

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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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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The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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The Common Foreign Security Policy after *Rosneft*: Still imperfect but gradually subject to the rule of law

Case C-72/15, *The Queen (PJSC Rosneft Oil Company) v. Her Majesty's Treasury*, Judgment of the Court of Justice (Grand Chamber), of 28 March 2017, EU:C:2017:236.

1. Introduction

Decisions in the area of the Common Foreign and Security Policy (CFSP) are of a political nature, and the principle of the separation of powers imposes limits on the judicial control of conduct of the executive.¹ This is the rationale at the basis of the restrictions imposed in the Treaties on the jurisdiction of the ECJ in this particular sector of EU law.² The Grand Chamber decision in *Rosneft*³ defines the scope of the two exceptions laid down by Article 275(2) TFEU to the Court's lack of jurisdiction with respect to the provisions of the CFSP. The judgment provides important clarifications on the kind of remedies available to control the legality of CFSP Decisions providing for restrictive measures *vis-à-vis* natural or legal persons, or other non-State entities: such a control can be exercised by means not only of the annulment action, but also of the preliminary ruling on the validity of such acts.

The remedy of Article 267(1)(b) TFEU is available to monitor respect of Article 40 TEU. This position is not revolutionary since the Treaty provisions already provide a wide margin of manoeuvre to justify such an interpretation. It was more difficult to define the scope of the notion of “review of legality” enshrined in Article 275(2) TFEU.⁴ *Rosneft* extends the principles deriving from *Foto-Frost*⁵ to CFSP for the first time,⁶ thus signalling a willingness of

1. See along these lines the point made in A.G. Wathelet's Opinion, EU:C:2016:381, para 52.

2. See Arts. 24(1) TEU and 275(1) TFEU.

3. For an interesting insight on the case see Butler, “A question of jurisdiction: Art. 267 TFEU preliminary references of a CFSP nature”, (2017) EP, 1–8.

4. See section 5.4. *infra*.

5. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, EU:C:1987:452.

6. However, it is not the first time the possibility to apply the *Foto-Frost* principles in the context of the CFSP is raised. A.G. Wahl had argued that national courts cannot declare a CFSP act invalid since this would be against such principles. However, he concluded that since there is no EU court to which that issue could be brought, the national court could at most suspend

the EU judiciary to ensure the monopoly of the review of legality even in this field.⁷ However, there are still some limits.⁸ This is a crucial decision of principle, not least because it affects the management of prominent CFSP acts, such as those setting up restrictive measures. In the last couple of years, the scope of the Court's limited jurisdiction in the area of foreign affairs was defined in *Elitaliana*⁹ and *H*,¹⁰ clarifying the interpretation of Article 275(2) TFEU, introduced by the Lisbon Treaty. In these two judgments, it was understood that the exceptions defined in Articles 24(1) TEU and 275(1) TFEU to the general jurisdiction of the ECJ on the interpretation and application of EU law should be interpreted narrowly, despite the clear intention of the Treaty makers to screen CFSP as much as possible from the scrutiny of the EU judiciary. What is, then, the place of the CFSP in the EU legal order¹¹ after *Rosneft*? The preliminary ruling further eroded the immunity from jurisdiction for acts adopted in the field of CFSP and contributed to a progressive "legalization" of this sector.¹² The EU judiciary makes the oversight on EU sanctions¹³ more thorough, upholding the right to effective judicial protection – which is crucial in a Union based on the rule of law. It should be acknowledged that the ECJ recognizes that the Council has a wide margin of discretion in areas which involve political, economic and societal choices on its part.¹⁴ Most importantly, it gives its blessing to the political choice of increasing the costs to be borne by the Russian Federation for its actions undermining Ukraine's territorial integrity, sovereignty and independence by targeting a major player in the oil sector, which is in part owned by the Russian State.¹⁵ This is not surprising and is in line with the obligation to "practise mutual sincere cooperation," enshrined in the last

applicability of the act *vis-à-vis* the applicant and, where appropriate, award him damages. See Opinion of A.G. Wahl in Case C455/14 P, *H. v. Council*, EU:C:2016:212, paras. 102–103.

7. This is contrary to the suggestion made by A.G. Kokott in her View on Opinion 2/13, EU:C:2014:2475, para 100.

8. See sections 5.1, 5.6, 6 *infra*.

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

10. Case C-455/14 P, *H. v. Council*.

11. This expression is borrowed from 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), 995.

12. See Cardwell, "The legalization of the European Union foreign policy and the use of sanctions", (2015) CYELS, 289–310, at 292 and 297–298; Smith, "Diplomacy by decree: The legalization of EU foreign policy", (2001) JCMS, 79–104, at 79.

13. "Sanctions" and "restrictive measures" are used interchangeably for convenience.

14. Case C-440/14 P, *National Iranian Oil Company v. Council*, EU:C:2016:128, para 77.

15. Judgment, para 147.

sentence of Article 13(2) TEU, which also applies to the ECJ in relation to the Council.¹⁶

2. Legal context and the questions referred by the High Court of Justice (England and Wales)

The key provision defining the ECJ's task in the Treaty is the second sentence of Article 19(1) TEU: to ensure that in the interpretation and application of the Treaties, the law is observed. The CFSP is *the* area in which the “masters of the Treaty” were willing to recognize only a limited form of judicial oversight. The general rule here is immunity from jurisdiction for the CFSP provisions, enshrined Article 24(1)(2) TEU.¹⁷ Article 275(1) TFEU elaborates on this rule: “The ECJ 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 last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU identify two exceptions to the lack of review of CFSP acts: Article 24(1)(2) refers to the competence of the Court to “monitor compliance with Article 40 TEU” (the so-called “non-affectation clause”),¹⁸ and “to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.” Article 275(2) TFEU re-states the first exception in identical terms and specifies the second one: the ECJ has jurisdiction to “rule in proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.” The decisions referred to in Article 275 TFEU are generally adopted on the basis of Article 29 TEU, and when they provide for economic sanctions, the Council “shall adopt the necessary measures,” on the basis of Article 215(1) TFEU; these are usually regulations.

16. On the limits posed by Art. 13(2) TEU on the Court's role in interpreting the Treaties, see Horsley, “Reflections on the role of the ECJ as the motor of European integration: Legal limits to judicial law-making,” 50 CML Rev. (2013), 931–964.

17. “The Court of Justice of the European Union shall not have jurisdiction with respect to the . . . provisions [of the CFSP].”

18. This provision ensures that when implementing the CFSP, the Union does not affect the application of the procedures and the powers of the EU institutions in non-CFSP sectors. In addition, when the EU implements policies other than the CFSP, it must respect the application of the procedures and the powers of the EU institutions laid down by the Treaty for the exercise of the competence in the CFSP.

Rosneft is a legal entity active in the oil and gas sectors, controlled by a State-owned company. It was included in the list of bodies engaging in the sale or transportation of crude oil or petroleum products in September 2014.¹⁹ At that time, the EU decided to reinforce the first round of sanctions imposed on Russia, and on non-State actors such as banks, energy and defence industries, enacted in July 2014, with the aim of causing heavy costs to the Russian economy.²⁰ The restrictive measures at stake were adopted through CFSP Decision 2014/512²¹ (“the contested Decision”) and Regulation 833/2014 (“the contested Regulation”).²² They clearly affected Rosneft’s economic activities since they imposed on operators, coming within the jurisdiction of EU Member States, prohibitions or restrictions with respect to sensitive goods and technologies destined for deep water oil exploration and production, Arctic oil exploration and production, and shale oil projects. These measures included the obligation to subject the direct or indirect sale, supply, transfer or export of certain equipment suited to specific categories of exploration and production projects in Russia to prior authorization,²³ as well as the stipulation to prohibit associated services necessary for these projects.²⁴

Rosneft sought the annulment of selected provisions of the sanction regime in an action before the General Court, in October 2014.²⁵ Additionally, approximately one month later, an action was brought before the High Court of Justice of England and Wales by Rosneft’s subsidiary in the UK. In that context, the applicant questioned the legality of the national legislation implementing the provisions of the contested Regulation, which imposed on Member States the obligation to provide for criminal penalties for any breach of the latter act. The referring court considered that the action concerned the validity of EU law acts; it took the view that while the jurisdiction of the ECJ to examine the validity of CFSP measures falls outside the *Foto-Frost*²⁶ case law, CFSP measures could have a serious impact on natural and legal persons.

19. As of 8 Sept. 2014, Rosneft was included in the list of Annex III to Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, O.J. 2014, L 229/13. On the context that led to strengthening the sanctions, see Krause, “Western economic and political sanctions as instruments of strategic competition with Russia – Opportunities and risks,” in Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (Brill, 2016), p. 271 et seq., at p. 279.

20. <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf>, (last visited 15 June 2017).

21. Council Decision 2014/512/CFSP, cited *supra* note 19.

22. Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, O.J. 2014, L 229/1.

23. Art. 4 of Decision 2014/512.

24. Art. 4a of Decision 2014/512.

25. Case T-715/14, *Rosneft v. Council*, pending.

26. Case 314/85, *Foto-Frost*.

Furthermore, the principle of access to a court to review the legality of acts of the executive is a fundamental right. In the light of these premises, the national judges raised three sets of questions: the first group asked whether the ECJ had competence to rule on the validity of some of the provisions of the CFSP Decision.²⁷ The second group raised doubts over the validity of the so-called “oil sector provisions”²⁸ and the “security and lending provisions”²⁹ of the CFSP Decision and of the contested Regulation, in addition to other provisions of these two acts.³⁰ In the referring order and written observations presented by Rosneft, it was argued that the contested provisions of both acts clash with Article 40 TEU, breach the Partnership and Cooperation Agreement between the EU and Russia³¹ and were tainted by other reasons of illegality.³² The third group questioned the interpretation of certain articles of the contested acts in the event that the Court considered the prohibitions or restrictions contained in the provisions to be valid.³³ The referring court justified its decision to seek clarification from the ECJ with the need to provide a uniform interpretation of the provisions at stake in the proceedings, which acknowledged the variations in the practices of the Member State national authorities in relation to the meaning of such provisions.³⁴

27. These are Arts. 1(2)(b) to (d) and 1(3), 4, 4a and 7 of the contested Decision and Annex III to this act, naming Rosneft amongst the addressees of restrictive measures.

