Constitutional Law of the EU's Common Foreign and Security Policy

Competence and Institutions in External Relations

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The Court of Justice and the Common Foreign and Security Policy

Beyond the place of Parliament in CFSP matters, as discussed in the previous chapter, regarding whether it should be more involved in the policy, it can be noted that the relationship that CFSP matters have with other EU institutions in the field of foreign policy has been lacking.[1] Jurisdictionally, the Court is not fully granted the same jurisdiction on CFSP matters, in textual terms, vis-à-vis other non-CFSP matters in the EU legal order. Therefore, this makes CFSP matters an unusual part of the EU legal order. Where the treaties fall short on providing a particular level of institutional guidance, the Court, when asked, ensures that the treaties and the Court's own jurisprudence on the EU legal order as a whole is adhered to. As an institution, the Court has demonstrated a healthy willingness to question the authority of other EU institutions when it believes it has overstepped the boundaries of their given authority. This is particularly evident in the constitutional law of CFSP matters. Given the lack of involvement of the Parliament in CFSP matters, it can now be assessed if a lack of parliamentary involvement in CFSP matters has been supplemented by a role for judicial involvement.

When the Union wishes to act internationally, such as, for example, when concluding international agreements, there are choices to be made regarding the agreement's legal basis, depending on the policy area. This external action creates an internal dilemma for the Union as there are choices to be made regarding the choice of legal basis for such agreements. Depending on the policy field, there can be a range of which to choose from, with the choice between a CFSP legal basis; a non-CFSP legal basis; or as of late, both. From an institutional point of view, different legal bases have consequential outcomes for a variety of EU actors. International agreements to which the Union is a party have presented particular challenges for the Court as it goes about defending the EU legal order that it itself champions.

The debate on an appropriate role for the Court as the Union's judicial body, against the powers of other institutional bodies in CFSP matters, has not yet come to full fruition. As a policy area, an eager attempt has been made by Member States

[1] Gráinne De Búrca, 'International Law Before the Courts: The EU and the US Compared' (2015) 55 *Virginia Journal of International Law* 685 at 695.

to shield CFSP matters from judicial review. This chapter proposes to understand the role of the Court in CFSP matters with regard to its constitutional status, as well as its contributory development towards EU external relations law more generally. In doing so, the chapter discusses whether there is a definitive role for the Court in CFSP matters, taking into account the specific impositions of the treaties.

The chapter begins by providing an overview of the unique circumstances of the Court's jurisdiction in CFSP matters as set down in the treaties, as well as the rationale for the limitation placed upon it. Subsequently, the nature of the Court's jurisdiction is analysed, followed by how the Court has understood such derogations on its jurisdiction. With this understanding elucidated in its judgments, it emerges that the Court has taken a rather generous institutional position towards itself, notwithstanding the explicit intent of how the treaties have attempted to construe its role.

With the treaties still entailing limited jurisdiction of the Court in CFSP matters, and the case law in no way settled, there remain outstanding questions regarding the full scope of the Court's jurisdiction. These open questions are considered in line with whether the Court ought to adopt a political question doctrine when cases are framed as legal questions, but in fact, are based upon political and policy choices. In light of the analysis, the chapter considers what the future holds for the jurisdiction of the Court in CFSP matters and argues that the direction of its case law indicates that, at a future juncture, full jurisdiction will have to be conferred upon it.

5.1. Introduction

The Court has been instrumental in the consistent development of the external relations of the EU.[2] As a constitutional system, the Union is based on the rule of law.[3] Such a conception exists because of the institutional balance the Union has developed through the numerous institutions, bodies, and agencies that form its collective being. These tasks mandated by the treaties outline the way each should operate, mostly specifying what they are bound or allowed to do; but rarely what they are not permitted to do. The role of the Court is still essential for the functioning of the Union in external relations, because the treaties are, for their users and readers, at times unclear, non-specific, and even blatantly inconsistent. This chapter addresses the jurisdictional issues and affords an opportunity

[2] Panos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-Use Goods and Armaments* (Hart Publishing, 2001) p 2.

[3] It is referenced twice in the preamble to the TEU, as well as TEU, Article 2, and within external action chapter of the treaties in TEU, Article 21. See, Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, and Alberto Alemanno, 'What Has Been, and What Could Be, Thirty Years after Les Verts/European Parliament' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010).

to examine the state of play for the Court in CFSP matters in the post-Lisbon environment.[4] This is particularly necessary given that the Treaty of Lisbon, effective since 2009, has gone some way to strengthening the Court in CFSP matters.

The Court, in the same way as the other institutions and bodies of the Union, is responsible for the development of the Union's legal framework. It has the jurisdiction provided to it by the treaties, when requested, based on a preliminary reference or direct action, to review areas of EU external relations competence, including but not limited to, the Common Commercial Policy (CCP), development cooperation, humanitarian aid, and so forth. However, this does not cover CFSP matters which, as outlined earlier in this book, is due to the differentiated status and nature of CFSP matters as a policy field. The limitations imposed by the treaties on the Court's role in CFSP matters pose an array of challenges. Therefore, it can be asked to what extent the Court has made efforts to respect the nature of its jurisdiction in CFSP matters, whilst simultaneously upholding the EU legal order.

The manner in which the Court has jurisdiction with regard to CFSP legal acts is no straightforward issue. How it distinguishes between the legal framework for CFSP matters, and that of ordinary or normal EU external relations law, has been essential for shaping the institutional design of EU external action. However, this task is premised on sufficient jurisdiction existing for the Court to make a determination. Debate on the jurisdiction of the Court has been taking place since its inception,[5] particularly given the occasional ambiguity of its role. In the Court's earlier years, it was conscious of its own jurisdiction and the issues pertaining to it. At times, the Court has undoubtedly engaged, for one reason or another, in 'conspicuous exercises [of] gap-filling'.[6] The framework of CFSP matters is notable given the special position of the Court. Yet at the same time, there is the possibility that it can 'define the external contours of its jurisdiction'.[7] The jurisdiction of the Court is assumed competent in the substantial form, but CFSP matters appear as an exception to the rule.

With the treaties now guaranteeing TEU and TFEU harmony, it can be reasonably claimed that the choice of legal basis has become more difficult to delineate, thus increasing the potential role for the Court to define a CFSP matter. Yet, if constrained, this increased need for the Court is confounded by the treaties' attempt to continue to hold it back. As put, it is possible to 'sympathi[s]e with

[4] For example, see, Stefan Griller, 'The Court of Justice and the Common Foreign and Security Policy' in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press, 2013).

[5] For one of its earliest commentaries, see, DG Valentine, 'The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action' (1960) 36 *British Yearbook of International Law* 174.

[6] Anthony Arnull, 'Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law' (2007) 31 *Fordham International Law Journal* 1174 at 1182.

[7] Koen Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order' in Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2014) p 47.

[the Court] over the failure of the Member States to entrust it with judicial review of CFSP action'.[8] Yet small changes have been afoot. The wording of the treaties with regard to the Court in CFSP matters changed with the implementation of the Treaty of Lisbon. This is consistent with history given that each treaty revision has seen, with the Member States' consent, the jurisdiction of the Court expand.[9] The Treaty of Lisbon permitted the Court to make 'authoritative pronouncements' in a limited range of CFSP instruments,[10] and provided it with general jurisdiction, save for where the treaties determine otherwise, with one such area being CFSP matters.

The merging of external relations objectives by the Treaty of Lisbon should have spurred on institutional cooperation, theoretically speaking, without institutions needing to resort to the Court for adjudication. The act of finding institutional balance is made delicate given there is no Treaty-mandated guidance on what determines or shapes institutional balance. However, institutional balance is normatively understood as eliminating centralised power-holding and favouring the de-concentration of powers. As will be demonstrated, the case law has allowed the complexity and jurisdiction of the Court in CFSP matters to be played out in full before it, whilst providing lawyers with a firmer understanding of CFSP matters and how these should be maintained according to the treaties.

5.2. Situating CFSP Matters

Despite the Court being one of the main drivers behind European integration since its inception, its role in CFSP matters is obscure. As a policy, CFSP matters are at the forefront of the Union's external relations on both legal and political levels. CFSP matters has its own chapter in the TEU, nestled in Title V,[11] whereas non-CFSP matters are located elsewhere in the treaties, primarily in the TFEU. With the formal pillars no longer in existence since the Treaty of Lisbon,[12] cases coming before the Court having elements of CFSP are generally cross-policy in nature; giving rise to inherent difficulties as the treaties impose limitations on its jurisdiction. Thus, it was always going to be inevitable that the Court would be placed in positions where it is to rule on where the border between the former pillars are within the current treaties. Moreover, with the treaties not completely clear on exactly what constitutes CFSP matters, it is inevitable that it would be left to the Court to decide the extent of this boundary.

[8] Eileen Denza, 'Forging Links between Legal Orders' (2016) 35 *Yearbook of European Law* 589 at 601.

[9] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 *Law and Contemporary Problems* 117 at 129.

[10] Geert De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008) p 212.

[11] TEU, Articles 23–46.

[12] Albeit, CFSP matters are still a *de facto* hidden pillar. See Chapters 2 and 3 of this book.

The primary law of the Union restricts the jurisdiction of the Court in CFSP matters.[13] Accordingly, the boundary between CFSP matters and non-CFSP matters is difficult to place. The treaties, creating a constitutional order with cavities, somewhat vaguely delineate the limited jurisdiction of the Court in CFSP matters. Courts of law, especially those of a supreme or constitutional nature are entrusted with delimiting various actors, be they institutional or the Member States, in a constitutional order. It was not envisaged, at first, that the Court would progress in such a comprehensive way towards the development of Union law. Yet today, the Court is obliged to fill in the cavities of the treaties, ensuring a consistent interpretation of Union law through mechanisms such as direct action, preliminary references, opinions, and other types of cases.

5.2.1. The Judiciary and Foreign Policy

The issue of the judiciary and foreign policy can be a complicated one for different types of actors, be they centralised or federal states.[14] As a piecemeal structure, the EU legal order actively discriminates against certain institutions. Just as the role of the Parliament is curtailed in CFSP matters,[15] the Court is also beleaguered by constitutional hurdles. This exclusion of the Court in CFSP matters has 'puzzled some' over time.[16] It has even been said that an apparent lack of judicial supervision could make CFSP matters weak and ineffective.[17] Yet, it is too simplistic to say that the Court is excluded absolutely from CFSP matters. There are three articles in both the TEU and TFEU, which state the role of the Court when dealing with CFSP matters, namely; Article 24(1) TEU,[18] Article 40 TEU,[19] and

[13] Title V (General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy), Articles 23–46 TEU for CFSP matters, while separately, TFEU, Article 275.

[14] See, Lawrence Collins, 'Foreign Relations and the Judiciary' (2002) 51 *International and Comparative Law Quarterly* 485, and Louis Henkin, *Foreign Affairs and the United States Constitution* 2nd edition (Clarendon Press, 1996).

[15] See Chapter 4 of this book.

[16] Marise Cremona, 'The Union's External Action: Constitutional Perspectives' in Giuliano Amato, Hervé Bribosia and Bruno De Witte (eds), *Genesis and Destiny of the European Constitution: Commentary on the Treaty establishing a Constitution for Europe in the light of the travaux préparatoires and future prospects* (Bruylant, 2007) p 1198.

[17] Piet Eeckhout, *EU External Relations Law* 2nd edition (Oxford University Press, 2011) p 172.

[18] TEU, Article 24(1), para 2: '…The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [the Common Foreign and Security Policy], 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.'

[19] TEU, Article 40: 'The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the [t]reaties for the exercise of the Union competence[] referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the [t]reaties for the exercise of the Union competence[] under this Chapter [Specific Provision on the Common Foreign and Security Policy].'

Article 275 TFEU.[20] Whilst the three articles are there to exclude the Court in CFSP matters, it does not necessarily mean that CFSP matters are entirely immune from oversight of the judiciary at Union level. The general jurisdiction conferred upon the Court grants it some discretion to weigh in on certain CFSP matters, which has allowed it to tread carefully in a guarded legal minefield. As such, therefore, the jurisdiction of the Court is often understated.

By looking at what the judiciary of the Union does in CFSP matters, we can view this in contrast with its role in non-CFSP external relations in an effort to examine how the Court manages judicial review in CFSP matters. With the wording of Article 24(1) TEU stating that the Court does 'not have jurisdiction with respect to [CFSP matters]', it has been suggested that the Court should not find itself in a position to ignore the provisions of the treaties on CFSP matters in their entirety. Rather, it should be read that it must consider them when interpreting and applying provisions from elsewhere in the treaties.[21]

Assessments of what a court of law's role should be ranges from a norm elaborator to an enforcer. Yet, with respect to one of its primary functions, judicial review, the Court has a recognised 'monopoly' on the activities of EU institutions.[22] Despite the Union being depillarised by the Treaty of Lisbon, the ring-fenced nature of CFSP matters remained.[23] Actions on a CFSP legal basis are non-legislative, therefore, not subject to the ordinary legislative procedure that governs nearly every other part of Union decision-making. With Article 19(1) TEU stating the Court 'shall ensure that in the interpretation and application of the [t]reaties the law is observed', it implicitly means that it can, to a certain degree, have jurisdiction in CFSP matters. This must be reconciled by the Court ensuring that Union law is observed, despite it being partially excluded from so doing. Article 19 TEU says that the Court 'shall' ensure that the interpretation and application of the treaties are observed, and likewise, that EU Member States 'shall' make remedies sufficient for effective legal protection in Union law. Consequently, the most audacious reading suggests that it must mean that the breadth of Article 19 TEU alone could override the attempted exclusion of the Court in CFSP matters. As will become apparent when the case law is analysed, the Court is certainly veering in this direction.

[20] TFEU, Article 275: '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 para 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.'

[21] Cremona (n 16) p 1199.

[22] View of Advocate General Kokott, Opinion 2/13, ECLI:EU:C:2014:2475 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 101.

[23] For more on this, see, Paul James Cardwell, 'On "Ring-Fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) 64 *Northern Ireland Legal Quarterly* 443.

5.2.2. Judicial Exclusion

It must be queried why the Court would have such a restrictive role in CFSP matters to begin with. The reasons for the Court's exclusion are numerous, ranging from the idea that foreign policy actions are at the height of political sensitivity to the short-term nature of some CFSP matters. The reasons why the Union's judiciary might not be legally gifted when it comes to some aspects of EU external action has been eloquently put by a former member of the Court: '[f]oreign policy decisions have a different kind of complexity, however: the relevant facts, the evaluation of risks, the necessary contacts, the responsibility for the consequences, they are all beyond the area of judicial investigation'.[24] Another reason is that CFSP matters are a mix of political and legal thinking[25] and that acts of foreign policy are not always hard legislative instruments. Rather, CFSP matters tend to be legal decisions that cannot be subjugated to intense scrutiny compared to other acts of public policy. From that perspective, foreign policy on a CFSP legal basis may be much more legal than foreign policy instruments, if any, in Member States. However, the most curious theory for deliberate continued judicial exclusion would be that judges would come with a background where they had elaborated on the doctrine of EU external relations law; and that such integrationist thinking would not necessarily be in conformity with the views of other more traditional international lawyers, who naturally could be much closer to assuming more state sovereignty.[26]

The Court, in the same way as the other institutional and non-international actors of the Union, is responsible for the development of the Union's legal framework. With the exception of restrictive measures and the delimitation of CFSP matters and non-CFSP matters, an Advocate General has said that the role of the Court in CFSP matters is 'highly regrettable from the aspect of integration policy'.[27] It can be said that the Member States were reluctant to see judicial aspects of their foreign, security, and defence affairs to a judiciary beyond the state,[28] as it could be perceived as a renunciation of sovereign rights. This hesitance of the Member States can be traced to a level of suspicion of the Court when it comes to judicial involvement; for fear the Court would attempt to assert itself as the ultimate decisive arbiter and depart from existing in a purely judicial domain. It was the belief of Member States that issues such as that should be disjointed from what

[24] Thijmen Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, 2003) p 101.

[25] David AO Edward, 'Is Art L of the Maastricht Treaty Workable?' in Georg Ress, Jürgen Schwarze and Torsten Stein (eds), *Die Organe der Europäischen Union im Spannungsfeld zwischen Gemeinschaft und Zusammenarbeit* (Nomos, 1995) p 23.

[26] Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, 2002) p 312.

[27] View of Advocate General Kokott, Opinion 2/13, ECLI:EU:C:2014:2475 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 101.

[28] Maria-Gisella Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 *International and Comparative Law Quarterly* 77 at 79.

they feared to be an overly eager Court to engage in 'judicial activism'.[29] Qualms against activism and integrationalism may be perceived, but this does not justify a position without taking an objective viewpoint. Whilst this crusading charge is nothing new to the debate, the Court has, more generally, defended itself against such charges.[30]

Member States of the Union did not waste much time disenfranchising the Court in CFSP matters when it was first being incorporated into the treaties.[31] Following the Treaty of Maastricht, the Treaty of Amsterdam was the first occasion on which the Court was given jurisdiction within the TEU.[32] Even the Constitutional Treaty, which arguably went further than the Treaty of Lisbon on integration, had not proposed absolute jurisdiction for the Court in CFSP matters. For the Constitutional Treaty, the jurisdictional concerns for the Court in CFSP matters were again highlighted, being described as 'potentially damaging'.[33] However, during these deliberations on the Constitutional Treaty, judicial control of CFSP matters or non-CFSP external relations as a whole was not in any way central to the discussion.[34] There were some notable exceptions in the discussion about the exclusion of the Court's jurisdiction in CFSP matters.[35] It nonetheless continued to exclude the jurisdiction of the Court,[36] but provided it with a monitoring

[29] Ramses A Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) 20 *European Foreign Affairs Review* 123 at 137.

[30] Michael Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship' in Hans-Wolfgang Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) p 114.

[31] Joseph HH Weiler, 'The Autonomy of the Community Legal Order: Through the Looking Glass' in Joseph HH Weiler (ed), *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999) p 313.

[32] See, Albertina Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam' (1998) 35 *Common Market Law Review* 1273. Furthermore, Nial Fennelly, 'Jurisdiction of the Court of Justice Following the Entry into Force of the Treaty of Amsterdam' [1999] European Parliament: Liberty, Security, Justice: An Agenda for Europe, Working Document, Civil Liberties Series, LIBE 106 EN 19. p 24.

[33] See, 'Editorial: The CFSP under the EU Constitutional Treaty? Issues of Depillarisation' (2005) 42 *Common Market Law Review* 325.

[34] Bruno De Witte, 'The Constitutional Law of External Relations' in Ingolf Pernice and Miguel Poiares Maduro (eds), *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (Nomos, 2004) p 105.

[35] Koen Lenaerts and Damien Gerard, 'The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed' (2004) 29 *European Law Review* 289 at 303.

[36] Article III-376: 'The Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy. However, the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.' For discussion on this point, Takis Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order – Volume 1: Constitutional and Public Law, External Relations* (Hart Publishing, 2004) p 128.

compliance role.[37] When the Constitutional Treaty keeled over, and the time came to bring forward the Treaty of Lisbon, the wording of the treaties with regard to the Court in CFSP matters changed, to provide what is today Article 24 TEU, Articles 40 TEU and 275 TFEU. To comprehend the provisions properly, they should be read together, despite being separated in the treaties.

5.2.3. The (Limited) Judicial Inclusion

The Court has previously been of the opinion that when the competence of the Union is at issue, prior to the existence of what is now Article 40 TEU, the Court could not be excluded entirely.[38] Accordingly, the Court must ensure that institutions, in whatever form, maintain the appropriate relationship in CFSP matters according to the respective roles that are prescribed for them in the treaties. The absence of an efficient legal mechanism to establish the consistency between CFSP matters and non-CFSP matters has been an issue that has been highlighted for some time.[39] Article 40 TEU provides the Court with a competence to scrutinise acts on a CFSP legal basis to the extent that it does not encroach upon the competence entrusted upon other EU institutions. Article 40 TEU can also be used by the Court to prevent the legislature from using implied powers conferred on the Union from expanding further,[40] ensuring that the 'ring-fenced' nature of CFSP matters continues. Its intent has been to protect institutions favouring one legal basis over another.[41] Under pre-Lisbon rules, Article 40 TEU (then Article 47 TEU) mandated that nothing in the TEU, and therefore CFSP matters, could affect the European Communities, implying that CFSP matters should not venture into policies of the treaties, but policies in the treaties might encroach into CFSP matters. However, post-Lisbon, this was changed to ensure mutual non-encroachment. The exclusionary ideal of the Member States intending to leave the Court out of CFSP matters has faded given this limited judicial inclusion.

The treaties specify that the Court's jurisdiction in CFSP matters can be split into general categories. The first category is the power to decide whether to accept jurisdiction in CFSP matters at all; and secondly, to examine the limits of CFSP matters as a legally distinct field, ensuring it does not encroach upon the other

[37] Articles III-308 and III-365. Ricardo Passos and Stephan Marquardt, 'International Agreements – Competences, Procedures and Judicial Control' in Amato, Bribosia and De Witte (n 16) p 911.

[38] This principle was evident in Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, ECLI:EU:C:1997:8.

[39] Jörg Monar, 'The European Union's Foreign Affairs System after the Treaty of Amsterdam: A "Strengthened Capacity for External Action"?' (1997) 2 *European Foreign Affairs Review* 413 at 434.

[40] Theodore Konstadinides, 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 *European Law Review* 511 at 523.

[41] Marise Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008) p 45.

matters vested in other Treaty provisions. The first scenario for Article 275 TFEU, which was newly inserted in the Treaty of Lisbon, is when the legality of acts on a CFSP legal basis are challenged on the grounds of an act going beyond CFSP matters and encroach upon other areas of Union competence.[42] However, the second scenario covers the legality of restrictive measures adopted on a CFSP legal basis. The Court has confirmed, following the General Court,[43] that it does not have jurisdiction 'to take cognisance of an action seeking to assess the lawfulness',[44] showing there is a limit to how generously the Court construes its jurisdiction given the limitations. Whilst the absolute specificity of CFSP matters has started to wane,[45] a number of judgments suggest that any extension of the Court's jurisdiction through interpretation can be both accepted and rejected,[46] demonstrating that it can interpret both the breadth and limits of its jurisdiction in a manner that is in compliance against and with the intentions of the drafters.

5.3. A Constrained Court?

With this unusual place of the Court with respect to CFSP matters, as a policy area, it is said to have incomplete judicial 'coverage',[47] and that the 'precise contours' of the Court's jurisdiction in CFSP matters is not a fully painted picture.[48] Member States have attempted to shelter CFSP matters from other prevailing integrationist forces that is dominant in other policy fields. Aside from the initial moves to marginalise it, the jurisdiction of the Court has been expanding throughout Treaty revision over the decades. Pre-Lisbon, the Court had little jurisdiction in the TEU

[42] Pieter Jan Kuijper, Jan Wouters, Frank Hoffmeister, Geert De Baere and Thomas Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor* (Oxford: Oxford University Press, 2013) p 863. TFEU, Article 275 has been labelled as being 'deeply regrettable', for it 'effectively replace[s] the "rule of law" with the rule of the executive'. Robert Schütze, *European Union Law* 2nd edition (Cambridge University Press, 2018) p 353.

[43] Case T-509/10, *Manufacturing Support & Procurement Kala Naft Co, Tehran v Council*, ECLI:EU:T:2012:201.

[44] Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft Co, Tehran*, ECLI:EU:C:2013:776, para 99. In that case, L 195/39. Council Decision of 26 July 2010 Concerning Restrictive Measures against Iran and Repealing Common Position 2007/140/CFSP.

[45] Christophe Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014) and also 'The Protection of Fundamental Rights in the EU Common Foreign and Security Policy – "A Half Measure"?' (2016) 19 *Europarättslig Tidskrift* 45 at 46.

[46] Compare, for instance, to the standing issue outside of CFSP matters in, for example, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625.

[47] Ricardo Gosalbo-Bono and Sonja Boelaert, 'The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) p 158.

[48] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, para 2.

more generally,[49] and the default position was that it was not entitled to rule in non-Community fields, unless so provided.[50] As a result, CFSP matters were not the only area where judicial control was subject to restrictions in the past.

The Court's role was restricted in third pillar matters too, with its own set of restrictions; the Court's authority in Police and Judicial Cooperation (PJC) was also circumscribed.[51] Both second (CFSP matters) and third pillars (JHA matters) were perceived as being at the heart of the competence of Member States. Today, the Court is assumed to have jurisdiction in all areas of the treaties, unless otherwise specified, such as its attempted exclusion in CFSP matters. Article 276 TFEU also prohibits the Court from having jurisdiction in matters of internal security or proportionality by law enforcement.[52] With the treaties not completely clear on the exact limits of CFSP matters, it is inevitable that it will be left to the Court, with its limited remit, to decide the extent of this perceived boundary.

