JUDICIAL REVIEW AND THE COMMON FOREIGN AND SECURITY POLICY: LIMITS TO THE GAP-FILLING ROLE OF THE COURT OF JUSTICE

PETER VAN ELSUWEGE*

Abstract

Since Opinion 2/13, the ECJ has gradually clarified that its role in the field of CFSP is less limited than a cursory reading of the Treaties may suggest. This article aims to take stock of this evolving case law and discuss the remaining uncertainties and criticisms regarding the Court's approach. After a brief introduction to the ambiguous position of the CFSP in the EU legal order, specific attention is devoted to the "gap-filling" role of the ECJ's case law in relation to CFSP matters. It is argued that the Court has developed a consistent line of case law, based on the horizontal application of general constitutional principles and mechanisms. The question remains how much further this "gap-filling role" can be stretched in light of the principles of institutional balance and conferral. The article discusses to what extent the specific features of EU law as regards judicial review in CFSP matters may still be regarded as an obstacle for EU accession to the ECHR.

1. Introduction

The Common Foreign and Security Policy (CFSP) occupies a peculiar position in the EU legal order. On the one hand, it is fully integrated in the EU’s single legal framework and subject to the same principles and objectives as the other EU policy areas. On the other hand, it remains subject to specific rules and procedures, including – amongst others – a more limited jurisdiction for the Court of Justice of the European Union. Pursuant to the second subparagraph of Article 24(1) TEU and Article 275(1) TFEU, the CJEU cannot, in principle, adjudicate with respect to acts adopted in the context of the CFSP. This is a so-called “carve-out” derogating from the general jurisdiction which Article 19 TEU confers on the CJEU to ensure that in the

* Professor of European Union Law and Jean Monnet Chair, Ghent European Law Institute (GELI), Ghent University, Peter.VanElsuwege@UGent.be.
1. Art. 23 TEU.
2. Art. 24(1) TEU.
interpretation and application of the Treaties the law is observed.\textsuperscript{3} As the Court already held on several occasions, this exception must be interpreted narrowly.\textsuperscript{4} Moreover, the last sentence of the second subparagraph of Article 24(1) TEU and Article 275(2) TFEU include an “exception to the exception” in the sense that the CJEU is competent to monitor compliance with Article 40 TEU and to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP provisions in the TEU. This “claw-back” provision, in combination with the full integration of the CFSP in the EU legal order, implies that the CJEU is not entirely powerless in the area of CFSP.\textsuperscript{5}

On the contrary, the changes introduced by the Treaty of Lisbon implied a significant shift in perspective.\textsuperscript{6} Following the abolition of the pillar structure, the CFSP is no longer to be regarded as a separate field of intergovernmental cooperation shielded from any judicial intervention. Rather, it is part and parcel of a Union based on respect for the rule of law where the right to an effective remedy is guaranteed under Article 47 CFR. Of course, the constitutional limitations to the jurisdiction of the CJEU cannot be ignored. The “drafters of the Treaties” did not grant the CJEU general and absolute jurisdiction over the entire spectrum of EU activities, but decided to retain a more limited regime of judicial review in the field of CFSP. Accordingly, the CFSP may well be described as \textit{lex imperfecta}: whereas CFSP acts are legally binding on the EU institutions and Member States, the judicial options to

\textsuperscript{3} The terms “carve-out” and “claw-back” to describe the scope of jurisdiction of the Court of Justice in CFSP matters are borrowed from the Opinion of A.G. Wathelet in Case C-72/15, PJSC Rosneft Oil Company v. Her Majesty’s Treasury and others, EU:C:2016:381, paras. 38 and 50.


ensure compliance with these acts are limited. This is manifested in two dimensions. First, there is no explicit judicial procedure for enforcement and penalties in case of breaches of the CFSP obligations. Second, there are only limited remedies available to individuals whose rights may be breached by acts adopted in the framework of the CFSP.

In view of its role to ensure that in the interpretation and application of the Treaties the law is observed, the CJEU must in so far as possible avoid the existence of lacunae which would contravene the normative foundations of the Union. The avoidance of normative gaps may even be regarded as a prerequisite for the autonomy of the EU legal order. From this perspective, “the very nature of EU law requires the Court of Justice to ‘find’ the law (‘Rechtsfindung’) by fashioning general principles of law where necessary”. Of course, this gap-filling role is not unlimited. Like any other institution, the Court has to act within the framework of its conferred powers as set out in Article 13(2) TEU. In other words, the CJEU cannot step beyond the boundaries defined under primary EU law to expand its own jurisdiction in order to remedy potential loopholes in the system of judicial protection as defined in the Treaties.

Obviously, the tension between the gap-filling role of the Court of Justice and the limits to its own jurisdiction is nothing new in the process of European integration. It suffices to refer to the landmark Les VERTS judgment of 1986 to demonstrate how the rule of law, as a fundamental constitutional principle, has been used to avoid certain gaps in the system of judicial protection. Later, in the rulings of Unión de Pequeños Agricultores and Jégo Quéré, the Court clarified the limits of this approach when it concluded that the principle of effective judicial protection does not allow to go beyond its jurisdiction as defined in the Treaties. If the system of judicial review is to be amended, this is not the task of the Court but of the Member States in accordance with Article 48 TEU.

Arguably, this old debate about how far the Court’s jurisdiction can be stretched in order to protect fundamental constitutional principles has gained new momentum following the entry into force of the Treaty of Lisbon. This is
very visible in relation to the judicial review of acts adopted in the field of CFSP. Taking into account the integration of the CFSP in the EU legal architecture, the CJEU is increasingly called to clarify the precise boundaries of its jurisdiction in this field of EU law. The result is an incremental process where the Court gradually defines the outer limits of its gap-filling role in upholding the rule of law against a background of constitutional exceptions to its mandate. Since Opinion 2/13, where the Court simply observed that it had not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters, the issue of judicial control over the CFSP returned in a series of judgments.

The aim of this contribution is to take stock of this evolving case law and to discuss the remaining uncertainties and criticisms regarding the Court’s approach. After a brief introduction to the ambiguous position of the CFSP in the EU legal order, specific attention is devoted to the “gap-filling” role of the Court’s case law in relation to issues such as the procedure for the conclusion of international agreements, the choice of legal basis for the adoption of EU acts covering CFSP and non-CFSP competences, and the options of judicial redress in relation to CFSP decisions pertaining to restrictive measures. Taken together, it is argued that the Court has developed a consistent line of case law, based on the horizontal application of general constitutional principles and mechanisms. The question remains how much further the “gap-filling role” of the Court can be stretched in light of the principles of institutional balance and conferral. In particular, the article discusses to what extent the specific features of EU law as regards judicial review in CFSP matters may still be regarded as an obstacle for EU accession to the ECHR.

