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## Unravelling the Tensions

Impact of the Common Foreign and Security Policy of the EU  
on Fundamental Rights and the Intricacy of Freedom of  
Movement

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# Summary

The recent geopolitical situation, the Russian invasion of Ukraine, has driven the European Union to strengthen their action in the global political arena development. The European Union's Common Foreign and Security Policy (CFSP) is one of the instruments utilized by the European Union (EU) to deal with the situation. The CFSP has become a focal point of legal and political analysis, particularly concerning its impact on fundamental rights and the free movement of capital. Departing from that situation, the thesis attempts to delve into the complex question as its research question to find out how the EU balance its collective interests in pursuing sanctions with national sovereignty, the fundamental rights of individuals affected by the CFSP measures, and what is the CJEU role in the effort to strike a balance between those?

This thesis aims to analyse the intricate and conflicting issues that arise during the implementation of CFSP measures. It seeks to evaluate the impact of EU CFSP measures on national sovereignty, fundamental rights, and the free movement of capital within the EU. The study primarily focuses on the objectives, principles, and legal instruments pertinent to CFSP measures, such as the Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights (CFR) of the EU.

The analysis of the thesis begins by exploring the legal basis and evolution of CFSP, followed by an assessment of the EU CFR and its interplay with the CFSP measures. Subsequently, it will study the tensions between national sovereignty, individual rights, and CFSP measures, spotlighting landmark cases and legal challenges. They also try to analyse the competence of the EU and scrutinize the complexity surrounding the questions of which competence is better for the EU and its Member States regarding CFSP.

The study finds a multifaceted relationship between CFSP measures, fundamental rights, and the free movement of capital within the EU. It attempts to highlight the initial contributions, strengths and weaknesses of the CJEU's approach, and the ramifications for practitioners, policymakers, and scholar. Furthermore, it also attempts to speculate on the potential developments in the CJEU's approach to CFSP measures.

# Abbreviations

1. CFSP: Common Foreign and Security Policy
2. CFSP/CSDP: Common Foreign and Security Policy/Common Security and Defense Policy
3. CSDP: Common Security and Defense Policy
4. CJEU: Court of Justice of the European Union
5. CoE: Council of Europe
6. ECHR: European Convention on Human Rights
7. ECtHR: European Court of Human Rights
8. EEA: European Economic Area
9. EFTA: European Free Trade Association
10. ESDP: European Security and Defense Policy
11. EP: European Parliament
12. EU: European Union
13. GATT: General Agreement on Tariffs and Trade
14. HR: High Representative
15. ICCPR: International Covenant on Civil and Political Rights
16. ICESCR: International Covenant on Economic, Social and Cultural Rights
17. IMF: International Monetary Fund
18. ILO: International Labour Organization
19. MS: Member States
20. MSs: Member States
21. NATO: North Atlantic Treaty Organization
22. NGO: Non-Governmental Organization
23. OSCE: Organization for Security and Co-operation in Europe
24. PSC: Political and Security Committee
25. TFEU: Treaty on the Functioning of the European Union
26. TEU: Treaty on European Union
27. UDHR: Universal Declaration of Human Rights
28. UN: United Nations
29. UNHCR: United Nations High Commissioner for Refugees
30. WTO: World Trade Organization

# Preface

I express my sincere gratitude to numerous individuals and institutions who have supported me throughout my academic journey at not so young age, including the Swedish Institute for providing me with the scholarship to pursue a master's degree at Lund University. It is the most prominent educational establishment in Sweden, and the completion of this thesis is a testament to my academic journey's enrichment and the commencement of fresh intellectual explorations. Despite the complexities of the thesis topic, juggling with family responsibilities along with work, I have learned invaluable life lessons. I am deeply grateful for the unwavering support of the Swedish Institute, which has shaped my academic and professional trajectory.

I owe a special debt of gratitude to my supervisor, Professor Xavier Groussot. His mentorship has been nothing short of transformative. By allowing me to participate in the European Law Moot Court Competition 2023 in Bucharest, Romania, under his guidance, was a pivotal experience that inspired me to delve deeper into the subject matter of this thesis and to gain a better understanding of EU law. I also extend my thanks to my teammates André Blomquist, Pauline Heimann, and Laura Vargas for the enriching experiences and collaborative spirit they brought to the competition.

My wife, Shintia Suryama, and our beautiful daughter, Kyna F. Astian, have been my unwavering pillars of support through the entire journey of writing this thesis. Despite my struggles with reading, assignments, and moot court, I have been constantly supported and encouraged by my loving family and for that, I am incredibly grateful.

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In conclusion, this thesis stands as a testament to the collective efforts of all those who have contributed to my academic journey in Sweden.

Thank you from the bottom of my heart.

# 1 Introduction

## 1.1 Background and context

The European Union (hereinafter, ‘EU’), as a political and economic union, has evolved over the years, resulting in a complex legal and political landscape.<sup>1</sup> One of the critical policy areas in the landscape<sup>2</sup> is the Common Foreign and Security Policy (hereafter, ‘CFSP’), which aims to coordinate the foreign and security policies<sup>3</sup> of the EU Member States to promote stability, peace, and security.<sup>4</sup> The CFSP was established by the Treaty of the European Union (hereafter ‘TEU’) in 1993 to preserve peace, strengthen international security, promote international cooperation and develop and consolidate democracy, the rule of law, and respect for human rights and fundamental freedoms.<sup>5</sup> Its drive is to uphold the value of democracy, the rule of law, universality, the indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.<sup>6</sup>

As the EU has been actively involved in foreign and security policy, which has had a significant impact on fundamental rights and the free movement of capital made the CFSP become relevant as it seeks to foster a stable and prosperous international environment where Member States could, respectively, and effectively, pursue their interests. The CFSP has also become a crucial aspect of the EU’s external actions, which aims to protect its fundamental values and interests and promote them worldwide.<sup>7</sup>

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<sup>1</sup> Joshua C Fjelstul, ‘The Evolution of European Union Law: A New Data Set on the *Acquis Communautaire*’ (2019) 20 *European Union Politics* 670, 670–671.

<sup>2</sup> Panos Koutrakos, *The European Union’s Common Foreign and Security Policy after the Treaty of Lisbon* (Svenska institutet för europapolitiska studier (SIEPS) 2017) 8.

<sup>3</sup> As suggested by Koutrakos that states ‘Diplomatic efforts, development, trade, and environmental policies should follow the same agenda. In a crisis there is no substitute for unity of command.’ *ibid* 65.

<sup>4</sup> Consolidated version of the Treaty on the Functioning of the European Union 2016 (OJ C 202, 762016) art 21.

<sup>5</sup> ‘Foreign Policy: Aims, Instruments and Achievements | Fact Sheets on the European Union | European Parliament’ (31 August 2022) 1 <<https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements>> accessed 8 April 2023.

<sup>6</sup> Auswärtiges Amt, ‘The Common Foreign and Security Policy (CFSP)’ (*German Federal Foreign Office*) <<https://www.auswaertiges-amt.de/en/aussenpolitik/europe/-/228280>> accessed 26 April 2023.

<sup>7</sup> Luigi Lonardo, ‘Common Foreign and Security Policy and the EU’s External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union’ (2018) 14 *European Constitutional Law Review* 584, 590 <[https://www.cambridge.org/core/product/identifier/S1574019618000329/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S1574019618000329/type/journal_article)> accessed 8

CFSP contributes to the EU's objectives of preserving peace and bolstering international security, promoting democracy, the rule of law, and the respect for human rights and freedoms worldwide.<sup>8</sup> The contribution assists in creating a favourable environment for the free movement of capital within the EU and beyond, as countries that adhere to democratic principles and respect human rights tend to have more stable and predictable economies.

The CFSP plays a very important role in the EU legal and political landscape, and its development reflects the EU's commitment to act collectively in international affairs, allowing its 27 member states to exert a powerful collective influence<sup>9</sup> because the common policies will enable all of the 27 member states to carry more weight on the world stage rather if they are acting individually.<sup>10</sup> Nonetheless, CFSP has also been subject to many tensions due to the lack of power to prevent Member States from pursuing their individual foreign policies or interests.<sup>11</sup>

Furthermore, the impact of CFSP towards fundamental rights and the freedom of movement (for this thesis, particularly the free movement of capital) is also significant as seen in *Kadi and Al Barakaat International Foundation v Council and Commission*<sup>12</sup>, which dealt with EU obligation to observe fundamental rights when implementing United Nations Security Council resolutions by enacting a restrictive measure against certain persons, groups, or entities. The CJEU ruled that the EU must respect and protect fundamental rights when implementing such measures, even if they are based on international law.

The *PJSC Rosneft* case<sup>13</sup> (C-72/15) highlights the meaning of safeguarding the free movement of capital within the European Union, even when it comes to Common Foreign and Security Policy (CFSP). The legal implications of imposing restrictive measures on this

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April 2023 as cited in; Kirill Ryabtsev and Chiraz Belhadj Ali, 'International Politics Shaped by the EU: A Critical Analysis of the European Common Foreign and Security Policy' (2022) 14 Amsterdam Law Forum 10, 1 <<https://amsterdamlawforum.org/article/10.37974/ALF.456/>> accessed 26 April 2023.

<sup>8</sup> 'Foreign and Security Policy - EUR-Lex' <[https://eur-lex.europa.eu/summary/chapter/foreign\\_and\\_security\\_policy.html?locale=en&root\\_default=SUM\\_1\\_CODED%3D25](https://eur-lex.europa.eu/summary/chapter/foreign_and_security_policy.html?locale=en&root_default=SUM_1_CODED%3D25)> accessed 26 April 2023.

<sup>9</sup> Derek E Mix, 'The European Union: Foreign and Security Policy' *The European Union* 5–6, 20.

<sup>10</sup> 'Foreign and Security Policy - EUR-Lex' (n 8).

<sup>11</sup> Mitchell A Orenstein and R Daniel Kelemen, 'Trojan Horses in EU Foreign Policy' (2017) 55 *JCMS: Journal of Common Market Studies* 87, 97–99.

<sup>12</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECJ Joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461.

<sup>13</sup> *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECJ Case C-72/15, ECLI:EU:C:2017:236.



freedom raise questions about the authority of the EU, adherence to legal certainty principles, and the right to an effective remedy. In its ruling of *Rosneft's*, the Court considered sanction proportionality while emphasizing protection to fundamental rights protection and the free movement of capital flow during CFSP-related actions.

The development of case laws at the CJEU concerning the impact of the CFSP on fundamental rights and the free movement of capital has raised questions of increased uncertainty on the Court's jurisdiction when dealing with CFSP provisions and acts in the TEU.<sup>14</sup> Impacts of CFSP towards fundamental rights and free movement could also give rise to claim compensation for damages to the EU; in *Bank Refah Kargaran* case<sup>15</sup>, the Court ruled that the EU was not liable to compensate for the damage caused by the restrictive measures against Iran since it was a valid measure.<sup>16</sup>

Regardless of the tensions, questions about the Court's jurisdiction, its intricacies, and the issues that surface in the landmark cases, the CFSP remains a crucial and integral part of the legal and political landscape. The problems mentioned highlight the importance to the EU as a collective power and its member states, respectively, to strike a balance between CFSP objective, the protection of fundamental rights, and freedom of movement in the EU.

## 1.2 Purpose and Research Questions

The objective of this thesis is to analyse the impact and interaction of Common Foreign and Security Policy (CFSP) on fundamental rights and free movement of capital within the European Union. The focus will be on recent case law from the CJEU. Specifically, the writer aims to evaluate the complexities that arise when placing restrictions on the free movement of capital within the CFSP framework. Additionally, this thesis will examine how these measures can be aligned with the protection of fundamental rights and the EU's commitment to free movement of capital. Finally, the thesis will briefly discuss the extent of Member States' discretion in implementing CFSP measures while maintaining their national interests and EU commitments. Therefore, the following research questions will guide this thesis:

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<sup>14</sup> Luigi Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (2017) 22 *European Foreign Affairs Review* 573–575 <<https://discovery.researcher.life/article/the-political-question-doctrine-as-applied-to-common-foreign-and-security-policy/84de02a1bb0d3b0f88f1f206d146e587>> accessed 8 April 2023.

<sup>15</sup> *Bank Refah Kargaran v Council of the European Union* [2020] ECJ Case C-134/19 P, ECLI:EU:C:2020:793.

<sup>16</sup> *ibid* 11 §62-63.

*How do the EU Common Foreign and Security Policy measures impact fundamental rights and the free movement of capital within the European Union, and how can potential tensions be addressed to strike a balance between collective interest of the EU, national sovereignty (or national interest), and individual rights?*

The thesis aims to shed light on the intricacies of implementing CFSP measures by exploring their interplay with fundamental rights, such as the free movement of capital, and national sovereignty (or national interests). By addressing these research questions, valuable insights can be gained.

### **1.3 Scope and Limitations**

Based on the aims of the thesis, which is to explore between and assess the impact of, the thesis will focus on the objectives, principles and legal instruments relevant to CFSP matters such as the TEU, Treaty on the Functioning of European Union (hereinafter, "TFEU"), Charter of Fundamental Rights of the European Union, including the relevant legal basis for the freedom of movements, particularly the free movement of capital within the EU that form the legal foundations of CFS EU Common Foreign and Security Policy measures, fundamental rights, and the free movement of capital the relationship

The scope of this thesis will focus on EU law, its policies, the role of EU institutions as well as the role of EU member states when implementing CFSP measures on the national level. The thesis will particularly assess the tensions and challenges that might arise within the context of fundamental rights and the free movement of capital along with the role of the Court of Justice of the European Union in addressing these challenges.

This thesis shall not attempt to delve into domestic policies of the Member States, or their individual decisions related to CFSP measures, except where they directly impact the objectives of CFSP and its implications towards fundamental rights and free movement of capital. Additionally, the thesis will focus on the development of CFSP from its inception to today from the legal perspectives, analysing the relevant case law ensure the study is relevant to the current legal landscape of the EU while addressing the political landscape where necessary. Additionally, the thesis might also be limited by the availability of relevant literatures and case laws, and the writer realizes that this might affect the comprehensiveness of this thesis analysis. Notwithstanding the potential limitations due to the availability of

relevant literature and case laws, the thesis shall attempt the best effort to provide a thorough examinations of the tensions between CFSP and fundamental rights, as well as the impact of CFSP on the free movement of capital.

## 1.4 Methodology and structure

The thesis will attempt to employ two-fold method as the research approach for this thesis. The dogmatic legal method will be applied where the relevant laws, cases and doctrines will be interpreted and analysed with focus on the CFSP, its impact and interplay with fundamental rights, especially the free movement of capital. Furthermore, as inspired by the method employed in Katarina Bungerfeldt graduate thesis<sup>17</sup>, this thesis will also employ a special contextual approach to answer the research question of this thesis. The special contextual approach known as ‘EU Law in context’<sup>18</sup> was essentially an interdisciplinary approach that took an external view of the law.<sup>19</sup> EU Law in context approach was seen as bridge to incorporate insights between legal analysis and other social sciences<sup>20</sup> such as political science, international relations, including economics that influence the CFSP on EU level and national level.

