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Article

Made in Luxembourg: The fabrication of the law on jurisdiction of the court of justice of the European Union in the field of the Common Foreign and Security Policy

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Abstract

The article provides an analysis of the case law of the Court of Justice of the European Union on the interpretation of Articles 24 TEU, first paragraph, second subparagraph, and 275 TFEU governing the question of the Court's jurisdiction in the field of the Common Foreign and Security Policy (CFSP). The article first describes the background of those provisions as they resulted from the Convention on the Future of Europe and the 2003-4 and 2007 Intergovernmental Conferences and then compares the Court's understanding of its jurisdiction to the drafting history of the provisions concerned. The main conclusion of the study of the case law suggests that the Court views its jurisdiction over the CFSP more broadly than the jurisdiction envisaged by the drafters of the Treaties. In particular, the Court both interprets the exclusion from its jurisdiction of acts based on the Treaty's CFSP provisions in a narrow fashion and is prepared to review the legality of CFSP acts not only through direct actions but also through references for a preliminary ruling. However, the article argues that the provision of adequate legal protection in the field of the CFSP necessarily requires both the Court of Justice and domestic courts of the Member States to play their respective roles.

Keywords: Court of Justice; Common Foreign and Security Policy; Jurisdiction; Review of Legality; Restrictive measures; Convention on the Future of Europe; Intergovernmental Conference

1. The judicial control of the CFSP: Outlining the change of paradigm

When setting up the initial treaty-architecture for the European Union's Common Foreign and Security Policy (hereafter 'CFSP'), the drafters of the Maastricht Treaty created a structure of governance that included virtually no mechanisms of judicial control by the Court of Justice of the European Union (hereafter 'CJEU'): Article 46 of the Treaty on European Union (hereafter 'TEU') categorically excluded the CFSP from the Court's jurisdiction, the sole exception being the control of the application of Article 47 TEU. Under this provision the Court was to protect the *acquis communautaire* and to review the exercise of the competence based on the CFSP (and, for that matter, on the 'Police and Judicial Cooperation in Criminal Matters') for the purpose of ensuring that acts that could have been adopted on the basis of the Community Treaties were not adopted on under the CFSP.¹ Under the treaties of Maastricht, Amsterdam and Nice, no other role was envisaged for the Court in the realm of the CFSP.²

Today, while significant limits on the Court's jurisdiction in the CFSP remain in place, things, as we shall see, look somewhat different. As a result of the changes introduced by the Treaty of Lisbon, we have, it will be argued, moved from the Maastricht-style categorical exclusion of the CFSP from the scope of Court's jurisdiction to a situation where the defining of the limits of the Court's powers has become a process of an essentially incremental character. On the one hand, the original justification for the exclusion of the Court's jurisdiction relating to the nature of CFSP instruments remains in place: as a rule, they – unlike acts of the Union's institutions in other policy areas – are not intended to lay down abstract general rules creating rights and obligations for individuals, nor is their content, from the point of view of the degree of discretion enjoyed by the political institutions, in most cases amenable to judicial review. On the other hand, certain measures taken in the context of the CFSP are capable of directly affecting the legal position of individuals.³ While the Union's sanctions policies, pursued mainly through what the Treaties denominate as '*restrictive measures*',⁴ provide the most obvious example, there are also other aspects of the implementation of the CFSP that are capable of producing legal effects *vis-à-vis* individuals and, therefore – notably from the point of view of the idea of the Union as '*a community based on the rule of law*' providing for '*a complete system of legal remedies*'⁵ – calling for mechanisms of effective legal protection before a court of law.⁶ Finally, the limits of the Court's jurisdiction in CFSP matters also have a bearing upon the prospects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, provided for in paragraph 2 of Article 6 TEU. The limited scope of its jurisdiction in those matters has namely been identified by the Court of Justice as one of the factors rendering the envisaged agreement on the Union's accession to the Convention as incompatible with Union law.⁷

In the above constellation, the Court, it will be argued, may no longer rely on a categorical exclusion of its jurisdiction in the field of the CFSP but will rather have to define, under the relevant provisions of the Treaties, the limits of its jurisdiction on case-by-case basis and, in so doing, balance, on the one hand, the characteristics of the CFSP justifying its exclusion from review and, on the other hand, the need for providing, together with national courts of the Member States, effective legal remedies in those situations where individuals are adversely affected by measures adopted under the CFSP.⁸

¹For the application of Article 47 TEU to the CFSP, see Case C-91/05, *Commission v Council*, EU:C:2008:288.

²On the reasons behind the exclusion of the Court from the CFSP, see E. Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002) at 312.

³As the General Court has confirmed '*... decisions providing for measures capable of directly affecting the legal position of individuals may be adopted on the basis of Article 29 TEU*'. See, e.g. Case T-256/11, *Ezz and Others v Council*, para 42.

⁴See Art 215 of the Treaty on Functioning of the European Union (hereafter 'TFEU').

⁵See, e.g. Case C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, para 316.

⁶For the description of the system, see, e.g. Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, paras 90–103.

⁷Opinion 2/13, accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, paras 249–57.

⁸As Hillion has put it, '*... the question might be less of whether it is desirable for the judiciary to control EU foreign policy measures, but how far it should exercise such a control ...*' 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*

The basis for the above change of paradigm – from the categorical exclusion at Maastricht to the incremental development post-Lisbon – was laid down by the drafters of the Treaties at the Convention on the Future of Europe and the 2003 and 2007 Intergovernmental Conferences: the result is now enshrined in the final sentence of the second subparagraph of paragraph 1 of Article 24 TEU and Article 275 TFEU that provide, respectively, as follows:

Article 24, paragraph 1, second subparagraph, TEU:

The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. [...] 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.

Article 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.

The aim of the present article is to look at the way in which the Court of Justice has interpreted the above provisions in its case law. While the interpretation of the second subparagraph of paragraph 1 of Article 24 TEU and Article 275 TFEU had attracted some academic attention in the past,⁹ it is only more recently that the Court has had an opportunity to address the matter in its case law with a greater degree of precision. Notably, in its opinion on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms the Court could still only note that it had ‘... not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of [the second subparagraph of Article 24(1) TEU and Article 275 TFEU]’ and that, for the purpose of adopting a position on the request for an opinion, it was ‘... 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’.¹⁰ Since then, however, the Court has delivered several judgments on the question of its jurisdiction in the field of the CFSP and it is the aim of the present article to contribute to the debate on that case law.¹¹

The article begins with a brief account of the drafting-history of Articles 24 TEU and 275 TFEU (Section 2). The structure of the main part of the contribution then corresponds to the structure of Articles 24 TEU and 275 TFEU: first, the scope of the derogation from the Court’s jurisdiction, introduced by the

Relations Law – Constitutional Challenges (Hart Publishing, 2014) 47 at 70 (emphasis added).

⁹In addition to Hillion, above n 8, see, e.g. M.-G. Garbagnati Ketvel, ‘The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy’, (2006) 44 *ICLQ* 77 and G. De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008) at 177–91.

¹⁰Opinion 2/13, above n 7, paras 251–52.

¹¹For recent commentaries addressing the post-Lisbon case law on the Court’s jurisdiction in the field of the CFSP, see notably P. Koutrakos, ‘Judicial Review in the EU’s Common Foreign and Security Policy’, (2017) 67 *ICLQ* 1; G. Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common and Foreign and Security Policy’, 13 *EuConst* (2017) 673; P. Van Elsuwege, ‘Upholding the rule of law in the Common Foreign and Security Policy: *H v. Council*’, 54 *CMLRev* (2017) 841; S. Poli, ‘The Common Foreign and Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law’, 54 *CMLRev* (2017) 1799; and C. Hillion & R.A. Wessel, ‘The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP’, in S. Blockmans and P. Koutrakos (Eds.), *Research Handbook on CFSP/CSDP* (Elgar Publishing, forthcoming in 2018).

final sentence of the second subparagraph of paragraph 1 of Article 24 TEU and the first paragraph of Article 275 TFEU, will be examined. This is followed by an analysis of the second paragraph of Article 275 TFEU whereby the Court's jurisdiction within the CFSP is again re-established (Section 3).¹² Finally, an overall assessment will be made of the case law (Section 4).¹³

2. Judicial control of the CFSP: The Pre-Lisbon Era and the genesis of article 275 TFEU

Alongside with other aspects of the powers of the Court of Justice, the question of the Court's lack of jurisdiction in the field of the CFSP was addressed in the course of the work of the Convention on the Future of Europe, a conclave assigned by the Laeken European Council of December 2001 with the task of providing input for the reform of the Union's constitutive treaties.

Within the framework of the Convention, the principal forum for addressing this question was the so-called 'Discussion Circle on the Court of Justice'. So as to prepare the meeting of the Circle of 4 April 2003,¹⁴ a working document¹⁵ outlined the following options as regards judicial control by the Court of Justice of the CFSP: first, maintaining the status quo (as described above); secondly, providing the national courts with the possibility of using the preliminary ruling procedure (Art 267 TFEU) for the purpose of *interpretation* of CFSP law; thirdly, giving individuals the right to institute actions before the Court of Justice either for the annulment of those CFSP decisions that may affect them otherwise than from an economic point of view¹⁶ and that are of direct and individual concern to them (e.g. visa bans) (Art 263 TFEU) or through claims of damages (Art 268 and 340, second and third para, TFEU); fourthly, providing the institutions and the Member States with the right to institute actions for annulment insofar as concerns CFSP acts; and, finally, extending the Court's jurisdiction to CFSP matters on the same conditions as those that applied in the areas covered by Community law.

