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THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE COMMON FOREIGN AND SECURITY POLICY

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SUMMARY

This doctoral dissertation examines the interaction between the Court of Justice of the European Union (hereinafter: CJEU) and the Common Foreign and Security Policy (hereinafter: CFSP), an area traditionally characterized by limited judicial oversight. Despite these formal limitations, the CJEU has, through its case law, expanded its influence over the CFSP, particularly in cases involving restrictive measures, the assessment of international agreements, and determining jurisdiction between the former pillars of the EU. The dissertation sheds light on how the Court, through a broader interpretation of its powers, rooted in fundamental values such as the principles of equality and the rule of law, tests the boundaries established by the founding Treaties and solidifies its role within the CFSP.

Although initially conceived as a sphere of intergovernmental cooperation, the CFSP has evolved largely due to the activism of the Court, which has set new rules and principles for its functioning. The Lisbon Treaty further expanded the Court's powers and integrated the CFSP into the broader framework of the EU legal system. This dissertation analyzes how these changes enabled the CJEU to play a key role in the expansion and institutionalization of the CFSP, while balancing judicial protection of human rights with political objectives.

One of the key aspects of the research is the evolution of restrictive measures within the CFSP, which have transitioned from economic sanctions against states to targeted sanctions against individuals and entities. The dissertation examines how these measures, initially designed to be preventive, have increasingly become punitive, and how the CJEU has focused more on protecting human rights through the proportionality of these sanctions. Special attention is given to the Court’s negative stance towards the EU's accession to the European Convention on Human Rights (hereinafter: ECHR), which further illustrates the complexity of the relationship between the EU legal system and international bodies.

The dissertation also analyzes the relationship between the CJEU and national and international courts, emphasizing the Court's fight for the autonomy of EU law. Although the CJEU formally lacks the authority to assess the legality of Member States' actions within the CFSP, in practice it often assumes this role through a broad interpretation of its jurisdiction. The Court adopts a monistic approach toward national courts, while taking a dualistic stance in relation to international actors, thus ensuring the coherence and unity of the EU legal order.

In conclusion, the dissertation highlights the need for a more consistent methodological approach by the Court within the CFSP to ensure legal certainty and harmonized case law. The research provides a comprehensive analysis of case law, legal standards, and principles, aiming to enhance understanding and further development of this complex area, emphasizing the Court's key role in shaping the autonomy of the EU and the challenges posed by the fragmentation of international law and the constitutionalization of EU law in this context.

Key words: European Union, Court of Justice of the European Union, Common Foreign and Security Policy, EU autonomy, restrictive measures, Treaty of Lisbon.
Area of study: Law
Specific area of study: International Public Law

REZIME

Ova doktorska disertacija istražuje interakciju između Suda pravde Evropske unije (u daljem tekstu: SPEU) i Zajedničke spoljne i bezbednosne politike (u daljem tekstu: ZSBP), oblasti koja je tradicionalno bila karakterisana ograničenim sudskim nadzorom. Iako formalno ograničen, SPEU je kroz sudsku praksu proširio svoj uticaj na ZSBP, naročito u slučajevima restriktivnih mera, ocene međunarodnih ugovora i određivanja nadležnosti između nekadašnjih stubova EU. Disertacija osvetljava kako Sud uspeva da kroz širu interpretaciju svojih ovlašćenja, zasnovanu na osnovnim vrednostima poput principa jednakosti i vladavine prava, testira granice postavljene osnivačkim ugovorima i učvrsti svoju ulogu unutar ZSBP.

ZSBP je, iako prvobitno zamišljena kao sfera međudržavne saradnje, evoluirala zahvaljujući aktivizmu Suda, koji je postavio nova pravila i principe za njeno funkcionisanje. Lisabonski ugovor je dodatno proširio sudska ovlašćenja i integrisao ZSBP u širi okvir pravnog sistema EU. Disertacija analizira kako su ove promene omogućile SPEU da igra ključnu ulogu u proširenju i institucionalizaciji ZSBP, istovremeno balansirajući između sudske zaštite ljudskih prava i političkih ciljeva.

Jedan od ključnih aspekata istraživanja je evolucija restriktivnih mera unutar ZSBP, koje su prešle od ekonomskih sankcija protiv država do ciljano usmerenih sankcija protiv pojedinaca i entiteta. U radu se analizira kako su ove mere, iako prvobitno preventivne, postale kaznene, a SPEU je sve više usmeren na zaštitu ljudskih prava kroz proporcionalnost ovih sankcija. Posebna pažnja posvećena je negativnom stavu Suda prema pristupanju EU Evropskoj konvenciji za ljudska prava, što dodatno ilustruje kompleksnost odnosa između pravnog sistema EU i međunarodnih tela.

Disertacija dalje analizira odnos SPEU prema nacionalnim i međunarodnim sudovima, naglašavajući sudsku borbu za autonomiju prava EU. Iako SPEU formalno nema ovlašćenja da ocenjuje zakonitost postupaka država članica u okviru ZSBP, u praksi često preuzima ovu ulogu kroz široku interpretaciju svojih nadležnosti. Sud primenjuje monistički pristup prema nacionalnim sudovima, dok u odnosu na međunarodne aktere zauzima dualistički stav, čime se osigurava jedinstvenost pravnog poretka EU.

Zaključno, disertacija ukazuje na potrebu za doslednijim metodološkim pristupom Suda u ZSBP kako bi se obezbedila pravna sigurnost i usklađena sudska praksa. Rad pruža temeljnu

analizu sudske prakse, pravnih standarda i principa, sa ciljem unapređenja razumevanja i daljeg razvoja ove složene oblasti, ukazujući na ključnu ulogu Suda u oblikovanju autonomije EU i izazove koje donosi fragmentacija međunarodnog prava, odnosno konstitucionalizacija prava EU u ovom kontekstu.

Ključne reči: Evropska unija, Sud pravde Evropske unije, Zajednička spoljna i bezbednosna politika, autonomija EU, restriktivne mere, Lisabonski ugovor.
Naučna oblast: Pravo
Uža naučna oblast: Međunarodno javno pravo

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ABBREVIATIONS

EC – European Community

EU – European Union

ECSC – European Steel and Coal Community

EEC – European Economic Community

EAEC – European Atomic Energy Community

CJEU – Court of Justice of the European Union

ECJ – European Court of Justice

CJEC – Court of Justice of European Communities

CFSP – Common Foreign and Security Policy

CSDP – Common Security and Defense Policy

EPC – European Political Cooperation

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on the European Union

JHA – Justice and Home Affairs

AFSJ – Area of Security, Freedom and Justice

PJCCM – Police and Judicial Cooperation in Criminal Matters

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

AG – Advocate General

ITL – Integration Through Law

HR/VP – The High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission

EEAS – European External Action Service

1. HISTORY OF THE RELATIONSHIP BETWEEN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE COMMON FOREIGN AND SECURITY POLICY - FROM THE EUROPEAN POLITICAL COOPERATION TO THE LISBON TREATY

"It is conventional to think of foreign and security policy as a realm of sovereign wills and national interests par excellence".[1]

1.1. Brief introduction to the topic

The Court of Justice of the European Union (hereinafter: CJEU or the Court) is the main judicial body of the European Union (hereinafter: EU), consisting of two distinct courts: the European Court of Justice (hereinafter: ECJ) and the General Court (former Civil Service Tribunal). It is responsible for ensuring the consistent application and interpretation of EU legislation across Member States. Based in Luxembourg, the Court reviews the legality of EU institution acts, resolves legal disputes between national governments and EU institutions, and can be utilized by individuals, companies, or organizations to take action against EU institutions.[2] Therefore, the CJEU enjoys both substantive and procedural jurisdiction over all aspects of EU law unless explicitly excluded by the Treaties, as is the case with the Common Foreign Security Policy (hereinafter: CFSP). The substantive jurisdiction pertains to the subject matter the Court can rule upon, and it requires that disputes have some connection with EU law. On the other hand, procedural jurisdiction refers to the types of legal actions that can be brought before the Court and the rules on legal standing.[3]

In terms of procedures, the ECJ is a venue for direct actions brought by EU institutions and/or Member States, while the General Court handles direct actions brought by natural or legal persons. However, the most important procedural mechanism employed before the CJEU is the preliminary rulings procedure.[4] This mechanism allows Member States to seek clarifications on the interpretation and validity of EU law when there is some uncertainty or no domestic judicial

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[1] Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer Law International, The Hague, 1998, 27.

[2] For further reference see Court of Justice of the European Union, available at: *https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en,* 03.11.2022.

[3] Dermot Hodson, John Peterson, *The Institutions of the European Union,* 4th edition, Oxford University Press, Oxford, 2017, 167-168.

[4] Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal,* 2008, Article 267 (ex Article 234 TEC). For more on the preliminary ruling procedure also see Morten Broberg, Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice,* Oxford University Press, Oxford, 2021, 1.

remedy available. What is more, national courts are obligated to refer such matters to the CJEU for a preliminary ruling. This procedure has contributed to, *inter alia*, strengthening the bottom-up relationship between the CJEU and national courts of Member States, thus facilitating the integration of EU legislation into national legal systems. As for the composition of the CJEU, the ECJ has one judge per each Member State while the General Court doubled the number of national judges (two per Member State) during the judicial reform process of 2019.[5] Additionally, there are eleven Advocates General (hereinafter: AG) who provide advisory opinions to the Court on complex legal questions. Although AG opinions are not legally binding, the Court generally follows their reasoning in its decisions.[6]

Since its early establishment, the Court has inclined towards a more supranational position within the institutional structure of what is now known as the European Union, despite the absence of a normative hierarchal relationship (at least in theory) between the national courts of Member States and the European Court itself. Substantively, the Union's law does not exclude national law and *vice verca*.[7] It is worth noting that the Court of Justice has played a major role in the development of the EU legal order, even though it has not always been a driving force for the process of European integration and was not as influential as it is today. Initially, the Court had limited independence and legal credibility, and its early judgments were often aligned with the political attitudes of Member States. However, from a current perspective, it can be argued that the CJEU's proactive expansion of judicial powers is a unique example in the field of international law, highlighting its undeniable internal and external authoritative influence. The Court's extensive impact is largely a result of pro-integrationist approach to its case law, which often diverged from the expectations of Member States. As rightly emphasized by Lukić, the integration of the European Union has resulted seemingly more from the developments of the EU law, particularly from the case-law of the CJEU than from a political process itself.[8] Not only did the

[5] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, *Official Journal,* L 341, 24.12.2015.
[6] More on the role of Advocates General see Maja Lukić, „Understanding the Role of Advocates General within the EU Judicial System", (Razumevanje uloge opštih pravobranilaca u okviru pravosudnog sistema Evropske unije), *Collection of Papers - Faculty of Niš*, No. 74/2016, 129-144.
[7] Christina Eckes, "The Autonomy of the EU Legal Order", *Europe and the World: A Law Review,* No. 4/2020, 12. Also see René Barents, "The Precedence of EU Law from the Perspective of Constitutional Pluralism", *European Constitutional Law Review,* No. 5/2009, 421-428.
[8] Maja Lukić, "The New Theatre of the Struggle for EU Unity – Judicial Cooperation in Criminal Matters and Police Cooperation Confronts Member State Sovereignty", *Annals of the Faculty of Law University of Belgrade,* No. 6/2016, 140.

Court of Justice reignite the integration process in the early 1970s by removing barriers to market integration, as Majone pointed out,[9] but it also ensured the autonomy of the Union's legal framework in the context of both national and international law.[10]

From a broader international legal perspective, the Court's role is unparalleled. Since its creation, the Court has established and further developed core constitutional features that are now indispensable for the EU legal system. Therefore, the importance of the EU judiciary in shaping the legal and political nature of the Union is not coincidental and linear, but rather a result of judicial activism, treaty design, and the cooperation of various political actors.[11] The Court's influential activism did not emerge overnight; it is a process that has spanned decades and has primarily impacted European integration, even without full consent or understanding from the Member States themselves. In addition to its impact on European integration, the Court has also influenced areas that were initially beyond its reach, such as the CFSP and Justice and Home Affairs (hereinafter: JHA). As the importance of fundamental human rights has grown over time, driven by changes in the geopolitical landscape, the traditional understanding of foreign relations, primarily grounded in international relations, has shifted towards institutionalization and legalization of the relevant field.[12]

Despite its circumscribed authority in areas like European integration and foreign affairs under the CFSP, the CJEU has significantly influenced both the internal and external operations of the Union. This influence has sparked debates over judicial activism, a topic that will be explored through an analysis of the Court's case law. Judicial activism is often conflated with what Stone Sweet termed "judicialization of lawmaking" (or judicial policymaking), which involves constitutional judges clarifying legislative rules through formal normative discourse.[13] While judicialization fills in legislative gaps, judicial activism is more contentious, as it involves judges

[9] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, Oxford University Press, Oxford, 2005, 143-161.
[10] Kirill Entin, 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", *Basic Research Program – Working Paper Series*, No. 90/2019, 3.
[11] Takis Tridimas, "The Court of Justice of the European Union", (eds. Robert Schütz, Takis Tridimas), *Oxford Principles of European Union Law*, Oxford, 2018, 581.
[12] For instance, *see* Panos Koutrakos, "Judicial Review in the EU's Common Foreign and Security Policy", *International and Comparative Law Quarterly*, No. 67/2018, 2.
[13] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, Oxford University Press, Oxford, 2000, 195.

diverging from the intended meaning of legislative or treaty language to modify the law.[14] In the realm of CFSP, the CJEU has exhibited both tendencies - sometimes adhering to the drafters' intent and at other times, arguably, overstepping it. Nonetheless, the Court's growing influence has been tempered in the foreign policy domain due to its sensitive nature. Some argue that there is a "tradition of otherness", which means that the CFSP is a policy of joint Member States rather than the Union itself, highlighting its unique features compared to other EU policies.[15] Moreover, the EU actions under the CFSP are quite broad, encompassing a range of actions such as restrictive measures/sanctions, international agreements, civilian, military and diplomatic missions and more. The external dimensions of internal policies refer to areas such as energy, environment, migration and asylum, which have implications beyond national borders. However, categorizing the CFSP is not always straightforward, as these activities often overlap in practice. For example, the EU military operation "Sophia" launched in 2015 to combat migrant smuggling routes in the Mediterranean, encompassed both the CSDP and the external dimension of internal policies. This is because it involved decentralized EU agencies like FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) and EUROPOL (European Police Office), as well as the Member States' law enforcement agencies. Another example of such an overlap between different "categories" of the CFSP, namely external action and external dimension of internal policies, could be found in EU international readmission agreements on safe and legal return of irregular migrants.[16]

According to Keukeleire and Delreux, the CFSP must be understood as a multifaceted policy encompassing Common Foreign Security Policy, Common Security and Defense Policy (hereinafter: CSDP), external action as well as external dimension of internal policies.[17] While the CFSP serves as the main political and diplomatic tool in the Union's external relations, it is still primarily governed by Member States through the European Council. On the other hand, the CSDP has been overshadowed by the CFSP over time due to various external security challenges.