14. Arguably, a similar evolution is visible with respect to the jurisdiction of the CJEU in relation to rule of law challenges in EU Member States; see Van Elsuwege and Gremmelprez, “Protecting the rule of law in the EU legal order: A constitutional role for the Court of Justice”, 16 EuConst (2020), 8–32.
2. The ambiguous status of the CFSP in the EU legal order: A legacy from the past

The scope of the CJEU’s jurisdiction in relation to the CFSP can only be understood in light of the broader constitutional framework of the EU legal order and the gradual evolution of the European integration process. In particular, the current Treaty provisions defining the special status of the CFSP are a legacy of the old pillar structure (section 2.1). Hence, for the interpretation of the relevant provisions it is important to trace the “intention of the drafters of the Treaties”, which is frequently invoked as an argument to criticize the case law of the Court of Justice (section 2.2).18

2.1. From a separate pillar to a special area of EU law

The Treaty of Lisbon provided a significant step in the gradual evolution of the CFSP from a purely intergovernmental system based on general international law into a fully integrated part of EU law.19 This evolution has significant consequences. First, it implies that the mechanisms of enforcement and sanctioning which exist in public international law are no longer available.20 The CFSP, just like any other EU policy, is subject to Article 344 TFEU meaning that only the methods of dispute settlement provided in the EU Treaties can be used. In Opinion 2/13, the Court of Justice firmly defined this requirement as “a fundamental feature of the EU legal system”, precluding the possibility of any external judicial control on the interpretation and application of EU law.21 Second, in accordance with the Court’s standing case law, Member States may not unilaterally decide to adopt corrective or protective measures to compensate in case of non-compliance on behalf of the EU institutions or other Member States.22 Third, proceeding from a holistic interpretation of the EU Treaties, the powers of the CJEU in the area of CFSP are more broadly defined than could be expected from a cursory reading of

22. Case C-45/07, Commission v. Greece, EU:C:2009:81, para 26; Case 232/78, Commission v. France, EU:C:1979:215, para 9. Arguably, this principle – which is based on the duty of sincere cooperation – also applies in relation to the CFSP and notwithstanding the limits to the jurisdiction of the CJEU. It presupposes that Member States raise issues of non-compliance with CFSP obligations within the Council and European Council, which are the key institutions responsible for the implementation of the CFSP under Art. 24 TEU. For comments, see further Van Elsuwege, “The duty of sincere cooperation and its implications for
Article 24 TEU and Article 275 TFEU. The latter provisions cannot be interpreted in isolation from the general constitutional principles of the EU. This derives in particular from a combined reading of Article 2 TEU, which defines the EU’s foundational values, and Articles 21 and 23 TEU. The link between the latter two articles is important. Article 21 TEU belongs to the “general provisions on the Union’s external action” whereas Article 23 TEU is subject to “the specific provisions on the CFSP”. Yet, Article 23 TEU expressly provides that the Union’s action in relation to the CFSP “shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions [on the Union’s external action]”.

The EU’s external action, which encompasses both CFSP and non-CFSP external policies, is based on a single set of objectives – defined in Article 21 TEU – and is guided by the EU’s internal principles and values. Hence, the EU Treaty provisions relating to the CFSP cannot be separated from the general structure and logic of the EU’s constitutional architecture. The EU’s external action, which encompasses both CFSP and non-CFSP external policies, is based on a single set of objectives – defined in Article 21 TEU – and is guided by the EU’s internal principles and values. Hence, the EU Treaty provisions relating to the CFSP cannot be separated from the general structure and logic of the EU’s constitutional architecture.24

Applied to the specific question of judicial review in relation to the CFSP, it follows from the principle of effective judicial protection – as an inherent aspect of the rule of law – that derogations from the CJEU’s general jurisdiction laid down in Article 19 TEU must be interpreted narrowly.25 It is noteworthy in this respect that the ECJ in Rosneft further added Article 47 CFR to support this interpretation.26 Whereas the Court expressly admitted that the Charter cannot confer jurisdiction where it is excluded by the EU Treaties, the Charter is horizontally applicable to all situations falling within the scope of EU law and, therefore, also to the CFSP.27 As argued by Advocate General Tanchev in another context, there is a “constitutional passerelle” between Article 47 CFR and Article 19(1) TEU in the sense that both provisions “share common legal sources and are circumscribed by the broader autonomous Member State action in the field of external relations” in Varju (Ed.), Between Compliance and Particularism. Member State Interests and European Union Law (Springer, 2019), pp. 285–288.

23. On the significance of Art. 23 TEU, see also the Opinion in Case C-72/15, Rosneft, para 66.
24. In Bank Refah Kargaran, the ECJ explicitly referred to the single legal structure of the Union and the integration of the CFSP into the general framework of EU law to reject arguments of the Council based on its pre-Lisbon case law and the old distinction between the Community and the Union. See Case C-138/19 P, Bank Refah Kargaran, paras. 47 and 48.
25. The Court for the first time referred to the narrow interpretation of the exceptions to its jurisdiction in CFSP matters in Case C-658/11, Parliament v. Council (Mauritius), para 70. However, on this occasion, it did not make a link with Art. 2 TEU. Such a link was made explicit in the Opinion in Case C-455/14 P, H v. Council, para 41.
26. Case C-72/15, Rosneft, para 74. A similar approach is followed in Case C-138/19 P, Bank Refah Kargaran, para 36.
matrix of general principles of EU law”. Without entering into the debate on the precise delimitation of the scope of application of the Charter, it suffices to observe that the protection of fundamental rights covers the entire scope of EU (external) action and the CFSP is no exception. This is another important element pointing to the “normalization”, “mainstreaming”, or “assimilation” of the CFSP into the Union legal order.

On the other hand, however, the EU Treaties also include several provisions stressing the distinctive nature of the CFSP in comparison to the other EU policies. As foreseen in Article 24 TEU, the CFSP is “subject to specific rules and procedures” implying a more limited role for the traditional supranational institutions and the absence of legislative acts. The CFSP particularity is also visible in the sense that it is the only policy area defined in the TEU instead of the TFEU. Moreover, the precise nature and scope of the CFSP competence is difficult to define. For instance, it is noteworthy that the CFSP is not mentioned in the “catalogue of competences” listed in Articles 3 to 6 TFEU. Hence, the CFSP competence has been defined as sui generis. The special status of the CFSP further derives from the “mutual non-affectation clause” of Article 40 TEU, which provides that the implementation of the CFSP cannot affect the EU’s non-CFSP external action and vice versa. It has been argued

that this provision reflects “the continuing bipolarity of EU external action”34 with the CFSP operating as a “hidden horizontal pillar”.35

Taken together, the position of the CFSP in the EU constitutional architecture thus remains somewhat ambiguous. Whereas the CFSP is fully integrated in the single EU legal order, this process is not brought to its logical conclusion. In particular, the ill-defined nature of the CFSP competence and the absence of full judicial powers of control for the CJEU may be regarded as relics of the past.36 The consequence is "a degree of ambivalence"37 leading to an “integration-delimitation paradox” in the sense that the focus on coherence and integration of the CFSP is difficult to reconcile with the desire to retain its distinctive status.38 This paradox is inherent in the discussion surrounding the jurisdiction of the CJEU in CFSP matters. Whereas the Court itself has consistently followed an “integrationist” logic – pointing to the principle of effective judicial protection in a Union based on respect for the rule of law – to construe the limits of its own jurisdiction (cf. below, section 3.2), it has been argued that this approach ignores the “intention of the drafters of the Treaties” to limit the judicial supervision of CFSP measures.39 However, even the understanding of this intention may give rise to divergent interpretations, as can be derived from different opinions of Advocate Generals. Whereas Advocate General Wahl (in H v. Council) stressed the “conscious choice made by the drafters of the Treaties” to grant limited powers to the Court of Justice with respect to CFSP acts irrespective their nature or content,40 Advocate General Bobek came to another conclusion in SatCen v. KF when he observed that only acts with a “genuine CFSP content” were intended to be excluded from the Court’s jurisdiction.41 On the question whether an action for damages in relation to CFSP decisions pertaining to restrictive measures falls within the scope of the Court’s jurisdiction, Advocate General Kokott concluded that this was not possible in light of the drafting history of Article 275 TFEU,42 whereas Advocate General Hogan also referred to the intention of the drafters of the

36. Van Elsuwege, op. cit. supra note 19, 1018.
38. The term “integration-delimitation paradox” is borrowed from Merket, The EU and the Security-Development Nexus. Bridging the Legal Divide (Brill, 2016), p. 70.
41. Opinion in Case C-14/19 P, SatCen v. KF, para 79.
Treaties in *Bank Refah Kargaran* to come to the opposite conclusion. Hence, it appears that – in essence – the entire discussion about the precise limitations to the jurisdiction of the CJEU largely corresponds to the interpretation of the intention of the drafters of the Treaties.