It however soon emerged that the Discussion Circle was divided over the question of the Court's jurisdiction in the CFSP sphere. Faced with the difficulties in finding consensus on the issue the Praesidium of the Convention proposed to the Convention a draft article essentially reflecting the existing legal situation, that is, the complete exclusion of the CFSP provision from the Court's jurisdiction.¹⁷ While, in the plenary sessions of 30–31 May 2003¹⁸ and 4 July¹⁹, as well as in comments and proposed amendments²⁰, several Convention members proposed a strengthening of legal protection in the CFSP field, the draft provision concerned remained unchanged up to the very final plenary session of the Convention of 9–10 July 2003, when, following a proposal of the Praesidium,²¹ a Draft Article III-282²² was adopted as follows:

¹²The structure of the analysis therefore essentially corresponds to that employed by Wathelet AG in his opinion in Case C-72/15, *Rosneft*, EU:C:2016:381, paras 36 et seq.

¹³The article does not address the case law on the question of the Court's jurisdiction to monitor compliance with Article 40 TEU because of the fact that that case law mainly concerns the (substantive) compliance by the institutions with Article 40 rather than scope of the Court's jurisdiction in regard to the provision concerned. On the case law on the interpretation of Article 40 TEU, see Hillion, above n 8, 58–65 and R.A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy', (2016) 2 *European Papers* 439 at 457–59.

¹⁴CONV 689/1/03 REV 1, 16 April 2003.

¹⁵Working Document 10, 12 March 2003, annexed to CONV 689/1/03 REV 1, paras 1 et seq.

¹⁶At the time, the Court already had jurisdiction with regard to economic sanctions against third countries or individuals provided for in a CFSP act and based on the EC Treaty.

¹⁷Draft Article 240a, CONV 734/03, 12 May 2003, at 27. It may be noted that the Praesidium none the less mentioned the possibility of the question being raised on '... whether or not the Convention considers it appropriate to extend the possibility of actions by individuals to acts adopted on the basis of CFSP decisions that affect persons *other than on an economic level* (e.g. restrictive measures pursuant to CFSP decisions may be concerned with prohibiting the entry and free movement of persons, such as refusal of visa)'. (ibid, at 27–28, emphasis in original). The Praesidium was also of the opinion that '... the Court must have jurisdiction to examine the compatibility of a proposed international agreement that comes within the CFSP with the provisions of the Constitution (current Article 300(6))'. See also Draft Article III-278 of the Draft Constitution, Volume II, Draft text of Parts Two, Three and Four, CONV 725/03, 27 May 2003.

¹⁸Summary report on the plenary session – Brussels, 30 and 31 May 2003, CONV 783/03, 16 June 2003.

¹⁹Note on the plenary session – 4 July 2003, CONV 849/03, 14 July 2003, at 5.

²⁰Reactions to draft text CONV 802/03– Analysis, CONV 821/03, 27 June 2003, at 153.

²¹Draft Article III-278, Draft Constitution, Volume II, CONV 847/03, 8 July 2003.

²²Draft Treaty establishing a Constitution for Europe, CONV 850/03, 18 July 2003.

The Court of Justice shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III concerning the common foreign and security policy.

However, the Court of Justice shall have jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons, adopted by the Council on the basis of Article III-224, and brought in accordance with the conditions laid down in Article III-270(4).²³

The above arrangement involving the extension of the Court's jurisdiction was then maintained in all essential respects by the 2003-4 and 2007 Intergovernmental Conferences in what came to be Article 275 TFEU. There are, however, certain differences between the relevant provisions of the Draft Constitutional Treaty on the one hand and the Lisbon Treaty on the other hand. First, the first paragraph of Article 275 TFEU explicitly excludes from the scope of the Court's jurisdiction not only the primary law provisions concerning the CFSP but also '*acts adopted on the basis of those provisions*'. Secondly, while in Draft Article III-278 of the Constitutional Treaty the 'carve-out' concerning the Court's jurisdiction was defined in terms of specific provisions of primary law (Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III), the corresponding provision of the Lisbon Treaty, through a potentially broader formulation, excluded from the scope of the Court's jurisdiction the provisions '*relating to*' the CFSP. Finally, the Intergovernmental Conference of 2007 added the final sentence of the second subparagraph of paragraph 1 of Article 24 TEU as a new provision governing the exclusion of the CFSP from the Court's jurisdiction. Therefore, as a result of the above changes, one could argue that the Treaty of Lisbon incorporates a more narrow conception of the Court's jurisdiction over the CFSP than the one originally envisaged under the Draft Constitutional Treaty.²⁴

3. The Post-Lisbon case-law on the judicial control of the CFSP

3.1. Preliminary considerations

Under Article 24 TEU and Article 275 TFEU, the limits of the Court's jurisdiction in respect of the CFSP are defined in two different ways. First, the Court's jurisdiction may arise in those cases where the exclusion of '*the provisions relating to the common foreign and security policy*' as well as '*acts adopted on the basis of those provisions*' (Article 275 TFEU, first paragraph) from its jurisdiction does not apply. Secondly, if the Court's jurisdiction should be excluded on the basis of the first paragraph of Article 275 TFEU, jurisdiction may none the less arise under the conditions set out in the second paragraph of Article 275. In the following, the above two criteria for defining the Court's jurisdiction will be addressed in turn. For the sake of clarity, it also needs to be emphasised at the outset that, under the CFSP, the Court has no jurisdiction to review the legality of a conduct attributable to Member States, nor has it jurisdiction to award damages on the basis of such conduct. Therefore, an essential prerequisite for any jurisdiction of the Court under the CFSP is the attribution of a given conduct to the Union.

3.2. The scope of the exclusion from the Court's jurisdiction (Art 275 TFEU, first paragraph)

The combined reading of Article 24 TEU, paragraph 1, second subparagraph, and the second paragraph of Article 275 TFEU excludes the jurisdiction of the Court of Justice with respect of '*the provisions relating to the common foreign and security policy*' as well as with respect to '*acts adopted on the basis of those provisions*'. This section explores the scope of the exclusion in question in the light of the Court's case law on the matter.

²³It may be noted that Draft Article III-209 provided as follows:

The implementation of the common foreign and security policy shall not affect the competences listed in Articles I-12 to I-14 and I-16. Likewise, the implementation of the policies listed in those articles shall not affect the competence referred to in Article I-15.

The Court of Justice shall have jurisdiction to monitor compliance with this Article.

²⁴In addition, the provision on the Court's jurisdiction in respect of the monitoring compliance with the 'non-affectation clause' of Article 40 TEU was moved from a separate provision to Article 275 TFEU.

3.2.1. The provisions relating to the CFSP

Insofar as concerns, first, the meaning of the phrase ‘*the provisions relating to the common foreign and security policy*’ in the first paragraph of Article 275 TFEU, together with the phrase ‘*these provisions*’ in the second subparagraph of paragraph 1 of Article 24 TEU,²⁵ it will be recalled that the exclusion of the CFSP from the Court’s jurisdiction could be seen as broader than that laid down by Draft Article III-278 of the Constitutional Treaty. In the latter, the Court’s jurisdiction had been excluded in respect of the specific provisions of primary law concerning the CFSP (Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III as they then were). In other words, one could argue that Article 24 TEU and the first paragraph of Article 275 TFEU exclude from the Court’s jurisdiction not only the provisions specifically governing the CFSP (Title V) but also other, more general provisions of the Treaties when the latter are applied in relation to, or in the context of, the CFSP.

Indeed, in *Parliament v Council*,²⁶ a case concerning the legality of the Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer,²⁷ it was argued by the Council and the intervening Member States that the first paragraph of Article 275 TFEU excluded the Court’s jurisdiction in respect of Article 218(10) TFEU – a provision establishing an obligation to inform the European Parliament ‘*immediately and fully . . . at all stages of the procedure*’ (relating to the signing and conclusion of an international agreement), in a situation where the decision challenged by the Parliament fell exclusively within the CFSP.

The Court, however, did not go along with that argument. It was pointed out, first, that the first paragraph of Article 275 TFEU was to be interpreted narrowly given that it marked a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed (para 70). While acknowledging, next, that the contested decision had been adopted on the basis of a single substantive legal basis falling within the CFSP, that is Article 37 TEU, the Court pointed out that the procedural legal basis of the decision was Article 218(5) and (6) TFEU which govern the procedure for the signing and conclusion of international agreements (para 71). In the light of the fact that the procedure covered by Article 218 TFEU is of general application and therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP (para 72), it could not be argued that the scope of the limitation, by way of derogation, on the Court’s jurisdiction envisaged in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU went so far as to preclude the Court from having jurisdiction *to interpret and apply a provision such as Article 218 TFEU* which did not fall within the CFSP, even though the provision concerned lays down the procedure on the basis of which an act falling within the CFSP had been adopted (para 73). In other words, even though Council Decision 2011/640/CFSP constituted a measure adopted, from a substantive point of view, on the basis of provisions relating to the CFSP within the meaning of the first paragraph of Article 275 TFEU, the Court none the less had jurisdiction to assess whether the Council, in the context of its adoption, had complied with the *procedural* rules provided for in paragraph 10 of Article 218 TFEU.

