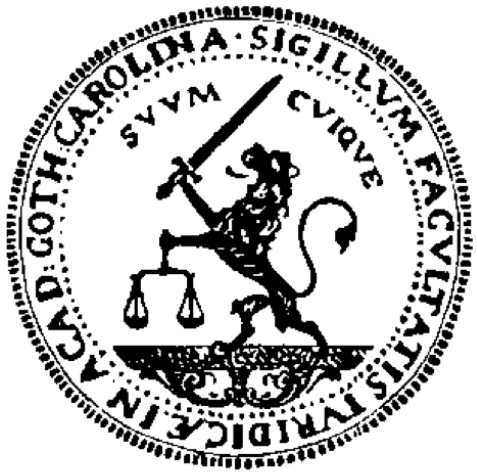

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The Anatomy of a Judicial Takeover:
A Commentary on the Evolution of the CJEU's Jurisprudence in the CFSP Field

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Contents

Abstract

The area of the Common Foreign and Security Policy is seen, mainly due to the unique place it occupies in Treaties, as the: '*realm of sovereign wills and national interest par excellence*'.[1] One may wonder what space it leaves for judicial review. The answer for so many years is that there wasn't any. The Court was, and still is, not fully granted the same liberty in CFSP matters as in other non-CFSP matters in the EU legal order, making this area an interesting one to say the least.[2] However, the role of the Court has significantly changed throughout the years and Treaties. This policy area, which was protected from the rule of law and any human rights overview due to its political nature, has lost piece by piece its intergovernmental shield as the Court's limited jurisdiction started to loosen up. Considering the numerous changes, does it mean that the field of CFSP will now be treated as any other policy area despite its uniqueness in the Treaties? This thesis will discuss the constant battle between the Court and the CFSP policymakers over the years. To do so, it will start by going through the relevant Treaties and their provisions which have reflected the evolution of the Court's role over the years. As the Lisbon Treaty was a cornerstone for, amongst other things, the Court in CFSP matters. This thesis will contain a pre- and post-Lisbon Treaty section to reflect that, with relevant case law that demonstrates the Court's adjudication or at least its ever so successful attempts to exercise its jurisdiction.[3] In separate chapters, it will go through the Rosneft case and the pending Neves 77 case. The last point will be a discussion on the consequence of the Court's extended review in CFSP.

[1] M Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in M Koskenniemi (ed), International Law Aspects of the European Union (Martinus Nijhoff 1998) 27

[2] G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 145

[3] The Maastricht, Amsterdam, Nice and Lisbon Treaties will be discussed in this thesis.

Abbreviations

AG	Advocate General
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
DAA	Draft Accession Agreement
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EPC	European Political Community
ESA	European Single Act
ICJ	International Court of Justice
IGC	Intergovernmental Conference
MS	Member States
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union

1. Introduction

1.1 Background and outline

On the 31st of May 2022, a request for a preliminary ruling was lodged from the Tribunalul București în România. Although inconspicuous at the first glance, the *Nevess 77* case has the potential to open new possibilities and substantial change for the Court of Justice of the European Union ('CJEU') to exercise judicial review in the Common Foreign and Security policy ('CFSP').[4]

From the early stage of the Union, the role of the Court has always been limited due to the politically contentious nature of the CFSP area. Prior to the Lisbon Treaty, the Court's jurisdiction was excluded from CFSP matters under Article L[5] and later, Article 46 EU[6]. Although as the old adage goes, theory often clashes with reality and the Court's outreach in the CFSP area certainly is an example of that. Despite its restraints, the Court's influence remained theoretically rigid, but from 2009 onwards more leeway was progressively accorded to, and in some cases taken by, the Court in CFSP matters. Articles 24(1), 40 of the Treaty of the European Union ('TEU') and 275 of the Treaty on the functioning of the European Union ('TFEU') provided for specific circumstances where the Court could be granted judicial review in certain aspects of the CSFP. This has always been a special EU policy to begin with, whether it is because it had a strong intergovernmental nature at the start of the Union or because it managed to keep it until now. The desire to keep such distinction is found under Article 2(4) TFEU, where the area of CFSP is separated from the other competences, with no further explanation provided. In today's Europe, which is prone to institutional balance, rule of law and protection of fundamental rights, the area of CFSP is of particular interest, as the Court's efforts to expand its jurisdiction within it is only matched by the will of different actors to keep it out. It is with this context in mind that one might wonder how a request for preliminary ruling of interpretation referring to a CFSP act even managed to find its way before the CJEU. The evolution of the Court's role will be the main subject of discussion in this thesis.

[4] Case C-351/22 *Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală* - Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 31 May 2022
[5] Article L is the article that restricts the Court's outreach in the Maastricht Treaty
[6] Article 46 EU, the previous Article L, can be found under the Amsterdam Treaty

Section II of this thesis will outline the relevant Treaty provisions touching upon the Court's jurisdiction in the Maastricht, Amsterdam and Nice Treaties as well as its application in practice through its jurisprudence. Section III discusses the Court's jurisdiction post-Lisbon Treaty and the seminal changes its provisions sustained as well as relevant cases to examine the Court's jurisdiction in practice. It will also include a discussion over the Court's Opinion 2/13 and its impact on the legal scholar world. Section IV will focus on one of the most prominent cases in regard to the Court's jurisdiction in the CFSP area, namely the *Rosneft case*.[7] The *Neves 77 case* and its potential outcomes will be discussed, followed by an evaluation of the impact it might have on the area of CFSP will be the subject of the fifth section. Finally, section VI will be a discussion on the consequences of the Court's extended jurisdiction.

[7] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236

1.2 Research question and purpose

The purpose of this thesis is to analyse the involvement of the Court of Justice in the field of CFSP throughout the Treaties and how far it has and will go to exercise jurisdiction in this field. To do so, it is necessary to analyse the fluctuations of the provisions that limit the Court's jurisdiction over the years and the interpretation of the later articles in its jurisprudence in the Maastricht Treaty, the "birthplace" of CFSP, Amsterdam, Nice, who both saw interesting cases that affected it, and finally the Lisbon Treaty, who introduced seminal changes to the area. After discussing in depth, the Rosneft case where the Court 'unlocked' a new form of exception, this thesis will attempt to assess the possible outcome of the Neves 77 case and its impact on the very nature of the CFSP, which just might leave the CJEU winner of this decade old institutional battle. Moreover, a short discussion on the consequences of the Court's extended review will be explored.

The choice of word 'takeover' in the title is not meant as a negative connotation. Rather, it outlines the necessary means and actions the Court was required to undertake to uphold the EU values. As the Treaties have always restrained the Court from exercising effective judicial review, a constitutional form of takeover was necessary to achieve the most democratic result.

This thesis will attempt to answer the following question:

How has the role of the Court changed throughout the Maastricht, Amsterdam, Nice and Lisbon Treaties in theory and how did it differ from its involvement in practice?

Furthermore, as a secondary question, this thesis will attempt to answer whether the Court's extended judicial review has impacted the very nature of the CFSP.

1.3 Delimitations

As the thesis' aim is to explore the role of the Court in the CFSP in theory, throughout the Treaties, and in practice, through its jurisprudence, only specific provisions regarding its limitations will be discussed. The Treaties mentioned will start with the Maastricht to the Lisbon Treaty. Although not much time will be used to discuss the Nice Treaty as nothing in theory has changed, many interesting cases have been ruled during that period which helps to better understand the Court's functioning in CFSP matters.

Furthermore, the cases mentioned in this thesis will only be discussed insofar as the Court's role in it as well as a short summary of the facts. Other aspects of these cases will not be discussed. Furthermore, the outcome of the Neves 77 case will not be reached out before the submission of this thesis, nor is the AG opinion available. Therefore, its section in this thesis will have a prospective opinion of what the outcome might be but will merely focus on its possible impact on the CFSP autonomy.

1.4 Methodology

As the thesis' principal aim is to analyse the evolution of the Court's role in the CFSP not only in practice but in theory as well, a doctrinal and comparative method will be used. In regards to the theory aspect, this thesis will follow a comparative approach as it will study the evolution of the Court's role depicted in the 3 different Treaty provisions.[8] Concerning the Court's evolution in practice, and to fully understand the Court's jurisprudence in the CFSP field, primary and secondary law as well as research conducted with academic literature will help to understand the Court's jurisprudence.[9] Moreover, as the Neves 77 case is still pending, research using blogs, journals, reviews and other online sources have been examined. The last section of this thesis, the secondary question, has been conducted following the legal theory method as it is regarding the subjects of democratic legitimacy.[10]

[8] Although this thesis discusses in general the four Treaties, the Nice Treaty will not be discussed in detail in regard to its provisions per se, as they bear no differences from the Amsterdam Treaty in regards to the Court's role. However, two interesting cases will be analysed during its entry into force. For the comparative approach, see Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd, Edinburgh University Press 2017) 113

[9] Rob van Gestel and Hans-W. Micklitz, *Revitalising Doctrinal Legal Research in Europe: What about Methodology?* in Neergaard, Nielsen and Roseberry (eds), European Legal Method (DJØF Publishing, 2011).

[10] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 9

2. Judicial control in the CFSP prior to the Lisbon Treaty

Although it bears little resemblance to today's streamlined policy area, the concept of having a common security framework was introduced in the early days of the Union. Unsurprisingly when accounting by how contentious such a subject could have been, attempts outnumbered successes. It started with the introduction of the European Political Community ('EPC'), where Member States began to share their guarded policies for the first time.[11] Yet, it was run in parallel with the European Community ('EC') and was deliberately kept separate from the legal instrument of the Community Institutions and had its separate share of policies. Even though the EPC had not provided a great deal of understanding, the accumulation of the numerous reports which had been unanimously agreed on by the Member States has led to the establishment of foreign policies on a legal footing.[12] From that point forward, the EPC was brought into Union Law through the 1987 European Single Act ('ESA'), which has been said to be the codified version of what was already established in practice. The 90's proved to be a decisive decade as the CFSP replaced the EPC in the Maastricht Treaty, which then formed the basis for the second pillar structure. For the first time, a CFSP legal framework was adopted and from there on it became the three-decade old institutional battlefield between the Court and the Council which brings us to today's topic. This section will examine the formative years of the CFSP and the Court's limited authority under the Maastricht, Amsterdam and Nice Treaties as well as the Court's jurisprudence during those years.

2.1. The Maastricht Treaty and the start of the tug-of-war

The famous pillar structure which used to define the EC was established and given competences by the Maastricht Treaty. The first pillar was the EC and paved the way for its institutions to exercise power; the second pillar, and main focus of this paper, was the Common Foreign Security Policy while the third pillar, the Justice and Home Affairs, outlined the various ways by which Member States would cooperate on internal matters.[13] The establishment of the second

[11] G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 22
[12] Ibid p.23
[13] European Parliament, 'The Maastricht and Amsterdam Treaties' EP Fact Sheets (2023)

and third pillars were extremely different from the first pillar since they were constructed away from the then 'Community Method'.[14] However, this division did not signify a lack of substantive basis of the CFSP in Union law as it was in the Maastricht Treaty that foreign policy gained 'a truly legal entity' from a Member State and Community perspective.[15]

The area of CFSP can be found under Title 5 of the EU Treaty, together with, amongst other things, the common broad objectives of CFSP measures. They were later refined in Article J.1(2), (3), and (4) of the Treaty. The main goal of these objectives was to consolidate the Community by promoting its common values and interests. In accordance with the United Nations Charter, they aimed to improve union cohesion by promoting international cooperation, democratic values, the rule of law, and fundamental human rights and freedoms.[16]

a. The Role of the Court in the Maastricht Treaty

Due to the political nature of the second pillar, the Member States' wish to keep this sensitive area under their competences was easily discernible by reading the Treaty and the role, or lack thereof, the drafters have given to the Court. At the time, this area was wholly political with, in theory, no possibility for the Court to exercise any type of judicial review. Therefore, this section is restricted to two articles, namely Articles L and M.