5.3.1. Handling Exclusion

Ever since CFSP matters have been contained within the treaties, the Court's jurisdiction has not significantly altered from the explicit mandate it was given by the Member States at the Intergovernmental Conferences. However, when they have been altered, it has been to a narrow degree to ensure individual rights are protected. This exclusion of the Court in CFSP matters has extended right through from the Treaty of Maastricht in the then Article L[53] to the present post-Lisbon environment. Despite the Court's expansion into new areas, particularly after the Treaty of Maastricht,[54] its jurisdiction in CFSP matters has not been significantly increased. Saying that, other developments over a longer period of time have effected the Court's jurisprudence. Given that the Single European Act (SEA) moved some policy fields from unanimity to qualified majority voting, this could

[49] David AO Edward and Robert Lane, *Edward and Lane on European Union Law* (Edward Elgar, 2013) p 176 (S 5.27).

[50] TEU, Article 46, pre-Lisbon.

[51] Steve Peers, 'Who's Judging the Watchmen? The Judicial System of the "Area of Freedom Security and Justice"' (1998) 18 *Yearbook of European Law* 337. Furthermore, John A Usher, 'Variable Geometry or Concentric Circles: Patterns for the European Union' (1997) 46 *International and Comparative Law Quarterly* 243 at 252, and Passos and Marquardt (n 37) p 991.

[52] The precise wording reads '…the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. For more on TFEU, Article 276, see, Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, 2009) pp 109–111.

[53] For more on Article L at the Treaty of Maastricht, see, Denis J Edwards, 'Fearing Federalism's Failure: Subsidiarity in the European Union' (1996) 44 *American Journal of Comparative Law* 537 at 533.

[54] Maja Brkan, 'The Role of the European Court of Justice from Maastricht to Lisbon: Putting Together the Scattered Pieces of Patchwork' in Maartje De Visser and Anne Pieter Van Der Mei (eds), *The Treaty on European Union 1993–2013: Reflections from Maastricht* (Intersentia, 2013) p 77.

have been a licence for the Court to act in a more 'aggressive' manner in instilling certain virtues,[55] such as institutional balance, rights of individuals and its own jurisdiction.

The pillarised Union, introduced at the Treaty of Maastricht, in a circumventive fashion put a limit on the powers of EU institutions. This ultimately meant delineation between different policies and difficulties in linking different areas of the treaties.[56] With the Court as a self-imposed proponent of the Union's external competence, it has engaged in bringing forward the concept of parallelism.[57] Where competence of the Union is held, this could allow it to engage externally, thereby preventing Member States from encroaching into the same sphere. This *ERTA* doctrine permitted external powers deriving from internal competence.[58] The Court, whilst possessing strength in shaping the Union legal order as a whole, has not played a strong role in shaping policy choices in external relations.[59] In non-CFSP matters, for example, the Court has only ever found that the external powers of the Union were misused.[60] On CFSP matters, as will be demonstrated, it has correspondingly stuck to jurisdiction, legal basis and other related matters, without pondering questions of wider significance.

The basis for judicial exclusion at Union level from CFSP matters may have been a precautionary measure. The Court ruled in *Pupino*,[61] pre-Lisbon, that indirect effect was to be read across from the third pillar (JHA matters).[62] However, it had other implications. Concern may have focused on how the then first pillar of the legal order would fall into the third pillar. The temptation was that Member States would use a third pillar legal basis; the question might have arisen as to what extent third pillar measures would prevent the use of a first pillar legal basis. Cases such as this led to 'legal ad-hocery',[63] as debate seethed over Court jurisdiction in the area.

[55] Koen Lenaerts, 'Some Thoughts About the Interaction Between Judges and Politicians in the European Community' (1992) 12 *Yearbook of European Law* 1 at pp 24–25.

[56] José Luís da Cruz Vilaça, *EU Law and Integration: Twenty Years of Judicial Application of EU Law* (Hart Publishing, 2014) p 95.

[57] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012) p 241.

[58] Case C-22/70, *Commission v Council*, ECLI:EU:C:1971:32 ('*European Road Transport Agreement*'), better known as '*ERTA*'. See, Paolo Mengozzi, 'The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010).

[59] See, Graham Butler, 'In Search of the Political Question Doctrine in EU Law' (2018) 45 *Legal Issues of Economic Integration* 329. Also, Marise Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in Cremona and Thies (n 45).

[60] As noted in, Marise Cremona, 'Structural Principles and Their Role in EU External Relations Law' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018) p 4.

[61] Case C-105/03, *Criminal Proceedings against Maria Pupino*, ECLI:EU:C:2005:386 ('*Pupino*').

[62] See, Maria Fletcher, 'Extending "Indirect Effect" to the Third Pillar: The Significance of Pupino?' (2005) 30 *European Law Review* 862.

[63] Bruno De Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' in Bruno De Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001) p 261.

5.3.2. Finding a Balance

On a number of occasions, the Court has used its judicial role to underscore the primacy of the treaties over international obligations.[64] When it came to defining the scope of competence for various external measures when the Union possess external competence, the Court has little issue in defining where the balance lies.[65] Much of the balance is 'ultimately in the hands of the Court',[66] putting it in an extremely powerful position. Consistent case law from the Court suggests that when selecting a legal basis for a particular measure, an objective test should be applied by the legal service of the institution, agency or body in question to ensure that the legal basis is correct and subject to judicial review.

One of the gripping issues in CFSP matters has been the question of the legal basis of certain international agreements that the Union wishes to enter into. There are often a number of choices that are available for the EU negotiating party when looking towards the conclusion and ratification of an international agreement. If an international agreement is proposed and it relates principally to CFSP matters, the Court does not have the competence to examine the legality of the Council's CFSP Decision regarding the conclusion of the agreement. However, problems arise when the Court is asked to decide whether a particular agreement is 'principally' a CFSP matter. This results in Article 40 TEU being deployed to determine where the balance of a particular external measure lies, as will be subsequently evident.

5.3.3. National Courts

Turning to national courts, there is in nothing, in theory, to prevent national courts in EU Member States from ruling on CFSP matters, but only as regards the effects of CFSP matters within their respective national legal orders. This thereby makes CFSP matters subject to mixed judicial control in a multilevel judicial field. It is not customary for the national courts of most Member States to have much association or involvement with the foreign policy of the Member State in which a national court exercises jurisdiction. However, this can principally be asserted because national governments have inherent competence to conduct foreign policy matters,[67] which are usually of a political and policy nature, as opposed being legally binding in the same manner of national legislation.

[64] Daniel Thym, 'Foreign Affairs' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* 2nd edition (Hart Publishing, 2009) p 327.

[65] For example, Case C-467/98, *Commission v Denmark*, ECLI:EU:C:2002:625 ('*Open Skies*').

[66] Pieter Jan Kuijper, 'Recent Tendencies in the Separation of Powers in EU Foreign Relations: An Essay' in Eleftheria Neframi and Mauro Gatti (eds), *Constitutional Issues of EU External Relations Law* (Nomos, 2018) pp 214–215.

[67] That national foreign policy must be in accordance with decided EU foreign policy, for which Member States are bound by the duty and obligation of sincere cooperation.

For national courts, *Foto-Frost* is a judgment of the Court worth reiterating.[68] It firmly stated that a national court cannot invalidate a legal act of the EU. Instead, that role is squarely a prerogative of the Court. However, the difficulty arises when a discrepancy arises between Union acts conducted on a CFSP legal basis and this comes into conflict with the domestic laws of a particular Member State.

Whilst a national court cannot annul a legal act on a CFSP legal basis (or any EU legal act for that matter), it can invalidate the implementing acts taken within that national context stemming from a legal act on a CFSP legal basis, subject to its own national restrictions. As part of Operation Atalanta (EUNAVFOR), to which the *Mauritius* judgment is linked, a national court in Germany was faced with a question of German involvement on fundamental rights grounds.[69] The applicant failed to have the national measures as part of the CSDP operation within the legal framework invalidated. In such instance, a preliminary reference to the Court may not be possible because of its exemptions, as will be later discussed in the *Rosneft* case.[70] Therefore, whilst the Court has a constrained role in CFSP matters; it is nonetheless provided with the power to define the limit of this external competence on all external action, including on CFSP matters,[71] even though national courts cannot invalidate CFSP legal acts.

5.3.4. Judicial Engagement

Cases heard by the Court have challenged acts on a CFSP legal basis on the grounds that an action goes beyond what is understood as a CFSP matter and extends into other areas of Union competence.[72] The Court is obliged to balance the autonomy of the Union's own legal order against its own position in CFSP matters, as the judiciary of the Union, against a potentially non-judicially reviewable policy field. Given the general jurisdiction of the Court provided by Article 19 TEU, the derogation stemming from Article 275 TFEU can be interpreted either broadly or narrowly.

[68] Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452. See, Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004) p 320.

[69] *Feststellung der Rechtswidrigkeit der Festnahme eines somalischen Staatsangehörigen im Golf von Aden von der deutschen Bundesmarine wegen des Verdachts eines (versuchten) seeräuberischen Angriffs (hier: Militäroperation Atalanta)* (Determination of the illegality of the arrest of a Somali national in the Gulf of Aden by the German Federal Navy on suspicion of a (attempted) piracy attack (Operation Atalanta), Oberverwaltungsgericht (OVG) (Administrative High Court) North Rhine-Westphalia (NRW), 4 A 2948/11, Germany, 18 September 2014. This case is referenced in, Hillion, (n 45) p 55.

[70] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381.

[71] Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004) p 163.

[72] For example, see, Case C-91/05, *Commission v Council*, ECLI:EU:C:2008:288 ('*ECOWAS*'); Case C-403/05, *Parliament v Commission*, ECLI:EU:C:2007:624 ('*Philippines Border Management*'); Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:2025 ('*Mauritius*'); and Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435 ('*Tanzania*').

The Court has not in any way attempted to shy away from CFSP matters, in fact, quite the opposite.[73] This has long been a dreaded scenario for the High Contracting Parties. In the Treaty of Maastricht, the restriction of the Court in CFSP matters may not have been as rigid as Member States wanted it to be.[74] As will be seen, the levering open of jurisdiction to the Court has happened incrementally. The use of the flexibility clause to bring new areas into Union law has also opened up those areas to the jurisdiction of the Court,[75] despite the flexibility clause having an external limit;[76] and in its present form, it cannot be used for CFSP matters.[77]

The Court has itself stated that, pre-Lisbon, its position with respect to CFSP matters was less extensive than the TEU as a whole.[78] The General Court said that a budgetary element of CFSP matters in the then second pillar meant the Court had the jurisdiction to hear a case, even though it centred on CFSP matters.[79] On appeal, this was an interpretation recommended to be upheld by the Advocate General,[80] and was later affirmed by the Court.[81] There is no equivalent of the former Article 46 TEU in the treaties post-Lisbon, but this small change from limited jurisdiction to assumed jurisdiction, albeit significant,[82] meant derogations on the Court's jurisdiction had to be imposed in specific areas. Yet, this has not meant that CFSP legal acts escape the jurisdiction of the Court entirely. Both the *Gestoras* and *Segi* cases implied that the exceptions applied to the jurisdiction of the Court should be read in a narrow manner,[83] and supervision by the Court can be conducted.

With international agreements having their position based within international law, the jurisdiction of the Court could be said to be limited to annulling internal Union acts. This limits the Court to annulling a Council Decision internally within

[73] In fact, it recently said it 'cannot, for want of jurisdiction'. See, Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 253.

[74] See, Nanette Neuwahl, 'Foreign and Security Policy and the Implementation of the Requirement of "Consistency" under the Treaty on European Union' in David O'Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, 1994).

[75] See, Graham Butler, 'The EU Flexibility Clause Is Dead, Long Live the EU Flexibility Clause' in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Hart Publishing, 2019).

[76] Robert Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47 *Common Market Law Review* 1385 at 1410.

[77] See Chapter 3 of this book.

[78] Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2007:116 ('*Segi*'), para 50.

[79] Case T-231/04, *Hellenic Republic (Greece) v Commission*, ECLI:EU:T:2007:9, para 74.

[80] Opinion of Advocate General Mazák, Case C-203/07 P, *Hellenic Republic (Greece) v Commission*, ECLI:EU:C:2008:270, para 54.

[81] Case C-203/07 P, *Hellenic Republic (Greece) v Commission*, ECLI:EU:C:2008:606, para 40.

[82] Gavin Barrett, 'Creation's Final Laws: The Impact of the Treaty of Lisbon on the "Final Provisions" of Earlier Treaties' (2008) 27 *Yearbook of European Law* 3 at 37.

[83] Case C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano Olano, Julen Zelarain Errasti v Council*, ECLI:EU:C:2007:115, para 53, and Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2007:116 ('*Segi*'), para 53. As noted, certain parts of the two judgments were 'practically identical'. Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625 at 1630.

Union law, whilst maintaining the external effects to be consistent with the international legal principle of *pacta sunt seventa*.[84] With restrictive measures, which are partly grounded on a CFSP legal basis through a CFSP Decision on Article 29 TEU, and a non-CFSP Regulation on Article 215 TFEU, the Court does have the jurisdiction to examine if such measures impose on other Union competence.[85] With this array of cases where it has explicit jurisdiction for individuals, a high number of cases are appealed to the General Court,[86] and on occasion appealed up to the Court. Thus, where the Court is not specifically prevented from ruling on the legality of restrictive measures against persons, groups, or bodies, it may be construed that allowing the Court to have a limited amount of judicial insight in CFSP matters, in essence, allows for the gradual opening of CFSP matters to full judicial review.

5.4. Questioning Jurisdiction

Judicial review is characteristically a power struggle between an applicant and a respondent. As much as it may seem that it does not want to embattle itself in such situations, the Court adopts an objective, as opposed to a subjective, test to assist in its judgments with respect to external relations.[87] By taking an objective approach to the cases before it, the Court looks to both the purpose of the act and its overarching aim in each cases, before reaching a decision. In CFSP matters, it is clear that the Court, first and foremost, has to answer questions about its own jurisdiction to rule, if such jurisdiction is disputed. The Court has been requested on many occasions to rule on complex cases relating to CFSP matters. To resolve inter-institutional conflict and decipher the exact position of the Court concerning review of CFSP matters, it is necessary to outline the positions it has previously taken on this issue.

Adjudication by the Court has increased rapidly in the past fifteen years,[88] It has always been subconsciously examining itself to ensure its efficiency and prudence in dealing with the matters that have come before it. With EU foreign policy being contested on a legal basis and other technical intricacies, battle lines have been drawn between different legal actors. With the EU formerly a pillar

[84] See, Samuli Miettinen, 'Annulment in Action: How Does the Court of Justice of the European Union Explain Maintaining the Legal Effects of Annulled Instruments?' in Jarna Petman (ed), *Finnish Yearbook of International Law 2012–2013: Volume 23* (Hart Publishing, 2016).

[85] TEU, Article 40 and TFEU, Article 275.

[86] See, Christina Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counter-terrorist to Third Country Sanctions' (2014) 51 *Common Market Law Review* 869.

[87] Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014) p 142.

[88] See, Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015). Figure 1: Data Court Jurisprudence 1961–2014.

project built upon a 'highly convoluted structure',[89] inter-pillar disputes before the Court continue to exist and be a regular feature of competence disputes between the institutions in CFSP matters. By putting CFSP matters through the Court's jurisdictional questions, it can be seen how the Court has shaped it as a constitutionalised, legal field. The judgments before the Court dealing with CFSP matters have, as of late, been seeking the Court's assistance with watering down the solidity in which CFSP matters, as a policy field, have been managed and controlled by the Council. With other institutions and legal actors seeking to challenge the actions taken by the Council in CFSP matters, pursuing such actions in the Court can be seen as an attractive option to dilute the Council's institutional power.

5.4.1. A Question of Jurisdiction

It was once claimed that '[t]he Court…cannot have control of its own jurisdiction. The ground rules must be clearly defined in a [Union] governed by the rule of law'.[90] As normative as that may be, it is quite distant from the reality where the Court defines its own jurisdiction. Cases like *National Road Haulage* have cemented the role of the Court in the jurisdictional issues of actors in their right to bring an action for annulment.[91] With the pillarisation of the Union, it was first acknowledged by the Court in *Grau Gomis* that it had 'no jurisdiction to interpret' certain matters that were carved out from judicial review by the treaties.[92] Around the same time, however, in *Airport Transit Visas*,[93] the Court demonstrated its ability to conduct border policing between the first and third pillars. The admissibility of the case demonstrated the Court's protection of Union competence against those pushed by the Member States.[94] By accepting that the Court itself could examine jurisdiction on the matter, it effectively confirmed it looks into the content of the measure to access compliance with the competence of the Union as set out in the treaties. The case clearly demonstrated that the Court could review pillar activity, at least with respect to the first and third pillars.

[89] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *Common Market Law Review* 17 at 23.

[90] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, ECLI:EU:C:2001:366, para 61.

[91] Case C-65/90, *Parliament v Council*, ECLI:EU:C:1992:325 ('*National Road Haulage*') See, Henry G Schermers and Piet Jan Slot, 'Case C-65/90, European Parliament v Council of the European Communities, Judgment of 16 July 1992' (1993) 30 *Common Market Law Review* 1067 at 1069.

[92] Case C-167/94, *Criminal proceedings against Juan Carlos Grau Gomis and others*, ECLI:EU:C:1995:113, para 6.

[93] Case C-170/96, *Commission v Council*, ECLI:EU:C:1998:219 ('*Airport Transit Visas*'). As noted by the Advocate General, the 'limitations on the Court's jurisdiction, however, do not deprive it of power to consider the content of the contested act for the purpose of the present action' [compared to *Grau Gomis*]. Opinion of Advocate General Fennelly, Case C-170/96, *Commission v Council*, ECLI:EU:C:1998:43 ('*Airport Transit Visas*'), para 11.

[94] Nial Fennelly, 'The Area of "Freedom, Security and Justice" and the European Court of Justice – a Personal View' (2000) 49 *International and Comparative Law Quarterly* 1 at 13.

When it came to the then second pillar, however, it had been argued previously that given the position of CFSP matters before the Union Courts, national courts in Member States should have jurisdiction when it comes to judicial review.[95] This, as often highlighted, was far from ideal.[96] Whilst *Haegemann* is known for asserting that international agreements form an integral part of the legal order,[97] it was also a case where the Court asserted jurisdiction through a preliminary reference on an external relations case, meaning that even when not specifically envisaged, the Court has ways to assert its jurisdiction. Similarly, in *Svenska Journalistförbundet*,[98] the General Court asserted that merely because the documents sought came under the CFSP provisions of the treaties, this did not in itself exclude the Court having jurisdiction. The General Court drew a distinction that it was not reviewing the legality of the measure under the then Article L, but rather, public access to such measures.[99] It furthermore justified its expansive interpretation on jurisdiction in a comparative perspective, in that it had jurisdiction to review certain JHA measures based on the third pillar just, like CFSP matters, another policy field, that is formulated based on rules-based cooperation. This *Svenska Journalistförbundet* judgment has been labelled one of the General Court's boldest,[100] as it made the step of asserting itself against the will of the Council.

The Court had previously expressed the view that when the competence of the Union is at issue in a case, pre-Article 40 TEU, it cannot be excluded entirely,[101] in contrast to how other interpreters of the treaties might see it. The Court, in attempting to provide a remedy in the *UPA* judgment, said it may not widen its own jurisdiction beyond the treaties themselves.[102] In the *ECOWAS* case,[103] arguably one of the most prominent cases on delineating CFSP and non-CFSP matters just prior to the entry into force of the Treaty of Lisbon, the basis for the action to determine the Article 40 TEU border policing role that the Court plays was not questioned. However, the jurisdiction of the Court to determine the legality of the Joint Action under Article 277 TFEU, then Article 230 EC, was contested.

[95] This position is supported in the Opinion of Advocate General Mengozzi, Cases C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano Olano, and Julen Zelarain Errasti v Council of the European Union ('Gestoras')*, and Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2006:667 ('*Segi*'), para 99.

[96] For example, Alicia Hinarejos, 'Judicial Control of CFSP in the Constitutional Treaty: A Cherry Worth Picking?' (2006) 25 *Yearbook of European Law* 363 at 392.

[97] Case C-181/73, *Haegemann v Belgium*, ECLI:EU:C:1974:41.

[98] Case T-174/95, *Svenska Journalistförbundet v Council*, ECLI:EU:T:1998:127. This judgment is analysed further in Chapter 6 of this book.

[99] Case T-174/95, *Svenska Journalistförbundet v Council*, ECLI:EU:T:1998:127, para 85.

[100] Peter Dyrberg, 'Current Issues in the Debate on Public Access to Documents' (1999) 24 *European Law Review* 157 at 161.

[101] This principle was evident in, Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, ECLI:EU:C:1997:8.

[102] Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462.

[103] Case C-91/05, *Commission v Council*, ECLI:EU:C:2008:288 ('*ECOWAS*').

The latter was not dealt with in full by the Court, yet it nonetheless appeared to suggest it had jurisdiction, given its connectedness to its border policing role.[104]

5.4.2. Post-Lisbon

Contestation within EU external relations law and finding the dividing line between CFSP and non-CFSP matters can be considered an inherently good exercise. The playing out of such arguments elucidate better validations and force institutions and legal actors to justify their stances. Given that jurisdictional matters for the Court underwent a flipping exercise in the Treaty of Lisbon, it is most prudent to look at the litigation on CFSP matters after this development. In *Smart Sanctions*,[105] the jurisdiction of the Court was not at issue, yet in *Mauritius*, the Court said that given Article 19 TEU gave general jurisdiction to the Court, it must be interpreted that the derogations imposed by Article 24 TEU and Article 275 TFEU must 'be interpreted narrowly'.[106] This, in itself, is not surprising; the Court interprets exceptions in a narrow manner, as otherwise, they would inevitably be exploited by the Council, further skewing any sense of institutional balance. It is thus construed that allowing the Court to have a limited amount of judicial control in CFSP matters – competence delimitation through Article 40 TEU and sanctions through Article 275 TFEU – in essence allows for the opening up of judicial control on a wider range of CFSP matters.

When the Court affirms jurisdiction in a case, it does not stop there. By patrolling the border between CFSP and non-CFSP matters, it looks to substance. Whilst the Court in *Mauritius* may have upheld the CFSP legal basis, it nonetheless accepted jurisdiction in the case. In *Eulex Kosovo*,[107] the General Court said the defendant lacked legal capacity.[108] Due to this technicality, it was not required to cast judgment on the 'alleged lack of jurisdiction of the General Court concerning acts adopted on the basis of the provisions of the [T]FEU…relating to…CFSP [matters]'.[109] On appeal to the Court, the Advocate General in his initial Opinion

[104] Ibid. para 34. See, Christophe Hillion and Ramses A Wessel, 'Competence Distribution in EU External Relations after Ecowas: Clarification or Continued Fuzziness?' (2009) 46 *Common Market Law Review* 551 at 569.

[105] Case C-130/10, *Parliament v Council*, ECLI:EU:C:2012:472 ('*Smart Sanctions*').

[106] Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:2025 ('*Mauritius*'), para 70. Also, see, Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 *Human Rights Law Review* 485 at 498.

[107] Case T-213/12, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:T:2013:292.

[108] It has been noted that the CFSP Decision giving effect to Eulex Kosovo has been amended following the judgment, giving it different legal capacities. L 174/42. Council Decision 2014/349/CFSP of 12 June 2014 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, Eulex Kosovo. As noted, Pieter Jan Kuijper, 'The Common Foreign and Security Policy and the Common Security and Defence Policy' in Pieter Jan Kuijper and others (eds), *The Law of the European Union* (Kluwer Law International, 2018) pp 1281–1282.

[109] Case T-213/12, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:T:2013:292, para 45.

did not broach the issue of jurisdiction.[110] Following another oral hearing on the specific issue of jurisdiction, upon which the Court raised the question of its own motion,[111] a second Opinion was delivered,[112] recommending the jurisdiction of the Court. The Opinion stated that even though a measure may be adopted under Title V, the provisions relating to CFSP matters of the treaties, the Court had jurisdiction in the matter given that it fell within the budgetary constraints of the Union.

The Court emphatically stated 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'.[113] Ultimately, therefore, the *Eulex Kosovo* judgment is demonstrative of the Court delving into CFSP matters, which was something the General Court had restrained itself from doing. The case also reveals different views from within the EU judiciary as regards the true scope of the Court's jurisdiction in CFSP matters.