The Court’s reasoning may be defended from the point of view of a literal interpretation of Articles 24(1) TEU and 275 TFEU: Article 218 TFEU is not a provision ‘*relating to*’ the CFSP in the sense that it does not fall within Chapter 2 of Title V of the TEU. However, the outcome of the Court’s judgment entails the annulment of an act that unquestionably falls within the CFSP Title of the Treaty, that is, an act in respect of which the Court’s jurisdiction is unequivocally excluded by the first paragraph of Article 275 TFEU. The judgment also goes further than the Court’s previous case law, most notably, in *Hautala v Council* concerning public access to a report from the Working Group of the Council on Conventional Arms Exports, adopted by the Political Committee of the Council within the framework

²⁵ According to the latter provision ‘*[t]he common foreign and security policy is subject to specific rules and procedures. [. . .] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions . . .*’

²⁶ Case C-658/11, *Parliament v Council*, EU:C:2014:2025.

²⁷ OJ 2011 L 254, p.1.

of the CFSP. According to that judgment, upheld by the Court of Justice, the fact that under Article L TEU (as it then was) the Court did not have jurisdiction to assess the lawfulness of acts falling within Title V TEU did not exclude its jurisdiction to rule on public access to those acts.²⁸ In that case, however, the annulment of the decision by the Council to refuse to grant access to the report in question did not concern an act adopted on the basis of the CFSP provisions of the Treaty but on the basis of Council Decision (93/731/EC) of 20 December 1993 on public access to Council documents.²⁹ The judgment in *Parliament v Council* also means that the Court's jurisdiction in respect of procedural aspects of CFSP law may differ depending on whether that policy is implemented through international agreements concluded under CFSP powers or through other, autonomous CFSP acts: jurisdiction over procedural aspects of an act exists in respect of the former but not in respect of the latter.

If it is accepted that the validity of a CFSP act may be reviewed by the Court in the light of rules of law extraneous to the CFSP such as Article 218 TFEU, the question is whether that jurisdiction is limited to rules of a procedural nature, or whether the Court may review the legality of CFSP acts in the light of *other non-CFSP rules of law* such as fundamental rights covered by Article 6 TEU or the principles of subsidiarity and proportionality. That question was raised but not decided in *H v Commission and Council*³⁰ – an appeal seeking to set aside an order of the General Court in which the latter had denied jurisdiction on the basis of the first paragraph of Article 275 TFEU, first, to review of a decision signed by the Chief of Personnel of the European Union Police Mission in Bosnia and Herzegovina (hereafter 'EUPM') and a decision by the Head of Mission³¹ confirming the above decision, entailing the redeployment of the applicant, an Italian magistrate, to the post of 'Criminal Justice Adviser – Prosecutor' in the regional office of Banja Luka, and, secondly, to rule on action for damages.³² The Commission sought to argue before the Court that Articles 24 TEU and 275 TFEU might be interpreted as limiting the Court's jurisdiction not with regard to acts of a certain nature and content, but only with regard to certain pleas submitted to the Court. In the Commission's submission, they would only bar the Court from interpreting provisions relating to the CFSP but not from reviewing the legality of CFSP acts when the *grounds of invalidity* invoked relate to non-CFSP provisions of the Treaties. That interpretation was however not accepted by Wahl AG³³ while the Court, after having established jurisdiction on the ground that the contested acts were not acts adopted on the basis of the provisions relating to the CFSP, did not have to address the Commission's argument.³⁴

However, it seems that the Court has now rejected the Commission's above interpretation in *Rosneft*²⁵ – a reference for a preliminary ruling relating to the validity of several provisions of Council Decision 2014/512/CFSP of 31 July 2014, concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.³⁶ In that judgment the Court held that it had no jurisdiction to review the legality of Articles 4 and 4a of the Decision³⁷ despite the fact that some of the pleas put forward by *Rosneft* alleged the incompatibility of those provisions with, inter alia, the obligation to state reasons laid down in Article 296 TFEU as well as the right to a fair hearing and to effective judicial protection, that is, non-CFSP law.³⁸ Had the argument put forward by the Commission in *H v Council and Commission* been

²⁸Case T-14/98, *Hautala v Council*, EU:T:1999:157, paras 41–42.

²⁹OJ 1993 L 340, p.43.

³⁰Case C-455/14 P, *H v Council and Commission*, EU:C:2016:569.

³¹Referred to in Article 6 of Council Decision (2009/906/CFSP) of 8 December 2009 on the EUPM in Bosnia and Herzegovina (BiH), OJ 2009 L 322, p.22.

³²Case T-271/10, *H v Council*, EU:T:2014:702.

³³See para 66 of the opinion.

³⁴Further on Case C-455/14 P, *H v Council and Commission*, see below Section 3.2.2.

²⁵According to the latter provision '[t]he common foreign and security policy is subject to specific rules and procedures. [...] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions ...'

³⁶OJ 2014 L 229, p.13, as amended by Council Decision 2014/872/CFSP of 4 December 2014, OJ 2014 L 349, p.58, and corrigendum, OJ 2014 L 350, p.15.

³⁷The Court held that Articles 4 and 4a of Council Decision 2014/872/CFSP did not constitute 'restrictive measures against natural or legal persons' in the sense of the second paragraph of Article 275 TFEU. See paras 96–99 of the judgment and, further, below Section 3.3.2.

³⁸For the sake of clarity it should be stressed that the conclusion that (outside the second paragraph of Article 275 TFEU) the Court has no jurisdiction to review the legality of acts adopted on the basis of the provisions relating to the CFSP in the

accepted, there would have been no obstacles for the Court to entertain some of the claims put forward by Rosneft in challenge of the legality of Articles 4 and 4a of the Decision 2014/512/CFSP.

3.2.2. Acts adopted on the basis of the provisions relating to the CFSP

It follows not only from the first paragraph of Article 275 TFEU but also from the Court's case law that the Court does not have jurisdiction with respect to acts adopted on the basis of the provisions relating to the CFSP. In *Manufacturing Support & Procurement Kala Naft v Council*, the General Court and, on appeal, the Court of Justice held that the sole fact that an act has been adopted on the basis of a provision falling within the CFSP excludes it from the Court's jurisdiction. If, in such a case, the Court were to have jurisdiction, that could only be based upon the second paragraph of Article 275 TFEU.³⁹ The sole exception to the above interpretation appears to be the situation covered by *Parliament v Council*:⁴⁰ if an act is based not only on provisions relating to the CFSP but also on provisions extraneous to the CFSP (such as Article 218 TFEU), the validity of the act may be reviewed by the Court in the light of the non-CFSP legal basis concerned.

A more difficult question concerns the more precise scope of the notion of '*acts adopted on the basis of those provisions*' in the first paragraph of Article 275 TFEU. In other words, when is an act to be considered an act adopted on the basis of the provisions relating to the CFSP in the sense of the provision concerned? That question arose for the first time in the context of an appeal in *Elitaliana SpA v Eulex Kosovo*⁴¹ – a dispute relating to the award of a public service contract concerning a project involving helicopter support to the European Union Rule of Law Mission in Kosovo (hereafter 'Eulex Kosovo').⁴² One of the arguments of the defendant was that by virtue of Article 275 TFEU the Court had no jurisdiction to review the legality of the measures, the validity of which had been challenged by Elitaliana, that is, the award, by Eulex Kosovo, of the public contract concerned to another tenderer. While the General Court had declined jurisdiction already on the ground that Eulex Kosovo did not have the capacity to act as a defendant in the proceedings, without considering the argument based on Article 275 TFEU,⁴³ the Court of Justice decided to consider the latter question of its own motion.

In the judgment the Court rejected the arguments based on the lack of its jurisdiction pursuant to the first paragraph of Article 275 TFEU essentially on the ground that despite the fact of Eulex Kosovo having been established pursuant to the CFSP, the award of the public contract at issue was one that gave rise expenditure to be charged from the European Union budget⁴⁴ and was, therefore, subject to the Council Regulation (EC, Euratom) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (applicable at the material time of the award of the contract).⁴⁵ The Court concluded that,

*[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.*⁴⁶

light of non-CFSP Union law does not mean some of the general principles of EU law would apply to the conduct of the CFSP. See Hillion, above n 8, at 66–9 and, further, C. Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy', (2016) 1 *European Papers* 55.

³⁹Case T-509/10, *Manufacturing Support & Procurement Kala Naft v Council* EU:T:2012:201, paras 36–39. For the judgment on appeal, see Case C-348/12P, *Council v Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 99.

⁴⁰See Case C-658/11, *Parliament v Council*, above n 26 and Section 3.2.1.

⁴¹Case C-439/13 P, *Elitaliana v Eulex Kosovo*, EU:C:2015:753.

⁴²See Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ L 42, 16 February 2008, pp.92–98.

⁴³See the order of the Order of the General Court of 4 June 2013 in Case T-213/12, *Elitaliana v Eulex Kosovo*, EU:T:2013:292.

⁴⁴According to Article 41, para 2, first subpara, of the TEU '*[o]perating expenditure to which the implementation of this Chapter [on the CFSP] gives rise shall also be charged to the Union budget, except for such expenditure arising from operations having military or defence implications and cases where the Council acting unanimously decides otherwise*'.

⁴⁵See Article 4, para 4, subpara a of the Financial Regulation, OJ L 248, 16 September 2002, pp.1–48.

⁴⁶Para 49 of the judgment.