The role of the Court has changed dramatically since the Maastricht Treaty, and not only in the CFSP. The obvious desire for a clear separation of power, reflected in the pillar structure, betrayed the Member States' unease at the idea of letting the Court rule on the more sensitive matters. This is reflected in Article L, as it limits the Court by clearly laying down the instances where it has jurisdiction as opposed to today's Union, where it must be indicated when it cannot exercise its jurisdiction.

[14] G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 25
[15] Stephan Stetter, 'EU foreign and Interior Policies: Cross-Pillar and the Social Constructions of Sovereignty' [2007] 45(3) Journal of Common Market Studies 37
[16] European Parliament, 'The Maastricht and Amsterdam Treaties' EP Fact Sheets (2023)

The Court may provide its ruling on provisions amending the specified Treaties, the third subparagraph of Article K.3(2)(c) which touches upon the area of Cooperation in Justice and Home Affairs and articles from L to S which englobes further general provisions.[17] No mention of Article J was made, which formed the basis of the second pillar as mentioned above.[18] This meant, in theory, that the Court was completely excluded from reviewing acts based on CFSP provisions. However, in a later section, this thesis will discuss how, in practice, the Court has never shied away from involving itself in CFSP matters.[19] It is safe to say that the shield that was supposed to be Article L was not as unbreachable as the Member States had hoped.[20]

Before discussing the Court's role in practice more extensively later on, it is worth to shortly mention the *Svenska Journalistförbundet case* as it showed that even from the early stages of the CFSP, the Court always managed to intervene.[21] It held that even though it had no jurisdiction under Article L to review the legality of Title IV acts, it did have the power to review matters over public access, regardless of the nature of the act's pillar. The Court based itself on Article 173(4) of the Treaty which allows the Court to exercise its jurisdiction to review the legality of Council measures under the relevant legislation on public access of Council documents.[22] Based on that argument, the Court argued that it did not need to address the fact that the matter was in the sphere of Justice and Home Affairs.[23] This reasoning was later confirmed in the *Hautala v Council case* with respect to documents concerning the area of CFSP.[24] In other words, if a measure is adopted under CFSP provisions, and if such act has a connection to an area covered

[17] Abbey MH and Bromfield N, 'A Practitioner's Guide to the Maastricht Treaty' 1353
[18] The Court of Justice Report on Certain Aspects of the Application of the TEU 1995, first paragraph of page three
[19] Argument supported by the Court's jurisprudence and has stated in Opinion 2/13 that, in fact, it 'cannot, for want of jurisdiction', see Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*')
[20] Nanette Neuwahl, 'Foreign and Security Policy and the Implementation of the Requirement of 'consistency' under the Treaty on European Union' in David O'Keeffe and Patrick M Twomey (eds), Legal issues of the Maastricht Treaty (Chancery, 1994).
[21] It was the Court of First Instance, nowadays the General Court, that ruled in this case. Case T-174/95 *Svenska Journalistförbundet v Council of the European Union* (1998) ECR II-228
[22] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.82
[23] Case T-174/95 *Svenska Journalistförbundet v Council of the European Union* (1998) ECR II-228 para 85
[24] Case T-14/98 *Hautala v Council* (1999) ECR II-2489, para 41-2

by the competence of the Court under the EC Treaties, it could exercise a form of judicial review.[25]

However, legal loopholes are not necessarily required for the Court to be able to review a CFSP act. In fact, Article M of the Maastricht Treaty leaves the opportunity to review CFSP acts which might affect the Treaties establishing the European Communities or the subsequent Treaties and acts modifying or supplementing them. This article will become later on one of the main 'carve-out' provisions for the Court to have jurisdiction in CFSP matters under the Lisbon Treaty. However, for now, it is solely restricted to limiting any interference the second and third pillars might have on the first pillar.[26] In other words, Article M is giving priority to the first pillar in case of overlap. This preference, or clear hierarchy, between the Community and Intergovernmental pillars will continue throughout the Amsterdam Treaty.

b. Understanding the Court's limited jurisdiction

Before diving into the reasons for its exclusion in CFSP matters, it is worth drawing attention to the fact that the importance and the impact of the Court enjoys today are different from the original mandate granted to it by the successive Intergovernmental Conferences. The notion that one day the Court would become the main institution responsible for the development of Union law was not originally accounted for. Nowadays, it is expected to fill in the holes of the Treaties and to ensure a consistent interpretation of Union law through multiple mechanisms such as direct actions, preliminary rulings, opinions and other instruments.[27] However, in the pre-lisbon area, the Court had little jurisdiction in the TEU and its default position was that it was not entitled to rule in non-Community fields.[28] Therefore, excluding the Court's jurisdiction almost entirely from proceedings in the CFSP policy area was not deemed or seemed as controversial as it is today.

[25] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.82
[26] Ramopoulos T, 'Article 40 TEU' in Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*' (Oxford University Press 2019) 267
[27] G Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 149
[28] Article L TEU, pre-Lisbon

There were mainly two reasons why Member States wished to keep the ECJ at bay in the area of CFSP.

The first reason is that CFSP instruments are essentially short term in character and sensitive in nature. In contrast to the drafting of Treaties, the texts agreed by the Member State were not meant to establish a permanent framework between mutual contracting parties but to organise a collective approach to a specific overseas crisis, catastrophe, a change of regime or to impose a collective discipline on a particular multilateral negotiation.[29] Such negotiations are often overtaken by events and, if it were the case, it is up to Member States to renegotiate or even to disregard them completely.[30] If a Member State were to act in a way that is contrary to its fellow Members, there will be a 'political price' to pay but no measures to enforce such compliance.[31] Joint actions and Common positions could bind Member States under international law, but dispute settlement between States regarding legal obligations were still excluded under the Maastricht Treaty.[32] The desire to maintain an independent and strong sovereign foreign policy, which is strengthened by the area of CFSP (with its intergovernmental nature) along with the urgency to resolve differences efficiently leaves close to no room for a 'slow' judicial resolution dispute mechanism.[33]

The second reason concerns the very nature of the ECJ. The area of CFSP in the Maastricht Treaty was not a matter of European law, but rather international law and as the judges appointed in the ECJ came from a background that is primarily based on the law of the former and not the later, it almost seemed inadequate for them to rule. Over the years, the ECJ has developed legal doctrines in many areas, such as in the area of external relations of the European Communities, which focused on integrating the goals of the Treaties and less on maintaining the individual sovereign powers.[34] Such behaviour for example could not be attributed to a tribunal of

[29] Denza E, 'Judicial Control of the Pillars' in Eileen Denza (ed), *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) 312
[30] ibid
[31] ibid
[32] ibid
[33] Denza E, 'Judicial Control of the Pillars' in Eileen Denza (ed), *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) 312
[34] ibid

international lawyers.[35] The Member States, especially the UK,[36] were apprehensive as they thought the ECJ would incorporate certain of their doctrines into the area of CFSP, such as for example prioritising the exclusive nature of Community external powers over pre-existing national powers.[37]

c. Views on the lack of jurisdiction

The 1995 Report on Certain Aspects of the application of the Treaty on European Union

As one might envision, the Court was quite unhappy with its own limitations set in the second and third pillar. In its 1995 Report, the Court drew the attention of the Intergovernmental conference that many issues might rise in the short or long term from the lack of jurisdiction.[38] It declared that:

"It is obvious that judicial protection of individuals affected by the activities of the Union, especially in the context of cooperation in the fields of justice and home affairs, must be guaranteed and structured in such a way as to ensure consistent interpretation and application both of Community law and of the provisions adopted within the framework of such cooperation. Further, it may be necessary to determine the limits of the powers of the Union vis-à-vis the Member States, and of those of each of the institutions of the Union. Finally, proper machinery should be set up to ensure the uniform implementation of the decisions taken."[39]

In other words, the Court made it clear that a single, central judicial body must exist in order to maintain a uniform application of Community law, and that it cannot be limited in its capacity to provide definitive rulings on all union policy areas in order to achieve it.[40] Moreover, it states

[35] Joseph Weiler, *The least-dangerous branch: a retrospective and prospective of the ECJ in the arena of political integration* in the Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration' (Cambridge University Press 1999) p.188
[36] The determination of the UK to exclude the ECJ from jurisdiction over the CFSP is illustrated during the negotiations of the Maastricht Treaty. See the 17th Report on the HL Select Committee on the European Communities (1990–91b) QQ 64–75.
[37] Denza E, 'Judicial Control of the Pillars' in Eileen Denza (ed), *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) 312
[38] Ibid p.316
[39] Report on Certain Aspects of the Application of the TEU 1995, page 3 first paragraph
[40] ibid para 4 and 5

that judicial review is essential to any case which is constitutional in character or raises an important question in regards to the development of law.[41]

The 1996 Commission's report for the Reflection Group

The Commission expressed similar views at the time in its Report for the Reflection Group. In paragraph 60 of the report, the Commission begins by laying down the limitations of the Court's jurisdiction which at the time was almost absolute except for Article M which created a hierarchy between a CFSP and Treaty procedure.[42] Moreover, the Commission expressed its discomfort at the fact that there was a proliferation of CFSP acts and still a lack of framework to review them which could pose a problem should individual rights be affected.[43] Therefore, two main institutions felt apprehension concerning the Member States' strong position against the Court's involvement.

The Maastricht Treaty remains a central piece for anyone wanting to understand this unique field as today's issues stems from the fact that the separation of power between the judiciary and the executive on this topic was ambiguous from the start since Member States wanted to preserve a very politically centred field. A field untouched by the democratic values and its implications, such as general legal framework, which might deter the political objectives. However, from the very start, the Court tried to play a different role that it was given, and this has certainly not changed throughout the Amsterdam Treaty.

2.2. Amsterdam Treaty

Although the Amsterdam Treaty essentially stuck to the previous Treaty's provision in regard to the role of the Court in CFSP matters, it experienced important structural changes to improve the Union's legal framework. One of the important additions to the CFSP was the appointment of High Representative.