The thesis will be founded upon a comprehensive analysis of three normative assumptions. Primarily, it will hypothesise the inseparable linkage between law and politics, with an emphasis on how the CFSP is intricately entwined in the political landscape of the EU. Secondly, the research in this thesis shall acknowledge that every stakeholder in the legislative processes including the Court of Justice, are political actors with differing interests and influence. Furthermore, thirdly, this study adopts a ‘rule of law’ perspective to highlight democratic values and legal frameworks essential in shaping the CFSP measures over times and its impacts towards fundamental rights and the free movement of capital.

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<sup>17</sup> Katarina Bungerfeldt, ‘Money Talks: The Potential of an EU Financial Conditionality Mechanism Linked to the Rule of Law’ (Lund University 2022) 9–12 <<http://lup.lub.lu.se/student-papers/record/9080061>>.

<sup>18</sup> Ulla B Neergaard and Marlene Wind, ‘Studying the EU in Legal and Political Science Scholarship’, *European Legal Method-in a Multi-Level EU Legal Order* (Jurist- og Økonomforbundet Forlag 2012) 265 as cited in; Bungerfeldt (n 17) 9.

<sup>19</sup> Richard A Posner, ‘Legal Scholarship Today’ (2002) 115 *Harvard Law Review* 1314, 1314–1326, 1316 as cited in; Bungerfeldt (n 17) 10.

<sup>20</sup> Neergaard and Wind (n 18) 266–267, 278–279 as cited in; Bungerfeldt (n 17) 10.

The legal sources reviewed in this thesis shall include the primary law such as TEU, TFEU, Charter of Fundamental Rights, case laws of the CJEU and the General Court, including the relevant EU regulation and directives. In some extent case laws from the European Court of Human Rights (hereinafter, 'ECtHR') will also be examined to understand the application of CFSP and its judicial interpretation under human rights protection context.

In line with EU law in context approach, this thesis will use sources from other disciplines such as social and political science to strengthen the legal analysis. For this purpose, the thesis shall rely on academic writing from various fields of EU law, political sciences, international relations, economics, and sociology. The thesis shall also consider official reports or documents from EU institutions, international organizations, and non-academic texts such as news and official speech.

Regarding the organization of this thesis, it will be structured with five chapters. Each chapter might consist of several subsections, first part in Chapter I, II and some of Chapter III shall be the overview of EU CFSP, Fundamental Rights, and the Four Freedoms. The second parts begin in some parts of Chapter III, the whole Chapter IV shall consist of the analysis of the impacts of CFSP towards fundamental rights and free movement principles and the conflicts and tensions of EU CFSP with national sovereignty, including discussions on the type of EU competences that might fit to the EU in regard to CFSP matter. Brief case studies will be distributed on each chapter and its subsections according to the topic of the discussions. The last part will begin by summarizing the finding of this thesis, provide the potential implications for EU law and policy, and try to explore the potential developments, including, if possible, recommendations for future research.

# 2 An Overview of EU Common Foreign and Security Policy (CFSP)

## 2.1 Legal basis and evolution of CFSP

As mentioned earlier the CFSP is an important element to the EU to maintain peace, strengthen international security, promote democracy, international cooperation, rule of law and to respect human rights and fundamental freedoms. The legal basis of EU CFSP has evolved since its inception by the Treaty of Maastricht following the evolution of the EU and its needs and challenges over time. The legal framework for the formation of CFSP matters was first developed in the Treaty of Maastricht, which formed the basis for the three pillars structure, that lasted until the Treaty of Lisbon in 2009.<sup>21</sup> The CFSP was placed as the second pillar in the Treaty of Maastricht and given an intergovernmental character,<sup>22</sup> which distinct it from the institutional and legal structure of the Community, resulting in a decision-making process that is more intergovernmental and less supranational than under the Community Pillar.<sup>23</sup>

In 1997 the Treaty of Amsterdam made changes which affected the CFSP as the second pillar, the changes were the creation of the High Representative for Foreign and Security Policy with the Secretary General of the Council being nominated for the position to assist the Council Presidency in CFSP<sup>24</sup>, such as coordinating the implementation of CFSP between Member States, representing the EU in international negotiations and ensuring the EU's and Member States external actions are in harmony, and the Council was given power to 'conclude' international agreements,<sup>25</sup> whenever this was necessary in implementing the

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<sup>21</sup>Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations*, vol 95 (Hart 2019) 25.

<sup>22</sup> *ibid.*

<sup>23</sup> Paul Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Seventh edition, Oxford University Press 2020) 12.

<sup>24</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 25.

<sup>25</sup> Jaap W De Zwaan, 'The Legal Personality of the European Communities and the European Union' (1999) 30 *Netherlands Yearbook of International Law* 75; Koen Lenaerts and Eddy De Smijter, 'The European Union as an Actor under International Law' (1999) 19 *Yearbook of European Law* 95 as cited in; Craig and De Búrca (n 23) 15.

CFSP.<sup>26</sup>

The changes brought by the Treaty of Nice was rather procedural and was aimed to streamline decision making process.<sup>27</sup> The changes introduced under the Nice Treaty was concerning decision making process which allowed the Council to adopt decisions by qualified majority voting (QMV) in three situations; when defining a Union action or position based on European Council decision, when implementing the adopted decisions, and when appointing EU Special Representatives. The changes also extended a limited possibility of enhanced cooperation to the CFSP while still excluding from its scope all ‘matters having military or defence implication’, which requires a unanimous decision by the Council.<sup>28</sup> Therefore, the Treaty of Nice did not materially change much in CFSP matters.<sup>29</sup>

The latest and considerably the most significant amendment to the Treaty that affected the CFSP was brought in 2009 by the Treaty of Lisbon which further strengthened the CFSP by removing the formal barriers of policies and brought everything together as one Union, integrating CFSP matters into the overall framework of EU external action while retaining its distinctiveness-a *de facto* hidden pillar.<sup>30</sup> By subsuming all framework of EU external action, the Lisbon Treaty abolished all the pillars, which was seen as establishing unified system of external policies.<sup>31</sup> One of its most important changes was that the role High Representative for Foreign Affairs and Security Policy was expanded, the position now also serve as the Vice President of the European Commission, this was seen as positive changes since it was expected to ensure better coordination and coherence in EU Foreign Policy. In addition to the strengthening of the role, the Lisbon Treaty also established the European External Action Service (hereinafter, ‘EEAS’) that consists of Commission and Council officials, as well as diplomats from Member States, to assist the High Representative in performing its role.<sup>32</sup>

Notwithstanding the institutional changes and the abolition of the pillars, the CFSP remain as a *sui generis* policy compared to other EU policy areas in the Treaty of Lisbon, particularly in its legal basis and decision-making processes. Under the Lisbon TEU, CFSP is

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<sup>26</sup> Craig and De Búrca (n 23) 15.

<sup>27</sup> ‘Foreign Policy: Aims, Instruments and Achievements | Fact Sheets on the European Union | European Parliament’ (n 5) 1.

<sup>28</sup> Steven Blockmans, ‘Differentiation in CFSP’ (2013) 66 *Studia Diplomatica* 53, 58–60.

<sup>29</sup> Butler, *Constitutional Law of the EU’s Common Foreign and Security Policy* (n 21) 28.

<sup>30</sup> *ibid* 29.

<sup>31</sup> Koutrakos, *The European Union’s Common Foreign and Security Policy after the Treaty of Lisbon* (n 2) 16.

<sup>32</sup> *ibid* 43.

primarily governed in Title V of the TEU, containing provisions that sets out the objectives, principles, and procedures of EU foreign and security policy.<sup>33</sup> In terms of decision-making, under the Lisbon Treaty the CFSP is still based on the intergovernmental principle, in which Member States retain a high degree of control over CFSP and, of course, foreign and security policies of each respective Member States.<sup>34</sup> Furthermore, under Lisbon Treaty, the CFSP is also subject to the principle of unanimity, which means that all Member States must approve the CFSP measures.<sup>35</sup>

Following the above development, the Lisbon Treaty also introduced qualified majority voting (hereinafter, 'QMV') innovation to improve the efficiency and coherence of the CFSP decisions,<sup>36</sup> such as for the adoption of sanctions, establishment of civilian missions, and the establishment of EU Special Representatives.<sup>37</sup>

In regard to the role of the Court of Justice, the Lisbon Treaty increased the role of the CJEU in overseeing and interpreting the legal aspects of CFSP.<sup>38</sup> The jurisdiction of the Court of Justice under Treaty of Lisbon remains limited but at the same time it is also growing,<sup>39</sup> as seen from case laws after the Lisbon Treaty. The Court (CJEU and General Court) were willing to engage with CFSP matter and to provide guidance on interpretation and application CFSP matter.<sup>40</sup>

Therefore, since the legal basis for the CFSP has developed further through CJEU's and General Court's case law since its formation under Maastricht Treaty. The following successive amendments and institutional changes have sought to strengthen the CFSP and enhance the capabilities of EU as global actor in foreign and security matters. However, even though it has evolved further the CFSP remains as *sui generis* that is distinct from other EU

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<sup>33</sup> Jan Wouters and others, 'Common Foreign and Security Policy' [2021] *The Law of EU External Relations* 359, 365–367.

<sup>34</sup> Guri Rosén and Marianne Riddervold, 'Beyond Intergovernmental Cooperation: The Influence of the European Parliament and the Commission on EU Foreign and Security Policies' (2015) 20 *European Foreign Affairs Review* 417 <<https://discovery.researcher.life/article/beyond-intergovernmental-cooperation-the-influence-of-the-european-parliament-and-the-commission-on-eu-foreign-and-security-policies/20dc84332c373213b4bbe9f548e0bb1d>> accessed 8 April 2023.

<sup>35</sup> *Mix* (n 9) 6.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid* 7–8.

<sup>38</sup> Peter Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) 58 *Common Market Law Review* 1731, 2–6.

<sup>39</sup> Wouters and others (n 33) 367.

<sup>40</sup> Van Elsuwege (n 38) 1734–1736, 1756, 1759.

with Member States retaining greater control over their foreign and security policies while as Union the EU is gradually moving towards a more integrated and coherent policy framework, this adjustment indicates changes in the challenges of global situation and the need of a more solid European response to the global challenges.

## **2.2 Objectives, Principles and Instruments of CFSP**

As a key framework in coordinating, harmonizing and conducting the EU's in external action in foreign and security policy that was established by the TEU Maastricht in 1993 which has been developed and strengthened by the subsequent TEU, the objectives of CFSP as enshrined in Article 21 (1) TEU, the CFSP's is aimed to preserve peace, strengthen international security, promote international cooperation, to consolidate and to develop democracy, rule of law, respect for human rights and to respect fundamental freedoms within and outside the territory of EU.<sup>41</sup> Article 21 (2) TEU also contains the main principles of CFSP which are to respect the UN Charter and international law to uphold the values and interests of the EU and its Member States, to enhance the EU's strategic autonomy and global role, to act in a coherent and consistent manner with other EU policies or actions, and to seek partnership and dialogue with third countries and regional or international organisations. In light of the recent development regarding these principles, the final report of the EU's Conference on the Future of Europe of May 2022 proposed that 'the EU must improve its capacity to take speedy and effective decisions, notably in CFSP, to speak as one voice and as a truly global player that project a positive role in the world and making a difference in response to any crisis'.<sup>42</sup> Therefore, by pursuing these objectives the CFSP is expected to reinforces EU commitment to create a safer, more democratic world that uphold equality under international law, human rights and the EU values.

To achieve the CFSP objectives that encompasses various aspects of foreign policies, the EU uses a range of instruments and tools include diplomatic actions, political dialogue,

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<sup>41</sup> 'Foreign Policy: Aims, Instruments and Achievements | Fact Sheets on the European Union | European Parliament' (n 5) 1.

<sup>42</sup> *ibid* 2.



declarations, common positions, joint actions, sanctions and restrictive measures.<sup>43</sup> Among those tools, sanctions are a very particular CFSP tool, since sanctions are measures of general application that also serves EU foreign relations general policy objectives and they are forceful tool that imposes directly applicable obligations on private parties, to this day there are more case laws on sanctions than on any other CFSP policy.<sup>44</sup> According to Butler, because of those ranges of instruments at the EU disposal, there is a consistent tension in Union law between the autonomous EU legal order, championed by institutions such as the Court, again the international organisation-like setup that Member States can perceive it to be at times.<sup>45</sup> Moreover, declarations, common positions, joint actions and common strategies that were previously included as an array of CFSP's legal instruments, now have been collectively grouped as CFSP Decisions.<sup>46</sup> This allow the Union to present a unified front when addressing global challenges. All of these instruments serve to foster the EU objective in international cooperation, promotion of peace and security, including to uphold the EU core values and principles globally.

As a crucial aspect of EU external relation, the CFSP instruments needs to be effective and coherent to achieve the objectives and principles of CFSP, as enshrined in the Treaties, in the international relation. While several scholars have highlighted the need for coherence and coordination in CFSP,<sup>47</sup> the effectiveness of these instruments is subject to debate with some study shown its considerable shortcomings in their utilization.<sup>48</sup> Coherence in CFSP must involve the consistency and alignment of the actions with the underlying principles of the policies, thus, it is important to ensure that the EU's actions in the international relations are not contradicting the EU values and interest, instead the action must attempt to further it. In this coherence discussion, the EU Parliament and the EU Commission, despite the limited roles, play a significant role in enhancing the policy's democratic accountability and pushing

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<sup>43</sup> *ibid* 1–4 also see in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 35.

<sup>44</sup> Christina Eckes, 'The Law and Practice of EU Sanctions' in Steven Blockmans and Panos Koutrakos, *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 2 <<https://www.elgaronline.com/view/edcoll/9781785364075/9781785364075.00019.xml>> accessed 8 April 2023.

<sup>45</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 35–36.

<sup>46</sup> Panos Koutrakos, 'Primary Law and Policy in EU External Relations – Moving Away from the Big Picture' (2008) 669 <<https://papers.ssrn.com/abstract=1567658>> accessed 10 May 2023 as cited in ; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 48.

<sup>47</sup> Oleksandr Moskalenko, "'Parliamentarisation' of the CFSP: Wishful Thinking or a Rational Choice?' (2016) 12 *Croatian Yearbook of European Law and Policy* 257–259 <<http://www.cyelp.com/index.php/cyelp/article/view/255/159>> accessed 10 May 2023.