The central rationale of the judgment, rejecting the arguments based on the lack of its jurisdiction pursuant to the first paragraph of Article 275 TFEU, is neatly encapsulated by the opinion of Jääskinen AG which the Court followed in this respect: acts such as the contested measures, which involve expenditure from the EU budget and which relate to management matters concerning the functioning of the entities created within the framework of the CFSP, must, for the purpose of ascertaining the Court's jurisdiction under Article 275 TFEU, be distinguished from acts adopted under the Treaty provisions on the CFSP as well as from acts adopted by bodies created under the provisions which relate and apply to the CFSP: jurisdiction exists in respect of the former but not in respect of the latter.⁴⁷ The logic, it is submitted, resembles the one employed by the General Court in *Hautala v Council*:⁴⁸ just as acts of the institutions based on the rules governing access to documents are subject to the Court's jurisdiction irrespective of their content relating to the CFSP, the Court's jurisdiction covers all acts relating to the implementation of the EU budget, including in the area of the CFSP. In the latter case, the justification for the existence of jurisdiction lies in the requirement of the control of the sound implementation and management of the Union's budget.⁴⁹

If in *Elitaliana SpA v Eulex Kosovo* it was the nature of the contested act as one relating to public procurement and involving expenditure from the EU budget that entailed the first paragraph of Article 275 TFEU not being applicable, the next opportunity for the Court to define the scope of its jurisdiction in regard to the CFSP was provided through *H v Commission and Council*⁵⁰. That case concerned the review of legality of a decision to redeploy, under the auspices of the EUPM, an Italian magistrate, to a regional office of the mission. Denying jurisdiction the General Court had held that the contested measures fell within the scope of the CFSP and that the applicant's situation was not covered by the second paragraph of Article 275 TFEU. In any event, those measures were, in principle, attributable to the Italian authorities and, therefore, their legality was to be reviewed by Italian courts. On appeal, Wahl AG agreed with the General Court on the question of jurisdiction. In his view there was no doubt that the contested decisions fell within the concept of acts adopted on the basis of the provisions relating to the CFSP within the meaning of Articles 24 TEU and 275 TFEU given that the Head of Mission of the EUPM had exercised the powers entrusted to him by Decision 2009/906, an act adopted pursuant to Article 43(2) TEU (para 83 of the opinion). Moreover, neither of the two specific exceptions provided for by the second paragraph of Article 275 TFEU from the principle that CFSP acts are excluded from the Court's jurisdiction was applicable to the contested decisions: the decisions concerned did not affect the application of the procedures and the extent of the powers of the institutions provided for under the non-CFSP areas of competence of the Union, nor could they be regarded as restrictive measures in the sense of the provision in question (para 87 of the opinion).⁵¹

The Court, however, concluded that the contested measures – characterized by the Court as '*acts of staff management*'⁵² – were not acts adopted on the basis of the provisions relating to the CFSP in the sense of the first paragraph of Article 275 TFEU. The Court's conclusion was essentially based on the reasoning that, had the contested decisions been directed to an official seconded to the EUPM by the European Union, the Court would have had jurisdiction to review the legality of those acts pursuant to Article 91 of the Staff Regulations of Officials of the European Communities, and, therefore, the

⁴⁷ See para 42 of his second opinion, EU:C:2014:2416.

⁴⁸ Case T-14/98, *Hautala v Council*, above n 28.

⁴⁹ As Jääskinen AG pointed out, however, the award of contracts could nonetheless fall outside the Court's jurisdiction where the contracts concerned relate to military actions operations having military or defence implications and are to be charged to the budget of the Member States (para 60 of the opinion). According to Article 41 TEU, operations having military or defence implications are to be charged to the budget of the Member States, unless the Council decides otherwise.

⁵⁰ Case T-271/10, *H v Council*, above n 32, and, on appeal, Case C-455/14 P, *H v Council and Commission*, above n 30.

⁵¹ Departing from the assessment of the General Court, however, Wahl AG concluded that the decisions in question were attributable to the European Union given that in their adoption '*... the Head of Mission acted as an EU body, by virtue of powers entrusted to him by the Council or the [Political and Security Committee...], on the basis of provisions of EU law*'. (para 99). In line with the view of Advocate General Kokott in Opinion procedure 2/13, EU:C:2014:2475, para 96, Wahl AG none the less considered that it was for the national courts to examine the lawfulness of the contested decisions and to rule on the related claim for damages.

⁵² Case C-455/14 P, *H v Council and Commission*, above n 30, para 55.

Court should also have jurisdiction to review the contested decision even when they apply to an expert seconded by a Member State who is not subject to the Staff Regulations. According to the Court, any other interpretation would have the consequence that where ‘*a single act of staff management*’ relating to field operations of a mission concerned both staff members seconded by Member States and staff members seconded by the institutions, a decision rendered by EU judicature with regard to the former would be liable to be ‘*irreconcilable*’ with that rendered with regard to the latter (para 57).

The logic behind the Court’s reasoning is to some extent similar to the one employed in *Elitaliana SpA v Eulex Kosovo*: just as in the latter case the award of a procurement contract for a CSDP mission was regarded as an act relating to the implementation of the EU budget and pertaining to the interpretation of the Financial Regulation, in *H v Commission and Council* the decision of the applicant’s redeployment was conceived of as ‘*an act of staff management*’ in the sense of the Staff Regulations. In *H v Commission and Council*, the difference is however that staff seconded by Member States do not fall within the scope of application of the Staff Regulations and, therefore, the Court needed an additional argument so as to bring a dispute concerning a national member of staff of the EUPM within the realm of its jurisdiction.⁵³ Here, the Court employed a strategy somehow reminiscent of the one used by the Court so as to justify its jurisdiction to interpret provisions of international agreements even in cases where a dispute in the main proceedings fell within the scope of the national law of a Member State.⁵⁴

The problem, however, is that it is not evident that the Staff Regulations could be relied upon in the context of an act such as the one concerning the redeployment of a member of a CSDP mission *even if directed at staff seconded by the European Union*. In the case of the applicant, it was clear that the decision on redeployment changed neither the person’s administrative status nor her grade or level of payment but merely consisted of her redeployment from one regional office of the EUPM to another. Moreover, all offices of the mission being linked to the same entity, namely the EUPM, the applicant, when applying for her secondment, had herself explicitly agreed to serve in the different offices of the mission. While there are good reasons for maintaining that, in *Elitaliana SpA v Eulex Kosovo*, the award of a contract concerning procurement of helicopters is an act relating to the implementation of the Union’s budget, it therefore appears much more problematic to argue that acts relating to *operational action of a CSDP mission*, characterized by the need of flexibility in the light of the situation of security on the ground and the goals set to ensure the mission’s CFSP/CSDP objectives, are conceived of as matters concerning the application of the Staff Regulations. Moreover, even if one supposed that the Staff Regulations were applicable to redeployment of *staff seconded by the Union*, there would exist no compelling reasons for the need of ensuring that the situation of *staff seconded by a Member State* is ‘reconcilable’ with the treatment of staff seconded by the Union given that, in any event, the Staff Regulations are not applicable to staff seconded by a Member State. Finally, the fact that the Staff Regulations, the applicability of which to staff seconded by the EU was so prominently relied upon by the Court of Justice as a ground for establishing jurisdiction, did not (and could not) play any role in the review of the legality of contested decisions has now also been confirmed by the reasoning of the General Court to which the case was referred back for the judgment on the substance of the action. In its judgment, the General Court concluded that, in adopting the contested decisions, the Head of Mission had acted in conformity with Council Decision 2009/906, as complemented by the Operation Plan (OPLAN) of the EUPM and the Guidelines for Command and Control Structure for EU Civilian Operations in Crises Management, with no reference being made to the Staff Regulations. The ‘*staff management*’ aspect of those acts, emphasized by the Court of Justice for the purposes of establishing jurisdiction, is hardly at all featured in the judgment, the General Court treating the acts in questions as falling within the operational activity of the mission aimed at ensuring the CFSP/CSDP objectives of the EUPM.⁵⁵ This shows that the characterization of the contested acts as ones of ‘*staff management*’ by the Court of Justice should be regarded as highly artificial.

⁵³ Van Elsuwege, above n 11, at 855, while in general agreeing with the Court’s conclusion on the question of jurisdiction, calls this a ‘creative solution’.

⁵⁴ See, e.g. Case C-53/96, *Hermès International v FHT Marketing Choice*, EU:C:1998:292, para 32.

⁵⁵ Case T-271/10 RENV, *H v Council*, EU:T:2018:180. See esp paras 57–72 of the judgment.

3.3. The re-establishment of the Court's jurisdiction (Art 275 TFEU, second paragraph)

3.3.1. Preliminary remarks

While the first paragraph of Article 275 TFEU excludes the jurisdiction of the Court of Justice with respect to the provisions relating to the CFSP as well as acts adopted on the basis of those provisions, the second paragraph of the provision in question provides that the Court shall, however, have jurisdiction 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 [TEU]’. The notion of ‘restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [TEU]’ reflects the wording of Article 215, paragraph 2, TFEU that authorizes the adoption, by the Council, of restrictive measures ‘against natural or legal persons and groups or non-State entities ... [w]here a decision adopted in accordance with Chapter 2 of Title V of the [TEU] so provides’. While the restrictive measures based on Article 215, paragraph 2, TFEU are subject to the standard judicial control by the Court, the second paragraph of Article 275 TFEU establishes, by way of derogation from the exclusion of the Court's jurisdiction within the CFSP, a jurisdiction to review the legality of CFSP decisions providing for restrictive measures against natural or legal persons, either in an autonomous fashion (such as restrictions of entry) or as a prerequisite for the adoption of a decision based on Article 215, paragraph 2, TFEU.