2.2. *Understanding “the intention of the drafters of the Treaties”*

Broadly speaking, two opposing views can be distinguished. On the one hand, it has been argued that it was a conscious choice to maintain the exclusion of the Court’s jurisdiction in the field of CFSP as a matter of principle. This position was, amongst others, upheld by Advocate General Kokott in her View in the procedure in Opinion 2/13 and by Advocate General Wahl in *H v. Council*. They both refer to the drafting history and the text of Article 24 TEU and Article 275 TFEU to conclude that the Court’s jurisdiction is confined to two specific situations, i.e. the monitoring of compliance with the non-affectation clause of Article 40 TEU and actions for annulment launched by natural or legal persons against restrictive measures adopted by the Council in the context of the CFSP. On the other hand, the intention of the drafters of the Treaties may be understood as a desire to exclude judicial interference in issues of high politics. From this perspective, the exclusion of the CJEU’s jurisdiction in relation to CFSP matters is nothing more than the codification of some kind of political question doctrine. This view appeared to be shared by Advocate General Wathelet in his Opinion in *Rosneft*, when he pointed out that:

“[T]he reason for the limitation of the Court’s jurisdiction in CFSP matters brought about by the ‘carve-out’ provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers.”

The latter approach largely corresponds with the established practice at the national level of EU Member States where foreign policy decisions traditionally escape judicial review. This parallel was drawn by Advocate

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44. Heliskoski, op. cit. supra note 6, 18–19.
General Hogan in his Opinion in Bank Refah Kargaran, when he defended the view that the exclusion of the Court’s jurisdiction is essentially linked to the political nature of CFSP decisions. A largely similar approach was previously developed by Advocate General Bobek in SatCen v. KF. In his view, the drafters of the Treaties proceeded from the assumption that CFSP matters are inherently political and, consequently, not amenable to judicial review. It follows that only CFSP acts involving political or strategic decisions fall outside the Court’s jurisdiction, whereas administrative acts without such connotations are subject to judicial review even when they are formally adopted within the ambit of the CFSP. This line of reasoning largely reflects the suggestion of the European Commission in H v. Council to distinguish between “acts of sovereign policy” (actes de gouvernement) and acts implementing this policy. In the Commission’s view, the drafters of the Treaties only intended to exclude the former from the scope of the Court’s jurisdiction.

Hence, it appears that the interpretation of the intention of the drafters of the Treaties essentially depends on the perspective adopted. A focus on the specific CFSP provisions alone leads to a narrow interpretation of the Court’s jurisdiction in this field. A more holistic approach, proceeding from the broader ambitions of the Treaty of Lisbon to enhance the coherence of the EU’s external action in a legal order based on respect for the rule of law, leads to a different conclusion. This difference in perspective reflects a rule-exception dilemma. This dilemma entails the question of whether the exclusion of the Court’s jurisdiction in relation to the CFSP is to be considered as the rule, with exceptions defined in Article 24(1) TEU and Article 275 TFEU, or whether the general jurisdiction of the CJEU is the rule and the exclusion in relation to CFSP matters the exception – with some “exceptions to the exception” defined in Article 24(1) and Article 275 TFEU. The answer to this question is of fundamental significance because, as in any other area of EU law, derogations from a general rule must be interpreted narrowly.

Looking at the specific CFSP provisions in the EU Treaty, it may well be argued that the absence of a role for the Court as foreseen in Article 24 TEU is the rule in this field of EU law. However, in light of the integration of the CFSP and the horizontal application of the EU’s general principles, such a position is difficult to uphold. In particular, the drafters of the Treaties not only intended to safeguard a specific status for the CFSP, but also strengthened the

50. Opinion in Case C-14/19 P, SatCen v. KF, para 74.
51. Ibid., para 83.
53. Butler, op. cit. supra note 5, 284.
54. Koutrakos, op. cit. supra note 18, 10.
role of the rule of law in the EU legal order. This can be derived from the definition of the rule of law as one of the EU’s foundational values in Article 2 TEU, and the incorporation of the Charter of Fundamental Rights in the primary law of the Union. Moreover, the drafters of the Treaties abolished the distinction between the Community and the Union as “integrated but separate legal orders” in favour of a single, unified legal order. In this respect, the significance of Article 23 TEU may not be underestimated. This provision forms the linchpin between the CFSP and the EU’s general principles and values. It is, therefore, no coincidence that the outcome of the rule-exception dilemma depends on the inclusion of this provision in the analysis of the relevant Treaty provisions. This is clearly illustrated in H v. Council where Advocate General Wahl ignored the role of Article 23 TEU and considered the absence of the Court’s jurisdiction in the field of CFSP as “the general rule”, whereas the Court referred to Article 23 TEU to support the view that its limited jurisdiction in the area of CFSP is a derogation from the general principle of judicial review as laid down in Article 19 TEU.

Given its interpretative discretion and taking into account the fundamental importance of the rule of law as a cornerstone of the EU legal order, the ECJ’s deliberate choice for a broad interpretation of its general jurisdiction as the main rule does not come as a surprise. It builds on the tradition of Les Verts to ensure, as far as possible, an effective system of judicial protection. Accordingly, the Court’s broad interpretation of its jurisdiction in the field of CFSP may be regarded as an answer to pre-Lisbon criticism that the self-imposed claim of respect for the rule of law in Les Verts was perhaps valid for the Community, but not for the EU as such.

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55. Case C-138/19 P, Bank Refah Kargaran, para 47.
56. Compare para 71 of the Opinion of A.G. Wahl in C-455/14 P, H v. Council with paras. 40–41 of the judgment in that case. The role of Art. 23 TEU was also highlighted in Case C-72/15, Rosneft, both in the Opinion of A.G. Wathelet (para 66) and in the judgment (para 72).
57. Since the EU Treaties do not provide any guidance as to which method of interpretation is to be preferred, the Court, in principle, is free to opt for the method which best serves the EU legal order as long as the principles of institutional balance and mutual sincere cooperation are observed. See Lenaerts and Gutiérrez-Fons, “To say what the law of the EU is: Methods of interpretation and the European Court of Justice”, 20 CJEL (2014), 4.
3. The gap-filling role of the Court of Justice

Whereas the Treaty of Lisbon did not open the gates to a general role for the Court of Justice in CFSP matters, the teleological interpretation of the “claw-back” provisions included in Article 24(1) TEU and Article 275 TFEU allowed the Court to play its traditional “gap-filling” role. This is most visible with respect to the Court’s approach towards the delimitation between CFSP and non-CFSP external action (section 3.1) and regarding questions of judicial protection in relation to restrictive measures against natural or legal persons (section 3.2).

3.1. The delimitation between CFSP and non-CFSP activities

The ambiguous EU Treaty provisions on the precise delimitation of the CFSP and its relation with other EU policies entail a huge potential for inter-institutional conflicts. It is, therefore, not surprising that the Court’s CFSP-related case law started with questions about the appropriate choice of legal basis for EU external action and the procedure for the conclusion of international agreements. With respect to the choice of legal basis, it is well known that the Court traditionally applies a “centre of gravity” test based on an examination of the aim and content of the measure in question. The absence of specific CFSP objectives and the mutual non-affectation clause of Article 40 TEU complicated this exercise after the entry into force of the Treaty of Lisbon. Notwithstanding suggestions for alternative solutions, the Court continued to apply its settled case law, albeit with certain nuances. Whereas the centre of gravity test is still formally based on an analysis of the “aims and content” of the contested decision, the “context” of the measure is also increasingly taken into account. For instance, in solving the dispute regarding the correct legal basis for the conclusion of an agreement with Mauritius on the transfer of