[14] Jared Wessel, "Judicial Policymaking at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication", *Columbia Journal of Transnational Law*, No. 2/2006, 377-452.
[15] Ramses A. Wessel, "Integration and Constitutionalisation of EU Foreign and Security Policy", *Governance and Globalization: International and Constitutional Perspectives*, (ed. Robert Schütze), Cambridge, 340.
[16] For more *see* "A Humane and Effective Return and Readmission Policy", available at: *https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en,* 25.05.2024.
[17] Stephan Keukeleire, Tom Delreux, *The Foreign Policy of the European Union,* Third Edition, Bloombsbury Publishing, London, 2022, 12.

Consequently, it is considered a distinct part of EU foreign policy, focusing on different civilian and military approaches to crisis management for conflict prevention and reconciliation worldwide. This divergence between the CSDP and CFSP is evident in the Court's increasing jurisdiction over the latter, while the former has maintained its purely political nature. Thus, Keukeleire and Delreux support the assumption that the CFSP is rather a distinct part of the EU foreign policy, deviating from the traditional understanding of external relations.

As can be observed, the CFSP has been developed on both political and legal grounds. Its political aspects relate to the principles and objectives, while the legal aspects pertain to procedural considerations. The Court's jurisdiction is limited in decision-making processes under the CFSP, which primarily rests with the Council of Ministers (or the Council) and the European Council, allowing executive power to remain in the hands of Member States. Given the independent positions of Member States and the intergovernmental nature of the CFSP, at first glance it is surprising that the Court exercises any judicial control over it.[18] According to the Hoffmann's dictum from 1966, the area of CFSP belongs to the realm of "high politics", suggesting that its intergovernmental borders would never be dismantled.[19] In other words, full supranationalization of this field would never be materialized due to its core political nature.

From today's perspective, there are certain exceptions to the general exclusion of the Courts' jurisdiction in the CFSP, as provided for by the Treaty of Lisbon. Thus, Article 275(2) of the Lisbon Treaty enables the CJEU 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". Besides, the Court is also entitled to monitor compliance with Article 40 of the Treaty on European Union (hereinafter: TEU) and Articles 24(1) TEU. In simpler terms, today's Court's jurisdiction in the CFSP is specifically limited to restrictive measures against natural or legal persons and the delimitation of competences between the former pillars of the EU, which means that the Court is allowed to ascertain whether an EU act is adopted

[18] Marise Cremona, "Effective Judicial Review is of the Essence of the Rule of Law: Challenging Common Foreign and Security Policy Measures Before the Court of Justice of the European Union", *European Papers,* No. 2/2017, 672.

[19] Stantley Hoffmann, "Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe", *Deadalus,* No. 95/1966, 865.

in accordance with the relevant EU legislation. In addition, it can be argued that the jurisdiction of the CJEU also extends to a procedural aspect, specifically regarding international agreements on CFSP matters and their compatibility with the suitable rules and procedures at the EU level. The Court's innovative and bold interpretation of its own jurisdictional boundaries, as defined in the Treaties, has generated significant academic interest and sparked debates regarding the legitimacy and potential existence of *ultra vires* behavior. By analyzing the relevant normative framework and conducting a comprehensive review of the most pertinent cases before the Court in recent decades, this paper aims to delve deeper into the intricate relationship between the CJEU and the CFSP, primarily from a legal perspective, while remaining mindful of the political sensitivity surrounding the subject matter.

1.2. Early development of the Court of Justice in the context of the Common Foreign and Security Policy

The CJEU was brought into being as a permanent Court by the Treaty of Paris, which created the European Coal and Steel Community (hereinafter: ECSC) back in 1952.[20] The Treaty aimed to establish a common market for coal and steel among six founding Member States: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. The main objectives revolved around promoting economic integration, ensuring fair competition, and preventing future wars by pooling the coal and steel resources of its member countries. Under this legal regime, the Court of Justice was an integral part of the institutional structure of the ESCS, having the power to settle disputes and provide legal guidance on matters related to the Treaty. Thus, it consisted of separate courts of justice that were responsible for ensuring the interpretation and application of the founding Treaty by the various organizations including the ECSC, the European Economic Community (hereinafter: EEC) and the European Atomic Energy Community (hereinafter: EAEC). The idea behind the establishment of a permanent European Court for the ECSC in the 1950s was primarily driven by French and German influence, with the goal of placing Franco-German coal and steel production under a common administrative High Authority or the Court.[21] For instance, this can be seen in Article 33 of the ECSC Treaty, which prescribed the nomination of a judge-rapporteur to oversee the Court's procedures and judgment-drafting processes, as later recognized in the

[20] Treaty establishing the European Coal and Steel Community and Annexes I-III, 1951, Article 7.
[21] Anthony Arnull, "The Court of Justice Then, Now and Tomorrow", (eds. Anthony Arnull, Damian Chalmers), *The Oxford Handbook of European Union Law,* Oxford, 2015, 1.

Assider v High Authority[22] case. Interestingly, despite their initial influence, both France and Germany later became strong opponents of the Court's interpretative maneuvers in the CFSP.[23]

With the signing of Treaty of Rome in 1957, establishing the European Economic Community (hereinafter: EEC), the Court of ECSC was replaced by a single and unified Court of Justice of the European Communities (hereinafter: CJEC), marking the beginning of judicial unity and prosperity in European integration processes. The Court's role, as stipulated by the Treaty, was limited to preliminary rulings on Treaty application, validity and interpretation of Community institutions' acts, interpretation of the statutes of bodies established by the Council, and hearing cases brought by the Commission or Member States against other Member States for Treaty violations (known as the infringement procedure).[24] Besides, the Treaty of Rome also introduced the annulment procedure, allowing the Court to review the legality of Community acts beyond mere recommendations and opinions.[25] Despite a slow start during the steal and coal period, the Court contributed in transforming the Treaty of Rome into a supranational "constitution", granting enforceability of fundamental rights to individuals and establishing the primacy of the Community's legal order, even though it was not explicitly stated in the Treaty.[26] The introduction of the aforementioned procedures strengthened the Court's power to safeguard the values and principles of the founding Treaties against any undermining influence from Member States or other EU institutions. While the Treaty of Rome's direct impact on the CFSP was initially limited, the Court's expanded competences and its courageous approach to judicial activism established a precedent that became applicable to CFSP matters in the years that followed.

Despite the Treaty of Rome defining the Court's role in upholding the law and ensuring its interpretation and application, the Court exceeded these boundaries, particularly during the "Empty Chair" constitutional crisis of 1965.[27] This crisis arose due to conflicts over sovereignty and the Commission's proposal for independent financial resources and budgetary powers, leading

[22] *Associazione Industrie Siderurgiche Italiane (ASSIDER) v High Authority of the European Coal and Steel Community*, Case 3-54, Judgment of February 1955, ECLI:EU:C:1955:2.
[23] The Court's pro-integrationist agenda often ran contrary to the interest of France and Germany in the first place. For further information see Monika Heupel, "Judicial Policymaking in the EU Courts: Safeguarding Due Process in EU Sanctions Policy Against Terror Suspects", *European Journal on Criminal Policy and Research*, No. 18/2012, 315.
[24] Treaty of Rome establishing the European Economic Community, 1957, Articles 169-170.
[25] *Ibid*, Article 173.
[26] M. Heupel, 316.
[27] For more on Empty Chair Crisis *see* for instance Jacques Ziller, "Defiance for European Influence – The Empty Chair and France", *The Enforcement of EU Law and Values: Ensuring Member States' Compliance,* (eds. András Jakab, Dimitry Kochenov), Oxford, 2017, 422-435.

French president Charles de Gaulle to boycott European institutions, including the Court.[28] In response to the lack of legislation, the Court engaged in judicial policy-making to overcome the resulting stalemates within the EEC. During this period the Court, along with the Commission, exerted significant influence by advocating for supranational leadership and revitalizing the European integration process. Some argue that the Court's interpretation of the Treaties was daring, thus supporting the dynamics of progressive legal integration and enhancing its own judicial legitimacy.[29] It follows that the Court's influence has evolved significantly from its earlier, more limited role during the "steel and coal" era. At that time, it functioned more as an arbitral or technical tribunal, hindered by a shortage of qualified members and the absence of legal unity in today's sense. Its open-ended adjudication style, combined with political circumstances of the time, paved the way for political and economic integration, bringing an end to the volatility of the 1960s. As noted by Boin, Hart and Fahy, even longstanding institutions face reputational and existential crises, but they manage to adapt and preserve their institutional character while meeting new demands.[30] This remains true for the Court, which continually encounters challenges to its legitimacy whenever the Union's values are under pressure, yet consistently preserves its authority.

Moreover, the period from the 1950s up until 1980s witnessed a significant contribution by the Court in promoting "integration through law" (hereinafter: ITL) theory. Thus, the ITL, initially introduced by Mauro Capelletti and Joseph Weiler, highlights the Court's influential role in the European integration process and constitutionalization of European law.[31] The constitutionalization refers to the Court's efforts to establish a unified legal order by incorporating the fundamental legal principles of the Community/Union.[32] While many legal scholars supported the Court's proactive role in integration, concerns were raised about the potential negative impact of ITL on the legal and political positions of Member States, leading to doubts regarding the legitimacy of the Court's influence.[33] Nevertheless, there were some contrasting viewpoints

[28] For further reference *see* Sabine Saurugger, Fabien Terpan, "The EU's Legal Identitied and the Court of Justice of the EU", *Comparative European Politics,* No. 17/2019, 551.
[29] Nathalie Brack, Ramona Coman, Amandine Crespy, "Sovereignity Conflicts in the European Union", *Dans Les Cahiers du Cevipol*, No. 4/2019, 3-30.
[30] Arjen Boin, Lauren A. Fahy, Paul 't Hart, *Guardians of Public Value: How Organizations Become and Remain Institutions,* Palgrave Macmillan, Cham, 2021, 2.
[31] For instance, *see* Mauro Cappelletti, Monica Seccombe, Joseph Weiler (eds)., *Integration Through Law: Europe and the American Federal Experience,* W. De Gruyter, Ann Arbor, 1986.
[32] For more on this definition see Martin Loughlin, "What is Constitutionalisation?", *The Twilight of Constitutionalism?,* (eds. Petra Dobner, Martin Loughlin), Oxford, 2010, 47-70.
[33] Mette Eilstrup Sangiovanni, *Debates on European Integration,* Palgrave Macmillan, Basingstoke, 2006.

suggesting that the Court's progressive approach actually strengthened the leading role of Member States, albeit with limited scope.[34] This perspective proposes that the Court's activism is a result of strategic calculations by national governments, but it does not hold much influence compared to the dominant view in this field. Regarding the early constitutional characteristics of the Court, some authors, like Shapiro, supported it by arguing that the spirit of the Treaties had played a role in shaping the Court's constitutional and institutional development. Shapiro expressed this perspective as follows:

"In choosing to adopt an institutional form with a long culturally determined repertoire, one must take the bitter with the sweet. The very attributed characteristics of legality, neutrality and independence, the very institutional strengths of low visibility, incremental, esoteric, epistemically defended, and precedent-driven decision making that led to the instituting of a judicial conflict resolver for the ECSC entailed a potential for path-dependent consequences. That is, once created, the Court would be required to make new law and would be institutionally strong enough to do it".[35]

While Shapiro's viewpoint is not without merit, it is important to acknowledge that the Court's evolutionary trajectory was also influenced by its own activism and a liberal interpretation of the textual constraints imposed by the founding Treaties. This raises the topic of constitutionalization of the EU law as well as and the legitimacy of the Court's conduct, which will be explored in the following chapters, particularly in relation to the question of autonomy and supremacy of the EU law.

In addition, Hinarejos accurately describes today's Court's functions as resembling those of both a national supreme court, ensuring consistent application of the law by lower courts, and a constitutional court, establishing a coherent legal system, upholding the division of powers vertically and horizontally, and safeguarding human rights.[36] It follows that the Court's role is not as straightforward as it may initially seem as it operates in a distinctive manner which stems from the unique nature of the Union. As a result, the Court exercises its judicial authority to ensure the

[34] For more see Stone Sweet, "The European Court of Justice and the Judicialization of EU Governance", *Living Reviews in European Governance,* No. 5/2010, 5-39. Also *see* Luigi Lonardo, "Law and Foreign Policy Before the Court: Some Hidden Perils of Rosneft", *European Papers*, No. 3/2018, 558.
[35] Martin Shapiro, "The European Court of Justice", *The Evolution of EU Law,* (ed. Paul Craig, Gráinne De Búrca), Oxford, 1999, 328.
[36] Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars,* Oxford University Press, Oxford, 2009, 1.

primacy, consistent application and interpretation of the Union's law, while also safeguarding the inviolable position of domestic courts. Thus, the Court's dual role reflects the *sui generis* phenomenon of the European Union, which transcends being a mere state or a regional international organization.

1.2.2. Gradual expansion of judicial powers – changes of a decorative nature or not?

When examining the Court's progression over time, it becomes evident that national governments did not give adequate attention to the Court's actions during the 1960s and 1970s. It was during this period that the Court delivered landmark rulings and established influential legal doctrines that would shape the Community and the process of European integration for decades to come. Following the groundbreaking rulings in the cases of *Van Gend en Loos*[37] and *Costa v. ENEL*[38], two significant doctrines were established, namely the principles of direct effect and supremacy (or primacy) of the Community's law, both of which played a crucial role in the remarkable success of the European project.[39] Together, the principles of direct effect and supremacy provide a strong legal framework for the protection and enforcement of rights under EU law. Direct effect allows individuals to directly rely on EU law in national courts, while supremacy ensures the uniform application and overriding authority of EU law over conflicting national law.

In 1963, the case of *Van Gend en Loos* presented a significant legal dispute. The claimants, a transport company named Van Gend en Loos, contested their obligation to pay import taxes at Dutch customs. They based their objection on Article 12 of the Treaty of Rome, which prohibited Member States from imposing higher custom charges on each other in their commercial activities.[40] The defendants in the case were Dutch customs collectors known as Nederlandse Administratie der Belastingen, who argued that the Van Gend en Loos company, being a legal entity and not a natural person, could not invoke their rights under the aforementioned article. The

[37] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, Judgment of the Court of 5 February 1963, ECLI:EU:C:1963:1.
[38] *Flaminio Costa v. E.N.E.L.*, Case 6-64, Judgment of the Court of 15 July 1964, ECLI:EU:C:1964:66.
[39] For further reference see Maja Lukić, "Relevance of Conceptualizing the Relationship Between International and National Law for the Legal Nature of the European Union", *Thematic Conference Proceedings of International Significance*, No. 2/2015, 333. Also see: Joseph H. H. Weiler, "The transformation of Europe", *Yale Law Journal*, Vol. 100, No. 8, 2403; Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution", *American Journal of International Law*, Vol. 75, No. 1, 1; Geoffery Garret, Daniel Kelemen, Heiner Schultz, "The European Court of Justice, National Governments, and Legal Integration in the European Union", *International Organization*, Vol. 52, No. 1/1998, 149.
[40] The Treaty of Rome, Article 12.

