



# The Normalisation of EU Foreign, Security and Defence Policy

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# Judicial Protection in the EU's Common Foreign and Security Policy (CFSP)

- › Title V of the Treaty on European Union: “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy”.
- › CFSP (incl. CSDP) only policy area in TEU (apart from ENP)
- › **Article 24(1) TEU:** The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.[...]

# Special position of CFSP

- **Article 24(1) TEU:** The common foreign and security policy is subject to specific rules and procedures.
- **The nature of the competence remains unclear.** CFSP is not mentioned in Articles 3-6 TFEU under either of the categories: exclusive competences, shared competences or supporting, coordinating or supplementing competences
- Different roles of the European Commission and the European Parliament in the decision-making process, the impossibility of the Court to rule on most CFSP decisions and treaty provisions, the different effects of CFSP decisions in the domestic legal orders of the member States, and the different nature of the instruments

# CFSP Acts as Legal Acts

- › Article 24(1) TEU: CFSP is formed on the basis of “specific rules and procedures” and the use of “legislative acts” is excluded
  - But, this largely relates to decision-making *procedures* and tells us less about the legal *nature* of the acts

# The ‘Normalisation’ of CFSP

- › Consolidation and constitutionalisation
  - “a policy producing norms just as any other EU public policy does.”  
(Saurugger and Terpan)
- › A ‘tradition of otherness’ (Cardwell), which is difficult to change
- › The principle of consistency (e.g. Art. 219(3) TEU)
  - “The Union shall ensure consistency between the different areas of its external action and between these and its other policies.”
  - A binding obligation of coherence in EU external relations
- › Confirmation by the Court in its recent case law

# Limited role of the Court

- › Articles 24(1) TEU + 275 TFEU: no jurisdiction with respect to the specific provisions on the Common Foreign and Security Policy' enshrined in chapter 2 of the TEU
  - Exceptions
    - Art. 40 TEU: choice of legal basis
    - Art. 275 TFEU: restrictive measures
  
- › Opinion 2/13, para 252: “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”.

# The Court's broad conception of its jurisdiction

- "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce 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, **and they must, therefore, be interpreted narrowly.**"
  - Case C- 658/11 *EP v Council* (Mauritius), ECLI:EU:C:2014:2025, para 70. See also, Case C-439/13P *Elitaliana*, ECLI:EU:C:2015:753, para 41. Case C-455/14P *H v Council*, ECLI:EU:C:2016:569, para 40

# Joined Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*

- › 283 In addition, according to settled case law, **fundamental rights form an integral part of the general principles of law whose observance the Court ensures.** For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by **international instruments for the protection of human rights** on which the Member States have collaborated or to which they are signatories. In that regard, the **ECHR** has special significance [...]



# Joined Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*

- > 284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that **measures incompatible with respect for human rights are not acceptable** in the Community (Case C - 112/00 Schmidberger, paragraph 73).
- > 285 It follows from all those considerations **that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights,** that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

# Joined Cases C-402/05 P & C-415/05 P *Kadi and Al Barakaat International Foundation v Council*

- › 326 ... the Community judicature must ... **ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights** forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations ...
- › Solution: states are free to chose the way in which they implement UN Security Council Resolutions

# A 'relation' with CFSP does not automatically grant jurisdictional immunity to an EU act

- > AG Wathelet in Case C-72/15 *Rosneft*:
- > "44. The use in the first paragraph of Article 275 TFEU of the words 'provisions relating to the [CFSP]' might create the false impression that the European Union Courts have no **jurisdiction** in relation to any provisions of the FEU Treaty that, while not falling within the scope of the CFSP, may relate to it."
- > "52. I would point out that the 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. [...] "

# General application of EU law with regard to international agreements...

- › "Article 218 TFEU, in order to satisfy the requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning the negotiation and conclusion of international agreements by the European Union in all the fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedure"
- Case C-263/14, *Tanzania* (also C-130/10 *Parliament v. Council*; Case C-658/11, *European Parliament v. Council (Mauritius Agreement)*)

# Example 1: C-439/13 P, *Elitaliana v Eulex Kosovo*

- › "In the present case, it is not disputed that the Eulex Kosovo Mission is civilian in nature and that the expenditure relating to the helicopter-support service for the Eulex Kosovo Mission was to be allocated to the European Union budget.
- › Therefore, the measures at issue, whose annulment was sought on the basis of an infringement of the rules of EU public procurement law, related to the award of a public contract which gave rise to expenditure to be charged to the European Union budget. Accordingly, the contract at issue is subject to the provisions of the Financial Regulation. ...
- › Consequently, the General Court and, in the case of an appeal, the Court of Justice have jurisdiction to hear this case."