<sup>48</sup> 'Instruments' (*Stiftung Wissenschaft und Politik (SWP)*) <<https://www.swp-berlin.org/en/topics/dossiers/the-eu-common-foreign-and-security-policy/instruments>> accessed 10 May 2023.

for a more coherent and effective CFSP measures, including sanctions.<sup>49</sup>

Coordinating with other EU policies also serves as an important aspect of CFSP since the effectiveness of CFSP could be improved by working together with other EU policies, especially those policies that might have an impact towards other countries, in particular towards developing countries. Furthermore, the EU and Member States has also pledge to have a more coherent policies on its policy coherence for development (PCD) to minimise the contradictions and build harmony between different EU policies.<sup>50</sup> Therefore, it is vital to have effective and coherent CFSP instruments to achieve the CFSP objectives and its principles and even though there are challenges, the EU continues to work towards enhancing the effectiveness, coherences and harmonization of CFSP instruments with other EU policies.

## 2.3 Competence and the role of EU institutions

Since the CFSP is a complex system that involve many EU institutions to contribute to its implementation, each institution will bear different competences and responsibilities. For instances, the European Council is ‘the alpha and the omega’<sup>51</sup>, which consisted of heads of the Member States, plays a key role by setting the strategic priorities in CFSP matters and provide guidance to the other EU Institutions, thus, making it the institution that define the objectives, guidelines and the trajectory in EU CFSP as endowed by Article 26 (1) TEU.<sup>52</sup>

The Council of the EU, which consists of the Member State ministers, following the strategies set by the European Council is responsible to adopt the necessary to implement the strategies and coordinate Member States in implementing it. The strategies will be implemented in various forms of measures, ranging from joint actions, common position, and common strategies which is known, as mentioned in the earlier section, as the CFSP

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<sup>49</sup> Michal Malovec, ‘Foreign Policy: Aims, Instruments and Achievements’ 3–4 <<https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements>>.

<sup>50</sup> ‘Policy Coherence for Development’ <[https://international-partnerships.ec.europa.eu/policies/european-development-policy/policy-coherence-development\\_en](https://international-partnerships.ec.europa.eu/policies/european-development-policy/policy-coherence-development_en)> accessed 10 May 2023.

<sup>51</sup> Deirdre Curtin, ‘Political Executive Power’ in Deirdre Curtin (ed), *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009) 70 <<https://doi.org/10.1093/acprof:oso/9780199264087.003.0004>> accessed 11 May 2023 as cited in ; Butler, *Constitutional Law of the EU’s Common Foreign and Security Policy* (n 21) 48.

<sup>52</sup> Koutrakos, *The European Union’s Common Foreign and Security Policy after the Treaty of Lisbon* (n 2) 33–34.

Decisions.<sup>53</sup>

The High Representatives for Foreign Affairs and Security Policy (HR/VP), as appointed by the European Council, also plays an important role in carrying out such CFSP Decisions by presiding over the Foreign Affairs Council, and heading the European Defence Agency.<sup>54</sup> The High Representatives also ensures the EU's external actions are consistent with the CFSP Decisions, thus, the implementation of CFSP Decisions would be effective and efficient.

The High Representatives for Foreign Affairs and Security Policy will be supported by the European External Action Service (EEAS) as its diplomatic arm in carrying out the CFSP Decisions around the globe.<sup>55</sup> In the application, the responsibilities and competences of these institutions are not without problems, as it sometimes lead to a 'fuzziness' regarding where the responsibilities lie.<sup>56</sup> This problem allowed the EU Parliament to expand its function to exercise control over the financing of the EEAS, however, it only done little to help the national parliaments to have any leverage against their respective governments since the CFSP is an area dominated by intergovernmental decision-making processes.<sup>57</sup> Some scholars such as Elsuwege<sup>58</sup> argued that the problems has made the CFSP competences are ill-defined, and the abolition of the hierarchical delimitation rule has created a need for a new balance between delimitation and consistency.<sup>59</sup> In spite of these particular challenges, the EU institutions has undertaken steps to improve the approach to CFSP matter, with the collaborative interplay and the division of competences between the so-called 'new' CFSP actors, such as the EEAS and the Justice and Home Affairs (JHA) council, so that it will demonstrate the strength of the EU as a cohesive political entity.

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<sup>53</sup> Koutrakos, 'Primary Law and Policy in EU External Relations – Moving Away from the Big Picture' (n 46) 669 as cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 48.

<sup>54</sup> 'EUR-Lex - High\_representative\_cfsp - EN - EUR-Lex' <<https://eur-lex.europa.eu/EN/legal-content/glossary/high-representative-of-the-union-for-foreign-affairs-and-security-policy.html>> accessed 11 May 2023.

<sup>55</sup> 'EU External Action' <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4346064>> accessed 11 May 2023.

<sup>56</sup> Ariella Huff, 'Executive Privilege Reaffirmed? Parliamentary Scrutiny of the CFSP and CSDP' (2015) 38 *West European Politics* 397 <<https://discovery.researcher.life/article/executive-privilege-reaffirmed-parliamentary-scrutiny-of-the-cfsp-and-csdp/49da89f4a1ab302fa2b9c1754608646a>> accessed 8 April 2023.

<sup>57</sup> *ibid.*

<sup>58</sup> In his paper Peter Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure' In *Search of a New Balance between Delimitation and Consistency* (2010) 47 *Common Market Law Review* <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\COLA\COLA2010044.pdf>> accessed 11 May 2023.

<sup>59</sup> *ibid* 988.

Apart from the above institutional challenges, the implementation of CFSP still meet several other challenges especially in coordination and cooperation of its institutions. Harmonisation of CFSP and conformity of national policy to the CFSP or its common position, as required by Article 24 TEU,<sup>60</sup> is one of the main difficulties. However, this challenge is not without opportunity if the EU managed to maintain the harmony and conformity, as argued by the former High Representative for Foreign Affairs and Security Policy, Javier Solana, the EU can generate significant voice as a united front in the global affairs,<sup>61</sup> thus, creating significant opportunities for EU and its Member State interests than by acting individually.<sup>62</sup> Maintaining balance between the powers and interests of EU institutions and Member States must be based on the principle of subsidiarity, however, in CFSP since the concept employed is to seek intergovernmental cooperation which combine the political weight of EU Member States and their pursuit of common goals,<sup>63</sup> which reflected by its unanimous decision, and its unique institutional framework, where diplomats from each Member States and officials from the EU institutions work together when formulating the CFSP.<sup>64</sup>

## 2.4 Member States' discretion in implementing CFSP measures

As a framework that allows the Member State and EU institution to coordinate, define and implement foreign policy.<sup>65</sup> The CFSP has an array of instruments available as measures, for instances, sanctions or restrictive measures,<sup>66</sup> which are intended to achieve the objective of

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<sup>60</sup> According to Article 24 TEU, "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area."

<sup>61</sup> Javier Solana, 'EUROPEAN FOREIGN POLICY AND ITS CHALLENGES IN THE CURRENT CONTEXT' 8th Instalment BBVA 4 <<https://www.bbvaopenmind.com/wp-content/uploads/2016/01/BBVA-OpenMind-Javier-Solana-European-Foreign-Policy-and-Its-Challenges-in-the-Current-Context-1.pdf>>.

<sup>62</sup> *ibid*.

<sup>63</sup> John Peterson and Niklas Helwig, '13. Common Foreign and Security Policy: Institutionalizing Europe's Global Role', *Institutions of the European Union* (Oxford University Press) <<https://>> accessed 12 May 2023.

<sup>64</sup> Hylke Dijkstra and Sophie Vanhoonaeker, 'The Common Foreign and Security Policy', *Oxford Research Encyclopedia of Politics* (2017) 5–10 <<https://>> accessed 12 May 2023.

<sup>65</sup> *ibid* 2.

<sup>66</sup> Ramses A Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' 6.

EU foreign policy. Restrictive measures or sanctions are not punitive in nature, but it is more designed to put pressure or bring change in the behaviour which was perceived as harmful to EU interests, thus, at the same time upholds the values and fundamental interests of the EU.<sup>67</sup>

Under the general application of EU law, and according to Article 288 TFEU<sup>68</sup>, while the EU institutions established the measures based on their competences, the implementation of these measures at the level Member States and to some extent it entails certain level of discretion for Member States.<sup>69</sup> For instances, sanctions in the EU are agreed in CFSP, a context where decisions are taken by unanimity and Member States have an individual formal veto.<sup>70</sup>

First of all, it is important to note that the adoption process require such unanimous agreement of all Member States so that it would allow Member States to exercise its discretion when considering and aligning the best interests of the Member States and the Union collective interests, so that when the policies were agreed the Member States must undertake to actively support the CFSP and refrain from any activity contrary to it.<sup>71</sup>

Second, indeed, the Member States have discretion to decide how to implement the measures within their own legal and administrative frameworks, however, such implementation still subject to the compliance with EU law. As discussed above, sanctions or

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<sup>67</sup> ‘Overview of Sanctions and Related Resources’ <[https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en)> accessed 12 May 2023.

<sup>68</sup> The article stated the following:

To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

<sup>69</sup> ‘Discretion in EU Law - a Total Mismatch?’ (5 February 2013)

<<https://www.leidenlawblog.nl/articles/discretion-in-eu-law-a-total-mismatch>> accessed 13 May 2023.

<sup>70</sup> Clara Portela, ‘Member States Resistance to EU Foreign Policy Sanctions’ (2015) 20 European Foreign Affairs Review 41

<<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EERR\EERR2015024.pdf>> accessed 13 May 2023.

<sup>71</sup> Katarina Štrbac and Branislav Milosavljević, ‘Crisis Management System in European Union: How It Works?’ (2021) 6 Serbian Journal of Engineering Management 45, 46.

restrictive measures may include several actions such as arms export prohibition, travel bans, or freezing of funds and other economic resource owned by targeted individuals or entities.<sup>72</sup> That is why when Member States implement CFSP measures, they have to consider various factors such as, national interests, public opinion, security concerns, and economic ties.<sup>73</sup>

In the implementation of restrictive measures, the EU has also developed a comprehensive legal framework which includes procedural requirements and judicial review mechanisms.<sup>74</sup> So, the Member States must enforce these measures in their respective jurisdictions, and at the same time, the Member States must ensure compliance with EU sanctions beyond their borders, which can lead to complex legal and procedural challenges.<sup>75</sup> This conditions also leads to variation in the implementation of CFSP by Member States,<sup>76</sup> with Member States, through the Council, attempted to shield matters of CFSP from the scope of judicial review by the CJEU.<sup>77</sup>

Therefore, in conclusion, while Member States retain some discretion in implementing the CFSP measures, they are also bound by the obligation to comply with EU law and unreservedly harmonise their national policies with the common positions of the EU.

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<sup>72</sup> 'EUR-Lex - Restrictive\_measures - EN - EUR-Lex' <<https://eur-lex.europa.eu/EN/legal-content/glossary/restrictive-measures-sanctions.html>> accessed 13 May 2023.

<sup>73</sup> Michal Piechowicz, 'Intergovernmental Cooperation and the Idea of Community in the Institutional and Decision-Making Sphere of the EU Common Foreign and Security Policy' (2015) 23 *European Review* 540, 547.

<sup>74</sup> Nadia Zelyova, 'Restrictive Measures - Sanctions Compliance, Implementation and Judicial Review Challenges in the Common Foreign and Security Policy of the European Union' (2021) 22 *ERA Forum* 159, 159–161, 174–176.

<sup>75</sup> *ibid* 2,5.

<sup>76</sup> Katharina L Meissner and Clara Portela, 'Beyond Foreign Policy? EU Sanctions at the Intersection of Development, Trade, and CFSP' (2022) 10 *Politics and Governance* 1, 2.

<sup>77</sup> Graham Butler, 'Hidden Administrative Review in EU Law: The BoAs of EU Agencies in the Common Foreign and Security Policy' in Merijn Chamon, Annalisa Volpato and Mariolina Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 121, 126–129 <<https://doi.org/10.1093/oso/9780192849298.003.0007>> accessed 13 May 2023.

# 3 EU law: Fundamental Rights and the Intricacies of Free Movement of Capital

## 3.1 EU Charter of Fundamental Rights and its impact on CFSP

In 2000, the European Convention devised The Charter of Fundamental Rights of the European Union (hereinafter, the ‘CFR’) through the representatives of multiple institutions that consists of the European Commission, the European Parliament, the national parliament and the national government.<sup>78</sup> The CFR initially functioned as an inter-institutional agreement and was not binding, but merely as a ‘declaration of European morality’,<sup>79</sup> it became a binding when the Lisbon Treaty came into force.<sup>80</sup> The Lisbon Treaty incorporate it as a primary law in Article 6 TEU, enshrining the EU commitment to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and identifying human rights as its foundational value and become an obligations addressed to Member States and the EU institutions as a whole.<sup>81</sup> Since the CFR has binding effect, the CJEU has played an active role to the development of the CFR as a source of human rights protections rules within the EU legal framework.<sup>82</sup> In accordance with Article 51(1) CFR, the CFR applies when Member States and/or EU institutions are implementing Union law and fundamental rights are involved.<sup>83</sup> It's important to interpret the clause broadly, as it includes CFSP as a crucial part of EU law for its external actions. Although the CFR isn't a part of the

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<sup>78</sup> Jan Wouters and Michal Ovádek, ‘The EU Legal Framework for the Protection of Fundamental Rights’ in Jan Wouters and Michal Ovádek (eds), *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 99 <<https://doi.org/10.1093/oso/9780198814177.003.0004>> accessed 14 May 2023.

<sup>79</sup> quoting Muszyński, 2009:56 in Edyta Krzysztofik, ‘THE APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS IN POLAND’ [2019] *Facta Universitatis*, Series: Law and Politics 173, 175.

<sup>80</sup> *ibid* 176.

<sup>81</sup> Christina Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation: EU Accession to the ECHR’ (2013) 76 *The Modern Law Review* 254, 273.

<sup>82</sup> Gráinne De Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 169–171.

<sup>83</sup> Charter of Fundamental Rights of the European Union 2016 (OJ C 202, 762016, p 391–407) art 51(1) stated that ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’

EU constitution, it's undoubtedly an essential element of the framework of EU law, as emphasized by the CJEU in its verdict on the *Kadi* case.<sup>84</sup>

The phrase 'implementing Union law' should be interpreted as encompassing the CFSP as one of EU instruments in dealing with external actions, in which the initiative for CFSP must respect the fundamental rights enshrined in the CFR as reflected in Article 21 (1) TEU. It is important to understand that the CFR is not an absolute construct. It serves a broader social function, and therefore, there may be restrictions imposed on these rights. However, these restrictions must align with the objectives of the general interest pursued by the EU and should not constitute a disproportionate and intolerable interference that could impair the substance of the fundamental rights.<sup>85</sup> Therefore, in the view of the writer of this thesis, the interaction between the CFR and CFSP is direct and delicate as it would require a precise balance and adherence to the principles of proportionality and legality within the EU legal framework.