28. Arts. 4, 4a of Decision 2014/512 and Arts. 3, 3a, 4(3) and (4) of, and Annex II to, Regulation 833/2014.

29. Arts. 1(2)(b) to (d) and 1(3) of, and Annex III to, Decision 2014/512 and Arts. 5(2)(b) to (d), 5(3) of, and Annex VI to, Regulation 833/2014.

30. Art. 7 of Decision 2014/512 and Art. 11 of Regulation 833/2014.

31. EU-Russia PCA, O.J. 1997, L 327/1.

32. I.e.: breach of the duty to state reasons; in addition, incompatibility of specific provisions of the contested acts relating to the oil sector with the principle of equal treatment; Council misuse of its power in adopting them; conflict with principle of proportionality, with the freedom to conduct one’s business and the right to property; failure of Regulation 833/2014 to give proper effect to Decision 2014/512; lack of clarity of the obligation to impose penalties by Member States for the breach of the content of the Regulation is contrary to the principles of legal certainty and *nulla poena sine lege certa*.

33. The doubts concern the meaning of “financial assistance” (Art. 4(3) of the Regulation), the scope of the prohibition of Art. 5 and the terms “shale” and “waters deeper than 150 meters” mentioned in the CFSP Decision and in the Regulation. Since this part of the ruling does not present special interest, no reference will be made to it in the summary of the case.

34. It is clear that the national court was very much aware of the fact that whereas there are no limitations to the Court’s competence on the interpretation and validity of a regulation, even if adopted in strict connection with a CFSP act, the grounds for its competence to interpret a decision, setting up restrictive measures, falling within Chapter 2 of Title V TEU, are less solid in the light of the letter of Art. 275(2) TFEU. The latter merely refers to “review of legality” of the CFSP acts providing for restrictive measures and does not explicitly envisage a competence to interpret these provisions. This is why almost all the interpretative questions concern the Regulation rather than the CFSP act.

3. Opinion of Advocate General Wathelet

Advocate General Wathelet's answer to the first (and most important) question raised by the referring court was that the EU judiciary could review the compliance with Article 40 TEU of all CFSP acts (either in an action for annulment or in preliminary ruling proceedings) as well as the legality of CFSP Decisions which provide for restrictive measures against natural or legal persons, again both in actions based on Article 263 and in those based on Article 267 TFEU.³⁵

In defining the scope and limits of the competence to review CFSP acts, Advocate General Wathelet referred to the “grands arrêts” of the ECJ as well as to Articles 24 TEU and 275 TFEU. Reference was made to *Les Verts*³⁶ (which famously stressed that the Treaty creates a complete system of legal remedies and procedures administered by the Court), and also to *Foto-Frost*.³⁷ On the basis of *Elitaliana*,³⁸ it was demonstrated that the ECJ's lack of competence in the sphere of the CFSP was an exception to its general competence under Article 19 TEU and, as such, the exception should be interpreted narrowly. However, most of the Opinion focuses on the wording of the “carve-out”³⁹ provisions of the Treaty, setting out the immunity from jurisdiction in the area of the CFSP and the “clawback”⁴⁰ provisions, defining the exceptions to the lack of jurisdiction. Advocate General Wathelet sought to identify a rule that would define the limits of the Court's jurisdiction, not only with respect to decisions setting up restrictive measures but, more broadly, to all CFSP acts producing legally binding effects.

Advocate General Wathelet claimed that the immunity from jurisdiction applied only to a CFSP act whose legal basis lies between Articles 23 and 46 TEU, and “its substantive content . . . falls within the sphere of CFSP implementation.”⁴¹ In other words, it is not enough for an act to have its legal basis in the CFSP Treaty provisions to therefore fall outside the scope of the ECJ's jurisdiction. For Advocate General Wathelet, the clawback provisions should be interpreted keeping in mind the rationale behind excluding such jurisdiction: “CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with the implementation of the

35. Para 65.

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

37. Case 314/85, *Foto-Frost*.

38. Case C-439/13 P, *Elitaliana*.

39. Art. 24(1)(2) TEU and Art. 275(1) TFEU.

40. The last sentence of Art. 24(1)(2) TEU and Art. 275(2) TFEU.

41. Opinion, para 49. The implication of the test identified by the A.G. to define the scope of the immunity from jurisdiction is that regulations adopted by the Council on the basis of Art. 215 TFEU fall outside the ambit of the “carve-out” provision.

CFSP, in relation to which it is difficult to reconcile judicial review with the separation of power.”⁴² The clawback provisions deprive CFSP acts of their immunity from ECJ oversight where they go beyond the bounds of the provisions of Title V, Chapter 2 of the Treaty. These Treaty Articles have not substantially altered the position from that which existed before the adoption of the Lisbon Treaty;⁴³ indeed, Article 47 EC also enabled the Court to patrol the borders between CFSP acts and other areas of law, although the clause was drafted so as to favour the choice of first pillar measures over second pillar ones, unlike Article 40 TEU.

Subsequently, the Advocate General analysed the ECJ’s specific competence regarding decisions providing for restrictive measures. He noted that while the two clawback provisions were worded in the same way as far as the competence under Article 40 TEU was concerned, this was not the case in the second exception to immunity. More precisely, according to Article 275(2) TFEU, the Court has jurisdiction “to rule on *proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty*, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union” (emphasis added). Thus, this strand of the Court’s limited competence in the sphere of the CFSP is defined in narrower terms than in the last sentence of Article 24(1)(2) TEU.⁴⁴ Article 275 seems to limit the possibility of challenging the legality of restrictive measures by non-State actors to direct actions, as well as implicitly excluding the competence to rule on these measures in the context of a preliminary ruling procedure. Yet, there is well-established case law providing authority to argue that the “review of legality mentioned in the last sentence of the second subparagraph of Article 24(1) TEU includes not only actions for annulment brought on the basis of the fourth paragraph of Article 263 TFEU, but also, and in particular, the preliminary ruling procedure provided for in Article 267 TFEU.”⁴⁵ In *Foto-Frost*, it is recognized that: “Requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the [European Union] institutions.”⁴⁶ Further support for this conclusion is drawn from a textual analysis of the Treaty provisions dealing with the Court’s jurisdiction:

42. Opinion, para 52.

43. Opinion, para 56.

44. Indeed, this provision merely refers to “review of the legality of *certain decisions* as provided for by the second paragraph of Art. 275 TFEU” (emphasis added).

45. Opinion, para 62.

46. Opinion, para 16.

“... The ‘carve-out’ provision introduced by the first paragraph of Article 275 TFEU must, like any derogation, be interpreted narrowly, and since the scope of the ‘clawback’ provision cannot be broader than that of the ‘carve-out’ provision, ... the ‘clawback’ provision in the second paragraph of Article 275 TFEU, which re-establishes the basic rule, must be interpreted broadly, with account being taken of the broader terms of the last sentence of the second subparagraph of Article 24(1) TEU.”⁴⁷

A further point supporting the Advocate General’s view is that the refusal to recognize a competence to give preliminary rulings in relation to any CFSP act⁴⁸ would be difficult to reconcile with Article 23 TEU, which provides that “the Union’s action on the international scene . . . shall be guided by the principles . . . laid down in Chapter 1, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, . . . which unquestionably include the right of access to a court and effective legal protection”.⁴⁹

A separate section of the Advocate General’s Opinion was dedicated to the Court’s competence to interpret CFSP acts, which appears to be excluded by the second paragraph of Article 275 TFEU. He convincingly argued that preliminary rulings on interpretation can be given with respect to restrictive measures.⁵⁰

The Opinion also discussed whether the provisions of the contested CFSP Decision actually fall within the category of “decisions providing for restrictive measures against natural or legal persons.” Advocate General Wathelet gave a positive answer with respect to the challenge against Articles 1(2)(b) to (d) and (3), and 7, given that Rosneft, listed in Annex III, comes within their scope of application. He criticized the position of the General Court in *Sina Bank*⁵¹ and *Hemmati*,⁵² because in these judgments the concept of “restrictive measure against natural/legal persons” is blended with the criterion of being “individually concerned” by the measure in question.⁵³ He found such an interpretation incompatible with that of a different Chamber of the General Court in *National Iranian Oil Company*.⁵⁴ There, it was

47. Opinion, para 64.

48. As supported by A.G. Kokott in her View in Opinion 2/13, and also by the UK, Czech, German, Estonian, French and Polish Governments and by the Council in the case at hand.

49. Opinion, para 66.

50. See for further comments section 5.8.2. *infra*.

51. Case T-67/12, *Sina Bank*, EU:T:2014:348.

52. Case T-68/12, *Hemmati*, EU:T:2014:349.

53. Opinion, para 90.

54. Case T-578/12, *National Iranian Oil Company v. Council*, EU:T:2014:678, confirmed by the ECJ in its judgment Case C-440/14 P, *National Iranian Oil Company*.

recognized that “the fourth paragraph of Article 263 TFEU confers on *all* natural and legal persons standing to institute proceedings against acts of the EU institutions, provided that the conditions laid down in Article 263 TFEU are fulfilled”, (emphasis added).⁵⁵ Finally, the Advocate General rejected the restrictive interpretation advanced by the Commission, the Council and the Member States, since it would be incompatible with the system of judicial protection instituted by the TFEU and the right to an effective legal remedy. Additionally, it would render the “clawback” provision, in particular the possibility of raising a preliminary ruling procedure on CFSP Decisions, “chimeric in very many cases.”⁵⁶

A negative answer was however given with respect to the Court’s jurisdiction on Articles 4 and 4a of Decision 2014/512, for the reason that these provisions do not refer to *Rosneft*. They cannot qualify as measures containing restrictive measures against the Russian company, because they fall outside the scope of Article 275(2) TFEU and thus cannot trigger the Court’s competence to rule on their validity.⁵⁷ This conclusion was based on the General Court’s ruling in *Kala Naft*.⁵⁸ Here, the challenge to Article 4 of Council Decision 2010/413/CFSP,⁵⁹ which did not specifically refer to the applicant, was considered to fall outside the notion of “decision providing for restrictive measures against natural or legal persons,” enshrined in Article 275(2) TFEU. Articles 4 and 4a of the contested Decision were considered similar in wording to Article 4 of the 2010 Decision.⁶⁰ In concluding this part, Advocate General Wathelet took the view that the lack of competence of the ECJ does not leave a legal gap in the EU system of judicial remedies since the applicants may challenge the almost identically worded provisions of the contested Regulation.⁶¹

Finally, the Advocate General turned to the substance of the contested acts. In his view, the contested acts cannot qualify as legislative acts within the meaning of Article 289(3) TFEU; they are enacted on the basis of a non-legislative procedure. Since *Rosneft* did not allege that the contested measures should have been adopted on any legal basis other than Articles 29 TEU and 215 TFEU, the (implicit) conclusion is that they are valid since they do not affect the powers of the EU institutions in areas different from the CFSP,

55. Case T-578/12, *National Iranian Oil Company*, para 36.

56. Opinion, paras. 90–91.

57. Opinion, para 85.

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

59. Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, O.J. 2010, L 195/39.