[41] Report on Certain Aspects of the Application of the TEU 1995 para 5
[42] The 1996 Commission's report for the Reflection Group, para 60. Moreover, this is the only exception at the time of the Court's jurisdiction 'in writing'. As seen in the *Svenska Journalistförbundet* and *Hautala* cases, the Court did not restrain itself from using Article M to explain any type of interference in CFSP matters.
[43] The 1996 Commission's report for the Reflection Group, para 61

In regards to the infrastructural changes, it marked a significant shift in the intergovernmental aspect as it transferred certain areas of activity falling within the CFSP area to the Community pillar and significantly reformed the old EU Treaty.[44] In Tampere, the European Council adopted the initial comprehensive programme outlining the objectives and measures to be implemented within the CFSP area[45], which was subsequently succeeded by another action planned known as the Hague Programme.[46] However, despite these new plans, the area of CFSP remained a dual issue. On the one hand, it is governed by a 'community regime' in the framework of the first pillar and on the other hand, by an intergovernmental regime in the framework of the third pillar. Hence, the CFSP area was a combination of both the first and third pillar under the Amsterdam Treaty.[47]

a. The extent of the Court's jurisdiction under the Amsterdam Treaty

As mentioned above, no drastic changes have been made regarding the two provisions which were previously discussed. Article 46 EU, ex Article L, still sets an exhaustive list of the limits of the Court's jurisdiction in relation to matters covered by the EU Treaty. In fact, it has jurisdiction to review the provisions amending the Community Treaties (Titles II-IV, Article 8-10), provisions on Police and Judicial Cooperation in Criminal Matters (Title VI, Articles 29-42)[48], provisions on Enhanced Cooperation (Title VIII, Articles 43-5)[49] and the final provisions of the EU Treaty (Title VIII, Articles 46-53). In comparison to Article L, the drafters have extended by one section more the Court's jurisdiction. Although no mention of Title V has been made yet in this thesis, it is merely a temporary relief as it will be seen further down.[50]

The ex Article M is now found under Article 47 EU. Article 46(f) EU points us to it and gives the Court the authority to use Article 47 EU in order to safeguard the division of competence

[44] European Parliament, 'The Maastricht and Amsterdam Treaties' EP Fact Sheets (2023)
[45] Lenaerts, '*The contribution of the European Court of Justice to the area of freedom, security and justice'* (n1) 258
[46] Hague European Council, Presidency Conclusions: Annex I 'The Hague Programme - Strengthening Freedom, Security and Justice in the European Union' [2005] OJ C 53, 3.3.2005
[47] Lenaerts, '*The contribution of the European Court of Justice to the area of freedom, security and justice'* (n1) 258
[48] Under the conditions provided for by Article 35 TEU
[49] Under the conditions provided for by Articles 11 and 11a TEC, and Article 40 TEU
[50] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.79

between the community competences and the intergovernmental objectives. It never missed an opportunity to use both articles to exercise judicial review as seen in the *Airport Transit Visa*[51] and later on in the *Environmental Crime*[52] *case.* It has emphasised in these cases that Article 47 EU was a preserver of the Community powers and that if a subject matter can be governed by Community measures, then it must be dealt with under Community law.[53]

b. The reasons behind the Court's continued limited power

According to many scholars, there were numerous reasons why the Member States still wish to limit the Court's jurisdiction.[54] The main argument was that, despite their extended period of collaboration, Member States were still wary of the Community Judiciary in matters relating to CFSP as they were afraid that it would constrain their sovereignty in the field of international policy.[55]

Furthermore, the 'persistent' nature of the provisions in Title V made it complicated to have judicial review. This was due to the generic formulation of the CFSP objectives, the open character of the Treaty's provisions and the very nature of CFSP acts which consisted of acts that were often taken in rapid response to international events. These acts were not designed to create a permanent framework which consisted of mutual obligations between Member States but rather created a collective response to a specific situation, crisis, or international negotiations.[56] Moreover, Member States were concerned that the Court would be too active or involved in this field. This could have resulted in creating a body of 'Union Law' next to Community law, which could have led to some Community Law doctrines being applied in the CFSP context and de facto clash with the intergovernmental nature of the field.[57] Overall, the Member States were

[51] Case C-170/96 *Commission v. Council* (Airport Transit Visa) [1998] ECR I-02763
[52] Case C-176/03 C*ommission v. Council* (Environmental Crime) [2005] ECR I-07879. The ruling of this case was to support the argument at hand. It was published during the period of the Nice Treaty and not the Amsterdam one.
[53] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 492, 500
[54] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.79
[55] ibid
[56] E Denza The Intergovernmental Pillars of the European Union (OUP Oxford 2002), 312
[57] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.80

concerned that granting the ECJ more judicial control over the area of CFSP will lead to actions that go beyond what was originally envisaged when the Treaties were drafted and would ultimately undermine their control over foreign policy.

However, the lack of judicial review at the Community level did not signify that Member States completely avoided judicial review as the provisions in Title V were considered to be legal obligations under international law. Therefore, they are not only binding under EU law but also under international law as they have implications for the relationship between EU Member States and other countries or international organisations.[58] Accordingly, a Member States of the Union could bring legal action against another under these provisions before the International Court of Justice (ICJ). As every Member State is also part of the United Nation and therefore acknowledges the ICJ statute, they may be subject to its jurisdiction. The ICJ may settle disputes between states and give advisory opinions on legal questions. In other words, certain provisions of the Title V of the Treaty were considered to be part of international law and Member States could use the dispute resolution mechanism made available to them to resolve any conflict that might have arisen due to CFSP provisions.[59] However, in practice, it is not likely that a Member State will go in front of the ICJ to resolve a dispute based on the intergovernmental provisions set in the EU Treaty. Moreover, under Article 11, it is the Council's responsibility to ensure that the listed objectives of the Union are respected and of settling any disputes arising from the CFSP in the absence of the ECJ.[60]

To conclude, despite the important changes made in the Amsterdam Treaty, the second pillar remains *in theory* wholly intergovernmental in nature by lacking any significant overview by the EU Courts. Although the Amsterdam Treaty did not introduce revolutionary provisions to broaden Court's jurisdiction from the existing Treaty, it did exert some authority over EC measures that put CFSP measures into place, as well as over common positions under the second. In addition, the Court had taken on certain "peripheral" responsibilities, such as monitoring the borders between the second and first pillars and enforcing the right of access to documents. All

[58] Ketvel M-GG, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) 55 p.82
[59] ibid
[60] Denza E, 'The second pillar under the Amsterdam Treaty' Eileen Denza (ed), *The Intergovernmental Pillars of the European Union* (Oxford University Press 2002) 133

these developments demonstrated a constitutional Court that was eager to be actively involved in all areas of the legal system, despite the narrow confines of the Treaty back then.[61]

However, in reality, the conclusion might differ. The next section will comment on how the Court's behaviour in practice is quite different from the rigid constraints of the Treaties. Before diving in, this thesis will not discuss the theoretical aspect of the Nice Treaty as it uses the same provisions as the Amsterdam Treaty regarding the limitation of the Court's jurisdiction. However, in practice, two important cases which will be discussed below have shaped the Court's jurisdiction during that period which reflects the growing tensions in this field.[62]

2.3. The extent of the Court's jurisdiction in practice

Up to this point, this thesis has discussed the limitations of the Court's jurisdiction written in various Treaties, but was the Court's jurisprudence equally as inflexible as the Treaties imply? With the sneak peak provided above in the form of the *Svenska Journalistförbundet and Hautala cases,* one can already guess the answer.[63] This section will discuss three different cases that have shaped the Court's role when encountering CFSP cases. The first is Ecowas, which discusses the Court's interpretation concerning Article 47 EU and its application in conducting judicial review. The second is the Segi case, the first case to discuss individual restrictive measures and the necessity to have preliminary rulings to ensure the rule of law. And finally, the Kadi case, in many respects a cornerstone of EU law, and especially important for the Court to express the community as an independent entity and to defend itself from internal and external pressure.

[61] Hinarejos, Alicia, 'Judicial Control in the Common Foreign and Security Policy', *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford, 2009; online edn, Oxford Academic, 1 May 2010)
[62] See Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647; Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351
[63] Case T-14/98 *Hautala v Council* (1999) ECR II-2489, para 41-2 Case T-174/95 *Svenska Journalistförbundet v Council of the European Union* (1998) ECR II-228

a. Ecowas: the protection of the *acquis communautaire*

After many inter-institutional conflicts on the relationship between the first and third pillar[64], the Commission for the first time contested a CFSP Council Decision on the ground that the legal basis of said decision should have been under the Community competence and not under the CFSP provisions of the EU Treaty.[65] In this *Commission v Council case,* the Court annulled the Council Decision 2004/833/CFSP providing European Union contribution to the Economic Community of West Africa States (*ECOWAS*) in the framework of the Moratorium on Small Arms and Light Weapons even though it did not have the power to do so according to primary law.[66] It used the combination of Articles 46(f) and 47 EU as these imply that the Court is entitled to supervise the borders between the intergovernmental and community pillars.[67] Following similar rulings it had given in the third pillar, the Court maintains the primacy of the EC Treaty when a measure pursues different and non-incidental objectives falling respectively within the EU and EC Treaties.[68] The outcome of this case essentially hinged on one's interpretation of Article 47 TEU. For Member States, and more specifically the UK, the fact that the Community may legislate in the matter of cooperation development does not preclude the Union from adopting an act which has similar content but pursues objectives set in Article 11(1) TEU.[69] In contrast, the Court and the Parliament believe that the Union must respect all Community competence regardless of their exclusive or non-exclusive nature.[70] Therefore, following that logic, a CFSP act adopted under an EC provision would be an infringement to Article 47 TEU and must therefore be set aside. According to the opinion of AG Mengozzi, Article 47 TEU rests on the presumption that all the competences conferred to the Community: *"deserve to be*

[64] See Case C-170/96 *Commission v Council* [1998] ECR I-2763; Case C-176/03 *Commission v Council* [2005] ECR I-7879
[65] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law 532
[66] Case C-91/05 *Commission of the European Communities v Council of the European Union* [2008] ECR I-03651
[67] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law 532
[68] ibid
[69] Ibid. For Article 11(1), see Article 21 TEU for the CFSP's objectives.
[70] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law 533

protected against any encroachment on the part of the Union".[71] However, a clear infringement of Article 47 TEU can be disregarded if the EU measure is exclusively or essentially following CFSP objectives under Title V of the EU Treaty. To determine whether the contested measure's main aim is for the Court to apply a centre of gravity test and determine whether there was an 'encroachment' of community competences at stake.

This judgement is ground-breaking as the Court clarified the boundaries between the European Community's external competences in the field of development cooperation[72] and in the Union's Competences in the field of CFSP.[73] The outcome strengthened the *acquis communautaire* against a possible intergovernmental contamination of the EC's supranational decision making.[74] More importantly for our subject, the Court's interpretation of Article 47 TEU limited the scope of the CFSP actions in practice. It meant that Member States may decide to act autonomously or collectively outside the framework of the EC if they comply with Community law.[75] The Court's judgement has been criticised as trying to: *"have the cake and eat it too".*[76] Therefore, the impression of a strong intergovernmental pillar, reinforced by the lack of judicial review in CFSP, is only that, an impression.

b. Segi: The rule of law

The Segi and Others case was instrumental as it brought to light the role of judicial review and the protection of fundamental rights with regards to the Union's lists of terrorist suspects.[77] What set this case apart was that Segi and Others were listed in an Union instrument without being targeted

[71] Case C-91/05 *Commission of the European Communities v Council of the European Union* [2007] ECLI:EU:C:2007:528, Opinion of AG Mengozzi, para 98
[72] Title XX in the EC Treaty
[73] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law 532.
[74] Ibid p.543.
[75] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law 5437
[76]Van Vooren B, 'The Small Arms Judgement in an Age of Constitutional Turmoil' (2009) 14 European Foreign Affairs Review 232
[77] Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647

by Community sanctions.[78] Segi was exclusively listed under a Common Position 2001/931/CFSP and made the request to be granted damages before the Court of First Instance (nowadays the General Court). One of the specifics of this case was the ambiguity regardings the nature of the act itself. A footnote at the bottom of the list pointing to Segi and several persons stated that they 'shall be subject to Article 4 only'. Said Article 4 is addressed to the Member States and stipulates that they should call upon each other through Police and Judicial Cooperation (which is the third pillar). The CFI then naturally concluded that this was an issue to be resolved under a third pillar measure, over which it lacked jurisdiction.[79] It therefore stated that it was not competent to assess the applicant's request for damages.[80] The CFI limited its jurisdiction to two points, essentially checking if there was any type of encroachment on Community competences under Article 47 TEU and whether the applicant was entitled to damages under 235, 288(2) EC. The CFI rejected the applicant's argument pointing out the lack of judicial review itself must be enough for the Court to focus on the applicant's grievances and not solely on the institutional objective examination. This examination was performed by the Court since Article 46(f) EU does not grant any additional judicial competences for fundamental rights.[81] The CFI in the *Segi case* therefore took a literal approach to the Treaties regarding its lack of jurisdiction.