Its significant impact makes the Charter of Fundamental Rights as a guiding beacon to ensure CFSP compliance with human rights and fundamental rights (EU values) in the EU external actions, including to CFSP. The application of CFR in the CFSP matter lay the emphasis on upholding and respecting the values and interests of the EU such as consolidating democracy, respect to human rights and fundamental freedoms. It will ensure the CFSP measures, including the restrictive measures or sanctions, to comply with the fundamental rights in the EU framework.<sup>86</sup> For instances, sanctions as one of CFSP measures, might directly infringe upon individual rights by limiting business activities such as trade, capital movement, etc. With the CFR as a safeguard, implementation of a restrictive measures or sanctions as part of CFSP must respect the rights of the individuals and entities targeted by the measures.

As mentioned in the above sections, the intergovernmental nature of CFSP has created challenges in terms of judicial review of the CFSP, where Member States and the Council attempted to shield matters related to the CFSP from the scope of judicial review by CJEU.<sup>87</sup>

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<sup>84</sup> Xavier Groussot and Gunnar Petursson, 'The EU Charter of Fundamental Rights Five Years On: The Emergence of a New Constitutional Framework?' [2019] SSRN Electronic Journal 143–147.

<sup>85</sup> *ibid* 143–144.

<sup>86</sup> Zelyova (n 74) 169.

<sup>87</sup> Butler, 'C6Hidden Administrative Review in EU Law' (n 77) 121, 129, 140.



It is important to note that the CJEU predominantly evaluates the measures implemented by the EU under TFEU in order to enforce sanctions decisions, rather than the CFSP decisions directly.<sup>88</sup>

Therefore, in summary this study found that the CFR has significant impacts on CFSP and its measures, in particular the measures that may interfere with fundamental rights within the EU legal framework. It works by ensuring the implementation of CFSP does not compromise the values of the EU and the fundamental rights enshrined in the CFR as it aims to create a balance between maintaining the EU foreign policy objectives and its commitment to uphold its values and fundamental rights.

## **3.2 The Role of Proportionality in Resolving Conflicts Between the EU Charter of Fundamental Rights and CFSP Measures**

The principle of proportionality is one of EU law's fundamental principle that sets the boundaries and requires that any measures taken by EU institutions must be proportionate to the objective pursued by the measures, this shall include the CFSP measure. As stated in Article 5 (4) TEU, the principle of proportionality contains three main criteria for EU measures, suitability, necessity, and the least restrictive means to achieve the desired purpose.<sup>89</sup> In other words, the measures pursued by EU and its Member States must not go beyond what is necessary to achieve the objective to determine whether and to what extent rights can be limited by governmental intervention motivated by public interests reason.<sup>90</sup>

The proportionality principle is relevant to the CFSP as well, as it ensures that any measures taken by the EU under foreign and security policy are necessary and proportionate to the objective pursued, for example, when the EU impose sanctions towards a third country, the EU must ensure that the sanctions are proportionate to the objective and do not have a

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<sup>88</sup> Eckes, 'The Law and Practice of EU Sanctions' (n 44) 2.

<sup>89</sup> 'EUR-Lex - Proportionality - EN - EUR-Lex' <<https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-proportionality.html>> accessed 16 May 2023.

<sup>90</sup> Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 440.

disproportionate impact on the fundamental rights of individual or groups within the EU.<sup>91</sup> The principle of proportionality would also ensure that the CFSP measures are consistent with EU's values and principles, including to respect human rights and the rule of law. As a key principle of EU law, the proportionality principle is frequently invoked in EU administrative law and constitutional adjudication.<sup>92</sup> In this manner, the principle of proportionality is essential in the CFSP field as it safeguards the fundamental values of the EU legal framework. It ensures that any measures taken in foreign and security policies are necessary, proportionate, and consistent with the EU's values and principles. Therefore, it contributes to the upholding and respecting of the EU's values and interests.

In determining whether a measure is proportional, the CJEU in *Titanium Dioxide*<sup>93</sup> developed the 'centre of gravity test' which considers 'in particular the aim and content of the measure' as the decisive criterion.<sup>94</sup> The centre of gravity test is also used in CFSP matter to determine its proportionality, the text involves balancing the CFSP objective against the impact on the fundamental rights of individuals or entities. The application of the centre of gravity test by the CJEU is seen in the *Kazakhstan* case,<sup>95</sup> to decide whether it was necessary for the CFSP decision to be adopted by the unanimity procedure, and whether the inclusion of CFSP as legal basis was at all necessary.<sup>96</sup> The Court eventually ruled that despite the clear CFSP dimension in the decision and in the 'Enhanced Partnership and Cooperation Agreement' between the EU and its MS as one part and the Republic of Kazakhstan in the other part, it is 'incidental to the agreement's two components constituted by the common commercial policy and development cooperation'.<sup>97</sup> In other words it is not necessary to include CFSP basis just because there are CFSP elements in a certain agreement or

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<sup>91</sup> *ibid* 439.

<sup>92</sup> Takis Tridimas, 'The Principle of Proportionality | Oxford Principles Of European Union Law: The European Union Legal Order: Volume I | Oxford Academic' (March 2018) 243 <<https://academic.oup.com/book/41926/chapter/354907422>> accessed 16 May 2023 see also; Xavier Groussot, *General Principles of Community Law* (Europa Law Pub 2006).

<sup>93</sup> *Commission v Council* [1991] ECJ Case C-300/89, 1991 I-02867 ECLI:EU:C:1991:244.

<sup>94</sup> *ibid* 10 cited in; Ramses A Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis' in Ramses A Wessel, *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 84 <<https://academic.oup.com/book/39268/chapter/338832633>> accessed 14 May 2023.

<sup>95</sup> *Commission v Council (PCA Kazakhstan)* [2018] ECJ Case C-244/17, ECLI:EU:C:2018:662 cited in; Wessel, 'Legality in EU Common Foreign and Security Policy' (n 94) 84.

<sup>96</sup> Wessel, 'Legality in EU Common Foreign and Security Policy' (n 94) 85.

<sup>97</sup> *Commission v Council (PCA Kazakhstan)* (n 95) para 46 cited in ; Wessel, 'Legality in EU Common Foreign and Security Policy' (n 94) 86.

decision.<sup>98</sup>

As seen from the above cases, and the subsequent cases, in CFSP matter, the CJEU has consistently applied the fulfilment of the proportionality criteria to exert pressure on the Council to improve its decisions providing measures in a qualitative manner.<sup>99</sup>

Thus, the assessment of CFSP measures against the fundamental rights protected by CFR involves a complex analysis of proportionality and its criteria, suitability, necessity, least restrictiveness and balancing, as the concept of the essences of fundamental rights operates as the absolute core value of European Union.<sup>100</sup>

From the above discussion the study found that as a key aspect of CFSP, the principle of proportionality requires that any measures taken by the EU and its Member States must be proportionate to the objective it pursues. While applying the principle of proportionality to matters related to Common Foreign and Security Policy (CFSP) can have benefits, it is important to consider the potential drawbacks it may have on the legitimacy, accountability, and effectiveness of CFSP measures. One potential benefit of applying the principle of proportionality to CFSP is that it could enhance the legitimacy of the EU's external activities, and by enhancing the legitimacy could also enhance the transparency, coherence, and effectiveness of the policy adoption process, as well as the accountability of the EU institutions and officials involved in the CFSP matter.<sup>101</sup> In contrast, the potential drawbacks on the application of principle of proportionality could also involve the same conditions, such as limitation on the effectiveness of the measures, for example the influence of larger Member States in the EU could add more complexity in the discussion on CFSP decision, particularly when trying to determine what is a 'proportional' response making the decision-making process difficult to reach an agreement between Member States. Another drawback of principle of proportionality application it could lead to legal uncertainty into the CFSP,

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<sup>98</sup> Wessel, 'Legality in EU Common Foreign and Security Policy' (n 94) 86.

<sup>99</sup> Boris Tučić, 'The Court of Justice of the European Union and the Autonomous Restrictive Measures against Natural and Legal Persons and Non-State Entities within the EU Common Foreign and Security Policy' (2021) 60 *Zbornik radova Pravnog fakulteta u Nišu* 117 (taken from the abstract).

<sup>100</sup> Koen Lenaerts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 *German Law Journal* 779, 781–782.

<sup>101</sup> Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (n 66) 2–3.

given the lack of clear criteria to determine when a measure is proportionate or not.<sup>102</sup>

To sum up, applying the principle of proportionality into CFSP measures can have both benefits and drawbacks, while it could enhance the legitimacy and accountability of the measures, it could also limit the effectiveness and introduce legal uncertainty. The overall impact of the principle of proportionality on the CFSP will depend on how it is interpreted and applied in practice, as well as on the specific context of each measure.

### **3.3 Legal basis for the free movement of capital: Overview of the Four Freedoms and their interaction with CFSP Measures**

Pursuant to the provisions of Article 3 (3) of the Treaty on European Union (TEU), the European Union is mandated to create an internal market that will foster the sustainable development of Europe through the attainment of balanced economic growth and price stability, the establishment of a highly competitive social market, the promotion of full employment, the advancement of social progress, the implementation of high levels of environmental protection, and the improvement of environmental quality. Additionally, the Union must also promote scientific and technological advancements. In order to accomplish these aims, it is necessary for the Union to establish an internal market that features the removal of barriers between Member States with regards to free movement of goods, individuals, services and capital.<sup>103</sup> These four freedoms can be found particularly in Part three of the TFEU which contains many of the fundamental principles for a customs union and common market.<sup>104</sup>

This thesis will focus on the free movement of capital as one of the four fundamental freedoms within the European internal market. Free movement of capital is set out in Article 63-66 TFEU which allows the unrestricted movement of capital between Member States and also between Member States and third countries. Free movement of capital is the only one of

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<sup>102</sup> Ramses A Wessel, 'The Legal Framework for the European Union's Common Foreign and Security Policy' [2011] Edward Elgar Publishing in; Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Pub 2011).

<sup>103</sup> Catherine Barnard, *The Substantive Law of the EU; The Four Freedoms* (7th edn, Oxford University press 2022) 16.

<sup>104</sup> Craig and De Búrca (n 23) 642.

the EU's fundamental freedom that extend its application beyond the Member States, it also applies to third countries, as the EU is firmly committed to maintaining an open investment environment for the global market, the belief is based on the idea that allowing unrestricted capital flow would be beneficial for the EU, even if it is granted unilaterally.<sup>105</sup>

The freedom is essential for the functioning of EU's internal market as it refers to the ability of individuals and businesses to transfer money and make investments across borders within the EU without restrictions. This freedom aims to create a single market for financial services, fostering competition, and providing better access to finance for businesses and consumers.<sup>106</sup>

The legal basis for this freedom is supported by the EU's common commercial policy, which aims to promote trade and investment with third countries.<sup>107</sup> As mentioned above, the legal basis mostly found in the TFEU Article 63-66 that outline the rules governing the free movement of capital and payments within the EU and between EU Countries, and the EU has also adopted various directives and regulations to further facilitate the free movement of capital, such as the Capital Requirements Directive (CRD) and the Payment Services Directive (PSD).<sup>108</sup>

Although the primary focus of CFSP is on diplomacy, defense, and crisis management, its measures has potentially impact and might interact with or affect the free movement of capital within the EU in several ways. In certain situations, the implementation of CFSP measures may result in economic sanctions being imposed on a third country and free

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<sup>105</sup> Heike Schweitzer, 'Sovereign Wealth Funds—Market Investors or “Imperialist Capitalists”?' The European Response to Direct Investments by Non-EU State-Controlled Entities' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism* (1st edn, Oxford University Press Oxford 2010) 250, 271 <<https://academic.oup.com/book/34425/chapter/292112051>> accessed 17 May 2023 cited in; Jonathan Mukwiri, 'Brexit and Implications for the Free Movement of Capital' (2019) 46 *Legal Issues of Economic Integration* 7, 12.

<sup>106</sup> Christian Scheinert, 'Free Movement of Capital | Fact Sheets on the European Union | European Parliament' (31 August 2022) <<https://www.europarl.europa.eu/factsheets/en/sheet/39/the-free-movement-of-capital>> accessed 18 May 2023.

<sup>107</sup> 'Making Trade Policy' (2 May 2023) <[https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/making-trade-policy_en)> accessed 18 May 2023.

<sup>108</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance 2013 [OJ L 176, 27.6.2013, pp. 338–436]; Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (Text with EEA relevance) 2015 [OJ L 337, 23.12.2015, pp. 35–127].

movement capital is one of the fundamental freedom that extend to third countries. This could have an impact on the free movement of capital within the EU, as well as between the EU and the affected country. Additionally, the sanctions or restrictive measures could take various forms such as freezing the assets of individuals or entities by the EU, travel bans, and restrictions on financial transactions<sup>109</sup> that could also have an impact on the free movement of capital. For instance, in the EU sanctions against Russian Federation following the annexation of Crimea in 2014 and its involvement in the conflict in eastern Ukraine, these sanctions included restrictions on financial transactions and investments on Russian Banks to EU capital markets, a ban on the provision of certain financial services, and asset freezes and travel bans against targeted individuals and entities involved in the crisis.<sup>110</sup> One notorious case on this sanctions against Russia is the *Rosneft* case,<sup>111</sup> where the EU implemented restrictions on specific financial transactions and restricted some Russian entities from accessing EU capital markets and, additionally, there were constraints on exporting certain goods, technology, and services that were necessary for oil transactions. The sanctions imposed on Russia have had a significant impact on the free movement of capital because European investors and financial institutions now face higher risks and costs when doing business with Russian counterparts.

Thus, we can see from the above example that CFSP measures, particularly in the form of sanctions or restrictive measures, can significantly impact the free movement of capital within the EU by restricting financial transactions, freezing assets and limiting access to capital markets for targeted individuals, entities or countries. As seen from the EU sanction in Russia, which have disrupted the flow of capital between EU and the third country.

The interactions between the free movement of capital principle and CFSP measures as seen from the above discussions are complex, can also leads to intricate dilemmas and challenges within the EU. The clash between the CFSP and free movement of capital, which a fundamental freedom enshrined in the EU's internal market,<sup>112</sup> may pose potential hindrances when it comes to one another, particularly when the CFSP measures is in the form

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<sup>109</sup> 'How and When the EU Adopts Sanctions' (27 January 2023) <<https://www.consilium.europa.eu/en/policies/sanctions/>> accessed 18 May 2023.

<sup>110</sup> 'Russia: EU Prolongs Economic Sanctions over Russia's Military Aggression against Ukraine' <<https://www.consilium.europa.eu/en/press/press-releases/2023/01/27/russia-eu-prolongs-economic-sanctions-over-russia-s-military-aggression-against-ukraine/>> accessed 18 May 2023.