Insofar as concerns the scope of, and the prerequisites for, the Court's jurisdiction under the second paragraph of Article 275, the following preliminary observations are called for. First, the jurisdiction established by the second paragraph of Article 275 TFEU is limited to ‘proceedings ... reviewing legality of decisions providing for restrictive measures’; jurisdiction, therefore, is provided for solely for the purposes of reviewing the legality of certain decisions of the institutions and not for proceedings of any other kind. For instance, a claim seeking compensation for the damage suffered as a result of the adoption of an act relating to the CFSP falls outside the jurisdiction of the Court.⁵⁶ Regarding, secondly, the prerequisites for the Court's jurisdiction under the second paragraph of Article 275 TFEU, two central criteria are established. The first one concerns the concept of ‘restrictive measures against natural or legal persons’ and the second one the meaning of the phrase ‘proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263’ of the TFEU. In the following, these will be addressed in turn.

3.3.2. The question of jurisdiction *ex ratione materiae*: The concept of ‘restrictive measures against natural or legal persons’

To begin with, the meaning of the notion of ‘restrictive measures’ in Articles 215 and 275 TFEU has not, as such, become a subject of controversy in the case law. In brief, the term – having first emerged the practice of the Council⁵⁷ and subsequently picked up by the Convention on the Future of Europe⁵⁸ and eventually the Treaty of Lisbon – refers to sanctions as a generic and open-ended category including, *inter alia*, trade restrictions, restrictions on financing and financial aid, freezing of assets as well as travel restrictions adopted as a reaction to the conduct of a country, an entity or an individual which the EU considers unlawful.⁵⁹ Insofar concerns the jurisdiction of the Court of Justice pursuant to the second paragraph of Article 275 TFEU, the attention in the case law has rather focused on the

⁵⁶See Case T-328/14, *Jannatian v Council*, EU:T:2016:86, para 31. Another matter is that even in the field of the CFSP the jurisdiction of the Court over actions seeking to establish the Union's contractual liability may be based on Art 272 TFEU and an arbitral clause contained, for instance, in an employment contract concluded between a CSDP mission, on the one hand, and a member of its personnel employed on a contractual basis, on the other hand. See the Order of the General Court of 9 November 2016 in Case T-602/15, *Jenkinson v Council of the European Union and Others*, EU:T:2016:660, and, on appeal, Opinion of Szpunar AG in Case C-43/17, *Jenkinson v Council and Others*, EU:C:2018:231, delivered on 11 April 2018.

⁵⁷See, e.g. Common Position (98/725/CFSP) of 14 December 1998 defined by the Council on the basis of Article J.2 of the Treaty on European Union on restrictive measures to be taken against persons in the Federal Republic of Yugoslavia acting against the independent media, OJ L 345, 19 December 1998, pp.1–2.

⁵⁸See Article III-224 and III-282 of the Draft Treaty establishing a Constitution for Europe.

⁵⁹See the opinion of Wahl AG in Case C-455/14 P, *H v Council and Commission*, above n 30, paras 73–80.

criterion concerning such measures being adopted ‘*against natural or legal persons*’ as required by Article 275 TFEU. The meaning of that latter criterion may usefully be illustrated through the Court’s case law concerning restrictive measures against Iran and Russia, respectively.

In *Manufacturing Support & Procurement Kala Naft v Council*,⁶⁰ the applicant – an Iranian company owned by the National Iranian Oil Company and acting as the central purchasing body for the oil, gas and petrochemical divisions of the latter’s group – requested the annulment of Council Decision (2010/413/CFSP) of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP,⁶¹ pleading, inter alia, the illegality of Article 4 of the Decision. In that regard, the General Court pointed out, through a reasoning upheld on appeal by the Court of Justice,⁶² that the prohibition measures laid down by Article 4 of the Decision – prohibiting the sale, supply or transfer to Iran of key equipment and technology as well as related technical and financial assistance that could be used in key sectors in the oil and natural gas industries – were ‘... of a general nature, their scope being determined by reference to objective criteria and not by reference to identified natural or legal persons’.⁶³ Consequently, the Court held, the provision concerned was not a decision providing for ‘*restrictive measures against natural or legal persons*’ within the meaning of the second paragraph of Article 275 TFEU and, therefore, the Court had no jurisdiction to review their legality.

However, while Article 4 of Decision 2010/413 was not considered to provide for restrictive measures against natural or legal persons in the sense of the second paragraph of Article 275 TFEU, the General Court and the Court of Justice both came to the conclusion that ‘... the restrictive measures adopted in relation to the applicant [arose] from the implementation of Article 20 of Decision 2010/413’.⁶⁴ The latter provision provided for the freezing of the funds of certain persons and entities listed in Annexes I and II to the Decision, including the applicant who had been placed in Annex II to the Decision, first by Decision 2010/413 and then by Decision 2010/644.⁶⁵ Accordingly, the General Court considered it had jurisdiction under the second paragraph of Article 275 TFEU to review the legality of Decision 2010/413 and Decision 2010/664 in so far as those measures concerned the applicant.

The above understanding of the meaning of the notion of ‘*restrictive measures against natural or legal persons*’ under the second paragraph of Article 275 TFEU has been confirmed by the Court of Justice, inter alia, in *Rosneft*⁶⁶ in which the Court drew a distinction between two categories of measures along the lines of *Manufacturing Support & Procurement Kala Naft v Council*.⁶⁷ On the one hand, the scope of application of Articles 4 and 4a of Council Decision 2014/512 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine⁶⁸ – providing for a system of prior authorisation for the sale, supply, transfer or export of certain technologies suited to specific categories of oil exploration and production projects in Russia and for a prohibition on the provision of associated services necessary for those projects – was determined by reference to objective criteria *without targeting identified natural or legal persons* and, therefore, those measures did not constitute restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU but rather measures of general application (paras 97 and 98). On the other hand, as in the case of Article 20 of Decision 410/2013 at issue in *Manufacturing Support & Procurement Kala Naft v Council*, the assessment was different in regard to Articles 1(2)(b) to (d) and (3), Article 7 of and Annex III to Decision 2014/512. Providing, inter alia, for the prohibition of the carrying out of financial transactions with respect to entities listed in Annex III to the Decision, one of those entities being Rosneft, the measures concerned were regarded by the Court as targeting specific entities listed in the Annex in question and constituting,

⁶⁰Case T-509/10, *Manufacturing Support & Procurement Kala Naft v Council*, EU:T:2012:201.

⁶¹OJ L 195, 27 July 2010, pp.39–73.

⁶²Case C-348/12P, *Council v Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776, para. 99. See also Case T-160/13, *Bank Mellat v Council*, EU:T:2016:331, paras 33–38.

⁶³Case T-509/10, *Manufacturing Support & Procurement Kala Naft v Council*, above n 60, para 37.

⁶⁴Ibid, para 38.

⁶⁵Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ L 281, 27 October 2010, pp.81–95.

⁶⁶Case C-72/15, *Rosneft*, above n 35.

⁶⁷See opinion of Wathelet AG in Case C72/15, *Rosneft*, above n 12, paras 84–85.

⁶⁸Above n 36.

therefore, restrictive measures against the legal persons concerned, including Rosneft (para 104).

In the light of the above case law, therefore, the notion of restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU is to be understood as covering measures targeting identified natural or legal persons, in practice, entities individually named in the provisions of the act concerned. They may take the form of a freezing of funds, travel restrictions or, as demonstrated by the *Rosneft* case, the becoming an object of a prohibition of the carrying out of certain financial transactions.

3.3.3. The question of locus standi (or jurisdiction ex ratione personae): The concept of ‘proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty’

The second prerequisite for the Court’s jurisdiction under the second paragraph of Article 275 TFEU relates to the condition enabling the Court ‘... to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of [the TFEU]’. The latter provision lays down the conditions under which the so-called non-privileged applicants – that is, natural or legal persons – may institute an action for annulment of acts of the Union’s institutions, bodies, offices or agencies, their standing (*locus standi*) being limited to proceedings against ‘... an act addressed to that person or ... of direct and individual concern to them, and ... a regulatory act which is of direct concern to them and does not entail implementing measures’. Therefore, for the Court to have jurisdiction to review the legality of restrictive measures against natural or legal persons, the second paragraph of Article 275 TFEU would appear to require that the applicant in the proceedings before the Court fulfils the conditions laid down in the fourth paragraph of Article 263 TFEU.

It is one of the characteristics of restrictive measures against natural or legal persons that they may also produce legal effects vis-à-vis third parties other than those persons or entities who are the subject of those measures. As the Court had an opportunity to explain in *Gbagbo and Others v Council*⁶⁹ – a case concerning the starting point for the calculation of the period for bringing an action for annulment of measures entailing the freezing of funds,⁷⁰ comparable to the ones imposed by Article 20 of Decision 2010/413 that had been at issue in the judgment in *Manufacturing Support & Procurement Kala Naft v Council* – such measures

‘... at the same time resemble both measures of general application in that they impose on a category of addressees determined in a general and abstract manner a prohibition on, inter alia, making available funds and economic resources to persons and entities named in the lists contained in their annexes and also a bundle of individual decisions affecting those persons and entities ...’.
(para 56)

More importantly, and for the purposes of defining the Court’s jurisdiction to review the legality of such measures, the Court went on to observe that:

... as regards measures adopted on the basis of provisions relating to the Common Foreign and Security Policy, such as the contested measures, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, permits access to the Courts of the European Union. (para. 57, emphasis added)

In other words, it is only the persons or entities that are *individually identified as the subject such measures* – as opposed to (other) addressees thereof determined in a general and abstract manner⁷¹ – that may be considered as being directly and individually concerned by those measures in the sense of the fourth paragraph of Article 263 TFEU⁷² and that are, accordingly, entitled to bring an action for the

⁶⁹Joined Cases C-478/11 P to C-482/11 P, *Gbagbo and Others v Council*, EU:C:2013:258.

