COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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COMMON MARKET LAW REVIEW

Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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CASE LAW

A. Court of Justice

Upholding the rule of law in the Common Foreign and Security Policy: *H* v. *Council*

Case C-455/14 P, *H* v. *Council of the European Union*, *European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina*, Judgment of the Court (Grand Chamber) of 19 July 2016, EU:C:2016:569

1. Introduction

The limited jurisdiction of the EU judicature in the area of Common Foreign and Security Policy (CFSP) is one of the specific features of EU law. Pursuant to Article 24(1)(2) TEU and Article 275(1) TFEU, the ECJ cannot, in principle, adjudicate with respect to acts adopted in the context of the CFSP. This is a so-called "carve-out" derogating from the general jurisdiction which Article 19 TEU confers on the Court of Justice of the EU to ensure that in the interpretation and application of the Treaties the law is observed.[1] As the Court already upheld on several occasions, this exception must be interpreted narrowly.[2] Moreover, the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU include an "exception to the exception", in the sense that the Court is competent to monitor compliance with Article 40 TEU and to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP provisions in the TEU. This "claw-back" provision, in combination with the full integration of the CFSP in the EU legal order, implies that the ECJ is not entirely powerless in the area of CFSP.[3]

1. Opinion of A.G. Wathelet in Case C-72/15, *Rosneft*, EU:C:2016:381, para 41.

2. Case C-658/11, *European Parliament* v. *Council of the European Union (Pirate Transfer Agreement with Mauritius)*, EU:C:2014:2025, para 70; Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo*, EU:C:2015:753, para 42.

3. The notions "claw-back" and "carve-out" provision are borrowed from the Opinion of A.G. Wathelet in Case C-72/15. On the role of the ECJ in relation to CFSP, see also Hillion, "A powerless court? The European Court of Justice and the Common Foreign and Security

Whereas the Treaty of Lisbon thus created a competence for the Court in relation to the CFSP, the precise contours of that jurisdiction are not fully clear.[4] In Opinion 2/13, for instance, the Court declared that "[it had] not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters" and, therefore, simply observed that "as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice".[5] The key question, of course, is what type of acts precisely escape from the Court's judicial control and how this can be reconciled with the general assertion in Article 2 TEU that the EU is a Union based upon the rule of law and the right to an effective remedy as guaranteed under Article 47 of the EU Charter of Fundamental Rights.

Without providing a comprehensive answer to this question, a series of recent cases helps to understand the post-Lisbon framework for judicial review in relation to the CFSP. The Court already clarified that it has jurisdiction to deal with the procedural requirements regarding the conclusion of international agreements pertaining to the field of CFSP[6] and with respect to the application of the EU's public procurement rules in the framework of a CFSP mission.[7] The *Rosneft* case will require the Court to rule on its capacity to give a preliminary ruling on the validity and the interpretation of CFSP acts.[8] The case of *H.* v. *Council*, which is the focus of this case annotation, adds another piece to the puzzle. It essentially concerns the question whether the ECJ is competent to hear an action for annulment directed against decisions taken by the Head of an EU mission established under the CFSP.

2. Factual and legal background

Mrs H. is an Italian magistrate who was seconded by the Italian Ministry of Justice to the EU Police Mission (EUPM) in Bosnia-Herzegovina. The latter is legally based upon Joint Action 2002/210/CFSP, which has been extended several times under Articles 28 and 43(2) TEU.[9] After working as a criminal

Policy" in Cremona and Thies (Eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing, 2014), pp. 47–70; Opinion of A.G. Jääskinen in Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo*, EU:C:2014:2416, paras. 25-30.

4. Opinion of A.G. Wahl in Case C-455/14 P, *H.* EU:C:2016:212, para 2.

5. Opinion 2/13, *Accession to ECHR*, EU:C:2014:2454, para 251.

6. Case C-658/11, *European Parliament* v. *Council (Pirate Transfer Agreement with Mauritius)*, paras. 69–74; Case C-263/14, *European Parliament* v. *Council (Pirate Transfer Agreement with Tanzania)*, EU:C:2016:435, para 84.

7. Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo*, paras. 41–49.

8. Case C-72/15, *Rosneft*, EU:C:2017:236. This case was pending at the time of writing.

9. Council Joint Action 2002/210/CFSP, O.J. 2002, L 70/1; Council Decision 2009/906/CFSP, O.J. 2009, L 322/22.

justice expert and, later, as chief of the legal office in Sarajevo, the Italian Government extended her secondment until December 2010. In March 2010, Mrs H. informed her superiors about certain irregularities in the management of the EUPM. A bit later, on 7 April 2010, the Head of Mission – as chief of personnel – redeployed her to the post of "criminal justice advisor-prosecutor" in the regional office of Banja Luka.[10] Following a complaint of Mrs H. to the Italian authorities, the Head of Mission confirmed the redeployment decision adding that the operational reason was the need for prosecutorial advice in the Banja Luka office. Mrs H. thereupon brought an action against the EUPM before the Regional Administrative Court of Lazio in Italy for annulment of the redeployment decisions and for compensation of the harm suffered. She also lodged an action for annulment of the decisions and for the award of damages before the General Court of the EU.