<sup>111</sup> *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (n 13) paras 26–37.

<sup>112</sup> Barnard (n 103) 515–516.

of sanctions or restrictive measures.<sup>113</sup>

This clash will create dilemmas and challenges for policymakers and stakeholders as they need to strike a balance between the security and foreign policy of the EU and its Member States, while considering the economic benefits of the free movement of capital. One of the biggest issues that arises when CFSP measures conflict with the principle of free movement of capital is the lack of clarity regarding which measures are subject to the provisions of freedom of establishment and free movement of capital.<sup>114</sup> This lack of clarity issues can lead to legal uncertainty and make it difficult to operate across borders, however, the lack of clarity can also be a relevant justification of restrictions to free movement of capital to third country as ruled by the CJEU in *SECIL* case.<sup>115</sup> The EU addresses these issues by implementing mechanisms like the standstill clause outlined in Article 64(1) of the TFEU.<sup>116</sup> and horizontal comparison,<sup>117</sup> which the standstill clause would prohibit Member States from introducing new restrictions on the free movement of capital, and the horizontal comparison would requires Member States to ensure their national laws do not discriminate against foreign investors.

The CJEU through the case laws also played an essential role in addressing the tension between CFSP measures and the free movement of capital, for instance, as observed from *SECIL* case, the CJEU ruled that free movement of capital might be restricted to protect the essential security interests.<sup>118</sup> Article 65 (1) TFEU allow Member States to have derogations in regards to free movement of capital, the CJEU in many occasions has also ruled that restrictions on the free movement of capital can be justified on several grounds such as public

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<sup>113</sup> Zelyova (n 74) 173, 176.

<sup>114</sup> Tamás Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2015) 16 *German Law Journal* 1099, 1102–1112.

<sup>115</sup> *SECIL - Companhia Geral de Cal e Cimento SA v Fazenda Pública* [2016] ECJ Case C-464/14, ECLI:EU:C:2016:896 [64, 157–160] in; Ana Paula Dourado, 'The EU Free Movement of Capital and Third Countries: Recent Developments' (2017) 45 *Intertax* 201 <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TAXI\TAXI2017016.pdf>> accessed 18 May 2023.

<sup>116</sup> Consolidated version of the Treaty on the Functioning of the European Union art 64(1) states that: The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999.

<sup>117</sup> Dourado (n 115) 203.

<sup>118</sup> *ibid* 200.

interest, public policy, public security. Like in *Commission v Portugal*<sup>119</sup>, in respect of justifications from Member States, the Court followed the approach in *Gebhard* case<sup>120</sup> where it ruled that free movement of capital is a fundamental principle of the Treaty and can only be restricted by national legislations that are justified by reasons mentioned in Article 65(1) TFEU or by overriding requirements of the general interest. These restrictions must apply to all persons and undertakings involved in activities within the host Member States.<sup>121</sup>

Regarding the justifications for imposing restrictions on the free movement of capital, the Court accepted three broad categories,<sup>122</sup> first category is justification that concerns public order, this could include many things, such as, in *Commission v Italy (Golden Share)*<sup>123</sup> the Court acknowledged that some restrictions on the free movement of capital may be necessary to ensure the minimum supply of vital energy resources and goods for the public, maintain uninterrupted public services, protect national defense, uphold public policy and security, and address health emergencies.<sup>124</sup> CJEU has also acknowledged other justifications in other cases such as it did in *A* case<sup>125</sup>, the court acknowledged the reasoning behind ensuring the efficiency of fiscal supervision in compliance with Article 65(1) (b) of the TFEU. In *Commission v Hungary (associations)*<sup>126</sup> The CJEU has deemed "increased transparency regarding financial support provided to said organizations" as a valid justification; in *Zheng*<sup>127</sup> The Court recognized the importance of addressing money laundering and used it as the basis for their decision; in *DMC*<sup>128</sup> the preservation of a balanced allocation of power to impose taxes between Member States was accepted; in *Miljoen*<sup>129</sup> it accepted the application of double-taxation conventions. The criteria for justifying actions based on public order as

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<sup>119</sup> *Commission of the European Communities v Portuguese Republic* [2002] ECJ Case C-367/98, 2002 I-04731 ECLI:EU:C:2002:326 in; Barnard (n 103) 539.

<sup>120</sup> *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECJ Case C-55/94, 1995 I-04165 ECLI:EU:C:1995:411 cited in; Barnard (n 103) 539.

<sup>121</sup> Barnard (n 103) 539.

<sup>122</sup> *ibid* 540.

<sup>123</sup> *Commission of the European Communities v Italian Republic* [2009] ECJ Case C-326/07, ECLI:EU:C:2009:193 2009 I-02291 [45] cited in; Barnard (n 103) 540.

<sup>124</sup> Barnard (n 103) 540.

<sup>125</sup> *Skatteverket v A* [2007] ECJ Case C-101/05, 2007 I-11531 ECLI:EU:C:2007:804 cited in; Barnard (n 103) 540.

<sup>126</sup> *European Commission v Hungary* [2020] ECJ Case C-78/18, ECLI:EU:C:2020:476 [79] cited in; Barnard (n 103) 540.

<sup>127</sup> *Lu Zheng v Ministerio de Economía y Competitividad* [2018] ECJ Case C-190/17, ECLI:EU:C:2018:357 [38] cited in; Barnard (n 103) 540.

<sup>128</sup> *DMC Beteiligungsgesellschaft mbH v Finanzamt Hamburg-Mitte* [2014] ECJ Case C-164/12, ECLI:EU:C:2018:357 [46] cited in; Barnard (n 103) 540.

<sup>129</sup> *JBGT Miljoen and Others v Staatssecretaris van Financiën* [2015] ECJ Joined Cases C-10/14, C-14/14, C-17/14, ECLI:EU:C:2015:608 [76] cited in ; Barnard (n 103) 540.



accepted by the CJEU are still evolving and subject to scrutiny depending on the circumstances.

The second broadly construed group of justification correspond to the protection of the values of the state, as observed in *Commission v. Austria (gifts for teaching and research institutions)*<sup>130</sup> The court recognized that promoting research and development may be necessary for the public interest. Additionally, there are various cases that pertain to justifications for land usage, for instance, in *Konle*<sup>131</sup> where the Court affirmed that Member States can impose a prior-authorization requirement for land acquisition, by relying on a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions. Or in the matter of environmental protection, such as in *Reisch*<sup>132</sup>, the Court determined that additional factors, such as environmental protection, could enhance the validity of the findings supporting those measures.

The third category of justifications, which are also broadly interpreted, pertains to the public interest requirement that addresses the safeguarding of the interests of third parties. In order to provide a better understanding of this type of justification, we can refer to the CJEU ruling in *Trummer and Mayer*<sup>133</sup> regarding the mortgage system. The ruling stated that Member States had the right to implement measures to ensure that the mortgage system clearly and transparently outlined the rights of mortgagees among themselves, as well as their rights in relation to other creditors.

Considering the discussions, it can be deduced that the clash or tension between CFSP measures and the principle of free movement of capital poses significant dilemmas and challenges for the EU. However, the EU has put in place mechanisms and case law to address these conflicts and ensure that the free movement of capital is not unduly restricted.

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<sup>130</sup> *European Commission v Republic of Austria* [2011] ECJ Case C-10/10, 2011 I-05389 ECLI:EU:C:2011:399 [37].

<sup>131</sup> *Klaus Konle v Republik Österreich* [1999] ECJ Case C-302/97, 1999 I-03099 ECLI:EU:C:1999:271 cited in; Barnard (n 103) 541.

<sup>132</sup> *Hans Reisch and Others (joined cases C-515/99 and C-527/99 to C-540/99) v Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others (joined cases C-519/99 to C-524/99 and C-526/99) v Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg* [2002] ECJ Joined cases C-515/99, C-519/99 to C-524/99, C-526/99 to C-540/99, 2002 I-02157 ECLI:EU:C:2002:135 [34]; Barnard (n 103) 541.

<sup>133</sup> *Manfred Trummer and Peter Mayer* [1999] ECJ Case C-222/97, 1999 I-01661 ECLI:EU:C:1999:143 [30] cited in; Barnard (n 103) 542.

### 3.4 The role of the Court of Justice of the EU and the General Court in CFSP matters

The Court of Justice of the European Union has played a significant role in the ongoing advancement of the EU's external affairs.<sup>134</sup> The Court of Justice of the European Union, like other Union institutions and bodies, bears the responsibility of advancing the legal framework of the Union.<sup>135</sup> The jurisdiction of the Court is limited to matters outlined in the relevant treaties and is invoked either through a preliminary reference or direct action. Its purview extends to the review of EU external relations competencies, such as the Common Commercial Policy, development cooperation, and humanitarian aid, among others. Nevertheless, the Court's jurisdiction does not extend to CFSP matters due to their differentiated status and nature, while still upholding EU legal principles.<sup>136</sup>

Determining whether the Court has jurisdiction over CFSP legal acts is not a simple matter.<sup>137</sup> Following the implementation of the Treaty of Lisbon, the language concerning the Court in CFSP matters underwent significant changes.<sup>138</sup> The Treaty of Lisbon permitted the Court to make 'authoritative pronouncements' in a limited range of CFSP instruments, Article 275 TFEU provided the Court with jurisdictions to rule on proceedings, brought to it directly by citizens under the conditions laid down in Article 263 (4) TFEU,<sup>139</sup> to review the

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<sup>134</sup> Rachel Barnes, 'Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-Use Goods and Armaments. By Panos Koutrakos. [Oxford and Portland, Oregon: Hart Publishing, 2001. Xxi and 243 Pp. Hardback £47.00. ISBN 1-84113-166-0.]' (2005) 64 *The Cambridge Law Journal* 761, 2 cited in ; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 146.

<sup>135</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 147.

<sup>136</sup> *ibid.*

<sup>137</sup> Butler, 'C6Hidden Administrative Review in EU Law' (n 77) 147.

<sup>138</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 148.

<sup>139</sup> Consolidated version of the Treaty on the Functioning of the European Union art 263 §4 provisions stated the following: Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. *ibid* 275 §2 stated that: The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

legality of decisions against that natural persons or legal persons made by the Council of the EU on the basis of EU Treaty provisions covering the CFSP.<sup>140</sup> However, while it granted the CJEU a general jurisdiction, exceptions were made where the treaties specified otherwise, particularly in matters related to the CFSP.<sup>141</sup>

The CFSP is addressed in a specific section of the TEU, which includes Articles 23-46 under Title V. Conversely, issues that do not fall within the scope of CFSP are dealt with in other parts of the treaties, mainly in the TFEU.<sup>142</sup> When discussing the Court jurisdiction in regards to CFSP, there are three articles that corresponds to it, namely; Article 24 (1) TEU,<sup>143</sup> Article 40 TEU,<sup>144</sup> and Article 275 TFEU.<sup>145</sup>

It is evident from the language used in these three articles that Court jurisdiction over CFSP matters has been explicitly excluded. However, this does not necessarily imply total immunity of CFSP areas to judicial oversight at the Union level. The general jurisdiction conferred upon the Court empowers it with some discretion to intervene on certain CFSP concerns, enabling it to cautiously navigate a legally sensitive terrain.<sup>146</sup> Therefore, understating the Court's extent of authority regarding CFSP issues would be inappropriate. A comparative analysis between its role in non-CFSP external relations and its actions pertaining to CFSP can shed light on how judicial review operates within this realm of EU decision-making. Article 24(1) explicitly states that the Court lacks jurisdiction with regards

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<sup>140</sup> Geert De Baere and Geert De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) 212 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 148.

<sup>141</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 148.

<sup>142</sup> *ibid.*

<sup>143</sup> Article 24 (1) §2 the last part stated that: "...The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

<sup>144</sup> Article 40 TEU stated that: The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

<sup>145</sup> Consolidated version of the Treaty on the Functioning of the European Union art 275 stated that: The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union..

<sup>146</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 150.

to CFSP matters. This indicates that the Court should not disregard the provisions of the treaties on CFSP matters altogether, but only take them into account when interpreting and applying provisions from other parts of the treaties. This implies that to some extent the Court might have jurisdiction, as observed under Article 275 TFEU that the Court has jurisdiction to oversee the compliance of CFSP decisions with Article 40 TEU, which ensures individual rights to review the legality of restrictive measures against natural or legal persons which was brought under the conditions of Article 263 TFEU.

Now we might wonder why the Court would have limited jurisdiction in CFSP matters might invite scholarly scrutiny to ascertain the rationale for the Court's restricted role. In fact, several scholars did scrutinize it, such as according to Butler and other scholars in his study,<sup>147</sup> there are many reasons why the Court jurisdiction is excluded, including the notion that CFSP matter are encompassed within foreign policy actions that are characterized by high levels of political sensitivity and may involve short-term term considerations.<sup>148</sup> Making decisions in foreign policy is a complex process that requires assessing risks, establishing vital connections, and being held accountable for outcomes that extend beyond the reach of legal scrutiny.<sup>149</sup> One key factor is that CFSP matters involve a blend of political and legal considerations and that foreign policy actions are not always in the form of concrete legislative measures.<sup>150</sup> According to Entin and Belous, the CJEU's authority is restricted due to Member States' reluctance to expand the direct effect principle and other CJEU acquis. Also, because CFSP is based on intergovernmental cooperation, Member States aim to safeguard their foreign policy sovereignty.<sup>151</sup>

Despite the limited role the Court has in CFSP matters, recent case laws shown that the role of CJEU in reviewing the legality of CFSP measures has been expanded. The Court's jurisdiction is normatively limited to cases where fundamental rights of individuals have been restricted, and to review the validity or proportionality of operations carried out by national

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<sup>147</sup> *ibid* 151.

<sup>148</sup> *ibid*.

<sup>149</sup> David AO Edward, 'Is Art. L of the Maastricht Treaty Workable?' in Georg Ress, Jürgen Schwarze and Torsten Stein (eds), *Die Organe der Europäischen Union im Spannungsfeld zwischen Gemeinschaft und Zusammenarbeit* (Nomos Verlagsgesellschaft Baden-Baden 1995) 23 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 151.

<sup>150</sup> Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press 2003) 101 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 151.

<sup>151</sup> Kirill Entin and Yulia Belous, 'The Role of the Court of Justice of the European Union in the Development of the Common Foreign and Security Policy after the Treaty of Lisbon' [2019] SSRN Electronic Journal 7 <<https://www.ssrn.com/abstract=3458948>> accessed 8 April 2023.

police or law enforcement authorities in the context of Area of Freedom, Security and Justice.<sup>152</sup> The recent development on the jurisdiction of the Court over CFSP matters from case laws showed that the Court has begun to interpret its limited jurisdiction of the Court in a broader term.<sup>153</sup> For the purpose of this study, the discussion shall be limited to the post-Lisbon era.