As expected, in the appeal, the Court of Justice did not agree with the CFI. The main aspect of this case is the Court's extended judicial review in Article 35(1) EU to allow for preliminary rulings on the validity of Common Positions. The scope of Article 35 EU only covers acts adopted by the Council that are intended to influence third parties. In other words, if a national Court has a question concerning a Council measure, it can rely on Article 35 EU to make a preliminary ruling to the Court of justice. The Court argued that preventing national Courts from referring a question concerning Common Positions would be contrary to the objective of the Article as it is no different to other acts, therefore setting aside its CFSP nature. The Court stated that interpreting narrowly Article 35 EU would block the: *'observance of the law in the interpretation and application of the*

[78] Eckes C, 'Protection from Autonomous European Sanctions: Community Law and Union Lists', *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford Studies in European Law (2010) Oxford Edition 328
[79] Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647, para 35
[80] Ibid para 40
[81] Eckes C, 'Protection from Autonomous European Sanctions: Community Law and Union Lists', *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford Studies in European Law (2010) Oxford Edition 329

Treaty".[82] Moreover, It concluded that the right for a preliminary ruling: *"must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties".*[83] In contrast to the CFI, the Court of Justice did not address the question on whether this case falls within the second or third pillar. The Court approached the matter in a very broad manner as it expressed that the nature of the act is irrelevant for it to be subject to a preliminary ruling. One of the reasons why the Court took a stand is because it was confirmed in the *Segi case* that the inclusion of an individual in a terrorist suspect list will affect their legal positions.[84] Therefore, the Court extended its jurisdiction as it opened up for the possibility of preliminary ruling under 230 EC in the second pillar insofar as lists are concerned as it would enable judicial protection. This case marks a new area for the nature of Union law, in which the exclusion of the judicial review by the ECJ is no longer justifiable in the light of the respect of rule of law.[85] The Segi case applies to both pillars as the ECJ in the appeal was not asked to assess whether the conclusion of the CFI was correct and the ECJ did not limit its jurisdiction to the third pillar.[86]

The Segi case is the beginning of a long list of cases regarding the Union's restrictive measures. This will be discussed in further detail in Chapter 4 alongside *the Rosneft case.*[87]

c. Kadi: Defensive constitutionalism

The context of *the Kadi case* was set in the early 2000', when the EU had adopted a set of legislative measures designed to implement a series of UN Security Council resolutions in the wake of the 11 September 2001 attacks on the United States.[88] It required all persons or entities listed who were presumably controlled directly or indirectly by the Taliban, associated with Osama Bin Laden or the Al-Qaeda network, to have their funds and other financial resources

[82] Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647, para 53
[83] ibid para 53
[84] Eckes C, 'Protection from Autonomous European Sanctions: Community Law and Union Lists', *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford Studies in European Law (2010) Oxford Edition 331
[85] Ibid p. 333
[86] ibid
[87] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236
[88] Council Regulation (EC) No 881/2002 of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban. See the Kadi case: Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351

frozen in all states.[89] In 2001, Kadi, Yusuf and the Al Baraakt Foundation, which were both listed in EU and UN sanction, brought proceedings before the CFI to challenge the EU implementing measures as they were deprived of their right to be heard before being sanctioned.[90] The so-called Kadi I case has triggered a number of interesting questions regarding the relationship between EU law, International law, the protection of human rights within the context of economic sanctions and, overall, the Courts designation of the EU legal order as autonomous.[91]

The CFI declined jurisdiction as it could not question the Resolutions of the UN Security Council, even indirectly, other than for a violation of the jus cogens which it had judged to not be the case here. Without much surprise, the ECJ's ruling differed and upheld the rule of law. By doing so, it accepted full jurisdiction to review regulations concerning economic sanctions, irrespective of their 'origins' and placed EU law as a 'higher law', due to the fact that the principles established in Article 6(1) EU could not be derogated from.[92] As mentioned in the opinion of AG Maduro, which the Commission, Council and CFI agreed to, the Court must tread carefully around the notion of 'political questions'.[93] The ECJ rejected the suggestion of "European political question doctrine" and declined to provide a clear delimitation of its jurisdiction in regards to the external exercise of executive power.[94] The Kadi case is a landmark case as the Court not only established the Union's autonomy by defending it from Member State's pressure from within the European Legal order but also from external pressure created by Member States cooperating with third parties, such as states in the UN.[95]

[89] Graig P and De Búrca G, EU Law: Text, cases and materials (6th edn Oxford University Press 2015) 403
[90]Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351, paras 32, 46, 49-50.
[91]Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351, para 321, 323 - 317
[92] Curtin D and Eckes C, 'The Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe Forum: Perspectives on the Kadi Case' (2008) 5 International Organizations Law Review 365, 365. See also Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351, paras 302 and 303
[93] *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* (C-402 and 415.05 P) [2008] ECLI:EU:C:2008:11, Opinion of AG Maduro para 33
[94] Curtin D and Eckes C, 'The Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe Forum: Perspectives on the Kadi Case' (2008) 5 International Organizations Law Review 365, 366
[95] ibid

The Court stated that the freezing of funds/assets (which led to Kadi's claim on the breach of his property rights) was not disproportionate in regards to the objectives at hand.[96] Therefore, the ECJ concluded that, per se, the freezing of funds could not be deemed disproportionate given the importance of the fight against terrorism.[97] However, independent of the terrorism aspect of the case, in line with the Court's objective to expand its jurisdiction, the fact that the Regulation provided no means for applicants to contest their inclusion on the sanction list constituted an infringement on his property rights.[98]

To conclude, the three Treaties mentioned in this chapter have not seen a lot of change in regard to the Court's jurisdiction in theory. The reflection of the desire of the Member States to keep this area away from a form of judicial review has succeeded only partially as the reality in practice was quite different. The Court's jurisprudence, from the Svenska Journalistförbundet to the Kadi case, prepares us for many more surprises to come as seen in the following chapter.

3. The role of the Court of Justice in the Lisbon Treaty area

3.1. The lead up to a new Treaty

This section will analyse the particular impact the Lisbon Treaty had on the area of CFSP regarding the Court's limitations. Even though it went through significant changes, it remains in theory predominantly intergovernmental. A new Treaty was long anticipated as it had given promises and raised expectations on the introduction of an international influence of the Union.[99]

Three developments influenced the drafting of the Lisbon Treaty.[100] Namely, the instability that has characterised the Eurozone since the late 2000s, the development of the migration crisis, and

[96]Cases C-402 and 415.05 P *Yassin Abdullah Kadi and Al Baraakt International Foundation v Council and Commission* [2008] ECR I - 6351, para 355
[97]Ibid paras 363 - 366
[98]ibid paras 368 - 371
[99] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 1
[100] Ibid p.8

the first-hand reaction of the MS when dealing with it individually, and lastly but certainly not least, the instability and the prospect of disintegration of the Union. The Union intervened by seeking to contain these events based on various internal and external measures.[101] These measures in question were met with criticism as numerous claims were made on their lack of compliance with fundamental rights. Moreover, yet again, it showed that Member States were not so willing to show solidarity in a time of crisis.[102] The disunity that reigned over the handling of the refugee crisis and instability of the European political and economic project would later, at least in part, result in the UK's exit from the EU.[103]

The refugee crisis was intensified by the war in Syria and the threat that neighbouring Russia and its expansionist attitude posed. All these factors combined raised an existential crisis within the Union's own border and has created difficulties for the EU to put in place a coherent and unified response using available instruments and policies, including the CFSP.[104] One can imagine that in a world of politics and crises, the rule of law regarding the CFSP is quite interesting.

Various reforms were put forward because of these events. The highest profile amongst which being the abolishment of the pillar structure and subsequent merging of all three legal frameworks of the previous Treaties (EC, CFSP and PJCCM) with the aim of forming a singular, unitary structure.[105] The EU is now a legal personality as established under Article 47 TEU. As one might imagine, this was an opportunity to create a more unified system of external policies, where the rules governing the EU's external policies would be consistent and not governed by a disparate set of rules. However, a closer look at the provisions governing the CFSP area shows that the nature of the competence that the EU enjoys is distinct from other areas.

The Court had its fair share of novelty starting with a fresh coat of paint, as even the name of the judicial branch was to be changed. It is now the Court of Justice of the European Union and

[101] See Council Decision 2015/1523 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L 239/146 and Council Dec. 2015//1601 [2015] OJ L 248/80.
[102] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 9
[103] ibid
[104] ibid
[105] Ibid p.16

includes the Court of Justice, the General Court (previously the Court of First Instance) and specialised Courts (previously the judicial panels).[106]

One of the main objectives of the Treaty of Lisbon was to establish a clear delimitation of competences. Article 2 of the TFEU distinguishes between exclusive, shared, coordinating, supporting, and supplementing competences.[107] However, under Article 2(4) TFEU, the EU's competence in CFSP is listed separately with no further elaboration. It does not provide any information on the nature of the competences to carry out the CFSP.[108] It merely provides that: "The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy".[109] The choice of the drafters, to say the least, is that this area remain distinct from the others.

3.2. The expansion of the Court's jurisdiction under the Lisbon Treaty

Article 46 EU was significant as it restricted the extent of the ECJ's jurisdiction in the early Treaties. It was a crucial article as it helped define the role and powers of the ECJ within the broader context of the EU's legal framework.[110] However, nowadays, Article 46 EU and what it represents cannot be found in the Lisbon Treaty. Its deletion meant many things, chief among them is that the entire Area of Justice and Home Affairs is now under the jurisdiction of the Court of Justice. In regard to the CFSP, this deletion meant a small, albeit significant, increase in the Court's jurisdiction. It does not mean that the Court has now full jurisdiction in Title V, but rather that it has now added other provisions elsewhere in the TEU in order to continue the exclusion of the Court in specific areas.[111] The area of CFSP has retained some of its uniqueness, unlike

[106] See Article 19(1) TEU
[107] R Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', (2008) 33 ELRev 709
[108] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 17
[109] See Article 2(4) TFEU
[110] Ibid p. 17
[111] Barrett G, 'Creation's Final Laws: The Impact of the Treaty of Lisbon on the "Final Provisions" of Earlier Treaties' (2008) 27 Yearbook of European Law 3, 37

nearly all other areas of Union policies, as it is still subject to different decision making procedures and essentially still excluding the Court's jurisdiction.[112]

The Treaties set out in the general jurisdiction of the Court go as follows: Article 19(1) TEU provides that the Court of Justice of the European Union *"shall ensure that in the interpretation and application of the Treaties the law is observed"*.[113] To say that the Court has absolutely no jurisdiction in regard to CFSP matters would be too simplistic. Three articles, found in both the TEU and TFEU, provide for a limitation of the Court when dealing with CFSP acts under the Lisbon Treaty: Articles 24(1) and 40 TEU and Article 275 TFEU. To understand these provisions properly, even though they are separated in the Treaties, they should be read together. Whilst these articles are there to limit or even exclude the Court from having judicial review over these proceedings, it does not mean that the area of CFSP is entirely immune from any judicial review. It has stated in its jurisprudence that, gIven that Article 19 TEU provides for a general jurisdiction, derogations imposed by Article 24 TEU and Article 275 TFEU must be interpreted narrowly.[114]

Article 24(1) TEU states that the CFSP *'is subject to specific rules and procedures'* which indicates and reinforces the distinctiveness of the field.[115] It provides that the Union's external action shall be guided by the principles and objectives of its CFSP and it shall be defined and implemented by the European Council and the Council acting unanimously, except when the Treaties state otherwise. Indeed, whilst maintaining the general rule of exclusion of the Court in the area of CFSP, Article 24(1) provides for the first time two exceptions. This is a notable departure from ex Article 11 EU and its structure, which only provided for the CFSP's objectives. The first notable change is a 'competence' exception where the Court has the jurisdiction to monitor compliance via Article 40 TEU. The second can be found under Article 275(2) TFEU and allows the CJEU to review the legality of certain CFSP measures. As discussed previously under the Maastricht and the Amsterdam Treaties, the exception laid down under Article 40 TEU

[112] Van Elsuwege P, '*On the Boundaries between the European Union's First Pillar and Second Pillar: A Comment on the Ecowas Judgment of the European Court of Justice Case Law*' (2008) 15 Columbia Journal of European Law for post lisbon sitch page 545
[113] See Article 19(1) TEU
[114] Case C-658/11 *Parliament v Council* [2014] ECLI:EU:C:2014:2025 ('Mauritus'), para 70
[115] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 17

was previously known respectively as Article M and Article 47 TEU (in combination with Article 46(f) EU). Although Article 40 TEU is not a newcomer, the second exception is.