61. Case C-130/10, Parliament v. Council (Smart sanctions); Case C-658/11, Parliament v. Council (Mauritius); Case C-263/14, Parliament v. Council (Pirate Transfer Agreement with Tanzania); Case C-439/13 P, Elitaliana v. Eulex Kosovo.
63. For instance, in Case C-130/10, Parliament v. Council (Smart sanctions) the European Parliament suggested that the more specific legal basis (lex specialis) should prevail over the more general provision (lex generalis). This option was also raised in academic literature (see e.g. Cremona, op. cit. supra note 33, p. 34). However, such an option was firmly rejected by the Court. See Case C-130/10, para 66.
pirates, the Court heavily relied on the context of Operation Atalanta to confirm the CFSP legal basis of the contested decision.64

Of particular significance is the limited role of Article 40 TEU in the deliberations of the Court. On several occasions, the parties invoked this provision as an argument to defend their positions. This was perhaps most striking in the litigation concerning the choice of legal basis for the adoption of an EU position in the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement (EPCA) with Kazakhstan.65 Both the European Commission and the Council explicitly referred to Article 40 TEU, but the Court completely ignored this provision in its judgment. Rather, it stressed the significance of “the institutional balance established by the framers of the Treaties” as the key guiding principle to deal with the inter-institutional conflict at stake.66 In other words, the Court does not proceed from a fundamental division between CFSP and non-CFSP competences, but horizontally applies general constitutional principles (the EU’s institutional balance) and mechanisms (the centre of gravity test) to tackle conflicts in relation to the choice of legal basis in the field of EU external action.67

The Court’s silence on Article 40 TEU is somewhat paradoxical, taking into account that this is one of the two explicit avenues providing for a role of the CJEU in CFSP matters. Only in Rosneft, the ECJ pointed out that the EU Treaties do not specify any particular means by which the monitoring of compliance with Article 40 TEU is to be carried out. Therefore, it follows from the general jurisdiction awarded on the basis of Article 19 TEU that this exercise can also be the subject of a preliminary ruling.68 In terms of substance, the Court used that occasion to clarify that the exclusion of legislative acts under Article 24(1) TEU and Article 31 TEU is to be interpreted as a purely procedural matter in the sense that it prevents the

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65. Case C-244/17, Commission v. Council (Kazakhstan), EU:C:2018:662.

66. Ibid., para 30.


68. Case C-72/15, Rosneft, para 62.
In general, however, it appears that Article 40 TEU is treated as a largely redundant provision, in the sense that it is essentially considered as a repetition of the general constitutional principle of institutional balance. Of course, the question remains to what extent this truly reflects the intention of the drafters of the Treaties (see section 2.2 above). It may, for instance, be argued that Article 40 TEU, and in particular the addition of a second paragraph in comparison to ex Article 47 TEU, has a more fundamental function which is to safeguard the specific features of the CFSP in the EU legal order. From this perspective, Article 40 TEU has been defined as “a metaphorical fence between the TEU and the TFEU, with the CJEU in charge of keeping the gate”. The Court, however, carefully avoided any understanding of the CFSP as a distinctive legal framework which needs protection from intrusion of TFEU policies or vice versa. Rather, it consistently stressed the unified nature of the EU legal order and the horizontal application of general principles of EU law.

This approach is particularly visible in the case law regarding the procedure for the signature and conclusion of international agreements. In the inter-institutional conflict between the European Parliament and the Council concerning the Pirate Transfer Agreement with Mauritius, the Court noted that Article 218 TFEU lays down “a single procedure of general application” covering all areas of EU competence, including the CFSP. Hence, the interpretation of the procedural requirements concerning the involvement of the European Parliament, laid down in Article 218(6) TFEU, cannot be disconnected from the general system of the Treaties and the division of powers among the institutions. In this respect, there is a symmetry between the procedure for adopting EU measures internally and the procedure for adopting international agreements. In compliance with the institutional balance established by the Treaties this implies, amongst others, a more limited role for the European Parliament in the area of CFSP in comparison to other policy areas. This, however, does not mean that the CFSP is isolated from the Parliament’s activities. There is only a lesser degree of parliamentary

69. Ibid., para 91.
72. Case C-658/11, Parliament v. Council (Mauritius), para 52.
intervention, which basically means a simple right to be informed about ongoing CFSP activities.\textsuperscript{73}

Significantly, the Court also proceeded from a holistic interpretation of the Treaties to assert its own jurisdiction on this matter. Even though the agreement at stake had been adopted on a substantive CFSP legal basis, it follows from the rule of general jurisdiction under Article 19 TEU that the interpretation of the procedural requirements laid down in Article 218 TFEU does not preclude an intervention from the Court.\textsuperscript{74} This was further confirmed in the Kazakhstan case, where the Court was asked to clarify the delimitation between CFSP and non-CFSP competences with respect to the implementation of an international agreement; more precisely in relation to the adoption of EU positions on the basis of Article 218(9) TFEU.\textsuperscript{75} In its judgment, the Court recalled the symmetry between the procedures relating to the internal and external activities of the Union.\textsuperscript{76} Accordingly, the determination of the decision-making procedure in the Council depends on the substantive legal basis of the decision, which is subject to a centre of gravity test. The Court used both quantitative (i.e. the relatively limited number of CFSP-related provisions in the agreement) and qualitative (i.e. the largely declaratory nature of the provisions) criteria to come to the conclusion that the CFSP provisions could not be regarded as a distinct component of the agreement and are incidental to the areas of common commercial policy and development cooperation.\textsuperscript{77} This approach is not without criticism, not least because it disregards the special nature of the CFSP competence. The latter does not have specific policy objectives and is, almost by definition, bound to be less detailed and less far-reaching in comparison to other areas.\textsuperscript{78} Moreover, simply counting the number of provisions related to a particular policy area and assessing the nature of the commitments may underestimate the significance of certain parts of an agreement.

It appears that the Court’s judgment in the Kazakhstan case did not solve the ambiguity about the choice of the appropriate legal basis in practice. For instance, the Comprehensive and Enhanced Partnership Agreement (CEPA) between the EU and Armenia was recently concluded on a joint CFSP-TFEU

\textsuperscript{73} Ibid., paras. 82–86. For comments, see Van Elsuwege, “Securing the institutional balance in the procedure for concluding international agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius), 52 CML Rev. (2015), 1379–1398.

\textsuperscript{74} Case C-658/11, Parliament v. Council (Mauritius), paras. 70–74.

\textsuperscript{75} Case C-244/17, Commission v. Council (Kazakhstan).

\textsuperscript{76} Ibid., para 30.

\textsuperscript{77} Ibid., paras. 43–46.

legal basis. Moreover, the Council decided to split the decision concerning the position to be taken on behalf of the Union for the adoption of the Rules of Procedure of the joint institutions established under the CEPA. The Council adopted a separate decision for the application of Title II of this agreement, which concerns the provisions on political dialogue and cooperation in the field of foreign and security policy. The latter Council decision was based on Article 37 TEU triggering unanimity for the establishment of EU positions under Article 218(9) TFEU, whereas the Council decision for the remaining parts of the CEPA was subject to qualified majority voting (relating to the fields of transport, trade and development). Not surprisingly, the European Commission contested the validity of this approach in light of the criteria defined in the Kazakhstan case.  

Again, the crux of the matter was whether the CFSP dimension of the CEPA constitutes a sufficiently distinct component or whether it was only incidental to the other, principal components of the agreement. In this respect, it is noteworthy that the CFSP provisions in the CEPA with Armenia are more extensive in comparison to the EPCA with Kazakhstan. For instance, the objective of cooperation in the area of foreign and security policy is more explicitly defined as an objective of the established political dialogue with Armenia in comparison to Kazakhstan. The CEPA also includes a clause on the possible participation of Armenia in EU-led civilian and military crisis management operations, whereas such a provision is absent in the EPCA. Notwithstanding these differences, the ECJ concluded that in view of the relatively limited number of CFSP-related provisions and their largely programmatic nature, the CFSP could not be regarded as constituting a distinct component of the CEPA. The specific context of the Nagorno-Karabakh conflict did not affect this conclusion. In addition, the Court recalled the broad scope of the EU’s competence in the field of development cooperation, which also incorporates general objectives such as the preservation of peace, the prevention of conflicts and the strengthening of international security.