The General Court dismissed the action as inadmissible. In essence, the order followed the argument put forward by the Council and the Commission that the contested decisions were operational actions decided upon and carried out under the CFSP so that, in light of the jurisdictional carve-out laid down in Article 24(1) TEU and Article 275 TFEU, the General Court had no jurisdiction to hear the action.[11] As to the applicant's claim that this amounts to a denial of her right to an effective remedy as laid down in Article 47 of the Charter of Fundamental Rights, the General Court concluded that there is no problem, taking into account that the legality of the contested measures can be reviewed at the national level. Based upon an analysis of Decision 2009/906/CFSP regarding the status of seconded staff, it found that only national courts have jurisdiction to deal with any issue concerning the secondment of national members of staff.[12] Hence, it held that "whilst the contested decisions were taken by the Head of Mission, they can in principle be attributed to the Italian authorities".[13] Following this logic, the GC found that it is for the national court to review whether or not the Head of Mission exceeded the powers that had been delegated to him by the Italian authorities

10. It is noteworthy that only the order of the GC (Case T-271/10, EU:T:2014:702) refers to the applicant's prior complaints regarding the alleged mismanagement of the EUPM (para 5). This order also more explicitly states that the Head of the EUPM "downgraded" the applicant to the post of "criminal justice advisor – prosecutor" (para 6), whereas the Opinion of A.G. Wahl and the judgment of ECJ only observe that Mrs H. was redeployed for operational reasons to this new post in Banja Luka, without any additional information.
11. Case T-271/10, *H* v. *Council*.
12. Ibid., para 46.
13. Ibid., para 50.

and to draw the necessary conclusions with respect to the legality and the existence of the contested decisions.[14]

In the appeal case before the ECJ, both the applicant (Mrs H.), the Commission and the Council argued that the General Court (at least partly) erred in law when explaining that the contested decisions did not fall within its jurisdiction. In essence, the arguments of the parties focused on three major issues: first, the type and nature of the CFSP acts escaping judicial review; second, the definition of the concept "restrictive measures" under Article 275 TFEU and; third, the legal arguments of the General Court relating to the delegation of powers.

First, with respect to *the scope of the jurisdictional carve-out*, the applicant claimed that this only applies to the CFSP acts referred to in Article 25 TEU and adopted by the European Council or the Council in accordance with the procedures set out in Article 31 TEU. Mere administrative decisions such as the allocation of human resources by a Head of Mission would then fall within the scope of the Court's jurisdiction.[15] The European Commission also contested the General Court's interpretation of the limits to its judicial review in the field of CFSP. In particular, the Commission disagreed that the General Court lacked jurisdiction for the sole reason that the contested decisions were taken within the context of a CFSP mission. Alternatively, it proposed a narrower interpretation of the jurisdictional carve-out based upon a distinction between "acts of sovereign policy" (*actes de gouvernement*) and acts implementing this policy. In the Commission's view, the Masters of the Treaties only intended to exclude the former from the scope of the Court's jurisdiction.[16] Nevertheless, the Commission believed that this approach would not affect the outcome of the case under appeal because the contested decisions were of an operational nature and could not be regarded as mere acts of implementation.[17] The Council, for its part, claimed that the General Court was correct in declining jurisdiction without making any distinction based upon the nature of the CFSP acts. In the Council's view, the jurisdictional carve-out extends to both the Treaty provisions concerning the CFSP and all acts adopted on the basis of those provisions. Hence, it covers not only acts of the Council or the European Council, as claimed by the applicant, but also actions of a CFSP mission, of the High Representative and of the Member States when implementing the CFSP.[18]

14. Ibid., para 53.
15. Judgment, para 25.
16. Ibid., para 32.
17. Opinion, para 33.
18. Judgment, para 35.

Second, as to *the scope of the notion "restrictive measures"* in Article 275 TFEU, the applicant suggested a broad interpretation so that it encompasses "all EU acts which adversely affect the interests of individuals, including the contested decisions".[19] Based upon a teleological interpretation of the Treaties, the European Commission also defended a broad definition of the term "restrictive measures" involving "all measures adopted by an EU institution against a person which produce legal effects in relation to him that potentially infringe his fundamental rights".[20] Nevertheless, also under this criterion the Court lacked jurisdiction according to the Commission, because the contested decisions were operational acts not producing legal effects in a way that could negatively affect her fundamental rights.[21] In contrast to the applicant and the Commission, the Council stressed that the concept of restrictive measures cannot be given a broad scope within the context of Article 275 TFEU since it exclusively covers the sanctions policy of the EU.[22]

Third, while agreeing with the general conclusion that the contested decisions fall outside the scope of jurisdiction of the EU judicature, the Council claimed that the General Court made two mistakes in its *legal reasoning regarding the delegation of powers*. In the Council's view, the redeployment decision of the Head of Mission is not attributable to the Member States but to the Council as an EU institution.[23] As a consequence, the Council advocates that the national court hearing the case has no power to annul the act challenged. Hence, the Council's reasoning implies that no court, neither at the EU level nor at the national level, is competent to review the legality of the contested decisions.