As it was bound to happen, the coming into force of the Lisbon Treaty has seen an increase in the number of cases due mainly to the events mentioned at the beginning of this chapter and the CJEU's jurisdiction being, although still limited, a bit more open than in the last Treaties.[116] As mentioned, this is due to the legal framework of the CFSP changing, As The Lisbon Treaty extended the Court's formal jurisdiction over CFSP: Article 275 TFEU in combination with article 40 TEU, article 275(2) in combination with Article 263 TFEU and Article 218(11) TFEU are the codified entry points for the Court into CFSP territory.[117]

a. The mutual non-affection clause of Article 40 TEU

As laid down in Articles 24(1) TEU and 275(2) TFEU, the Court can oversee the 'mutual non affection clause' established in Article 40 TEU. It shall ensure that CFSP and non CFSP acts do not interfere with each other. The first section of the latter article is identical to its pre-Lisbon form, namely ex Article 47 EU. It protects the TFEU policies from any CFSP influence or 'invasion'.[118] Pre-Lisbon, this has led to the *impression* of the primacy of Community Law (now TFEU policies) over Union Law (CFSP policies for example).[119] This is in line with the Court's opinion that when the competence of the Union is at issue, it could not be entirely excluded.[120] It stated that nothing in the TEU (therefore CFSP matters) could affect the Community policies, but nothing was written about the possibilities of community policies encroaching on CFSP matters.

Post Lisbon, a second section to Article 40 TEU was added. It mirrors the first in that it protects the intergovernmental nature of CFSP policies by blocking TFEU powers from affecting CFSP

[116] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 497
[117] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 499
[118] Ibid p.500
[119] Case C-176/03 Commission v. Council (Environmental Crime) [2005] ECR I-07879, Case C-170/96 Commission v. Council (Airport Transit Visa) [1998] ECR I-02763
[120] Principle found in Case C-124/95 T*he Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-00081

policies. This does not only end the primacy that was given to TFEU policies, but also requires the Court to protect political discretion in the field of CFSP policies from the more legalised TFEU policies.[121] As AG Kokott has explained in her opinion in the Kazakhstan agreement case, the two 'non-affection clauses' in the first and second paragraphs of Article 40 TEU have been formulated 'symmetrically'.[122] Meaning that: *"In order to comply with the spirit of Article 40 TEU, the unanimity principle of the CFSP must not be allowed to be undermined by the procedural rules of the communitised policies, nor must this unanimity principle of the CFSP be permitted to 'infect' the communitised policies."*[123]

However, abolishing the hierarchy on whether a policy should be based on a CFSP or TFEU provision might lead to future confusion and disagreements. The Court has already ruled on the matter and will likely continue to do so.[124] This will be discussed further below, in the section regarding the Court's jurisdiction in practice.

b. Individual restrictive measures under Article 275(2) TFEU

The new exception found under the second paragraph of Article 275 TFEU further extends the Court's jurisdiction in a direct but still limited way when it establishes jurisdiction of the EU Courts over actions of annulment (Article 263 TFEU) of restrictive measures against individuals' sanctions.[125] What might look like a quite narrow area of jurisdiction resulted in an enormous number of cases as restrictive measures are by far the most contested CFSP acts since sanctions interfere directly with individuals' rights.[126] This has therefore given the Court numerous opportunities to rule on matters such as the role and protection of fundamental rights in the area

[121] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 500
[122] *Commission v Council* (C-244/17) [2018] ECLI:EU:C:2018:364 (Kazakhstan agreement), Opinion of AG Kokott para 50
[123] *Commission v Council* (C-244/17) [2018] ECLI:EU:C:2018:364 (Kazakhstan agreement), Opinion of AG Kokott para 50
[124] See Case C-130/10 *Parliament v. Council* [2012] ECLI:EU:C:2012:472 (UN Sanctions); Case C-658/11 *Parliament v Council [*2014] ECLI:EU:C:2014:2025 (Piracy Agreement); Case C-263/14 *Parliament v. Council* [2016] ECLI:EU:C:2016:435 (Piracy Agreement II/Tanzania).
[125] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 500
[126] C. Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions', (2014) 51 Common Market Law Review, 869–906.

of CFSP. This Article is in line with the Court's stance in regards to the *Segi* and *Kadi case* as Article 275 TFEU does not make a distinction as to the EU or UN origin of a sanction.[127] The general interpretation of the Court is that it only extends its review to cover CFSP decisions that provide for restrictive measures against natural and legal persons that are implemented by the union (ie Regulations under Article 215 TFEU).[128] For now, only an action of annulment is considered a direct action. However, the Court will interpret this more broadly in its upcoming jurisprudence. This will be assessed later through the Rosneft case. However, the AG opinion in the latter case has shed some light on the use of Article 275 TFEU.

The opinion of AG Whatelet was significant due to its introduction of the key notions of the 'carve-out' and 'claw-back' provisions. The 'carve-out' is a restriction of the general jurisdiction of the CJEU conferred in Article 19 TEU. According to AG Whatelet, it is: *"the unreviewable nature of certain acts adopted in the context of CFSP".*[129] The carve-out exceptions which have been the main subject of this thesis so far consist of the second paragraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU respectively. AG Whatelet then explains the 'claw-back' exception, which can be found under the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of 275 TFEU. This is where the Court may review the compliance with Article 40 and legality of decisions providing for individual restrictive measures against legal or natural persons adopted by a CFSP decision.[130]

3.3. The Court's jurisdiction in practice

This section will assess the Court's jurisprudence after the entry into force of the Lisbon Treaty. It will focus on the 'carve-out' provision, which consists of cases where the main question is whether or not the matter qualifies as a CFSP measure and falls under the carve-out exceptions under

[127] C. Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions', (2014) 51 Common Market Law Review p.881
[128] ibid p.883
[129] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet in section V(A)(2)(b).
[130] Peter van Elsuwege, 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case' (Verfassungsblog 2017)

Articles 24(1)TEU/275(2) TFEU and Article 40 TEU.[131] We can place these cases in more of a 'procedural context' as the Court ruled that measures that touch upon certain aspects of CFSP do not instantly entail a restriction in its litigation as ruled in the *EU Mauritius case* which will be discussed below. [132] In the words of AG Bobeck, these acts are rather, by their substance, '*normal administrative acts*'.[133] The cases in this section will therefore be of 'internal' issues and specific aspects of CFSP missions, such as cases of public procurement (Elitaliana v Eulex Kosovo)[134] or staff management (H v Council) [135] that, in principle, are acts that are indistinguishable from acts taken in other EU policy fields.[136]

a. The procedural aspect

The Lisbon Treaty has significantly reformed the legal framework of the EU's external policies. In fact, it introduced Article 218 TFEU which provides the procedure for negotiating and concluding international agreements. Nevertheless, depending on the nature and subject of the agreement, the procedural requirements differ.[137] It comes to no surprise that, seeing the specificity of the CFSP area, this requires its very own procedure. Regarding agreements that exclusively or principally concern the CFSP, High representatives instead of the Commission will have the right of initiative and negotiations.[138] The European Parliament ('EP'), which gained overall more power in external relations after the Lisbon Treaty came into force, is still rather limited towards CFSP matters.[139] Article 218(6) TFEU states that the EP has no right of consent nor the right to be consulted in regards to agreements that relate exclusively to the CFSP. Moreover, subsection 10 of the same Article grants the EP to be: *"immediately and fully informed at all stages of the*

[131] As laid down by AG Bobek in the CSUE v KF case, to be considered a CFSP provision, it must formally and substantially relate to the CFSP. See *European Union Satellite Centre v KF* (C -14/19 P) [2020] ECLI:EU:C:2020:492, Opinion of AG Bobek para 61.
[132] Case C-658/11 *Parliament v Council* [2014] ECLI:EU:C:2014:2025 (EU- Mauritius Transfer Agreement)
[133] *European Union Satellite Centre v KF* (C-14/19 P) [2020] EU:C:2020:220, Opinion of AG Bobeck para 81
[134] Case T-213/12 P *Elitaliana SpA v Eulex Kosovo* [2013] ECLI:EU:T:2013:292
[135] Case C-455/14 P *H* [2016] ECLI:EU:C:2016:569
[136] Lorin-Johannes Wagner, 'A Deconstruction of the Jurisdiction of the CJEU in CFSP Matters – Enlightenment at the End of the Tunnel?' (2020) Graz Law Working Paper Series 08-2020 p.1
[137] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1379*
[138] Article 218(3) TFEU
[139] Article 36 TEU

procedure".[140] Due to its rather limited reach, it is the institution that brings the most cases before the Court as it is more concerned regarding the exact scope of CFSP and its relation to other external policies.[141]

The Commission was expected to be the principal "litigator" and not, as it turned out, the EP. This came as a surprise to many, as there was a prevalent belief that Article 218 TFEU would bring many inter-institutional litigations before the ECJ.[142] High representatives are the head of CFSP within the Council, but also Vice-president within the Commission. This dual function discouraged the Commission from initiating proceedings against the Council to avoid any CFSP influence on the TFEU competences.[143] However, this is not set in stone as *the EU Mauritius Transfer Agreement case* will demonstrate.[144] In this case, the Parliament will challenge the Council on several grounds. It sought the Court's clarification on what is meant when discussing 'exclusive' CFSP agreements in regard to Article 218(6) TFEU. Furthermore, it believed Article 218(10) TFEU grants the EP to be part of all international agreements, including those of CFSP subject.[145]

The EU concluded numerous agreements based on the various UN Security Council resolutions calling for an end to acts of piracy and armed robbery in the Somali region. As part of its CFSP mechanism, the EU launched in 2008 its Naval Force Operation Atalanta to fight off piracy in the Somali coast and to transfer the suspects of piracy. One of these transfer agreements was with Mauritius.[146] The EP filed an action for annulment as it believed that the agreement did not relate

[140] Article 218(10) TFEU
[141] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1380*
[142] Peter Van Elsuwege, *The Potential for Inter-Institutional Conflicts before the Court Justice: Impact of the Lisbon Treaty* in Cremona and Thies (eds.), The European Court of Justice and External Relations Law: Constitutional Challenges (Hart Publishing, 2014) 123 - 124
[143] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1380*
[144] Case C-658/11 *Parliament v Council* [2014] ECLI:EU:C:2014:2025
[145] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1380*
[146] Council Decision 2011/640/CFSP on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, 2011 O.J. L 254

exclusively to the CFSP but to other policies as well.[147] In addition, the EP held that the Council had violated its duty of information.[148] Its claim, based on Article 218(6) TFEU, was rather unsuccessful. However, the Court mainly focused on the second claim touching upon Article 218(10) TFEU and annulled the decision due to the delayed communication of the Council and hence the breach of the EP's right to information.[149]