60. Opinion, para 85.

61. Opinion, para 93.

in breach of Article 40 TEU. The Opinion also rejected the other pleas of invalidity, after a detailed analysis, with the exception of one: the second subparagraph of Article 3(5) of Regulation 833/2014 was considered invalid since it contradicts the contested CFSP Decision. The last part of the Opinion was devoted to the interpretation of terms used in the contested Regulation, while the contested CFSP Decision was not touched upon at all.

4. Judgment of the Court

4.1. Admissibility of the first question

According to the Council and the interveners,⁶² there was no need to raise a question on the validity of the contested CFSP Decision; the dispute at national level could be settled in the light of the contested Regulation only. The ECJ rejected these arguments. After recalling the limited number of cases in which a request for a preliminary ruling was held inadmissible, the Court underlined that the first question had a direct connection to the subject matter of the main proceedings. Its ruling on the validity of a CFSP Decision was necessary because, if the ECJ found itself not competent to deal with the matter, “it [would be] for the national court to ensure that there exist legal remedies sufficient to ensure effective judicial protection.” This obligation stemming from Article 19(1)(2) TEU also applies in the field of CFSP. In addition, limiting the ECJ’s legal analysis to the validity of the Regulation would have provided “inadequate answers to the concerns of the national court.”⁶³ A further point was that such an act is based on a CFSP Decision, and the validity of the latter is a prerequisite for that of the former. Finally, the last justification was that even if a regulation is declared invalid, this has no legal effects on the obligation of Member States to ensure that their national policies conform to the restrictive measures of the contested CFSP Decision. We return to the possibility of reviewing the Regulation *in lieu* of the CFSP act in the comments below.⁶⁴

4.2. Substance of the first question

In relation to the substance of the first question, a number of interveners⁶⁵ sided with the Council in holding that the EU judiciary did not have

62. The Estonian and Polish Governments and the Council.

63. Judgment, para 53.

64. See section 5.3. *infra*.

65. UK, Czech Republic, Estonia, France and Poland.

jurisdiction to rule on the validity of the contested Decision. By contrast, the Commission took the position that a preliminary ruling on the aforementioned act was not precluded by the Treaty provisions; nonetheless, the conditions⁶⁶ as defined by Article 275 (2) TFEU were not satisfied. The ECJ considered that the question referred by the national court required clarification of two issues: whether its jurisdiction could be exercised in the context of a preliminary ruling procedure under Articles 40 TEU and 275(2) TFEU.

4.2.1. *The preliminary procedure as a means to exercise jurisdiction under Article 40 TEU*

In a single paragraph, the Grand Chamber recognized the Court's jurisdiction to give a preliminary ruling concerning the compliance of Decision 2014/512 with Article 40 TEU.⁶⁷ The Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out. Therefore, the general rule defining the ECJ's jurisdiction was applicable; Article 19(3)(b) TEU states that the EU judiciary gives preliminary rulings, at the request of national courts or tribunals, on, *inter alia*, the validity of acts adopted by the institutions of the European Union.

4.2.2. *The preliminary ruling procedure as a means to control the legality of CFSP Decisions providing for restrictive measures*

The second issue, concerning the jurisdiction with respect to restrictive measures, was more difficult. Although Article 275(2) TFEU seems to limit the ECJ's jurisdiction to review the legality of restrictive measures to annulment actions – given the reference to the competence to rule “on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU”, contained in this provision – three arguments were used to stretch it so as include the preliminary ruling procedure on the validity of these measures. First, the task of carrying out such a review of EU acts relies on two complementary judicial procedures that are couched in a system of legal remedies which is complete. Recalling a well-known dictum in the *Francovich* ruling,⁶⁸ the Court further argued:

“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

66. These are: a) the applicant in the main proceedings must satisfy the conditions laid down in Art. 263(4) TFEU; and b) the aim of the proceedings is to examine the legality of restrictive measures against natural or legal persons.

67. Judgment, para 62.

68. Here the Court recognized that the principle of State liability was inherent in the system of the Treaty. See Joined Cases C-6 & 9/90, *Francovich and others*, EU:C:1991:428.

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 reference for a preliminary ruling, unless those persons unquestionably 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.⁶⁹

The Court recalled the *Foto-Frost* principles: the preliminary ruling procedures are intended to ascertain the validity of a measure and constitute, like actions for annulment, a means to review the legality of EU acts. The Court went on: “That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP.”⁷⁰ Subsequently, the Court signalled that Article 275(2) TFEU did not prevent the proposed interpretation:

“Neither the EU Treaty nor the FEU Treaty 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 reference for a preliminary ruling on validity.”⁷¹

At this juncture, the Court had a closer look at the text of the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU. They are drafted in such a way as to allow the EU judiciary a comfortable margin of interpretation. It argued that: “[They] 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.”⁷²

Next, the Court emphasized the essential role played by the preliminary ruling procedure in ensuring effective judicial protection, given that the implementation of a decision providing for restrictive measures against

69. Judgment, para 35.

70. Judgment, para 69.

71. Judgment, para 70.

72. Ibid.

natural or legal persons falls on the Member States. The fact that the latter have an obligation to comply with the Union position, enshrined in Council decisions, makes access to judicial review of those acts indispensable for natural or legal persons targeted by restrictive measures.

The Grand Chamber then turned to the EU's founding values, with particular focus on the rule of law. These are recalled in the common provisions of the EU Treaty and are referred to, albeit more obliquely, as guiding principles of the Union (when it is involved in actions on the international stage) in Article 23 TEU defining the common principles of the EU external action. The principle of effective judicial review, as embodied in Article 47 of the EU Charter of Fundamental Rights, was invoked to support the interpretation that the exclusion of the ECJ's jurisdiction in the CFSP should be interpreted restrictively.⁷³ It was argued that excluding the possibility that courts and tribunals of Member States may use Article 267 TFEU to question the validity of Council Decisions as envisaged in Article 275(2) TFEU would conflict with the tasks assigned to the Court by Article 19(1) TEU and with the principle of effective judicial protection. Given that the ECJ has jurisdiction *ratione materiae* over CFSP Decisions providing for restrictive measures, it would be inconsistent with the "system of effective judicial protection"⁷⁴ established by the Treaties to interpret the latter provision as excluding the possibility that the courts and tribunals of Member States may refer questions to the Court on the validity of Council decisions prescribing the adoption of such measures.

The Court, drawing once again on the *ratio decidendi* of *Foto-Frost*, explained that the necessary coherence of the system of judicial protection requires that when the validity of acts of the EU institutions is raised before a national court or tribunal, the power to declare such acts invalid should be reserved to the Court under Article 267 TFEU.⁷⁵ The same conclusion was imperative with respect to decisions in the field of CFSP where the Treaties confer jurisdiction on the Court to review their legality. Finally, the idea that national courts can rule on the validity of CFSP Decisions was rejected on the ground that the ECJ is better placed than national courts to perform such a task. Indeed, it is open to the ECJ, within the preliminary ruling procedure, on the one hand, to obtain the observations of Member States and the institutions of the Union whose acts are challenged; and, on the other, to request that the mentioned entities, bodies or agencies of the Union which are not parties to

73. Judgment, para 75. The Court is very much aware of the limits posed by the principle of conferral, though. Para 74 starts: "... admittedly, Art. 47 of the Charter cannot confer jurisdiction on the Court . . ."

74. Judgment, para 76.

75. Judgment, para 78.

the proceedings provide all the information that it considers necessary for the purposes of the case before it.⁷⁶

An additional reason to centralize control of the assessment of the validity of CFSP Decisions was that “a different interpretation would be liable to jeopardize the very unity of the European Union legal order and to undermine the fundamental requirement of legal certainty.”⁷⁷

4.3. *Substance of the second question: The relation between the CFSP Decision and the Regulation on the basis of Article 215 TFEU and the discussion on “legislative measures” in the area of CFSP*

The second group of questions listed a number of grounds for the invalidity of the selected provisions of the contested measures.⁷⁸ The most interesting one concerns the breach of Article 40 TEU. Rosneft considered that the Council infringed the non-affectation clause for two reasons: first, by adopting Decision 2014/512, the EU position on the restrictive measures at issue in the main proceedings was defined with excessive detail, thereby encroaching on the powers of the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, as provided for by Article 215(1) TFEU. Second, the contested Decision may be qualified as a legislative measure while the adoption of legislative acts is excluded by the Treaty in this field.

The Court rejected both arguments, taking the view that, first of all, targeted restrictive measures are clearly technical in nature (they concern access to capital markets, defence, dual-use goods and sensitive technologies, particularly in the energy sector). The Council enjoys a broad discretion in determining the persons and entities to be sanctioned. Article 215 TFEU, the legal basis for the contested Regulation, serves as a bridge between the objectives of the EU Treaty in CFSP matters and the actions of the Union involving economic measures falling within the scope of the TFEU. Such an act also ensures their uniform application across all Member States. The ECJ acknowledged that the two acts have different functions; however, the fact that the Decision describes in detail the persons and entities subject to the restrictive measures could not, as a general rule, be regarded as encroaching on the procedure laid down in Article 215 TFEU for the implementation of that Decision. In particular, when the measures relate to a field where there is a degree of technicality,⁷⁹ it may prove appropriate for the Council to use detailed wording when establishing restrictive measures. In such

76. Judgment, para 79.

77. Judgment, para 80.

78. Judgment, paras. 28–30.

79. Judgment, para 90.

circumstances, this institution could not be criticized for having predetermined, by the adoption of Decision 2014/512, part of the content of Regulation 833/2014.