81. Compare Art. 3 CEPA and Art. 5 EPCA.
82. See Art. 7 CEPA.
83. Case C-180/29, Commission v. Council (Armenia), paras. 46 and 52.
84. Ibid., para 54.
85. Ibid., paras. 49–50.
Taken together, it thus appears that the threshold for adding a CFSP legal basis to the adoption of an EU measure of a transversal scope is rather high. In the Philippines judgment, the Court already determined that the addition of a separate legal basis for policy areas that are not identified as predominant is only justified when they pursue specific objectives which are distinct from those of the EU policy identified as predominant.\textsuperscript{86} More specifically, the Court proceeded from a broad understanding of the (predominant) objectives of development cooperation to conclude that the Council’s addition of a range of other substantive policy areas (on migration, transport, and the environment) was redundant in a Council decision on the signature of a framework Partnership and Cooperation Agreement. \textit{Mutatis mutandis}, the same logic applies in relation to the potential addition of a CFSP legal basis.\textsuperscript{87} The operationalization of the centre of gravity test in the Kazakhstan and Armenia judgments, with its combination of quantitative and qualitative criteria, only confirms the conclusion that the addition of a specific CFSP legal basis is not easily required for measures of a transversal scope.\textsuperscript{88} In any event, it remains difficult to define the precise threshold requiring the addition of a CFSP legal basis for the conclusion and implementation of comprehensive framework agreements.

Finally, in a series of judgments, the Court further defined the scope of Article 275(1) TFEU, which excludes CJEU jurisdiction with respect to “provisions relating to” the CFSP and “acts adopted on the basis of those provisions”. In \textit{Elitaliana SpA v. Eulex Kosovo}, it was clarified that the context of a CFSP mission does not preclude the involvement of the CJEU when the issues at stake concern the interpretation of EU rules on public procurement.\textsuperscript{89} This line of reasoning reflects the approach of the Court with respect to access to documents. The simple fact that the content of the documents is related to the CFSP does not preclude the Court’s jurisdiction concerning the application of constitutional principles such as transparency and proportionality and the application of relevant secondary legislation.\textsuperscript{90} Likewise, the Court concluded that the jurisdictional carve-out cannot be considered so extensive as to exclude the judicial review of acts of staff management.\textsuperscript{91} In \textit{H v. Council}, in

\begin{footnotesize}
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\item[86.] Case C-377/12, \textit{Commission v. Council (Philippines)}, EU:C:2014:1903.
\item[87.] For an application of this logic, see the Opinion in Case C-180/20, \textit{Commission v. Council (Armenia)}, paras. 56–69.
\item[88.] Ibid., para 70.
\item[89.] Case C-439/13 P, \textit{Elitaliana v. Eulex Kosovo}, paras. 41–49.
\end{itemize}
\end{footnotesize}
particular, the Court further based its reasoning on the right to an effective judicial review and respect for the rule of law to justify its jurisdiction to hear an action for annulment against a decision taken by the Head of the EU Police Mission (EUPM) in Bosnia-Herzegovina to redeploy an Italian magistrate who was seconded by the Italian Ministry of Justice. In this respect, it also pointed to the requirement of consistency when a single act of staff management relates to field operations concerning both staff members seconded by the Member States and staff members seconded by the EU.92 This example of “gap-filling”, where the Court refers to general constitutional principles to assert a coherent system of judicial protection, is quite controversial. The main criticism is that, in contrast to the situation in Elitaliana, the issue at stake did not clearly fall within the scope of non-CFSP legislation – in this case the Staff Regulations. Hence, the characterization of the contested decision as an act of staff management has been regarded as “highly artificial”93 and as an example of “interpretative acrobatics”.94

3.2. A coherent system of judicial protection in relation to restrictive measures against natural or legal persons

As far as the judicial review of CFSP decisions pertaining to the adoption of restrictive measures against natural or legal persons is concerned, Article 24(1) TEU refers to Article 275(2) TFEU, which provides that “the Court has jurisdiction to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU”. A literal interpretation of these provisions could lead to the conclusion that a direct action for annulment is the only option for reviewing the legality of targeted sanctions. However, the Court firmly rejected such an understanding of this “claw-back” provision in Rosneft when it found that the reference in Article 24(1) TEU to Article 275(2) TFEU did not concern the type of procedure (i.e. a direct action for annulment), but rather the type of decision (i.e. restrictive measures) whose legality may be reviewed.95 Moreover, the Court concluded that “it would be inconsistent with the system of effective judicial protection established by the Treaties” to exclude the possibility for Member State courts or tribunals to refer preliminary questions to the ECJ on the validity of the CFSP decisions prescribing the adoption of restrictive measures.96

93. Heliskoski, op. cit. supra note 6, 10.
94. Koutrakos, op. cit. supra note 18, 12.
95. Case C-72/15, Rosneft, para 70.
96. Ibid., para 76.
Significantly, the Court explicitly rejected the argument that national courts and tribunals would be able to ensure effective judicial protection on their own, in the absence of a role for the Court of Justice. In this respect, it recalled the well-known *Foto-Frost* rule that national courts are not entitled to declare EU acts invalid. This task is exclusively reserved for the Court of Justice under Article 267 TFEU, which is essential to ensure the uniform application of EU law.\(^97\) Hence, the Court confirmed that its jurisdiction to answer preliminary questions of validity covers the two stages for the adoption of restrictive measures involving the combination of a CFSP decision on the basis of Article 29 TEU and an implementing non-CFSP regulation under Article 215 TFEU. The Court did not accept the argument that its jurisdiction to assess the validity of the implementing regulation would already be sufficient in light of the substantive overlap between the content of the regulation and the CFSP decision.\(^98\) In this respect, the Member States’ obligation to ensure that their national policies are in conformity with their commitments under the CFSP is a key consideration.\(^99\) The invalidity of an implementing regulation would not affect the obligations of the Member States under the CFSP decision. Whereas the practical implications of such a situation would arguably be limited in situations where the implementing regulation and the CFSP decision overlap, since the annulment of the regulation would unavoidably also affect the decision in view of Article 266 TFEU, the situation is different for restrictive measures which are not implemented at EU level. This is, for instance, the case with CFSP decisions imposing entry bans. It is precisely for this type of restrictive measures that the Court’s approach prevents a lacuna in the EU’s system of judicial protection. Otherwise, national courts would have to decide on the validity of such measures without having a possibility to consult the Court of Justice, which is difficult to square with the *Foto-Frost* logic and the uniform application of EU law.\(^100\)

On this point, it is interesting to recall the View of Advocate General Kokott in the Opinion 2/13 procedure, where she somewhat bluntly concluded that the *Foto-Frost* reasoning cannot be applied to the CFSP and that, as a result, “the uniform interpretation and application of EU law in the context of the CFSP cannot be ensured”.\(^101\) The Court’s reasoning in *Rosneft* contradicts this view.

\(^97\) Ibid., para 79.

\(^98\) This point was raised by the Estonian and Polish governments and the Council. The argument is based on the observation that the annulment of the regulation would also affect the corresponding provisions of the CFSP decision as a result of the Council’s obligations under Art. 266 TFEU.