Court of Justice examined the case and concluded that European treaties granted the same rights to both legal and natural persons in this regard. This ruling was significant as it affirmed that the Community's law "not only imposes obligations on individuals but is also intended to confer upon them rights".[41] On this occasion, the Court made a historic statement that can be summarized as follows:

"In addition to the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals […] The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".[42]

The statement underscores the unique nature of the European Community as a distinct legal system, differing from the traditional understanding of international law. It also emphasizes that Member States have limited their sovereignty for the benefit of the Community and that individuals can enforce their rights under the Community law, thus solidifying the supremacy of Community law and the role of the Court in its interpretation and application. In a nutshell, the Court successfully addressed a major issue at that time, which was the inconsistent application of the Community law by national courts of Member States, which eventually led to development of the doctrine of direct effect. It is important to note that Community law was initially discussed as a part of international public law, despite being recognized as a "new legal order". However, this perception changed in the case of *Costa v. ENEL*, which occurred a year later. In this case, the claimant, an Italian citizen named Costa, argued that Italian attempts to nationalize the electric industry were in violation of the provisions of the Treaty of Rome. The Italian Constitutional Court ruled against the claimant, citing the principle of *lex posterior derogate legi anteriori/priori.*[43] Nevertheless, the Court of Justice overturned the decision of the Italian Court and took an opportunity to slightly depart from international law framework established in *Van Gend en Loos* case. Instead, it emphasized the supremacy of the Community law by stating that:

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which […] became an integral part of the legal systems of the Member States and which

[41] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* Case 26-62, para. 3(2).
[42] *Ibid,* II section, B, para. 4.
[43] This maxim means that in the event of a conflict, the newer legal rule takes precedence over the older one.

their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane […] the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves".[44]

Hence, the doctrine of primacy of the European law was officially declared, mandating Member States to fully adhere to this established rule. In other words, the Court ruled that Community law always takes precedence over national laws, thus ensuring its uniform application and effectiveness. As Arnull pointed out, these landmark judgments simply "fueled a narrative of the Court of Justice as both savior and architect of the integration process compensating for the failings of weak and ineffective Member States who could not be trusted to stick to the commitments they had made".[45] In addition, both judgments marked a turning point in the legal landscape of the Community, consolidating the legal basis for further harmonization and integration of Community law throughout Member States. Alongside these groundbreaking rulings, it is essential to recognize the significance of the *Les Verts* case of 1986[46], which emphasized the interdependence an autonomous legal order and the principle of the rule of law.

The case revolved around the Green Party's objection to the system of political party funding by the European Parliament, raising concerns regarding its compatibility with the Community's constitutional framework. As a result, the Green Party sought a declaration that the Parliament was not authorized to fund political parties, as it was viewed as encroaching upon the powers of Member States outlined in Article 173 of the EEC. Thus, Article 173 was expanded to encompass the Court's jurisdiction to review legality of acts beyond Council recommendations and Commission opinions. This included the power to render judgments on appeals by a Member State, the Council, or the Commission based on grounds such as incompetence, substantial errors, infringement, or abuse of power.[47] In this notable judgment, the Court of Justice articulated the following statement:

[44] *Flaminio Costa v E.N.E.L.*, Case 6-64, para. 3.
[45] A. Arnull, 4. Also see *Reyners v Belgium*, Case 2/74, Judgment of the Court of 21 June 1974, EU:C:1974:68; *Van Binsbergen v Bedrijfsvereniging Metaalnijverheid*, Case 33/74, Judgment of the Court of 3 December 1974, EU:C:1974:131; *Defrenne v SABENA*, Case 43/*75*, Judgment of the Court of 8 April 1976, ECR 455, EU:C:1976:56.
[46] *Parti écologiste "Les Verts" v European Parliament*, Case 294-83, Judgment of the Court of 23 April 1986, ECLI:EU:C:1986:166.
[47] Treaty of Rome establishing the European Economic Community, Article 173.

"The European Economic Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".[48]

Moreover, the ruling was based on the assumption that the principle of the rule of law necessitates a review of legality by the Court, especially when the protection of individual human rights is at stake. Additionally, the quoted paragraph suggests that the Court astutely seized the opportunity to interpret Article 173 in a broad manner, expanding its judicial powers. This can be seen as another effort to constitutionalize the law of the Community to the greatest extent feasible, resulting in a more coherent interpretation and application of the law and ultimately broadening the range of judicial competences.[49] Therefore, the legacy of the aforementioned case law cannot be overstated, especially in terms of the autonomy of the former Community's and now Union's legal order. It enabled the Court to determine the validity of the entire Community's law independently from both international public law and the national laws of Member States. It follows that the question of autonomy undoubtedly has an external component that extends to the area of CFSP, adding to the intriguing scope of judicial powers in this regard. Furthermore, the Court has evolved into a guardian of fundamental rights and an arbiter in conflicts between powers of the central government and different national governments.[50]

Given this context, it is crucial to approach the issue of primacy or autonomy from a different perspective that reveals the existence of constitutional conflicts arising from the Court's case law. In several pre-Lisbon cases, the Court demonstrated its openness not only to the Community/Union's autonomy but also to the constitutional identities of Member States, leading to complexities regarding supranational and national competences. During the early 1970s, the Court began developing a set of fundamental rights derived from both the founding Treaties and domestic constitutional traditions, which was met with resistance from Member States who believed that national courts held exclusive rights in this domain. Despite this resistance, the Court

[48] *Ibid*, para. 23.
[49] For further reference *see* Jovana Tošić, "Constitutional Breakthrough of the Common Foreign and Security Policy in the context of Bank Refah Kargaran Case", *Facta Universitatis: Law and Politics*, No. 2/2022, 147-160.
[50] A. Hinarejos, 5.

sought to articulate these rights for the very first time in the case of *Internationale Handelsgesellschaft* ruling *(Solange I)*[51], underlining the importance of the legally binding principles of supremacy and direct effect. It is worth noting that the 1970s posed significant challenges as the European project faced intense criticism for perceived intrusiveness on Member States' constitutional traditions. Additionally, the impending retirement of influential judges further complicated matters and prompted a reevaluation of the Court's operational approach. This period was referred to as a "paradox of success", as the institution's capacity to adapt was potentially undermined by its own achievements.[52] Therefore, the Court's success stemmed from its resolute stance, which enabled it to overcome waves of criticism and enhance the stability of the Community by establishing a unique juridical style aimed at safeguarding and interpreting the provisions of the founding Treaties. Consequently, the *Solange* cases illustrate an intriguing interaction of supremacy conflict between the Community's legal order and the legal orders of Member States.

In particular, the *Solange I*[53] involved the German Constitutional Court *(Bundesverfassungsgericht)* asserting its authority to assess the compatibility of fundamental rights under the German Basic Law *(Grundgesetz)* with the law of the Community. This case arose from a conflict between the CJEC and the national constitutional court regarding agricultural exports policy, with the argument that Community's standards violated the claimant's right to conduct businesses in accordance with the German Constitution. The German Constitutional Court considered itself a better guardian of human rights than the CJEC at the time because the Community lacked a comprehensive catalogue or bill of fundamental rights comparable to those in the German Constitution. Consequently, the protection of rights provided by the Community's law did not reach a level equivalent to that guaranteed by German constitutional standards. The CJEC responded by asserting the unconditional supremacy of the Community's law, which was not subject to review by national courts. Even though the CJEC emphasized that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court

[51] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Case 11-70, Judgment of the Court of 17 December 1970, ECLI:EU:C:1970:114.
[52] A. Boin, L. A. Fahy, P. 't Hart, 27.
[53] *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany,* Case 69/85, Order of the Court of 5 March 1986, ECLI:EU:C:1986:104.

of Justice"[54], it began progressively developing its human rights jurisprudence thereafter. Consequently, in the case of *Solange II*, which centered around the EC import licensing system, specifically the Commission Regulation 2107/74 laying down protective measures on imports of preserved mushrooms,[55] the German Constitutional Court expressed its satisfaction with the subsequent jurisprudence of the Court and declared that it would not exercise jurisdiction as long as it could ensure an effective protection of fundamental rights against the acts of public authorities. In other words, the German Court acknowledged the authoritative and binding legal effect of the CJEC's judgments and decided not to review the secondary legislation of the European Community, while reserving the right to review its human rights regime in case of a general decline in this regard. This acceptance of the judicial authority of the Court of Justice by the German Court was conditional. However, the Court reaffirmed its power and the supremacy of the EC by confirming the validity and proportionality of the contested Commission Regulation and protective measures, which were deemed necessary given the relevant context at the time.[56]

On a related note, the case of *Omega*[57] before the Court of Justice is also noteworthy. Alongside the *Solange* cases, the *Omega* case marked the beginning of ongoing conflicts over authority between the Court of Justice and the constitutional courts of Member States regarding distribution of competences, despite the well-established fact that the national courts cannot override the judgments of the Court of Justice. In *Omega*, the Court stated that "fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories".[58] The recognition of the importance of human rights protection within the CFSP demonstrated the Court's commitment to upholding fundamental rights within the EU's legal framework. This acknowledgment not only showcased the growing maturity of the Union's legal system but also

[54] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Case 11-70, para. 4.
[55] Regulation (EEC) No 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms, *Official Journal,* L 218 (out of force).
[56] *Wünsche Handelsgesellschaft v Federal Republic of Germany,* Case 126/81, Judgment of the Court (Second Chamber) of 6 May 1982, ECLI:EU:C:1982:144.
[57] *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn,* Case C-36/02, Judgment of the Court (First Chamber) of 14 October 2004, ECLI:EU:C:2004:614.
[58] *Ibid,* para. 33.

emphasized the significance of engaging in constitutional dialogue with Member States, as argued by some authors.[59] Nevertheless, there are noticeable distinctions between the *Solange I* and *Omega* cases, as the latter demonstrates a greater openness by the Court towards national constitutional identities, unlike the former which appears more protective of the Union's principles such as direct effect and supremacy. Some authors have characterized this constitutional complexity as a "conflictual consensus", while other have gone so far as to describe it as a "judicial schizophrenia".[60] These terms aptly capture the Court's contradictory stance and the challenges it faces navigating the tension between the two equally important objectives.

The aforementioned case law is significant as it underscores the ambiguity in judicial decision-making, resulting in legal uncertainties, which is also pertinent to the CFSP. Also, the presumption that the founding principles of direct effect and primacy are excluded from the CFSP scope can be challenged in the light of current perspectives. Hence, it appears lately that the CFSP has become subject to further integration into the Union's legal system through the progressive jurisprudence of the Court. Consequently, the CFSP norms may not be as soft as they initially seem, despite their intergovernmental nature. As the Union's external objectives continue to evolve, it becomes increasingly challenging to isolate the CFSP from other policies, resulting in the application of general fundamental rules and principles to this field as well.[61] This resonates with the debate on intergovernmentalism v. supranationalism in the realm of CFSP, which holds more significance in the post-Lisbon period.

Historically, the CJEC, as a standalone institution, held exclusive jurisdiction over Community law until the enactment of the Single European Act in 1987. Following this, the Court of First Instance was established in 1989 as part of the Court, specifically to handle first-instance cases brought by individuals or entities.[62] This addition not only enhanced the system of judicial protection but also alleviated the Court's workload, enabling it to focus on more significant and intricate matters. Furthermore, the relevance of the Single European Act in relation to the CFSP and the Court of Justice lies in its role as the first legal document to implicitly exclude external relations matters from the jurisdiction of the Court. Thus, Article 31 of the Single European Act

[59] Giuseppe Martinico, "The Tangled Complexity of the EU Constitutional Process: On Complexity as a Constitutional Theory of the EU", *Yearbook of European Law*, No 13/2012, 223.
[60] G. Martinico, 225.
[61] For instance, *see* Ramses A. Wessel, "Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?", *European Foreign Affairs Review*, No. 2/2015, 139.
[62] The Single European Act, 1987. Also see Article 168a of the EEC Treaty and Article 140a of the EAEC Treaty.

affirmed that the powers of the CJEC should be limited to provisions of Title II, which allowed for the possibility of attaching an additional court to the Court that would have "[…] a jurisdiction to hear and determine at first instance […] certain classes of action or proceeding brought by natural or legal persons", however without any competence to "[…] hear and determine actions brought by Member States or by Community institutions or questions referred for a preliminary ruling".[63] Such a circumscribed scope of jurisdiction indicates that the Court of Justice was not empowered to intervene in external relation policies. This exclusion may have stemmed from growing Member States' concerns about the potential impact of the Court's integration actions on the Community's foreign relations, which were predominantly under the purview of national courts. Consequently, the Single European Act not only introduced significant amendments to the Treaties establishing the European Communities, such as the establishment of a customs union and a single market, but it also formalized the European Political Cooperation (hereinafter: EPC), considered a predecessor to the CFSP.[64]

The purpose of creating the EPC was to provide a somewhat informal set of internal rules governing the area of foreign policy and to ensure their proper coordination, harmonization and implementation among Member States. It is worth noting that prior to the Single European Act and establishment of the EPC therefrom, discussions on foreign policy matters took place in an unofficial political setting. On a particular note, it is important to reflect on some significant efforts made by Member States in the early 1950s towards unification of their military forces under the European Defense Community and the European Political Community, commonly known as the "Pleven Plan"[65], as to counterbalance the Soviet army and facilitate the process of European integration.[66] However, the Pleven Plan faced obstacles, mostly objections from France, and ultimately did not come to fruition. Nonetheless, this failed attempt highlights the long-standing aspiration for a unified foreign policy in Europe. It is important to note that that had the Pleven Plan been implemented, its direct impact on the relationship between the CFSP and CJEU would have remained limited. This is because the CFSP continued to develop separately from the defense

[63] The Single European Act, Article 31 and Title II Article 4.
[64] *Ibid,* Article 30.
[65] For more on the "Pleven Plan" see for instance Branko M. Rakić, *Za Evropu je potrebno vreme,* The Faculty of Law University of Belgrade, Belgrade, 2009, 89.
[66] Although accepted by most of the countries, the proposal on establishment of the European Defense Community had failed mainly due to French objections to the initial plan.

integration proposed by the Plan, and the jurisdiction of the Court would have remained focused on legal matters falling within the scope of the existing treaties.