5.4.3. The Hurdle to ECHR Accession

Accession of the Union to the European Convention on Human Rights (ECHR) would have resolved some of the issues surrounding the judicial gap in CFSP matters. Given that actions on a CFSP legal basis may not always be compatible with human rights,[114] it has been recognised that the Union being a party to the ECHR would resolve some deficiencies. The accession of the Union to the ECHR was always going to be difficult, for the Union's 'competence to legislate on the subject-matters dealt with in the Convention has not been…transferred from the Member States to the [Union]'.[115] In this vein, an earlier attempt at accession was shot down by the Court in *Opinion 2/94*,[116] which 'implicitly reject[ed] the notion of external control by the Strasbourg machinery'.[117] Even with the

[110] Opinion of Advocate General Jääskinen [First of Two] of 4 December 2014, Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2014:2416.

[111] Caroline Naômé, *Appeals before the Court of Justice of the European Union* (Oxford University Press, 2018) p 114.

[112] Opinion of Advocate General Jääskinen [Second of Two] of 21 May 2015, Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2015:341.

[113] Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2015:753, para 49.

[114] Brkan (n 54) p 113.

[115] Max Sørensen, 'The Enlargement of the European Communities and the Protection of Human Rights' in Bartholomeus Landheer (ed), *European Yearbook, Vol. XIX* (Martinus Nijhoff Publishers 1973) p 7.

[116] Opinion 2/94, ECLI:EU:C:1996:140 ('*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*').

[117] John L Murray, 'The Influence of the European Convention on Fundamental Rights on Community Law' (2010) 33 *Fordham International Law Journal* 1388 at 1397.

first failed attempt, the then second pillar of CFSP matters alongside the other third pillar of JHA matters was of concern for accession,[118] given the method of decision-making was different from mainstream supranational activity.

Following the amendments to EU primary law by the Treaty of Lisbon, Article 6(2) TEU stipulated that the Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms', supported by Protocol 8 and Declaration 2 of the treaties. Between 2010 and 2013, a Draft Accession Agreement (DAA) was negotiated during intense rounds of discussion between the relevant parties.[119] With the importance of the matter for the Union, the Commission referred the DAA under the Article 218(11) TFEU Opinion procedure to the Court to ensure its compatibility with the treaties.[120] The Opinion of the Court was set to be highly contentious given it had rejected becoming a party to the ECHR once before under the same procedure.

Central to the Court's dilemma was that the proposed DAA would cover the entirety of the Union's undertakings. The question, therefore, was whether it would have regard for the specific nature of particular areas of Union law that are special in the Union's legal order. The prestige that the Court prides itself on came into play when it wasted no time in grasping an opportunity to use the jurisdictional derogation imposed on it to prevent an international agreement from proceeding. In a wide-ranging Opinion, the Court in *Opinion 2/13* detailed a number of incompatibilities with the proposed DAA and ultimately found it not to comply with the primary law of the Union. It found fundamental problems with the agreement, stating it undermined the autonomy of Union law and its entire legal order. CFSP matters were just one of a number of issues the Court identified with the agreement for the Union to accede to the ECHR.

The most striking element of the Opinion is that the Court exercised jurisdiction over the DAA that covered CFSP matters. It did this, without any reluctance, or apparent opposition from the parties before the Court. In its interpretation, allowing a non-Union body, the ECtHR, to have jurisdiction over an EU policy domain such as CFSP matters, where the Court itself does not have full jurisdiction was a bold proposal. In the eyes of the Court, with the agreement failing to have regard for the setup of CFSP matters by not giving appropriate jurisdictional safeguards, and the possibility for Union law to be deciphered in a way that is uncontrollable by itself, was a step beyond acceptable. This train of thought is not

[118] Síofra O'Leary, 'Accession by the European Community to the European Convention on Human Rights – The Opinion of the ECJ' [1996] *European Human Rights Law Review* 362 at 366.

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

[120] The Opinion procedure affords the Court, as an institution, strong influence upon the foreign relations matters of EU, particularly regarding competence internally within the Union, and the constitutional nature of the Union externally. See, Graham Butler, 'Pre-Ratification Judicial Review of International Agreements to Be Concluded by the European Union' in Mattias Derlén and Johan Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing, 2018).

altogether surprising given the Court's past performance. One of the ways in which the Court exercises its 'legal agenda' is through 'selective input…[on]…the determination of the boundaries of its jurisdiction'.[121] In *Opinion 2/13*, the Court stated that putting a hypothetical limit on the scope of its powers in CFSP matters was premature, as it has not had the opportunity previously to state the exact boundary of its jurisdiction in CFSP matters.[122] Neither was it likely to be willing to define that limit. The Court said that given the structures of the treaties to exclude certain acts in CFSP matters from the Court, Union law alone could only explain this given that, under the DAA, the ECtHR would be in a position to judicially review acts in all areas of Union law, including CFSP matters. The Court said this enabled the transfer of Union law exclusively to a non-EU body[123] and referred to a previous Opinion which stated that these said acts could not be exclusively conferred to a non-EU body,[124] even though it would only be on areas covered by the ECHR.

One reading of *Opinion 2/13* shows that the Court wished to see an amendment to the DAA so that the jurisdiction of the ECtHR in legal acts on a CFSP legal basis would be curtailed.[125] The other solution that the Court might also settle for, despite not setting it out itself, would be to open up jurisdiction of CFSP matters to the Court. It could be argued that the Court was compelled to ensure basic rights were appropriately protected by finding the DAA incompatible with the treaties, for fear of what national courts would do if EU accession occurred and left a vacuum with respect to CFSP matters that the Court was legally unable to fulfil. In line with the potential conflict between national courts and the Court in the *Solange* line of thinking, with particular regard to the Federal Constitutional Court in Germany,[126] the Court's foresight has demonstrated how seriously it viewed a potential threat, and thus fended it off with rigour.

The Court, in effect, said that this threatened the very nature of the EU legal order given its limited jurisdiction in CFSP matters, and with no similar derogation placed on the ECtHR. The Court appeared to be very willing to use CFSP matters as one of many reasons to protect not only the EU legal order, but also its own interests. It could be argued that the handling of CFSP matters by the Court is not as clear-cut as it suggests in *Opinion 2/13*. It has even been suggested that

[121] Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 the EC Treaty* (Hart Publishing, 1998) p 19.

[122] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 251.

[123] It has been claimed that the Court got its 'exclusive' claim wrong, given the national legal space for national courts to act. See, Christophe Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' (2016) 1 European Papers 55.

[124] Opinion 1/09, ECLI:EU:C:2011:123 ('*Creation of a Unified Patent Litigation System*'), paras 78, 80, and 89.

[125] Jörg Polakiewicz, 'Accession to the European Convention on Human Rights (ECHR) – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' (2016) 36 *Human Rights Law Journal* 10 at 19.

[126] See, Mattias Kumm, 'Who Is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice' (1999) 36 *Common Market Law Review* 351.

Opinion 2/13 puts a limit on the role that national courts play in CFSP matters, saying that the Court believes all judicial authorities dealing with Union legal matters ought to be excluded, except for itself.[127] Whilst this may or may not be the case, it still raises questions as to how far the Court could go, if it so wishes, to set out its own jurisdiction in CFSP matters, which it has not done to date. However, it is clear that the Court will never fully define the extent of the limitations posed on it, as it would effectively be pigeonholing itself for future cases.

The issue of CFSP matters in *Opinion 2/13* goes further. If the drafters of the DAA were willing to give jurisdiction over CFSP matters to the ECtHR, what is to say jurisdiction over CFSP matters could, as it presently stands, end up in front of the International Court of Justice (ICJ). Moreover, the same could be said for other international courts and tribunals such as the the International Tribunal for the Law of the Sea (ITLOS),[128] with respect to the EU's martime operations. The *Mox Plant* case would seem to serve as a rebuttal to this view.[129] In addition, Article 344 TFEU specifies that disputes concerning the treaties should not go elsewhere,[130] other than the Court itself.[131] This reading of Article 344 TFEU in *Opinion 2/13* is thought to be strict,[132] in line with previous cases in which the Court has taken a 'straight and narrow' approach.[133] EU Member States accordingly have no discretion for where they can settle judicial disputes that are of a particular nature. This would imply that no forum shopping in the international arena for CFSP matters is allowed. Article 344 TFEU's predecessor, Article 292 EC, was not applicable to CFSP matters, given the provision did not extend from the Community to the Union, when a clear distinction was made. A potential case at the ICJ would be a moot point, given the possibility for initiating a case would be limited to Member States, where the admissibility of the case itself would be a point of contention. Furthermore, the Statute of the ICJ in Article 34(1) specifies that, '[o]nly states may be parties in cases before the Court'.[134] Accordingly, *Opinion 2/13* has been criticised for first stating that the ECtHR would be judicially reviewing CFSP

[127] This claim by the Court is outlined in, Hillion (n 45) p 53.

[128] Christophe Hillion and Ramses A Wessel, '"The Good, the Bad and the Ugly": Three Levels of Judicial Control over the CFSP' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar, 2018) p 75.

[129] Case C-459/03, *Commission v Ireland*, ECLI:EU:C:2006:345 ('*Mox Plant*') See, Nikolaos Lavranos, *Jurisdictional Competition: Selected Cases in International and European Law* (Europa Law Publishing, 2009) p 28, and Nico Schrijver, 'Case C-459/03, Commission of the European Communities v Ireland, Judgment of the Court (Grand Chamber) of 30 May 2006, [2006] ECR I-4635' (2010) 47 *Common Market Law Review* 863.

[130] TFEU, Article 344: 'Member States undertake not to submit a dispute concerning the interpretation or application of the [t]reaties to any method of settlement other than those provided for therein.'

[131] This view is supported in De Baere (n 10) p 177.

[132] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, para 47.

[133] Pieter Jan Kuijper, 'The Case Law of the Court of Justice of the EU and the Allocation of External Relations Powers: Whither the Traditional Role of the Executive in EU Foreign Relations?' in Cremona and Thies (n 45) p 112.

[134] 'Charter of the United Nations and the Statute of the International Court of Justice'. Article 34(1), Statute of the International Court of Justice.

matters,[135] and secondly for claiming 'exclusivity' on the judicial scene,[136] appearing to ignore national courts.

The legal nature of *Opinion 2/13* can be questioned for its own institutional motives and whether the Opinion was a political act dressed in the cloak of legal argumentation. How accession of the Union to the ECHR may be overcome is a matter that will remain the subject of intense debate. One consideration will be whether the Court's objections to how CFSP matters will manifest in the future and whether the development of further case law will straighten out the issues raised by the Court, or if the setup of CFSP matters in the treaties will have to be altered. The issues related to CFSP matters raised by the Court in *Opinion 2/13* will be the most difficult to overcome within the current framework of the treaties. In the event neither occurs, it is likely, politically speaking, that the further negotiations that will attempt to overcome *Opinion 2/13* will result in the next DAA again being subject to an Opinion of the Court through the Article 218(11) TFEU opinion procedure.

5.4.4. Further Litigation

The *H v Council* judgment has been another case of the Court prising open its jurisdiction.[137] A Grand Chamber judgment, it was an appeal of an Order of the General Court.[138] Initially, upon receipt of the case, the General Court said it had no jurisdiction on the matter given the CFSP matters, thereby interpreting the treaties' provisions on lack of jurisdiction – Article 24(1) TEU and Article 275 TFEU – in a broad manner. The applicant appealed the case to the Court as it was of the view that the staffing issue was an administrative act and could not be construed as to entail non-jurisdiction of the Court, notwithstanding the fact that the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH) was formed on a CFSP legal basis.[139] The case presented itself as an opportunity for the Court to refine the extent of its jurisdiction in CFSP matters. In the General Court, both the Council and the Commission said the matter was a CFSP matter and, therefore, pursuant to the second paragraph of Article 24(1) and the first paragraph of Article 275 TFEU, the General Court did not possess any jurisdiction over it. The General Court agreed.

On appeal, the Advocate General said the General Court was correct in saying it had no jurisdiction.[140] However, the Court took a contrasting outlook and, whilst

[135] Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) 38 *Fordham International Law Journal* 955 at 988.

[136] See, Hillion, (n 45).

[137] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569.

[138] Case T-271/10, *H v Council*, ECLI:EU:T:2014:702.

[139] L 322/22. Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH).

[140] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, paras 30–94.

acknowledging that, principally, it can be assumed that its jurisdiction does not extend to the provisions related to CFSP matters in the treaties, known as Title V, or Articles 23–46 TEU, it stated that the general exclusion of the Court cannot extend to all aspects of CFSP matters. Based on this assertion, it can be assumed that acts adopted on a CFSP legal basis may potentially come within the Court's jurisdiction. Despite the EUPM being formed on a CFSP legal basis through Articles 28 and 43(2) TEU, the issue, was whether administrative decisions falling within the 'day-to-day' sphere of operations on the ground in the EUPM constitute non-jurisdiction of the Court. The CFSP Decision establishing the EUPM, amongst other things, set out the staffing arrangements for the mission. What was clear from the Decision is that EUPM staff are all subject to the rules and direction of the Civilian Operation Commander. This is sensical, given that the idea of senior officials not being in central control of all staff would be an operational and logistical nightmare.

On closer inspection of the CFSP Decision, however, the legal positions are in fact distinct, in that some staff are seconded from national public bodies, while others are seconded from various EU institutions, agencies, and bodies. Despite this difference, the CFSP Decision allows for the coordination of day-to-day operations to cover all staff. The Court used this tool to prise open jurisdiction for the matter at hand. Given that acts of staff management occurs in all EU public bodies, the Court noted that the CFSP Decision on staff arrangements within the EUPM is similar to those exercised in EU institutions.[141] As a result, the Court believed that the derogations imposed on its jurisdiction in both Article 24(1) TEU and Article 275 TFEU cannot prevent it from exercising review over staff management in the EUPM, notwithstanding the fact that an EUPM is situated on a CFSP legal basis.

This interpretation by the Court was not without further justification. Reliance was also placed upon a CFSP Decision governing the statute, seat and operational rules of the European Defence Agency (EDA),[142] which conferred jurisdiction upon the Court to adjudicate on matters relating to seconded national experts. Furthermore, the Court said, 'the very existence of effective judicial review [is] designed to ensure compliance with provisions of [Union] law'.[143] This was not the first time that the Court had used rule of law considerations in justifying judicial review, originally stemming from *Les Verts*.[144] In addition, the Court stated that the issue in this particular case was redeployment, and not secondment itself, which it says the General Court mistook.

The Court's *H v Council* judgment can be commended for trying to exclude perceived meddling by national authorities of Member States in what are essential

[141] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569, para 54.

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

[143] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569, para 41.

[144] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166. See, Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in Miguel Poiares

EU external missions,[145] which is well beyond the remit of Member State's domestic legal orders. Yet the *H v Council* judgment can be criticised for making a false comparison in which it looked at a CFSP Decision related to the EDA and applied it, by analogy, to a CSDP mission also established by a CFSP Decision. Comparing a permanent fixture such as the EDA with a legal basis in primary law,[146] with a temporary fixture such as a CSDP mission whose comparability is not as straightforward as the Court reasoned, given they are characteristically different creatures. However, notwithstanding the contested reasoning of the Court in *H v Council*, the treaties attempting to exclude it from CFSP matters cannot be interpreted as being that everything to do with CFSP matters is beyond the Court's reach.

To interpret all things relating to CFSP matters, including administrative, procedural and operational issues, as being actions on a CFSP legal basis to escape judicial oversight of the EU judicial body would have been over-interpretation of the restrictions on the Court that have been set down by the treaties. However, what is construed as an act on a CFSP legal basis has become smaller as a result, as the Court took a narrow construal of what an act is, and the derogations imposed on the restrictive judicial review arrangements. The treaties distinguish between acts of foreign policy and implementing acts, with Article 40 TEU stating '[t]he implementation of…[CFSP matters] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the [t]reaties for the exercise of the Union competence'. Even through implementing acts of foreign policy, in the Court's interpretation, it would be erroneous to construe all decisions of various importance on a CFSP legal basis as to exclude judicial review.

Notwithstanding the environment in which missions like the EUPM operate, the Council's argument in *H v Council* – that an operational issue in the context of security and defence should fall outside the EU judicature – is not particularly strong. The CFSP Decision by the Council on the EDA, the year prior to *H v Council*, mean it, in a way, flatly contradicted itself. Perhaps without realising the full ramifications of that Council Decision,[147] it had a spillover effect. The Council trampled over its own arguments by granting the Court jurisdiction within a previous CFSP Decision, but then tried to claim that it did not have the same adjudication powers within a different CFSP Decision on an EUPM. As a result, *H v Council* is another case in a series of breakthroughs for the Court in CFSP matters, and its result can be interpreted as meaning that a measure concluded

Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010) p 303. Furthermore, Graham Butler, 'Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law' (2018) 24 *Columbia Journal of European Law* 637.

[145] Kuijper (n 108) p 1282.

[146] TEU, Article 42(3), second para, and TEU, Article 45. It also has secondary law provisions. L 183/16. Council Decision 2011/411/CFSP of 12 July 2011 Defining the Statute, Seat and Operational Rules of the European Defence Agency and Repealing Joint Action 2004/551/CFSP.

[147] L 266/55. Council Decision (CFSP) 2015/1835 of 12 October 2015 Defining the Statute, Seat and Operational Rules of the European Defence Agency (n 142).

on a CFSP legal basis does not, de facto, exclude the Court. Whilst *H v Council* extended the jurisdiction of the Court in CFSP matters, it did not, as should be remembered, completely set down the case for judicial review of acts on a CFSP legal basis in themselves. It was, rather, another marked exception to the limitations placed on the Court's jurisdiction.

Whilst the Court's *Mauritius* and *Tanzania* judgments, as discussed in the previous chapter, have demonstrated that it has been strong on institutional procedures, ensuring that CFSP decision-making also respects non-CFSP articles that are applicable, such as Article 218 TFEU; another matter is notable. The Court in *H v Council* opened up its jurisdiction in CFSP matters without making use of Article 40 TEU, its border-policing role between CFSP and non-CFSP matters. In addition, traces of the General Court's *Svenska Journalistförbundet* judgment can be spotted in the Court's judgment.[148]

In an unusual scenario, it would appear that the General Court has become much more reserved in its jurisdiction in CFSP matters than twenty years ago, and it is the Court which has been much more courageous. The outcome of *H v Council* meant the General Court's order finding of no jurisdiction has been set aside. Article 61 of the Statute of the Court permitted it to send back cases to the General Court,[149] for which it will be bound now on points of law that have been issued by the Court. Hence, the Court bounced the issue back to the General Court to decide the case on matters of substance, now that its jurisdiction had been affirmed.[150]

5.4.5. A Preliminary Reference

Whilst *H v Council* has implicitly affirmed that 'CFSP [matters are] fully integrated in the EU legal order',[151] it is not as fully as may be anticipated, for the jurisprudence has not been exhausted. The *Rosneft* case came to the Court from a British court via the preliminary reference procedure, which, amongst other things, dealt with the Court's jurisdiction in CFSP matters.[152] With narrow legal standing for the rights of individuals taking direct actions, as an alternative, preliminary references have functioned as an indirect filtering mechanism for individuals using national courts to seek access to the Court.

[148] Case T-174/95, *Svenska Journalistförbundet v Council*, ECLI:EU:T:1998:127.

[149] C 83/210. Protocol (No 3) on the Statute of the Court of Justice of the European Union.

[150] Case T-271/10 RENV, *H v Council*, ECLI:EU:T:2018:180. On procedural grounds, the case that returned to the General Court has been appealed again to the Court. Case C-413/18 P, *H v Council*, pending.

[151] Peter Van Elsuwege, 'Upholding the Rule of Law in the Common Foreign and Security Policy: H v Council' (2017) 54 *Common Market Law Review* 841 at 858.

[152] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381.

Individuals are in a peculiar position when it comes to legal standing before the EU courts. This is no different in CFSP matters, albeit with its own legal specifics. The wording of the second paragraph of Article 275 TFEU specifies that the jurisdiction of the Court is confined to restrictive measures cases,[153] which are direct actions taken to the General Court. Article 275 TFEU appears not to provide for cases that arise as a result of preliminary references. It has been argued that the Court 'may afford possibilities' to handle preliminary references in this field,[154] whilst acknowledging the case law is not complete in the area. The *Rosneft* case afforded the Court the possibility to clarify the parameters of its potential judicial review powers over CFSP matters that do not relate to restrictive measures through the preliminary reference procedure.

It was argued nearly a decade prior to *Rosneft* that concerns over the rule of law and the uniformity of Union law could be used as a justification for the Court to open up the preliminary reference procedure to CFSP matters.[155] The *Rosneft* scenario, therefore, had been a long time coming. Cases on CFSP matters coming to the Court as preliminary references provide new challenges. Whereas the landmark cases on CFSP matters to date have been direct actions, many of which have been inter-institutional litigation, the preliminary reference cases on CFSP matters ultimately go back to the appropriate national court for application.

The judgment in *Rosneft* has, to date, provided the 'rich[est] conception of the Court's role in CFSP matters'.[156] The High Court of England and Wales in the United Kingdom asked a number of questions of the Court, including whether it had jurisdiction under a preliminary reference to rule on questions relating to a CFSP Decision[157] (which was subsequently amended by two other CFSP Decisions)[158] and a Council Regulation[159] (subsequently amended by

[153] TFEU, Article 275, second para: '…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.'

[154] See the case for this being set out in, Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (ed Janek Tomasz Nowak) 3rd edition (Oxford University Press, 2014) p 458 (para 10.04).

[155] De Baere (n 10) p 186.

[156] Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International and Comparative Law Quarterly* 1. p 23.

[157] L 229/13. Council Decision 2014/512/CFSP of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine.

[158] L 271/54. Council Decision 2014/659/CFSP of 8 September 2014 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine; L 349/58. Council Decision 2014/872/CFSP of 4 December 2014 Amending Decision 2014/512/CFSP Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine, and Decision 2014/659/CFSP Amending Decision 2014/512/CFSP.

[159] L 229/1. Council Regulation (EU) No 833/2014 of 31 July 2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine.

two other Regulations).[160] By asking questions of this nature, it brought forward the issue of whether the Court even had the jurisdiction to hear the case to begin with, having regard to Articles 19(1), 24, and 40 TEU, Article 275 TFEU, and Article 47 CFR.

The *Gestoras* and *Segi* cases,[161] whilst former third pillar judgments, presented a similar, albeit different conundrum, that would help guide the Court in *Rosneft*, allowing it to exercise jurisdiction in CFSP matters, subject to Article 267 TFEU. The former Article 35(1) TEU, in which Article 267 TEU has its roots, would have to be interpreted broadly for the Court to be in a position to find jurisdiction. In both *Gestoras* and *Segi*, the Court found that 'preliminary [references] [are] designed to guarantee observance of the law in the interpretation and application of the Treaty, [and] it would run counter to that objective to interpret Article 35(1)… narrowly'. Given the recent *H v Council* judgment as discussed above, it was highly likely the Court would find jurisdiction for itself in *Rosneft*, if it was to apply the former third pillar rules to the former second pillar.

To put the *Rosneft* case in context, a two-step process was put in place for restrictive measures to be legally crafted with two differing legal instruments at work to give full effect in the EU legal order. For the first step, the Council, as per Article 29 TEU, made a CFSP Decision based on the CFSP chapter of the treaties. A follow-up Council Regulation under Article 215 TFEU subsequently follows this. The relationship between the CFSP Decision and non-CFSP Regulation is the key to unlocking the puzzle. The legal basis of Article 215 TFEU permits Union actors to allow the relationship between a CFSP and a non-CFSP legal basis to flourish. The *Kadi I* case emphasised that where a bridge is extended between the TEU and the TFEU, such as the objectives of the TEU against those of Article 75 TFEU (ex-Article 60 EC) and Article 215 TFEU (ex-Article 301 EC), such a bridge only exists where a link has been made 'explicitly'.[162] Article 215 TFEU is an exceptional fusion facilitation method in the treaties whereby a non-CFSP provision can only be utilised on foot of another legal act on a CFSP legal basis.

In the Opinion of the Advocate General in *Rosneft*, he noted that the Court's jurisdiction in the sphere of CFSP matters is limited by Article 24(1) TEU and Article 275 TFEU 'at first sight'.[163] Article 263 TFEU states that the Court has

[160] L 271/3. Council Regulation (EU) No 960/2014 of 8 September 2014 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine; L 349/20. Council Regulation (EU) No 129/2014 of 4 December 2014 Amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine and Amending Regulation (EU) No 960/2014 Amending Regulation (EU) No 833/2014.