This case highlights the change in nature of the CFSP area post Lisbon Treaty and that it could no longer escape a form of judicial or parliamentary control.[150] As stated in AG Bot's opinion, the area of CFSP: *"like the Union's other policies, is subject to respect for fundamental rights".*[151] It cannot escape its duty to respect Article 51(1) of the EU Charter of Fundamental rights ('CFR').[152]

b. The substantive aspect

The substantive aspect examples presented in this thesis touches upon public procurement and staffing management related to CFSP civilian missions.[153] In the Elitaliana case, the Court established its jurisdiction regarding the budgetary commitment for CFPS matters.[154] The General Court had ruled that the defendant lacked legal capacity and judged that it was not necessary: "*to rule on the alleged lack of jurisdiction of the General Court concerning acts adopted on the basis of the provisions of the FEU Treaty relating to the CFSP."*[155] In the appeal, the AG originally did not discuss the jurisdiction issue.[156] After an additional hearing which was solely about the Court's own jurisdiction, AG Jääskinen issued a second opinion where he recommended the jurisdiction

[147] Case C-658/11 *Parliament v Council* [2014] ECLI:EU:C:2014:2025 para 25
[148] ibid paras 75 and 76
[149] ibid para 86
[150] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1388*
[151] *Parliament v Council* (C-658/11) [2014] ECLI:EU:C:2014:4, Opinion of AG Bot para 119
[152] Peter Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament* v. *Council* (*Pirate Transfer Agreement with Mauritius)' (2015) 52(5) CML Review 1390*
[153] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 60
[154] Case T-213/12 P *Elitaliana SpA v Eulex Kosovo* [2013] ECLI:EU:T:2013:292
[155] Ibid para 45
[156] *Elitaliana SpA v Eulex Kosovo* (Case T-213/12 P) [2013] ECLI:EU:T:2013:292, Opinion of AG Jääskinen [2014].

of the Court as, regardless of the nature of the act, it fell within the budgetary constraints of the Union.[157]

The Court stated in its appeal that the derogations laid down under Article 24(1) TEU and 275(2) TFEU could not be so extensive as to exclude the Court's jurisdiction to interpret and apply the relevant provisions of the Financial Regulation with regard to public procurement.[158] Therefore, it established its jurisdiction due to the fact that the award of a public contract by the Head of Mission of EULEX Kosovo resulted in expanses being charged to the EU budget under Article 41 (2) TEU.[159] This is another example of how the General Court has shown restraint from acting upon CFSP matters, which is something that the CJEU has never shied away from.[160] Another interesting aspect of the case is that it reveals the diversity of views in regards to the Court's jurisdiction within the EU judiciary.[161]

A similar outcome was reached in the C-455/14 P *H case.*[162] It started with an appeal of an Order of the General Court.[163] Initially, the General Court had refused to rule on the issue since it pertained to CFSP matters, therefore interpreting broadly the EU Judiciary's limitation set in Article 24(1) TEU and 275 TFEU. This was approved by both the Council and the Commission as they had raised a plea of inadmissibility.[164] When appealing the case, the applicant argued that the staffing issue was an administrative act and should be viewed by the Court, regardless of the legal basis of the European Union Police Mission.[165] AG Wahl in his opinion of the appeal agreed with the General Court concerning its lack of jurisdiction.[166] However, the Court saw an opportunity to extend its jurisdiction and ruled that the decision adopted by the Head of Mission of the European

[157] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 164
[158] Case C-439/13 P *Elitaliana SpA v Eulex Kosovo* [2015] ECLI:EU:C:2015:753 para 49
[159] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 59
[160] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 164
[161] Ibid p.164
[162] Case C-455/14 P *H* [2016] ECLI:EU:C:2016:569
[163] Case T-271/10 *H v Council* [2014] ECLI:EU:T:2014:702
[164] ibid para 14
[165] Case C-455/14 P *H* [2016] ECLI:EU:C:2016:569 para 29. See also the Council Decision 2009/906/CFSP on the European Union Police Mission (EUPM) in Bosnia and Herzegovina, 2009 O.J. L 322/22
[166] *H v Council* (C-455/14) [2016] ECLI:EU:C:2016:212, Opinion of AG Wahl paras 30 - 94

Union Police Mission in Bosnia and Herzegovina regarding the relocation of a temporary transfer of a staff member in the later countries fell within the Court's jurisdiction.[167] It was of the opinion that the limitations laid down in the Treaties cannot extend to all CFSP matters.[168] were the Court to stick to that reasoning, it can be assumed that many other CFSP cases have yet to be heard.

Therefore, the Court has interpreted Articles 24(1) TEU and 275(2) TFEU in a very narrow manner, and by doing so, clarified its interpretation over these provisions.

c. Opinion 2/13: a political act hiding behind legal argumentation?[169]

The most controversial aspect of CFSP is that, due to its fundamental nature and in contrast to the majority of the policies within the EU legal framework, there isn't necessarily space for the important notions that make the EU a democratic entity. Notions like fundamental rights, the rule of law or institutional balance have to be set aside if one desires the most effective outcome. The fact that CFSP decisions and regulations have a temporary nature is one the reasons why they have slipped through the cracks of today's more sensitive society. The accession of the Union to the European Convention on Human Rights ('ECHR') would have resolved some of the controversies regarding the lack of space for the basic principles that found the EU, which would normally be up to the Court to enforce. In other words, it created a possibility to fill the policy's judicial gaps.

Prior to the Lisbon Treaty, the accession to the ECHR was always going to be difficult since: *"the Union's competence to legislate on the subject-matters dealt with in the Convention has not been (...) transferred from the Member States to the Union".*[170] The previous attempt at accession, Opinion 2/94[171], was shot down by the Court as it rejected the notion of external

[167] Koutrakos P, 'The European Union's Common Foreign and Security Policy after the Treaty of Lisbon' (2017) Swedish Institute for European Policy Studies 60
[168] Case C-455/14 P *H* [2016] ECLI:EU:C:2016:569 para 44, 45, 55
[169] This title has been borrowed from Graham Butler in his *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) page 168
[170] Max Sørensen, *The enlargement of the European Communities and the Protection of Human Rights* in Bartholomeus Landheer (ed), European Yearbook vol. XIX (Martinus Nijhoff Publishers 1973) 7
[171] Opinion 2/94, ECLI:EU:C:1996:140 (*'Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms'*).

control by the 'Strasbourg machinery'.[172] One of the concerns of the Court during the 2/94 Opinion was the difference of the decision-making in the then second and third pillars which diverged strongly from the European Community's standard decision process.[173]

In the amendments of the Lisbon Treaty, Article 6(2) TEU makes it possible Treaty-wise for the accession of the EU to the ECHR.[174] The intense round of discussions between the Council of Europe and the Commission from 2010 to 2013 resulted in what we know as the Draft Accession Agreement ('DAA').[175] To ensure the compatibility of the latter with the Treaties, the Commission asked the Court to issue an opinion under the Opinion procedure of Article 218(11) TFEU.[176] The anticipation was high as the Court had already rejected once before the accession to the ECHR.

As foreseen, the Court issued a negative opinion, namely Opinion 2/13.[177] The outcome was that the DAA was contrary to EU law as it undermined its autonomy and entire legal order.[178] Its role over CFSP matters in the DAA was one of the reasons why the Court came to that conclusion and found the DAA to be incompatible.[179] In fact, the proposed DAA would allow the European Court of Human Rights ('ECtHR') to have jurisdiction to cover the entirety of the Union's policies. From a legal standpoint, it means that the ECtHR would be above the ECJ and would therefore have a higher ranking than the ECJ. The main question the Court had was whether it would take into account the specifics, mainly that certain policy areas such as the CFSP had a unique position within the EU's legal order.

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[172] Murray L J, 'The influence of the European Convention on Fundamental Rights on Community Law', (2009/2010) 33(5) Fordham International Law Journal 1388 at 1397
[173] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 165
[174] Supported by Protocol 8 and Declaration 2 of the Treaties
[175] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 165
[176] The Opinion procedure is meant for the Court to provide its opinion on the drafts that touch upon foreign relations since it holds a strong influence in those regards. See, Graham Butler, Pre-Ratification Judicial Review of InternationalAgreements to be Concluded by the European Union in Mattias Derlén and Johan Lindholm (eds), The Court of Justice of the European Union: Multidisciplinary Perspectives (Hart Publishings, 2018).
[177] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*') para 258
[178] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 492
[179] Ibid p. 492

The most interesting aspect of its opinion is that the Court exercised jurisdiction over the DAA in matters regarding the CFSP area. In the opinion of the Court, accepting that a non-EU body might have jurisdiction over an EU policy - which the Court itself does not possess, is a daring proposal.[180] The fact that the Court was restrained from hearing most CFSP matters and that a non-EU Court would have the possibility to interpret EU law made it impossible, in its opinion, for the Court to accept the DAA.[181]

The Court further stated that, although the Commission sees its scope significantly broad enough to examine the same cases the ECtHR would regarding Human Rights violations, a view that Member States have disagreed with, the Court did not have the opportunity to yet define the extent to which its jurisdiction is limited in CFSP matters.[182] In a rather unsurprising way, it did not take the present opportunity to define that limit in its Opinion. The question arises on whether it will ever do so. Since the Court was restrained from acting in certain CFSP areas due to the EU Treaties, it can only be explained with reference to EU law. By granting the ECtHR judicial review over areas for which the Treaties limited the Court's jurisdiction, it would amount to the exclusive transfer of EU law to a non-EU legal body.[183] The Court referred to a previous Opinion which stated that such exclusive transfer was not possible to a non-EU body.[184]

What may be drawn from the Court's remarks is that it wishes for the DAA to limit the extent of the ECtHR's jurisdiction on legal acts having a CFSP legal basis.[185] It viewed the lack of similar derogations imposed on the ECtRH in the CFSP field as a threat to the very nature of the EU legal order.[186] Another way for the Court to be content would be to 'simply' expand the

[180] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 165. See also, Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*') paras 254 and 255
[181] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*') para 255
[182] Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*') para 251
[183] Ibid para 255
[184] Stated in Opinion 2/13, ECLI:EU:C:2014:2454 ('*Accession of the European Union to the European Convention for the Protection of Human Rights*') para 256. Referred to Opinion 1/09, EU:C:2011:123 ('*Creation of a Unified Patent Litigation System*'), paras 78, 80 and 89
[185] Jörg Polakiewicz, 'Accession to the European Convention on Human Rights – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' [2016] 36 Human Rights Law Journal 19
[186] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 166

jurisdiction of CFSP matters to the Court.[187] It is difficult to draw a line at this particular crossover between the Court's desire to either protect the EU legal order or its own interest. Opinion 2/13 has been said to cast even more doubts concerning the Court's jurisdiction in regard to CFSP as some even suggested that it even excludes all judicial authorities dealing with Union legal matters within the field, except for itself.[188]

On a hypothetical note, if the drafters of the DAA would allow the ECtHR to have jurisdiction over CFSP matters, what would stop the ICJ from having CFSP cases end up before it as well? This would clash with Article 344 TFEU which specifies that disputes regarding EU Treaties are not to be dealt elsewhere but from the Court itself.[189] Moreover, Article 344 TFEU seems to have been interpreted narrowly by the Court in Opinion 2/13.[190]

To conclude, there were already many doubts concerning the Court's role in the area of CFSP before Opinion 2/13, but the Court made sure to add some more. Most likely, if the Treaties have not been amended in the meanwhile, another discussion over its jurisdiction will be found in a new Opinion concerning a new DAA.[191] Therefore, Opinion 2/13 represents a political play from the CJEU at its finest. The Court has always indirectly criticised in its jurisprudence, or more directly in the Opinion, the limitation of its role in the CFSP as it could not properly protect the foundational principles of the EU.