\(^99\) This obligation is laid down in Art. 29 TEU. See Case C-72/15, *Rosneft*, para 56.


as far as the validity of EU restrictive measures against natural or legal persons is concerned. At least for this specific type of CFSP acts, the Court’s gap-filling role implies that there is no difference compared to other areas of EU law. This is further confirmed in the more recent Bank Refah Kargaran judgment, where the Court recognized its jurisdiction to hear an action for damages in relation to CFSP decisions pertaining to restrictive measures.\textsuperscript{102}

Despite the absence of any reference to such an autonomous form of action in Article 275 TFEU, the Court elaborated its reasoning developed in Rosneft. While an action for damages is conceptually distinct from a legality review, it is also an integral component of the EU system of legal remedies. Taking into account that the Court has jurisdiction to rule on an action for damages in relation to the implementing regulations adopted on the basis of Article 215 TFEU and the connection with the CFSP decisions imposing restrictive measures, the Court found that:

“\[T\]he necessary coherence of the system of judicial protection provided for by EU law requires that, in order avoid a lacuna in the judicial protection of the natural or legal persons concerned, the Court of Justice of the European Union must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP decisions.”\textsuperscript{103}

Accordingly, the Court closely followed the Opinion of Advocate General Hogan who argued that any other reading of Article 275(2) TFEU would result in “indefensible anomalies” which would be at odds with fundamental principles relating to the protection of the rule of law, as well as impairing the effectiveness and coherence of the judicial remedies established in the Treaties.\textsuperscript{104} It is noteworthy that other advocates general had explicitly ruled out the option to include the action for damages within the scope of Article 275(2) TFEU. For instance, Advocate General Wathelet considered that the Court could only rule on the legality of restrictive measures, either in an action for annulment or in preliminary ruling proceedings.\textsuperscript{105} Advocate General Kokott even firmly stated in her View in Opinion 2/13 that such a broad interpretation of Article 275(2) TFEU would go beyond the judicial competences of the CJEU.\textsuperscript{106} The Court, however, consistently adopted a teleological and holistic interpretation of the Treaties, leading to the conclusion that the entire system of EU legal remedies is available with

\textsuperscript{102} Case C-138/19 P, Bank Refah Kargaran.
\textsuperscript{103} Ibid., para 39 (emphasis added).
\textsuperscript{104} Opinion in Case C-138/19 P, Bank Refah Kargaran, para 67.
\textsuperscript{105} Opinion in Case C-72/15, Rosneft, para 65.
\textsuperscript{106} View of A.G. Kokott in Opinion procedure 2/13, para 91.
respect to the adoption of restrictive measures against natural or legal persons.107

The recent Venezuela judgment provides an additional dimension to this approach.108 In this case, the Bolivarian Republic of Venezuela challenged the validity of a number of provisions of Regulation 2017/2063 concerning restrictive measures in view of the situation in Venezuela. The core legal issue was not so much the scope of jurisdiction of the CJEU but the legal standing of a third State before the EU courts.109 In other words, the key question was whether a third State can be regarded as a “legal person” within the meaning of the fourth paragraph of Article 263 TFEU. In its assessment, the Court expressly dismissed the arguments based on public international law, such as the principle of reciprocity, and based its reasoning entirely on the EU’s obligations to ensure respect for the rule of law and the principle of effective judicial review in the EU legal order.110 The practical consequence is that third States may challenge the validity of EU restrictive measures before EU courts on the condition that they satisfy the general admissibility conditions as laid down in Article 263(4) TFEU.

4. Opinion 2/13 revisited: Remaining obstacles for accession to the ECHR

In light of the gap-filling role of the Court of Justice, the question remains to what extent the limits of its jurisdiction in CFSP matters is still an important obstacle on the road towards accession to the ECHR. The key issue in this respect is that the European Court of Human Rights (ECtHR) would be empowered to rule on the legality of certain acts, actions and omissions performed in the context of the CFSP where the CJEU has no jurisdiction.111 In comparison to the situation when Opinion 2/13 was delivered, the Court of Justice now already had the opportunity to clarify that its role is more

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107. For a critical account of the Court’s approach, see Verhellen, “In the name of the rule of law? CJEU further extends jurisdiction in CFSP (Bank Refah Kargaran)”, 6 European Papers (2021), 17–24.
109. The legal challenge exclusively concerned the regulation adopted on the legal basis of Article 215 TFEU, implying that the EU courts have full jurisdiction. Case C-872/19 P, Bolivarian Republic of Venezuela v. Council of the EU, para 21.
110. Ibid., paras. 48–52.
extensive than appeared from the assessment in the View of Advocate General Kokott. Nevertheless, there are still a number of grey areas.

First, the Court’s strand of case law is essentially confined to cases of a cross-policy nature and procedures pertaining to restrictive measures. The latter form a particular area of CFSP action, due to the specific role of Article 215 TFEU, which serves as “a bridge between the objectives of the EU Treaty in matters of the CFSP and the actions of the Union involving economic measures falling within the scope of the FEU Treaty”. Moreover, CFSP decisions imposing restrictive measures have direct human rights implications, in the sense that they target individuals and affect their reputation even before further implementation measures are adopted. This is not the case for other types of CFSP measures such as military or civilian missions set up in the context of the Common Security and Defence Policy (CSDP) where human rights violations may occur at the implementation or application stage and questions of attribution arise before it can be established whether the action falls under the responsibility of the EU or the Member States. The situation is inherently different in the case of restrictive measures, where there is a direct connection between the adopted CFSP act and the fundamental rights of individuals. Hence, the line of reasoning developed in cases such as Rosneft and Bank Refah Kargaran cannot be automatically extended to other areas of CFSP action.

Second, only measures of an individual nature fall within the scope of the term “restrictive measures against natural or legal persons” as provided under Article 275(2) TFEU. Provisions of a CFSP decision imposing in a general and abstract manner restrictions that are applicable to all operators still escape the Court’s jurisdiction. Whereas Advocate General Wathelet observed in Rosneft that this situation does not lead to a lacuna of judicial protection, since the applicants could challenge the identically worded provisions of the

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112. Amongst others, A.G. Kokott excluded the Court’s jurisdiction in preliminary ruling proceedings and actions for damages in the context of the CFSP. She also proceeded from the assumption that the exclusion of the Court’s jurisdiction in CFSP matters is to be regarded as the rule rather than the exception. See View of A.G. Kokott in Opinion procedure 2/13, para 89.

113. Case C-72/15, Rosneft, para 89.


implementing Regulation, this is not always the case. Reference may be made to restrictions on admission and arms embargoes which are implemented directly by the Member States on the basis of the CFSP Decision. To the extent that such measures are of a general rather than an individual nature, they escape the judicial review of the Court.

Third, the scope of the term “restrictive measures” in Article 275 TFEU cannot be interpreted so broadly that it covers all EU acts which adversely affect the rights of individuals. Whereas such a broad interpretation would solve the issues regarding the EU’s accession to the ECHR, this appears to be a bridge too far. As argued by Advocate General Wahl in \textit{H v. Council}, “a textual, systematic and historical interpretation of Article 275 TFEU, in fact, reveals that concept to be of more limited scope”. This provision is not intended to permit judicial review of all CFSP acts having restrictive effects on individuals, but only concerns the specific area of targeted sanctions. Hence, other acts adopted in a CFSP context only fall within the scope of the Court’s jurisdiction when there is a link with the exercise of TFEU competences. Such a link is not always straightforward, as can be derived from the criticisms of the Court’s judgment in \textit{H v. Council} (cf. Section 3.1 above).