The ECJ rejected the argument that Article 40 TEU was breached because the impugned Decision constituted a “legislative act”, while the adoption of legislative acts is prohibited by Article 24(1) TEU. The Court based this finding on the fact that according to Article 289(3) TFEU, legal acts adopted by legislative procedure constitute legislative acts. It added that the exclusion of the right to adopt legislative acts in the area of the CFSP “reflects the intention that that policy should be subject to specific rules and procedures as it is clear from Article 24 TEU”.⁸⁰ The other arguments raised against the validity of contested acts were also considered to be unfounded.⁸¹

5. Comment

5.1. *An audacious judgment making CFSP, almost, but not quite, perfect*

These comments focus on the ECJ’s answers to the admissibility and substance of the first and second group of questions.⁸²

First of all, it may be observed that there are many similarities between the Advocate General’s Opinion and the Grand Chamber ruling. Both of them give a positive answer to the first question, concerning the competence to rule on the validity of a CFSP Decision, on condition that the request for preliminary ruling concerns respect of Article 40 TEU or one of the mentioned acts providing for restrictive measures against natural and legal persons. Thus, the national court may raise doubts on whether the contested CFSP Decision went beyond the sphere of foreign affairs and thus breached Article 40 TEU. It is also possible to ask for a preliminary ruling on the validity of the inclusion of Rosneft in the list of operators of Annex III of the contested CFSP Decision, given that such an Annex is part of that act.

The ECJ followed Advocate General Wathelet’s position in declaring itself not competent to review the legality of certain of the so-called “oil sector provisions” (Arts. 4 and 4a) of the impugned Decision. The reasons are

80. Judgment, para 91.

81. These are the breach of the EU-Russia PCA, and of a number of obligations, including respecting fundamental rights.

82. The remainder of the judgment (paras. 108–196) will not form the object of any comments.

similar.⁸³ Finally, on the substance, Advocate General Wathelet and the ECJ concur in holding that the contested acts were not affected by invalidity.⁸⁴

The most important difference between the Opinion and the judgment concerns the competence to interpret a CFSP Decision, which was admitted by the Advocate General, whereas the ECJ did not approach this issue.⁸⁵ The interpretation techniques are also different: Advocate General Wathelet based himself on the wording of the Treaty provisions⁸⁶ whereas the core of the Court's ruling was based on the principle of effective judicial protection.

The ECJ judgment sheds light on the boundaries of its limited jurisdiction in CFSP matters:⁸⁷ the Court interpreted its competence to examine the legality of restrictive measures widely and made clear that its power of review in this area is subject to the same principles as those applicable to non-CFSP areas. In earlier cases, particularly *Segi*,⁸⁸ the Court also provided a wide interpretation of the right to make a reference to the ECJ for a preliminary ruling with respect to common positions.⁸⁹ However, in *Rosneft* the Grand Chamber was even more audacious than in *Segi* concerning counter-terrorist sanctions: whereas former Article 35(1) TEU provided for the competence of the Court to rule on the interpretation and validity of selected third pillar acts in the context of the preliminary rulings, Article 275 TFEU did not explicitly envisage the possibility of using that remedy.⁹⁰

Given that the ECJ has interpreted the scope of the CFSP extensively (also to the detriment of the provisions of the area of freedom, security and justice),⁹¹ the wide interpretation of the means available to control the legality

83. Judgment, paras. 95–99 and Opinion paras. 81–85.

84. However, there is a difference between the position of A.G. Wathelet and that of the Court. In comparing the wording of Art. 4(4) of Decision 2014/512 and Art. 3(5) of Regulation 833/2014, A.G. Wathelet found that the act based upon Art. 215 (2) TFEU is invalid whereas the Court confirms its validity.

85. However, this difference may be a minor one considering that it would be impossible to rule on the validity of the contested act without interpreting it.

86. Sometimes, it is not easy to recognize the interpretation technique used by A.G. Wathelet to achieve his conclusions. For example, it is not clear in para 64 of his Opinion why the exception to the exception to the immunity from jurisdiction for the CFSP provisions should be construed broadly.

87. Opinion 2/13, *ECHR*, EU:C:2014:2454, para 251.

88. This case concerned sanctions with a counter-terrorism purpose falling at the time of this ruling within the third pillar. C-355/04 P, *Segi and others*, EU:C:2007:116.

89. *Ibid.*, para 54.

90. This point was made by the French Government in Opinion 2/13, see para 134.

91. The ruling of the ECJ on the EU-Tanzania Agreement (Case C-263/14 P, *Parliament v. Council*, EU:C:2016:435) is the last example of this judicial trend (see also Case C-658/11, *Parliament v. Council*, EU:C:2014:2025). Here, the ECJ considered that the agreement in question, enabling Member States to transfer pirates caught during the operation *Atalanta* to Tanzania, in view of their prosecution, falls predominantly within the CFSP, despite its containing clauses concerning the area of freedom, security and justice that could have justified

of a subset of CFSP acts can be considered a welcome compensation. The incursion of the EU judiciary into the CFSP, as a result of post-Lisbon case law, is significant. In the judgment, the ECJ interpreted the provisions of the Treaty limiting its jurisdiction in CFSP narrowly,⁹² in the name of the principle of effective judicial protection. This adds to *Elitaliana*⁹³ and *H*,⁹⁴ which respectively concerned the legality of acts of an administrative nature necessary to carry out the Eulex mission⁹⁵ and that of a decision⁹⁶ concerning the management of staff seconded to an EU mission. These acts were thus merely set in the “context of the CFSP.” In both those appeals, the ECJ considered itself competent.⁹⁷ The *EU-Tanzania Agreement* case⁹⁸ is also noteworthy in this context; here, the Court interpreted the exception to its lack of jurisdiction with respect to the provisions of the EU Treaty related to the CFSP as including its competence to monitor whether an international agreement adopted to implement a CFSP act “does not impinge upon the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union’s competences under the FEU Treaty.”⁹⁹ The ECJ is therefore empowered to verify whether Article

reliance on Arts. 82 and 87 TFEU in addition or instead of Art. 37 of TEU. The ECJ took the view that such an agreement pursues the objectives of the operation Atalanta, set up to preserve international peace and security, in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished (para 54). An earlier notorious ruling is that in Case C-130/10, *Parliament v. Council*, EU:C:2012:472. This time internal measures, in particular, restrictive measures of UN origin, enacted for counter-terrorism purposes, are deemed to fall within the CFSP. The Court excludes they can be based on Art. 75 TFEU, concerned with the prevention of fighting of terrorism in the context of the provisions of the AFSJ.

92. Case C-439/13 P, *Elitaliana*, para 49 and Case C-455/14 P, *H. v. Council of the European Union*, paras. 55–59.

93. *Ibid.*, Case C-439/13 P, *Elitaliana*.

94. Case C-455/14 P, *H. v. Council*, paras. 42–44. See the comments on this ruling by Van Elsuwege, “Upholding the rule of law in the Common Foreign and Security Policy: *H v. Council*,” 54 CML Rev. (2017), and Verellen, “*H v. Council*: Strengthening the rule of law in the sphere of the CFSP, one step at a time,” (2016) EP, 1–13.

95. In particular, a decision to award a contract for a service necessary to the Eulex mission as provided for by the rules of the Financial Regulation applicable to the general budget of the EU, including expenditures in the area of the CFSP. See Case C-439/13 P, *Elitaliana*, para 63.

96. In particular, a decision by national authority to re-locate a staff member seconded to the EU Police Mission in Bosnia and Herzegovina.

97. In *Elitaliana* the applicant’s annulment action was rejected by the General Court (Case T-213/12, *Elitaliana v. Eulex Kosovo*, EU:T:2013:292) and the appeal against the General Court’s order was upheld by the ECJ in Case C-439/13 P, *Elitaliana*.

98. Case C-263/14 P, *Parliament v. Council*.

99. *Ibid.*, para 42.

40 TEU was breached by the EU Agreement at stake. This was an important decision of principle, although the Court could not review the concerned act on the substance.

With its broad construction in *Rosneft* of judicial oversight of selected CFSP acts, the ECJ does not empty the general rule on its lack of jurisdiction with respect to CFSP measures (laid down in Article 24(1)(2) TEU) of all content. Rather it applies principles stemming from its case law (and relating to non-CFSP areas) to specific CFSP acts which fall within its competence *ratione materiae*, as a result of the Treaty itself. In light of the above-mentioned considerations, it is possible to argue that the Court advanced the process of transition of this field towards the fuller integration into the mainstream of European Union law¹⁰⁰ while respecting the boundaries of the competence conferred on this institution by the Treaty drafters.

Yet, the CFSP is not fully part of the EU legal order as far as judicial review is concerned: access to justice in this field is still limited; for instance, natural and legal persons cannot challenge the so-called “oil sector provisions” of the CFSP Decision impugned by the applicant in the present case; nor are the CFSP acts, distinct from those imposing sanctions, generally subject to the Court’s jurisdiction. For example, if an EU mission set up through a CFSP Decision were to breach human rights, the ECJ could not examine the legality of the EU’s action in the context of the Common Security and Defence Policy,¹⁰¹ which is part of the CFSP. This area is therefore still *lex imperfecta*.¹⁰² It may be concluded that the scope of judicial review in the area remains limited and the exercise of EU powers in many areas of this sector continues to be screened from judicial oversight. If the Commission were to ask an Opinion under Article 218(11) TFEU on the EU’s accession to the ECHR, as it did in 2013, the ECJ’s answer would still be that an accession treaty cannot be concluded, insofar as the European Court of Human Rights would be able to review CFSP acts which are not subject to the jurisdiction of the ECJ.¹⁰³

100. Gosalbo Bono, “Some reflections on the CFSP legal order,” 43 CML Rev. (2006), 337–394, at 394.

101. For a more detailed examination of this issue, see Øby Johansen, “Accountability mechanisms for human rights violations by CSDP missions: Available and sufficient?,” (2017) ICLQ, 181–207. See also Section 6 *infra*.