In addition, the early stages of the common foreign policy can be traced back to the Marshall Plan of 1948 and Schuman Declaration of 1950, which aimed to rebuild war-ravaged Western European societies and foster regional cooperation. The European integration emerged as a means to address inter-state conflicts and strengthen the fragile Franco-German relationship, ultimately leading to the formation of a loosely structured foreign policy in the post-war Europe. With the establishment of the EEC through the Treaty of Rome, the focus of the common foreign policy shifted towards economic cooperation, particularly external trade policy and association agreements with third countries. One of the first cases demonstrating the importance of externalizing trade policy was the case of *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* of 1973[67]. In this case, the Court emphasized that the Treaty's provisions on common commercial policy and customs union should be broadly interpreted as to enable the EEC institutions to effectively regulate external trade. By doing so, the Court contributed to expanding the EEC's authority in external trade matters. Therefore, the EEC gradually assumed a role as a foreign policy actor, despite lacking clear foreign policy competences, which was not unanimously supported by all Member States.[68] The foreign policy of the EEC remained largely unchanged until the late 1960s when EEC Member States recommitted to advancing European political integration, as emphasized in the Hague Summit Declaration of 1969.[69] The formal foundation for the EPC, later introduced by the Single European Act, was laid by the Davignon Report adopted by the Council of Ministers in the early 1970s.[70]

In order to maintain the intergovernmental character of the EPC, which emphasized decision-making by the Member States, it was intentionally kept separate from the EEC's institutional and legal framework. This was because cooperation envisaged by the EPC was "distinct from and additional to the activities of the institutions of the Community which are based on the juridical

[67] *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH,* Case 8-73, Judgment of the Court of 12 July 1973, ECLI:EU:C:1973:90.
[68] Stephan Keukeleire, Tom Delreux, 51.
[69] Communiqué of the meeting of Heads of State or Government of the Member States at The Hague (1 and 2 December 1969), available at: *https://www.cvce.eu/en/obj/final_communique_of_the_hague_summit_2_december_1969-en-33078789-8030-49c8-b4e0-15d053834507.html,* 23.11.2022.
[70] Davignon Report, 1970.

commitments undertaken by the Member States in the Treaty of Rome".[71] In fact, the EPC did not have its own decision-making or legislative bodies, which depicts its somewhat unique features and intergovernmentalist tendencies. However, the political environment changed significantly from the initial proposal for establishing the EPC to its implementation. This is because Member States had already engaged in extensive discussions on foreign policy matters, such as deployment of economic sanctions and joint positions on international issues. As a result, draft provisions concerning the EPC and those relating to the Community Treaties were consolidated into a single text, reinforcing the relationship between the EPC and EEC. The importance of this coherence was also specifically emphasized in Article 30 of the Single European Act.[72] Simultaneously, the EPC was intentionally detached from the rest of the legal text of the Single European Act for several reasons. One of the main reasons was to emphasize the intergovernmental nature of the EPC and its distinct character compared to the supranational institutions of the European Community. By placing the EPC in a separate legal section (Title III), it served to highlight its independence and underscore the fact that it operated outside the framework of the Community Treaties. This detachment aimed to restrict the EPC's influence in the field of foreign relations and emphasize its lack of legal powers.

In the context of the Court's increasing authority during the period of the Single European Act's adoption, it is important to highlight the significance of the principle of implied external powers, which was established through both the *AETR/ERTA*[73] judgment and provisions of the EEC Treaty.[74] The doctrine of implied external powers allowed the Communities to engage in external policies even in the absence of explicit competence conferred by the Treaties.[75] This concept emerged as a means to address the lack of a precise legal basis for the foreign action of the Communities. Consequently, the external policy was pursued either through Treaty

[71] Second Report of the Foreign Ministers to the Heads of State and Government of the Member States of the European Community (The Copenhagen Report), 1973, 88. Also see Aurel Sari, "Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Common Foreign and Security Policy", *EU External Relations Law and Policy in the Post-Lisbon Era,* (ed. Paul James Cardwell), The Hague, 2011, 15.

[72] The Single European Act, Article 30, para. 5.

[73] *Commission of the European Communities v Council of the European Communities*, Case 22-70, Judgment of the Court of 31 March 1971, ECLI:EU:C:1971:32.

[74] The Treaty of Rome, Article 220(32).

[75] For more on the doctrine of implied external competence *see* Piet Eeckhout, *EU External Relations Law,* Oxford University Press, Oxford, 2011, 70-119. Also *see* Geert De Baere, Panos Koutrakos, "The Interactions Between the Legislature and the EU Internal Market", *The Judiciary, the Legislature and the EU Internal Market,* (ed. Philip Syrpis), Cambridge, 2012, 245.

amendments or the Court's flexible interpretation of existing Treaty provisions. The abovementioned case involved the European Agreement on the Work of Crews of Vehicles Engaged in International Road Transport, which had not entered into force due to a lack of necessary ratifications. The question before the Court was whether the EEC had the authority to conclude agreements outside its specific external competences, which mainly covered areas such as common commercial policy, association agreements, and cooperation with international organizations. The Court of Justice ruled that the EEC did possess implied external powers, enabling it to pursue external policies even in the absence of an explicit authorization. On a relevant note, the Court stated the following:

"The Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty… in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope…"[76]

In other words, the judgment enabled the Community's institutions to act "externally", but it faced criticism for not providing a clear explanation of the principle of implied external powers, which stemmed from the subsequent paragraph of the judgment:

"Each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".[77]

Overall, this ruling played a significant role in expanding the external action of the EEC and provided a legal basis for its engagement in foreign relations. However, the Court's inability to clearly delineate the circumstances surrounding the principle of implied external powers and the scope of action for the Community's institutions in implementing common policies is evident. This indicates that the gradual expansion of judicial powers has been a deliberate and progressive development affecting all aspects of Community law, with the exception of foreign policy, which

[76] *Commission of the European Communities v Council of the European Communities*, Case 22-70, para. 1.
[77] *Ibid,* para. 1. Also see Paul James Cardwell, "The Legalization of European Union Foreign Policy and the Use of Sanctions", *Cambridge Yearbook of European Legal Studies,* No. 17/2015, 290-291.

remained primarily political until the Treaty of Lisbon was adopted in 2009, giving it legal features and foundations. Thus, the Court's limited role in the CFSP, which persisted even after the Lisbon Treaty despite greater integration into EU law, was not entirely unexpected. This outcome was a product of an evolving political and legal landscape, reflecting the Member States' intergovernmentalist desires to preserve their sovereign powers in the external relations field. As a result, the CFSP remains rooted in intergovernmentalism, despite ongoing efforts to enhance cohesion within this policy area and improve coordination among European institutions. It could be said that from the 1950s, when the first elements of a common foreign policy (focused on trade and economic cooperation) began to emerge, to the present day, we have witnessed a "transformation of European integration from a national foreign-policy issue to the EU becoming a foreign-policy actor pursuing foreign-policy objectives in a world that is sometimes less than fertile for European templates."[78]

1.3. The formal launch of the Common Foreign and Security Policy

The end of the Cold War and the reunification of Germany marked the beginning of a new era in international relations, characterized by a shared need for rapid globalization and integration. The repercussions of the long-standing tensions between the Soviet Union, the United States and their respective allies were felt in Europe, impacting the dynamics of European integration in the post-war period. The collapse of communist regimes in the late 1980s, coupled with events such as the Iraqui invasion of Kuwait and the outbreak of the Yugoslav wars in the early 1990s, accelerated the development and institutionalization of the CFSP within the framework of the European Community. The primary objective of the CFSP was to facilitate European integration and enhance cooperation and interdependence among Member States in responding to foreign policy challenges. The evolving landscape has also given rise to a more complex and multidimensional understanding of conflict, moving beyond narrowly defined categories like ethnic or religious conflict. Instead, we now see the emergence of "new wars", characterized by their multilayered nature, involving a diverse range of actors and a variety of objectives.[79] In the face of an unstable geopolitical environment, the leaders of the European Community recognized the need for a new international agreement in the early 1990s. In 1992, this agreement was

[78] Knud Erik Jrgensen, Kalland Aarstad, Edith Drieskens, et. al. (eds.), *The SAGE Handbook of European Foreign Policy: Two Volume Set*, SAGE Publications Ltd, London, 2015, 10; 464.
[79] *Ibid*, 69.

officially signed in the city of Maastricht by the twelve Member States at the time and came into effect the following year, laying foundations for the European Union as it exists today.

Known as the Treaty on European Union or the Maastricht Treaty, it amended the former European Treaty establishing the European Economic Community and introduced a European Union structured around three pillars or areas of competence: the European Communities (providing a framework for exercising the powers conferred on the Community's institutions by Member States), the Common Foreign and Security Policy (to safeguard common values, peace and security in the Union on intergovernmental basis) and cooperation in the field of Justice and Home Affairs (dealing with cooperation between the police, customs, asylum/immigration services and ministries of justice of Member States).[80] Despite the fragmented legal framework, the general idea was to prioritize the first pillar, which also had a supranational character, whenever a specific measure could be adopted under its authority.[81] Or in the words of Weatherill, "if something can be done within the framework of the first pillar, then it must be done within the framework of the first pillar".[82] While the CFSP was intended to be a distinct competence within the second pillar, it actually complemented the first (supranational) Communities pillar albeit in a less intrusive manner. The decision to establish a three-pillar structure with separate policy-making mechanisms was not without flaws and inefficiencies, but considering the challenging political context in which the Maastricht Treaty was developed, it would be unfair to solely criticize the Treaty makers. The creation of the CFSP in isolation, without incorporating essential foreign policy instruments such as trade policy, development cooperation and external dimensions of internal policy (which were part of the first pillar), demonstrated a strong inclination to maintain full control of this area by the Member States, again reflecting intergovernmental tendencies within the Union.[83]

With the Maastricht Treaty and the establishment of the European Union in 1992, the Court of Justice of the European Communities was transformed into the Court of Justice of the European Union or the CJEU. The Treaty also introduced changes to the composition of the CJEU, with the Court of First Instance being attached to the Court "with a jurisdiction to hear and determine at

[80] The Treaty on European Union, *Official Journal of the European Communities*, C 191/1, 1992.
[81] *Ibid,* Article 47.
[82] Stephen Weatherill, "Safeguarding the acquis communautaire", *The European Union after Amsterdam: a Legal Analysis*, (eds.) Ton Heukels *et. al.*, The Hague, 1998, 160.
[83] Stephan Keukeleire, Tom Delreux, 55-57.

first instance […] certain classes of action or proceeding".[84] The Court of First Instance did have authority to interpret the Treaty in certain cases. According to ex-Article 173 TEU, it had jurisdiction to hear and determine actions or proceedings brought against acts of the institutions, including acts of the Council, Commission and European Central Bank (hereinafter: ECB). However, it did not have the power to give preliminary rulings on the interpretation of the Treaty, nor did it have the authority to interpret the statutes of bodies established by the Council. Those powers remained within the jurisdiction of the CJEU. Although ex-Article 47 TEU did not explicitly addressed the CFSP, it could be interpreted as granting the Court jurisdiction to ensure adequate protection of competences under the first Community pillar. This is because the CFSP was designed to remain primarily under the authority of Member States rather than supranational institutions. In addition, under the Maastricht Treaty, the Union's objectives were defined as follows:

"i) to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;

ii) to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence;

iii) to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;

iv) to develop close cooperation on justice and home affairs;

v) to maintain in full the 'acquis communautaire' which […] may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community."[85]

From the above, it follows that the Maastricht Treaty introduced significant changes to the legal structure of the former European Community, aiming to strengthen the overall legal framework both internally and externally. The Treaty merged formerly existing communities and established the European Union as a single legal entity, encompassing both existing communities and the newly established pillars of CFSP and JHA. These reforms encompassed internal aspects

[84] *Ibid*, Articles 168 and 177.
[85] TEU, Article B.

such as the establishment of a single monetary union, the concept of EU citizenship and cooperation in justice and home affairs. Externally, the Treaty formalized the launch of the CFSP as a part of the intergovernmental second pillar. With the CFSP succeeding the EPC, it marked the beginning of institutionalization of European foreign policy, with the Council and the European Council taking the lead role.[86] This means that the Council was entrusted with greater responsibilities in the field of CFSP, under Title V of the Treaty. This included the power to adopt legally binding decisions and assume an independent institutional role, while adhering to general guidelines from the European Council.[87] Likewise, Member States were subject to more concrete obligations within the CFSP, supported by the following Maastricht Treaty's provision:

"The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations".[88]

In addition to establishing the obligation of loyalty and mutual solidarity in foreign policy, the Maastricht Treaty imposed concrete legal obligations on Member States in the field, such as the duty to "inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that their combined influence is exerted as effectively as possible by means of concerted and convergent action", as well as to "ensure that their national policies conform to the common positions".[89] The use of the term "shall" instead of "should" indicated the intention of the Treaty's drafters to create binding obligations in this regard, for the very first time. Therefore, the former second pillar of the Maastricht Treaty was not only a forerunner to the EPC, but also marked a significant step in the institutionalization and legalization of foreign relations within the Community's system. It introduced joint actions and common positions as instruments for Member States to coordinate their actions. Joint actions referred to situations requiring operational action by the Union in accordance with ex-Article 14 TEU, while common or joint positions of Member States were legally binding guidelines or positions agreed upon by the Member States on specific foreign policy matters.

[86] A. Sari, 76.
[87] TEU, Title V – Common rules on competition, taxation and approximation of laws.
[88] *Ibid*, Article J.1(4).
[89] *Ibid,* Article J.2.

The Lisbon Treaty later abolished common positions and replaced them with decisions. Hence, the Maastricht Treaty successfully materialized a floating set of procedural and substantive rules governing this area of the Union's law. In spite of the Treaty's success in establishing procedural and substantive rules for the CFSP, it failed to fully integrate the Community's legal order due to fragmented pillar structure. The CFSP's effectiveness was further weakened by the explicit exemption of judicial control mechanisms, as outlined in ex-Article 146 TEU. However, ex-Article 47 TEU allowed the CJEU to protect the body of the EU laws (*acquis communautaire*) by reviewing competences related to the CFSP, thus ensuring proper delimitation between the first two pillars – the European Communities and the CFSP.