Fourth, the Court addressed in \textit{Rosneft} its jurisdiction concerning the validity of CFSP decisions imposing restrictive measures without tackling its competence of interpretation under the preliminary reference procedure. This is remarkable because the questions from the referring British court also entailed issues of interpretation, and Advocate General Wathelet had expressed himself on this issue. In the Advocate General’s view, the competence to perform the broader task of a legality review necessarily implies the competence to perform the narrower task of interpretation. In addition, the crucial role of the preliminary reference procedure in ensuring the uniform interpretation of EU law and the coherence of the system envisaged by the EU treaties may be a forceful argument in favour of such a broad interpretation. An important counterargument, however, is the express reference to the “review of legality” in Article 275(2) TFEU, which makes it

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119. Case C-138/19 P, \textit{Bank Refah Kargaran}, para 41. Measures such as arms embargoes or entry restrictions are implemented directly.
120. Of course, this does not exclude the option of judicial review before Member State courts (see \textit{infra} in this section).
121. In \textit{H v. Council}, the European Commission argued that a teleological interpretation of the Treaties leads to the conclusion that the term “restrictive measures” covers “all measures adopted by an EU institution against a person which produce legal effects in relation to him that potentially infringe his fundamental rights”. See Case C-455/14 P, \textit{H v. Council}, para 33. See also the Commission’s arguments in Opinion 2/13, paras. 97–100.
difficult to further stretch the role of the Court in relation to CFSP decisions pertaining to restrictive measures.\textsuperscript{124} 

Taken together, it appears that the Court’s gap-filling role cannot prevent some CFSP acts still falling outside its jurisdiction. However, as argued by Advocate General Kokott in the Opinion 2/13 proceedings, this does not automatically imply that there is a problem of legal protection for individuals.\textsuperscript{125} For CFSP-related cases falling outside the ambit of judicial review by the Court of Justice, Member State courts can still play their role as “co-guardian” of the Treaties.\textsuperscript{126} It follows from Article 19 TEU and the principle of sincere cooperation set out in Article 4(3) TEU that the courts and tribunals of EU Member States are bound to ensure compliance with provisions of EU law.\textsuperscript{127} Whereas Article 24(2) TEU and Article 275 TFEU limit the jurisdiction of the Court of Justice in CFSP matters, this restriction does not apply to national courts. Moreover, Article 274 TFEU explicitly provides that “[s]ave where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.” Hence, it may well be argued that “domestic judges have jurisdiction as a matter of EU law over questions of interpretation and validity of CFSP matters”.\textsuperscript{128} As a result, the remaining gaps of judicial protection regarding CFSP matters in the EU legal order may be filled by the national judiciary. Such a conclusion logically follows from the significance of effective judicial protection in the EU legal order. In areas where the Court of Justice cannot provide the necessary legal protection as a result of constitutional constraints, it is up to the Member States to provide effective remedies.\textsuperscript{129}

However, this may not always be a satisfactory solution. National judicial control may be complicated in the absence of national acts implementing EU law in CFSP matters or due to procedural hurdles.\textsuperscript{130} Moreover, allowing national courts to review the legality of CFSP acts is difficult to reconcile with

\textsuperscript{124} Poli, op. cit. supra note 100, 1829.
\textsuperscript{125} View of A.G. Kokott in Opinion procedure 2/13, paras. 96–103.
\textsuperscript{126} Hillion and Wessel, op. cit. supra note 5, p. 82.
\textsuperscript{128} Koutrakos, op. cit. supra note 18, 33. Along similar lines, Hillion and Wessel, op. cit. supra note 5, p. 82.
\textsuperscript{129} Lonardo, “May Member States’ courts act as catalysts of normalization of the European Union’s Common Foreign and Security Policy?”, 28 MJ (2021), 292.
\textsuperscript{130} On the procedural and substantive hurdles to adjudication on CFSP matters by national courts, see Moser, Accountability in EU Security and Defence. The Law and Practice of Peacebuilding (OUP, 2020), pp. 185–191.
the preservation of the unity of the EU legal order along the lines of the Foto-Frost logic.\textsuperscript{131} This implies that national courts are entitled to confirm the validity of an EU act but they are not endowed with the power to declare such an act invalid themselves. This task belongs to the jurisdictional monopoly of the CJEU. In Opinion 2/13, the Court did not explicitly engage with the argument of Advocate General Kokott that this logic cannot be applied to the CFSP.\textsuperscript{132} Nevertheless, it recalled that the consistency and uniformity in the interpretation of EU law is crucial to preserve the specific characteristics and the autonomy of the EU legal order.\textsuperscript{133} Also in Rosneft, the Court recalled that:

“The necessary coherence of the system of judicial protection requires, in accordance with the settled case law, that when the validity of acts of the European Union institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court of Justice under Article 267 TFEU.” \textsuperscript{134} 

Significantly, the Court added that this conclusion “is imperative with respect to decisions in the field of CFSP where the Treaties confer on the Court jurisdiction to review their legality”.\textsuperscript{135} Hence, the question remains what happens in situations where the CJEU has no such jurisdiction. It may well be argued that in such a context the practical complications for the functioning of the EU legal order “cannot in itself disqualify the only judicial protection against CFSP acts that is available under EU law as it stands”.\textsuperscript{136} A legality control at the national level may thus be regarded as “the lesser of two evils”, in the sense that it is to be preferred over a situation where there is no judicial review at all.\textsuperscript{137} Nevertheless, the consequences of such a decentralized judicial control should not be underestimated. As observed by Advocate General Wahl in H v. Council, this would undermine the procedural rights of the EU institutions and Member States, in the sense that it would be more difficult for these parties to submit their observations in comparison to the procedures before the CJEU. This would impair the national court’s ability to rule in full knowledge of all relevant facts. Moreover, the annulment of a CFSP act by a national court would have far-reaching consequences for the security

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  \item \textsuperscript{131} Hillion and Wessel refer in this respect to “the Court’s implicit position on Member States’ courts in Opinion 2/13”; Hillion and Wessel, op. cit. \textit{supra} note 5, p. 84.
  \item \textsuperscript{132} View of A.G. Kokott in Opinion procedure 2/13, para 100.
  \item \textsuperscript{133} Opinion 2/13, para 174.
  \item \textsuperscript{134} Case C-72/15, \textit{Rosneft}, para 78.
  \item \textsuperscript{135} Ibid. (emphasis added).
  \item \textsuperscript{136} Hillion and Wessel, op. cit. \textit{supra} note 5, p. 85.
  \item \textsuperscript{137} Lonardo, op. cit. \textit{supra} note 129, 302.
\end{itemize}
and foreign policy of the Union and the Member States. Hence, the decision of a national court on the lawfulness of a CFSP act cannot have erga omnes consequences.\footnote{Opinion in Case C-455/14 P, \textit{H v. Council}, paras. 101–103.}

The Court’s broad interpretation of its own jurisdiction in CFSP matters somehow mitigates this structural deficiency in the EU system of judicial protection. Furthermore, national courts are not prevented from referring preliminary questions regarding non-CFSP issues at stake.\footnote{Hillion, “Decentralised integration? Fundamental rights protection in the EU Common Foreign and Security Policy”, \textit{1 European Papers} (2016), 65.} Nevertheless, there will always be a core of CFSP measures which are outside the Court’s jurisdiction.\footnote{Koutrakos, op. cit. supra note 18, 32; Wessel and Hillion, op. cit. supra note 5, p. 86.} This situation may hypothetically arise with respect to measures adopted or carried out by Member States for the purpose of implementing CFSP decisions other than those imposing restrictive measures, or in relation to acts attributed to the EU in the context of a CSDP mission.\footnote{Plaza Garcia, “Accession of the EU to the ECHR: Issues raised with regard to EU acts on CFSP matters”, \textit{16 ERA Forum} (2015), 491–492.} In such a scenario, the CJEU would arguably not have the opportunity to rule on the interpretation or validity of the CFSP act under EU law, whereas potential human rights violations may be brought before the ECtHR. The question is how this can be reconciled with the Court’s findings in Opinion 2/13.