102. See A.G. Wahl’s Opinion in Case C-455/14 P, *H.*, paras. 38–40.

103. On the characteristics of judicial review in CFSP matters see Opinion 2/13, paras. 249–259.

5.2. *Domestic courts and their review of CFSP Decisions implementing a UN Security Council Resolution in the light of Rosneft (ECJ) and Al-Dulimi (ECtHR)*

Notably, the Council Decision impugned in *Rosneft* instituted autonomous EU sanctions. However, there is no reason to believe that the outcome of the case would have been different had the EU restrictive measures implemented a United Nations Security Council (“UNSC”) resolution, obliging UN members to freeze the assets of natural or legal persons. The need to provide effective judicial protection, in a Union based on the rule of law, applies equally to sanctions adopted in the UN context, given the absence of an independent judicial review mechanism.¹⁰⁴ If national courts in the EU doubt the validity of the act providing for restrictive measures, they *may refer* a question to the ECJ which will exercise its jurisdiction, following *Rosneft*.¹⁰⁵ However, it is possible that domestic courts will give effect to the freezing order and refuse to question the legality of the sanction, thus escaping the ECJ’s review. In such a situation, the ECtHR could find that such a refusal breaches Article 6(1) ECHR, as was the case in *Al-Dulimi* in 2016.¹⁰⁶ In this judgment, the Grand Chamber of the ECtHR held that Switzerland violated the right of access to a court because its judicial authorities refused to review on the merits the national measure confiscating Mr Al Dulimi’s property, in compliance with a UNSC resolution of 2003. The view of the ECtHR was that the domestic court should have carried out a judicial review for the purpose of avoiding arbitrary designations by the UNSC.¹⁰⁷ The reasoning underlying the

104. See Joined Cases C-584, 593 & 595/10 P, *Commission v. Kadi*, EU:C:2013:518. Autonomous sanctions and sanctions of UN origin are subject to the same standards of judicial review as well as procedural standards, including the obligation to state reasons for the Council. For an interesting case on this issue, see Case T-681/14, *El-Qaddafi v. Council*, EU:T:2017:227. The GC confirmed that even if in an EU act the summary of reasons, justifying the inclusion in the blacklist of a person, is motivated in identical terms to that of the UNSC resolution which the concerned EU act must implement, the EU Council is not relieved of its obligation to ascertain whether those reasons comply with the principles of the case law on Art. 296 TFEU (see para 66).

105. The ECJ in *Rosneft* does not state in clear and unequivocal terms that domestic courts are obliged to refer to the ECJ in case of doubts. The use of the terms “may refer” in para 76 and the expression “should refer” (instead of “shall”) lead to the conclusion that domestic courts are not obliged to turn to the ECJ.

106. ECtHR, *Al-Dulimi and Montana management inc. v. Switzerland*, Appl. No. 5809/08, judgment of 21 June 2016. For insightful comments on *Al-Dulimi* and also on the inconsistencies in the ECtHR’s case law on access to justice, see Peters, <www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/>, (last visited 20 Aug. 2017).

107. In *Al-Dulimi*, Switzerland was found to breach Art. 6(1) ECHR since in 2008 the Swiss Federal court refused to examine the merit of the action brought by a number of former officials of the Iraqi Government against the confiscation of their properties, enacted by

interpretation of Article 6(1) ECHR in *Al Dulimi* and the justification leading the ECJ to assert its jurisdiction in *Rosneft* (in the light of Art. 47 of the EU Charter of fundamental rights), is similar. On the one hand, for the ECtHR access to justice must be made available to persons listed by a UNSC resolution in order to avoid arbitrariness, since “[o]ne of the fundamental components of European public order is the principle of the rule of law ...”;¹⁰⁸ the denial of any substantive review undermines “the very essence of the applicant’s right of access to a court”.¹⁰⁹ On the other hand, for the EU judiciary, “any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in [Art. 47 of the EU Charter]. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of (sic) the essence of the rule of law”.¹¹⁰ Although the *Al Dulimi* ruling concerns access to justice (Art. 6 ECHR) and not the right to an effective remedy (Art. 13 ECHR), which was at stake in *Rosneft*, there are similarities in the language used by the two

Switzerland to implement a UNSC Resolution of 2003. The reason leading the domestic court to take such a decision was that under Art. 103 of the UN Charter the obligations deriving from the latter Treaty prevail over other those stemming from other sources of international law, except for *jus cogens*. In addition, the UNSC resolution at stake did not leave any degree of flexibility to national authorities. The ECtHR excluded that there was a conflict of obligations between the UN Charter and the ECHR. There was no need to apply the equivalent protection test. The examination of the text of the UNSC resolution led to conclusion that: “... where a [UNSC] resolution ..., does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorizing the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided” (para 146). The ECtHR went on to state that: “Any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Art. 6 of the Convention.” See for a comment, Tzevelekos, “The *Al-Dulimi* case before the Grand Chamber of the European Court of Human Rights: Business as usual? Test of equivalent protection, (constitutional) hierarchy and systemic integration,” 38 *Questions of International Law* (2017), 5–34.

108. Judgment, para 145.

109. Judgment, para 151.

110. Judgment, para 73. The reference to the rule of law emerges even more clearly in A.G. Wathelet’s Opinion. He stresses that the refusal to recognize a competence to give preliminary rulings in relation to any CFSP acts “would be difficult to reconcile with Art. 23 TEU, which provides that ‘the Union’s action on the international scene . . . shall be guided by the principles . . . laid down in Chapter 1, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, . . . which unquestionably include the right of access to a court and effective legal protection” (para 66). It seems that Art. 47 of the Charter, which is at the centre of the ECJ’s ruling, offers a more solid ground than Art. 23 TEU (with its indirect link to the rule of law) to impose on the EU institutions respect of the principle of effective judicial protection. For a different view on the importance of Art. 23 TEU, “which forms the linchpin between the CFSP and the EU’s general principles and values,” see Van Elsuwege, *op. cit. supra* note 94.

courts.¹¹¹ It is submitted that the legal avenues offered to individuals wishing the challenge restrictive measures are therefore strengthened as a result of the two rulings, and the ECJ and the ECtHR play complementary roles in providing human rights scrutiny. Indeed, if an EU domestic court does not question the validity of a CFSP decision implementing an UNSC resolution, the victim of a possible breach of a right protected by the ECHR, may turn to the ECtHR. It should be noted that from the perspective of an individual affected by a CFSP decision imposing restrictive measures implementing a UNSC resolution in an EU member State, it is preferable that a national court starts a preliminary ruling procedure. The rule on the previous exhaustion of domestic remedies, applicable in context of the ECHR,¹¹² will inevitably delay a judgment of the ECtHR, whereas in the EU, following *Rosneft*, all national courts may raise a question on the validity of CFSP Decisions providing for restrictive measures and they are likely to receive a relatively prompt answer.¹¹³

5.3. *Is the ECJ's answer on the admissibility of the first question convincing?*

Could the ECJ have limited itself to ruling on the validity of the impugned Regulation, considering that its competence was uncontested, without tackling the problem of the legality of the CFSP Decision at all? This issue was raised by several interveners,¹¹⁴ and the ECJ, unlike the Advocate General, dwells on it at length. It is submitted, that in principle, the EU judiciary could have ruled on the validity of the act adopted under Article 215 TFEU (the Regulation), given that this measure largely reflects the content of the contested CFSP Decision. The Advocate General's Opinion lends indirect support for this position, making the point that if the impugned Regulation is declared invalid, the Council would be required to take the necessary measures to make the equivalent provisions of CFSP Decision compatible

111. It is striking that there is no reference to *Al Dulimi* in *Rosneft*. This absence may be interpreted as meaning that the ECJ has chosen to give to Art. 47 of the Charter an interpretation which is autonomous from that provided by the ECtHR with respect to Art. 6(1) or Art. 13 ECHR. For a discussion of the usefulness of Art. 47 of the EU Charter, see Lebrun, "De l'utilité de l'art. 47 de la Charte de droits fondamentaux de l'Union européenne", (2016) *Revue Trimestrielle de droits de l'homme*, 433–459.

112. Art. 35(1) ECHR.

113. The High Court of England and Wales referred its questions to the ECJ on 9 Feb. 2015, and the ECJ *Rosneft* judgment was given on 28 March 2017. The notion of effective judicial protection entails also the notion of reasonably speedy protection. For this point, see Spaventa, annotation of Case T-256/07, *People's Mojahedin Organization of Iran v. Council*, 46 CML Rev. (2009), 1239–1263, at 1258.

114. Estonian and Polish Governments and the Council.

with the Court's judgment; this follows from Article 266 TFEU.¹¹⁵ His point is convincing and it is regrettable that it is not reflected in the judgment. This shows that, on the one hand, the ECJ did not wish to side-step the thorny issue of the scope of the exception to the derogation from its general jurisdiction with respect to decisions providing for restrictive measures, and that it attached little importance to the fact that private parties could unquestionably have challenged the validity of the Regulation. The Court emphasized the reasons why it had to answer the question raised by the national court on its competence to examine the validity of a CFSP Decision. Three points were mentioned: first, the impossibility of challenging such an act would undermine the fundamental right of access to justice; second, a prerequisite for the validity of a regulation adopted under Article 215(2) TFEU is the prior adoption of a valid CFSP Decision (which is why it was relevant for the referring national judicial authority to ask the ECJ a question on the latter act rather than the former one). These two arguments are generally convincing. As a third argument, the Court stated that, even if the Regulation were to be declared invalid, this can

“as a matter of principle, have no effect on the obligation of Member States to ensure that their national policies conform to the restrictive measures established pursuant to Decision 2014/512. Accordingly, to the extent that the Court has jurisdiction to examine the validity of Decision 2014/512, such an examination is required in order to determine the scope of the obligations resulting from that decision, irrespective of whether Regulation 833/2014 is valid.”¹¹⁶

This argument is not easy to grasp. The ECJ undermines the idea that if the Regulation is illegal, such illegality also taints the CFSP Decision. In addition, the fact that CFSP decisions are binding for Member States does not explain why it is necessary for the Court to determine the scope of the obligations laid down by them, in the absence of a competence to interpret them.