The legal relationship between the CFSP and the CJEU remained unchanged under the Maastricht Treaty, despite incremental institutional developments, and this continuity persisted through the subsequent Amsterdam and Nice treaties. It was the Lisbon Treaty that brought about a substantial shift in the Court's involvement and influence within the CFSP. An illustrative example of the Court's limited powers before the Lisbon Treaty is the *Grau Gomis*[90] case from the 1990s. In this case, the Court clarified that it did not have the authority to determine the compatibility of national provisions with Community law concerning preliminary ruling questions on Article B (the Union's objectives) under Article 177 TEU (the scope of ECJ jurisdiction).[91] This case reaffirmed the intergovernmental nature of the CFSP and its separation from the legal framework governed by the CJEU. The case reaffirmed the intergovernmental nature of the CFSP and its separation from the legal framework governed by the CJEU. As a result, the CFSP actions lacked legal enforceability, raising questions about the effectiveness and legal accountability of the EU's foreign policy decisions within this realm.

Reflecting on the Maastricht legal era of the 1990s and its impact on the CFSP, it is interesting to consider the implementation of restrictive measures. Challenges emerged in addressing "home terrorists," referring to individuals and terrorist organizations operating within the EU's territory. In simpler terms, the Community lacked the authority to act because the issue did not fall under the scope of the CFSP, but rather under the third pillar which pertained to police and judicial cooperation in criminal matters and was solely the responsibility of the Member States.

[90] *Criminal proceedings against Juan Carlos Grau Gomis and others*, Case C-167/94, Order of the Court of 7 April 1995, ECLI:EU:C:1995:113.
[91] *Ibid*, paras. 4 and 12.

Consequently, the CFSP, as a second Maastricht's pillar, remained isolated from the "new legal order" as established by the *Van Gend en Loos* judgment. As such it was neither a subject of the first pillar's law-making procedures nor the Court's judicial review, unlike the third pillar of Justice and Home Affairs which gradually became integrated into the Treaties. The CFSP, lacking constitutional elements and the Court's judicial oversight, suffered from practical inefficiencies and its declaratory nature, especially during the 1990s.[92] As Cardwell puts it, "the characterization of a weak EU foreign policy was difficult to throw off".[93]

Since the establishment of the CFSP through the Maastricht Treaty, debates have persisted regarding the effectiveness and practical existence of the EU's foreign policy, particularly considering its inadequate response to various global crises. While some argue that Member States displayed a lack of coordination in their approaches towards war-torn third countries like the former Yugoslavia, Iraq, Georgia and more[94], others commend the EU for striving for unity and upholding common values.[95] Considering the numerous EU operations and missions under the CSDP, as well as the coordinated use of restrictive measures, it now becomes challenging to support the former view that the Union's common foreign policy is ineffective or non-existent. But on the other hand, it is important to note divergent approaches to conflict-affected countries (except for the recent unified stance on the Russia-Ukraine conflict) and valid concerns regarding human rights in relation to CFSP restrictive measures. Therefore, the CFSP undoubtedly exists and operates as such despite varying degrees of practical success. Nevertheless, as emphasized earlier, the CFSP under the Maastricht Treaty remained purely intergovernmental and declaratory, disconnected from the broader EU legal framework, which raised doubts about the enforceability of CFSP actions from a legal standpoint. As Cardwell pointed out, it was difficult to overcome the perception of a weak foreign policy of the EU during that time.[96] Despite broadening of the CJEU's

[92] Paul James Cardwell, "The Legalization of European Union Foreign Policy and the Use of Sanctions", *Cambridge Yearbook of European Legal Studies*, No. 17/2015, 291.
[93] *Ibid.*
[94] For instance, *see* John Peet, "The European Union and the Middle East", *The foreign policy of the European union: Assessing Europe's Role in the World*, (eds. Federiga Bindi, Irina Angelescu), Washington DC, 2012, 203-212; Raj S. Chari, Francesco Cavatorta, "The Iraq War: Killing Dreams of a Unified EU?", *European Political Science*, No. 1/2003, 25–29.
[95] Ben Tonra, "Constructing the CFSP: the Utility of a Cognitive Approach", *JCMS: Journal of Common Market Studies*, No. 4/2003, 731-756. Also see Michael Smith, "Institutionalization, Policy Adaptation and European Foreign Policy Cooperation", *European Journal of International Relations*, No. 1/2004, 95–136.
[96] Paul J. Cardwell, "The Legalization of European Union Foreign Policy and the Use of Sanctions", *Cambridge University Press*, No. 17/2015, 291.

jurisdictional competences through the Treaty of Maastricht, it was evident that the CFSP was explicitly excluded from the scope of the Court's jurisdiction. In light of this, it is pertinent to recollect the Commission's declaration on the CFSP during the International Conference on Political Union in 1991, which states as follows:

"In matters of vital common interest (those falling within the scope of the common foreign and security policy) the right of Initiative for Council decisions would be shared between the Member States and the Commission […] democratic control would be ensured by the close involvement of the European Parliament in formulating and implementing the common policy. Acts adopted *would not* be subject to the jurisdiction of the Court of Justice".[97]

1.4. From Maastricht to Lisbon: a journey of progress?

The general rule that the CJEU lacks competences in the field of CFSP remained in force even after the introduction of the Treaty of Lisbon, at least when strictly considering the Treaty's text. This is mainly due to reluctance of Member States to comply with EU's foreign policy decisions, either through political pressure or actions (decisions) of the Court. The hesitancy of Member States towards the judicialization of the CFSP was driven not only by its political sensitivity but also by the infrequent necessity for robust and permanent legislative instruments in foreign policy matters.[98] While subsequent treaties, such as the Amsterdam and Nice treaties, did not significantly expand the CJEU's jurisdiction over the CFSP beyond what was established in the Maastricht Treaty, it is essential to consider their impact on this specific area.

Furthermore, the Amsterdam Treaty of 1997 introduced modest yet significant changes to the CFSP, reinforcing the roles of the European Parliament, the European Council as well as the European Commission. The European Parliament became a more significant actor in shaping and influencing this policy. Hence, the new "assent procedure" required the Parliament's approval for certain international agreements related to the CFSP. Besides, it gained the right to be informed and consulted on the main aspects and fundamental choices of the CFSP. Furthermore, the European Council took on an enhanced role in setting the main principles and guidelines of the CFSP, whilst the Council continued to play a central decision-making role in the field. Also, the Commission was recognized as another important actor in the CFSP by being granted specific

[97] Commission of the European Communities, Initial Contributions by the Commission to the Intergovernmental Conference on Political Union, Composite Working Paper, SEC (91) 500, 27.
[98] Eileen Denza, *The Intergovernmental Pillars of the European Union*, Oxford University Press, Oxford, 2002, 312.

responsibilities in funding, initiating actions, participating in political dialogue, and representing the EU externally.[99]

The Amsterdam Treaty further emphasized the importance of the formation of the CSDP, showcasing a stronger commitment towards this aspect of the CFSP compared to previous treaties. While the Maastricht Treaty introduced the CSDP as a potential option, the Treaty of Amsterdam was "*resolved* to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence".[100] Another innovation set forth by the Amsterdam Treaty was creation of the post of the High Representative for Common Foreign and Security Policy, under the auspices of the European Council, which became responsible for shaping and conducting the foreign policy within the Union as well as its external representation.[101] Apart from the efforts to raise visibility and demonstrate a stronger commitment to strengthening CFSP capabilities, the appointment of the CFSP High Representative had limited success in the initial years. It proved to be an inadequate tool for addressing the challenges posed by external security issues, especially in war-affected territories like the former Yugoslavia.[102] While decision-making procedures were streamlined and made more efficient, the essential character of the CFSP remained unaltered: an intergovernmental process without any judicial oversight.

The additions made by the Amsterdam Treaty were not insignificant for the subsequent development of the CFSP. While some perceived the changes as modest and insufficient, their long-term impact has proven to be significant.[103] In addition to a yearslong loyalty to an intergovernmentalist approach, the Treaty strengthened the framework of the CFSP and brought about a clearer differentiation of its legal instruments. The introduction of common strategies also aimed to enhance the coherence of the Union's external action. Although the Amsterdam Treaty may not have been as groundbreaking as anticipated, it laid the foundations for the later Treaty of Lisbon, which brought about more substantial reforms. One of the notable achievements of the Amsterdam Treaty was the inclusion of the mutual defense clause, which facilitated operationalization of the CSDP in later years.

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[99] Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 1997, Title V – Provisions on a Common Foreign and Security Policy.
[100] *Ibid,* Article 1(3).
[101] *Ibid,* Articles J.8, J.16 and 151(2).
[102] S. Keukeleire, T. Delreux, 60.
[103] A. Sari, 78.

The Saint Malo Declaration of December 1998[104] played a significant role in establishing autonomous EU decision-making and military action in foreign policy, resolving tensions between Europe and the United States over Europe's reliance on NATO. Moreover, the "Berlin Plus Agreement" signed in 2003, helped bridge the gap between NATO and EU military responses, thus improving cooperation by allowing the EU to utilize NATO's military resources in its own peacekeeping missions. Under this agreement, the EU took on NATO operations in North Macedonia, conducted a civilian peace-enforcement mission in Bosnia and Herzegovina with NATO assets, and carried out an EU-led and UN-authorized military operation in Democratic Republic of Congo. As Keukeleire and Delreux stated, the EU finally had "boots on the ground" at the time, despite the CFSP still being limited in scope.[105]

In addition, the terrorist events of 11 September 2001 created an unprecedented international crisis, prompting the EU to react as well. The European Security Strategy, adopted during a European Council meeting in 2003, acknowledged that "in the age of globalization, distant threats can be just as much a cause for concern as closer ones".[106] This highlighted the interdependence between external and internal threats that the EU recognized in response to this crisis. These events increased the need for adopting CFSP targeted sanctions against terrorist suspects at both the UN and EU levels. However, the adoption of restrictive measures against the EU-based individuals or terrorist organization under the pre-Lisbon pillar structure was complex. Such measures did not fall under the scope of the CFSP as expected but were instead related to the third pillar of JHA. Therefore, they remained within the competence of the Member States.[107]

These geopolitical circumstances were followed by the adoption of the Treaty of Nice,[108] which came into force in 2003, introducing additional institutional reforms and addressing some gaps left by its predecessors. Thus, it aimed to create an adequate framework for the forthcoming

[104] Joint Declaration on European Defence Joint Declaration issued at the British-French Summit, Saint-Malo, 4 December 1998, available at: *http://www.cvce.eu/obj/franco_british_st_malo_declaration_4_december_1998-en-f3cd16fb-fc37-4d52-936fc8e9bc80f24f.html*, 27.11.2022.
[105] S. Keukeleire, T. Delreux, 62.
[106] European Council, European Security Strategy. A Secure Europe in a Better World, 12 December 2003, available at: *https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf*, 28.11.2022. Also see Annegret Bendiek, Raphael Bossong, "Shifting Boundaries of the EU's Foreign and Security Policy", *German Institute for International and Security Affairs*, Research Paper No. 2019/12, 7.
[107] For more see Peter Van Elsuwege, "The Adoption of "Targeted Sanctions" and the Potential for Inter-institutional Litigation after Lisbon", *Journal of Contemporary European Research*, No. 7/2011, 491.
[108] Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, *Official Journal of the European Communities*, C 80/2001, 2003.

process of EU enlargement. In a way, the Nice Treaty paved the way for the formal abolition of the EU's three-pillar architecture, which was ultimately achieved with the Treaty of Lisbon in 2009. Additionally, the Nice Treaty recognized the need for enhanced cooperation across all three pillars. It also acknowledged the importance of the Charter of Fundamental Rights as a document setting out fundamental rights and principles, even though the Charter itself remained legally non-binding at the time. The Nice Treaty also introduced some modifications to the composition of the Court. It allowed the Court to sit in different formations, such as chambers consisting of three to five judges, the Grand Chamber composed of eleven judges, or as the Full Court.[109] These changes allowed the Court greater flexibility in handling cases and making decisions.

Also, the Treaty included provisions for the establishment of specialized courts to deal with specific matters related to the EU staff members. It laid the groundwork for the subsequent establishment of the Civil Service Tribunal in 2005, which was later merged into the EU General Court due to a reform aimed at streamlining the EU's judicial structure and improving the efficiency of the Court system.[110] The Nice Treaty primarily focused on institutional reforms and decision-making processes within the EU, rather than directly addressing the interaction between the CFSP and the CJEU, which remained largely unchanged. Additionally, while the Treaty introduced structural modifications to the Court's internal organization, it did not allocate any substantial new judicial roles to the General Court concerning the CFSP.

1.4.1. The dichotomy between the CFSP and JHA

The evolving relationship between the second (CFSP) and third pillar (JHA) drew attention due to a noticeable shift in dynamics. Initially, both pillars operated on the basis of intergovernmental cooperation, but their paths diverged over time. Before the Lisbon Treaty, the CFSP and JHA shared a similar procedural framework, involving unanimous decision-making within the Council, limited involvement of the European Commission and the European Parliament, and the absence of powers for the CJEU. The Amsterdam Treaty brought about partial integration of sensitive policy areas such as visas, asylum and immigration from JHA into the supranational first pillar of the Communities, thereby strengthening the respective roles of the Commission and the CJEU in these matters. This marked a departure from the intergovernmentalist logic of the JHA.

[109] *Ibid*, Title II, Articles 9-18.
[110] D. Hodson, J. Peterson, 164.

However, it was with the entry into force of the Lisbon Treaty that the former second and third pillars fully diverged. The JHA, now known as the Area of Freedom Security and Justice (hereinafter: AFSJ), which also encompasses police and judicial cooperation in criminal matters (hereinafter: PJCCM), became subject to full judicial review, while the CFSP retained limited powers for the Court, thus maintaining its intergovernmental nature.[111] Additionally, the AFSJ, along with the PJCCM, was strengthened by the Lisbon Treaty and became subject to co-decision and qualified majority voting. This marked a shift away from the unanimity requirement that characterized pre-Lisbon intergovernmentalism, which still did not apply to the CFSP. In the Maastricht's era, the relationship between CFSP and JHA, in conjunction with the supranational first pillar, was regulated by ex-Article 47 TEU (now Article 40 TEU)[112], which aimed to protect the first pillar *(acquis communautaire)* from influences of the second and third pillars. Conversely, former Article 3 TEU called for "a single institutional framework in order to ensure the consistency and continuity of the activities" which obviously runs contrary to the substance of ex-Article 47 TEU.

While the Court acknowledged its limited jurisdiction over CFSP matters in the aforementioned *Grau Gomis* case, the case of *Airport Transit Visas*[113], on the other hand, showcased the Court's ability to navigate the borders between the first and third pillars, thereby maintaining the integrity of the EU law. The case involved a situation where the ECJ had to consider the third pillar issue of airport transit visas, which touched upon aspects falling under the CJEU's jurisdiction, particularly freedom of movement. The ECJ, while recognizing its limited authority in CFSP matters, asserted its competence to interpret regulations related to airport transit visas. Indeed, the Court aligned with the Advocate General's view that "the limitations on the Court's jurisdiction do not deprive it of power to consider the content of the contested act for the purpose of the present action".[114] Overall, the case highlighted the Court's role in reconciling and resolving conflicts between different pillars of the EU, even when dealing with matters falling under the CFSP.