Since the entry into force of Treaty of Lisbon, the Court's jurisdiction has been interpreted and developed broadly in case laws. One such case is *EP v Council (Mauritius)*,<sup>154</sup> which established that the second subparagraph of Article 24 (1) TEU and the first paragraph of Article 275 TFEU create a derogation to the Court's general jurisdiction conferred by Article 19 TFEU, specifically in regards to CFSP-related matters. As a result, this derogations must be narrowly interpreted in order to ensure the observance of law in the interpretation and application of the Treaties.<sup>155</sup>

More recent case law such as *H v Council*,<sup>156</sup> the CJEU has expanded its jurisdiction on some CFSP acts, since the object of the controversy was the decision of a Head of an EU diplomatic Mission to transfer a seconded national officer.<sup>157</sup> During the General Court proceedings, it was determined that the GC did not have jurisdiction due to the non-restrictive nature of the case. However, the CJEU reversed this ruling and emphasized the principle of the rule of law. It deemed that the decision of the Head of Mission was subject to legal scrutiny under Article 270 TFEU, which grants the EU judicature jurisdiction over all actions brought by EU staff members who have been seconded to EU missions.<sup>158</sup> Therefore, despite the CFSP act in *H v Council* was not a restrictive measure, the Court had jurisdiction on it.

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<sup>152</sup> Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 European Constitutional Law Review 8, 24–25.

<sup>153</sup> Panos Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (2018) 67 International and Comparative Law Quarterly 1, 10–11.

<sup>154</sup> *European Parliament v Council of the European Union* [2014] ECJ Case C-658/11, ECLI:EU:C:2014:2025 [70] see also; *Elitaliana SpA v Eulex Kosovo* [2015] ECJ Case C-439/13 P, ECLI:EU:C:2015:753 [41] See also; *H v Council* Court of Justice of the EU C-455/14 [40] cited in; Christophe Hillion and Ramses A Wessel, "The Good, the Bad and the Ugly": Three Levels of Judicial Control over the CFSP', *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 67–68.

<sup>155</sup> Hillion and Wessel (n 154) 67–68.

<sup>156</sup> *H v Council* (n 154).

<sup>157</sup> Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (n 14) 574.

<sup>158</sup> *ibid* 575.

Whereas on some other CFSP acts such as on its opinion in *Opinion 2/13*<sup>159</sup>, as argued by Lonardo,<sup>160</sup> the Court did not further specify why did it rule that acceding to the ECHR is part of CFSP acts, as EU law now stands, that it falls outside the ambit of judicial review by the CJEU. While Koutrakos<sup>161</sup> in his article, argues that even if the CFSP exclusion is interpreted narrowly, there is a core of CFSP measures which are beyond the Court's jurisdiction.<sup>162</sup>

In *Rosneft*,<sup>163</sup> a case that involve a Russian petroleum company PJSC Rosneft Oil Company whose majority is owned by a legal person belonging to the Russian Federation and partly owned by British company, Rosneft which was affected by the EU sanctions which was imposed on Russian Federation and targeted its individuals, entities, and sectors involved in or benefiting from Russia's actions. This sanction was imposed in response to its actions destabilising the situation in Ukraine. Rosneft lodged its case for judicial review before the High Court of Justice of England and Wales challenging the EU restrictive measures and its legality under EU law and an agreement with the Russian Federation, the case then referred by the UK court to the CJEU, questioning whether the CJEU has jurisdiction over the matter, and if the sanctions are valid and how to interpret them.<sup>164</sup> *Rosneft* is often regarded as the first ever preliminary ruling on CFSP matters,<sup>165</sup> which in the case the Court has again established its jurisdiction on a CFSP act by narrowing it insofar as it was a restrictive measure, or in the word of Advocate General Wathelet in the opinion<sup>166</sup> to *Rosneft* to carve-out that CFSP acts are primarily designed to implement purely political decisions related to the CFSP. As such, it can be challenging to balance judicial review with the separation of powers.<sup>167</sup> Despite the case arose out of a heavily charged international political environment

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<sup>159</sup> *Opinion of the Court (Full Court) of 18 December 2014 Opinion pursuant to Article 218(11) TFEU Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties Case Opinion 2/13* [2013] ECLI:EU:C:2014:2454 (ECJ) [252].

<sup>160</sup> Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (n 14) 574.

<sup>161</sup> Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (n 153).

<sup>162</sup> *ibid* 32 see also; Van Elsuwege (n 38) 1754.

<sup>163</sup> *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (n 13).

<sup>164</sup> *ibid* 25–37.

<sup>165</sup> Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (n 14) 575.

<sup>166</sup> *Opinion of Advocate General Wathelet delivered on 31 May 2016 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others Case C-72/15* (2015) ECLI:EU:C:2020:793 (ECJ) [52] cited in; Van Elsuwege (n 38) 1739.

<sup>167</sup> *Opinion of Advocate General Wathelet delivered on 31 May 2016. PJSC Rosneft Oil Company v Her Majesty's Treasury and Others. Case C-72/15.* (n 166) para 52 cited in; Van Elsuwege (n 38) 1739.

the Court, for the purpose of establishing jurisdiction, had to ascertain what provisions of the CFSP Decision were restrictive measures, and what were not.<sup>168</sup>

In a more recent *Bank Refah Kargaran* case,<sup>169</sup> the CJEU has addressed the issue of jurisdiction by acknowledging its competence to rule on claims for damages brought by individuals or organizations who allege they have been harmed by restrictive measures implemented under CFSP. The judgement to Advocate General Hogan's opinion, the Court's jurisdiction exclusion is connected to the political nature of CFSP decisions. As a result, the judgement was made.<sup>170</sup> This case law has expanded the role of the CJEU in reviewing the legality of CFSP measures.

As discussed earlier, that Member States through the Council has consistently tried to exclude CFSP-related matters from judicial review by the CJEU. This action may be perceived as an effort to establish a separation between EU organizations involved in CFSP and the legal framework of the EU,<sup>171</sup> due to the sensitive political nature and goals involved. However, Lonardo in his article<sup>172</sup> argues that the national courts could act as the catalyst of normalization of the EU CFSP, in so far as they refer questions for preliminary rulings to the CJEU.<sup>173</sup> There are two potential outcomes from the actions of national courts. Firstly, it could enable the CJEU to apply general rules to CFSP. Secondly, when the CJEU agrees to provide a preliminary ruling on the validity or interpretation of restrictive measures, this can be seen as a form of normalization, as it involves subjecting CFSP to a general procedure, potentially going against Article 275 TFEU.<sup>174</sup>

Notwithstanding the Court acceptance to provide a preliminary ruling referred by the national courts in regard CFSP, and also in accordance to Article 275 (2) TFEU which provide that CFSP decisions on restrictive measures can be reviewed in proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU (i.e. action for annulment), the Court as seen in previous cases, and as also discussed in previous

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<sup>168</sup> Lonardo, 'The Political Question Doctrine as Applied to Common Foreign and Security Policy' (n 14) 575.

<sup>169</sup> *Bank Refah Kargaran v Council of the European Union* (n 15).

<sup>170</sup> *Opinion of Advocate General Hogan delivered on 28 May 2020 Bank Refah Kargaran v Council of the European Union Case C-134/19 P* [2019] ECLI:EU:C:2020:396 (ECJ) [47–49] cited in; Van Elsuwege (n 38) 1740.

<sup>171</sup> Butler, 'C6Hidden Administrative Review in EU Law' (n 77) 124–127.

<sup>172</sup> Luigi Lonardo, 'May Member States' Courts Act as Catalysts of Normalization of the European Union's Common Foreign and Security Policy?' (2021) 28 *Maastricht Journal of European and Comparative Law* 287.

<sup>173</sup> *ibid* 289.

<sup>174</sup> *ibid*.

chapters of this thesis, has extend its jurisdictions to preliminary rulings on validity on a case such as *Rosneft* and action for damages such as in *Bank Refah Kargaran*.<sup>175</sup>

The intricacy of determining whether the jurisdiction of the Court covers the interpretation of CFSP decisions related to restrictive measures reflects the unique nature of CFSP decisions as an "intergovernmental echo," resulting in the questioning of the Court's jurisdictional boundaries.<sup>176</sup> Former case law also has never shown that the Court has done a preliminary ruling on interpretation of CFSP matters. There is, however, new request for a preliminary ruling on the interpretation of CFSP decision from the Regional Court of Bucharest,<sup>177</sup> in case C-351/22 (*Neves 77*).<sup>178</sup> The *Neves 77* case involves EU sanctions imposed in response to Russia's destabilizing actions in Ukraine. A Romanian company, *Neves 77 Solutions SRL*, acted as a broker for the sale of military-grade radio equipment from a Ukrainian to an Indian company. However, the Romanian tax authority seized the entire transaction's profits because *Neves 77* failed to comply with the notification requirements outlined in Council Decision 2014/512/CFSP from July 31, 2014.<sup>179</sup> The questions referred reflected a request for the interpretation of CFSP decision concerning restrictive measures which would also falls under the claw-back rule, though it has not yet been ruled by the Court yet.<sup>180</sup> Before addressing to the questions referred by the Romanian court, the CJEU will have to rule on its own jurisdiction in preliminary rulings on interpretation.<sup>181</sup> This thesis predict that the Court will try to provide a strict differentiation of interpretation and validity which could also be precedent for other cases beyond CFSP matters.

The EU treaties currently put on limitations on the jurisdiction and competence of the CJEU in regards to CFSP matters. While case laws have broadened the Court's ability to

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<sup>175</sup> Christian Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (*European Law Blog*, 13 October 2022) <<https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/>> accessed 26 May 2023.

<sup>176</sup> *ibid.*

<sup>177</sup> 'COUNCIL DECISION 2014/512/CFSP - of 31 July 2014 - Concerning Restrictive Measures in View of Russia's Actions Destabilising the Situation in Ukraine' cited in; Breitler (n 175).

<sup>178</sup> *Case C-351/22: Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 31 May 2022 — Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală — Direcția Generală Antifraudă Fiscală* (ECJ) 77.

<sup>179</sup> *Working Documents-Request for a preliminary ruling from the Tribunalul București (Romania) lodged on 31 May 2022 — Neves 77 Solutions SRL v Agenția Națională de Administrare Fiscală — Direcția Generală Antifraudă Fiscală (Case C-351/22)* Court of Justice of European Union C-351/22.

<sup>180</sup> Breitler (n 175).

<sup>181</sup> Xavier Groussot and Anna Zemskova, 'Using Financial Tools to Protect the Rule of Law: Internal and External Challenges in The Rule of Law in the EU: Crisis and Solutions (SIEPS, 2023)' 47.



review the legality of CFSP measures, it remains limited to cases where the rights of a natural or legal person have been restricted, the validity of CFSP decisions, and actions for damages. *The Neves 77* case is expected to lead to a significant development in the Court's handling of jurisdictional matters related to CFSP.

# 4 Striking a Balance between National Sovereignty and Individual Rights in the CFSP Context

## 4.1 The Classification of CFSP Competence within EU Law

### 4.1.1 Shared vs Exclusive Competence

As a framework in the EU that aims to coordinate the foreign and security policy of its Member States, the CFSP is in a very peculiar position. It is considered as a separate Union competence in Article 2(4) TFEU to distinct it from other, ‘general’ competences.<sup>182</sup> Cremona<sup>183</sup> and Butler<sup>184</sup> suggested to begin by looking at the constitutional structure of the EU Treaties, TEU and TFEU since both are of equal legal value and closely bound together.<sup>185</sup> Basically, matters related to provisions on the EU’s foreign policy and external relations regime is constitutionally located in two distinct areas,<sup>186</sup> under Title V of the TEU, and in Part V of the TFEU. General provisions that applicable to all of external actions can be found in TEU, substantive and procedural provisions concerning CFSP and CSDP are in the TEU, and provisions on all other external policy fields and some general procedural

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<sup>182</sup> Paul James Cardwell, ‘The United Kingdom and the Common Foreign and Security Policy of the EU: From Pre-Brexit “Awkward Partner” to Post-Brexit “Future Partnership”?’ (2017) 13 *Croatian Yearbook of European Law and Policy* 5 <<https://discovery.researcher.life/article/the-united-kingdom-and-the-common-foreign-and-security-policy-of-the-eu-from-pre-brexit-awkward-partner-to-post-brexit-future-partnership/1fd66a7b12e23f97aadec32f7b5a6d51>> accessed 8 April 2023.

<sup>183</sup> Marise Cremona, ‘The Position of CFSP/CSDP in the EU’s Constitutional Architecture’ [2018] *Research Handbook on the EU’s Common Foreign and Security Policy* 5, 5.

<sup>184</sup> Butler, *Constitutional Law of the EU’s Common Foreign and Security Policy* (n 21) 40.

<sup>185</sup> Cremona (n 183) 5.

<sup>186</sup> Robert Schütze (ed), ‘External Union Powers: Competences and Procedures’, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2014) 304 <<https://www.cambridge.org/core/books/foreign-affairs-and-the-eu-constitution/external-union-powers/25A96AE961F913ED722B5891916299A5>> cited in; Butler, *Constitutional Law of the EU’s Common Foreign and Security Policy* (n 21) 40.

provisions are under the TFEU.<sup>187</sup> Now, we can see that while nearly all external relation matters are contained in the TFEU, CFSP matters are located only in the TEU.<sup>188</sup>

The unique nature of CFSP matters can be seen in Article 24(1) TEU, which stated that CFSP is subject to particular regulations and procedures as outlined in the treaties.<sup>189</sup> The competences of the European Union, as described in Articles 2-6 of the TFEU, can be categorized into three groups. Article 2 of the TFEU outlines the three types of EU competences, namely exclusive competence detailed in Article 3 of the TFEU, shared competence as defined in Articles 4 and 5 of the TFEU, and supporting competence, which includes the support, coordination, or supplementation of actions, as outlined in Article 6 of the TFEU. As a policy, the peculiar nature of CFSP make it often be considered as a *sui generis* policy due to its intergovernmental nature as the central feature.<sup>190</sup> The *sui generis* nature of CFSP makes it difficult to determine to which competence the CFSP should be included. From a brief overview, the CFSP matters might fall into both shared and exclusive competences, this combination of both competences might have implications to the operations and efficiency of CFSP.

The view is also suggested by scholars studying this matter such as Cremona,<sup>191</sup> which suggest that CFSP is designed to be separate from the foreign and security policies of individual Member States, although they should be in harmony with each other, as according to Article 24(3) TEU the Union itself is envisaged to be a cohesive force in international relations with its own strategic interests. This is because Article 2(4) TFEU grants the Union the competence to establish and implement CFSP, which involves gradually developing a common defense policy. Though, Article 24 TEU states that the role of Member States in supporting EU policy goes beyond mere coordination or supplementation of their own

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<sup>187</sup> Cremona (n 183) 5 cited in; Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018) 5.