## Example 2: C-455/14 P, H v Council and Commission

- › "the scope of the limitation, by way of derogation, on the Court's jurisdiction, (...) cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff **members** seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they **concern staff members** seconded by the EU institutions."
  - Cf. also T-286/15 - *KF v CSUE*

# Article 19 TEU

## + the principle of effective juridical remedies in Art. 47 CFR

- › 3. The Court of Justice of the European Union shall, in accordance with the Treaties:
  - (a) rule on actions brought by a Member State, an institution or a natural or legal person;
  - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
  - (c) rule in other cases provided for in the Treaties
  
- › 1. [...] **Member States shall provide remedies** sufficient to ensure effective legal protection in the fields covered by Union law.

- AG Kokott in Opinion 2/13 (par. 96): “national courts or tribunals have, and will retain, jurisdiction”
- AG Wahl in the *H-Case* (par. 89): when the CJEU does not have jurisdiction it is for the national courts “to examine the lawfulness of the contested decisions and rule on the related claim for damages.”



- > Opinion 1/09, Unified Patent Court
  - "the guardians of [the] legal order and the judicial system of the EU are the Court of Justice and the courts and tribunals of the Member States
  - It is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law "
- > Earlier (pre-Lisbon) case law: *Segi*:
  - "The right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council"

- Yet, the *Foto-Frost* approach could still apply to certain CFSP-related situations: Member States' courts seem to be precluded from invalidating CFSP acts that fall under the Court of Justice's jurisdiction. The *Rosneft* judgment:
  - [t]he Court must reject the argument that it falls to national courts and tribunals alone to ensure effective judicial protection if the Court has 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 person

# C-72/15, Rosneft

- › The legality control over CFSP restrictive measures is not limited to annulment proceedings envisaged in Article 263(4) TFEU, but includes the possibility for it to give **preliminary ruling** on their validity:
- › *Rosneft*: "Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, **it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction** conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU [...]"

- "In those circumstances, provided that the Court has, under Article 24(1) TEU and the second paragraph of Article 275 TFEU, jurisdiction *ex ratione materiae* to rule on the validity of European Union acts, that is, in particular, where such acts relate to restrictive measures against natural or legal persons, it would be inconsistent with the system of effective judicial protection established by the Treaties to interpret the latter provision 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 such measures."

# Case C-134/19 P, *Bank Refah Kargaran v Council of the European Union*, 6 October 2020.

- > Do the EU courts have the necessary jurisdiction to determine whether the Union can be held non-contractually liable, and hear actions for damages pleas against restrictive measures imposed through a CFSP Decision made on the basis of Article 29 TEU?
- > ‘the consistency of the system of judicial protection in EU law requires that...**in order to avoid a gap for natural or legal persons...[the CJEU] is competent to rule on damages** allegedly suffered on foot of restrictive measures provided for by CFSP [D]ecisions’ (par. 39)

# Judicial review of restrictive measures: the state of affairs

- › It is possible for states, non-state entities and individuals to challenge sanctions Decisions before the Courts in Luxembourg (direct actions)
- › It is possible for natural and legal persons to challenge national implementation measures of EU sanctions before courts of the EU member states and these courts may/should ask preliminary questions to the CJEU
- › It is possible for natural and legal persons to ask for a damage compensation before the EU Courts.

# So, is everything solved?

- › Deviating from binding international law for ‘domestic’ reasons remains problematic
- › The decision to impose sanctions is a political one and the subjects are not heard, and often insufficiently informed; motivations and access to documents are often flawed.
  - As restrictive measures are often close to criminal law measures, shouldn’t the same checks and balances apply?
- › The lengthy procedures may form a violation of fair trial principles (e.g. both *H* and *Bank Refah Kargaran* have been proceeding for more than 10 years)

# P.S.: Current debates: What to improve in CSFP and CSDP

- › Institutional changes (larger role of the Commission, EP?; more integration of the Commission and the HR/EEAS?)
- › Decision-making: gradual implementation of qualified majority voting?
- › More frequent use of Enhanced Cooperation under Article 20 TEU
  - PESCO (also applicable in civilian missions?)
- › More integration of CFSP and non-CFSP foreign policies?



# Options to explore for improving CFSP

- › Activation of the Treaty's bridging, or *passerelle*, clauses, contained in Article 31(3) TEU
  - acting unanimously, the European Council can adopt a decision prescribing that the Council shall act by a qualified majority
  - Acceptable for MS for e.g. sanctions, human rights related decisions (especially regarding the EU's action at various international fora) and civilian missions? (see also the Commission's proposal)
  - Questions to be addressed:
    - relation with the general Article 48(7), the simplified revision procedure, which confers certain powers to the European Parliament and the national parliaments in this process.
    - A role for the CJEU with regard to this decision?
    - Effects of CFSP QMV on the legitimacy and impact of EU foreign policy

# Options to explore for improving CFSP

## › Treaty amendments?

- Does not seem politically feasible in the short run (and not the intention of the Conference on the Future of Europe)
- Yet, having CFSP as the only policy area (with ENP) in another treaty seems largely outdated (if it has ever made sense)
- An integration of the TEU and the TFEU seems to make perfect sense and the ‘special rules and procedures’ for CFSP could still be clarified in the CFSP chapter in the modified TEU.