3. Opinion of Advocate General Wahl

Advocate General Wahl started his Opinion with some general reflections about the legal status of the CFSP, which he defined as *lex imperfecta.* This is an old term, derived from Roman law, to describe "a law that imposes a duty or prohibits a behaviour but does not provide for any penalty for its infringement".[24] The *lex imperfecta* nature of the CFSP is a legacy of the old second pillar that was created with the Treaty of Maastricht when it involved a mixture of Community law and public international law. Subsequent Treaty amendments led to the gradual integration of the CFSP

19. Opinion, para 31.
20. Judgment, para 33.
21. Opinion, para 34.
22. Judgment, para 36.
23. Opinion, para 32.
24. Ibid., para 38.

in the EU legal order, be it with some specific characteristics.[25] This implies, on the one hand, that CFSP acts are legally binding upon the institutions and its Member States. On the other hand, however, the Union cannot adopt legislative acts,[26] there is no explicit judicial procedure for enforcement and penalties in case of breaches of the CFSP obligations, and there are limited remedies available to individuals whose rights may be breached by acts adopted in the framework of the CFSP.[27]

Taking into account that the CFSP is now "part and parcel of the EU legal order", the mechanisms of enforcement and sanctioning existing under public international law are no longer available.[28] The scope for judicial review and dispute settlement is determined by EU law. As observed by the Advocate General, it was "a conscious choice made by the drafters of the Treaties … not to grant the ECJ general and absolute jurisdiction over the whole of the EU Treaties".[29] Hence, the judicial control is undeniably more limited with respect to the CFSP in comparison to other fields of EU law. This, however, does not imply that there is no judicial protection as far as acts adopted in the framework of the CFSP are concerned. Apart from the judicial procedures available before the domestic courts of the Member States, the jurisdiction granted to the ECJ is not to be underestimated.[30]

Nevertheless, the Advocate General did not follow the arguments of the applicant and the European Commission in favour of a (very) narrow interpretation of the jurisdictional carve-out based upon a distinction between different categories of CFSP acts, depending on their nature and content (cf. above). In his view, "neither a literal nor a systematic reading of the relevant Treaty provisions" can lead to such a conclusion.[31] Hence, all acts adopted under Chapter 2 of Title V of the TEU are considered to fall outside the scope of jurisdiction of the EU judicature, save for the explicit exceptions laid down in Articles 24(1) TEU and 275 TFEU. It does not matter whether the CFSP acts were adopted by the European Council, the Council or any other body

25. See, on this point, also Wessel, "*Lex Imperfecta:* Law and integration in European Foreign and Security Policy", (2016) *European Papers*, 439–468; Van Elsuwege, "EU External Action after the collapse of the pillar structure: In search of a new balance between delimitation and consistency", 47 CML Rev. (2010), 987–1019; Govaere, "Multi-faceted single legal personality and a hidden horizontal pillar: EU external relations post-Lisbon", 13 CYELS (2011), 87–111.

26. Arts. 21(1) and 31(1) TEU. A.G. Wahl defines this prohibition as the incapacity "to adopt acts that lay down general abstract rules creating rights and obligations for individuals": Opinion, para 37.

27. Opinion, para 39–40.

28. Ibid., para 45.

29. Ibid., para 49.

30. Ibid., para 50.

31. Ibid., para 57.

established on the basis of CFSP provisions. The nature of the adopted acts is also deemed to be irrelevant. Given the impossibility to adopt legislative acts, the CFSP is almost by definition an operational policy giving guidance to the EU and national administrations. The Commission's suggestion to distinguish between sovereign foreign policy acts (*actes de gouvernement*) and acts of implementation also failed to convince the Advocate General. In the absence of concrete criteria or principles it is very difficult to make such a distinction in practice. It is even questionable whether such a distinction is possible at all taking into account that acts of implementation seem an integral part of the sovereign policy decisions on the basis of which they are adopted.[32] Moreover, the teleological interpretation advocated by the European Commission is difficult to reconcile with the wording of Article 24(1) and 275 TFEU leading the Advocate General to the conclusion that there is "no textual basis for a distinction based on the nature of the pleas".[33]

Also with respect to the definition of the concept "restrictive measures" under Article 275 TFEU, the Advocate General did not follow the proposals to adopt a broad interpretation so that it includes all acts adversely affecting the interests of individuals. In his Opinion, "a textual, systematic and historical interpretation of Article 275 TFEU, in fact, reveals that concept to be of more limited scope".[34] It is intended to permit judicial review of all CFSP acts having restrictive effects on individuals that were decided and implemented as part of the EU's sanctions policy. As a result, the contested decisions cannot be brought under this exception since they are clearly disconnected from the notion of sanctions. Since also the other explicit ground for ECJ jurisdiction in relation to the CFSP, i.e. checking compliance with the mutual non-affectation clause of Article 40 TEU, was not applicable to the case at stake, the Advocate General proposed to the Court to dismiss the appeal.