⁷⁰Art 5 of Council Decision 2010/656/CFSP of 29 October 2010 renewing the restrictive measures against Côte d’Ivoire, OJ L 285, 30 October 2010, pp.28–32.

⁷¹As the Court had pointed out in Case C-402/05 P, *Kadi v Council and Commission*, EU:C:2008:461, para 244 ‘... [a] prohibition [of making available funds and economic resources to those [listed] persons or entities] is addressed to whoever might actually hold the funds or economic resources in question’. See also Case C-550/09, *E and F*, EU:C:2010:382, para 51.

⁷²See Case C-200/13 P, *Council v Bank Saderat Iran*, para 120.

annulment of those measures for the purposes of, inter alia, verifying whether that individual decision complies with the general listing criteria laid down in the act upon which the listing is based.⁷³ It follows that a person or an entity that is not individually identified as the subject of restrictive measures does not, as a rule, have a standing to bring an action for annulment of the measures in question.⁷⁴ It has however been acknowledged that such a person or entity may none the less be entitled to rely, in support of an action against an individual measure (concerning, e.g. his or her listing) and by means of a *plea of illegality* provided for Article 277 TFEU, upon the irregularity of a measure of general application (e.g. the alleged irregularity of listing criteria provided for by the act in question) that constitutes the basis of an individual measure.⁷⁵

Once it has been established that the concept of restrictive measures against natural or legal persons in the second paragraph of Article 275 TFEU is limited to restrictive measures individually identifying the targeted natural or legal persons by name and that it is, as a rule, only these entities individually identified that have *locus standi* to challenge the legality of the measures concerned through a direct action based on the fourth paragraph of Article 263 TFEU, the question arises whether the jurisdiction of the Court of Justice to review the legality of restrictive measures against natural or legal persons is limited to direct actions under Article 263 TFEU or whether the jurisdiction also covers references for a preliminary ruling pursuant to Article 267 TFEU.⁷⁶ The Court had to address this question for the first time in *Rosneft* – the national court having sought to ascertain whether the Court of Justice had to jurisdiction to give a preliminary ruling, under Article 267, on the validity of an act adopted on the basis of provisions relating to the CFSP.⁷⁷ In their observations, the Council and a number of Member States argued that no such jurisdiction existed while the Commission took the view that while the Treaties did not, in principle, preclude the Court from also having jurisdiction to rule on the validity of CFSP acts such as Council Decision 2014/512/CFSP in the context of a request for a preliminary ruling, the conditions for the existence of such jurisdiction had not been met in the case at issue.

The Court, following the opinion of Wathelet AG on this point, however came to the opposite conclusion and confirmed its jurisdiction to review the legality of CFSP acts such as Decision 2014/512 under Article 267 TFEU. That conclusion was reached, essentially, through a reasoning recalling the central attributes of ‘*a complete system of legal remedies and procedures*’, including, in particular, the right of persons bringing proceedings before a national court, to challenge the legality of provisions contained in European Union acts, in order that the national court consults the Court of Justice on that matter by means of a reference for a preliminary ruling (para 67). Such requests, like actions for annulment, constituted ‘*a means of reviewing the legality of European Union acts*’ (para 68). According to the Court, that essential characteristic of the system for judicial protection extended to the review of the

⁷³See Case C-440/14 P, *National Iranian Oil Company v Council*, EU:C:2016:128, para 44, and Case T-578/12, *National Iranian Oil Company v Council*, EU:T:2014:678, para 36.

⁷⁴There however appears to be some divergencies in the way in which the Court justifies the inadmissibility of actions of annulment brought by applicants against restrictive measures not mentioning them by name. In Case T-68/12, *Hemmati v Council*, EU:T:2014:349, paras 30–33, for instance, the General Court argued that the restrictive measures provided for in Art 19(1)(b) and Art 20(1)(b) of Decision 2010/413 were measures of general application and, consequently, could not be classified as ‘decisions providing for restrictive measures against natural or legal persons’ within the meaning of the second paragraph of Article 275 TFEU. In Case T-653/11, *Jaber v Council*, EU:T:2014:948, paras 58–61, the General Court concluded that the applicant did not have any legal interest in bringing proceedings against the restrictive measures insofar as they did not mention his name. It seems that in both cases the General Court rather ought to have dismissed the requests inadmissible on the ground that the applicants did not fulfill the conditions for standing under the fourth paragraph of Article 263 TFEU.

⁷⁵See Case T-15/11, *Sina Bank v Council*, EU:T:2012:661, paras 43–46; Case T-578/12, *National Iranian Oil Company v Council*, above n 73, paras 91–95; and Case T-348/14, *Yanukovych v Council*, EU:T:2016:508, paras 57–59.

⁷⁶In the literature, Hillion, above n 8, at 51–54, and De Baere, above n 9, at 190, have expressed themselves in favour of accepting the Court jurisdiction under Article 267 TFEU. P. Eeckhout, *EU External Relations Law*, 2nd ed. (OUP, 2011), at 498, appears to take the opposite view.

⁷⁷In the Court’s previous case law, Kokott AG had concluded that the Treaties, as already mentioned did not provide for the Court of Justice to have any jurisdiction to give preliminary rulings in relation to the CFSP. See the view of Kokott AG in Opinion 2/13 regarding accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2475, paras 64 and 99. A view in favour of allowing references for a preliminary in the field of the CFSP is expressed (*obiter dictum*) by Wahl AG in Case in Case C-455/14 P, *H v Council and Commission*, above n 30, para 91.

legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP (para 69). The Court observed that neither the EU Treaty nor the FEU Treaty indicated that an action for annulment brought before the General Court, pursuant to the combined provisions of Articles 256 and 263 TFEU, constituted the sole means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons, to the exclusion, in particular, of a reference for a preliminary ruling on validity (para 70).⁷⁸ To the contrary, a reference for a preliminary ruling on the validity of a measure ‘[played] an essential part in ensuring effective judicial protection’, particularly, where, as in the main proceedings, both the legality of the national implementing measures and the legality of the underlying decision adopted in the field of the CFSP itself are challenged within national legal proceedings (para 71). Referring, further, to Article 47 of the Charter of Fundamental Rights, the Court pointed out that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law – one of the Union’s founding values (paras 72 and 73). According to the Court, the principle of effective judicial protection also implied that the exclusion of the Court’s jurisdiction in the field of the CFSP should be interpreted strictly (paras 74 and 75). In conclusion, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the second paragraph of Article 275 TFEU as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of restrictive measures against natural or legal persons (para 76).

Finally, relying essentially on the *Foto-Frost* case law⁷⁹, the Court rejected the argument that courts and tribunals of Member States would be capable of ensuring effective judicial protection if the Court had no jurisdiction to give preliminary rulings on the validity of decisions in the field of the CFSP that prescribe the adoption of restrictive measures against natural or legal persons (paras 77–80).⁸⁰

It is evident that the Court’s conclusion on the question of jurisdiction is based on an interpretation that departs from the wording of the second paragraph of Article 275 TFEU. While in some of the opening paragraphs of its assessment of that question⁸¹ the Court makes reference to the wording of the provision concerned, it turns, in the operative part of the reasoning, a blind eye to a central condition for establishing jurisdiction – that is, that the jurisdiction arising from the second paragraph of Article 275 TFEU is limited to ruling on ‘*proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*’. In the reasoning following paragraph 65 of the judgment that phrase in Article 275 TFEU, let alone its purpose and meaning, is not revisited by the Court. Nor did the Court intend to counter the arguments, put forward by the parties having submitted observations apart from Rosneft and the Commission, to the effect that the purpose of the phrase in question had been to limit the Court’s jurisdiction to direct actions brought pursuant to Article 263 TFEU. Those arguments were met with silence in the judgment. Yet, at the same time it is obvious that, in the light of the wording of the second paragraph of Article 275 TFEU, the provision in question could not conceivably be interpreted as conferring upon the Court jurisdiction to rule on anything other than *actions*

⁷⁸More specifically, the Court observed that ‘... the last sentence of the second subparagraph of Article 24(1) TEU refers to the second paragraph of Article 275 TFEU in order to determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality’. (para 70). Similar reasoning appears to have been put forward by Wathelet AG in para 61 of his opinion.

⁷⁹Case 314/85, *Foto-Frost*, EU:C:1987:452.

⁸⁰In the past, Kokott AG and Wahl AG had suggested that, in the absence of the jurisdiction of the CJEU, domestic courts of the Member States had the power to review the compatibility of certain CFSP acts with higher-ranking EU law and, as the case may be, to suspend their application in the given case (see the view of Kokott AG in Opinion 2/13, above n 7, paras 99–100) and, possibly, award damages (opinion of Wahl AG in Case in Case C-455/14 P, *H v Council and Commission*, above n 30, paras 41–44 and 101–103). Neither Kokott AG nor Wahl AG had however argued that a domestic court would have the power to declare a CFSP act invalid but rather a power to ‘*disapply [it] in a particular dispute*’ (Kokott) or ‘*at most suspend the applicability of the act vis-à-vis the applicant*’ (Wahl). While not contesting the jurisdiction of domestic courts as such, in his opinion in *Rosneft*, Wathelet AG, arguing in favour of acknowledging the jurisdiction of the CJEU under Article 267 TFEU in matters of the CFSP, seemed to distance himself from the position expressed by Kokott AG in Opinion 2/13. See especially footnote 15 of the opinion Wathelet AG.