[111] TEU, Article 3(2).
[112] TEU, Article 47.
[113] *Commission of the European Communities v Council of the European Union*, Case C-170/96, Judgment of the Court of 12 May 1998, ECLI:EU:C:1998:219.
[114] *Ibid*, para. 11.

It becomes evident that the former third pillar of JHA underwent significant transformations by transitioning from an intergovernmental framework to a more integrated EC pillar with enhanced decision-making mechanisms, cooperation and supranational involvement. This was driven by the need for a more transparency, simplicity and coordination within the EU legal regime. It also aimed to provide a more efficient response to common challenges, such as major crime and terrorism, without being hindered by national vetoes and divergent political attitudes. As Donelly observed, the field of former JHA could be regarded as the complement to the EU's well-established internal market, implying that Member States' governments should closely collaborate to protect internal security which in a way threatened by the deepening of the internal market.[115] The dismantling of national barriers between Member States and the EU provided an opportunity for further integration of JHA.

Conversely, the CFSP's resistance to adopting the first Community method, unlike JHA, can be attributed to its focus on external relations, which often involve confidential, sensitive, and opportunistic political dealings with the outside world. As a result, Member States are more inclined to preserve their exclusive sovereignty in these external policy areas closely tied to national interests. In contrast, unity in JHA-related matters generally offers more benefits than harm. Given that the CFSP and JHA shared the objective of safeguarding both internal and external security, delineating competences between the former second and third pillars was not an easy task prior to the Lisbon Treaty. The Court's jurisdiction was limited in the former third pillar and did not cover CFSP common positions. The cases of *Segi*[116] and *Gestoras Pro Amnistia*[117] from 2007 illustrate the pre-Lisbon ambiguities regarding the delimitation of competences between the former second and third pillars. These cases involved applicants who were included in the Council's list of terrorist individuals, which primarily pertained to the common position under the third pillar. However, the Court's findings were placed within the second pillar since the former could not be challenged before the Court. It follows that the Court broadly interpreted its jurisdiction to extend the JHA common position to the CFSP area, given that it was equally based on both pillars. Also,

[115] Brendan Donelly, "Justice and Home Affairs in the Lisbon Treaty: A Constitutionalizing Clarification?", available at: *http://aei.pitt.edu/11043/1/20080509184107_SCOPE2008-1-4_BrendanDonnelly.pdf,* 15.01.2023.

[116] *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*, Case C-355/04 P, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:116. the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties"[116]

[117] *Gestoras Pro Amnistia and Others v Council*, C-354/04 P, Judgment of the Court (Grand Chamber) of 27 February 2007, ECLI:EU:C:2007:115.

it acknowledged the binding nature of common positions (or today's Decisions) under the CFSP by stating that:

"A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law".[118]

In *Gestoras Pro Amnistia* the Court relied on the then-existing Article 35(1) TEU (which has since been abolished) and concluded that matters falling under the purview of the CFSP common position could not be addressed through the preliminary ruling procedure. Furthermore, the Court excluded the possibility of determining claims for damages in this context, thus narrowly interpreting the inherent jurisdictional limitations. Interestingly, the Court expanded the judicial doctrine of the first pillar to encompass certain third-pillar common positions, employing the principles of sincere cooperation and consistent interpretation which allowed for limited judicial oversight. Drawing an analogy to the *AETR/ERTA* judgment, the Court asserted jurisdiction under the third pillar "in respect of all measures adopted by the Council, whatever nature or form, which are intended to have legal effects in relation to third parties".[119] The Court further stated that preliminary rulings were intended to "guarantee observance of the law in interpretation and application of the Treaty, thus it would run counter to that objective to interpret Article 35(1) EU narrowly".[120]

1.4.2. The cross-pillar mixity

Based on the aforementioned, it can be observed that the Court took steps towards legalizing the CFSP and strengthening judicial powers in traditionally inaccessible areas. At the same time, the Court faced challenges due to a lack of jurisdiction regarding the review of legality of CFSP acts. During the pre-Lisbon period, the impractical and somewhat confusing delimitation of competences between the former second and third pillars exacerbated existing jurisdictional "black holes", thus compromising the rule of law protection and the right to an effective legal remedy, as

[118] *Ibid*, para. 52.
[119] *Ibid*, para. 53.
[120] *Ibid.*

noted by Pech.[121] This "cross-pillar mixity", as referred to by Wessel,[122] was evident in the conclusion of international agreements that required the use of dual legal basis of the CFSP and JHA. This interdependent relationship between the CFSP and JHA was not uncommon as both areas involved specific decision-making procedures due to Member States' reluctance to share executive and national sovereignties with EU institutions in these sensitive domains. It could be even argued that such overlaps were inevitable since these procedures shared the same legal basis, *i.e.* former Article 11 TEU (now Article 24 TEU).[123] Despite the practical challenges in delimitation, the simultaneous use of the intergovernmental second and third pillars was less problematic than combining the supranational (first) and intergovernmental (second) legal bases. This was mainly due to the distinct decision-making processes involved. For example, the first pillar required qualified majority or unanimous decisions within the Council, while the CFSP only required a qualified majority on a Commission's proposal.[124] Moreover, combining the intergovernmental pillar with the supranational pillar was quite unwelcomed by Member States for political and self-protective reasons.

Speaking of the delimitation between the first and second pillars, the landmark *ECOWAS* (European Community of West African States) case of 2007 provided the Court with its first opportunity to address this matter and tackle the issue of competence distribution between the EU and the Community.[125] The case originated from 2005 when the Commission challenged the legality of two Council's acts: the CFSP joint action on the EU's fight against proliferation of small arms and light weapons and the implementing decision, on the grounds of violating the Commission's competences in development cooperation and security. Their mutual involvement in CFSP joint actions was envisaged by the Council Decision 2003/159/EC of 2002 which stems from the following:

"The Council and the Commission shall be responsible for ensuring the consistency of the Union's activities in the field of small arms, in particular with regard to its development policies.

[121] Laurent Pech, "A Union Founded on the Rule of Law? Meaning and Reality of the Rule of Law as a Constitutional Principle of EU law", *European Constitutional Law Review,* No. 6/2010, 385.
[122] Ramses A. Wessel, "Legality in EU Common Foreign and Security Policy", *Contemporary Challenges to EU Legality,* (eds. Claire Kilpatrick, Joanne Scott), Oxford, 2021, 71-99.
[123] Treaty on European Union as amended by the Treaty of Amsterdam of 2 October 1997, Title V, Article 11 – Provisions on a Common Foreign and Security Policy.
[124] TEU, Article 228a. Also *see* Part three, Community policies (12).
[125] *Commission of the European Communities v. Council of the European Union*, Case C-91/05, Judgment of 20 May 2008, ECLI:EU:C:2008:288.

For this purpose, Member States and the Commission shall submit any relevant information to the relevant Council bodies. The Council and the Commission shall ensure implementation of their respective action, each in accordance with its powers."[126]

While there was no disagreement regarding the Court's jurisdiction over the delineation of competences between the pillars, the Council contended that former Article 241 TEC did not confer jurisdiction to the Court when it concerned the question of the illegality of joint actions. The Court determined that the Council's decisions contravened ex-Article 47 TEU, as they should have been adopted under the Community's Treaty rather than the EU Treaty. Even though the contested decisions had dual objectives of equal importance, falling within the ambit of both the first and second pillars, the Court asserted that the first pillar could not be combined with the second pillar. On a relevant note, the Court stated the following:

"Since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community".[127]

Thus, prior to the Lisbon Treaty, the judicial approach primarily relied on the center of gravity test to prioritize the Community's competence over the CFSP legal basis.[128] From this perspective, ex-Article 47 TEU could be seen as a hinderance when undertaking CFSP actions. In cases involving two equally important competences, such as the *ECOWAS* case, it would be illogical to opt for a single legal basis. However, given that the disputed legal grounds originated from different sections of the EU Treaty, the nature of Article 47 - which ensured absolute protection of the *acquis communautaire* - along with the broader political context surrounding the intergovernmental pillars, such a decision is justified from a pre-Lisbon standpoint. Nevertheless, the Court's ruling in this case was particularly significant as it contributed to clarifying the ambiguity in the distribution of powers between Community and non-Community pillars.

[126] Council Decision (EC) No 2003/159 of 19 December 2002, *Official Journal* L 317/3, Article 1(1).
[127] *Ibid*, para. 77.
[128] The center of gravity test is used by the Court in competence delimitation cases (usually involving the CFSP) in order to choose an adequate legal basis based on the specific objective of a particular measure.

However, it could be argued that the Court could have offered greater clarity regarding conflicts of principles underlying EU external relations.[129]

This is because there was a possibility of interpreting Article 47 TEU in a teleological manner, which would have allowed for a mutual reference to both the CFSP and the Community pillars, with a procedural preference given to the latter. As Hillion and Wessel argued, the Court could have accepted the connection between different pillars to ensure consistency in external policies, similar to how it was done with economic sanctions and anti-terrorism regimes at the time.[130] But such legal reasoning was ahead of its time, considering that the ratification processes for the Lisbon Treaty were still pending. It follows that the pre-Lisbon period was largely dominated by delimitation difficulties. Consequently, the Court's preference for the first Communities pillar placed the intergovernmental CFSP in a marginalized position and disrupted the overall coherence of external relations policies.

1.5. The Draft Treaty establishing a Constitution for Europe: a failed attempt to "constitutionalize" the CFSP?

The debate surrounding the constitutionalization of the EU legal order has been a prominent topic in legal discourse for many decades. In scholarly literature, the term "constitutionalization" refers to the transformation of the European integration process into a legalized framework that supersedes the traditional concept of national sovereignty in international relations. In simpler terms, constitutionalization entails a shift towards a more structured and constitution-like system of governance. As highlighted by Haltern, the EU has progressed from being a collection of legal arrangements applicable to sovereign states to becoming a vertically integrated legal regime that grants judicially enforceable rights and obligations to all legal and natural persons within the EU territory.[131] For the most part, the term "constitutionalization" has been associated with the Court's interpretation of the EEC Treaty in a broader sense, ensuring its superiority over national laws and enabling individuals to directly enforce the provisions of the Treaty at the domestic level.

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[129] Christophe Hillion, Ramses A. Wessel, "Competence Distribution in EU External Relations after *ECOWAS*: Clarification or Continued Fuzziness?", *Common Market Law Review*, No. 46/2009, 585.
[130] *Ibid*, 586.
[131] Ulrich Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Integration", *Webpapers on Constitutionalism & Governance beyond the State*, No. 6/2002, 1-34. Also see Berthold Ritterberger, Frank Schimmelfenning, "Explaining the Constitutionalization of the European Union", *Journal of European Public Policy*, No. 13/2006, 1148-1167.

In other words, the process of constitutionalization has been founded on the principles of supremacy and direct effect, which were established through previously mentioned landmark cases of *Van Gend en Loos* and *Costa v E.N.E.L* in the 1960s. There had been no substantial efforts to establish a legally binding constitution in the form of a document prior to the 2000s. It was only at this time that former German foreign minister Fischer presented such a vision during an open debate.[132] The initial idea was quite unarticulated from the very beginnings due to disagreements on the desired future of European integration. The Laeken European Council Summit in 2001[133] set the stage for adoption of the very first "constitutional text" or "constitutional treaty" of the European Union. However, the use of vague terminology reflected the Member States' reluctance to adhere to the traditional notion of a constitution applicable to most today's nation-states. Instead, the common view was that the EU was neither a state nor an international organization, but rather a *sui generis* supranational governance model that had legitimized itself through, *inter alia,* pursuit of its common foreign and defense policy. For these reasons, the Laeken Declaration of 2003 opted for a vague term "constitutional text" rather than the explicit term "constitution" in a narrow sense.

The primary motivations behind proposing the Draft Treaty establishing a Constitution for Europe in 2003[134], alongside the Laeken Declaration, were to enhance the Union's legitimacy, strengthen its external representation and international capacities, and provide clarity and consolidation of EU policies across Member States.[135] Due to insufficient ratifications and unsuccessful national referendums, particularly in France and Netherlands, the Draft Treaty was rejected. This rejection led to a constitutional crisis that was eventually resolved by the subsequent adoption of the Treaty of Lisbon in 2009. Despite the calls for "a deeper and wider debate about the future of the European Union", it seemed that Eurosceptic views prevailed at the time, possibly due to inadequate national campaigns and lack of information about the Treaty's substance.[136] The Draft Treaty's foreign policy and judicial objectives could have potentially led to further

[132] From Confederacy to Federation – Thoughts on the finality of European integration. Speech by Joschka Fischer at the Humboldt University in Berlin, 12 May 2000, available at: *https://ec.europa.eu/dorie/fileDownload.do?docId=192161&cardId=192161,* 07.12.2022.

[133] Laeken Declaration on the future of the European Union, 15 December 2001, available at: *https://www.cvce.eu/content/publication/2002/9/26/a76801d5-4bf0-4483-9000-e6df94b07a55/publishable_en.pdf,* 07.12.2022.

[134] Draft Treaty establishing a Constitution for Europe (not ratified), *Official Journal,* C169, 18.07.2003, 1-105.

[135] Grainne De Búrca, "The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?", *Washington and Lee Law Review,* No. 2/2004, 555-582.

[136] European Council – Nice Summit, 7-10 December 2000, available at: *https://www.europarl.europa.eu/summits/nice1_en.htm,* 08.12.2022.

constitutionalization of these areas. On the other side, the external dimension of the proposed provisions received less attention in subsequent debates.

The strengthening of the EU's unity and identity at the international political scene was of a particular importance at the time due to fragmented nature of the Union as well as certain legal complexities in terms of conclusion of international agreements. This was done through establishing a framework of common principles, objectives and values aimed at both internal and external representation of the Union. In particular, external values were deemed necessary for the purpose of establishing the Union's very own identity. In this regard, Article I-3(4) of the Draft Treaty stated the following:

"In relations with the wider world, the Union shall uphold and promote its interests and values. It shall contribute to peace, security, the sustainable development of the earth, solidarity, and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter".[137]

Speaking of the Union's legal identity, it is important to note that while the first pillar of the European Communities was granted a legal personality to engage in international agreements with other parties, the EU as a whole lacked such legal status, despite having concluded numerous agreements on behalf of the Union.[138] This discrepancy created confusion regarding the pillar structure and resulted in overlapping powers in the field of foreign policy. De Búrca highlights that the proposed constitutional Draft Treaty addressed these issues by emphasizing the need for a unified and more effective external action, as well as the desire to counterbalance the political influence of the United States through the CFSP.[139] Although strengthening the EU's international identity was a key motivation behind the constitutional Treaty proposal, it ultimately received only limited attention.