4. Rosneft and the institutional battlefield

Following the first category mentioned at the beginning of the third chapter, which was in part dedicated to whether a measure would in principle fall under the carve-out provisions, this section will be dedicated to the cases where the Court created an 'exception to the exception' in order to exercise its jurisdiction. In other words, a measure brought back to the Court's

[187] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) p.166
[188] Christophe Hillion, 'A powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Changes* (Hart Publishing, 2014) 53
[189] Geert de Baere, *Constitutional principles of EU external relations* (Oxford University Press, 2008) 177
[190] *H v Council* (C-455/14 P) [2016] ECLI:EU:C:2016:212, Opinion of AG Wahl para 47
[191] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 168

jurisdiction by virtue of a 'claw-back'.[192] Even though it had more of a habit to rule on 'carve-out' cases,[193] it happened to extend its jurisdiction in cases concerning individual restrictive measures such as in the Rosneft and most likely in the Neves 77 case.[194] The 'claw-back' provision as well as the full integration of the CFSP into the EU legal order suggests that the Lisbon Treaty has given more power to the CJEU in the field of CFSP.[195] This thought is supported by the CJEU ruling of the Rosneft case. The next chapter will be dedicated to the latter case since the nature of the discussion will be different due to its pending status.

The *Rosneft case* is most likely one of the most ground-breaking cases in regard to the Court's jurisdiction in CFSP matters as it was the first 'claw-back' case where the Court went beyond its usual broad interpretation of the Treaties and further expanded the already existing exception found in Article 275(2) TFEU.[196] In contrast to Article 40 TEU, Article 275(2) TFEU was a novelty. In terms of understanding, Article 267(1)(b) TFEU is quite straightforward and has been used to monitor the compliance required by Article 40 TEU. However, the notion of 'review of legality' in Article 275(2) was yet to be defined and the Court was quick to seize the opportunity to do so.

In order to have a complete understanding of the exceptional circumstances of this case, a quick rundown of the adoption process of individual restrictive measures under EU law is necessary. This process is two folded as there is a need for two different legal instruments to give full effect of these measures in the EU legal order.[197]

To begin with, the Council starts by adopting a decision under Article 29 TEU to approach a particular matter. Such a decision must pursue one of the objectives laid down under Article

[192] Christian Breitler, 'Jurisidction in CFSP matters - Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022)
[193] Such as those discussed in the previous chapter
[194] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236; Case C-351/22 *Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală* - Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 31 May 2022
[195] Peter van Elsuwege, 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case' (Verfassungsblog 2017)
[196] Neves 77 could possibly reach the podium however it has not been ruled.
[197] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart Publishing 2019) 173

21(1) TEU. Even though it looks like the Council is restrained to follow these objectives, they are written in such a broad way that allows it to have a considerable amount of discretion. The following step is to adopt the decision into an instrument, here in the form of a regulation, as it has to be directly implemented in the Member States' legal system in order to give effect to the decision. The regulation becomes Union Law under Article 215(2) TFEU, which is the proper legal basis to sanction natural or legal persons, groups, and non-State entities.[198] This is yet another interesting factor as the decision finds its legal basis in the TEU while the regulation is based under the TFEU.

4.1. Background

Following the Russian invasion of Crimea and the overall Russian destabilisation of Ukraine, the EU enacted a multitude of Council Decisions in order to apply pressure on the Russian state.[199] In September 2014, it included a series of bodies engaging in the sale or transportation of crude oil or petroleum products. The purpose to expand its sanctions to individuals and companies such as banks, energy and defence industries was to cause heavy damage to the Russian economy.[200] Rosneft, a Russian state-owned company, which is active in those sectors, was included in the EU sanctions.[201]

Rosneft lodged two actions back in 2014. An annulment procedure under 263 TFEU in regards to both the Council Decision and Regulation, as well as an action for judicial review before the High Court of the United Kingdom ('High Court').[202] Rosneft believed that both the initial measures and the national measures implementing them should be rendered invalid.[203] As there are multiple Rosneft cases, this thesis will focus on the judicial review before the High Court as the outcome of the latter action has a very important impact on the CJEU's jurisdiction in the field of CFSP.

[198] Article 215(2) TFEU. There have been many debates concerning the use of either Article 75 or 215 TFEU where the Court has ruled that in case of external foreign policy, Article 215 TFEU is more adequate.
[199] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236 27
[200] The European Council, 'Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the name of the European Union on the agreed additional restrictive measures against Russia' (2014)
[201] As of 8 Sept. 2014, Rosneft was included in the list of Annex III to Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 2014 O.J. L 229/13.
[202] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236 32
[203] Ibid

More precisely, it will focus on the validity questioned by the applicant on the national legislation implementing the provisions of the contested Regulation which required the Member States to impose criminal penalties for any breach of the contested act's provisions.

4.2. The question referred

The High Court deemed it necessary to refer questions to the ECJ since, if it would find the measures to be valid, it was unsure of the interpretations of certain provisions.[204] Moreover, it discovered that there had already been different interpretations by several Member States regarding these provisions and for the sake of uniform application of EU law, a preliminary ruling was requested.[205]

The High Court referred several questions to the ECJ. However, for the scope of this thesis, only the first question will be addressed as it touches upon the Court's jurisdiction. Essentially, the referring Court is asking whether Articles 19, 24 and 40 TEU as well as Article 275 TFEU and 47 CFR must be interpreted as meaning that the Court has jurisdiction to give a preliminary ruling, under Article 267 TFEU, on the validity of an act adopted based on provisions relating to CFSP, such as decision 2014/512.[206]

Before going into the Court's ruling, it is essential to point out its impact in the CFSP sphere and what door it opened when the Court accepted the request. A CFSP regulation as such is within the Court's jurisdiction to review as it is adopted under Article 215 TFEU, which lacks the general protection CFSP provisions are awarded. Therefore, it may provide rulings in direct or indirect actions on measures which are based on this legal basis. However, the Court does not have jurisdiction to review Council decisions, as its legal basis is Article 29 which is under Title 5 of the TEU and restricts the Court's access.[207] The significance of this judgement is immense in regards to the Court's expansion over CFSP matters as it will seize the opportunity offered by the

[204] Ibid para 36
[205] Ibid
[206] Ibid para 46
[207] And is therefore limited by Articles 24(1) TEU and 275 TFEU

Rosneft case to expand Article 275(2)'s exception with the possibility of ruling on preliminary rulings of validity in CFSP matters.

4.3. Opinion of AG Whatelet

The opinion of AG Whatelet was significant due to its introduction of the key notions of the 'carve-out' and 'claw-back' provisions, as discussed under section 2.4.(b). The 'carve-out' is a restriction of the general jurisdiction of the CJEU conferred in Article 19 TEU. According to AG Whatelet, it is: *"the unreviewable nature of certain acts adopted in the context of CFSP".*[208] The carve-out exceptions which have been the main subject of this thesis so far consist of the second paragraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU respectively. AG Whatelet then explains the 'claw-back' provision, which can be found under the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of 275 TFEU. This is where the Court may review the compliance with Article 40 and legality of decisions providing for individual restrictive measures against legal or natural persons adopted by a CFSP decision.[209]

In his analysis, AG Whatelet stated that, in accordance with the Court's jurisprudence[210], the 'carve-out' provisions must, like any other derogation, be interpreted narrowly. Since the scope of the 'claw-back' provisions cannot be broader than the provisions of the 'carve-out'[211], by value of transitivity, the 'claw-back' provisions must be interpreted narrowly themselves.[212] In light of this conclusion, AG Whatelet is of the opinion that the CJEU should review the compliance mechanism of all CFSP acts under Article 40 TEU with either an action of annulment or preliminary ruling of validity as well as review the legality of CFSP decision adopted by the Council under Title V by either an action of annulment or preliminary ruling of validity.[213]

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[208] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet in section V(A)(2)(b).
[209] Peter van Elsuwege, 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case' (Verfassungsblog 2017)
[210] See the judgments in Parliament v Council (C-658/11, EU:C:2014:2025, paragraph 70) and Elitaliana v Eulex Kosovo (C-439/13 P, EU:C:2015:753, paragraph 42).
[211] It is not possible for the second paragraph of Article 275 TFEU to re-establish the Court's jurisdiction in matters that have not yet been excluded from the first paragraph of Article 275 TFEU
[212] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet para 64
[213] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet para 65

This goes against the opinion of his colleague, AG Kokot, in regards to her thoughts over Opinion 2/13 for the accession of the EU to the ECHR, as she concluded that: "*the Treaties … specifically do not provide for the Court of Justice to have any jurisdiction to give preliminary rulings in relation to the CFSP*".[214] However, Whatelet believed that it would undermine the crucial principles found under Article 23 TEU such as the rule of law, the protection of human rights and fundamental freedoms[215] and unquestionably includes the right of access to a Court and effective legal protection.[216]

With this opinion, the AG stayed as close as possible to the normal rules governing the preliminary rulings. Although it is true that denying the request would have led to national Courts refraining from seeking clarifications on certain points of EU Law, this is yet another chip off the CFSP sustaining its independence. It is even more significant as, albeit by an alternative method, the Court arrived at the same conclusion.[217]

4.4. The Court's ruling

Before diving into the Court's reasoning as to why and how it justified its involvement over the matter, it is of particular interest to discuss the Court's arguments in regard to the inadmissibility claim. As expected, there have been several objections from interested parties who believed that the Court lacked jurisdiction.[218] Essentially, the Council believed that the issue could be resolved by reviewing the contested Regulation alone and did not see the necessity to review the validity of the Decision 2014/512. This was intended to block the Court from exercising a review on the CFSP legal basis, but to have it focus on the contested regulation instead.[219]

[214] Opinion pursuant to Article 218(11) TFEU (Opinion 2/13) [2014] ECLI:EU:C:2014:2475, Opinion of AG Kokott, para 100 -101
[215] See Article 21(1) TEU
[216] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet para 66
[217] Stian Øby Johansen, 'Judicial control of EU foreign policy: the ECJ judgement in Rosneft' (EU Law Analysis 2017)
[218] Namely the Council, the Polish and Estonian governments
[219] Stian Øby Johansen, 'Judicial control of EU foreign policy: the ECJ judgement in Rosneft' (EU Law Analysis 2017)

Without surprises, the Court refuted the claim by using arguments that are not entirely adequate in the sphere of CFSP, as it mainly played on the importance of Article 19(1) TEU and an effective judicial protection. Interpreting once again Article 24(1) TEU and 275(2) TFEU in such a way that the very political nature of CFSP was of no importance.[220] The Court's answer and attitude regarding this claim was a glimpse as to what could be expected in its actual answer to the question.

Once the admissibility aspect had been answered, the Court delved deep into the first question and found, without surprise, that it was indeed allowed to rule on the validity of the case. The Court first stated that Article 40 TEU does not suggest a particular form in which the judicial monitoring needs to be carried out.[221] As the monitoring falls within the Court's jurisdiction and, per Article 19(1) TEU, the Court must hear preliminary rulings upon the request of national Courts, the CJEU has the right to determine the validity of acts adopted by the institutions of the Union.[222]

Secondly, the Court agreed with the advisory opinion of AG Whatelet by saying that it had to uphold the importance of having a complete system of judicial protection for individuals, this includes the fact that they should have the opportunity to challenge the validity of CFSP measures which directly affect their individual rights, pursuant to Article 47 FR.[223] Instead of focusing on the 'claw-back' provisions as the AG did, the Court's argument was more about the rule of law and the need to maintain the important notion of coherence of judicial protection.

This case shows that the Court grants itself wide power to adjudicate in case of CFSP matters. Whereas before the Court would stretch the Treaties, it became truly inventive to adjudicate in this case when faced with the shortcomings of the Treaties. If it was not clear in its previous jurisprudence, it became apparent that the CJEU will not stop pushing around the fragile boundaries of the CFSP until it resembles any other EU policy.