In a final interesting part of the Opinion, the consequences of this assessment are taken into account. If, as the General Court upheld, the validity of the contested decisions can only be examined at the national level, the question remains under which conditions the national courts can exercise a judicial review and whether they have the power to potentially annul these decisions. After stressing the importance of the preliminary ruling procedure in this regard,[35] the Advocate General addressed three important issues: the

32. Ibid., para 61.
33. Ibid., para 66.
34. Ibid., para 74.
35. The question whether or not the ECJ is competent to give preliminary rulings in CFSP cases is tackled in Case C-72/15, *Rosneft*, pending at the time of writing. (Editor's note: Briefly, the ECJ did find that it was able to give a preliminary ruling in that case, which concerns sanctions, since it has jurisdiction to consider whether CFSP measures comply with Art. 40 TEU and to review CFSP decisions imposing restrictive measures on natural or legal persons.)

applicable legal rules; the identity of the defendant; and the powers of the national courts.

First, whereas the procedural rules governing the actions before the national courts are to be determined under national law – subject to the principles of equivalence and effectiveness – the situation is different for the substantive rules. The validity of an EU act cannot be checked against provisions or principles of national law but, exclusively, on the basis of the applicable rules of EU law.[36] Second, as to the identity of the defendant, the Advocate General observed that the General Court erred in law in finding that the contested decisions were attributable to the Italian authorities. In his view, the Head of Mission did not act pursuant to the powers delegated to him by the Italian Government but as an EU body, by virtue of the powers entrusted to him by the Council or the Police and Security Committee (PSC). Accordingly, the applicant should bring her proceedings before the national court against the Union and not against the Italian Government.[37] Third, in line with the *Foto-frost* line of reasoning, national courts cannot annul acts adopted by EU institutions or bodies. As a result, the powers of the national courts are necessarily limited to the suspension of the applicability of the act *vis-à-vis* the applicant and, if appropriate, the award of damages. It cannot, however, have any *erga omnes* consequences.[38] Arguably, this raises significant questions regarding the EU's system of judicial protection and the uniform application of EU law (see below point 5.2.), which, however, were not tackled in detail in the Opinion of the Advocate General.

4. Judgment of the Court

After reconfirming that the jurisdictional carve-out in relation to CFSP matters is a derogation from the general rule and must be interpreted narrowly, the ECJ underlined that the EU is founded on the values of equality and the rule of law. The existence of effective judicial review is an inherent aspect of the rule of law.[39] Without drawing any further direct consequences from these general observations at this stage, the Court pointed out that "the EU judicature has jurisdiction, in accordance with Article 270 TFEU, to rule on all actions brought by EU staff members having been seconded to the EUPM".[40] Of course, the situation of staff

36. Opinion, para 93.
37. Ibid., paras. 94–99.
38. Ibid., paras. 101–103.
39. Judgment, para 40–41.
40. Ibid., para 44.

members seconded by the Member States differs in many respects from that of staff members seconded by the EU institutions. For instance, the authority to adopt disciplinary action falls within the competence of the Member States or the EU institutions respectively. However, all staff members, irrespective of whether they are seconded by the Member States or the institutions, are subject to the same rules as far as the performance of their duties "at theatre level" is concerned. It follows from several provisions of Decision 2009/906 that the Head of Mission is responsible for the day-to-day management of the EUPM including the capacity to give instructions to all staff members.[41]

Contrary to the General Court's assessment that the contested decisions concerned the issue of secondment, thus falling outside the scope of its jurisdiction, the ECJ stressed that they constitute acts of staff management relating to the operation of the mission at theatre level.[42] This allowed the Court to conclude that the EU judicature has jurisdiction to deal with the case of Mrs H., more precisely under Article 263 TFEU, as regards the action for annulment, and Article 268 TFEU read in conjunction with Article 340(2) TFEU, as regards the actions for non-contractual liability. Significantly, the Court also referred to Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights pointing at the importance of ensuring effective judicial review in the EU legal order.[43]

Taking into account the complexity of the matter, involving an area in which the EU institutions enjoy a broad discretion, the Court refrained from analysing the lawfulness of the contested decisions itself and referred the case back to the General Court.[44] Nevertheless, the Court of Justice clarified a more procedural issue, which concerns the identity of the defendant. Taking into account that the European Commission is not involved in the chain of command of the EUPM and the fact that the contested decisions have no budgetary implications, the action was dismissed as inadmissible insofar as it was directed against the Commission.[45] The contested decisions were adopted by the Head of Mission. He was appointed by the Police and Security Committee (PSC) and acted under the authority of the Civilian Operation Commander who himself was placed under control of the PSC and the High Representative. Proceeding from the observation that the PSC acted under the responsibility of the Council whereas the Civilian Operation Commander must ensure the implementation of both the PSC's decisions and those of the

41. Ibid., paras. 50–52.
42. Ibid., para 54.
43. Ibid., para 58.
44. Ibid., paras. 69–71.
45. Ibid., para 65.

Council, the Court concluded that "the contested decisions are imputable to the Council …, accordingly, the action is admissible only in so far as it is directed against the Council".[46]

5. Comments

The Court's judgment does not solve all questions regarding the precise boundaries to the ECJ's jurisdiction in the field of CFSP. Nevertheless, it reveals a number of interesting developments in relation to this specific area of law. First of all, the Court unequivocally confirms that the CFSP is a fully integrated part of EU law which, as such, is subject to the EU's constitutional values and norms. In a Union that is based on the values of equality and the rule of law, the right to (equality of treatment as regards) effective judicial review thus also applies with respect to the CFSP. Of course, there is a certain tension between this observation and the jurisdictional carve-out laid down in Articles 24(1) TEU and 275 TFEU. The legal argumentation developed on the basis of the ECJ's jurisdiction in relation to staff management allowed the Court to circumvent this fundamental issue, apart from the general observation that the scope of the jurisdictional carve-out is to be interpreted narrowly.[47] Be that as it may, the Court's judgment puts the exceptional nature of the CFSP, understood as *lex imperfecta* by Advocate General Wahl, further in perspective. It implies that the EU Treaty provisions regarding the CFSP cannot be interpreted in isolation from the broader objectives of the EU.