An additional argument supporting the Court's first two justifications is that it is not always possible to challenge a regulation. For example, the provisions of a CFSP Decision setting up admission restrictions are implemented at national level. There are no acts whose legality could be questioned by the addressees of such measures. These persons would have to go to national courts and attack the denial of entry in the territory of the Member State concerned. Since it would not have been possible to contest the validity of the CFSP Decision providing for the restrictive measure, the

115. Opinion, para 93.

116. Judgment, para 56.

national court concerned would have had to take the final decision without being able to consult the ECJ. In consideration of the impossibility to challenge all aspects of regulations, it may be concluded that the decision to answer the first preliminary ruling question is welcome.

5.4. *The scope of the ECJ's limited jurisdiction: The strengthening of the position of individuals as subjects of restrictive measures*

These comments now address the ECJ's reasoning in order to define the scope of its jurisdiction under Article 275(2) TFEU. As regards the jurisdiction to monitor compliance with Article 40 TEU, the Treaty provisions are sufficiently open to support the interpretation that the Court's task can be performed through all legal remedies available in the Treaty. It is therefore straightforward to recognize a competence under Article 267 TFEU on the basis of a literal interpretation of the Treaty.¹¹⁷ The exceptional circumstances in which the ECJ can rule in the area of the CFSP are set out in Articles 24(1) TEU and 275(2) TFEU. Where a *ratione materiae* competence exists and there are no limitations in the Treaty as to the kind of procedures which may be used in order for the Court to carry out its tasks, this must mean that this institution is free to use all the remedies at its disposal. There was little doubt that the ECJ could make full use of its powers to police the boundaries between CFSP and non-CFSP acts.

There were a number of hurdles to overcome, however, in order to interpret the relevant Treaty provisions in support of its competence to make preliminary rulings on the validity of restrictive measures. Indeed, Article 275(2) specifies that the Court has jurisdiction: "... to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural and legal persons ..." (our emphasis added); this means that the Court is competent to assess the legality of those Decisions in a specific type of procedure, namely, annulment actions. Had the Treaty drafters meant to include the preliminary ruling procedure, arguably they would have drafted Article 275(2) TFEU as follows: "to rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural and legal persons." However, this argument is not sufficient to exclude the preliminary ruling procedure from the notion of

117. The General Court has also recognized this competence: "It is only on an exceptional basis that, under the second paragraph of Art. 275 TFEU, the Courts of the European Union are to have jurisdiction in matters relating to the CFSP. *That jurisdiction includes review of whether Art. 40 TEU has been complied with . . .*" (emphasis added). Case T-328/14, *Jannathian v. Council*, EU:T:2016:86, para 30.

“review of legality”. In fact, one could also argue that, had the Treaty drafters wanted to exclude this particular competence, they would have made the exclusion explicit. This is all the more convincing since the expression “review of legality”, in Article 275(2), encompasses both annulment actions and the preliminary ruling procedure, as has also been stressed by legal scholars.¹¹⁸

The Court is right to hold that Articles 24(1) TEU and 275(1) TFEU do not determine the type of procedure under which the EU judiciary may review the legality of certain decisions, but rather the type of decisions whose legality may be controlled by the Court. Opening up the possibility of asking for a preliminary ruling in the name of the right to an effective judicial protection is convincing. The same holds for arguments supporting the position that the ECJ is better placed than domestic courts to assess the validity of those measures.¹¹⁹ By contrast with classic CFSP Decisions, establishing the position of the EU on a certain thematic or geographic issue and thus affecting the position of third countries, individual sanctions touch directly upon the rights of non-State actors. In a system of remedies such as that on which the EU is founded, these measures should be subject to judicial review, either in direct or indirect actions. Therefore, there is no logical reason to allow applicants to challenge sanctions in annulment actions but not in preliminary ruling procedures, once the political choice is made to provide non-State actors with the opportunity to contest the legality of CFSP Decisions. By enabling private applicants to contest restrictive measures, the Lisbon Treaty contributed to turning non-State actors from objects to subjects of EU law.¹²⁰ The ECJ has now simply reinforced their position as litigants in relation to restrictive measures. It has been suggested that “it should now be up to the

118. Hillion, “A powerless Court? The European Court of Justice and the Common Foreign and Security Policy”, available at <ssrn.com/abstract=2388165>, (last visited 15 June 2017); Tridimas, “The European Court of Justice and the draft constitution: A supreme Court for the Union?”, in Tridimas and Nebbia (Eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 1 (Hart Publishing, 2004), p. 128.

119. It should be noted that since the Court will be able to have access to “all information that the Court considers necessary for the purposes of the case before it” this may imply that the Council will be able to provide the ECJ with confidential information without disclosing it to the other party, as a result of the new rules of procedure of the General Court and the ECJ (see Art. 105 of the Rule of procedure of the General Court and Art. 190a of the Rules of procedure of the ECJ). This entails that legal and natural persons targeted by restrictive measures and wishing to challenge them may not necessarily benefit from the fact that the ECJ will have access to “all the information available.”

120. Although they do not have all legal remedies at their disposal as any other subject of EU law wishing to challenge a non-CFSP measure. For further thoughts on this, see Poli, “The turning of non-State entities from objects to subjects of EU restrictive measures,” in Fahey and Bardutzky (Eds.) *Framing the Subjects and Objects of EU Law* (Edward Elgar, 2017), pp. 158–181.

Member States to reflect the clarification of the Court of the Justice in the Treaty.”¹²¹ However, since the Court has simply clarified the wording of the Treaties, it is probably not necessary to change primary law.

5.5. *The relationship between the annulment action and the plea of illegality*

Given the Court’s competence to review CFSP Decisions of the kind at stake in *Rosneft*, in the context both of an annulment action and a preliminary ruling procedure, it is necessary to examine how *TWD*¹²² (which limits the latter remedy, depending on the standing of the applicants under Art. 263 TFEU) operates in the context of challenges to restrictive measures. The *TWD* ruling enables a private applicant to plea the illegality of an act of a general nature, even if he has not brought an annulment action against the measure in question within the available time limit, provided that it is uncertain that he would have had standing to challenge such a measure in an annulment action.¹²³ Is the plea of illegality available to natural or legal persons only if they have previously submitted an action for annulment before the General Court, or also where they have not done so, provided it is not undisputed that they would have standing to directly challenge the CFSP Decision? The ECJ did not tackle this issue directly in *Rosneft*. In fact, the Russian company had first brought an annulment action before the General Court¹²⁴ and had later sought judicial review at national level primarily against the national legislation imposing criminal penalties for breach of the restrictive measures. The ECJ’s judgment supports the view that an applicant like *Rosneft* was required to bring a prior annulment action before the General Court,¹²⁵ since it is clear that it had standing to challenge the CFSP Decision. This interpretation finds an indirect confirmation in *A and others*, given 14 days before *Rosneft*, which concerned the inclusion of the Tamil Tigers on a list of entities subject to

121. An advocate of this solution is Verellen, op. cit. *supra* note 94, 12.

122. Case C-188/92, *TWD Textilwerke Deggendorf*, EU:C:1994:90.

123. *Ibid.*, para 17. This principle continues to be relevant after the entry into force of the Treaty of Lisbon. See A.G. Sharpston’s Opinion in Case C-158/14, *A and others*, EU:C:2016:734, para 68.

124. See Section 2 *supra*.

125. Judgment, para 67: “... 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 . . . consults the Court on that matter by means of a reference for a preliminary ruling, *unless those persons unquestionably had the right to bring an action against those provisions on the basis of Art. 263 TFEU and failed to exercise that right within the period prescribed*” (emphasis added).

counter-terrorism sanctions, where the Court stated that: “a request for a preliminary ruling 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 ruling to the ECJ 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*” (emphases added).¹²⁶

Combining *Rosneft* and *A and others*, it is possible to argue that a preliminary ruling on the validity of a CFSP Decision is admissible only if the addressee of a restrictive measure, who has standing to directly challenge that measure, has previously sought to impugn such an act within the prescribed time limit. The implication of the two cases is that natural and legal persons identified by a CFSP decision will have an incentive both to apply for the annulment of the contested measure before the General Court and to make use of the preliminary ruling to question the validity of a CFSP measure. The General Court will, most likely, suspend its ruling, pending the ECJ’s reply, as it did in *Rosneft*.¹²⁷ By contrast, whenever natural and legal persons are not sure whether they would have standing to question the legality of a CFSP measure in an annulment action, they will most likely seek justice at a national level hoping that the national court has doubts on the validity of the CFSP act and decides to refer the case in the context of a plea of illegality, which the Court will consider admissible. As a result of this state of the law, the EU judiciary will see an increase in its case load on restrictive measures due to the rise in number of actions under Articles 267 and 277 TFEU.

5.6. *The narrow interpretation of “restrictive measures against natural and legal persons”*

In *Rosneft*, the Court gives a narrow reading of the provisions of a CFSP Decision providing for restrictive measures whose legality may be questioned by natural and legal persons: only the provisions of a CFSP Decision individually concerning the applicant can be challenged. This position does not sit comfortably alongside the preliminary ruling in *A and others*, enabling

126. Case C-158/14, *A and others*, para 70.

127. By order of 26 March 2015, the President of the Ninth Chamber of the General Court stayed the proceedings in Case T-715/14, pursuant to Art. 54(3) of the Statute of the ECJ and Art. 77(a) of the Rules of Procedure of the General Court of 2 May 1991, pending delivery of the judgment in the preliminary ruling.

private parties to challenge the validity of the provisions of a CFSP Decision providing for restrictive measures against a designated terrorist group, despite the fact that they were not listed by that act.

The Court states in *Rosneft* that: “By establishing the criteria laid down in Article 1(2)(b) to (d) of Decision 2014/512, allowing the identification of Rosneft, and by naming that company in Annex III to that decision, the Council adopted restrictive measures against the legal person concerned... If the legality of these measures is challenged, it must be possible for those measures to be subject . . . to judicial review.”¹²⁸ Here, the Court recognizes that it is the individual nature of the Decision providing for restrictive measures against natural and legal persons that enables the latter to contest the concerned act even in the context of a preliminary ruling. This issue was raised for the first time, before the entry into force of the Lisbon Treaty, with respect to regulations in *Kadi I*¹²⁹ and with respect to Council Decisions in *Gbagbo*.¹³⁰ Later, in the *Sina Bank*¹³¹ and *Hemmati*¹³² rulings the General Court applied the same interpretation.

