of jurisdiction in certain circumstances – for example Article 275 TFEU – that this could provide a path for the Court to, 'clos[e] the present loopholes' in the Court's judicial protection system.[150]

Cases like *Rosneft* would have been dealt with much differently in the pre-Lisbon era. The question as it was posed in *Rosneft* – of asking for certification of the validity of both the CFSP Decision and non-CFSP Regulation – would not have been possible then. Legal entities subject to restrictive measures could only contest non-CFSP acts against them, as CFSP acts *de facto* escaped judicial control.[151] For future CFSP cases, *Rosneft* has effectively begun to level the playing

[146] ECJ 19 July 2012, ECLI:EU:C:2012:472, *European Parliament* v *Council of the European Union* ('*Smart Sanctions*').

[147] Called '*PESCalised*' in an English-French amalgamation. C. Hillion, 'Fighting Terrorism through the Common Foreign and Security Policy', in I. Govaere and S. Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill 2014) p. 83.

[148] Art. 21 TEU. Akin to 'motherhood and apple pie': A. Dashwood et al., *Wyatt and Dashwood's European Union Law*, 6th edn (Hart Publishing 2011) p. 903.

[149] Art. 13 TEU: 'The Union shall have an institutional framework…'

[150] K. Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) p. 309.

[151] L. Paladini, 'The European Charter of Fundamental Rights After Lisbon: A "Timid" Trojan Horse in the Domain of the Common Foreign and Security Policy?', in G. Di Federico (ed.), *The EU Charter of Fundamental Rights* (Springer 2011) p. 284.

field between Article 263 TFEU direct actions, and Article 267 TFEU preliminary references. The extent to which CFSP can really remain insulated could potentially bring the Court to the point where it draws a line on its willingness to accept jurisdiction.

Conflict between Union law and national legal orders is not always at issue – the narrative dealing with issues of judicial protection and the jurisdiction of the Court can be framed differently. The issues in *H* v *Council* and *Rosneft* were merely raised to ensure effective judicial protection, regardless of how – or whether – a judicial remedy is to be enforced by the Union's Court.[152] A *Rosneft* scenario was not totally unexpected: the gap in the Treaties that left the Court's jurisdiction in CFSP cases uncertain was already a major concern before that case.[153]

The Union will continue to draw up measures that restrict the activities of legal entities originating in multilateral organisations such as the United Nations, or ones of its own creation, within its own sphere of influence. Accordingly, restrictive measures will continue to be challenged, and *Rosneft* has opened another avenue for effective judicial remedy. Practice regarding restrictive measures will continue to evolve as the Union ensures that the sanctions it wishes to impose are in compliance with its own Treaties, and with the principles of public international law that have been successfully invoked by the parties acknowledged by the Union's judiciary.

Issues of primacy, damages, staffing, and infringements will inevitably be straightened out in CFSP law, but a point could be reached at which the Court's jurisdiction – while not at stake regarding intricate legal issues – could be put in doubt when the Court is asked to decide questions that hinge upon political matters. In such situations, the Court could decline jurisdiction as a way of evading political questions. Thus, when push comes to shove, faced with a jurisdictional dilemma, the Court might not be able to extricate itself. Accordingly, given this future hypothetical, national courts will still play a prominent role, and the doctrine emanating from *Foto-Frost* will continue to apply.[154]

The High Contracting Parties' attempt at keeping the Court out of CFSP as much as possible has failed. The Court's philosophy of bringing CFSP closer in line with normal, non-CFSP external relations law has prevailed instead. Whilst CFSP continues to be legally distinct, it is progressively becoming more

[152] *See* the approach taken in W. Van Gerven, 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* (2000) p. 501 at p. 502.

[153] K. Lenaerts *et al.*, *EU Procedural Law*, 3rd edn (ed. Janek Tomasz Nowak, Oxford University Press 2014) p. 458.

[154] ECJ 22 October 1987, ECLI:EU:C:1987:452, *Foto-Frost* v *Hauptzollamt Lübeck-Ost*. *See* A. Arnull, 'National Courts and the Validity of Community Acts', 13 *European Law Review* (1988) p. 125.

communitarised, and the Court's ability to deliver substantive judgments expanded, once its jurisdiction has been affirmed. It will require significant imagination for the legal issues pertaining to CFSP to be resolved. CFSP cases will usually start, on many occasions, with questions about the Court's jurisdiction. Once that is affirmed, the real substance of other CFSP questions can continue to be probed.

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