5.1. *The CFSP as lex imperfecta in a Union based on the rule of law*

The Treaty of Lisbon significantly changed the system of judicial protection with respect to measures adopted in the framework of the CFSP. Despite the principled exclusion of the Court's jurisdiction in CFSP matters, laid down in Articles 24(1) TEU and 275 TFEU, the abolition of the pillar structure implies that the CFSP is no longer to be regarded as a separate area of intergovernmental cooperation which is immune to any judicial intervention. On the contrary, the Court has been given significant powers, not only in respecting the borderline between CFSP and non-CFSP competences and in exercising judicial review in the context of the EU's sanctions policy, but also in ensuring that the general principles underpinning the

46. Ibid., para 68.
47. Ibid., para 40.

EU's legal order are guaranteed.[48] This entails a fundamental shift in perspective in comparison to the pre-Lisbon setting where the absence of the Court's jurisdiction in CFSP matters was the rule.

It appears that the Treaty of Lisbon provides a better balance between, on the one hand, respect for the special nature of foreign affairs and, on the other hand, respect for the rule of law and fundamental rights of individuals. Nevertheless, the continued existence of Treaty-based limitations to the Court's jurisdiction implies that the CFSP is still to be regarded as *lex imperfecta*. In a mature constitutional system, all acts of the institutions are subject to judicial control and it is for the judges themselves to develop a policy of judicial self-restraint taking into account the sensitive nature of foreign policy decisions and the broad discretionary powers of the executive power in this respect.[49] Such a step would have been logical in light of the EU's single legal personality, the importance attributed to the values laid down in Article 2 TEU and the constitutionalization of the CFSP as an integral part of the EU legal order. However, Member States refused to draw these conclusions and preferred to keep certain constitutional limits to the Court's jurisdiction in the field of CFSP. The reasons for this decision may be flawed[50] but, as Advocate General Wahl observed, it is "the result of a conscious choice made by the drafters of the Treaties".[51] Consequently, the Court needs to strike a balance between, on the one hand, respect for the rule of law and, on the other hand, the principles of inter-institutional balance and mutual sincere cooperation.[52]

This is nothing new in the process of European integration. Already in the famous *Les Verts* judgment of 1986, the ECJ provided a broad interpretation of the Treaties to ensure an effective system of judicial protection in what was then the European Economic Community.[53] Later, in the rulings of *Unión de Pequeños Agricultores* and *Jégo Quéré*, the Court clarified the limits of this approach when it concluded that the principle of effective judicial protection

48. Hillion, op. cit. *supra* note 2, p. 51; Opinion of A.G. Jääskinen in Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo*, paras. 25–30.

49. Van Elsuwege, op. cit. *supra* note 25, at 999–1000.

50. Eeckhout, *EU External Relations Law* (OUP, 2011), p. 499.

51. Opinion, para 49.

52. Pursuant to Art. 13(2) TEU, "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practise mutual sincere cooperation"; see Lenaerts and Gutiérrez-Fons, "To say what the law is: Methods of interpretation and the European Court of Justice", *EUI Working Paper* 2013/9, 3.

53. Case 294/83, *Les Verts*, EU:C:1986:166.

does not allow it to go beyond its jurisdiction as defined in the Treaties.[54] If there are, nevertheless, some gaps in the system of judicial protection it is for the Member States to take their responsibility in accordance with Article 48 TEU.[55] The reasoning developed in the context of those cases also applies in the discussion surrounding the limits to the Court's jurisdiction in the field of CFSP.

In ensuring the right to effective judicial protection as an inherent part of the rule of law while respecting the limits of its own jurisdiction, the Court clearly opted for a systemic and contextual interpretation of the Treaties. Of particular significance is the combined reference to the EU's foundational values set out in Article 2 TEU (as part of the "common provisions of the EU Treaty") and Articles 21 and 23 TEU in order to conclude that those values are fully applicable in relation to CFSP actions.[56] The link between the latter two Articles is important. Article 21 TEU belongs to the "general provisions on the Union's external action" whereas Article 23 TEU is subject to "the specific provisions on the CFSP". Yet, Article 23 TEU expressly provides that the Union's action in relation to the CFSP "shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions [on the Union's external action]".[57] In other words, the EU Treaty provisions relating to the CFSP – including the part on the limits to the Court's jurisdiction – cannot be interpreted in isolation from the general structure and logic of the Treaties.