Therefore, if the challenged provisions of the measures are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies, as in the case of the prohibitions contained in Articles 4 and 4a of Decision 2014/512, Rosneft, as well as the other companies, coming within the scope of the mentioned act, lack *locus standi* to challenge them. The justification is that these provisions do not constitute “restrictive measures against natural and legal persons” within the meaning of Article 275(2) TFEU, but rather measures of general application.¹³³

Thus, only if the applicant falls within the scope *ratione personae* of the restrictive measures *and* is listed in annexes of the CFSP Decision, does a sanction against a natural and legal person fall within the definition of Article 275(2) and may be subject to judicial review. In contrast, private parties cannot bring an action against the provisions of the Decision that identify the target by reference to objective criteria and are applicable generally. The implication is that the ECJ cannot review the provisions of the CFSP Decision that determine in an abstract and general manner a category of persons and impose on them a trade ban or restriction, not even if the listed persons are those directly affected by these measures. This exclusion is based on a narrow reading of the expression “restrictive measures against natural and legal

128. Judgment, para 104.

129. Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461, paras. 241–244.

130. Case C-488/11 P, *Gbagbo*, EU:C:2013:258, para 57.

131. Case T-67/12, *Sina Bank*.

132. Case T-68/12, *Hemmati*.

133. Judgment, para 98.

persons” enshrined in Article 275 TFEU and is not supported by any apparent justifications. Hence, the power to review CFSP Decisions providing for restrictive measures *vis-a-vis* non-State actors has a limit that the Court has set for itself; it is not imposed by the wording of the relevant Treaty provision. As Rosas reminds us, “judicial review contributes to keeping sanction decisions especially those against private persons and companies within reasonable limits, in other words that they are not taken in a completely arbitrary haphazard and disproportionate manner.”¹³⁴ However, this is only possible if private parties have access to justice.¹³⁵ In the light of this, it may be thought that natural and legal persons should be able to seek judicial review before the ECJ whenever they are listed and are affected by the provisions of the Decision, in parallel with the second paragraph of Article 263(4) TFEU. The Court could of its own motion interpret Article 275(2) TFEU in such a manner.

Furthermore, the Grand Chamber’s position on the inadmissibility of Rosneft’s challenge of Articles 4 and 4a of the Decision is not easily reconcilable with the ruling in *A and others*,¹³⁶ concerning a sanction enacted in order to combat terrorist organizations. Under the latter judgment, it is possible for persons not listed by a restrictive measure to challenge the act providing for such measures via the preliminary ruling procedure, despite the fact that they were not included in the list of targeted persons. If third parties can contest the legality of restrictive measures, why then, can Rosneft, which is listed in the contested Decision, not impugn an export prohibition that directly affects its activity? A possible explanation is that there is an ontological difference in the structure of counter-terrorism sanctions (at stake in *A and others*) and in that of sanctions against third country regimes,¹³⁷ despite the fact that neither Article 215 nor Article 275 TFEU makes a distinction between these two categories of measures. Individuals targeted by the former can simply challenge the listing Decision; non-State actors blacklisted by the latter have additional hurdles to climb. Indeed, the Council may decide to impose prohibitions designed to isolate the concerned third country and may define in a general and abstract manner the categories of

134. Rosas, “EU restrictive measures against third States: Value imperialism, future gesture politics of judicial extravaganza,” (2016) *Dir. Un. Eur.*, 650.

135. The need to provide “sufficient scrutiny so as to avoid arbitrariness” by national courts when they assess the legality of freezing orders enacted by UN members to implement a Security Council Resolution is also recognized by ECtHR in *Al-Dulimi*, Appl. No. 5809/08, para 146.

136. Case C-158/14, *A and others*.

137. For an in-depth study comparing sanctions on third country regimes and sanctions countering terrorism, see Eckes, “EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions,” 51 *CML Rev.* (2014), 869–905.

persons hit by the sanction. The ECJ cannot interfere with the Council's discretion. That is why individuals affected by sanctions concerning a third country are in a worse position than suspected terrorists when they seek to challenge their listing; and even if they are included in the blacklist, they are prevented from contesting the prohibitions enshrined in the CFSP Decision. This situation is not satisfactory for individuals from the perspective of the right of access to justice.

5.7. *No limits to the challenge of regulations based on Article 215 TFEU and the uncertainty as to the legal standing conditions operating on natural and legal persons' challenges of these acts*

Rosneft clarifies that the ECJ has the full power to review regulations adopted under Article 215 TFEU in annulment actions, as well as under pleas of illegality, despite the adoption of the act being contingent on the adoption of a CFSP decision. In contrast to CFSP decisions providing for restrictive measures, the challenge to regulations is in no way restricted by Article 275(2) TFEU, as they are acts adopted on the basis of the TFEU. There is some uncertainty, though, as to the conditions to which the challenge of a regulation under Article 215 TFEU is subject. In *Sina Bank*¹³⁸ these conditions seem to be that the provisions of the regulation have to be of individual and direct concern, as in the case of any measure of general nature. In *Bank Mellat*,¹³⁹ the General Court agreed to qualify a regulation adopted under Article 215(2) TFEU as a "regulatory act", thus making it possible for private parties to challenge it without proving any individual concern. They have to show that such an act directly affects them and does not entail implementing measures. It is not clear what standing conditions private parties should therefore satisfy in direct actions. In contrast to annulment actions, the plea of illegality does not impose an obligation on private parties to fulfil any standing requirements.¹⁴⁰

5.8. *Unsettled issues*

Three legal issues were not addressed in *Rosneft*.¹⁴¹ The first concerns the application of *Foto-Frost* to CFSP acts other than those providing for

138. Case T-67/12, *Sina Bank*.

139. In *Bank Mellat* the General Court considered as partially admissible an annulment action against a provision of a regulation, prohibiting certain transfers to banks. See Case T-160/13, *Bank Mellat v. Council*, EU:T:2016:331, para 66.

140. However, the *TWD* principle, limiting the availability of the plea of illegality to applicants whose standing in annulment actions is not undisputed, should operate also in this context.

141. The Court did not need to do so in the context of the ruling at hand.

restrictive measures. The second is whether the ECJ is competent to hear a preliminary ruling on the interpretation of a CFSP Decision, in addition to its competence under Article 267(1)(b) TFEU. The third concerns actions for failure to act, and actions for damages available to natural and legal persons, challenging the Decisions referred to in the “clawback” provision in the last sentence of Article 24(1)(2) TEU and Article 275(2) TFEU.

5.8.1. *Can domestic courts refer to the ECJ in case of doubts on the validity of all CFSP decisions?*

It is not clear whether, after *Rosneft*, the possibility for a national court to ask for a preliminary ruling on validity applies only in relation to the CFSP Decisions referred to in Article 275(2) TFEU or to *any* CFSP act. The ruling commented here does not address this issue. Of course, the arguments made by the Court to support its competence under Article 267(1)(b) TFEU in relation to restrictive measures could also apply to any CFSP Decision which affects the position of individuals. For example, the ECJ, is in principle, better placed than domestic courts to rule on the validity of CFSP Decisions; the objective of ensuring a uniform application of EU law would be better served.¹⁴² However, it is submitted that the Treaties, as they stand, provide an insurmountable obstacle to such an interpretation. Article 275(2) TFEU, in specifying that the CFSP Decisions referred to in Article 24(1) TEU are subject to the control of legality of the ECJ, refers to “decisions providing for restrictive measures”, which are a subset of all CFSP Decisions. Finally, although the principle of effective judicial protection enables a strict interpretation of the exclusion of the Court’s jurisdiction in the CFSP, Article 47 of the Charter (enshrining that principle), cannot confer jurisdiction on the EU judiciary when the Treaty excludes it – as stressed by the ECJ in *Rosneft*.¹⁴³

5.8.2. *Uncertainty as to the existence of a competence to rule in a preliminary ruling on the interpretation of a CFSP Decision*

The ECJ has recognized its competence to rule on the validity of a CFSP decision providing for a restrictive measure, while it has not touched upon its competence to interpret this act. The latter category of competence is no less important than the former, in relation to ensuring the uniform application of EU law and the coherence of the system of remedies. The national court, in all

142. Judgment, paras. 79–80.

143. Judgment, para 74. See also, along these lines, C-583/11 P, *Inuit Tapiriit Kanatami v. Parliament*, EU:C:2013:625, paras. 97–98.

likelihood, will need the ECJ's guidelines on the interpretation of CFSP decisions, especially when the latter are not accompanied by regulations giving effect to them. However, all this does not guarantee that the Court would rule in favour of preliminary rulings on such interpretation. On the one hand, in addition to the principle that its jurisdiction is excluded under Article 24(1) TEU, it should be noted that the types of actions envisaged by Article 275(2) TFEU refer to "review of legality" thus making it difficult to stretch the meaning of this expression to include a preliminary reference on interpretation.

Yet, Advocate General Wathelet's argument that the possibility of questioning the validity of a CFSP decision *a fortiori* implies the competence of the ECJ to interpret this act, is convincing; the link between interpreting a measure and assessing its validity was recognized in *Busseni*,¹⁴⁴ with regard to the ECSC Treaty, which is also quoted in *Rosneft*. In *Busseni*, it was explicitly stated that in the context of that Treaty, the requirement of ensuring uniformity in the application of the law is as cogent and obvious as it is in the EEC and Euratom Treaties.¹⁴⁵ Furthermore, it would be contrary to the objectives and the coherence of the Treaties to "leave responsibility for determining the meaning and scope of rules derived from the ESC Treaty exclusively in the hands of the national courts, thereby depriving the ECJ of any power to ensure they were given a uniform interpretation."¹⁴⁶ The reasoning requiring the Court to provide the definitive interpretation of EU secondary law instead of leaving this to the ECtHR in the prior involvement procedure¹⁴⁷ could apply to the relationship between the ECJ and national courts. Drawing from Opinion 1/09, "it should . . . be recalled that Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States".¹⁴⁸

A further justification for extending the competence of the EU judiciary to include interpretation of a CFSP decision is that this may be necessary in order to elucidate the meaning of other provisions, such as those of a regulation if adopted.¹⁴⁹

144. Case C-221/88, *Busseni*, EU:C:1990:84.

145. *Ibid.*, para 15.