[161] Case C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano Olano, Julen Zelarain Errasti v Council*, ECLI:EU:C:2007:115, and Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2007:116 ('*Segi*').

[162] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461 ('*Kadi I*'), para 202.

[163] Opinion of Advocate General Wathelet, Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 39.

jurisdiction to answer actions brought by the Parliament on the grounds of essential procedural requirements, misuse of institutional powers, and infringements of the Treaties more generally. Article 263 TFEU, fourth paragraph, states that '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'. If interpreted narrowly, this could mean that preliminary references for CFSP matters could be excluded. The Advocate General skirted this interpretation by noting the inconsistency in the drafting of particular parts of the treaties,[164] stating that Article 24(1) TEU allows the Court to 'review the legality of certain decisions'. Furthermore, the Advocate General stated the Court does have jurisdiction to hear the preliminary reference, stating that 'in accordance with the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, the Court has jurisdiction to give a preliminary [reference], under Article 267 TFEU'.[165]

On the substance of the jurisdictional question in *Rosneft*, and in line with previous case law on the limitations on its jurisdiction, the Court argued that these limitations had to be narrowly interpreted. It said 'the principle of effective judicial protection…implies that the exclusion of the Court's jurisdiction in [CFSP matters] should be interpreted strictly'.[166] The Court went so far as to say that 'neither the [TEU] nor the [TFEU] indicates that an action for annulment brought before the General Court, pursuant to the combined provisions of Articles 256 and 263 TFEU, constitutes 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 [preliminary reference] on validity'.[167] It used a number of different articles in EU primary law to claim jurisdiction – Articles 19, 24, and 40 TEU, Article 275 TFEU, and Article 47 CFR.

Article 24 TEU can be seen as insufficiently precise. In just one sentence it states that the role of the Parliament and Commission 'is defined by the [t]reaties' in CFSP matters, but 'hardly bother[s]' to elaborate the details.[168] The text of Article 24(1) TEU, with respect to the derogations in the Court's jurisdiction, appears to be open to greater interpretation than other carve-outs. Article 24 TEU and Article 275 TFEU appear to possess similar features. However, on closer inspection, the wording is slightly different. Taken together, Article 24 TEU and Article 275 TFEU allow the Court 'a comfortable margin of interpretation'[169] and allows significant discretion upon the Court to determine if a particular matter is amenable to judicial review or not.

[164] Ibid. para 60.
[165] Ibid. para 92.
[166] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 74.
[167] Ibid. para 70.
[168] Edward and Lane (n 49) p 139.
[169] Sara Poli, 'The Common Foreign Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law' (2017) 54 *Common Market Law Review* 1799 at 1810.

In the Court's judgment in *Rosneft*, it placed greater emphasis on Article 24 TEU than on Article 275 TFEU. This focus on Article 24 TEU allowed the Court to read around Article 263 TFEU, or, to put it more bluntly, to avoid it altogether. Moreover, the language of Article 275 TFEU made many suggestions. Firstly, post-Lisbon, it provided an explicit legal basis for entities to challenge CFSP legal acts targeting them. Second, in keeping with the Court's overall narrow approach to allowing direct challenges to EU legal acts, it has interpreted the kinds of applicants allowed to use Article 275 TFEU.[170] In *Eulex Kosovo*, as recalled, the Court determined that Article 24 TEU and Article 275 TFEU together could 'not 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'.[171]

By analogy, the Advocate General in *Rosneft* said 'there is a difference in wording between the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU', potentially leaving the reader with the 'false impression that the [EU] [c]ourts have no jurisdiction'.[172] The Court, approvingly, stated that Article 24 TEU refers to 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'.[173] This interpretative understanding has precedent. Prior to the entry into force of the Treaty of Lisbon, applicants could circumnavigate the narrow grounds for *locus standi*, a tactic that the Court allowed. For example, in *OMPI*,[174] the General Court annulled a Common Position founded upon a CFSP legal basis,[175] the first time it ever did so.[176]

Article 263 TFEU focuses on the question of legality,[177] as it incorporates many legal concepts, each with a different interpretation of what legality entails. Legality is a broad term and questions often arise about its scope. Textually, Article 263 TFEU is uncomfortable reading for the Court and does not sit

[170] As noted, '[t]he Court has never adopted such a broad interpretation of the first paragraph of Article 275 TFEU'. Opinion of Advocate General Wathelet, Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 45.

[171] Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2015:753, para 49.

[172] Opinion of Advocate General Wathelet, Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 44.

[173] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 70.

[174] Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, ECLI:EU:T:2006:384 ('*Modjahedin I*').

[175] Note that Common Positions are no longer CFSP legal acts and instead have been consolidated into a CFSP Decision. See Chapter 3 of this book.

[176] See, Christina Eckes, 'Case T-228/02, Organisation Des Modjahedines Du Peuple d'Iran v Council and UK (OMPI)' (2007) 44 *Common Market Law Review* 1117.

[177] For an overview of this extensive area, see, Laurence W Gormley, 'Judicial Review – a New Dawn after Lisbon?' in Henning Koch and others (eds), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing, 2010).

well with its 'desire for jurisdiction'.[178] Accordingly, it is unclear how 'a complete system of legal remedies and procedures' à la *Les Vert*[179] could be measured against the legality of Article 263 TFEU. Explicitly, Article 275 TFEU refers to Article 263 TFEU, as the Court acknowledged, but that reference 'was not considered relevant'.[180] By contrast, it has been argued that if the drafters wanted to include the Article 267 TFEU preliminary reference procedure within EU restrictive measures law, then it would have specifically said so in Article 275 TFEU.[181]

Article 19(1) TEU served as another cornerstone of the *Rosneft* judgment. It states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Therefore, the scope of the provision has increased dramatically to include Union measures of any description within the scope of the Court's judicial review. At best, Article 19 TEU is flexible enough to accommodate the variety of circumstances that may be presented for adjudication. At worst, it is a potential license for the Court to do as it pleases. Prior to Article 19 TEU, when no such precise specification for judicial protection existed in Union law, the Court had held in *UPA* that it was for the national courts of the Member States to put procedures in place to ensure effective judicial review and protection.[182] This can be linked with Article 40 TEU and the Court's border policing role. Although the treaties do not explain the precise meaning of Article 40 TEU, the Court can consider questions regarding its application no matter what type of case is before the Court.

In *Rosneft*, the Court asserted that Article 40 TEU was not specific enough to find that it did not have jurisdiction and could therefore be construed as conferring jurisdiction. It explained that while it had jurisdiction to monitor compliance under Article 40 TEU, the primary law of the Union 'd[id] not make provision for any particular means by which such judicial monitoring is to be carried out'.[183] Moreover, Article 19 TEU served as a basis for the Court to claim that the monitoring provision of Article 40 TEU fell 'within the scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the interpretation and application of the [t]reaties the law is observed'.[184] Thus, deriving powers under Article 19 TEU, the Court determined that it had jurisdiction to examine the CFSP Decision and its compliance with Article 40 TEU. Yet, the monitoring provision is not itself an effective tool for challenging restrictive measures, thus, the

[178] Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *European Constitutional Law Review* 673 at 688.

[179] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, para 23.

[180] Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (n 156) p 22.

[181] Poli (n 169) p 1821.

[182] It is 'for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'. Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, para 41.

[183] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 62.

[184] Ibid. para 62.

Rosneft judgment can be viewed as a continued license for political institutions to issue detailed CFSP Decisions for restrictive measures. Given that Article 19 TEU is by no means the sole treaty article describing the contours of the Court's functions and jurisdiction, reading too much into Article 19 TEU may prove to be a flaw in its reasoning.

In *Rosneft*, the Court also drew in the rule of law and the CFR. One Advocate General has said that '[t]he ground rules [for the Court's jurisdiction] must be clearly defined in a [Union] governed by the rule of law'.[185] The formative case of *Van Duyn* came about after much debate within EU legal circles[186] and is known for a number of reasons.[187] However, a lesser-known view is that *Van Duyn* was 'essentially concerned with assuring respect for the rule of law'.[188] Today, the rule of law is built into the structural framework of the Union and is inherent in most of its policies. This includes CFSP matters, despite the limitations on the Court's jurisdiction.[189] Over time, the Court has gradually become more dependent on the rule of law, ensuring 'democracy, human rights and constitutions enforced by independent judiciaries'.[190] Thus, its eagerness to use the rule of law where appropriate is not entirely surprising. The *Rosneft* judgment referred to the rule of law, taking a broad view, noting that the 'very existence of effective judicial review designed to ensure compliance with provisions of [Union] law is of the essence of the rule of law'.[191] The Court did not have to use the rule of law alone to justify its judgment; rather, it invoked the principle as an additional ground to support its declaration of jurisdiction. The rule of law is an important value in Union law, and the Court could deliver more value-laden judgments in the future, given how easily it invoked rule of law in *Rosneft*.

Rosneft also centred on whether acts on a CFSP legal basis can be challenged on the basis of fundamental rights, a question of Article 47 CFR and whether a right to an effective remedy applies. The incorporation of the CFR into EU primary law was a long process, characterised by a complicated debate regarding how to incorporate human rights into the EU legal order. This road led to concessions on the scope of the CFR. For example, in the pre-Lisbon era, primary law was shaped so that it 'clearly implie[d] a lack of competence for the Court…to review both acts

[185] Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, ECLI:EU:C:2001:366, para 61.

[186] Case C-41/74, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

[187] It was the first case finding the direct effect of directives; it determined some of the scope given to public policy exemptions for restricting free movement of workers; it was the first preliminary reference from the newly acceded United Kingdom; and the case, given the subject matter, the Church of Scientology, generated quite the media interest in the Court's work.

[188] Giuseppe Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart Publishing, 2000) p 6.

[189] Ricardo Gosalbo-Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *Common Market Law Review* 337 at 347.

[190] 'Judges as Diplomats in Advancing the Rule of Law: A Conversation with President Koen Lenaerts and Justice Stephen Breyer' (2017) 66 *American University Law Review* 1159 at 1165.

[191] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 73.

of the institutions of the Union and implementing measures taken by EU Member States for their compatibility with any standard of fundamental rights'.[192] The Treaty of Lisbon changed this, giving the CFR's additional relevance, but limited applicability. The initial scope of the CFR was addressed in *Åkerberg Fransson*,[193] but its applicability to CFSP matters had yet to be fully and authoritatively determined by the Court. Article 47 CFR corresponds closely to Article 6(1) ECHR. Questions have lingered about whether the preliminary reference procedure can be made fully compatible with the guarantees of the Convention, such as that of effective legal remedies.[194] Article 47 CFR could be construed to mean that any court or tribunal may provide 'effective remedies'. A national court's refusal to make a reference to the Court 'should thus be analysed in the light of Article 47 [CFR]',[195] which would cover all questions of Union law, including CFSP matters. However, a direct action before the General Court may suffice to meet the Union's fundamental rights obligations under the CFR. In addition to the CFR's text, the Court has used the 'Explanations Relating to the [CFR]' to help it to interpret the true meaning of the CFR's terms,[196] a practice it began in *DEB*.[197]

The *Rosneft* case was the first time the Court invoked the CFR in its reasoning in a case on CFSP matters.[198] At the time of *Les Verts*, the Court had no CFR to refer to and had to be creative in finding a legal justification for its judgment. The right of access to a process overseen by a judicial body was established later in *Johnston*, which held that 'all persons have the right to obtain an effective remedy in a competent court',[199] thereby meaning an 'effective judicial remedy'.[200] The *Johnston* principles were subsequently incorporated into EU primary law.[201] Accordingly, the Court's lack of jurisdiction in CFSP matters since the Treaty of Lisbon was 'susceptible for challenge by reference to Article 47 [CFR]'[202] and the

[192] Koen Lenaerts and Eddy De Smijter, 'The Charter and the Role of the European Courts' (2001) 8 *Maastricht Journal of European and Comparative Law* 90 at 94.

[193] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

[194] Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review* 9 at 31.

[195] Clelia Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' (2016) 53 *Common Market Law Review* 679 at 688.

[196] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20 *Columbia Journal of European Law* 3 at 52.

[197] Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, ECLI:EU:C:2010:811, paras 31–40.

[198] Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, paras 73, 74, and 81.

[199] Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para 19.

[200] Ibid. para 58.

[201] Michael Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011) p 431.

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

Court finally reviewed such a challenge in *Rosneft*. This may appear to be contrary to the understanding that the Court 'may not rely on the [CFR] so as to expand its jurisdiction over areas that the authors of the [t]reaties expressly sought to insulate from judicial scrutiny'.[203] However, CFSP matters are a field where '[f]undamental rights may now be relied upon as grounds of review' more generally.[204] Therefore, in *Rosneft*, the Court tied CFSP matters more closely to the CFR; and so, this connection is likely to persist in all future cases on CFSP matters.

If the Court had adopted an approach in *Rosneft* which did not allow for indirect access for individuals aggrieved by acts on a CFSP legal basis, supplementing restricted direct access, it would have contributed towards supporting an area of Union law where there would be a judicial vacuum. Framed in this line of thought, the Court rejecting jurisdiction in *Rosneft* due to it being a preliminary reference as opposed to a direct action would be unusual. If the Court cannot answer a case on CFSP matters through the preliminary reference procedure, this would undermine the whole system of judicial remedies. It could even be said that without widespread use and the capabilities of the preliminary reference procedure, to use an old description, 'the roof would collapse'.[205] An Advocate General has previously alluded to how national courts should continue to send cases on CFSP matters to the Court, despite the boundaries to its jurisdiction in the area.[206] The question of whether the doctrine of primacy extends to CFSP matters has not been directly broached,[207] but finding a lack of jurisdiction of the Court to give a judgment from a preliminary reference case could mean the issue of primacy and direct effect may never make it onto the table.[208]

5.4.6. Continued Questioning

The Court's role in external relations expanded when adjudication extended beyond international agreements and focused on other factors such as legal basis and validity.[209] The delimitation of CFSP matters and the recent case law has long

[203] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) p 1572.

[204] Ibid.

[205] Giuseppe Federico Mancini and David T Keeling, 'From CILFIT to ERT: The Constitutional Challenge Facing the European Court' (1991) 11 *Yearbook of European Law* 1 at 2–3.

[206] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, para 91.

[207] Discussed later in this Chapter. Also, Bruno De Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* 2nd edition (Oxford University Press, 2011) p 346.

[208] Bruno De Witte, 'The European Union as an International Legal Experiment' in Gráinne De Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011) p 47.

[209] Antonio Tizzano, 'The Foreign Relations Law of the EU between Supranationality and Intergovernmental Model' in Enzo Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, 2002) p 141.

been predicted.[210] Just after the Treaty of Lisbon came into force, it was predicted that the use of CFSP legal bases alongside that of other Union competence, non-CFSP matters, would raise a number of issues.[211] This is notwithstanding the relatively small number of cases of constitutional nature on CFSP matters; within which there are opportunities for the Court to express itself on CFSP matters.

As is evident, the Court has been requested on a number of occasion to rule on 'sensitive and very complex' cases relating to CFSP matters.[212] It is evident that litigation in CFSP matters before the Court falls mainly to quarrels over jurisdiction and competence. The Court's decisions have had, or at least attempt to find, the middle ground. With national courts in Member States being competent to examine CFSP matters guaranteed by Article 274 TFEU,[213] preliminary reference cases have inevitably arisen. The difficulty arises when a discrepancy would arise between Union acts conducted on a CFSP legal basis that come into conflict with the domestic laws of Member States. The Court has demonstrated a particular level of pragmatism that suits the institutional actors as well as its own interests. The broadening of its jurisdiction in CFSP matters is only occurring where it has been essential as the least-worst option from a legal order and uniformity perspective.

The continued limitation of the Court's jurisdiction in CFSP matters has been said to be 'unnecessary and undesirable'.[214] Nevertheless, the Court has adopted a narrow, 'even retrograde' view of new provisions in view of some,[215] particularly with regard to respecting the CFSP legal basis in both *Mauritius* and *Tanzania* judgments. Despite this charge put against the Court, the overall body of case law reveals that it is not constrained as to what it may include within their judgments. For example, in *H v Council*, the Court brought in a Council Decision, unrelated to the facts before it, to justify its reasoned outcome. The various cases ascribed above can point to anomalies that may not necessarily have occurred in the earlier days of case law from the Court.

Progressively, the Court has seen the number of its cases rise quite considerably, alongside the breadth of issues that are before it on a consistent basis. In *Les Verts*, the Court said that 'neither [Member States or institutions] can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[216] On a strict reading of *Les Verts*,

[210] Tim Corthaut, 'An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution' (2005) 12 *Tilburg Foreign Law Review* 110 at 144.

[211] Alan Dashwood, 'Mixity in the Era of the Treaty of Lisbon' in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2010) p 354.

[212] Andrea Biondi and Silvia Bartolini, 'Recent Developments in Luxembourg: The Courts' Activities in 2013' (2014) 20 *European Public Law* 611 at 630.

[213] TFEU, Article 274: 'Save where jurisdiction is conferred on the Court of Justice of the European Union by the [t]reaties, 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.'

[214] Cremona (n 16) p 1194.

[215] Kuijper (n 42) p 14.

[216] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, para 23.

it can be implied that nothing can escape judicial review in Union law – not even CFSP matters.

5.5. Lingering Questions

It is inevitable that some cases come before the Court that do not have CFSP matters as their focus, but nonetheless have elements of CFSP matters attached to them.[217] In such scenarios, it is thus obliged to interpret the element touching upon CFSP matters.[218] In *Rosneft*, the Court had to declare jurisdiction to prevent national courts from invoking the *acte clair* doctrine in cases where, as the Court saw it, there may have been no recourse to the Court if they incorrectly applied such a doctrine. For otherwise, a consequentialist line of thinking, would allow for varying interpretations to evolve at different national courts, without the possibility for the Court to clarify the law. In this line of thinking, there are a number of outstanding issues with respect to CFSP matters that overlap with the jurisdiction of the Court that have yet to be fully addressed. Each will be discussed in turn.

5.5.1. Primacy

Primacy exists to ensure that EU legal actions are applicable in national law. It dictates that it is national courts and other related national bodies that disapply national laws of Member States when they are in conflict with Union law. Primacy, as a constitutional principle, never formally made it into the Union's primary law as a specific textual element,[219] despite being contained in a specific Declaration annexed to the treaties.[220] It can even be said that the formal absence of primacy in the treaties is meant to preserve some level of national constitutional identity for the superior courts of Member States.[221]

Despite no primacy clause in the treaties, there continues to be lingering questions over the true scope of primacy over CFSP matters, despite the doctrine

[217] For example, see, Case C-550/09, *E and F*, ECLI:EU:C:2010:382.

[218] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford University Press, 2010) p 113.

[219] Although, it was located in the Constitutional Treaty that never made it into force. See, Per Cramér, 'Does the Codification of the Principle of Supremacy Matter?' in John Bell and Claire Kilpatrick (eds), *Cambridge Yearbook of European Legal Studies 2004–2005: Volume 7* (Hart Publishing, 2006).

[220] Declaration 17 of the treaties (Declaration concerning primacy): 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the [t]reaties and the law adopted by the Union on the basis of the [t]reaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).'

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

being one of the early emanating canons of Union law. The European constitutional system has been careful when declaring which principles do or do not apply to selective areas. More generally, however, the treaties have still not handled or attempted to address the issue of primacy of CFSP matters.[222] When the Treaty of Lisbon put an end to the pillar structure, it might have been assumed that the principle of primacy of Union law would stretch beyond the former first pillar areas and begin to cover what were formerly the second and third pillars. Yet, such an assertion is false. Although the pillar structure was formally abandoned, CFSP matters remained an area with special decision-making rules.[223]

As pronounced by the Court as far back as *Costa v ENEL*, in that 'the [t]reaty…could not…be overridden by domestic legal provisions',[224] the application of primacy to CFSP matters is nonetheless not entirely clear. This is given there is no case law to look to,[225] despite the very concept of primacy being re-stated by the Court repeatedly.[226] Primacy functions well due to the existence of the preliminary reference procedure. In CFSP matters, however, prior to *Rosneft*, was a perilous situation. Having national courts disapply national law – the implementation of CFSP matters in a domestic legal order – without any level of certainty whether the national law actually is in conflict with Union law, was an unjustifiable situation.[227] Primacy may not have applied to all CFSP Decisions because questions on CFSP matters could previously not be sent to the Court through a preliminary reference.[228] The Court confirmed in *Rosneft* that the right of a national court to have its questions answered eclipses the incongruities of the treaties on the Court not having full jurisdiction. The opportunity was thus given to the Court, and it swiftly made full use of the circumstances to rectify one such ambiguity, whilst leaving aside the issue of primacy.

This is an important matter that hinges on a question of competence. Article 2(4) TFEU states '[t]he Union shall have competence, in accordance with the provisions of the [TEU], to define and implement a common foreign and security policy', but does not strictly apportion it the exclusive, shared, or supporting competence defined in Articles 3–6 TFEU. Although it is difficult to pin a label on CFSP matters, it has to fit somewhere in the spectrum of competence.

[222] Cremona (n 16) p 1194.

[223] See Chapter 3 of this book.

[224] Case C-6/64, *Flaminio Costa v ENEL*, ECLI:EU:C:1964:66, p 594.

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

[226] Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ECLI:EU:C:1978:49, and as of late, Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*, ECLI:EU:C:2018:979. See, John A Usher, 'The Primacy of Community Law' (1978) 3 *European Law Review* 214.

[227] Cramér (n 219) p 72.

[228] Marise Cremona, 'The Two (or Three) Treaty Solution: The New Treaty Structure of the EU' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press, 2012) p 53.

For CFSP matters, competence is non-pre-emptive,[229] in a shared manner. Thus, while Member State actions implementing their own foreign policy can run concurrently to Union actions,[230] the principle of sincere cooperation applies, covering both CFSP matters and non-CFSP matters within external relations.[231] Article 24(3) TEU obliges Members States to act in their individual capacities in such a manner that they 'shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area'.[232] However, that is not substitute for a clear assertion of the primacy of CFSP matters.

Before the Court's judgment in *Rosneft*, it would be left to national courts to deal with the primacy of CFSP legal acts and national law, with no possibility for the Court to clarify. The consequence of this would be that national courts could interpret primacy the same way they interpret international law generally,[233] differing from the way the Court might interpret it. If the various national courts adjudicate differently on whether to apply the doctrine of primacy, this would not bode well for a coherent EU legal order. With *Rosneft*, the Court now has jurisdiction to declare the primacy of CFSP Decisions over national law, if so asked. Both the Declaration annexed to the treaties, and the Opinion of the Council Legal Service cited within it,[234] do not contain any reservation in respect of CFSP matters.[235] Thus, it is possible to draw the understanding that given the absence of such qualification, the primacy of CFSP matters over national law is understood to exist.

It remains to be seen how far the Court will go in extending the primacy of an act on a CFSP legal basis over national law, although recent jurisprudence gives

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

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

[231] Eleftheria Neframi, 'The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations' (2010) 47 *Common Market Law Review* 323. Moreover, see, Christophe Hillion, 'Mixity and the Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' in Hillion and Koutrakos (eds), (n 211). Albeit, the duty was originally considered more flexible in practice. See, Stephen Hyett, 'The Duty of Co-Operation: A Flexible Concept' in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell, 2000).

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

[233] De Baere (n 10) p 203.

[234] 'It results from the case law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/64) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.' Opinion of the Legal Service (Subject: Primacy of EC Law) (11197/07) (JUR 260).

[235] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* 3rd edition (Hart Publishing, 2018) p 66.

some indication. For example, in *Opinion 2/13*, the Court said that primacy is one of the 'essential characteristics [that] have given rise to a structured network of principles, rules and mutually interdependent legal relations'.[236] Yet such a proclamation of primacy of CFSP matters over national acts would be a 'significant shift in the balance of power'.[237] However, with such a view, a contrary argument can be made. Given the treaties are otherwise rather descriptive with regard to CFSP matters, and that they contain no text or language on the non-applicability of primacy in CFSP matters, it is therefore perfectly conceivable that primacy of CFSP legal acts over national law is the most logical outline. Primacy is not expressly excluded, and therefore, could be found to apply.

5.5.2. Scope of the Opinion Procedure

Elsewhere, the (attempted) accession of the Union to the ECHR has stirred up questions about the Court's jurisdiction in CFSP matters. The Court has previously stated that the Opinion procedure contained within Article 218(11) TFEU has its limits. In *obiter dicta*, it has asked 'whether it would be appropriate to remove to the judicial arena disputes which could just as satisfactorily be settled at a political level'.[238] Given that CFSP matters were still new to the EU legal order at the time of the first attempt to accede to the ECHR, they featured little in the discussion.[239] When an Opinion was requested, the Court in *Opinion 2/94* dealt accession a swift blow by finding the EU had no competence to accede,[240] therefore there was no need to address issues related to CFSP matters.