<sup>188</sup> According to Butler, its because of historical reasons. Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 40.

<sup>189</sup> *ibid.*

<sup>190</sup> Sabine Saurugger and Fabien Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy' (2015) 20 *European Foreign Affairs Review* 1 <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EERR\EERR2015022.pdf>> accessed 31 May 2023 citing; Wolfgang Wagner, 'Why the EU's Common Foreign and Security Policy Will Remain Intergovernmental: A Rationalist Institutional Choice Analysis of European Crisis Management Policy' (2003) 10 *Journal of European Public Policy* 576, 4.

<sup>191</sup> Cremona (n 183) 6.

policies. The provision emphasizes that it is the responsibility of Member States to actively assist and uphold EU policy initiatives.<sup>192</sup>

Moreover, according to Butler's research, the legal framework of the EU encompasses all facets of the CFSP, despite its notable differences.<sup>193</sup> If CFSP were to be categorized under competences, it would fall under "non-pre-emptive shared competence."<sup>194</sup> However, the CFSP is not intended to replace or pre-empt foreign or defense policy of the Member States,<sup>195</sup> it cannot be classified as a shared competence since Member States cannot be deterred to pursue their desired course of action, thus, labelling CFSP as a shared competence would not be appropriate. Moreover, there is no list of policy areas in the treaties that give Member States complete discretion on the matter.<sup>196</sup> Furthermore, CFSP is also not categorized as a shared competence anywhere in the Treaties. Despite Article 4 TFEU indicating that competences labelled as neither exclusive nor shared, and supportive (support, coordinate, or supplement), should be shared, it is evident from the allocation of CFSP competence in Article 2(4) TFEU, that this residual allocation does not fall under this category.<sup>197</sup> Article 42 (2) and (7) of the TEU provides assurance that CSDP will not affect the unique character of the security and defense policies of certain Member States and will uphold the obligations of Member States within NATO. This assurance is also reiterated in Declaration 13 and 14, emphasizing that CFSP will not take on the responsibilities and powers of Member States in relation to the development and execution of foreign policy.<sup>198</sup>

Moving on the discussions on whether the CFSP should be categorized as exclusive competence, this thesis begin by observing Article 2(4) TFEU, which stated that the EU has the competence to establish and implement a common foreign and security policy, which includes a common defense policy. Additionally, Article 3(2) TFEU declares that the Union has exclusive competence to finalize an international agreement, provided that its conclusion is passed by the Union's legislative act and is necessary to enable the Union to exercise its internal competence or affect common rules or their scope. The combination of two

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<sup>192</sup> *ibid.*

<sup>193</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 41.

<sup>194</sup> *ibid* quoting; Marise Cremona, 'The Union's External Action: Constitutional Perspectives' [2007] *Genèse et destinée de la Constitution européenne / Genesis and Destiny of the European Constitution* 1173, 1195.

<sup>195</sup> Cremona (n 183) 6.

<sup>196</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 41–42.

<sup>197</sup> Cremona (n 183) 6–7 see also; Craig and De Búrca (n 23) 119.

<sup>198</sup> Cremona (n 183) 7.

provisions could grant exclusive competence to the EU, but a precondition in Article 3(2) TFEU complicates matters. EU exclusive competence requires a legislative act, which is not included in Article 24 (1) subparagraph 2 TEU.<sup>199</sup> Therefore, exclusive competence is difficult to assign in this case.

In conclusion, the unique nature of EU competence in CFSP, which blends elements of shared and exclusive competence, has far-reaching implications for the CFSP operation and effectiveness. As the EU lacks exclusive competence, Member States maintain a certain degree of sovereignty over their foreign and security policies, which may result in disharmony and inconsistency between EU and Member State policies. This disharmony could lead to tensions that could impact the operation and effectiveness of the CFSP. However, the intergovernmental or shared nature of the policy allows for a more inclusive and coordinated approach, which could present the EU as a cohesive force in international relations and leverage its bargaining power in global politics.

#### 4.1.2 The concept of Special Competence

In light of the preceding discussion on the EU competence in the realm of CFSP, it appears that the CFSP does not align with any of the categories of exclusive, shared, or supporting competence. Since its inception in the Treaty of Maastricht in 1993, the CFSP has developed significantly. Article 24 (1) TEU stipulates that the EU competence in matters of CFSP shall include all areas of foreign policy and all questions relating to the Union's security.<sup>200</sup> A diverse range of policies has been adopted under the CFSP that spans from missions focused on preserving civil and military peace and security to diplomatic initiatives aimed at promoting international cooperation on matters such as climate change and nuclear proliferation.<sup>201</sup> The most notable action carried out by the EU under CFSP is the imposition of restrictive measures or sanctions, which has also resulted in the most litigation.<sup>202</sup> As a policy, the CFSP remains in many ways special and *sui generis*. According to Article 40 TEU, CFSP matters shall not impact the application of the procedures and the extent of the powers of the institutions that are established by the treaties. This view is shared by Butler,

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<sup>199</sup> *ibid.*

<sup>200</sup> Christina Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (2015) 20 *European Foreign Affairs Review* 538 <<https://discovery.researcher.life/article/the-cfsp-and-other-eu-policies-a-difference-in-nature/56a831d4395b383fa980f9f2bfeaf3b2>> accessed 8 April 2023.

<sup>201</sup> *ibid.*

<sup>202</sup> *ibid.*

arguing that CFSP matters are unique and, therefore, do not comply with the three types of competences (exclusive, shared, or supporting competence) as they have their own distinctive provisions, thus, a special competence.<sup>203</sup>

However, regardless of CFSP special nature, it would be inaccurate to presume that CFSP matters possess their own distinct legal system. Butler argues that the CFSP's unique characteristics, such as its unconventional Union decision-making process, absence of a comprehensive foundation for judicial review, and predominantly unanimous voting procedures, imply that there exists only a one true legal order within the EU.<sup>204</sup>

There are three aspects that distinct the CFSP from other TFEU policies. Firstly, the Council has greater authority than the European Parliament when enacting an act under the CFSP. This gives representatives of Member States a stronger position than in other policy areas.<sup>205</sup> Article 24 (1) TEU restrict the European Parliament and Commission role in this area, which prohibits the adoption of legislative acts and applies special procedures. The TFEU grants more decision-making power to the Commission and Parliament, but the intergovernmental nature of the CFSP necessitates unanimity among Member States, thus, prioritizing the preferences of the national executive in the Council.<sup>206</sup>

Secondly, the difference lies in the relationship between the Union and its Member States. In accordance to Article 2 (4) TFEU and Declarations 13 and 14 mentions that even though CFSP as a separate competence when the EU exercises its CFSP competences Member States are not pre-empted or prevented from taking national action. Lastly, the relationship between the EU and the individuals in the area of CFSP also differs with the relationship between EU and individuals under the TFEU, where the CFSP acts do not have the capacity to enter directly into the national legal orders.<sup>207</sup>

Furthermore, in regards to the competence of CJEU, although it has general competence, as governed under Article 24 (1) TEU which refers to Article 40 TEU and Article 275 TFEU, in which CJEU can monitor the compliance to Article 40 TEU and review the legality of

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<sup>203</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 41.

<sup>204</sup> *ibid* citing; Daniel Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105, 138.

<sup>205</sup> Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (n 200) 539.

<sup>206</sup> *ibid*.

<sup>207</sup> *ibid*.

decisions providing for restrictive measures against natural or legal persons adopted by the Council, its competence for CFSP remains limited under the Lisbon Treaty.<sup>208</sup> As observed further, we may see that the EU legal order fully encompasses CFSP matters, despite its sharp differences and as mentioned earlier in sub chapter 4.1.1 earlier, if CFSP would fit into a category of competence, it would be a 'non-pre-emptive shared competence.'<sup>209</sup> But, still, it would be a poor fit to deem it as a shared competence.

Accordingly, CFSP matters can be further delineated as a competence area that involves the authority of certain institutions to adopt decisions. Article 24 (1) TEU restricts these matters by allowing very little room for interpretation by institutional actors. As a result, CFSP matters sit uncomfortably between two different approaches - formative intergovernmentalism and contemporary supranationalism. Additionally, CFSP is constitutionally isolated<sup>210</sup> within the Union, with its core principles being established during earlier stages of integration and later accommodating diversity<sup>211</sup> in a fragmented manner. This emergence has been regarded as a watershed moment<sup>212</sup> in the development of EU policies.

### **4.1.3 The Implication of Competence Classification on CFSP Effectiveness and Coherence**

The classification of competence refers to the allocation of decision-making powers between the EU and its Member States and it has significant implications for the effectiveness and coherence of the CFSP.<sup>213</sup> As an intergovernmental policy, the CFSP lacks direction from supranational institutions and credible enforcement mechanisms, and it also

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<sup>208</sup> Entin and Belous (n 151) 5.

<sup>209</sup> Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 41 citing ; Cremona (n 194) 1195.

<sup>210</sup> Rober Schütze, *European Union Law* (Cambridge University Press 2015) 889 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 42.

<sup>211</sup> Daniel Thym, 'Foreign Affairs' (29 March 2009) 317 <<https://papers.ssrn.com/abstract=2756100>> accessed 10 August 2023 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 42.

<sup>212</sup> Joris Larik, 'Foreign Policy Objectives in European Constitutional Law - Joris Larik - Oxford University Press' 78 cited in; Butler, *Constitutional Law of the EU's Common Foreign and Security Policy* (n 21) 42.

<sup>213</sup> Patrick Müller, Karolina Pomorska and Ben Tonra, 'The Domestic Challenge to EU Foreign Policy-Making: From Europeanisation to de-Europeanisation?' (2021) 43 *Journal of European Integration* 519, 520, 526.

predicated on the sovereign rights of Member States to conduct their own foreign policies alongside the CFSP framework.<sup>214</sup> The EU foreign policy strategy aims to advance the EU's interests and values in the global arena by means of a cohesive approach to foreign policy.<sup>215</sup> It prioritizes protecting its own interests while advocating for democracy, human rights and the rule of law. The EU seeks stability, prosperity and security while advocating for the protection of human rights and freedoms.<sup>216</sup>

The classification of shared competences, as governed by Article 4 TFEU, can enhance the effectiveness of the CFSP through joint decision-making and coordinated action, enabling the EU to present a unified voice and coherent foreign policy stance to the international community.<sup>217</sup> Nonetheless, the shared competence can also pose difficulties since it requires consensus among Member States, which can be challenging due to conflicting national interests and priorities.<sup>218</sup> Should the CFSP is considered to fall within shared competence, it is crucial to closely scrutinize the powers of both the EU and Member States in order to clarify the nature of power sharing.<sup>219</sup>

In the exclusive competence the EU has sole authority to act in specific areas of foreign policy,<sup>220</sup> i.e. in Article 3 (2) TEU the EU has the competence for the conclusion of an international agreement as long as it is necessary for the Union to exercise its internal competence, or when it affect common rules or alter their scope. The exclusive competence classification may be able to streamline EU decision making and facilitate CFSP implementation. The High Representative, as required by Article 27(2) TEU<sup>221</sup> represent the Union coordinates Member States to ensure consistency in external action. However, the exclusive competence could also have adverse effect of hindering the involvement of

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<sup>214</sup> *ibid* 520 citing; Orenstein and Kelemen (n 11) 87–102.

<sup>215</sup> Craig and De Búrca (n 23) 409.

<sup>216</sup> Müller, Pomorska and Tonra (n 213) 520, 525, 526 see also; Consolidated version of the Treaty on European Union (OJ C 202, 762016) art 3.

<sup>217</sup> Müller, Pomorska and Tonra (n 213) 525, 526, 530.

<sup>218</sup> *ibid* 523, 525, 529.

<sup>219</sup> Craig and De Búrca (n 23) 119.

<sup>220</sup> *ibid* 111–112, 367, 384–385.

<sup>221</sup> TFEU art 27(2) 'The High Representative shall represent the Union for matters relating the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.'



Member States in shaping policy decisions, which could result in a lack of democratic accountability and legitimacy.<sup>222</sup>

As previously discussed, the term special competence pertains to the area where the EU has the competence to action when implementing CFSP but Member States can also exercise their own competence.<sup>223</sup> The special competence allow for a flexible and adaptable approach to foreign policy, as it allows Member States to take action in their particular interest.<sup>224</sup> However, also as has been highlighted in the earlier chapter, the special competence can also lead to fragmentation and inconsistency in the implementation of the CFSP, as Member States may pursue their own agendas without sufficient coordination.<sup>225</sup>

The successful implementation of CFSP is dependent on the closely connected challenges and advantages of competence classification. While shared competence can improve coordination and coherence, it necessitates the attainment of consensus among Member States, which can prove to be a daunting task.<sup>226</sup> The exclusive competence may result in a more efficient decision-making process, but it could potentially restrict the engagement of Member States involvement and impede democratic accountability.<sup>227</sup> Meanwhile, even though special competence allows for flexibility, but it can also lead to fragmentation and inconsistency.<sup>228</sup> The analysis in this chapter reveals that classification of competences has profound implications for the effectiveness and coherence of CFSP. The allocation of competences as shared, exclusive, or special competences determines the extent to which the EU and Member States can act independently or in concert with one another in the realm of foreign policy.<sup>229</sup> Therefore, while each classification bring its own challenges and benefits,

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<sup>222</sup> Jan Wouters, Hanne Cuyckens and Thomas Ramopoulos, 'The European Union: A Federation in All but Name' 191, 191–235.

<sup>223</sup> Eckes, 'The CFSP and Other EU Policies: A Difference in Nature?' (n 200) 539 see also ; Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (n 153) 30.

<sup>224</sup> Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (n 153) 3, 6.

<sup>225</sup> *ibid* 33.

<sup>226</sup> Müller, Pomorska and Tonra (n 213) 532, 525, 526, 527.

<sup>227</sup> Wouters, Cuyckens and Ramopoulos (n 222) 191–235.

<sup>228</sup> Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (n 153) 10,15,33.

<sup>229</sup> Müller, Pomorska and Tonra (n 213) 520,526,530.

striking the right balance between those classifications is important for the effectiveness and coherences in the implementation of CFSP.<sup>230</sup>

## 4.2 Types of tensions between national sovereignty, individual rights, and CFSP measures

Following the discussions from the above chapters, it has been observed that implementing CFSP might create tensions amongst national sovereignty, individual rights and the measures taken under CFSP can manifest in various ways and have significant impacts on policy implementation.

Among the manifestation of those tensions is the difficulty in balancing national sovereignty with the need for collective decision-making in the CFSP. Since the CFSP has been regarded as an intergovernmental policy, decisions are supposed to be made collectively by Member States rather than by the supranational institutions like the CJEU.<sup>231</sup> Member States' desire to protect national sovereignty can create tensions with the need for coordinated action in foreign and security policy.