⁸¹See paras 60, 61 and 65 of the judgment.

for annulment lodged pursuant to the fourth paragraph of Article 263 TFEU by natural or legal persons against decisions providing for restrictive measures adopted by the Council under the CFSP.⁸² It is evident that a reference for a preliminary ruling does not constitute ‘*proceedings brought*’ before the Court of Justice in any normal meaning of the phrase; it goes without saying that no ‘proceedings’ are ‘brought’ before the Court of Justice under Article 267 TFEU, a reference for a preliminary ruling rather providing for an instrument of cooperation between the Court of Justice and a national court, whereby the former supplies the latter with the information on the interpretation of Union law which is necessary in order to enable them to settle disputes which are brought before them.

No more convincingly can the phrase ‘*proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*’ be interpreted as referring to proceedings brought before a national court, given the fact that the conditions for standing set out in the fourth paragraph of Article 263 TFEU have no bearing in the context of proceedings brought before domestic courts insofar as concerns the right of a party to challenge an act of an institution by means of a plea of illegality. To the contrary, according to settled case law (outside the CFSP), persons bringing proceedings before a national court have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, *unless* they unquestionably had had the right to bring an action against those provisions on the basis of Article 263 TFEU and had none the less failed to exercise that right.⁸³ In other words, if a claimant pleading invalidity of a Union measure before a national court had unquestionably met the conditions for standing laid down in the fourth paragraph of Article 263 TFEU, and nonetheless failed to lodge an action for annulment, the Court would not be entitled to review the legality of the provisions in question under Article 267 TFEU. Therefore, there would have been no logic in providing, in the second paragraph of Article 275 TFEU, the Court with jurisdiction under Article 267 TFEU exclusively for those cases in which an applicant in the main proceeding is deemed to meet the conditions of standing under Article 263 TFEU.

In the judgment, the Court then sought to justify the overlooking of the reference to Article 263 TFEU in the second paragraph of Article 275 TFEU by three arguments, one of which was based on the wording of Article 24, paragraph 1, second subparagraph, of the TEU, and the two others on the essential function of a reference for a preliminary ruling on the validity of a measure in ensuring ‘*effective judicial protection*’ (para 70) and on the ‘*necessary coherence of the system of judicial protection*’ (para 78), respectively. As far as the first argument is concerned, the Court observed that neither the EU Treaty nor the TFEU indicated that an action for annulment brought before the General Court constituted the sole means for reviewing the legality of decisions providing for restrictive measures against natural or legal persons, to the exclusion, in particular, of a reference for a preliminary ruling on validity. Following Wathelet AG,⁸⁴ the Court observed that the last sentence of Article 24 TEU, paragraph 1, second subparagraph, refers to the second paragraph of Article 275 TFEU ‘... *in order to determine not the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality*’. While such a reading of Article 24 TEU might seem plausible in the light of, for instance, the French version of the provision,⁸⁵ the Court’s reasoning does not explain why the second paragraph of Article 275 TFEU refers to ‘*proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article*

⁸²See the view of Kokott AG in Opinion 2/13, above n 7, paras 84 and 89, and opinion of Wahl AG in Case C-455/14 P, *H*, above n 30, para 34, where it seems to be taken for granted that the Court’s jurisdiction in that regard is limited to direct actions.

⁸³Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90, paras 23–25.

⁸⁴See his opinion, paras 61–63.

⁸⁵Indeed, there appears to be a difference between at least the English and French versions of the provision. While the English version of the last sentence of the second subparagraph of the first paragraph of Article 24 TEU refers to the Court’s jurisdiction ‘... *to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU]*’ (emphasis added), the French version speaks of jurisdiction ‘... *pour contrôler la légalité de certaines décisions visées à l’article 275, second alinéa, du [TFUE]*’ (emphasis added). In other words, the English version makes reference to the entire second paragraph of Article 275 TFEU (including the reference to ‘*proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*’), while in the French version the cross-reference appears to be limited to certain decisions provided for by the second paragraph of Article 275 TFEU.

263 of this Treaty'. Had the intention of the drafters of the Treaty been to grant the Court jurisdiction to review the legality of restrictive measures against natural or legal persons under the CFSP in both direct actions and references for a preliminary ruling, they certainly would not have included the above phrase in the second paragraph of Article 275 TFEU. Therefore, the Court's conclusion on the question of jurisdiction is contrary to both the wording of the Treaty⁸⁶ as well as the intentions of its drafters.⁸⁷

Insofar as concerns, secondly, the imperative of providing for effective legal protection as well as of preserving the coherence of the system of judicial protection, it is true that the Court has on certain exceptional occasions interpreted its own jurisdiction 'in a manner exceeding the literal scope of a given measure, inter alia in order to fill a lacuna in the system of legal protection or to secure the coherence of the Union's legal order'.⁸⁸ In none of those cases, however, did the Court of Justice deduce from the requirement of effective legal protection entirely new legal remedies or types of action or procedure, as it did in *Rosneft*.⁸⁹ In that regard, it should be borne in mind that while the reference for a preliminary ruling, like the action for annulment, constitutes a means for reviewing the legality of European Union acts, those remedies together constituting the 'complete system of legal remedies', there are also significant differences between them insofar as concern both their aim and consequences.⁹⁰ Moreover, it seems doubtful whether the assumption of jurisdiction by the Court was actually necessary for the purposes of providing effective legal protection to an entity such as Rosneft against whom restrictive measures are adopted, given that the addressees of such measures would in any event have the possibility of challenging those measures before the General Court,⁹¹ something Rosneft had in fact done.⁹² While, admittedly, a challenge to the invalidity cannot be dismissed on the basis of the *Textilewerke Deggendorf* case law in those cases where the person concerned has in fact brought an action for annulment under Article 263 TFEU within the prescribed period, it is evident that the role played by the preliminary reference procedure, as part of the 'complete system of legal remedies', mainly relates to circumstances where a person seeking to challenge the validity of a measure does not meet the conditions for standing set out in the fourth paragraph of Article 263 TFEU. As we have seen, however, an entity against whom restrictive measures within the meaning of the second paragraph of Article 275 TFEU have been adopted is usually deemed to meet those conditions.

Therefore, for the requirement of ensuring effective legal protection as the rationale of the judgment to serve some purpose, the Court's reasoning should probably be interpreted as meaning that the reference to the conditions of fourth paragraph of Article 263 TFEU in the second paragraph of Article 275 TFEU has no significance at all. In other words, the Court would have jurisdiction under Article 267 TFEU to review the legality of a CFSP measure providing for restrictive measures against natural or legal persons *irrespective of* whether it is the addressee of a given measure, or an entity otherwise fulfilling the conditions set out in the fourth paragraph of Article 263 TFEU, that is pleading for its illegality before the national court. In this case, the Court's jurisdiction would cover, for instance, a situation where a financial institution to which the prohibition to make loans or credit to an institution such as Rosneft applies under Article 1, paragraph 3, of Council Decision 2014/512/CFSP seeks to challenge the legality of the provision concerned before a national court.⁹³ As a matter of fact, that interpretation appears now to have been

⁸⁶See the view of Kokott AG in Opinion 2/13, above n 7, para 89, observing that '... the clear wording of the second alternative in the second paragraph of Article 275 TFEU ... refers only to jurisdiction for actions for annulment brought by individuals in accordance with the fourth paragraph of Article 263 TFEU against restrictive measures, but not to any other subject-matter of an action or type of action, and certainly not to references from national courts or tribunals as provided for in Article 267 TFEU'.

⁸⁷In that regard, it will also have to be remembered that the possibility of conferring upon the Court jurisdiction for references for a preliminary rulings in the field of the CFSP was considered by the Convention on the Future of Europe (see the text accompanying n 12 above), without however being accepted by either the Convention or the Intergovernmental Conference. See the view of Kokott AG in Opinion 2/13, above n 7, para 90.

⁸⁸K. Lenaerts & P. van Nuffel, *European Union Law*, 3rd ed. (Sweet & Maxwell, 2011) pp.524–25, with examples.

⁸⁹See the view of Kokott AG in Opinion 2/13, above n 7, paras 92–94.

⁹⁰See, e.g. M. Broberg & N. Fenger, *Preliminary References to the European Court of Justice* (OUP, 2010) p.220.

⁹¹See paras 102–4 of the judgment and the case-law cited therein. As Poli has submitted, it is 'clear' that Rosneft had had standing to challenge Council Decision 2014/512/CFSP in a direct action. See Poli, above n 11, at 1823. But see Butler, above n 11, at 683.

⁹²See Case T-715/14, *Rosneft and Others v Council*, OJ C 431, 1 December 2014, p.40 (pending).