It is noteworthy that this holistic approach, followed by the ECJ, stands in contrast to the Opinion of Advocate General Wahl. The latter does not explicitly refer to Article 2 TEU and somehow minimizes the importance of Article 23 TEU as a provision defining the CFSP objectives.[58] On the contrary, his focus on the specific CFSP provisions, in particular Article 24(1) TEU, leads to the conclusion that "save for specific exceptions expressly provided for in the Treaties, the ECJ has no jurisdiction to hear actions which concern CFSP acts".[59] The exclusion of the Court's jurisdiction in CFSP matters is even regarded as "the general rule that … may not be overlooked".[60] Consequently, the Advocate General mainly reduces the role of the ECJ in the

54. Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council,* EU:C:2002:462, para 44; Case C-263/02 P, *Commission* v. *Jégo Quéré*, EU:C:2004:210, para 36. See also Case C-583/11 P, *Inuit Tapiriit Kanatami et al.,* EU:C:2013:625, para 98.

55. Case C-50/00 P, *Unión de Pequeños Agricultores*, paras. 43–45; Case C-263/02 P, *Commission* v. *Jégo Quéré*, paras. 35–37.

56. Judgment, para 41.

57. On a similar view regarding the significance of Art. 23 TEU, see the Opinion of A.G. Wathelet in Case C-72/15, *Rosneft*, para 66.

58. Opinion, para 54.

59. Ibid., para 53.

60. Ibid., para 71.

area of CFSP to the two explicit exceptions laid down in Article 24(1) TEU and 275 TFEU, i.e. patrolling the boundaries between CFSP and non-CFSP external action in light of Article 40 TEU and reviewing the legally of restrictive measures adopted in the framework of the EU's sanctions policy, while largely overlooking its role as a guardian of the EU's general principles and values.

The different views defended by the Court and the Advocate General relate to the fundamental question – coined as "an issue of constitutional nature" by Advocate General Wahl – whether all or only certain categories of CFSP acts escape judicial scrutiny by the ECJ.[61] The Court's judgment did not engage with this question for obvious reasons of procedural economy. Nevertheless, the argument put forward by the European Commission that the Court's jurisdiction is excluded "only with regard to CFSP acts which are an expression of sovereign foreign policy ('*actes de gouvernement'*)" deserves further reflection.[62] This argument is derived from the tradition of the French *Conseil d'Etat* to deny jurisdiction with respect to "decisions of high governmental responsibility which require a high degree of sensitivity and knowledge in matters in which the courts are not competent to form a judgment".[63] With certain variations, a comparable restraint of the judiciary to deal with foreign policy and security issues exists in many other countries.[64] A noticeable example is the so-called *political questions* doctrine of the United States Supreme Court.[65] However, the established practice to exclude substantive judicial review of foreign policy decisions is not without controversy. It is not only difficult to be reconciled with a broad conception of the rule of law[66] but also raises several practical concerns since the precise contours of what constitutes a non-justiciable political decision are not always very clear.[67] Hence, a neat distinction of different CFSP acts may only

61. Ibid., para 52.

62. Ibid., para 33.

63. Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, 2009), p. 170.

64. Opinion of A.G. Darmon in Case C-241/87, *Maclaine Watson*, EU:C:1990:189, paras. 66–94; Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge, 2003), pp. 98–104. Adam, *La procédure d'avis devant la Cour de justice de l'Union européenne* (Bruylant, 2011).

65. See e.g. Henkin, "Is there a political questions doctrine?", 85 *Yale Law Journal* (1976), 597–625; Franck, *Political Questions/Judicial Answers. Does the Rule of Law Apply to Foreign Affairs?* (Princeton, 1992), p. 198.

66. De Baere, *Constitutional Principles of EU External Relations* (OUP, 2008), p. 200.

67. Opinion, paras. 60–61.

increase the legal uncertainty surrounding the precise scope of the Court's jurisdiction.[68]

Be that as it may, there is a certain merit in the argument of the Commission. Proceeding from a teleological interpretation of the Treaties, it may well be argued that the rationale of the jurisdictional carve-out is not to exclude the ECJ's jurisdiction with respect to all acts adopted in relation to the CFSP but, rather, to prevent the Court's interference with questions of foreign policy where the executive power has a wide margin of discretion. From this perspective, the exclusion of the ECJ's jurisdiction in relation to CFSP matters is nothing more than the codification of some kind of political questions doctrine. This view appears to be shared by Advocate General Wathelet in his Opinion in *Rosneft* when he points out that:

"[T]he reason for the limitation of the Court's jurisdiction in CFSP matters brought about by the 'carve-out' provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers."[69]

However, in her View in Opinion 2/13, Advocate General Kokott claims that such a broad conception of the Court's powers in CFSP matters does not follow from the drafting history of Article 275 TFEU.[70] Advocate General Wahl also refers to "the intention of the drafters of the Treaties" in order to reject a narrow interpretation of the jurisdictional carve-out.[71] Hence, it appears that different methods of interpretation lead to different conclusions as far as the role of the ECJ is concerned. A teleological approach implies that the exclusion of the Court's jurisdiction in relation to CFSP acts is to be exceptional in light of the EU's rule of law objectives whereas a textual interpretation with reference to the *travaux préparatoires* points in a different direction. It is symptomatic for this difference in approach that Advocate General Wahl considered the absence of the Court's jurisdiction in the field of CFSP as "the general rule" while the Court stressed its general jurisdiction under Article 19 TEU to ensure that in the interpretation and application of the Treaties the law is observed.[72]

In view of this observation, it is noteworthy that the Treaties do not provide any guidance as to which method of interpretation is to be preferred. This means that the Court is, in principle, free to opt for the method which best

68. Verhellen, "*H vs. Council,* strengthening the rule of law in the sphere of the CFSP, one step at a time"*, European Papers – European Forum,* highlight of 9 Dec. 2016, 11 <www.europeanpapers.eu>.