It was not until many years later that accession was attempted again, this time with the support of Article 6(2) TEU and discussions leading to a DAA.[241] Again, an Opinion of the Court was requested under Article 218(11) TFEU.[242] The Court in *Opinion 2/13* claimed it had 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters'.[243] Yet for the purposes of EU accession to the ECHR, it said 'it is sufficient to declare that, as [Union] law

[236] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 167.

[237] Eileen Denza, 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy' in Takis Tridimas and Paolisa Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order – Volume 1: Constitutional and Public Law, External Relations* (Hart Publishing, 2004) p 269.

[238] 'Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union' (Court of Justice of the European Communities 1995).

[239] Barring an honourable exception. O'Leary (n 118) p 366.

[240] Opinion 2/94, ECLI:EU:C:1996:140 ('*Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*').

[241] Council of Europe and European Commission (n 119).

[242] For a fuller account of the Opinion procedure before the Court, see, Butler, 'Pre-Ratification Judicial Review of International Agreements to Be Concluded by the European Union' (n 120).

[243] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 251.

now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.[244] One of the charges the Court opened itself up to on CFSP matters was that it interpreted its own jurisdiction over them rather rigidly. Remarkably, its narrow and unspecific proclamation over its jurisdiction in *Opinion 2/13* can be seen against the backdrop that it examined the DAA anyway.[245]

Yet, whilst *Opinion 2/13* dealt with CFSP matters, which were important grounds for why the Court ultimately found the DAA incompatible with the treaties, that opens up wider questions about relevant legal actors requesting an Opinion when an international agreement, based upon a CFSP legal basis, could be brought before the Court for questions of its compatibility. Article 218 TFEU as a whole encompasses the procedure for the conclusion of international agreements more generally, be it based on a CFSP legal basis or a non-CFSP legal basis. Therefore, it must be assumed the Opinion procedure covers an international agreement proposed to be concluded on a CFSP legal basis. However, the issue here is a practical one, given that when a CFSP legal basis is used for an international agreement, it is usually only the Council that is involved in the opening, negotiation, and conclusion of such an agreement. The Council only has to notify other institutions after an international agreement has entered into force. The clearest examples of this reality were in both the *Mauritius* and *Tanzania* cases.[246] In such circumstances, the other legal actors with sufficient legal standing, such as the Commission and the Parliament, did not even have the possibility to refer such a draft international agreement to the Court for an Opinion in an *ex ante* fashion. Rather, therefore, as a matter of practice, only *ex post* cases appear to be possible for draft international agreements to be concluded on a CFSP legal basis.

5.5.3. Damages

The very existence of damages as a legal remedy within the sphere of Union law has had immense effect. Yet, the issue of damages in CFSP matters is not clear. By their very nature, damages affect actors' behaviour with respect to obligations that stem from Union law. CFSP matters and its constitutional structure set the requirements and threshold to be met before damages apply which, in practice, is very high. The Court has shown restraint by shying away from pronouncements on how the lawfulness of Union actions is compatible with international law.[247]

[244] Ibid. para 252.

[245] Christina Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 *European Law Journal* 492 at 493.

[246] Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:2025 ('*Mauritius*'); Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435 ('*Tanzania*').

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

However, there is much more scope for actions for damages when the Union has not followed its own internal law.

Article 268 TFEU and Article 340 TFEU govern damages and the contractual liability of the Union.[248] It could be interpreted that allowances for damages brought against the Union exist for whatever kind of action.[249] However, the extent to which this applies to CFSP matters is unclear given the limited jurisdiction of the Court. This reveals a void in the system of judicial protection provided by the treaties. Given how CFSP matters are implemented in practice, the role that Member States play, given their potential involvement in actions on a CFSP legal basis, must be considered. Liability for unlawful actions can be shared between the Union and Member States,[250] but the role of the Court is starkly different from the role played by national courts, as national authorities could only apportion damages attributed by Member State actions.

The General Court has to date taken a narrow view as regards the potential for damages in CFSP matters.[251] Whilst being awarded damages may be possible, applicants have not had much success to date.[252] In *Georgias and Others*,[253] the General Court in a case on CFSP matters linked the settled case law on damages. It stated that if any of the settled condition for damages is not met,[254] then 'the action must be dismissed in its entirety', and thus, other matters do not need to be considered by the General Court. Furthermore, in *Jannatian*, the General Court

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

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

[250] See generally, Wouter Wils, 'Concurrent Liability of the Community and a Member State' (1992) 17 *European Law Review* 191. Furthermore, Paul Craig, *EU Administrative Law* 2nd edition (Oxford University Press, 2012) pp 698–702.

[251] For example, see, Case T-338/02, *Segi and Others v Council of the European Union*, ECLI:EU:T:2004:171; Case T-187/11, *Mohamed Trabelsi and Others v Council of the European Union*, ECLI:EU:T:2013:273, para 48, where the Court said the claim for damages was 'manifestly inadmissible'; and Case T-218/11, *Habib Roland Dagher v Council of the European Union*, ECLI:EU:T:2012:82.

[252] Hillion (n 45) p 51.

[253] Case T-168/12, *Aguy Clement Georgias and Others v Council of the European Union and European Commission*, ECLI:EU:T:2014:781.

[254] The conditions being: (1) Conduct of the institutions, alleged by the applicant, being unlawful; (2) Damage must be suffered; and (3) The existence of a causal link between the conduct alleged and damage suffered. The Court in *Georgias* drew two cases for this support. Firstly, from the Court, Case C-26/81, *SA Oleifici Mediterranei v European Economic Community*, ECLI:EU:C:1982:318, para 16; and secondly, from the General Court, Case T-175/94, *International Procurement Services SA v Commission of the European Communities*, ECLI:EU:T:1996:102, para 44.

held that, in light of the provisions on CFSP matters in the treaties, 'a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to [CFSP matters] falls outside the jurisdiction of the Court'.[255] This is due to Article 275 TFEU, second paragraph, stating the treaties 'do[] not give the Court…jurisdiction to hear or determine any kind of claim for compensation'.[256]

However, the question of how damages might be applicable because of acts on a CFSP legal basis, besides restrictive measures, for example, as a result of CSDP missions and so forth, remains open, but will eventually need to be addressed. There is an understanding in some quarters that the Court could not adjudicate on damages for CSDP missions.[257] This is particularly troubling, given that military missions, one type of CSDP missions, is where violations of human rights can occur. The entire realm of CFSP matters is an area where 'the most serious infractions of values are liable to occur'.[258] In such a scenario, it is likely that jurisdiction to rule will have to be settled before the Court addresses the substance of a question of damages.

Damages can be tied to fundamental rights, which are also protected by the primary law of the Union. Actions for damages have not always been found admissible, particularly if they have been disguised as an action for annulment.[259] Individuals could be affected by EU activity of an operational capacity by actions that are formulated upon a CFSP legal basis,[260] for instance, if errors in CFSP Decisions are copied into EU measures, such as non-CFSP legal acts. The Union may be sued in damages actions on the basis of a non-CFSP Regulation, adopted on an Article 215 TFEU legal basis. Bringing such an action based on Article 340 TFEU to the non-CFSP Regulation may mean, in turn, that the CFSP Decision directed at an addressee does not need to be determined at length.

The unimplemented Constitutional Treaty would have led to the further development of the law on CFSP matters, yet it still would not have resolved the issue of damages.[261] The foreseen lack of damages available in CFSP matters is comparable to how, in the old pillar system, it stood alongside the third pillar, another area in which damages did not apply. It was not for a lack of trying however, as the Court affirmed in both *Gestoras* and *Segi* that it lacked this jurisdiction.[262]

[255] Case T-328/14, *Mahmoud Jannatian v Council of the European Union*, ECLI:EU:T:2016:86, para 31.
[256] Ibid. para 30.
[257] Frederik Naert, 'European Union Common Security and Defence Policy Operations' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) p 692.
[258] Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press, 2016) p 406.
[259] Walter Van Gerven, 'The Legal Protection of Private Parties in the Law of the European Economic Community' in Francis G Jacobs (ed), *European Law and the Individual* (North Holland, 1976) p 14.
[260] Anne Thies, 'General Principles in the Development of EU External Relations Law' in Cremona and Thies (n 45) p 150.
[261] Koen Lenaerts and Tim Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 287 at 314.
[262] Case C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano Olano, Julen Zelarain Errasti v Council*, ECLI:EU:C:2007:115; and Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2007:116 ('*Segi*').

However, the Treaty of Lisbon changed this and was seen as a 'great step forward',[263] with the third pillar fully absorbed into the Union's system of judicial protection. Yet the manner in which damages are applicable to CFSP matters, the former second pillar, remains unclear.

Despite the exercise of jurisdiction by the Court in cases like *Rosneft*, it appears that actions for damages coming within the remit of the Court on purely CFSP matters is not going to be entertained by the Court. A more formative manner would be a formal amendment of the treaties would be needed for such an extension, if desired. The Court could have addressed damages in *Opinion 2/13*, given that one of the intervening Member States claimed that, by their reading of the treaties, the Court did not have the applied jurisdiction 'to rule on claims in non-contractual liability in which compensation is sought for damage resulting from a CFSP act or measure'.[264] Yet the Court chose not to address the matter, and it thus remains to be settled.

5.5.4. Staffing

The issue of staffing in CSDP missions, or in other bodies established on a CFSP legal basis, is another area where the extent of the Court's jurisdiction has yet to be fully clarified. The jurisdiction of the Court in staff-related questions and its relationship with CFSP matters may appear to be trivial, but they are immensely important for the overall special character of CFSP matters. *H v Council* concerned the Court's ability to render judgment in a staffing case with respect to a CSDP mission. Such discussion feeds into a broader determination of how the Court can be involved in the operation of the EEAS.[265] At its very basis, it could be asked whether staffing matters escape the Court's protection given a CFSP legal basis, and thus, fall into the jurisdictional carve-out; or whether staffing matters merely constitute a normal matter falling within the scope of judicial review.

What the Court did in *H v Council* was to equate the staffing arrangements in the EDA,[266] in which it was specifically conferred staffing jurisdiction by a CFSP Decision to a CSDP mission founded upon a CFSP legal basis. The implications of the judgment appear to have escaped the attention of the General Court when it gave an order in *Jenkinson* shortly after.[267] However, beyond *H v Council*, there has

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

[264] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 133.

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

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

[267] Case T-602/15, *Liam Jenkinson v Council of the European Union and Others*, ECLI:EU:T:2016:660. Appealed on procedural grounds, which succeeded at the Court: Case C-43/17 P, *Liam Jenkinson v Council of the European Union and Others*, ECLI:EU:C:2018:531. The case is currently back, pending again at the General Court: Case T-602/15 RENV, *Jenkinson v Council and Others*, pending.

also been the *KF v SatCen* case involving a challenge to an internal staffing action by the European Union Satellite Centre (SatCen),[268] which was founded upon a CFSP legal basis.[269] As an EU agency, with a legacy of being incorporated within the WEU, its tasks have been to support the Union and its Member States in 'products and services based on exploiting space assets and collateral data, including satellite imagery and aerial imagery, and related services'.

The applicant in their pleading drew a distinction between matters of foreign policy that comes under a CFSP legal basis and, within that same legal basis, matters that are 'purely administrative and relate to staff management'.[270] Thus, the applicant's argument was that the curtailment of the EU judiciary's jurisdiction with respect to CFSP matters only concerned political and strategic matters. Moreover, given that the applicant had no means of alleviation before a national court of any description,[271] failing to assert jurisdiction would deprive the applicant of judicial protection. By contrast, SatCen as the defendant claimed that the treaties did not contain any explicit provisions giving jurisdiction to the EU judiciary over staff disputes between it and its staff. In absence of this, Article 263(5) TFEU[272] allows alternative means of dispute settlement; SatCen claimed that its own Appeal Board was competent to rule on disputes, as per Article 28(6) of its Staff Regulations,[273] and thus possess exclusive jurisdiction,[274] therefore, excluding the General Court.

At first glance, the issue dealt with by the Court previously in *H v Council* appeared relevant to *KF v SatCen*. However, the factual circumstances differed, as did the law. Whilst Article 11(6) of the CFSP Decision on the EDA specifically granted the Court jurisdiction, as utilised in *H v Council* over EDA staffing disputes,[275] no such jurisdiction was explicitly conferred upon the Court in the SatCen staffing arrangements,[276] or by its predecessors.[277] The facts of *H v Council* concerned a seconded expert to the mission established on a CFSP legal basis.

[268] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718. Note, this judgment is pending appeal in Case C-14/19 P, *European Union Satellite Centre (SatCen) v KF*, pending.

[269] L 200/5. Council Joint Action of 20 July 2001 on the Establishment of a European Union Satellite Centre (2001/555/CFSP). For the sake of legal clarity and to consolidate previous changes to the establishing Joint Action of SatCen, a new Decision was adopted in 2014. L 188/73. Council Decision 2014/401/CFSP of 26 June 2014 on the European Union Satellite Centre and Repealing Joint Action 2001/555/CFSP on the Establishment of a European Union Satellite Centre.

[270] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718, para 60.

[271] Ibid. para 63.

[272] TFEU, Article 263, fifth para: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.'

[273] L 276/1. Council Decision 2009/747/CFSP of 14 September 2009 Concerning the Staff Regulations of the European Union Satellite Centre. Note, there is now an updated Staff Regulation. See, L 123/7. Council Decision (CFSP) 2017/824 of 15 May 2017 Concerning the Staff Regulations of the European Union Satellite Centre.

[274] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718, paras 65–68.

[275] L 266/55. Council Decision (CFSP) 2015/1835 of 12 October 2015 Defining the Statute, Seat and Operational Rules of the European Defence Agency (n 142).

[276] L 276/1. Council Decision 2009/747/CFSP of 14 September 2009 (n 273).

[277] L 39/44. Staff Regulations of the European Union Satellite Centre, 9 February 2002.

By contrast, the matter in *KF v SatCen* was an individual employed as contract staff, albeit in the position of Head of the Administrative Division of the agency. Accordingly, direct transposition was not possible;[278] however, it would be highly influential in determining jurisdiction.

Despite the distinction, the General Court launched a full-throated defence of the Court's *H v Council* judgment,[279] noting that 'the fact that the contested decisions fall within the framework of the function of a body operating in the field of…CFSP [matters] cannot, in itself, mean that the EU judicature lacks jurisdiction to rule on this dispute'.[280] Moreover, given how Article 24(1) TEU and Article 275 TFEU derogations are to be interpreted narrowly and that Article 47 CFR supports this view.[281] the General Court determined the actions in question were those 'purely acts of staff management',[282] so the dispute was 'comparable to disputes between an institution, body, office of agency of the [EU] which are not covered by…CFSP [matters]…which may be brought before the EU judicature under Article 270 TFEU'.[283] The General Court justified including contract staff within the scope of its jurisdiction to exercise judicial review because of an anomaly in the existing establishing decision of SatCen.[284] Namely, Article 8(3) provided for seconded officials to be within the jurisdiction of the EU judiciary,[285] but not contract staff.

In a consequentialist reading, if the General Court had found otherwise, it would have left staff in different Union offshoots falling with the scope of CFSP matters treated differently, leading to divergent and inconsistent case law, which would ultimately have to be rectified. Given the General Court had prior jurisdiction with respect to staff of EU institutions and equal treatment,[286] it saw no distinction here, and thus, exercised jurisdiction accordingly, despite the absence of an affirmative legal basis to do so. In light of the increasing size and capabilities of CSDP missions, staffing issues are likely to continue to arise, as will the

[278] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718, para 78.

[279] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569.

[280] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718, para 83.

[281] The General Court here invoked, as support, Case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2017:236.

[282] Case T-286/15, *KF v European Union Satellite Centre (SatCen)*, ECLI:EU:T:2018:718, para 91.

[283] Ibid. para 95. The General Court invoked an analogous situation with respect to the European Investment Bank (EIB), implying bodies of all kinds with CFSP matters are not unique. Case T-192/99, *Roderick Dunnett, Thomas Hackett and Mateo Turró Calvet v European Investment Bank*, ECLI:EU:T:2001:72, para 54.

[284] L 188/73. Council Decision 2014/401/CFSP of 26 June 2014 (n 269).

[285] Article 8(3): 'The need for secondment of staff to SATCEN shall be determined by the Board in consultation with the Director of SATCEN. In agreement with the Director, experts from Member States and officials from the EEAS, Union institutions agencies or bodies may be seconded to SATCEN for an agreed period, either to posts within SATCEN's organisational structure and/or for specific tasks and projects.'

[286] To cite one illustration of the General Court and the European Central Bank (ECB), Case T-333/99, *X v European Central Bank*, ECLI:EU:T:2001:251, para 40.

legal complexity of the jurisdiction of the Court. In response to piracy off the east African coast, the Union launched Operation Atalanta (EUNAVFOR) in 2008 to combat such activity[287] and to protect core European interests and support third states in such endeavours. It subsequently launched its second naval mission, Operation Sophia (EUNAVFOR Med) in 2015,[288] in response to irregular migrants crossing the Mediterranean. Such large-scale CSDP missions reveal staffing issues that may in turn end up before the Union's judiciary where its jurisdiction to rule will be questioned once again.

5.5.5. Infringements

Infringement actions by Member States for failure to comply with CFSP legal acts do not lie within the ambit of the Court's jurisdiction.[289] Generally speaking, infringements of Union law may be initiated at both the Union level[290] and by other Member States,[291] but the Commission has a specific role in CFSP matters that is 'defined by the [t]reaties', as per Article 24 TEU.[292] Therefore, implementation of CFSP matters at national level cannot be brought before the Court through an infringement action by the Commission.

The lack of infringement proceedings in CFSP matters is also underlined with regard to the duty of sincere cooperation that is applicable with Article 24(3) TEU, third paragraph, stating that '[t]he Council and the High Representative shall ensure compliance with these principles' and not the Commission or the Court. Moreover, Article 260(3) TFEU implies that infringements brought to the Court are to be of a legislative nature. Accordingly, given CFSP legal acts are non-legislative, which underlines that CFSP matters are exempt from infringement actions by the Commission. By contrast, a Member State failing to fulfil its obligations flowing from a CFSP Decision would be rare, given that the vast majority of decisions must be taken unanimously. That, however, does not rule out the possibility for inter-state litigation in CFSP matters taken upon Article 259 TFEU, for this refers to obligations arising under Union law, and not merely EU legislation.[293]

[287] L 301/33. Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Rerression of Acts of Piracy and Armed Robbery off the Somali Coast. See, Graham Butler and Martin Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) 85 *Nordic Journal of International Law* 235.

[288] L 122/31. Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR Med).

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

[290] By the Commission, as per Article 258 TFEU.

[291] TFEU, Article 259. For more, see, Graham Butler, 'The Court of Justice as an Inter-State Court' (2017) 36 *Yearbook of European Law* 179.

[292] TEU, Article 24(1), second para.

[293] Butler (n 291).

5.5.6. Forum Non Conveniens

Forum shopping, in legal terms, can be classified as selecting the best avenue for seeking adjudication with the intent being that it would reach a desired result favourable to the applicant. It is akin to cherry picking, and could be a new development in CFSP matters because of the *Rosneft* judgment and the Court's assertion of jurisdiction for challenges of a CFSP Decision through a preliminary reference. Whilst *Rosneft* has had the effect that cases on CFSP matters can reach the EU judiciary two ways – both through direct actions and preliminary references – there are still distinctions to draw.

As put by the General Court, 'the legal basis of the action for annulment, namely Article 263 TFEU, differ[s] from those of a [preliminary reference] introduced by Article 267 TFEU' with respect to CFSP matters,[294] principally due to the fact-finding work that the General Court does. Furthermore, 'the conditions relating to the cause of action and subject matter of the [current] dispute cannot be regarded as being fulfilled…for the purpose of a finding that the authority of *res judicata* attaches to the [*Rosneft*] judgment'.[295] This, in effect, is the General Court trying to ensure that the potential ramification of *Rosneft*, that cases on CFSP matters would be more speedily heard through the preliminary reference procedure, is offset by ensuring the General Court has a continued role in restrictive measures cases.[296]

Restrictive measures, given their CFSP legal basis, take up a substantial portion of its docket, with parties traditionally bringing actions to the General Court under Article 263 TFEU.[297] The litigant in *Rosneft* brought a case to the General Court,[298] in conjunction with a case before a national court. Nothing in primary law or the Court's own internal rules of procedure prevents or even discourages this from occurring. An issue therefore arises as to how judicial review of

[294] Case T-715/14, *PAO Rosneft Oil Company, formerly NK Rosneft OAO and Others v Council of the European Union*, ECLI:EU:T:2018:544, para 98.

[295] Ibid. para 99.

[296] It should be noted that this *PAO Rosneft* judgment of the General Court is currently pending appeal before the Court. Case C-732/18 P, *Rosneft e.a v Council*, pending.

[297] TFEU, Article 263, fourth para: 'Any natural or legal person may, under the conditions laid down in the first and second paras, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

[298] Case T-715/14, *PAO Rosneft Oil Company, formerly NK Rosneft OAO and Others v Council of the European Union*, ECLI:EU:T:2018:544. Once the case was also on the docket of the Court, the General Court case was stayed by an Order of the President of the Council Court pending the judgment of the Court in Case C-72/15. This was in accordance with Article 54, third para of the Statute of the Court: 'Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.'

CFSP matters works when a preliminary reference is made under Article 267 TFEU by a national court to the Court of Justice while a direct action on the same matter is before the General Court under Article 263 TFEU. Both procedures, preliminary references and direct actions, accomplish similar objectives, ensuring effective judicial protection. However, for judicial protection to work effectively, only one route to a judicial remedy is needed.

In *Brahim Samba Diouf*, the Court stated that '[t]he principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction'.[299] The *forum non conveniens* doctrine, a 'judge-made concept'[300] according to which a judicial body may decide it will not exercise jurisdiction over a matter, means that another judicial forum may be the more appropriate venue for answering certain questions. The Court in *Rosneft* might have wanted to invoke the *forum non conveniens* principle whereby the General Court would be designated the better court for dealing with the substance of the challenged restrictive measure. Yet, it did not do so. The Court had previously addressed the *forum non conveniens* issue head on, albeit in a different context. In *Owusu*,[301] the Court held that Member States must accept jurisdiction in certain cases to ensure legal uniformity across the Member States.[302] However, given that the questions in *Rosneft* arrived at the Court from a national court through the preliminary reference procedure, an invocation of the *forum non conveniens* doctrine would have been unsuitable. This finding is in stark contrast to a prior case on CFSP matters, *H v Council*,[303] an appeal from the General Court in which, once the Court had established the jurisdiction of the EU courts, it sent the case back to the General Court for adjudication on the merits.[304] *H v Council* therefore confirms that the EU courts are the proper forum for judicial review in CFSP matters, and not national courts.

The fact that the *Rosneft* judgment favoured a preliminary reference over a direct action is consequential because it may relieve the General Court of some of its caseload. This is particularly remarkable because there are 'good arguments supporting the view that the preliminary [reference] procedure does not offer an equivalent alternative to a direct action before the EU courts'.[305] These arguments

[299] Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, ECLI:EU:C:2011:524, para 69.

[300] Trevor C Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *International and Comparative Law Quarterly* 813.

[301] Case C-281/02, *Andrew Owusu v NB Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, ECLI:EU:C:2005:120. For commentary, see, Adrian Briggs, 'The Death of Harrods: Forum Non Conveniens and the European Court' (2005) 121 *Law Quarterly Review* 535.

[302] Ibid. paras 43–46.

[303] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569. Appeal of Case T-271/10, *H v Council*, ECLI:EU:T:2014:702. For analysis, see, Van Elsuwege (n 151).

[304] Case T-271/10 RENV, *H v Council*, ECLI:EU:T:2018:180. On procedural grounds, the case that returned to the General Court has been appealed again to the Court. Case C-413/18 P, *H v Council*, pending.

[305] Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009) p 349.

include the fact that an entity subject to restrictive measures goes on an indirect path to the Court via a national court; and the preliminary reference follows a longer (albeit faster) procedural road to a legal remedy than a direct action. Given the very nature of the preliminary reference procedure, it has been argued that preliminary references may never come before the General Court because the procedure 'cannot logically operate with a hierarchical [Union] judicial system tuned to eventually produce two such authoritative pronouncements'.[306] Thus, *Rosneft* may prompt targets of EU restrictive measures to forum-shop, in that firstly, they may bring a direct action to the General Court; and, secondly, for speedier results, simultaneously lodge a complaint before a national court and seek a referral to the Court.