[220] Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] C:2017:236 para 51
[221] ibid para 62
[222] ibid
[223] Ibid para 73

5. Neves 77 or the road towards Judicial monopoly

On the 31st of May 2022, the Regional Court of Bucharest lodged a request for a preliminary ruling on the *interpretation* of Decision 2014/512/CFSP ('the CFSP Decision')[224] which consisted of restrictive measures in view of Russia's action to destabilise the situation in Ukraine (which has been in place since the Russian invasion of Crimea).[225] The dispute is between the Romanian company Neves 77 Solutions SRL ('Neves 77') and the tax fraud department of the Romanian national tax administration agency ('national agency'). In summary, Neves 77 acted as an intermediary for a transaction between Ukrainian and Indian clients for the delivery of certain radio sets that were manufactured in Russia.[226] Following the transaction, the Romanian department in charge of Export Control issued a fine to Neves 77 and ordered the confiscation of the entire proceeds that came from the transaction. The fine and confiscation were appealed and that is when the Regional Court of Bucharest decided to refer three questions to the CJEU in regard to the interpretation of the CFSP Decision.[227]

At first glance, it seems odd that a Member State is lodging a preliminary ruling of interpretation concerning a national measure implementing a regulation, as per Article 288 TFEU, such instrument is directly applicable into the domestic legal system. However, as enshrined in the Council's best practice on implementation of restrictive measures, a Member State may, when deemed necessary, adopt additional legislation to freeze funds, financial assets, and economic resources at a national level.[228] It is in this instance that the CJEU is being asked to assess the proportionality of the authorization of a Romanian measure to confiscate an entire profit of a transaction.

[224] Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, 2014 O.J. L 229/13.
[225] Case C-351/22 *Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală* - Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 31 May 2022
[226] Christian Breitler, 'Jurisidction in CFSP matters - Conquering the Gallic Village One Case at a Time?' (European Law Blog, 13 October 2022)
[227] ibid
[228] Council of the European Union, 'EU Best Practices for the effective implementation of restrictive measures', 10572/22, Brussels, 27 June 2022, para 25

The possible outcome of this case is truly phenomenal since a preliminary ruling of interpretation in CFSP matters has never been dealt with, and, if the Court were to follow the intentions of the Treaty drafter's, the answer to the request would be straightforward. If the Court would accept this preliminary ruling request, the significance would be tremendous as, for the first time, the Court would allow the possibility of a preliminary ruling of interpretation based on Article 267 TFEU in the CFSP context.[229] It stands to reason that this was only a question of time, as seen in its previous jurisprudence, the Court will always exercise its jurisdiction if presented with the opportunity to do so. One might say, especially after the Rosneft case, that this is the last brick before establishing a complete legal system of remedies and procedures in the realm of CFSP.

Quite frankly, it would be the most surprising turn of event if the Court were to refuse the preliminary ruling request. As described throughout this thesis, the Court has always played a tug of war between the Council, Treaty Drafters, and anyone that tried to steer it away from expanding its jurisdiction in this policy area. Therefore, for the sake of discussion, let us say that the Court will accept the request and rule on the matter. By analogy to the Rosneft case, the Court might either play on the 'coherence' argument or follow AG Whatelet's opinion to explain its involvement. Indeed, for AG Whatelet, if the Court could be competent to rule on the wider question of validity of a CFSP decision on restrictive measures, it should also be able to rule on the narrow question of interpretation.[230]

Were the Court to reject such a request, it would still be an interesting development as it would send back the area of CFSP into its inherent political realm. However, this would go against the internal struggles the Court has faced the last 30 years to uphold fundamental principles and values of the EU. The seemingly unassuming *Neves 77 case* has the potential to deprive the area of CFSP of its specificity or mark a significant shift in the attitude of the Court regarding its own jurisdiction. It could very well follow in the footsteps of Rosneft in its lasting effects over the field or be a bizarre turn of circumstances. In any case, an influential development in the ongoing project that is the European Union.

[229] Groussot X and Zemskova A, ' Using financial tools to protect the rule of law: Internal and External Challenges' in The Rule of Law in the EU: Crisis and Solutions' (2023) Swedish Institute for European Policy Studies p. 46
[230] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (C-75/15) [2016] ECLI:EU:C:2016:381, Opinion of AG Wathelet para 73-76

6. The impact of the Court's extended judicial review in the field of CFSP

The previous chapters of this thesis discussed the Court's formal jurisdiction over CFSP set out in the old Treaties, its jurisdiction in practice and how the post-Lisbon era has led to an expansion of its power. When looking at the timeline of the evolution of the CJEU's role in CFSP, one cannot help but ask: By involving itself in the area of CFSP, has the Court contributed to the protection of democratic legitimacy?[231]

This thesis will attempt to answer whether the Court's extended judicial review has impacted the very nature of the CFSP.

The contributions of the Court throughout the years have brought change to the area in ways that were not intended at the start. By involving itself, the Court gained the power to annul, hold sway over and review decisions of the national executives and, equally as important, created another doorway that allowed individuals to challenge decisions that directly affected their rights. This is arguably its most important contribution to democratic legitimacy.[232] Therefore, boosting the relevance of the law and scrutiny in an area that was deprived of it due to its political nature. In fact, the Court has always supported the exercise of its jurisdiction in order to uphold important principles which form the basis of the Union's foundational and democratic values, such as the rule of law, fundamental rights and freedoms, the principle of proportionality, an effective judicial system with remedies and much more. By doing so, it can be argued that the Court's exercised influence over CFSP matters is in fact a form of constitutional review. Indeed, the notion of constitutionalism in the context of Union law refers to the development and application of common EU norms and principles.[233] It generally aims to protect fundamental democratic values, namely democratic legitimacy, fundamental rights and separation of powers by the means of limiting politics.[234]

[231] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 493
[232] ibid
[233] Constitutional review is, when conducted by the judiciary, another form of judicial review see Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 493
[234] Lars Chr. Blicher and Anders Molander, ''Mapping Juridification' [2008] European Law Journal, 36 - 54

This is important to note, as it can be said that any form of constitutional review by unelected judges: *"stands in essential tension and may even pose a threat to democratic legitimacy".*[235] So on one hand the Court is extending democratic legitimacy by adding ways by which the executive decisions of political institutions can be challenged by individuals and entities that are affected by these decisions. And on the other hand, enacting constitutional review by unelected judges, thus potentially threatening democratic legitimacy.[236] This ambiguous situation is a result of institutional design, and quite frankly, cannot be helped.[237] Protection of fundamental rights by the Court is just as fundamental to democracy and democratic legitimacy. Political institution having the opportunity to enshrine in law *"democratically determined content"*[238] is also a critical aspect to maintain democratic legitimacy. If the Court were to overturn legislation born of democratic will in the name of safeguarding fundamental rights, is it to the detriment of democracy?[239]

As an interesting aside, there are as many democratic theories as there are political theorists, one of these being 'deliberative democracy'. Deliberative democracy is quite pertinent to the present subject, as the apparent contradiction between the Court protecting and hindering Democratic legitimacy by its actions presented above is accounted for in this particular form of institutional design. Said theory does not focus on the individual's preferences and personal opinions that may change in light of debate, but rather on the open and inclusive debate itself which leads to a common ground decision making.[240] Due to the fact that deliberative democracy is a constant process of open discussion, it would further institutionalise political freedom by making debate at all levels of society a core feature of the political process.[241] In which, the rule of law and

[235] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 494
[236] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 495
[237] ibid
[238] ibid
[239] ibid
[240] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press 2002); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology Press 1996).
[241] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 493

independent judicial review can help forward the political process together rather than taking away competencies from political institutions.[242]

According to Jürgen Habermas, democratic legitimacy can be reached if the combined political will is based in: "*a legally structured political community"*,[243] that bases itself in the rule of law and constitutionalism.[244] This follows the Court's jurisprudence as it exercises both judicial review and constitutional review.[245] Both components are necessary for democracy as one protects the legal framework for the formation of the collective while the other one protects the rights of individuals.[246]

We can now focus on the consequence of judicial review on the field of CFSP.

Due to new provisions in the Lisbon Treaty and events that unfortunately called for their use, such as the Russian invasion of Crimea in 2014 or of Ukraine in 2022, there has been a notable increase in the use of CFSP provisions, and, as a result, the CJEU's jurisdiction in CFSP matters has increased itself. These two facts have and will continue to provide the CJEU with new opportunities to exercise constitutional and judicial review over CFSP provisions, all by being restrained by Articles 24(1) and 40 TEU and Article 275 TFEU.[247]

A situation that will eventually arise from this will be the progressive removal of purely political overview and reach of CFSP matters, as the CJEU is creating an ever so comprehensive body of work with regards to its approach to the CFSP area. Whether or not these developments will lead judicial and political institutions to clash will hinge on the nature of the arguments presented by the CJEU. Indeed, the Court could in practice consolidate the constitutional functions of EU law

[242] Cristoph Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', in A. von Bogdandy and J. Bast (eds.), Principles of European Constitutional Law (Hart Publishing, 2010), 174
[243] Jürgen Habermas, *On the Internal Relation between Law and Democracy*, in J. Habermas, the Inclusion of the Other (Massachusetts Institute of Technology Press 2000) 448
[244] ibid
[245] Constitutional review is, when conducted by the judiciary, another form of judicial review.
[246] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 495
[247] ibid p.511

to limit political powers in the name of ensuring democratic legitimacy by protecting fundamental rights, but this would lead to the aforementioned clashes between institutions.[248]

As seen in its jurisprudence, the Court has, over the years, subjected the area of CFSP as much as possible to the main principles of the Union such as the rule of law. This is a recurrent situation simply because the Court desires a coherent and robust protection of fundamental rights and to apply an effective judicial system to provide appropriate remedies when these rights have been breached. This can be seen as a contribution to democracy and the rule of law.

Post-Lisbon Treaty, the Court has found success in reaching out to exercise its powers of judicial review by strengthening the legal framework for legitimation of CFSP policies. The relatively new development of Neves 77 has the potential to change the very nature of the CFSP area, policies, and relationship these CFSP policies in question might have with other EU policies. The exact extent of this change will be clearer once the case is published.

The ultimate result of this, it can be hoped, would be that these incremental changes with regards to the jurisdiction of the Court would lead to the true juridification of the area of CFSP. Indeed, a shift of power in favour of the EU judiciary with regards to CFSP could lead to a further democratisation of control over the CFSP related executive decisions of national parliaments, even though it is not expressly provided for in primary law.

[248] Eckes C, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) 22 European Law Journal 512

Conclusion

It is beyond doubt that, from the earliest stages of the implementation of what would become the CFSP, there was a conscious decision to keep this policy area exclusively into the political and intergovernmental realm. This is most obvious in the wording of the provisions found in the successive Maastricht, Amsterdam, and Nice Treaties. This, however, was not accounting for the various involvements of the Court which, over time, managed to find several niches in CFSP acts to, with great success, stretch the boundaries of its influence over proceedings. The role of the Court in theory drifted from practice greatly quite early on, as the Court found itself often at odds with the vision the Treaties' drafters had for it.

Due to a series of events in combination with the seminal changes sustained by the field of CFSP by the Lisbon Treaty itself, the Court has increased its influence to the point that it could be said that it is not far off from a complete framework of judicial overview. The Court seized the opportunity that presented itself in the increase of CFSP cases to rule on numerous 'carve-out' cases. However, faced with the apparent shortcomings in the Lisbon Treaty to protect individual's rights, the Court extended extensively its role with the 'claw-back' provisions to adjudicate in the Rosneft case.

With the arrival of Neves 77 and the potential sea change that the ruling may have on the entirety of the EU legal framework, one may ask whether we are spectators to the last days of the area of CFSP standing out amongst over policy areas. Indeed, there have been many new developments and the results of Neves 77 and the other cases that will undoubtedly follow will continue to redefine the nature of CFSP as we know it just like the Rosneft case did before.

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