146. Arnulf, *The European Union and its ECJ* (OUP, 2006), p. 52.

147. Opinion 2/13, paras. 243–247.

148. Opinion 1/09, *Patent Court*, EU:C:2011:123, para 83.

149. The ECJ's competence to issue a preliminary ruling on the interpretation of the provisions of a regulation, is uncontested, as demonstrated in Case C-314/13, *Užsienio reikalų ministerija*, EU:C:2014:1645, concerning the freezing of funds of a Belarusian citizen.

5.8.3. *Are actions for damages available to natural and legal persons affected by a CFSD decision providing for restrictive measures?*

One of the arguments underlying the Court's interpretation of Article 275(2) TFEU in *Rosneft* was that annulment actions and preliminary ruling procedures can have the aim to review the legality of a CFSP decision.¹⁵⁰ Article 275(2) TFEU does not provide for a competence to hear actions regulated by Articles 265 TFEU (failure to act) or 340 TFEU (liability of the Union), which has been conceived as an autonomous form of action, independent of annulment proceedings.¹⁵¹ Therefore, in principle, a Treaty revision would be needed to change the state of the law. In terms of practice, the General Court's ruling in *Jannathian* may be mentioned, which denies the existence of a competence to hear or determine any kind of claim for compensation in connection with a CFSP decision.¹⁵² In contrast to this position, Advocate General Wathelet, in a footnote to his Opinion, denied that the two actions are available against CFSP decisions against natural and legal persons, without providing any further guidance.¹⁵³

Focusing only on the remedy under Article 340 TFEU, so far the CJEU has examined a number of actions in damages brought by applicants against regulations giving effect to CFSP decisions, and has also upheld one on appeal.¹⁵⁴ Therefore, it might be thought there would be no need for the addressees of restrictive measures to know if they can sue the Union for an action in damages on the basis of a breach occurring as a result of an CFSP Decision. Indeed, they can bring an action under Article 340 TFEU against a regulation adopted under Article 215 TFEU. However, as shown in section 5.3 above, in *Rosneft* the possibility to challenge the Regulation did not prevent the ECJ from asserting its competence to rule on the validity of the CFSP Decision. The same position could be taken with respect to an action in damages connected to a CFSP Decision. Moreover, once again, the adoption

150. Judgment, para 70.

151. Case 175/84, *Khron v. Commission*, EU:C:1986:85.

152. "It must therefore be held that a claim seeking compensation for the damage allegedly suffered as a result of the adoption of an act relating to the CFSP falls outside the jurisdiction of the Court." Case T-328/14, *Jannathian v. Council*, para 31. The General Court's position was more cautious in the order in Case T-602/15, *Liam Jenkinson v. Council*, EU:T:2016:660; in para 30, it stated: "It cannot be ruled out that the contractual and the non-contractual liability of an EU institution may coexist in respect of one of the parties with which it has concluded a contract."

153. There was no need to deal with this specific issue. See footnote 36 of the Opinion "Actions for failure to act and actions for damages which relate to a CFSP act are covered by the 'carve-out' . . . but not by the 'claw-back'".

154. Case C-45/15 P, *Safa Nicu v. Council*, EU:C:2017:402.

of regulations under Article 215 TFEU is not mandatory; there may also be cases in which sanctions set by a CFSP act are not given effect through a non-CFSP measure, as in the case of restrictions on the admission of persons, which are directly implemented by Member States. Leaving aside the added value of the availability of an action in damages, could the ECJ interpret “review of legality” to include non-contractual liability? The Commission supported a positive answer in the Opinion proceedings 2/13.¹⁵⁵ It could be argued that although the purpose of an action in damages is not to review the legality of a given EU act, such a remedy is complementary to the possibility of contesting the validity of a CFSP decision and therefore should be permitted in a system of remedies where the right to effective judicial protection is recognized by Article 47 of the EU Charter. However, on the whole, it is uncertain whether it would be possible to interpret the above-mentioned provision in such a way as to include the remedy provided for by Article 340 TFEU. On the hand, the coherence of EU system of remedies, which is at the heart of *Foto-Frost* ruling, would require the ECJ to extend the availability of the action in damages to CFSP Decisions. This would make the system of EU remedies for natural and legal persons affected by sanctions almost complete. On the other hand, there are limits to such an interpretation. Article 275(2) TFEU does not include the non-contractual liability of the EU amongst the exceptions to the limits on the ECJ’s jurisdiction. Moreover, *Segi* is an important precedent, where the Court considered this action inadmissible when interpreting Article 35 TEU.¹⁵⁶

5.9. *Interpretation of the compatibility of the contested CFSP Decision with the “non-affectation clause” (Art. 40 TEU) and a missed opportunity to shed light on what is a legislative act*

The Court’s examination of the compatibility of the impugned CFSP Decision with the non-affectation clause may be criticized. *Rosneft* contended that the contested CFSP act defines the EU position in excessive detail, thus encroaching on the powers of the High Representative of the Union and the Commission to propose measures necessitated by the adoption of a CFSP decision, as stipulated in Article 215(1) TFEU. The Court found that the

155. See Opinion 2/13, para 99.

156. This provision does not include the competence to examine an action in damages, and the ECJ rejected these actions in Cases C-355/04 P, *Segi and others*, paras. 46–47 and C-340/04 P, *Gestoras Pro Amnistia v. Council*, EU:C:2007:115, paras. 46–47. This issue was also raised by A.G. Kokott in her View in Opinion 2/13, para 94.

Council needed to decide on the technical details of the sanctions in the CFSP Decision, given the high degree of technicality of this field. This finding may be questioned. Restrictive measures are adopted on the basis of Article 29 TEU, enabling the Council to “define the approach of the Union to a particular matter of a geographical or thematic nature.” Should they set out the political choices – such as the subjects that targeted and the design of the main features of the sanctions – leaving all the technical details to the regulation necessary to implement them? The two acts have different functions. However, in the Council’s practice, everything is decided in the CFSP decision, and the regulation merely reproduces the content of the decision. It seems that the Council expressly wants to pre-determine the content of the regulation, with the net effect of affecting the extent of the powers of the High Representative and the Commission. By defining all the aspects of the sanction in CFSP decisions, does the Council not impinge upon the power of the Commission or the High Representative to propose and design a regulation? It is submitted that it does. The Court could have said something to condemn this practice.

Rosneft further argued that the contested CFSP Decision constitutes a legislative act by reason of its content, and was thus in breach of Article 24(1)(2) TEU, which excludes the adoption of legislative acts in the domain of foreign affairs. It is true that there are CFSP Decisions which may be described as legislative measures, given their content¹⁵⁷ and therefore they may be qualified *de facto* legislative acts, if not *de iure*. The Court does not look at the content of the mentioned act in its formalistic analysis. The Grand Chamber merely observes that the contested CSFP Decision cannot be a legislative act, since it has not been adopted by a legislative procedure.¹⁵⁸ Since the Treaty does not offer any guidelines on what is a legislative act, this was a missed opportunity for the Court to shed some light on this issue.

6. Conclusions

Rosneft strengthens the Court’s power to rule on the legality of restrictive measures. However, it does not lead to ending the special status of the CFSP compared with non-CFSP areas. The ECJ does not open up the possibility of challenging *all* aspects of CFSP decisions providing for restrictive

157. This was admitted by A.G. Wahl in his Opinion in Case C-455/14 P, *H.*, see his footnote 51.

158. Judgment, para 91. See, later, on this point, Joined Cases C-643 & 647/15, *Slovakia and Hungary v. Council*, EU:C:2017:631, where the ECJ confirmed that adoption through the legislative procedure is what determines that a measure is a legislative act.

measures.¹⁵⁹ In addition, there are certain types of CFSP acts which continue to be kept off-limits for the Court's jurisdiction. The carve-out provisions of the Treaties, limiting the ECJ's jurisdiction, continue to apply to CFSP decisions. This seems to be an acceptable limit from the perspective of the right to an effective remedy, as these measures do usually concern third countries rather than individuals. Nonetheless, there may be situations in which a national measure, having the effect of depriving a person of his/her liberty, is taken in the context of an EU military mission, authorized under a CFSP act, as happened in the context of the Atalanta mission. In March 2009 a group of suspected pirates was arrested by German military personnel who were operating under the command of the EUNAVFOR headquarters. They were transferred to Kenya after an agreement was concluded between the two countries. In May 2009, one of the arrested pirates brought an action before the German administrative court claiming that both the arrest and the transfer to Kenya were unlawful. The German court considered that the conduct was attributable to Germany rather than to the EU, and found in favour of the applicant on human rights grounds. A higher administrative court substantially confirmed the ruling of the lower court.¹⁶⁰ Does the exclusion of the ECJ's competence to deal with such situations lead to a legal lacuna in the individual protection?¹⁶¹ The answer seems to be negative. It is submitted that national courts are, in fact, best placed to provide access to justice for persons concerned in such a situation. This is justified by the fact that the contested conduct is attributable to the Member State rather than to the EU.¹⁶² Moreover, the task to verify whether violations of human rights were committed by the national authorities, albeit in the context of an EU operation, can be performed by the national courts.

The second paragraph of Article 19(1) TEU imposes on Member States the obligation to provide remedies sufficient to ensure effective legal protection in areas coming within the scope of EU law. Therefore, they can step in where the jurisdiction of the ECJ is limited. It is true that this state of affairs presents

159. Only those, admittedly numerous, which target specific individuals. See on this point section 5.6. *supra*.

160. See Sommario, "Attribution of conduct in the framework of CSDP missions: Reflections on a recent judgment by the Higher Administrative Court of Nordrhein-Westfalen," in Poli (Ed.), *Protecting Human Rights in the European Union's External Relations* (CLEER Paper, 2016/5), p. 155.

161. Poli, "Human rights in EU external relations: Setting the scene," in Poli, *op. cit. supra* note 160, pp. 17–20.

162. Even if the conduct is attributable to the EU, Art. 274 TFEU makes it possible for domestic courts to have jurisdiction on the disputes to which the EU is a party. See on this issue Øby Johansen, *op. cit. supra* note 101, at 202.

inconveniences: it is possible that national courts provide a different answer to the question of whether or not international human rights standards are violated in the instance of an operation carried by the EU. However, this is a risk inherent to the EU system of decentralized control over CFSP acts.

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