69. Opinion of A.G. Wathelet in Case C-72/15, *Rosneft,* para 52.

70. View of A.G. Kokott in Opinion procedure 2/13, EU:C:2014:2475, para 90.

71. Opinion, paras. 63–66.

72. Compare para 71 of the Opinion with para 40 of the judgment.

serves the EU legal order as long as the principles of inter-institutional balance and mutual sincere cooperation are observed.[73] Proceeding from this interpretative discretion and taking into account the fundamental importance of the rule of law as a cornerstone of the EU legal order, the Court's reasoning in *H* v. *Council* makes a lot of sense. It builds upon the tradition of *Les Verts* to ensure, in so far as possible, an effective system of judicial protection. Of course, the question remains whether the remaining limits to the Court's jurisdiction allow to conclude that there is a "complete system of legal remedies".

5.2. *A complete system of judicial remedies?*

In the *Elitaliana* v. *Eulex Kosovo* case, Advocate General Jääskinen observed that:

> "The European Union Courts 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. Therefore, the discussion as to the status of the missions and their staff, inasmuch as they have privileges and immunities, must go hand in hand with establishing legal remedies, accessible to individuals, against acts adopted by missions which have an impact on the rights and obligations of those individuals."[74]

The Court's judgment in *H.* v. *Council* provides a partial answer to this challenge in clarifying that operational acts adopted by a Head of Mission "at theatre level" are imputable to the Council, taking into account the latter's political authority with respect to CFSP matters.[75] Its competence to rule on actions brought by EU staff members under Article 270 TFEU and the observation that all staff members, irrespective of whether they are seconded by the EU institutions or the EU Member States, are subject to the operational control of the Head of Mission, allowed the Court to assert its jurisdiction. With this creative solution, which had not been brought up by any of the parties nor by the Advocate General, the fundamental question about the role of the Member States' judiciary in CFSP affairs could be avoided. Nevertheless, in a Union based on the rule of law the complementary role of the latter is not to be ignored.[76]

73. Lenaerts and Gutiérrez-Fons, op. cit. *supra* note 52, at 4.
74. Opinion of A.G. Jääskinen in Case C-439/13 P, *Elitaliana* v. *Eulex Kosovo*, para 66.
75. Judgment, para 43.
76. Hillion, "Decentralised integration. Fundamental rights protection in the EU Foreign and Security Policy", (2016) *European Papers*, 61–63.

The system of judicial protection established on the basis of Article 19 TEU is based on two pillars including the ECJ *and* the national courts and tribunals of the Member States.[77] Significantly, the jurisdictional carve-out laid down in Articles 24(1) TEU and 275 TFEU only concerns the powers of the ECJ, but not the jurisdiction of Member States' courts.[78] As a result, the Member States' obligation "to provide remedies sufficient to ensure effective legal protection", laid down in Article 19(1) TEU, also applies with respect to the CFSP. However, as observed by Advocate General Wahl, competent national courts or tribunals may have doubts as to the extent of their review and its potential consequences. This almost unavoidably triggers the application of the preliminary ruling procedure, an option which is to be welcomed in order to bring further legal clarity about the scope of the ECJ's jurisdictional carve-out, the implications of the EU's general principles and the legal consequences of the national courts' duties under Article 19(1) TEU.[79]

An outstanding issue in this respect concerns the application of the *Foto-Frost* rule that only the ECJ has the power to declare EU acts invalid.[80] This is crucial to ensure the uniform application of EU law within the EU legal order. Of course, the question is how this logic can be applied when the ECJ has no jurisdiction to review the legality of CFSP acts. On this point, Advocate General Kokott somewhat bluntly concluded that the *Foto-Frost* reasoning cannot be applied to the CFSP and that, as a result, "the uniform interpretation and application of EU law in the context of the CFSP cannot be ensured".[81] In her view, this is the price to be paid for retaining the special characteristics of the CFSP as opposed to the supranational areas of EU law. Advocate General Wahl also referred to the *lex specialis* nature of the CFSP to point at the limits of the applicable judicial review, in the sense that national courts can at most suspend the applicability of CFSP acts – in line with the conditions laid down in the *Zuckerfabrik* case law[82] – and award damages without there being a possibility to declare a CFSP act invalid.[83] Arguably, both approaches seem to disregard the fundamental importance of Article 23 TEU, which forms the linchpin between the CFSP and the EU's general principles and values. Accordingly, the right of access to a court and effective legal protection also applies in relation to the CFSP. This connection, as