Such forum shopping could lead to circumvention of time limits for bringing cases. While the validity of Union law measures can be challenged through any means that a question reaches the Court, procedural distinctions apply. For example, direct actions for annulment under Article 263 TFEU must be brought within two months[307] while preliminary references under Article 267 TFEU have no prescribed time limit. Theoretically, the unlimited period provided to applicants under the preliminary reference procedure may threaten the limitation that applies under the direct action procedure. One month after the applicant in *Rosneft* filed a direct action with the General Court, it separately brought a lawsuit before a national court.[308] This could be seen as an attempt to *de facto* extend the time limit applicants face under the *TWD* doctrine,[309] which prevents cases coming under a preliminary reference after the specified period that is set down for actors with sufficient *locus standi* to bring a direct action. As the Court explained, this would 'in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action has expired'.[310] The *TWD* doctrine was not directly addressed in *Rosneft*, but the Court did affirm that the applicant had standing to challenge the measure before the General Court.[311] In another recent restrictive measures case, however, in

[306] Hjalte Rasmussen, 'Docket Control Mechanisms, the EC Court and the Preliminary References Procedure' in Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworths 1994) p 93. That is assuming that if the General Court gave judgments in preliminary reference cases, they would be appealable to the Court.

[307] TFEU, Article 263, sixth para: 'The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

[308] Poli (n 169) p 1802.

[309] Case C-188/92, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:1994:90.

[310] Ibid. para 18.

[311] 'It is inherent in that complete system of legal remedies and procedures that persons bringing proceedings must, when an action is brought before a national court or tribunal, 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, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a [preliminary reference], unless those persons unquestionably

A and Others, the Court confirmed that the *TWD* doctrine should not be abused when there are multiple ways to challenge a legal act.[312]

With the jurisdiction in cases on CFSP matters through the preliminary reference procedure and the possibility of forum shopping between the Court and the General Court, there is the possibility that forum shopping in restrictive measures cases could emerge, and therein lies the potential for the role of the General Court in direct actions in restrictive measures cases to be undermined. Forum shopping is not new in Union law in a horizontal sense as the issue potentially arose as a result of the *Masterfoods* case.[313] However, forum shopping between different national courts in Member States never materialised.[314] Forum shopping on a vertical level because of *Rosneft* is much more problematic. Litigants, if they have the option, choose their battleground based on a number of factors, including the ability to plead a case in their favour, but also the timeframe that a court or tribunal needs to render a decision. This is not to say that the litigant in *Rosneft* was necessarily forum shopping, but rather that the judgment has potentially set the stage for future cases. Going forward, an individual chamber of the General Court handling a case can take a decision to stay proceedings, allowing the Court to deal with a preliminary reference case on its docket first. Therefore, a scenario could develop in which the Court, in a future *Rosneft*-esque case, might prefer to dismiss it or, alternatively, encourage parties to take a direct action to the General Court.

Pre-Lisbon, the avenues for challenging the Union's restrictive measures through a preliminary reference were also dealt with in *Segi*,[315] challenging a Common Position. After that judgment, similar concerns about forum shopping arose. There the question was whether national courts should hear cases brought by legal entities subject of restrictive measures determined by their residence or by their citizenship,[316] if they were even Union citizens at all. However, this issue never arose given the abolition of Common Positions by the Treaty of Lisbon

had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed.' Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2017:236, para 67.

[312] 'It follows that a request for a preliminary [reference] concerning the validity of an act of the European Union can be dismissed only in the event that, although the action for annulment of an act of the European Union would unquestionably have been admissible, the natural or legal person capable of bringing such an action abstained from doing so within the prescribed period and is pleading the unlawfulness of that act in national proceedings in order to encourage the national court to submit a request for a preliminary [reference] to the Court of Justice concerning the validity of that act, thereby circumventing the fact that that act is final as against him once the time limit for his bringing an action has expired.' Case C-158/14, *A and Others v Minister van Buitenlandse Zaken*, ECLI:EU:C:2017:202, para 70. It is worth noting that *A and Others* and *Rosneft* had the same *juge rapporteur* and were delivered in the same month – March 2017.

[313] Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, ECLI:EU:C:2000:689.

[314] Imelda Maher, 'Competition Law Modernization: An Evolutionary Tale?' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* 2nd edition (Oxford University Press, 2011) p 733.

[315] Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2007:116 ('*Segi*').

[316] Christina Eckes, 'Sanctions against Individuals: Fighting Terrorism within the European Legal Order' (2008) 4 *European Constitutional Law Review* 205 at 212.

shortly thereafter. The possibility of forum shopping has the potential to deprive the General Court of a sizeable portion of its docket. It remains to be seen if and how forum shopping will manifest itself in future cases on CFSP matters, including restrictive measures.

5.5.7. The Role of National Courts

There is a broad understanding that judicial power within the Union is to encompass not just the EU courts, but also the national courts within EU Member States.[317] The monopolistic reading of the Court's continued assertion of ultimate interpretation has been claimed to have little textual support.[318] However, that is what has happened. It has long been held, since *Foto-Frost*,[319] that only the Court itself, and not national courts, can invalidate Union law. In light of the *Rosneft* judgment, it has been advocated that *Foto-Frost* be revisited, and adjusted, to take into account the curtailed jurisdiction of the Court.[320] This would be an abnormal route for the Court to follow, given that when *Foto-Frost* was decided, the Court had less jurisdiction than it does in the post-Lisbon world. The *Foto-Frost* doctrine has worked well up to now, and the Court has not seen fit for it to be revisited. Arguably, chipping away at the *Foto-Frost* doctrine would have the potential for it to be undermined altogether.

Although national courts are crucial to the effective functioning of the EU legal order, they are largely invisible in the text of the treaties. The *Les Verts* doctrine[321] of a *complete* system of legal remedies and procedures in the EU legal order can be interpreted to mean that a single entity, the Court, cannot be single-handedly responsible for judicial remedies. A *complete* system, instead, comes from the notion that multiple actors can provide legal remedies, guaranteeing a role for national courts. The EU's judicial architecture is decentralised, generating dialogue between the courts of all kinds, at both appellate and first-instance levels in the Member States. The decentralisation of the EU judicial system imposes widespread obligations. For example, national courts' failure to comply with 'the mandate of [Article 267 TFEU – the preliminary reference procedure] is of course itself a treaty violation'[322] and thus, they too fit into the *Les Verts* doctrine. National courts

[317] Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 *Common Market Law Review* 11 at 18.

[318] Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to over-Constitutionalisation' (2018) 24 *European Law Journal* 358 at 365.

[319] Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

[320] Koutrakos (n 156) p 32.

[321] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, para 23. See Butler (n 144).

[322] Eric Stein, Peter Hay and Michel Waelbroeck, *European Community Law and Institutions in Perspective: Text, Cases and Readings* (The Michie Company, 1976) p 262. As demonstrated recently, Case C-416/17, *Commission v France*, ECLI:EU:C:2018:811, for the failure of the French *Conseil d'État* to make a reference to the Court.

are already strongholds when it comes to providing effective remedies. Colloquially put, 'the torch…has been passed on to them'[323] and they too give effect to Union law and are therefore jointly responsible for ensuring judicial protection. If, hypothetically, the Court did not undertake judicial review of CFSP legal acts, what forum would there be for judicial review of CFSP matters? The apparent answer would be the national courts. Within the EU legal order, national courts retain certain powers, and the enforcement of Union law is 'in principle [left] to the national courts'.[324] Yet, national courts cannot do what the Court does, namely, authoritatively interpret or invalidate Union law.

The retention of power by the national courts poses inherent problems for the EU legal order. In *Busseni*,[325] the Court declared that '[i]t would…be contrary to the objectives and the coherence of the [t]reaties' if some Union treaties had the Court as their ultimate arbiter,[326] but the European Coal and Steel Community Treaty (ECSC) had no such arbiter. Such a division would result in a situation in which powers 'were to be retained exclusively by the various national courts, whose interpretations might differ',[327] preventing the uniform interpretation of Union law. In addition, the practical result of the *Segi* judgment was that if a national court was unsure about the validity of an EU legal act with respect to restrictive measures, it could make a preliminary reference,[328] even though the text of the treaties at the time did not provide for preliminary references explicitly.

Given that *Segi* was resolved a decade before *Rosneft*, it is puzzling why it took so long for the jurisdictional questions in cases on CFSP matters based on a preliminary reference to be answered. One possible answer is the fact that CFSP legal acts have not always been 'sufficiently clear and precise',[329] in comparison to other EU legal acts. Notwithstanding the prominence of national courts in ensuring that Union law functions effectively, one could read *Rosneft* to mean that national courts were 'dismissed' from the task of providing sufficient judicial protection.[330] The Court labelled national courts as '"ordinary" courts within the [EU] legal order'.[331] This status in turn begs the question of whether national courts are servants of Union law, with the Court as the master of Union law. The role of

[323] Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing, 2017) p 136.

[324] Koen Lenaerts and Piet Van Nuffel, *European Union Law* Robert Bray and Nathan Cambien (eds) 3rd edition (Sweet and Maxwell, 2011) p 524.

[325] Case C-221/88, *European Coal and Steel Community v Acciaierie e Ferriere Busseni SpA (in liquidation)*, ECLI:EU:C:1990:84.

[326] Such as the European Economic Community treaty and the Euratom treaty.

[327] Case C-221/88, *European Coal and Steel Community v Acciaierie e Ferriere Busseni SpA (in liquidation)*, ECLI:EU:C:1990:84, para 16.

[328] De Baere (n 10) p 185.

[329] Cramér (n 219) p 72. This is supported in, Ramses A Wessel, 'Good Governance and EU Foreign, Security and Defence Policy' in Deirdre Curtin and Ramses A Wessel (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, 2005) p 241.

[330] Koutrakos (n 156) p 23.

[331] Opinion 1/09, ECLI:EU:C:2011:123 ('*Creation of a Unified Patent Litigation System*'), para 80.

national courts has been fixed since *Foto-Frost*,[332] when national courts, whatever their stature, were duly informed that their powers did not extend to invalidating Union law. Even as early as the 1960s, before *Foto-Frost* confirmed the situation, it was understood that '[t]he Court alone can invalidate illegal acts' of the Union.[333] Given that the contemporary Article 344 TFEU provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of the [t]reaties to any method of settlement other than those provided for therein', it could be read that the Court is the only body to resolve CFSP matters.

National courts could be seen as mere supporters of the EU legal order, without any meaningful role in decision-making once a preliminary reference has returned to them. That is not to say the Court had or has abandoned national courts; indeed, quite the opposite. The Court championed the role of national courts in *Opinion 1/09* when it stated that 'the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the [t]reaties'.[334] Furthermore, it stated that the preliminary reference procedure is 'essential for the preservation of the [Union] character of the law established by the [t]reaties'.[335] Whatever the implications stemming from *Rosneft*, they ultimately came at the cost of preserving the functioning and effectiveness of Article 267 TFEU.

The uniformity of Union law can 'be frustrated' by national courts,[336] particularly if they act in a manner that undermines Union law. In addition, there are limits to the effectiveness of national courts under Union law, and it may be preferable in many instances to have issues solved by an EU court. As one well-cited Advocate General Opinion noted, 'proceedings before national courts are not, however, capable of guaranteeing that individuals seeking to challenge the validity of [Union] measures are granted fully effective judicial protection'.[337] To prevent any lack of judicial cooperation from hindering the effective functioning of the EU legal order, dialogue, cooperation, and respect for the courts' differing judicial roles is essential.

In the early days, the Court had to secure the cooperation and goodwill of national courts,[338] not only for referring cases, but also for enforcing them. Legally, national courts are bound to observe the principle of sincere cooperation

[332] Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.
[333] John Temple Lang, *The Common Market and Common Law* (University of Chicago Press, 1966) p 15.
[334] Opinion 1/09, ECLI:EU:C:2011:123 ('*Creation of a Unified Patent Litigation System*'), para 85.
[335] Ibid. para 83.
[336] Jeffrey C Cohen, 'The European Preliminary Reference and US Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism' (1996) 44 *American Journal of Comparative Law* 421 at 443.
[337] Opinion of Advocate General Jacobs, Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:197, para 40.
[338] Giuseppe Federico Mancini, 'The Making of A Constitution For Europe' (1989) 26 *Common Market Law Review* 595 at 605. See also, Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) p 367.

under Article 4(3) TEU,[339] which is applicable to CFSP matters.[340] Extensive cooperation now takes place, and on the same day the Court delivered its judgment in *Rosneft*, a forum of judges from the EU courts and the superior national courts of the Member States noted that '[t]he Court of Justice, in close cooperation with the national courts, will continue to fulfil the duty entrusted to it by the [t]reaties of ensuring respect for the law by all and for all, thereby safeguarding the values common to the citizens of the EU and the Member States'.[341] Yet, the *Rosneft* judgment's rejection of a meaningful role for national courts in CFSP matters could strain the otherwise cooperative relationship shared by the national and European courts. The Court's repudiation of a role for national courts in filling the legal gaps that remain with respect to CFSP matters has been strongly criticised,[342] and calls could be made, given such developments, for allowing national courts a greater role in the judicial review of CFSP matters.

The separation of powers between the Union judiciary and the national judiciary has long been clear. Before *Foto-Frost* was decided, it was argued that 'it is a matter for the [Union] Court to interpret [Union] law and to determine the validity of acts of the institutions', and, accordingly, 'it is for the national judge to apply this law, thus interpreted and evaluated, in resolving the case before [themselves]'.[343] This uncompromising approach appears to mark a clear hierarchy. The *Foto-Frost* doctrine has been directly linked with CFSP matters[344] and there is no reason to suggest that just because these are different from other Union policies, *Foto-Frost* would not apply. There is one EU legal order, of which CFSP matters are an element, maintaining its 'specific rules of procedures'.[345] *Rosneft* did not alter the *Foto-Frost* doctrine,[346] but rather, it firmly supported it.

Calls have been made for a greater role for national courts in the EU legal order more generally,[347] but as evidenced in *Rosneft*, the Court is not willing to

[339] TEU, Article 4(3): 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the [t]reaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the [t]reaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

[340] See Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *European Law Review* 524.

[341] Press, Release: Judges' Forum: Celebration of the 60th Anniversary of the Signing of the Rome Treaties – March 2017.

[342] See, Koutrakos (n 156).

[343] Pierre Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (A W Sijthoff, 1974) p 99.

[344] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, para 102.

[345] TFEU, Article 24(1).

[346] It ought to be noted that in *Segi*, it was proposed by the Advocate General that the *Foto-Frost* doctrine would not apply to the then pillars – CFSP matters and JHA matters – thus finding a strong role of national courts. Opinion of Advocate General Mengozzi, Cases C-354/04 P, *Gestoras Pro Amnistía, Juan Mari Olano Olano, and Julen Zelarain Errasti v Council of the European Union ('Gestoras')*, and Case C-355/04 P, *Segi, Arait, Zubimendi Izaga, and Aritza Galarraga v Council*, ECLI:EU:C:2006:667 ('*Segi*'), para 121. However, that was a point that the Court did not follow.

[347] See, Jan Komárek, '"In the Court(s) We Trust?" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467.

seriously entertain this idea. If national courts are empowered to adjudicate on CFSP matters, their competence would only extend to the disapplication of legal measures on a CFSP legal basis in the national context. This would not only prove wildly insufficient for ensuring proper remedies for subjects and objects of the EU's restrictive measures regime but would also be unsatisfactory from a legal certainty perspective, potentially leading to divergences among the different national courts. Granting powers to national courts in CFSP matters as an indirect way for the Member States to retain some level of control simply tiptoes around the critical flaws in EU primary law. Such a position would be unsustainable in the long-term and would inevitably cause fractures in the EU legal order. Setting aside the national courts' role in CFSP matters is not the same as abandoning them, however. As the Advocate General noted in *H v Council*, granting national courts the power to annul EU legal acts, such as CFSP legal acts, would lead to 'potential[ly] grave repercussions on the Union's and Member States' security and foreign policy'.[348] Thus, it is perfectly legitimate to ensure that judicial review is maintained at EU level for the functioning of the EU legal order.

The number of cases on CFSP matters of constitutional importance to reach the Court is always going to be limited, given that access to it is quite restricted. However, if national courts are to be left to deal with CFSP matters, notwithstanding the *Foto-Frost* judgment,[349] this may potentially lead to different interpretations emerging, lacking any form of coherence. With a Court not having the ability to rule in CFSP matters, authority would then appear to revert to the national courts. Given that Member States may never have wished to transfer the competence,[350] it is the natural fallback. Despite national adjudication on CFSP matters being limited and thus confined to the national jurisdiction, alternative versions of case law without clear guidance from the Court on matters of Union law can only be detrimental. The hesitation to allow the Court full jurisdiction in some aspects of the treaties demonstrates distrust. The intended isolation of CFSP matters in the treaties, according to the British Foreign Secretary prior to the amendments of the Treaty of Lisbon, was to 'ensure the "ring-fencing" of CFSP [matters] as a distinct, equal area of action'.[351] By contrast, what the revision actually did was to empower the Court to get a better foothold in CFSP matters.

Most recently, CFSP matters arose between a national court in the United Kingdom in 2018 dealing with whether, in absence of jurisdiction of the Court,

[348] Opinion of Advocate General Wahl, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:212, para 102.

[349] Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452. See, Gerhard Bebr, 'The Reinforcement of the Constitutional Review of Community Acts Under Article 177 EEC Treaty (Case 314/85 and 133 to 136/85)' (1988) 25 *Common Market Law Review* 667.

[350] This argument is made in another relatable context in, Joni Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements' (2000) 69 *Nordic Journal of International Law* 395.

[351] House of Commons Foreign Affairs Committee, 'Foreign Policy Aspects of the Lisbon Treaty' (House of Commons 2008) HC120-II, Third Report of Session 2007–08, Volume II. p 70.

that national courts should exercise jurisdiction. In *Tomanović v European Union*,[352] the Commission, repesentating the Union as a whole,[353] argued that it not to be inferred from Article 19(1) TEU that national courts have jurisdiction on CFSP matters just because the Court itself does not on the basis of other articles in the treaties. In the Commission's support was a line of case law that supported the notion that not every action that has its initial foundation on a CFSP legal basis means that the jurisdiction of the Court is absolutely curtailed. On this basis, in the specific circumstance of the case, it could be inferred that the Court may have jurisdiction, and thus, means the national court does not have jurisdiction.

The national court in *Tomanović v European Union* was of the view that the principle of *Foto-Frost* and the right of the individual under Article 47 CFR were difficult to square.[354] However, the national court ultimately affirmed and embraced the post-Lisbon jurisprudence of the Court on CFSP matters, namely *Eulex Kosovo*, *H v Council*, *KF v SatCen*, in that not all actions on a CFSP legal basis fall into a judicial vacuum. Moreover, given the Court's assertion in *Opinion 2/13* that it has 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters'[355] weighed particularly heavily on the national court.

The national court acknowledged that there is a judicial vacuum with respect to CFSP matters. However, it was not willing to 'go first' with respect to asserting jurisdiction. It chose not to make a preliminary reference, despite the urging of the Commission, concluding that the more suitable place for judicial review was at the Court. Therefore, the role that national courts play in CFSP matters, for now, will remain an unanswered legal question. The implications of this judgment are that EU bodies may find it more difficult to plead before the Court in that future, arguing that it lacks jurisdiction in CFSP matters.

Unquestionably, the Court sees itself as the proper forum for determining the validity of EU legal acts, reiterating the rationale of *Foto-Frost*.[356] Yet, this assertion

[352] *Verica Tomanović and Others v The European Union, the Council of the European Union, the High Representative of the Union for Foreign Affairs and Security Policy, and the European Union Rule of Law Mission in Kosovo (Eulex Kosovo)*, High Court of Justice, Queen's Bench Division, Royal Courts of Justice, London, United Kingdom, Case No HQ18X02173, 13 February 2019. The author is grateful to Becket Bedford for calling this case to attention.

[353] TFEU, Article 335: 'In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.'

[354] *Verica Tomanović and Others v The European Union, the Council of the European Union, the High Representative of the Union for Foreign Affairs and Security Policy, and the European Union Rule of Law Mission in Kosovo (Eulex Kosovo)*, High Court of Justice, Queen's Bench Division, Royal Courts of Justice, London, United Kingdom, Case No HQ18X02173, 13 February 2019, Mr. Justice Murray, para 76.

[355] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 251.

[356] The Court has said that it is 'best placed to give a ruling on the validity of acts of the Union'. Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2017:236, para 79.

of the application of the *Foto-Frost* doctrine on CFSP matters is dependent upon the existence of jurisdiction. The Court has mechanisms in place 'to obtain the observations of Member States and the institutions of the Union'[357] and it implied that national courts would not be in a position to do likewise – a correct observation on the inherent structural deficiencies in national courts' abilities. A system of 'decentrali[s]ed judicial control of CFSP [matters]' would be quite a problem.[358] With centralisation preferred over decentralisation, the future of the Court's judicial review remains strong.

5.6. Political Questions

Taking into account the nature of the execution of foreign policy, CFSP matters may seem unfit for judicial review. International events require swift and decisive action. CFSP matters may once have been viewed as reactionary, short-term, dealing with matters with limited cooperation between Member States. The reality in the contemporary era is much different, with a strategic vision for a long-term EU foreign policy and the wide-ranging and deep commitment of Member States in strides towards common goals, regulated by law. Ultimately, the fact that CFSP matters bring about more political questions before the Court has implications for the political question doctrine across the EU legal order. Even with the Court possessing jurisdiction, which, as demonstrated, is 'coming of age',[359] that is not to say the Court would ever have much to say in terms of substance on CFSP matters. As things stand, there are no determinable factors for what makes CFSP legal acts not subject to judicial review, beyond the attempted exclusion of the Court's jurisdiction, which, as demonstrated, is read narrowly.

Doctrines in law can often overlap with one another, and such overlaps and the invocation of the political question doctrine can become conflated, such as a question before a court failing a 'ripeness' test,[360] but the political question doctrine is different. The political question doctrine prohibits courts from adjudicating on particular matters. Simply put, a court of law invokes this doctrine when it believes it lacks the jurisdiction to rule upon legal actions or actions having legal effects that are more attached to political activity. Political questions are strongly tied to allocations of power and can concern different branches of government, including the judiciary. Formally speaking, the political question doctrine provides 'a technical legal basis for courts to refuse to consider the lawfulness of an action' taken pursuant to foreign policy.[361]

[357] Ibid. para 79.
[358] Hillion and Wessel (n 131) p 85.
[359] See, Butler (n 178).
[360] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd edition (Yale University Press, 1986) p 118.
[361] With regard to the political question doctrine in the United States. Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Alfred A Knopf, 2015) p 19.

There is no ideal or easy approach to defining political questions. Thus, there is a problem in Union law in that there is no explicit doctrine on what constitutes a political question.[362] The Court has to answer questions of political relevance,[363] but is more cautious with political questions. Defining political questions can be unappealing because they require analysis on a case-by-case basis. Courts can 'try to exert the force of reason on what are basically technical rules aimed at technocratic ends'[364] with mixed results. Each legal order must formulate its own test or doctrine in order to accommodate these inevitable concerns and questions as they arise. The political question doctrine does not assert that judgments never have a political dimension as there are many political elements of judgments evident in the Court's case law. Rather, a political question implies a choice between two or more alternatives, the outcomes of which are not solutions to given legal problems. The presence of choices raise questions about who makes them; be they executive, political, administrative, or judicial decisions.

The intensity of judicial review is subject to different standards. Intertwining the judiciary in fields of political questions is a matter that any constitutional entity views with a great deal of caution. Judicial review by the Court in Union law ought to differ in its latitude and intensity, depending on the issue that has been brought before it. It is claimed that in national settings, it 'would require something extraordinary for a court to intervene in relation to the manner of exercise [of foreign policy]'.[365] By contrast at Union level, it could be contended that the very existence of the Court in the Union's framework meant that limitations upon the Court's jurisdiction 'have been disposed of',[366] given the tasks which have been assigned to the Court, and thus, there has been no need for a political question doctrine. The Court has the possibility to interfere in the political and policy choices of the Union's political institutions. Some methods of review are more endearing than others,[367] yet the Court has, to date, not elaborated on what amounts to a political question.