⁹³As another example of a category that could benefit from the Court jurisdiction under Article 267 TFEU Hillion, above n 8,

confirmed by the Court in the judgment, handed down fourteen days before the *Rosneft* judgment, in *A and Others*⁹⁴ where the Court reviewed the validity of, inter alia, Common Position 2001/931,⁹⁵ as amended by Common Position 2006/380,⁹⁶ in the context of preliminary ruling notwithstanding the fact that the applicants in the main proceedings had not been individually identified by the Common Position, nor necessarily would otherwise have fulfilled the conditions set out in the fourth paragraph of Article 263 TFEU.⁹⁷ It therefore appears to follow from that judgment that the Court has jurisdiction to review the legality of CFSP measures providing for restrictive measures against natural or legal persons under Article 267 TFEU irrespective of whether the criteria for standing set out in the fourth paragraph of Article 263 TFEU are met by the applicant.⁹⁸

As regards, finally, the Court's desire, in *Rosneft*, to extend the application of the *Foto-Frost* case law to CFSP acts so as to guarantee '*necessary coherence of the system of judicial protection*', it is submitted that the judgment should not be interpreted as definitely precluding domestic courts of Member States from independently providing for legal protection against CFSP acts in those cases which do not fall within the jurisdiction of the Court of Justice, for instance, in the light of the fact that a given act does not provide for '*restrictive measures against natural or legal persons*' within the meaning of the second paragraph of Article 275 TFEU.⁹⁹ In those cases where there is a need of legal protection against CFSP acts in respect of the prerequisites for the Court's jurisdiction are not fulfilled, one should therefore, even after *Rosneft*, rely on national courts to provide for such protection.

4. Assessment

It will be recalled that when the Member States agreed on a Treaty amendment extending the jurisdiction of the Court of Justice to the CFSP at the 2007-8 Intergovernmental Conference, that extension was intended to provide a remedy in *one specific situation* in which there was, under the previous Treaties, deemed to exist a need to enhance the legal protection of individuals – that is, in regard to restrictive measures adopted on the basis of CFSP decisions in respect of which no implementing measures on the basis of Article 215 TFEU were needed. While more ambitious proposals concerning the extension of the jurisdiction were considered by the European Convention in particular, there was no sufficient support among the Member States for them to be adopted. Hence, the exclusion of the Court's jurisdiction in the field of the CFSP was maintained by the Treaty of Lisbon, save for the carefully circumscribed exception to that exclusion now provided for in the second subparagraph of paragraph 1 of Article 24 TEU and the second paragraph of Article 275 TFEU, establishing the Court's jurisdiction '*to monitor compliance with Article 40 [TEU]*' and '*to rule on proceedings, brought in accordance with the conditions laid down in the*

at 54, mentions family members of the addressees of restrictive measures who would not be able to challenge those measures under the fourth para of Article 263 TFEU.

⁹⁴Case C-158/14, *A and Others*, EU:C:2017:202.

⁹⁵Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), OJ L 344, 28 December 2001, p.93.

⁹⁶OJ L 144, 31 May 2006, p.25.

⁹⁷See paras 71–74. As the Court explained, the applicants were not themselves included on the list of those whose funds were to be frozen through acts implementing Common Position 2001/931, as amended, but had allegedly been involved in the *Liberation Tigers of Tamil Eelam (LTTE)* – identified, by virtue of Common Position 2006/380 and subsequent common positions amending and updating Common Position 2001/931, as an entity to which Common Position 2001/931 applies.

⁹⁸Curiously enough, in *A and Others*, the Court, unlike Sharpston AG (see paras 89–91 of her opinion), did not devote a word for addressing the question of its jurisdiction to review the validity of CFSP acts under Article 267 TFEU. However, whatever the reason for Court for side-stepping the question in that judgment, the outcome of *Rosneft* would have been evident to anyone familiar with the Court's treatment of Common position 2001/931 in *A and Others*! It may also be noted that in Case C-550/09, *E and F*, above n 71, the Court had already interpreted Common Position 2001/931 in the context of a reference for a preliminary ruling '*for the purposes of interpreting*' Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28 December 2001, p.70. See paras 70–71 of the judgment.

⁹⁹Indeed, in Case C-72/15, *Rosneft*, above n 35, the Court held that '*...the power to declare [acts of the European Union institutions] invalid should be reserved to the Court ... where the Treaties confer on the Court jurisdiction to review their legality*'. (para 78, emphasis added). As Hillion and Wessel, above n 11, have submitted, '*[o]ne may ... infer from the above dictum that for CFSP-related cases falling outside the scope of Article 275(2) TFEU, by contrast, Member States' courts are able to exercise what remains their judicial power*'.

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 [TEU]. The change, therefore, was to enable natural or legal persons to challenge, through a direct action provided for in Article 263 TFEU, restrictive measures adopted against them on the basis of CFSP provisions of the TEU.

The above analysis of the case law shows that the Court construes its jurisdiction in CFSP matters more broadly than what was the intention of the drafters of the Treaties.

In *Rosneft* in particular, the Court has construed the conferment of jurisdiction in the second paragraph of Article 275 TFEU as covering not only direct actions but also references for a preliminary ruling. The Court, moreover, has interpreted the exclusion of its jurisdiction in the first paragraph of Article 275 TFEU concerning ‘*the provisions relating to the common foreign and security policy*’ and ‘*acts adopted on the basis of those provisions*’ in a distinctively narrow fashion by establishing its jurisdiction to review CFSP acts in the light of Article 218 TFEU (*Parliament v Council*) as well as by either accepting to review the legality of non-CFSP acts adopted in a CFSP context (*Elitaliana v Eulex Kosovo*) or artificially characterizing CFSP acts as non-CFSP acts so as to extend its jurisdiction (*H v Council and Commission*).

In the submission of the present author, two of those judgments merit critical scrutiny. In *Rosneft*, the Court employed a selective reading of the Treaties, coupled with arguments based on the need to ensure effective legal protection and to maintain the coherence of Union law, whereas in *H v Council and Commission*, a CFSP act of an operational nature was artificially converted by the Court to an administrative act of ‘*staff management*’ relating to the application of the Union’s Staff Regulations. While the arguments employed by the Court differ from one case to another, the more general paradigm adopted by the Court is the same in all cases relating to its jurisdiction over the CFSP. The Court regards the exclusion of the Court’s jurisdiction in the CFSP by the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU as a derogation from the rule of the general jurisdiction conferred on the Court by Article 19 TEU that must be interpreted narrowly. However, as has been argued by *Koutrakos* in particular, the Court could also have taken a different perspective and treated the conferment of jurisdiction in the second paragraph of Article 275 TFEU as the derogation, introduced by the Treaty of Lisbon, from the general rule of the Court’s lack of jurisdiction in the field of the CFSP.¹⁰⁰ Given the narrow conception of the conferment of jurisdiction envisaged by the Intergovernmental Conference, the latter would have been more faithful to the wording and purpose of the Treaties.

While some may have welcomed the judgments in *Rosneft* and *H v Council and Commission* from the point view of enhancing legal protection under the CFSP,¹⁰¹ the concrete contribution by the judgments in question towards that purpose appears to remain relatively limited. In the circumstances of *Rosneft*, a remedy before the General Court would in any event appear to have been available to the claimant, as indeed to most, if not all, natural or legal persons against whom restrictive measures in the sense of the second paragraph of Article 275 TFEU are adopted. Admittedly, it appears to follow from *A and Others* that the Court considers to have jurisdiction to review the legality of restrictive measures against natural or legal persons under Article 267 TFEU irrespective of whether those measures have been directed against the person seeking to challenge the legality of the measures in question. If that is the case, the jurisdiction of the Court in respect of CFSP act is broader under Article 267 TFEU than under Article 263 TFEU. On the other hand, *Rosneft* also confirms that the Court’s jurisdiction within the CFSP, apart from the control of application of Article 40 TEU, continues to be limited to the review of ‘*restrictive measures against natural or legal persons*’ in the sense of the second paragraph of Article 275 TFEU, thereby excluding from the Court’s jurisdiction other CFSP acts capable of having legal effects upon individuals (e.g. acts adopted in the context of CSDP missions). Finally, remedies other than the review of legality (notably claims for damages) are with all likelihood excluded from the Court’s jurisdiction. In conclusion, therefore, the complete system of legal remedies, transplanted by the Court into the domain of the CFSP, appears, in a final analysis, less complete and more artificial than what that notion has come to imply in

¹⁰⁰See *Koutrakos*, above n 11, at 10–11.

¹⁰¹See *Van Elsuwege*, above n 11, and, more cautiously, *Poli*, above n 11.

the more traditional context of providing legal protection in the European Union.

To conclude, if the CFSP should to be endowed with a system of complete legal remedies (as it no doubt should in the view of the present author), it would not be the system of remedies traditionally proclaimed by the Court in the realm of *EU-law-minus-CFSP* but rather a system of a different kind, *specific to the CFSP*, where appropriate remedies are provided by the Court of Justice insofar as that court has jurisdiction and, for the remainder, by domestic courts of the Member States, in accordance with the first paragraph of Article 19 TEU.¹⁰² Through its case law reviewed in this article the Court has created, or reinforced, one part of the system, but, for the CFSP system of judicial protection to reach a stage of genuine completeness, the Court would necessarily have to work together with the judiciaries of the Member States. Such an approach would not only be faithful to the specific characteristics of the CFSP but it would also enable to remove the CFSP-related obstacles to the accession of the Union to European Convention on Human Rights. As regards those acts of the Union's institutions in respect of which the Court has no jurisdiction there would be a direct remedy from domestic courts of the Member States to the European Court of Human Rights, in full conformity with the powers of the Court of Justice (which, in this case, do not exist).

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Declarations and conflict of interests

The author declares no conflicts of interest with this work.

¹⁰²In this sense, Hillion & Wessel, above n 11.