77. View of A.G. Kokott in Opinion procedure 2/13, para 96.
78. Hillion, op. cit. *supra* note 76, at 62.
79. Opinion, para 91.
80. Case C-314/85, *Foto Frost* v. *Hauptzollambt Lübeck-Ost*, EU:C:1987:452.
81. View of A.G. Kokott in Opinion procedure 2/13, paras. 100–101.
82. See Joined Cases C-143/88, *Zuckerfabril Süderdithmarschen AG* v. *Hauptzollamt Itzehoe* & 92/89, *Zuckerfabrik Soest GmbH* v. *Hauptzollambt Paderborn*, EU:C:1991:65.
83. Opinion, para 103.

upheld by the Court in its *H.* v. *Council* ruling, is also recognized by Advocate General Wathelet in the *Rosneft* case (pending at the time of writing) as a crucial consideration in defence of the ECJ's jurisdiction to give a preliminary ruling on the validity of CFSP sanctions adopted against Russia.[84]

Hence, it appears that the *Foto-Frost* logic can only be applied to the extent that the ECJ is competent to address preliminary questions from national courts and tribunals.[85] The constitutional limitations to the Court's jurisdiction in relation to the CFSP unavoidably imply that there may be situations in which this option is unavailable. This is a structural deficiency in the EU's system of judicial protection, which is indeed the result of a conscious choice of the drafters of the Treaties. Nevertheless, proceeding from its task under Article 19 TEU and the EU's foundational values laid down in Article 2 TEU, it is for the Court to keep this gap as small as possible. The Court's ruling in *H.* v. *Council* appears to point in this direction but, taking into account the specific nature of this staff management case, it is somewhat premature to draw firm conclusions about the scope of judicial review over CFSP acts.

In any event, the issues raised in this case point at some fundamental questions which will need to be dealt with in future case law, starting with *Rosneft*.[86] In particular, the engagement of national courts in judicial review of CFSP matters, in combination with the limited jurisdiction of the ECJ, undeniably complicates the system of judicial protection in the EU legal order. As observed in *Foto Frost*, the coherence of this system is based upon the interaction and complementarity of both judiciaries and is inspired by the requirements of legal certainty and uniformity in the application of EU law.[87] This implies, amongst others, that national courts are entitled to consider the validity of EU acts whereas only the ECJ has the power to declare such acts invalid. The absence of the latter option, in consequence of the ECJ's jurisdictional carve-out in relation to CFSP acts, creates a loophole in the EU's system of legal remedies.

A situation where judicial control of the CFSP essentially takes place at the national level shifts the responsibility for upholding the uniform application of EU law from the judicial to the political level. As observed by Advocate General Wahl, "it would then be for the EU institution responsible for the act to draw the necessary inferences from the decision of the national court".[88]

84. Opinion of A.G. Wathelet in Case C-72/15, para 66.

85. See, on the link between the application of *Foto-Frost* and the availability of the preliminary ruling procedure, the Opinion of A.G. Mengozzi in Case C-354/04 P, *Gestoras Pro Amnistia et al*., EU:C:2006:667, paras. 122–126.

86. Case C-72/15, *Rosneft*, pending at the time of writing.

87. Case C-314/85, *Foto Frost* v. *Hauptzollambt Lübeck-Ost*, paras. 15–17.

88. Opinion, para 103.

Arguably, this solution is questionable from the perspective of legal certainty. On the other hand, it is probably the only option in situations where the ECJ cannot intervene and where judicial protection against CFSP acts is only available at the Member State level.

6. Concluding remarks

In what appears to be a rather specific dispute concerning the deployment of an Italian magistrate seconded to the EU Mission in Bosnia and Herzegovina, the ECJ provides an important contribution to the further demystification of the CFSP as a specific area of EU law. Most importantly, it confirms that the CFSP is fully integrated in the EU legal order implying that the EU's horizontal principles are fully applicable. Moreover, building upon a tradition which already started in the pre-Lisbon period, the Court seeks to uphold the rule of law within the constitutional limits of the Treaties.[89] Without providing definite answers about the precise borderline between the right of effective judicial review, on the one hand, and the jurisdictional carve-out in CFSP matters, on the other hand, it seeks to ensure a coherent – be it incomplete – system of legal remedies.

Taken together with a number of other judgments, it becomes increasingly clear that the CFSP is not disconnected from neither parliamentary nor judicial control. Of course, the intensity and scope of this control is subject to constitutional limitations guaranteeing a dominant role for the executive power. Whereas such a limitation is, in itself, not uncommon and perhaps unavoidable with respect to sovereign foreign policy questions, the Treaty-based jurisdictional carve-out remains an anomaly in a Union based on the rule of law. On the other hand, it also appears that the ECJ is a meaningful actor in relation to the CFSP. As illustrated in *H.* v. *Council*, the Court interprets CFSP acts – in this case Decision 2009/906 – in light of the EU's general principles. This does not set the door wide open to judicial review of all CFSP acts but, at least, allows to offer judicial protection when a person's legal position is affected by an act of staff management.

Peter Van Elsuwege*

89. See e.g. Case C-354/04 P, *Gestoras Pro Amnistia et al*., EU:C:2007:115, para 53; Case C-355/04 P, *Segi* v. *Council*, EU:C:2007:116, para 53.

* Professor of EU law, Ghent European Law Institute (GELI), Ghent University.

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