In terms of the proposed judicial arrangement, the Draft Treaty suggested merging the existing treaties into a single document and establishing a unified legal personality for the Union as a whole. Also, the Treaty put forth the idea of expanding the CJEU's jurisdiction as to cover certain aspects of the CFSP for the first time, such as those referring to economic sanctions adopted

[137] Draft Treaty establishing a Constitution for Europe, Article I-3(4).
[138] G. De Búrca (2004), 568.
[139] *Ibid*. Also see Charles Krauthammer, "The Unipolar Moment", *Foreign Affairs,* No. 1/1990, 23-33.

under Article III-224[140] as well as protection of the borderline between the CFSP and other Union's policies pursuant to Article III-209.[141] Both concepts were later incorporated into the Lisbon Treaty. From that perspective, it can be argued that the Lisbon Treaty incorporated a narrower concept of the Court's jurisdiction if compared to the Draft Treaty. For instance, Article III-282 of the Draft Constitutional Treaty proposed a broader scope of the Court's jurisdiction when it comes to the CFSP as opposed to the corresponding Article 275 Treaty on Functioning of the European Union (hereinafter: TFEU). While the Draft Constitutional Treaty provided for the "carve-outs" or exceptions to the Court's jurisdiction in a broader sense, *i.e.* only to specific provisions of the primary law, the Article 275 TFEU excludes the Court's jurisdiction not only from provisions governing the CFSP but also from the provisions "relating to" the CFSP.[142] In particular, Article III-282 stated that "the Court of Justice shall not have jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III concerning the common foreign and security policy".[143] The articles being referred to pertain to specific provisions aimed at implementing the CFSP as well as principles and objectives of the Union's external action. On the other hand, Article 275 TFEU excludes primary law provisions relating to the CFSP as well as "all acts adopted on the basis of those provisions".

This comparative analysis of the aforementioned provisions supports the statement that the Draft Constitutional Treaty offered broader jurisdiction to the CJEU in the field of CFSP compared to the currently applicable Treaty of Lisbon. Despite these proposed changes, the Draft Treaty did not completely deviate from intergovernmentalist views of its predecessors regarding the CFSP. Instead, the CFSP largely retained its intergovernmental nature, indicating that the full constitutionalization of the Union's foreign policy would not have been entirely successful, even if the Treaty had been ratified by all Member States. Additionally, the connection between the CJEU and CFSP remained relatively weak, in spite of an innovative proposal for a narrower scope of the Court's jurisdiction in the field. It is important to note, however, that the proposed solution presented a more favorable outcome for the Court than the one ultimately adopted by the Treaty

[140] Draft Treaty establishing a Constitution for Europe, Article III-224.
[141] *Ibid*, Article III-209.
[142] Draft Treaty establishing a Constitution for Europe, Article III-282; Consolidated Version of the Treaty on Functioning of the European Union, *Official Journal of the European Union,* C 326/47, 26.10.2012., Article 275. Also see Joni Heliskoski, "Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy", *Europe and the World: A Law Review,* No. 2/2018, 5-6.
[143] Draft Treaty establishing a Constitution for Europe, Article III-282.

of Lisbon. In summary, if the Draft Constitutional Treaty had been implemented, the CFSP and the Court's judicial approach to the field would have remained largely the same. However, there would have been more legal grounds for flexible judicial maneuvering within the CFSP, leading to fewer controversies compared to the current situation under the Lisbon Treaty. Thus, it is evident from the proposed constitutional Treaty text that the efforts to constitutionalize the CFSP focused on aspects other than judiciary itself, as the latter was seen as posing the greatest obstacle to the intergovernmental nature of the CFSP.

When it comes to other aspects of the constitutionalization of CFSP envisaged by the Draft Treaty, the focus primarily revolved around changes to the Union's institutional and decision-making framework. Many of these proposed changes were later transposed into the Lisbon Treaty, although certain significant modifications were omitted due to political disagreements and the sensitive nature of the foreign policy area. For instance, the Draft Treaty intended to supranationalize the CFSP by introducing the post of a Union Minister for Foreign Affairs[144] which corresponds to today's European External Action Service governed by the High Representative for Foreign Affairs.[145] Similar to the former, the latter was intended to hold the vice-presidential role within the Commission and be appointed by the European Council through qualified majority voting. Despite constitutionalization attempts and introduction of qualified majority voting (hereinafter: QMV) mechanism (55% of Member States or 65% of the EU population) not only with respect to the aforementioned position, but also for a broader range of CFSP decisions, except those concerning the Union's core policies and operability. The attempts of QMV expansion within the CFSP is related to the so-called *passerelle* clause, which allows the European Council to unanimously transition to QMV in all circumstances other than those pertaining to defense and military actions. But this could hardly amount to a revolutionary change as it only applied to CFSP decisions of secondary importance. Therefore, intergovernmentalist tendencies, supported by the unanimity as a ground decision-making rule within the European Council for the CFSP, prevailed over the attempts at CFSP constitutionalization.[146] However, the constitutionalization of the CFSP

[144] *Ibid,* Article I-28.
[145] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal of the European Union,* C 306/01, 2007, Article 13a.
[146] For instance, see Pawel Karolewski, "Constitutionalization of the Common Foreign and Security Policy of the European Union: Implications of the Constitutional Treaty", *German Law Journal*, No. 6/2005, 1649-1666.

continues to run parallel to intergovernmentalist dynamics, largely due to the CJEU's judicial practices.

1.5.1. Proposed modifications to the CSDP

Furthermore, the scope of the CSDP was broadened to include the fight against terrorism, expanding its objectives beyond the peacekeeping and conflict prevention focus outlined in the Nice Treaty. The modifications made to the Petersburg talks of 1992, which addressed the deployment of national military forces from Member States to the EU and NATO, extended the range of activities to include military assistance, disarmament actions, post-conflict resolution, and more. These efforts in relation to the CSDP aligned with the demands posed by the global security crisis of that time. However, as Karolewski correctly argued, the Draft Treaty did not bring about many changes to CSDP either since this area had been evolving apart from the Union's constitutional framework.[147] The proposal for introduction of a solidarity mechanism in CFSP matters introduced a novel concept, particularly regarding Member States affected by terrorist attacks at the time. Nevertheless, the proposed solidarity clause, which stated that "Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union"[148] could be criticized for its lack of clarity regarding practical implications. It was unclear whether it pertained to military defense actions or some symbolic forms of assistance. The dilemma also raised concerns among military-neutral Member States, who viewed the solidarity clause as intrusive to their internal security policies.[149] For these reasons, the solidarity clause was later proposed as legally non-binding and as such incorporated into the final version of the Draft Constitutional Treaty.

Therefore, it can be argued that the success of CFSP constitutionalization attempts through the Draft Constitutional Treaty was limited in scope, particularly in relation to the CSDP which remained rather distinct and weak due to, *inter alia,* absence of a legally binding solidarity mechanism. However, this does not imply that the CSDP would be military inefficient under the proposed Constitutional Treaty, but the inconsistencies surrounding the solidarity mechanism would undoubtedly hinder broader constitutionalization of the CFSP. Another important aspect of

[147] *Ibid*, 1658.
[148] Draft Treaty establishing a Constitution for Europe, Article 15.
[149] European Council, Social Summit - Intergovernmental Conference, 2003, available at: *https://www.europarl.europa.eu/doceo/document/CRE-5-2003-12-03-ITM-004_EN.html,* 16.12.2022.

the Draft Constitutional Treaty was the lack of parliamentary scrutiny in the CFSP. Namely, both the national parliaments of Member States and the EU Parliament were granted only limited powers in this regard, thereby restricting the decision-making process in foreign and defense policies to the respective executive branches. The role of the EU Parliament was confined to making recommendations and general guidelines for the CFSP.[150] However, some modest democratic control mechanisms for the CFSP were included in the final version of the Draft Constitutional Treaty, which proposed an enhanced role of the EU Parliament through the position of Foreign Minister. In accordance with the Intergovernmental Conference of 2003, the Foreign Minister post was intended to have full voting rights within the Commission, even in areas outside the scope of CFSP. In addition to that, the post of the permanent European Council President was proposed to strengthen the intergovernmental nature of the CFSP and the balance of powers of the Commission President by replacing the rotating presidency system and assuming certain functions of the Foreign Minister. Clearly, the proposed solution at the time was met with both controversy and confusion.

In essence, there were no significant improvements in addressing the issue of democratic deficit within the CFSP, particularly the CSDP. Therefore, the CFSP retained its informal and executive-dominated nature despite the implemented efforts. Considering still limited democratic control of the CFSP and the reluctance of national governments to relinquish their executive powers, it becomes challenging to argue that the Draft Constitutional Treaty had the necessary strength to fully constitutionalize the CFSP.[151] Instead, if the Draft Constitutional Treaty had been successfully adopted, the CFSP would have remained more isolated compared to other areas of the EU. Also, the Draft Treaty's efforts to establish more coherent institutional set-up and decision-making procedures in the CFSP would not have changed limited roles of the Commission and the CJEU respectively. The involvement of these two institutions is essential for the constitutionalization of the CFSP.

The Commission was intended to supervise the EU's external representation, but with an explicit exclusion of the CFSP[152]. Apart from that, unanimity remained as a general voting rule in the CFSP whereas other policy areas enjoyed more flexibility in this regard. The proposed

[150] Draft Treaty establishing a Constitution for Europe, Article III-205; Constitutional Treaty, Article III-304.
[151] P. Karolewski, 1665.
[152] Draft Constitutional Treaty, Article 25.1.

provisions on enhanced cooperation among Member States lacked a mandatory solidarity mechanism, resulting in their weakness and ambiguity. The overlapping and competitive roles of Foreign Minister and the European President further added to the confusion. Ultimately, from a constitutional perspective encompassing democratic scrutiny and judicial oversight, the failed Draft Constitutional Treaty would not have brought significant developments to the CFSP. However, its less strict legal framework for judicial adjudication in CFSP matters would have been more favorable than the current solution, which is theoretically strict but flexible in practice.

1.6. The Treaty of Lisbon: a pivotal moment in the constitutional interplay between the Common Foreign and Security Policy and the Court of Justice?

The Treaty of Lisbon, recognized as the most significant international agreement for the EU reform thus far, represented a culmination of prior endeavors towards constitutionalization that had been officially underway since the early 2000s. This Treaty not only brought about notable alterations to the institutional framework of the Union by eliminating the three-pillar system of governance, but it also re-defined the role of the EU in the context of a globalized world. As said, the European Council Declaration on the Future of the European Union or the Laeken Convention of 2001, followed by the so-called Draft Constitutional Treaty which failed in 2005 due to negative referenda outcomes, was the one to set officially kick off a new era of the EU's existence. However, this does not imply that the events leading up to the Laeken Convention and subsequently to the Lisbon Treaty were entirely irrelevant. On the contrary, the Lisbon Treaty was rather a culmination of a series of interconnected events that gradually built momentum towards a pivotal moment in the history of the EU. While pinpointing the exact moment of birth of what has come to be known as the Treaty of Lisbon, it can be argued that its first origins can be traced back to the Single European Act of 1987, as noticed by other authors as well.[153] This is mainly because the Single European Act brought significant modifications to the Community's institutional and operational set up at that time, setting the stage for subsequent amending treaties.

On a particular note, it is worth mentioning that the Single European Act expanded qualified majority voting, empowered the European Parliament in the legislative process through the cooperation procedure with the Council of Ministers, established a deadline for adoption of a single market (by the year of 1992), and crucially for this dissertation, codified the provisions on the EPC

[153] Maria Popescu, "Lisbon Treaty – the Architect of a New European Institutional Structure", *Juridical Tribune,* No. 3/2013, 117.

which laid the groundwork for the formal establishment of the CFSP under the Maastricht Treaty. It follows that the idea of amending the Treaty on European Union and the Treaty establishing the European Community in a more constitutionalized manner has its roots in the Single European Act, even though the failed Draft Constitutional Treaty is often seen as a *prima facie* forerunner to the Lisbon Treaty. This is understandable because the Lisbon Treaty consolidated majority provisions of the Draft Constitutional Treaty, thus amending the previously existing treaties that had governed the European integration process since the Treaty of Rome.

Furthermore, in 2005 the European Council initiated a two year "period of reflection" following a failure to ratify the Draft Constitutional Treaty in all Member States. Finally, the Berlin Declaration (officially known as the Declaration on the occasion of the 50th anniversary of the signature of the Treaty of Rome) was signed in 2007 as a legally non-binding instrument aimed at finding a "renewed common basis" as well as new political shape of Europe in order to keep up with the changing times.[154] The Berlin Declaration was of a particular importance as it had laid the foundations for the European Council's Intergovernmental Conference of 2007 launched for the purposes of drafting a reform treaty. Following the Conference, the Treaty of Lisbon, which amended the Treaty on European Union and the Treaty establishing the European Community, was signed by all Member States on 13 December 2007. It came into effect two years later, on 1 December 2009, marking a significant milestone in the functioning of the EU. This Treaty played a vital role in transforming the EU into a supranational organization by officially recognizing its full legal personality for the first time. Besides, it bestowed the EU Charter of Fundamental Rights[155] (hereinafter: EU Charter) with legally binding status, thereby enhancing the overall protection of human rights within the EU. The Treaty also strengthened the EU's competences in areas such as trade and other commercial activities and brought about notable changes in the roles of the European Parliament, European Council and High Representative of the Union for Foreign Affairs and Security Policy, who also assumed the position of vice-president of the European Commission (hereinafter: HR/VP). It is important to note that while the Lisbon Treaty did not formally declare the supremacy of the EU law over national legal systems, the principle of primacy

[154] Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome, 25 March 2007, available at: *https://europa.eu/50/docs/berlin_declaration_en.pdf,* 20.01.2023.
[155] Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, C 364/1, 18.12.2000.

was indirectly derived from subsequent annex (Declaration No 17) that tackled this question in the following manner:

"It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice".[156]

In other words, the Treaty makers devised a clever solution that would accommodate all parties involved by linking the EU's primacy with the Court's authoritative jurisprudence. The annex in question went on to emphasize that "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions".[157] Therefore, the EU was placed in a supranational position that granted it significant, but not all-inclusive power over national governments. With its full legal personality, the EU gained the ability to sign international treaties and join other international organizations as an equal subject of international law. On the other hand, Member States were not completely stripped of their powers in this regard, as they could still be signatories to international agreements as long as they aligned with the EU law. Also, the Treaty of Lisbon brought much-needed clarity to the Union's competences by distinguishing between exclusive (the Union can legislate on its own), shared (Member States can step in and legislate if the Union has not done so) and supportive competences (the Union adopts measures to support the Member States' policies), whereas all three types are governed by the principles of conferral, subsidiarity and proportionality.