Without entering into a discussion of the international responsibility of the EU for CFSP actions,\footnote{See Heliskoski, “Responsibility and liability for CFSP measures” in Blockmans and Koutrakos, op. cit. supra note 5, pp. 132–153.} it is sufficient to recall that as a result of Opinion 2/13 and in light of the remaining gaps in the jurisdiction of the CJEU in CFSP matters, two general solutions may be considered. On the one hand, the Draft Agreement on Accession of the EU to the ECHR could be amended to accommodate the specific features of judicial review on CFSP matters.\footnote{Rangel de Mesquita, “Judicial review of Common Foreign and Security Policy by the ECtHR and the (re)negotiation on the accession of the EU to the ECHR”, \textit{28 MJ} (2021), 367–369.}

On the occasion of the ninth meeting of the Steering Committee for Human Rights (CDDH) ad hoc negotiating group on EU accession to the ECHR, the introduction of a new attribution clause was put on the table:

“Such clause would enable the EU to allocate, for the purpose of the Convention, responsibility for an CFSP act of the EU to one or more Member State(s) if such act is excluded from the judicial review of the CJEU to the limitations of the latter’s jurisdiction. The autonomy of EU law would require that the determination of whether such act falls within
the CJEU’s jurisdiction is provided by the EU itself. Such a solution would guarantee that all CFSP acts and omissions would fall under the external control of the Court [of Human Rights] with regard to their compatibility with the Convention, while making it legally possible for the EU to accede to it.”

Even though it is presumed that the reattribution of a CFSP act would be needed only in exceptional circumstances – due to the gap-filling role of the CJEU – it is at this stage not entirely clear how such a clause would work in practice. It is, therefore, not surprising that several delegations voiced concerns about the complexity of this arrangement and the potential implications for applicants. For instance, applicants may be faced with unexpected changes of the respondent party and a more time-consuming procedure, possibly in various EU Member States. Only a reattribution clause which is sufficiently transparent and with procedural guarantees for the applicants may serve as a solution for the issues raised in Opinion 2/13 regarding the judicial review of CFSP acts.

On the other hand, an amendment of the EU Treaties could be contemplated. In a mature legal system, it could be expected that all acts of the institutions are subject to judicial control and it is for the judges themselves to develop a policy of judicial self-restraint taking into account the specific features of foreign policy decisions. A complete system of judicial review without predefined exclusions would be logical in light of the EU’s single legal personality, the importance attributed to the values laid down in Article 2 TEU, and the constitutionalization of the CFSP as an integral part of the EU legal order. However, this logic was not followed with the Treaty of Lisbon. Notwithstanding the strict interpretation of the Treaty-based exceptions to the Court’s jurisdiction in CFSP matters, building on the characteristics of a Union based on respect for the rule of law, there are limits to the gap-filling role of the CJEU. Even though the national courts may arguably step in to ensure the judicial protection of individuals, the key challenge remains the consistent and uniform interpretation of EU law. As can be derived from Opinion 2/13, this is a crucial consideration for the Court which is the guarantor of the EU’s legal autonomy. Accepting an external judicial review for CFSP acts when a complete system of judicial protection with safeguards for uniform interpretation is not available internally, appeared a bridge too far for the Court. Whereas this approach may well be criticized for its

145. Ibid., p. 4.
inward-looking perspective, the fact remains that an amendment of the EU Treaties seems the most appropriate solution to the conundrum of Opinion 2/13.

5. Conclusion

Building on the connection between the CFSP and the EU’s structural principles, the Court of Justice actively pursued a “gap-filling” role in ensuring a broad interpretation of its jurisdiction as defined in Article 24(1) TEU and Article 275 TFEU. The Court consistently followed a teleological interpretation of the Treaties to ensure as far as possible a coherent system of judicial protection in the autonomous EU legal order. This is not a new phenomenon, in the sense that it reflects the spirit of old landmark cases such as Van Gend en Loos, Les Verts and others. Nevertheless, the Court’s approach has not been without criticism. The broad interpretation of its own jurisdiction stands at odds with a strict, textual interpretation of the CFSP provisions. Moreover, it raises questions about its compatibility with the “intention of the drafters of the Treaties” to retain a more limited regime of judicial review in CFSP matters.

However, the intention of the drafters of the Treaties is not straightforward. The end of the pillar structure, the link between the CFSP, the other areas of EU external action and the EU’s foundational values, as well as the strengthened protection of fundamental rights with the Charter and the envisaged accession to the ECHR, are also part of this intention. The result is a catch-22 situation between, on the one hand, the integration of the CFSP in the EU legal order and, on the other hand, the continued CFSP particularism. This puts the Court of Justice before an almost impossible task to pursue its role under Article 19 TEU while respecting the limits of its jurisdiction.

Arguably, the limited role for the CJEU in CFSP matters may be partially compensated at the national level. After all, national courts and tribunals of EU Member States are part and parcel of the EU legal system of judicial protection and play a crucial role in upholding the rule of law. The key issue, however, is that the autonomy of the EU legal order is subject to the uniform and consistent interpretation of EU law as guaranteed by the Court of Justice. This is the essence of the so-called “Foto-Frost logic” and a crucial consideration in the discussion of the organization of judicial review in the field of CFSP. This may also be derived from Opinion 2/13 and the Court’s

146. De Witte, “A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union” in Cremona and Thies, op. cit. supra note 5, p. 46.
147. Timmermans, op. cit. supra note 29, p. 305.
concerns regarding the EU’s accession to the ECHR. As long as certain CFSP acts fall outside the ambit of judicial review by the Court of Justice, the uniform and consistent interpretation of the relevant provisions cannot be guaranteed to the same extent as in other areas of EU law.

The Court’s extensive interpretation of its own jurisdiction under the current Treaty provisions keeps this systemic gap in the EU system of judicial review as limited as possible, but this approach cannot be stretched much further. As a result, the EU remains confronted with an ambiguous constitutional architecture where certain acts cannot be brought before the CJEU notwithstanding their legally binding nature. Whereas the implications of this lex imperfecta should perhaps not be overestimated, insofar as the EU judicature is not entirely toothless in reviewing the lawfulness of certain acts adopted in the area of CFSP, important gaps remain. The introduction of a reattribution clause in the draft Agreement on Accession to the ECHR may be sufficient to solve the concerns raised in Opinion 2/13 but, in the longer run, a revision of the EU Treaties seems a logical option.

The “carve-out” provision limiting the jurisdiction of the Court in the field of CFSP is difficult to reconcile with the fundamental significance of the rule of law in the autonomous EU legal order. Of course, abolishing the CFSP-specific carve-out does not mean that the CJEU is to review choices of foreign policy or security that are eminently political. As in other fields of EU law where the institutions enjoy broad discretion and are required to make complex choices of a political nature, it may be expected that the Court applies a rather limited judicial review. Such an approach was already visible in Rosneft, where the Court restrained from interfering in the policy choices made at the level of the Council.148 Hence, as argued by Advocate General Bobek in SatCen v. KF, the jurisdiction of the CJEU in the field of CFSP may be understood as “a scale or gradual continuum, and not as a matter of all-or-nothing extremes”.149 Depending on the political nature of the decision at stake, the Court may either apply a full or more limited judicial review, taking into account the discretionary powers of the institutions involved. Such an assessment requires a case-by-case analysis in line with the approach in other areas of EU law, where there is no predetermined exclusion of the Court’s jurisdiction.150 Of course, it is up to the drafters of the Treaties to take their responsibility in addressing the remaining gaps in the EU system of judicial remedies. The renewed negotiations on the EU’s accession to the

148. Case C-72/15, Rosneft, para 146.
149. Opinion in Case C-14/19 P, SatCen v. KF, para 85.
150. See e.g. Case C-418/18 P, Puppinck and others v. Commission, EU:C:2019:1113, paras. 95–96 (on the implementation the EU citizens’ initiative); Case C-358/14, Poland v. European Parliament and Council, EU:C:2015:848, paras. 146–147 (on the principle of subsidiarity and the adoption of internal market harmonization measures).
ECHR and the Conference on the Future of Europe provide the perfect background for putting this issue on the agenda.151

151. The Conference on the Future of Europe was launched in April 2021 as a joint initiative by the European Commission, the European Parliament and the Council to stimulate an open debate about the evolution of the EU. It is expected to reach its conclusions by spring 2022. See further <future.europa.eu/>. 