One of the challenges in pursuing common security objectives is the possibility of violating individual rights. The CFSP may involve actions like imposing sanctions and other restrictions, which could have considerable consequences for individuals and their rights. The Court in *Kadi Case*<sup>232</sup> implied that careful consideration, transparency, and adherence to legal principles when implementing sanctions is necessary to avoid potential conflicts with human rights norms and judicial scrutiny.<sup>233</sup> The task of reconciling the need for safeguarding individual rights with the imperative of ensuring collective security can be quite arduous and may give rise to conflicts between these two objectives. Such conflicts can exert a significant influence on the implementation of policies. For instance, the challenge of striking a balance between national sovereignty and shared decision-making may cause delays or disagreements

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<sup>230</sup> Koutrakos, 'JUDICIAL REVIEW IN THE EU'S COMMON FOREIGN AND SECURITY POLICY' (n 153) 7, 10, 1, 11, 27, 33.

<sup>231</sup> *ibid* 3, 17.

<sup>232</sup> *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] GC Case T-315/01 114.

<sup>233</sup> Heleen Over de Linden, 'The Court of Justices Difficulty with Reviewing Smart Sanctions as Illustrated by Rosneft' (2019) 24 *European Foreign Affairs Review* 27, 31,36,40.

in the adoption of measures related to the CFSP. The divergent priorities or interests of Member States can impede the realization of mutually agreed-upon policies.<sup>234</sup>

Furthermore, the potential infringement on individual rights may give rise to legal challenges and delays in the implementation of CFSP measures. The CJEU has a limited role in reviewing CFSP measures, but it has been involved in cases where the obligation to state reasons and the protection of individual rights have been at stake.<sup>235</sup> These legal challenges can slow down the implementation of CFSP measures and create uncertainties regarding their legality.

In conclusion, tensions between national sovereignty, individual rights, and measures under CFSP can impact policy implementation. Balancing these interests requires careful coordination among Member States to address key challenges like safeguarding individual rights while achieving CFSP goals.

### **4.3 Judicial Review and Remedies for Individuals Affected by CFSP Measures**

Judicial review holds crucial role in the context of CFSP. Howorth in his works,<sup>236</sup> claim that CFSP While the CFSP is an intergovernmental instrument, the involvement and influence of EU supranational institutions like the Commission and the European Parliament in the CFSP have been subject to growing scrutiny.<sup>237</sup> Sjursen argues that the CFSP is intended to retain Member States' capitals to initiative and control of Member State capitals, but in practice, the level and scope of the cooperation entails a 'voluntary surrendering power

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<sup>234</sup> Cardwell (n 182) 5,7,8,12,22.

<sup>235</sup> Over de Linden (n 233) 36,38,40.

<sup>236</sup> Jolyon Howorth, 'Decision-Making in Security and Defense Policy: Towards Supranational Inter-Governmentalism?' (2012) 47 *Cooperation and Conflict* 433, 433–453 as cited in; Rosén and Riddervold (n 34) 400.

<sup>237</sup> Rosén and Riddervold (n 34) 400,402,417.

to a larger entity'.<sup>238</sup> The involvement of judicial entities, particularly the CJEU, has evolved with regards to the CFSP subsequent to that particular manifestation.

The jurisdiction of the CJEU has been expanded to encompass review of CFSP measures and their compliance with EU law. It has the power to hear direct actions and preliminary references related to the CFSP, and it can provide remedies for individuals affected by CFSP measures, including damages for infringements of their rights.<sup>239</sup> According to Butler, when it comes to the significance of the Court jurisdiction can be seen in five cases, among others, *Mauritius*,<sup>240</sup> *Eulex Kosovo*,<sup>241</sup> *Opinion 2/13*,<sup>242</sup> *H v. Council*,<sup>243</sup> and, *Rosneft*.<sup>244</sup> All these cases had jurisdiction of the Court as part of their considerations.<sup>245</sup> This demonstrates the CJEU's commitment to upholding the rule of law and protecting individual rights within the CFSP framework. However, the CJEU is not the only entity involved in this intricate balance, other supranational entities and national bodies also contributes to the CFSP balance, ensuring adherence to democratic principles and the safeguarding of individual rights.

It is important to note that while the CFSP retains its intergovernmental nature, Member States still have a significant role in decision-making.<sup>246</sup> This means that the CJEU's judicial

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<sup>238</sup> Helene Sjursen, 'Not so Intergovernmental after All? On Democracy and Integration in European Foreign and Security Policy' (2011) 18 *Journal of European Public Policy* 1078, 1078–1095, 1092; as cited in Rosén and Riddervold (n 34) 400.

<sup>239</sup> Graham Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13 *European Constitutional Law Review* 673, 675, 676, 690.

<sup>240</sup> *EP v Council* (n 154) para 70 the Court asserted its jurisdiction by stating that Article 19 TEU provide the Court general jurisdiction as legal basis, and in regards to derogations to Article 19 TEU by Article 24 TEU and Article 275 TFEU is the Court obligation to determine such by interpreting it narrowly.

<sup>241</sup> *Elitaliana* (n 154) para 49 Interpreting the final sentence of the second subparagraph of Article 24 (1) TEU and the first paragraph of Article 275 TFEU narrowly, as they are derogations from the general jurisdiction of the court, since the contract at issue was subject to the provisions of the Financial Regulation.

<sup>242</sup> *Opinion 2/13* (n 159) paras 251–252 The Court claimed that it had 'not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters. Yet for the purposes of EU accession to ECHR, the Court consider that it is enough to declare according to EU law at that time, certain acts adopted in teh context of CFSP fall outside the ambit of judicial review by the Court of Justice.

<sup>243</sup> *H v Council* (n 154) paras 40–41, 54–55 Quite similar with *Mauritius* case and *Eulex*, the Court consider derogation to Article 19 TEU must be interpreted narrowly while stating that effective judicial review is designed to ensure compliance with provisions of EU law inherent with the existence of the rule of law. While the decisions in dispute is under CFSP context, they also constitute, at the very essence, acts of staff management so in that case, the Court may have jurisdiction over such matter.

<sup>244</sup> *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* (n 13) para 81 The Court ruled that it has jurisdiction to give preliminary ruling under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the CFSP provided that the request for preliminary ruling relates either to the monitoring of the decision to Article 40 TEU.

<sup>245</sup> Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (n 239) 676.

<sup>246</sup> Rosén and Riddervold (n 34) 402, see also; Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (n 239) 674.

review of CFSP measures is limited to their compatibility with EU law, rather than reviewing the substance of Member States' foreign and security policy decisions.<sup>247</sup> Individuals affected by the CFSP measures may seek damages for violations of their rights and challenge the measures before national courts. National courts can refer questions of EU law to the CJEU for a preliminary ruling.<sup>248</sup> It ensures that individuals can have access to justice and seek remedies both at the national level and EU level.

When it comes to safeguarding the rights of individual within the implementation of its foreign and security policies, the EU has established a system of checks and balances. This includes the involvement of EU Commission and the EU Parliament in the CFSP.<sup>249</sup> The EU Parliament in CFSP matters plays a role by scrutinizing and influencing the CFSP through its power to approve or reject international agreements.<sup>250</sup> This helps to ensure democratic accountability and transparency in the decision-making process. Furthermore, in an intergovernmental system the national parliament would have a role to play in scrutinizing the CFSP as an intergovernmental policy such through budgetary power, though their powers are limited.<sup>251</sup> However, the attitude of national parliamentarians towards scrutinizing the CFSP is also an important factor in determining the quantity and quality of parliamentary scrutiny.<sup>252</sup>

Therefore, the judicial review carried out by the CJEU ensures the compliance of CFSP measures with EU law as mandated by Article 24(1) TEU. The CJEU can provide remedies for individuals affected by CFSP measures, including damages for rights infringements. Involving supranational institutions and national parliaments in the CFSP decision-making process could also enhance the protection of individual rights by promoting democratic accountability and transparency.

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<sup>247</sup> Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (n 239) 681.

<sup>248</sup> *ibid* 695–696.

<sup>249</sup> *ibid* 690,700 see also; Rosén and Riddervold (n 34) 408.

<sup>250</sup> Rosén and Riddervold (n 34) 402.

<sup>251</sup> See page 20 of this thesis.

<sup>252</sup> Huff (n 56) 406–412.

# 5 Conclusion

## 5.1 Summary of Findings

In an attempt to answer the research question “*How do the EU Common Foreign and Security Policy measures impact fundamental rights and the free movement of capital within the European Union, and how can potential tensions be addressed to strike a balance between collective interest of the EU, national sovereignty (or national interest), and individual rights?*”, the thesis tries to highlight the importance of collective decision-making, judicial review, and the striking of balance of economic, legal and political considerations, including its tensions.

Implementing CFSP on both EU and national levels is complex and full of challenges, but also opportunities. The CFSP has become a valuable tool for EU foreign policy, allowing the EU to navigate global politics and security. Balancing collective action with Member States' discretion is crucial for the CFSP to demonstrate EU commitment to shared values and objectives. Sanctions and restrictions are complex to implement and may have significant consequences for individuals' rights.

The CJEU's role in reviewing CFSP measures remains limited, but it has been significant in cases concerning individual rights. The interaction between the free movement of capital and CFSP measures, such as financial sanctions, is complex and may pose challenges to maintaining the integrity of the Single Market.

Striking a balance between national sovereignty and collective decision-making can prolong or impede the adoption of CFSP measures, as the divergent priorities or interests of Member States can affect mutually agreed-upon policies. This thesis unravels the complexities and tensions inherent in CFSP, contributing to a nuanced understanding of the challenges and opportunities in balancing collective interest, national sovereignty, and individual rights within the EU's unique legal and political framework. The analysis of CFSP highlights the multifaceted interplay between EU law, fundamental rights, economic principles, and international relations.

## 5.2 Implications of the Study for EU Law and Policy

This research delved into the CFSP and its interaction with fundamental rights and free movement of capital. The outcomes of this study have far-reaching implications for EU law and policy. The multifaceted nature of CFSP was revealed by the thesis, which also highlighted the delicate balance between collective or common objectives and the protection of individual rights as a recurring theme. The findings of the study demonstrate the necessity of careful consideration and adherence to legal principles while implementing CFSP measures, such as sanctions. Reconciling these competing interests can be challenging and may lead to conflicts that could impact the implementation of policy.

The implementation of CFSP measures may potentially violate individual rights, creating significant challenges. To prevent conflicts with human rights norms, it is necessary to ensure transparency and legal oversight. The CJEU plays a crucial role in safeguarding individual rights. This thesis adds to the ongoing discussion on how to balance the need for collective security with the protection of fundamental rights.

The relationship between CFSP measures and the free movement of capital in the EU is a complex topic that has been examined in this thesis. The research conducted in this study sheds light on the challenges that must be overcome to maintain the integrity of the single market, and contributes to the understanding of how CFSP interacts with economic principles. The study's findings are expected to provide practical guidance for practitioners in implementing CFSP measures, with a particular emphasis on legal compliance and respect for individual rights. Additionally, the research is expected to inform policy decisions by highlighting the challenges and considerations involved in balancing national sovereignty, collective interests, and individual rights. Finally, the thesis contributes to academic discourse by providing a nuanced analysis of CFSP, its legal foundations, and its impact on fundamental rights and economic principles.

## 5.3 Potential Developments in the CJEU's Approach to CFSP Matters

The CJEU takes a unique approach to CFSP, balancing national sovereignty, individual rights, and EU interests. As the legal landscape evolves, potential developments may shape CJEU's jurisprudence. Precedent suggests an expansion of CJEU's jurisdiction in CFSP, with the court reviewing the legality of measures and providing remedies for individuals. This may lead to a more integrated and legally scrutinized approach to CFSP.

The involvement of CJEU in cases concerning safeguarding of individual rights within CFSP matters like *Kadi*, *Rosneft*, *Bank Refah Kargaran* and others has emphasized the importance of transparency, legal principles, and human rights. The CJEU's role in safeguarding individual rights against potential infringements by CFSP measures may be strengthened in the future development. Safeguarding individual rights also relevant to the implementation of CFSP at national level. On national level, tensions between national sovereignty and collective decision-making in CFSP may become a focal point in the CJEU's future jurisprudence. To address this issue, striking a balance between different priorities of Member States and the collective interests of the EU will remain a complex challenge. The expansion of Court approach in this balance may evolve, reflecting the changes in political dynamics and legal principles.

The interaction between free movement of capital and CFSP measures is an area of significant importance that warrants exploration. The CJEU's treatment of economic considerations, public policy, security, and solidarity within the context of CFSP may lead to changes that reflect the intricate economic dimensions of foreign policy. Additionally, the future development of CFSP may involve more participation from national parliaments and supranational institutions to promote democratic accountability and transparency in decision-making. The CJEU's approach to CFSP judicial review, remedies, and competence classification may also undergo modifications to reflect broader shifts in EU law and governance.

Therefore, considering the above argument, one could argue that the evolving development in CJEU's approach towards CFSP matters will continue to present a complex and multifaceted landscape. Striking balance between CFSP measures, national sovereignty,



and individual rights will also continue to be a central issue, indicating the intricate interplay of legal, political, and economic factors. The insights derived by this study's exploration on CFSP matters offer valuable perspectives on the potential trends, changes, or continuities in the CJEU's jurisprudence related to CFSP. These assumptions, in line with the analysis on the previous chapters, has provide a thoughtful understanding of the potential trajectory of EU law and policy in this vital area.

## **5.4 Recommendation for Future Research**

Given the intricate and multifaceted legal framework surrounding the CFSP, there exists a wealth of research opportunities to explore its interplay with the principles of free movement, particularly the free movement of capital, and fundamental rights. Amongst several areas of focus, future research could delve into specific CFSP measures, such as targeted sanctions, to comprehend the intricacies of individual measures and their impact on individual rights and economic dynamics.

The role of national courts in the implementation of CFSP could also provide further insight into how to balance national sovereignty, EU interests, and the protection of individual and human rights. Comparative studies on the role of national courts across Member States may offer multiple perspectives and challenges. Investigations into the democratic processes involved in CFSP decision-making, including the role of national parliaments and supranational institutions, could enhance accountability, transparency, and democratic values in the adoption and implementation of CFSP. Moreover, given the rise of technological advancements, exploring how technological developments could affect CFSP may provide insights into emerging challenges and opportunities in foreign and security policy.

In conclusion, it is essential for future researchers to delve deeper into the intricate relationship between national sovereignty, collective interests of the EU, and individual rights. This will contribute to a more comprehensive understanding of the complex interplay between legal, politics, economy, and social dimensions. By exploring this interplay, we can gain valuable insights into how to create a fair, just, and effective society that benefits all individuals involved.

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