The interpretation of certain foreign policy questions, such as the Court's jurisdiction, hinges upon many matters, such as, *inter alia*, the objectives of EU foreign policy[368] or the need to resolve constitutional disputes. The dividing line between law and politics is an eternal question, but actions taken in the context of foreign policy can be described as political, in the sense that 'in democracies

[362] See, Butler (n 59).

[363] Miguel Poiares Maduro, 'Interpreting European Law – On Why and How Law and Policy Meet at the European Court of Justice' in Henning Koch and others (eds), *Europe. The New Legal Realism: Essays in Honour of Hjalte Rasmussen* (Djøf Publishing, 2010) p 467.

[364] Again, with respect to the United States. Stephen Breyer, 'Judicial Review of Question of Law and Policy' (1986) 38 *Administrative Law Review* 363 at 395.

[365] See, Paul Craig, 'Engagement and Disengagement with International Institutions: The UK Perspective' in Curtis A Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019).

[366] Pescatore (n 343) p 84.

[367] As put, the ability of the Court in its Opinions, through Article 218(11) TFEU, means it offers the Court a more likely interference, than say, a preliminary reference case. Eckes (n 245) p 501.

[368] Larik (n 221) p 18.

[the dividing line is] part of the process of political debate'.[369] It has long been held that the Court must pay heed to considerations of a legal nature versus those of a political nature.[370] As the Court has acknowledged, the Union's political institutions are 'allowed…broad discretion in areas which involve political, economic and social choices'.[371] Yet, despite this claim, it 'seems apparent that currently there is no such thing as an explicit justiciability or political question doctrine in [Union] law per se'.[372] Whatever view one takes of interpreting foreign policy matters, the Court's judgment in *Rosneft* brushed aside active policy choices made by the drafters of the treaties, an act in itself inherently political.

It is routine for the Court to adjudicate on competency disputes between different institutions or to rule on the correct interpretation of the treaties regarding allocations of power between EU institutions in the name of institutional balance. Such disputes are central to the Court's role as the Union's judiciary. Yet, the Court might find that it lacks jurisdiction over a policy area without defined legal standards, such as in CFSP matters. The Court is not the institution to decide the non-legal questions that arise in such contexts. It has long been aware of the dangers of diverting political disputes to the judicial arena unnecessarily. During the 1995 Intergovernmental Conference, the Court considered 'whether it would be appropriate to remove to the judicial arena disputes which could just as satisfactorily be settled at a political level',[373] and there is no doubt that the Court would be very reluctant to delve into CFSP matters that could significantly hamper the political side of the Union's external action.

Conflicts of Union law cannot always be resolved within the political institutions of the Union, but the Court can decide them when there is a legal issue at stake.[374] However, '[a] true…[Union] will not be forged merely by judgments of the Court…[as] [t]hat will above all require lucid and courageous political decisions'.[375] Therefore, the Court is regularly asked to address 'politically charged

[369] Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964) p 7.

[370] DG Valentine, *The Court of Justice of the European Communities: Volume One: Jurisdiction and Procedure* (Stevens and Sons, 1965) p 388.

[371] Case C-440/14 P, *National Iranian Oil Company v Council of the European Union*, ECLI:EU:C:2016:128, para 77.

[372] Elaine Fahey, 'Challenging EU-US PNR and SWIFT Law before the Court of Justice of the European Union' in Patryk Pawlak (ed), *The EU-US Security and Justice Agenda in Action* (European Union Institute for Security Studies, 2011) p 56.

[373] 'Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union' (n 238) As discussed in, Ole Due, 'The Judicial System of the European Union in the Perspective of the 1996 Intergovernmental Conference' in Göran Melander (ed), *Modern Issues in European Law: Nordic Perspectives: Essays in Honour of Lennart Pålsson* (Kluwer Law International, 1997) p 28.

[374] For example, when a Member State violates Union law. Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205 at 252.

[375] Josse Mertens de Wilmars and Jacques Steenbergen, 'The Court of Justice of the European Communities and Governance in an Economic Crisis' (1984) 82 *Michigan Law Review* 1377 at 1398. Replicated in, Josse Mertens de Wilmars and Jacques Steenbergen, 'The Court of Justice of the European Communities and Governance in an Economic Crisis', *The Art of Governance: Festschrift zu Ehren von Eric Stein* (Nomos, Verlagsgesellschaft mbH & Co KG 1987) p 260.

questions left unsolved by the political process'[376] and examine them on the merits. This occasionally results in the outsourcing of fractious political issues and questions to a judicial body that only decides questions of law. The treaties provide some guidance, but the ambiguity leaves considerable room for judicial interpretation and discretion, and some would criticise the exercise of such discretion. Allowing the Court to unilaterally decide what constitutes a political question could mean that 'many articles of the [treaties]…would never be reviewed'.[377] Yet, an overly cautious Court would also have its opponents; while the Court may exceed its jurisdiction, it may also underuse it.

Just how far the Court should delve into political matters has arisen before in non-CFSP matters. In the *Fediol* judgment, the Court granted the political institutions deference to make political decisions in the Union's interests.[378] An Advocate General elaborated on this decision a little later, in another case called *Maclaine Watson*,[379] saying that the 'existence of legal criteria of assessment constitutes one of the determinant factors as regards the court's jurisdiction'.[380] In *Commission v Greece*, another Advocate General briefly discussed how to distinguish the political dimension of a legal act.[381] More recently in *Kadi I*, another Advocate General acknowledged that it is 'never an easy task' for the Court to determine when it was 'reaffirming the limits that the law imposes on certain political decisions' compared to 'trespassing into the domain of politics'.[382] Furthermore, the Advocate General stated that 'the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of [Union] law and deprive individuals of their fundamental rights'. However, the Court did not make any such reference to any form of doctrine, either affirming it may exist or determining that a political question did not apply in that specific case. Another Advocate General has said '[t]here are simply no juridical tools of analysis for approaching such problems' in regard to a 'political assessment of an eminently political question'.[383] This has been described as the closest the Court, albeit an Opinion of an Advocate General,

[376] Koen Lenaerts and José Antonio Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629 at 1668.

[377] Edwards (n 53) p 555.

[378] Case C-191/82, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission*, ECLI:EU:C:1983:259, para 26.

[379] Case C-241/87, *Maclaine Watson & Company Limited v Council and Commission of the European Communities*, ECLI:EU:C:1990:189.

[380] Opinion of Advocate General Darmon, Case C-241/87, *Maclaine Watson & Company Limited v Council and Commission of the European Communities*, ECLI:EU:C:1989:229, para 78.

[381] Opinion of Advocate General Jacobs, Case C-120/94, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1995:109, para 48.

[382] Opinion of Advocate General Maduro, Case C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:11 (*'Kadi I'*), para 45.

[383] Opinion of Advocate General Jacobs, Case C-120/94, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1995:109, para 59.

has come to addressing the political question doctrine.[384] Delving a little deeper allows an examination of how political questions arise in CFSP matters.

5.6.1. Political Questions and CFSP Matters

The Court has widened the scope for judicial review of Union actions conducted under a CFSP legal basis, and thus the Court risks straying into political territory. If it had a well-founded fear that it was getting 'too close to the political arena and having it decide on political "hot potatoes"',[385] the Court could invoke the political question doctrine. From the earliest days of considering European defence cooperation through the failed EDC formulated in the 1950s,[386] matters of military and defence matters had 'deeply political underpinnings'.[387] Thus, contemporary CSDP matters would be an area that is ripe for the use of the doctrine, as would matters of national security and the formation of national armed forces. CSDP missions, be they civilian or military, are a vast applied undertaking. As put, '[t]he planning and execution…must meet so many legal, political and practical challenges'.[388] In *H v Council*,[389] the Court provided an understanding that staffing of a CSDP mission can be equated with that of a permanent EU agency such as the EDA. This has been criticised given that CSDP missions are 'specific initiatives undertaken ad hoc pursuant to the political will of the Council'.[390] Equating them with permanent bodies could be read as extending the Court into political territory where the doctrine might have been suitable. However, the Court avoided invoking the doctrine and sent the case back to the General Court once jurisdiction was affirmed.[391]

The *Rosneft* case may have brought the Court close to a political question given it was a case involving restrictive measures imposed on a Russian oil and gas firm, which was partly owned by the Russian State. The Commission in the oral hearing attempted to sway the Court into invoking the doctrine, ultimately

[384] Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (n 71) p 452.

[385] Gil Carlos Rodríguez Iglesias, 'The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication' (2004) 15 *European Business Law Review* 1115 at 1117.

[386] See Chapter 2 of this book.

[387] Panos Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, 2013) p 8.

[388] Panos Koutrakos, 'International Agreements in the Area of the EU's Common Security and Defence Policy' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) p 177.

[389] Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569. An appeal of Case T-271/10, *H v Council*, ECLI:EU:T:2014:702.

[390] Koutrakos (n 156) p 12.

[391] Case T-271/10 RENV, *H v Council*, ECLI:EU:T:2018:180. On procedural grounds, the case that returned to the General Court has been appealed again to the Court. Case C-413/18 P, *H v Council*, pending.

trying to prevent it from exercising jurisdiction over the Decision adopted upon a CFSP legal basis through the preliminary reference procedure, attempting to prevent the Court from getting into what the Commission saw as a policy choice behind actions on a CFSP legal basis. Captivatingly, the Commission had made the opposite argument in *Eulex Kosovo*, claiming that public procurement law was a 'legislative factor extraneous to…CFSP [matters]'.[392] In *Rosneft*, the Advocate General reasoned that 'the reason for the limitation of the Court's jurisdiction in CFSP matters…is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of…CFSP [matters]'.[393] He further stated that 'it is difficult to reconcile judicial review with the separation of powers'.[394] He saw no need to define or delineate which actions or objectives required a CFSP legal basis, as opposed to those needing a non-CFSP legal basis, which was an undertaking conducted in a previous case by one of his colleagues.[395]

The Court's conclusion that it did have jurisdiction in this case on CFSP matters coming from an Article 267 TFEU preliminary reference is at odds with a view recently expressed in *Opinion 2/13*. The Advocate General said the 'clear wording' of Article 275 TFEU, second paragraph, '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'.[396]

This points to sharp differences that can be made in arguments about how jurisdiction in CFSP matters is structured and interpreted. With such contrasting viewpoints, it may well be asked whether such jurisdictional questions would ever hinge upon political questions. It is not apparent from *Rosneft* whether the Court's extension of jurisdiction applies only to restrictive measures or also to other types of CFSP legal acts. Yet, the political question doctrine as applied to other acts on a CFSP legal basis could hinge upon a foreign policy decision, in contrast to restrictive measures, which have a specific treaty mandate for judicial review. Such a choice might consist of whom to sanction or what type of CSDP mission to launch. However, the circumstances in *Rosneft* did not meet the threshold for constituting a political question. With that in mind, however, the broad potential of actions on

[392] Opinion of Advocate General Jääskinen [Second of Two] of 21 May 2015, Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2015:341, para 43.

[393] Opinion of Advocate General Wathelet, Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2016:381, para 52.

[394] Ibid.

[395] Opinion of Advocate General Bot, Case C-130/10, *Parliament v Council*, ECLI:EU:C:2012:50 ('*Smart Sanctions*'), para 63. This interpretation has come in for criticism however. Geert De Baere and Tina Van den Sanden, 'Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: The Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action' (2016) 12 *European Constitutional Law Review* 85 at 105.

[396] View of Advocate General Kokott, Opinion 2/13, ECLI:EU:C:2014:2475 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 252.

a CFSP legal basis means that such cases are more likely to raise political questions than actions on a non-CFSP legal basis. Nonetheless, the Court can take, as it took, a teleological approach, toning-down the active policy choice, a political choice by the drafters of the treaties in excluding restrictive measures from the scope of questions that can be sent to the Court through the preliminary reference procedure. The Court thus rejected invoking the doctrine, but it did not define what the doctrine might have been since the circumstances of the case did not warrant it.

The treaties specify how CFSP matters should be handled, namely by excluding institutional actors. However, the articles in the treaties that govern how Union law flows more generally, 'including procedural provisions', are 'not covered by the exclusion of jurisdiction'.[397] The unitary nature of the procedural provisions demonstrates the Court's respect for its conferred jurisdiction, while simultaneously preventing the Court from veering into fields where it ought not to go, such as substantive policy proclamations. The Court may adopt other interpretative methods in order to ensure that CFSP matters never reach a stage where the Court specifically invokes the political question doctrine.

In *Kala Naft*,[398] an appeal of a General Court judgment,[399] the Court began to shape the primitive contours and outline the silhouette of the political question doctrine in CFSP matters. In agreement with the General Court, it found that 'the Court…does not have jurisdiction to take cognisance of an action seeking to assess the lawfulness of Article 4 of Decision 2010/413'.[400] Given that Article 4 of Decision 2010/413[401] was 'of a general nature' and did not refer to identifiable natural or legal persons, it did not constitute a restrictive measure.[402] This interpretative method approach is rather reverential to the Council, and thus, is a *de facto* recognition that there is some form of political question doctrine in restrictive measures imposed on a CFSP legal basis. However, the criteria that the Court used were not clear or prescribed.

5.6.2. Dividing the Legal and the Political

The Court may yet find itself in a situation where it is asked to interpret a matter verging upon a political question, leading it to 'act under the premise

[397] Marise Cremona, '"Effective Judicial Review Is of the Essence of the Rule of Law": Challenging Common Foreign and Security Policy Measures Before the Court of Justice' (2017) 2 *European Papers* 671 at 682.

[398] Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft Co., Tehran*, ECLI:EU:C:2013:776.

[399] Case T-509/10, *Manufacturing Support & Procurement Kala Naft Co, Tehran v Council of the European Union*, ECLI:EU:T:2012:201.

[400] Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft Co, Tehran*, ECLI:EU:C:2013:776, para 99.

[401] L 195/39. Council Decision of 26 July 2010 (n 44).

[402] Case T-509/10, *Manufacturing Support & Procurement Kala Naft Co, Tehran v Council of the European Union*, ECLI:EU:T:2012:201, para 37.

of judicial restraint'.[403] This point has still not yet been reached, but it cannot be far into the future. It is perfectly conceivable that a case on CFSP matters may force the Court to write a future judgment elaborating on the political question doctrine in the not-so-distant future. The considerable deference granted by the Court to the political institutions to conduct political affairs has worked to the EU institutions advantage, namely the Council, as long as there is compliance with primary law. Critically, the political question doctrine does not mean that the political institutions can do whatever they want. Leaving entire areas of the treaties outside of the scope of judicial review merely to satisfy skeptical concerns about an over-active court would not serve justice for anyone, including the Member States themselves.

Whereas the doctrine may be considered for multiple strands of Union law, some fields stand out, in that it is 'most obvious in the cases touching upon foreign relations'.[404] Judiciaries usually show a significant amount of restraint when faced with acts of government relating to foreign policy matters, particularly when there are dynamics that represent political choice. Foreign policy of any description is normally formulated and executed by political actors, be they executives or, to a lesser extent, legislators. Yet, foreign policy matters also come before judicial actors. Applying the doctrine might allow a court of law the discretion to 'sit out major foreign [policy] cases'[405] and it has been argued extensively that courts are constrained in foreign policy cases more than they are in other types of cases. To date, the Court has discounted an explicit doctrine in CFSP matters, much as it has in other fields, but CFSP matters are a field where it is more implicit. Notwithstanding the attempted exclusion of CFSP matters from judicial review, *prima facie*, the Court has been delivering judgments on the margins of its jurisdiction, with the treaties catering for an explicit circumstance where the doctrine be adopted – that of the question of jurisdiction itself.

Foreign policy matters are a formative part of the contemporary EU constitution and lend themselves to a particularly special position in the EU constitutional order. CFSP matters allow the Union to act 'in world affairs, without overstraining the system beyond its capacities'.[406] A number of opportunities have arisen post-Lisbon where the doctrine could have been developed for CFSP matters,[407] and it therefore appears to be a field of law where the doctrine may appear because it can be seen as being more political than legal in nature. Such a hypothesis could render CFSP matters, as a policy field, unsuitable for judicial review to take place.

[403] Hinarejos (n 96) p 393.

[404] Fritz W Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 *Yale Law Journal* 517 at 567.

[405] Louis Henkin, *Foreign Affairs and the Constitution* (Foundation Press, 1972) p 215.

[406] Achilles Skordas, 'Is Europe an Aging Power with Global Vision – A Tale on Constitutionalism and Restoration' (2005) 12 *Columbia Journal of European Law* 241 at 286.

[407] Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:2025 ('*Mauritius*'), Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016:435 ('*Tanzania*'). See, Luigi Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (2017) 22 *European Foreign Affairs Review* 571.

Thus, the use of the doctrine in CFSP matters may be easier to see compared to other fields of Union law, due to the fact that there is 'no question of any measures to enforce compliance'[408] through the political process or Court direction.

CFSP matters, as a name, can be an 'umbrella term',[409] given that it covers a variety of actions, and its scope of 'all areas of foreign policy',[410] and is entirely dependent on the political will of Member States as to choices of what actions should be on a CFSP legal basis. In *Opinion 2/13*, the Court acknowledged that 'certain [CFSP] acts fall outside the ambit of judicial review by the Court',[411] but despite the extensive judgment, the Court did not define what it meant by 'certain acts' falling outside of judicial review. This could mean that the Court viewed its jurisdiction in CFSP matters not being conferred upon it explicitly, or, by contrast, that if its jurisdiction was not curtailed, some matters would call for the need of the doctrine. Judicial actors casting review over foreign policy decisions have long been a point of contention in national frameworks, which have been transposed upwards to an equally applicable question at Union level. However, while executive and judicial actors might be hesitant in situating specific circumstances for courts in foreign policy, it is rare to find scenarios where there is prescribed jurisdiction for courts in foreign policy from within state systems. This makes the EU and its own judicial system an anomaly. In practice, the embedded nature of the Court's tendency to grant itself jurisdiction,[412] even in tenuous cases, sits uncomfortably with the eventuality that it may decline to provide judgment in a field where it has been active in expanding its own jurisdiction.

EU foreign policy is established 'through…political and legal procedures'[413] and traditional views of foreign policy see it as an 'expression and realisation of…wills and interests'.[414] Given the legal nature of CFSP matters, the legal instruments that give effect to foreign policy wishes do much more than merely express wills and interests as they are legal acts with legal effect. CFSP matters are '[not] vague political guideline[s]'.[415] Rather, they are guided by foreign policy objectives, which can feed into how the Court conducts its review. The scope of specific

[408] Denza (n 26) p 312.

[409] Deirdre Curtin, 'Legal Acts and the Challenges of Democratic Accountability' in Marise Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (Oxford University Press, 2018) p 13.

[410] TEU, Article 24(1).

[411] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 252.

[412] For example, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569, and Case C-72/15, *Rosneft Oil Company OJSC v Her Majesty's Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*, ECLI:EU:C:2017:236.

[413] Panos Koutrakos, 'Constitutional Idiosyncrasies and Political Realities: The Emerging Security and Defense Policy of the European Union' (2003) 10 *Columbia Journal of European Law* 69 at 79.

[414] Martti Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Martinus Nijhoff Publishers, 1998) p 27.

[415] Mireia Estrada Cañamares, '"Building Coherent EU Responses": Coherence as a Structural Principle in EU External Relations' in Marise Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018) p 249.

objectives set down in the treaties may be perceived as political questions,[416] Article 21 TEU, with its scope stretching across both CFSP matters and other external relations.

How the EU reacts to international events varies depending on the prevailing political winds. Certain foreign policy actions require decisive action in a prompt fashion, with prevailing political situations potentially warranting swift action. Judicial review of CFSP matters is a mixture of both substantive and procedural law. Conducting extensive review in substantive CFSP matters is certainly more difficult than in procedural matters. The former, being challenging at best, would extend the Court into a domain where policy choices exist and, thus, circumstances may warrant the invocation of the doctrine. The procedural grounds review, on the other hand, is much less likely to encounter the same conundrums of the divisions of legal and political questions. Yet, the trickiest matter that the Court might face is determining whether a question before it is either substantive or procedural. It is conceivably possible that separating a substantive from a procedural issue would be an insurmountable challenge.

A straightforward reading of the treaties would leave the reader with the impression that the drafters wished to exclude the Court's role in certain aspects of Union law. However, as elucidated in this chapter, that has not lived up to that expectation. Whilst actions taken on a CFSP legal basis are within 'the scope of political discretion',[417] it has been articulated that the Court determining its jurisdiction in post-Lisbon cases on CFSP matters has so far found itself going beyond its mandate to answer questions,[418] but as contended, without interfering in substantive policy matters. Article 40 TEU provides for a non-encroachment clause, or in other words, an explicit monitoring role for the Court when it is called upon. One interpretation is that Article 40 TEU implies that the doctrine is provided for in CFSP matters through EU primary law,[419] detailing the drafters' understanding of areas of EU policy that are off-limits to the Court. Having CFSP matters *de facto* outside the remit of judicial review, barring the limited exceptions, may make it easy for the Court to decline jurisdiction in cases on CFSP matters on the mere basis of Article 24 TEU and Article 275 TFEU. Yet it has not done so.

Restrictive measures are partly concluded on a CFSP legal basis and are subject to intense judicial review by the Court. Like other fields, no explicit doctrine has been seen to date in this field, yet there appears to be traces. In *OMPI*,[420] the Court annulled a Common Position founded upon a CFSP legal basis when Common

[416] Eleftheria Neframi, 'Vertical Division of Competences and the Objectives of the European Union's External Action' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014) p 25.

[417] Eckes (n 245) p 499.

[418] See, Koutrakos (n 156).

[419] Kuijper (n 133) p 99.

[420] Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council*, ECLI:EU:T:2006:384 ('*Modjahedin I*').

Positions might have been considered political in nature. Subsequently in *Kadi I*,[421] the Commission and the Council contended the Court could not determine the validity of the implementing measures in Union law flowing from a UN Security Council Resolution.[422]

5.6.3. A Need for a Political Question Doctrine

The line between law and politics is thin, and the Court could be clearer in providing general guidelines for itself. There is no docket control system at the Court, so it must deal with, in some form, every case that arrives on its docket. Without any level of docket control, the Court may have to invoke the political question doctrine sooner rather than later. A test to determine what constitutes a political question, firmly grounded on specific criteria, is long overdue, but it is not clear when it will be forthcoming. This requires the Court to have finely tuned insight, wisdom, and acumen.

Other matters in Union law have been labelled as political questions. For example, one late former President of the Court labelled the principle of subsidiarity as a 'political assessment',[423] but the Court has not yet made an authoritative determination in this regard. A grounded test, firmly based on specific criteria for the Court to determine what touches upon a political question, is long overdue, given that the Court is slowly adapting to acknowledging the doctrine, but is doing so in an unsatisfactory manner. Elaborating on the doctrine would ensure some level of legal certainty across an array of different legal contexts. Not doing so causes difficulties for understanding whether the political question doctrine is to apply or not apply. Without properly defined standards, the invocation of the doctrine in Union law can give rise to added legal uncertainty.

It is put that it is only a matter of time, given the Court's expanding jurisdiction in CFSP matters, before questions will be asked of the Court that will go well beyond legal questions. Political questions are for the political process, yet courts of law should not be afraid of answering delicate questions of law with political significance. The days when courts may have been 'overzealous' and got 'too far out in front' of acceptable judicial review have been left behind.[424] The justifiability of cases that the Court answers as part of its routine is important for retention of

[421] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461 ('*Kadi I*').

[422] Paolo Palchetti, 'Judicial Review of the International Validity of UN Security Council Resolutions by the European Court of Justice' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers, 2012) p 387.

[423] Rodríguez Iglesias (n 385) p 1117.

[424] With respect to the United States at least. Michael J Glennon, 'Foreign Affairs and the Political Question Doctrine' (1989) 83 *American Journal of International Law* 814 at 816.

the Court's legitimacy. Future questions asked of the Court may begin to veer into policy and political questions. The inherent weakness of future cases, particularly those with political choices, is that the Court may be asked to make value judgments. For justiciable questions in EU, there ought to be 'judicially discoverable criteria'.[425] Without set standards of judicial review, the Court is not in a position to answer questions before it. As a result, the Court may need to create and invoke an explicit doctrine to refuse to answer unsuitable questions that lack a specific connection to the law.

Most cases that become before the Court are run-of-the-mill. The Court has 'succeeded in rendering the most far-reaching rulings in relatively trivial controversies'.[426] Yet the Court needs to remain sensitive to the manner in which it conducts judicial review, and that means knowing which cases to and which not to adjudicate in. Some matters are so contentious in the EU, however (eg, long-drawn-out inter-state disputes that are devoid of legal issues) that a judicial ruling through a court of law of any description should not be made, barring exceptional circumstances. Since *Les Verts*,[427] when the Court first declared that the Union was based on the rule of law, the essence of judicial review was relaunched with new vigour. If the ideas of *Les Verts* are to be truly applied, it demands judicial review in nearly all circumstances where questions of Union law arise. Creating a distinctive test for the correct application of the doctrine is the way forward in the EU. Highly contested cases without legal questions can arise; thus, a political question doctrine in Union law must be given serious consideration.

5.7. A Changing Border

The slow convergence of CFSP and non-CFSP matters, at least procedurally within the EU external action framework, is evident. This process, albeit incrementally, is occurring, with nothing but time allowing progression to evolve in a way that occurs naturally, or alternatively, treaty revision, slowing down the process. With rules and principles from Union law more generally applying to CFSP matters, the Union-wide application of rules and principles means that CFSP matters, as a policy field, are becoming more akin to other areas of non-CFSP external relations. It can be contemplated whether the boundary between CFSP legal bases and non-CFSP legal bases is fixed or moving,[428] thus being contrary to the principle of legal certainty.

[425] Pieter Jan Kuyper and Karel Wellens, 'Deployment of Cruise Missiles in Europe: The Legal Battles in the Netherlands, the Federal Republic of Germany and Belgium' (1987) 18 *Netherlands Yearbook of International Law* 145 at 187.

[426] Eric Stein, *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press, 2000) p 155.

[427] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, para 23.

[428] Ronald Van Ooik, 'Cross-Pillar Litigation Before the ECJ: Demarcation of Community and Union Competences' (2008) 4 *European Constitutional Law Review* 399 at 412.

Where constitutional dictum specifies, the Union should act in a predicable fashion.[429] Whilst the Court is in no position to dictate what legal bases ought to be used for EU external action, questions relating to such choice of legal basis continue to exist.

As seen in the post-Lisbon jurisprudence, it is apparent that the Court is happy to review elements of cases on CFSP matters, despite the apparent restrictions imposed on its jurisdiction by the treaties. By doing so, the Court is broadening the remit of certain actors within EU external relations by ruling on the limit for what is permissible for actions situated on a CFSP legal basis. Therefore, the continued exclusion of the Court, textually, is but an anomaly. It has been argued that the traditional exclusionary ideal of the Member States of the Court from CFSP matters has already waned,[430] and certainly, the wording of the restrictions on the Court is not as tight as it may seem. Thus, the divide between CFSP matters and non-CFSP matters may naturally erode over time. Notably, the Court has even moved on, in some cases, to not even addressing the question of jurisdiction, such as in *Kazakhstan*.[431] With Article 40 TEU empowering the Court with the responsibility for patrolling the border to ensure the implementation of CFSP matters does not materially affect the Union's other competence, and *vice-versa*, this mutual non-encroachment could mean there is scope for the Court to have not only jurisdiction, but to penetrate powers into CFSP matters too.

The recurring theme between the case law in CFSP matters has clearly been the maintenance of balance between the institutional actors. It has been suggested that if the Court was to exercise jurisdiction over CFSP matters, it would do so on matters of substance that would be 'very, very light touch'.[432] Assuming the Court would not go wild with newfound powers, in the meantime, its position in CFSP matters has been how the rule of law has been advanced outside the normal Union processes.[433] The Council should not be afraid of the Court, given that the Court has proceeded with procedural review as opposed to a substantive review.[434] Even though the Court continues to be formally excluded from CFSP matters, there is a constitutional role for it in that policy.[435] An argument for enhancing the Court's

[429] Alec Stone Sweet and Thomas Brunell, 'Constructing a Supranational Constitutions' in Alec Stone Sweet (ed), *The Judicial Construction of Europe* (Oxford University Press, 2004) p 93, when discussing, Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

[430] See, Hillion (n 45).

[431] Case C-244/17, *Commission v Council (Accord avec le Kazakhstan)*, ECLI:EU:C:2018:662. However, in the same case, the Advocate General did discuss whether the Court even had jurisdiction, which, in her Opinion, it did. Opinion of Advocate General Kokott, Case C-244/17, *Commission v Council (Accord avec le Kazakhstan)*, ECLI:EU:C:2018:364, paras 28–31.

[432] See, Paul Craig in United Kingdom's House of Lords, 'House of Lords European Union Committee, 6th Report of Session 2003–04, The Future Role of the European Court of Justice: Report with Evidence (HL Paper 47)' para 97, p 31.

[433] De Baere (n 289) p 356.

[434] For example, long before CFSP matters were a legal policy domain, see, Case C-191/82, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v Commission*, ECLI:EU:C:1983:259, para 30.

[435] Ramses A Wessel, 'The Constitutional Unity of the European Union: The Increasing Irrelevance of the Pillar Structure?' in Jan Wouters, Luc Verheij and Philipp Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia, 2009) p 298.

jurisdiction in CFSP matters would be that the correct interpretation of acts on a CFSP legal basis could be applied in a clear and precise manner, especially given that the validity of acts on a CFSP legal basis is not always clear. Yet, answering questions of validity has been avoided.[436] A pattern has emerged when the Court is interpreting the limits of its competence as defined by primary law. Whilst the Court is restricted in its approach to external action, one Advocate General has stated that '[EU] [c]ourts will in the future be unable to avoid addressing the issue of the inadequacy of the protection of individuals' rights in the context of external action'.[437] This statement can be interpreted as seeing that CFSP matters should be fair game for the Court in terms of jurisdiction, just like any other policy field.

There is seen a certain level of dynamic interpretation that insinuates that the treaties are not as clear-cut when it comes to institutional involvement in CFSP matters. Therein lies an inherent problem for the Court: should it interpret provisions in the treaties from the drafter's perspective, or, find an alternative approach which fulfils a legally sound conclusion to satisfy the legal conundrum before it? The Court is not an apolitical actor. It is cognisant of the operational environment in which it carries out its functions. Keenly aware of its own limits, the Court has not been shy in interpreting the boundary of different acts in the past. For example, the former third pillar measures had to be delimited from those of the then Community as the Court had limitations in JHA matters. The Court has previously been willing to test the exclusion of its jurisdiction in given circumstances and will likely continue to do so in the future. Such a scenario may be involving a military mission under a CSDP legal basis when an individual's human rights standard may not be compliant with Union law.[438] The ramifications for such a judgment at a given opportunity would be unmatched, compared to the Court's approach to its jurisdiction in CFSP matters to date. The administration of justice and upholding the treaties is the primary function for which it exists, so any new lines being drawn will be keenly observed.

5.7.1. A Time for Reflection

Using the best of sporting metaphors,[439] the Court is the umpire of its own game. It views itself as *the* guarantor of the treaties, ensuring that other institutions follow

[436] For example, see, Stian Øby Johansen, 'Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?' (2017) 66 *International and Comparative Law Quarterly* 181.

[437] Opinion of Advocate General Jääskinen [Second of Two] of 21 May 2015, Case C-439/13 P, *Elitaliana SpA v Eulex Kosovo*, ECLI:EU:C:2015:341, para 66.

[438] Daniel Thym, 'Transfer Agreements for Pirates Concluded by the EU – a Case Study on the Human Rights Accountability of the Common Security and Defence Policy' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing, 2014) p 181.

[439] The sporting metaphor belongs to Chief Justice of the United States, John Roberts, who, during his confirmation hearing before the Judiciary Committee of the United States Senate in 2005, said a judge's role is to 'to call balls and strikes[,] and not to pitch or bat'.

it and the flowing legal order. CFSP matters bind the Union's institutions and its Member States, with norms arising as a result.[440] Why the principal exclusion of the Court continues to be problematic is the uncertainty that it may generate. The Court's role has been crucial in developing, more broadly, the demeanour of EU external relations, both legally and politically. Whether it should continue to adopt a pragmatic approach, an integrationist approach, or rather one that is in favour of the drafters of the treaties, is a speculative question, but with consequential effects.

Continuing that train of thought, whether it pursues an agenda of expanding Union competence under the pretext of interpretation, or otherwise, the Court's overall record in all policy domains of managing the limits of Union competence has been varied, with no clear methodological path being followed. Changes to the Court's jurisdiction in CFSP matters have come about as a result of both formal textual changes to the treaties and the case law that it itself has been responsible for. The *Rosneft* judgment might have been the opportunity for the Court to pre-empt the next Intergovernmental Conference by allowing preliminary references to it in cases on CFSP matters. The amendments to the jurisdiction of the Court made by the Treaty of Lisbon gifted opportunities for further expansion into new realms, which it has exploited. This was the inevitable result as the growing jurisdiction of the Court is not surprising when its origins are considered. As noted in its infancy, the Court's extensive jurisdiction was greater than that of other international adjudication bodies of its time,[441] to reflect the specificity of the Union.

Every court is given the difficult task of deciding matters before it in one way or another. For the Court's handling of CFSP matters, this means satisfying the academic inquiry of pushing CFSP matters to its treaty limits on the one hand and satisfying the practical issue in the case to hand that has real implications on the other. The potential powers of the Court are strong enough to retain the power to define the nature and scope of EU external relations law, refining the legal effect of Union law instruments and developing new doctrines leading to its development. With its widening jurisdictional space on a general and explicit basis, its marginal jurisdiction in CFSP matters looks more misplaced than ever. Thus, the Court itself appears not to view any contradiction of widening its jurisdiction within politically acceptable limits.

The Due Report in 2000 made a number of recommendations regarding the future of the EU courts.[442] At the time, it was praised for its willingness to consult,[443] by looking at a number of options for the structure of the EU's

[440] Jan Willem Van Rossem, 'The EU at Crossroads: A Constitutional Inquiry into the Way International Law Is Received within the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers, 2012) p 84.

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

[442] Ole Due and others, 'Report by the Working Party on the Future of the European Communities' Court System (the 'Due Report')' (European Commission 2000).

[443] Paul Craig, 'The Jurisdiction of the Community Courts Reconsidered' in Gráinne De Búrca and Joseph HH Weiler (eds), *The European Court of Justice* (Oxford University Press, 2001) p 213.

judiciary, and how jurisdiction would be managed between the Court and the General Court. What it did not do, however, was to consider the actual jurisdiction the EU judicial system. Thus, potential utterances on CFSP matters and other areas at the time were not included. A huge change in the Court's approach to CFSP matters has evolved over the past 20 years, going initially from *Grau Gomis*,[444] right through to *Opinion 2/13*, starting with an absolute hands-off approach, to using its curtailment of jurisdiction for justifying the scuppering of Union accession to an international agreement.

5.7.2. The Reasoning in Cases on CFSP Matters

Whilst the Court has knocked down some bricks from the wall holding up CFSP matters, it has been careful not to chip it away altogether for fear of itself losing the legitimacy of its actions by going too far. There is the appearance coming from the Court that it is using opportunities provided to it to slowly chip away at the provisions on CFSP matters in the treaties, eventually tearing down the wall that separates it from non-CFSP external action. Like any other court of law, the Court plays a role in ensuring order and 'unity in diversity'.[445] In light of its judgments, however, it can be asked if the Court has had it both ways with respect to CFSP matters. Resorting to less significant issues on the political spectrum, such as the focus on legal bases, transparency, procedures, and general principles, has been the Court's preferred method. Thus far, once jurisdiction has been asserted, it has not made policy decisions. It has not turned to declaring EU acts in CFSP matters unlawful themselves just yet, but that is not to say it may never be contemplated in the future. Instead, the Court has attempted to bring about a system of reasoning that is within politically acceptable means.

It can be argued that given ambiguity in cases before it, the Court is left with little other choice. As a fallback, it also uses more general understandings to justify the limits grounds upon which it may acceptably adjudicate. In *Mauritius*, the Court said that with Article 19 TEU providing general jurisdiction to the Court, derogations must be construed in a narrow sense.[446] This was also done in *Rosneft*, thus, using Article 19 TEU, the Court sees itself as exercising a constitutional role. The Court may continue to chisel away at the limits of its jurisdiction in CFSP matters, or it may adopt a more cautious approach to accepting too wide

[444] Case C-167/94, *Criminal proceedings against Juan Carlos Grau Gomis and others*, ECLI:EU:C:1995:113 ('*Grau Gomis*').

[445] Joxerramon Bengoetxea, 'Rethinking EU Law in the Light of Pluralism and Practical Reason' in Miguel Poiares Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014) p 167.

[446] Case C-658/11, *Parliament v Council*, ECLI:EU:C:2014:2025 ('*Mauritius*'), para 70.

a jurisdiction without sufficient indicators from the legislature that this is permissible. *Opinon 2/13* in itself may be indirectly attempting to extend the scope of judicial review of CFSP matters by identifying its unique nature and using it for its own institutional interests.[447] Notwithstanding this perception, the case demonstrated that the Court can defend the provisions on CFSP matters in the treaties.

Part of the Court's issue with defining its own jurisdiction is that it can often disregard the text of the treaties at times, in favour of what *ought* to be there. There is a legitimacy and accountability problem with this, never mind a democratic one, if the Court's actions stretch creative interpretations a little too far. The Court's previous actions may have caused and thus triggered its exclusion from CFSP matters at the Treaty of Maastricht. The approach of the Court from its inception in 1952 up to the early 1990s may have spooked the Member States into transferring 'sovereign' foreign, security, and defence matters under its jurisdiction. Yet, it was not just Member States who were initially concerned about the Court in CFSP matters. The Commission also had reservations.

The Court is not the possessor of unconditional wisdom, as it is just and reasonable that its decisions to expand its jurisdiction are appropriately questioned and critiqued. The Court has to ask itself some questions, such as, for example, what role it wishes to have. It has found itself to be a 'competent constitutional adjudicator'[448] rather than being a blind actor, subject to policy considerations.[449] For a long time, it has been a constitutional court in the making, despite the EU legal system potentially being unsuited for one.[450] The Court finds itself in a predicament: it does not possess the necessary jurisdiction it desires; yet is willing to defend the nature of the jurisdiction that it has been granted. With this, the Court puts the higher objective of itself as the supreme arbiter of Union law to ensure the EU legal order that it has fought for decades to build and consequently uphold.

To accuse the Court of activism in CFSP matters would be untrue. The evidence suggests that if the Court had full jurisdiction in CFSP matters, it would act in a responsible fashion. The substance of CFSP matters is not delved into, but procedural review can occur, which the Court had duly handled. However, the cases that

[447] See, Graham Butler, 'The Ultimate Stumbling Block? The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights' (2016) 39 *Dublin University Law Journal* 229.

[448] Eleanor Sharpston and Geert De Baere, 'The Court of Justice as a Constitutional Adjudicator' in Anthony Arnull and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011) p 149.

[449] Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113 at 128.

[450] Ole Due, 'A Constitutional Court for the European Communities' in Deirdre Curtin and David O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon Mr Justice T F O'Higgins* (Butterworths, 1992) p 10.

have led to the Court ruling in cases on CFSP matters give rise to the question of the applicability of the political question doctrine. Officially, the Court does not have the doctrine as part of its judicial framework, but it does raise questions about justiciability. The legitimate question that can be asked is whether the questions before the Court in some cases are of a *political* nature. If the decision-making process for CFSP matters was more integrated like broader decision-making in the Union, such as in non-CFSP matters, the inter-institutional disputes would not be arising before the Court.

5.7.3. The Existence of the Border

The border between CFSP and non-CFSP matters was around long before the current incarnation of the treaties.[451] The Court's border policing has been resolute and has not been afraid of annulling measures where encroachment has occurred. Given that CFSP and JHA matters made up the former second and third pillars, with distinct procedural and decision-making regimes applicable for each, there is consistency from the Court in that it can apply jurisdictional principles from one to the other. This was most evident, and a direct link was made in the *Svenska Journalistförbundet* judgment.[452] Like the jurisdiction issue to police the border in *Airport Transit Visas*,[453] the links between CFSP matters and JHA matters when it comes to the role of the Court are evident. Similarities in the Court's position on CFSP matters can be traced to the former third pillar pre-Lisbon.[454] New developments in the law and practice of external relations for CFSP legal acts and non-CFSP legal acts could necessitate the Court to revisit and further consider the jurisdictional aspects of CFSP matters.

The General Court, as seen in *H v Council*,[455] has been much more cautious in declaring jurisdiction in cases on CFSP matters, and instead has waited for the direction of the Court. However at the same time, the General Court continues to assert jurisdiction in CFSP matters with regard to restrictive measures. In *Bank Mellat*,[456] the General Court stated that 'the exception to the jurisdiction of the Courts of the European Union provided for in Article 275 TFEU cannot be interpreted as going so far as to preclude review of the legality of a measure adopted under Article 215 TFEU' when applied to restrictive measures.

[451] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart Publishing, 2012) p 243.

[452] Case T-174/95, *Svenska Journalistförbundet v Council*, ECLI:EU:T:1998:127.

[453] Case C-170/96, *Commission v Council*, ECLI:EU:C:1998:219 ('*Airport Transit Visas*').

[454] See, Steve Peers, 'Finally "Fit for Purpose"? The Treaty of Lisbon and the End of the Third Pillar Legal Order' (2008) 27 *Yearbook of European Law* 47.

[455] For the General Court case on initially declining jurisdiction, see, Case T-271/10, *H v Council*, ECLI:EU:T:2014:702, and on appeal on points of jurisdiction, see, Case C-455/14 P, *H v Council*, ECLI:EU:C:2016:569.

[456] Case T-160/13, *Bank Mellat v Council*, ECLI:EU:T:2016:331.

5.7.4. Jurisdiction in Perspective

Debate on the Court's role in CFSP matters has not yet gathered full steam, maybe because the constitutional framework is relatively clear regarding its intended role.[457] But yet, with a singular set of external objectives for the Union, it is difficult, for example, to determine whether or not an agreement is related to CFSP matters in principle[458] and the treaties require the Court to have a role. The importance of the Court in this area going forward cannot be underestimated. Through no fault of its own, perfect or near-perfect occasions can arise when it can rule on CFSP matters, should it feel the need to do so, to uphold Union law. It can thus be argued that with the continuing choice of legal bases on potential CFSP matters, alongside other issues that previously came under different pillars of the treaties, litigation is likely to continue before the Court which will continue to find itself in the position of adjudicator-in-chief as EU institutions continue to keep battling over contentious issues relating to CFSP matters.

The underlying problematic aspects of European integration is that there is no judicial control, and thus constitutional principles and procedure are ripe for being undermined and circumvented. This adds to a hypothesis that the Court ought to hold 'inherent jurisdiction' to make a stronger 'contribution to the administration of justice in the [Union]'.[459] The exclusion of the Court in CFSP matters has been disappointing according to some[460] and has demonstrated Member States' 'aversion to any "judicialisation" of the diplomatic processes'.[461] With the rule of law a core component of the Union and its legal regime, the lack of judicial jurisdiction continues to be problematic from a legal certainty perspective.[462] The Court's silence on its limits in CFSP matters as seen in *Opinion 2/13*[463] is *de facto* shaping the nature of EU external relations policies, leaving it to the political institutions to resolve. Beyond such jurisdictional matters, however, there are some bigger questions at play. The Court is facing a challenge on whether it is to follow an integrationist route, that of 'more Europe' or to appease the Council members by allowing 'constitutional mediation'.[464] Acting in its role of border

[457] De Búrca (n 1) p 695.

[458] Passos and Marquardt (n 37) p 899.

[459] Anthony Arnull, 'Does the Court of Justice Have Inherent Jurisdiction?' (1990) 27 *Common Market Law Review* 683 at 706.

[460] See, Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 553 at 571.

[461] Eric Stein, 'European Foreign Affairs System and the Single European Act of 1986' (1989) 23 *The International Lawyer* 977 at 987.

[462] That is despite there being 'some amount of fuzziness in the way the Court uses its past rule of law case law in justifying its findings' in the *Rosneft* case. Mirka Kuisma, 'Jurisdiction, Rule of Law, and Unity of EU Law in Rosneft' (2018) 37 *Yearbook of European Law* 3 at 18.

[463] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*'), para 251.

[464] See, Marie-Pierre F Granger, 'The Court of Justice's Dilemma: Between "More Europe" and "Constitutional Mediation"' in Christopher J Bickerton, Dermot Hodson and Uwe Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press, 2015).

policing between the CFSP and non-CFSP legal bases, it has tried to refrain from demonstrating a pro-*communautaire* bias towards a supranational legal order. If the Court is consistently annulling Union acts because of substantive or procedural matters or is delivering rulings finding incompatibility with the treaties, it can become an issue of whether legal actors like the Council and the Parliament will retain an interest in exhausting their institutional battles against one another at the Court.

The Union could have a fully fledged Court to deal with the complex matters before it and adjudicate accordingly. Instead, it is left with a Court with one of its hands permanently tied behind its back. The jurisdictional position of the Court remains as uncertain as it ever has, and for now, more cases will determine the way forward for its jurisdiction on CFSP matters. For a lack of judicial control by the Court, CFSP matters have been subject to political control internally within the Council. Yet, the Court dragging its feet in political questioning is inherently a dangerous move.[465] Not only is that not the intention of the treaties, but it would also risk losing its basis to answer legal questions.

The adoption of relevant amendments to the treaties to empower the Court to have greater judicial oversight of CFSP matters is possible. This would provide some liberation to the Court which finds itself in a stranglehold. However, the question needs to be asked whether the accompanying responsibility of the Court would be a suitable forum. The adjudication of the Court could give rise to future foreign policy and external relations actions being conducted on bilateral or multilateral levels outside Union law. This push factor would, from a Union perspective, be detrimental to the overall coherence and consistency its legal order, which incrementally has seen CFSP matters edge towards its natural and eventual home – forming a normal part of the EU decision-making framework, with no curtailments on the Court's jurisdiction.

5.8. Conclusion

If CFSP matters as a regime of specific rules and procedures were to be attempted today, the current institutions would not tolerate it as an acceptable means of decision-making within the EU. As it stands, full judicial protection by the Court might not be achievable,[466] despite the 'complete' system of remedies and procedures that the treaties and case law it has built up. It has been contended that the Court's

[465] See, Butler (n 59).

[466] See the section titled 'Is the assumption correct that the preliminary [reference] procedure provides full and effective judicial protection against general Community measures?' in, Opinion of Advocate General Jacobs, Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:197, paras 36–49.

jurisdiction has been extended by the Treaty of Lisbon, but on a 'hidden' basis.[467] This does not just apply to CFSP matters, but extends across all matters of EU external action. The Court's institutional role as the arbitrator for legal disputes means it is a critical cog in the wheel of elaborating on the external effect of Union law. Its 'laboratory'[468] status means that its role in shaping external relations law is always going to be followed closely. With the former pillars no longer formally in existence since the Treaty of Lisbon, the cross-policy cases coming before the Court will give rise to inherent difficulties. Whilst it has been said that omitting the Court from having jurisdiction from CFSP matters was a mistake,[469] one positive view of CFSP matters as a policy domain could be that it is a 'sector-specific adaptation',[470] catering for preferences of the Member States.

The purported Chinese wall between CFSP matters and other Union policies may have been much more distinct in the past, but CFSP matters still remain in diluted form from the perspective of the Court's jurisdiction. The EU cannot be a real constitutional order if it lacks basic characteristics such as full judicial review on legal matters. If the Union is to live up to the Court's *Les Verts* expectation of establishing 'a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions',[471] major constitutional change of the Union will be needed. The future of cavities in the EU judicial order depends, largely, on the Court's own interpretation of its jurisdiction to rule. This responsibility to police itself is a task that will have to be threaded on with immense care and precision.

Once, 'tucked away in the fairyland Duchy of Luxembourg',[472] the Court is tasked by the treaties to adjudicate in important cases, with parties arguing before it on both legal basis and other grounds. What the future holds is inevitable. There is the slow and gradual shift, continuing with the Treaty of Lisbon, towards a supranational policy that will one day entail full Court competence in all areas of Union policy. As time goes on, the two differing legal regimes of CFSP and non-CFSP matters in EU external action will slowly intertwine and merge. Until such time as these issues of EU constitutional law are ironed out, the Court will continue to be asked detailed questions about its jurisdiction in CFSP matters.

[467] Christina Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (2015) 20 *European Foreign Affairs Review* 535.

[468] Piet Eeckhout, 'A Panorama of Two Decades of EU External Relations Law' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press, 2008) p 337.

[469] Cremona (n 16) p 1203.

[470] Daniel Thym, 'Parliamentary Involvement in European International Relations' in Marise Cremona and Bruno De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, 2008) p 220.

[471] Case C-294/83, *Parti écologiste 'Les Verts' v Parliament*, ECLI:EU:C:1986:166, para 23. See also, Butler (n 144).

[472] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.