The principle of conferral, which is of particular relevance when discussing the Court's involvement in the CFSP, stipulates that the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties, while any competences not conferred upon the Union remain with the Member States.[158] Under the subsidiarity principle, the EU acts only

[156] Consolidated version of the Treaty on the Functioning of the European Union - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, 17. Declaration concerning primacy, *Official Journal*, C 115, 09.05.2008.
[157] *Ibid.*
[158] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Article 3b.

when the proposed objectives cannot be achieved by Member States in matters outside the Union's exclusive competence.[159] Finally, the principle of proportionality, laid down in Article 5(4) of the TEU, dictates that EU measures must be suitable, necessary and not too excessive and burdensome in relation to the desired end or objective.[160] As for the abolished constitutional pillar structure, the former third pillar, now known as AFSJ) was absorbed into the first Communities pillar. Consequently, the European Community ceased to exist as a distinct entity, as all its institutions and powers were transferred to the European Union, which gained full legal personality as an independent entity under Article 47 TEU.[161]

Despite the initial disappearance of the intergovernmental structure being abolished through the absorption of the former third pillar and the introduction of an ordinary legislative procedure (involving qualified majority voting and co-decision) as well as the incorporation of new legal instruments (directives, regulations, decisions, recommendations and opinions)[162] into the EU's overall constitutional framework, the CFSP area maintained a significant level of isolation. Hence, it continued to be governed by the specific rules and procedures as outlined in Article 24(1) TEU, with unanimity principle serving as the primary *modus operandi.* The pursuit of qualified majority voting expansion within the CFSP has been linked to the inclusion of the *passerelle* clause in the EU, which was originally proposed in the Draft Constitutional Treaty. This clause aimed to offer a potential pathway for transitioning to qualified majority voting in certain CFSP matters. However, its practical application faced challenges due to requirement of unanimity in both the Council and the Council to active it. Consequently, it has only been employed with respect to PJCCM.[163] According to some authors, the CFSP deliberatively avoided further normalization through the treaty-amendment process in order to preserve its nature in line with the spirit of the

[159] *Ibid.*
[160] Treaty on European Union, Article 5(4).
[161] Treaty on European Union, Article 47.
[162] Directives are legislative acts that impose a certain goal upon Member States, however it is up to countries themselves to choose the exact method of implementation. Regulations, on the other hand, are legally binding instruments that must be implemented in their entirety across all Member States. Decisions are directly binding and applicable only to whom they are addressed (a Member State or a company). Recommendations are not legally binding and have a suggestive character. Finally, opinions allow the EU institutions to make a non-binding statement on a specific issue.
[163] European Parliament, *Draft Report on the implementation of the passerelle clause in the EU Treaties*, 21.02.2023.

Maastricht Treaty of 1992.[164] Therefore, the intergovernmental "echo" of the CFSP continues to exist, despite the formal collapse of the three-pillar system.

Thus, the Lisbon Treaty assigns a relatively limited role to the CJEU in the CFSP, despite some strengthening through newly introduced exceptions to the general rule that the Court is devoid of any jurisdiction in the field. These exceptions are outlined in Article 24(1) TEU in conjunction with Article 275 TFEU, which grants the Court limited powers within the CFSP. From a procedural perspective, provisions regarding the CJEU's lack of powers in the CFSP were transferred from TEU to TFEU, while the rules governing the CFSP remained in TEU, thus distinguishing it from the rest of the EU's constitutional framework. This perfectly reflects the intention of the Treaty drafters to preserve the distinct character of the CFSP. However, unlike the former Article 146 TEU, Article 269 TFEU does not strictly limit the Court's jurisdiction, and it should be treated and interpreted as a narrow exception to the Court's general jurisdictional competence under Article 19(1) TEU.[165] The latter Article stipulates that "the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article"[166]. On the other hand, the former Article circumscribes the power of the Court to "actions brought by a Member State, the Council or the Commission on grounds of lack of competence infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers".[167] This might lead to a conclusion that the Lisbon Treaty's drafters wanted to leave an open, albeit not excessively large room for potential expansion of the Court's gateways, in accordance with the changing political and legal circumstances.

Although the predecessors of the Lisbon Treaty laid the groundwork for the integration and constitutionalization of various EU policies, including the CFSP, it was the Lisbon Treaty that further reinforced the institutional role of the CJEU and strengthened EU competence in the CFSP field. In spite of the introduction of exceptions allowing for the Court's involvement in monitoring

[164] Graham Butler, "The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy", *European Constitutional Law Review,* No. 13/2017, 674.
[165] Consolidated version of the Treaty on European Union, *Official Journal of the European Union*, C 202, 26.10.2012., Article 19(1).
[166] Consolidated version of the Treaty on the Functioning of the European Union, Article 269.
[167] Treaty on European Union, Article 146.

the non-affection clause of Article 40 TEU and conducting a legality review of CFSP decisions on restrictive measures under Article 275 TFEU, the overall relationship between the CFSP and the CJEU remained largely limited if considering the core text of the Lisbon Treaty. However, the actual implementation and practical reality seem to differ from what was envisioned by the Treaty itself, as will be further demonstrated. In other words, the CFSP under the Lisbon Treaty has not significantly deviated from its longstanding intergovernmental nature, thereby remaining ill-suited for a full judicial review. Notwithstanding the clear legislative constraints imposed primarily by the Lisbon Treaty, the interplay between the CFSP and the CJEU has intensified to a debatable extent. As a consequence, the CFSP has been experiencing an ongoing process of constitutionalization due to the progressive involvement of the judiciary in this domain. These developments will be thoroughly explored from various legal viewpoints in subsequent sections that delve into the post-Lisbon era.

2. THE COURT OF JUSTICE OF THE EUROPEAN UNION AND COMMON FOREIGN AND SECURITY POLICY AFTER THE LISBON TREATY: UNDERSTANDING THE APPLICABLE NORMATIVE FRAMEWORK

Setting aside the significant historical development of both the CJEU and the CFSP, which is crucial for understanding the subject matter, it is essential to further investigate their respective normative frameworks as established by the Treaty of Lisbon onwards. As stated, prior to the Lisbon Treaty adoption, the rules governing the area of CFSP were loosely connected while the Court's competence in the field was formally absent. The autonomous sanction regime under the CFSP operated on legally non-binding instruments such as the Council's European Security Strategy of 2003, followed by the Guidelines on implementation and evaluation of sanctions, but also broadly interpreted provisions of the EC Treaty. However, these guidelines did not provide detailed explanation of the sanctions themselves, apart from emphasizing the need for proportionality in their use and the necessity for improvement and refinement. Hence, the Council's "Basic principles for the use of sanctions" of 2004 stated that "sanctions should be targeted in a way that has maximum impact on those whose behavior we want to influence, while […] targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighboring countries".[168]

It is also worth stressing that there was no explicit legal basis for imposing restrictive measures or sanctions against individuals, which significantly changed with the adoption of the Lisbon Treaty. Back in the day, the sanction regime evolved from provisions on economic sanctions against third countries, more specifically ex-Article 60(1) EC which allowed the Council to adopt "the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned". Additionally, Article 301 EC stated that "economic sanctions with one or more third countries required a prior Common Position or Joint Action adopted under the CFSP and was to be decided by the Council on the basis of qualified majority voting and on proposal from the European Commission".[169] Despite these provisions only referring to third countries, the Council still used them as a legal basis for imposing restrictive measures against individuals.

[168] The Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions), No. 10198/04, 07.06.2004.
[169] Treaty establishing the European Community, Articles 60 and 301. For further reference also *see* P. V. Elsuwege, 490.

A relevant example illustrating this practice is the case of *Minin*[170], which involved restrictive measures against Liberia and the freezing of funds belonging to persons associated with the former Liberian president, Charles Taylor. The Court of Justice ruled that the "Community is competent to adopt restrictive measures directly affecting individuals on the basis of Articles 60 EC and 301 EC, where a common position or a joint action adopted under the provisions of the EU Treaty relating to the Common foreign and security policy so provides, provided that those measures actually seek to interrupt or reduce, in part or completely, economic relations with one or more third countries".[171] Furthermore, the Court emphasized that measures taken against a third country could also encompass the rulers of that country, as well as individuals and entities associated with them either directly or indirectly. This was however strongly opposed by the Liberian legal team, arguing that Articles 301 and 60 EC did not constitute an adequate legal basis for imposing restrictive measures on individuals. In addition, the Council's flexible interpretation of the relevant EC Treaty provisions was especially evident in the case of the EU's restrictive measures against the Milošević regime in the former Federal Republic of Yugoslavia (hereinafter: FRY) during the 1990s.

Under the same legal framework, economic and financial sanctions, as well as visa bans, were imposed on FRY the officials in response to the wars in Croatia, Bosnia and Herzegovina and Kosovo.[172] Interestingly, these sanctions remained in place even after overthrow of the Milošević regime, as the individuals in question were still seen as a threat to the democratic rehabilitation of FRY which can raise questions from the perspective of the proportionality principle requiring a balance between the means employed and the intended objective. It could be argued that EU and UN sanctions at the time had disproportionate effect on FRY and their continuation after the sanctioned state transitioned to democracy could be deemed unnecessary and subject to severe criticism.[173] To some extent, this situation paved the way for the emergence

[170] *Leonid Minin v Commission of the European Communities*, Case T-362/04, Judgment of the Court of First Instance (Second Chamber) of 31 January 2007, ECLI:EU:T:2007:25.
[171] *Ibid*, para. 2.
[172] Common Position of 19 March 1998 on restrictive measures against the Federal Republic of Yugoslavia, OJ (1998) L 95/1 and Common Position of 7 May 1998 concerning the freezing of funds held abroad by the Federal Republic of Yugoslavia (FRY) and Serbian Governments, *Official Journal*, L 143/1.
[173] Richard Garfield, "Sanctions and the Federal Republic of Yugoslavia: Assessing Impacts and Drawing Lessons", available at: *https://odihpn.org/publication/sanctions-and-the-federal-republic-of-yugoslavia-assessing-impacts-and-drawing-lessons/*, 27.02.2023.

of smart or targeted sanctions, aimed at minimizing the long-term impoverishing impact on the civil population and focusing on government officials and their allies.[174]

Even though the pre-Lisbon context can be criticized for legal ambiguities and impracticalities as regards restrictive measures, it was the only feasible way of implementing such measures at the time to lack of an appropriate legal ground. These issues were significantly resolved by the Treaty of Lisbon, despite the general rule remaining in place. Thus, the Treaty introduced several modifications in terms of the CJEU's competence in the field and expanded the legislative basis, allowing for the adoption of restrictive measures not only against third countries but also private individuals.

2.1. Analyzing the general rule: the CJEU's absence of jurisdiction in the CFSP

As mentioned earlier, the Lisbon Treaty strengthened the entire institutional framework of the EU by granting the EU a single legal personality and enhancing the respective roles of the European Council, the European Parliament as well as the CJEU. In particular, the Treaty preserved the general rule that the Court lacks jurisdiction in the CFSP, along with exceptions in the form of restrictive measures and delimitation of competences within the EU external actions. Furthermore, the Lisbon Treaty maintained the Court's authority to review international agreements between the Union and third parties. The primary aim of adopting the Treaty was to maintain the CFSP as an independent pillar within the legal framework of the EU and subject it to "specific rules and procedures" as stipulated by Article 24(1) TEU. Also, the "otherness" of the CFSP stems from the fact that the authority to shape and execute foreign policy rests primarily with the European Council and the Council (acting unanimously), unless otherwise specified in the Treaty. At the same time, the respective roles of the European Commission and European Parliament have remained marginalized in this domain.

From a technical standpoint, the implementation of the CFSP relies on the HR/VP and the Member States, who are obliged to uphold the principles of mutual solidarity and loyalty in this regard. It could be said that the post-Lisbon diplomacy is predominantly centralized around the HR/VP, who is supported by the European External Action Service (hereinafter: EEAS). Established in 2010, the EEAS functions as a diplomatic service responsible for the Union's foreign policy as well as its diplomatic representation across the world. The HR/VP also plays a

[174] *See* for instance Jakub Hejsek, "The Impact of Economic Sanctions on Civilians: Case of the Federal Republic of Yugoslavia", *The Science for Population Protection,* No. 2/2012, 1-13.

significant role in implementing restrictive measures, highlighting the hybrid nature of these measures under both the CFSP and TFEU.[175] The institutional set up following the Lisbon Treaty is particularly noteworthy as it elevates the European Council on the top of the CFSP hierarchy for political reasons, while empowering the Council of European Union (the Council) to align decisions with proposals from the European Council. Therefore, exclusion of the executive and legislative powers from the CFSP, namely the Commission and the Parliament, was partially compensated by the inclusion of the Council as the main decision-making body of the EU, alongside the Parliament.

When examining the unique characteristics of the CFSP, it becomes evident that it is not entirely confined within the scope of the Lisbon Treaty. Despite certain indications of isolation, the CFSP exhibits a complex nature that extends beyond the Treaty's boundaries. As per Article 1(3) TEU, the CFSP forms an integral part of the EU's normative framework, placing the TEU and TFEU on an equal legal footing. Additionally, Article 40 TEU[176], also known as the *non-affection claus*e, also ensures equal protection of the CFSP under both Treaties while maintaining the pre-Lisbon intergovernmental logic. Accordingly, the CFSP is awarded an exclusive competence in pursuing political objectives, while the TFEU covers narrowly defined substantive goals of the Union's foreign policy. Although the constitutional changes introduced by the Lisbon Treaty were intended to "make clear that implementation of other Community policies set out in the TFEU cannot affect the procedures and powers of institutions when taking action under CFSP"[177], the CFSP and TFEU policies were brought closer to each other at the same time. On a particular note, the Court's power to exceptionally adjudicate on the CFSP matters was further elaborated by Article 275(2) TFEU, despite the TEU appearing as a more logical choice. This is because the TEU lays down general provisions on the Union's foreign policy as well as specific rules on the CFSP under Title V Article 21 which states the following:

"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and

[175] Christina Eckes, "The Law and Practice of EU Sanctions", *Research Handbook on the EU's Common Foreign and Security Policy*, (eds. Steven Blockmans, Panos Koutrakos), Cheltenham, 2018, 226.
[176] Consolidated version of the Treaty on European Union, Articles 1(3) and Article 40.
[177] House of Commons Foreign Affairs Committee, "Foreign Policy Aspects of the Lisbon Treaty", *Third Report of Session 2007-08,* Vol. 2, 43.

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."[178]

Therefore, Article 21 TEU serves to integrate the EU's foreign policy into a unified framework through application of common principles and values. While Article 4(3) TEU extends the constitutional principle of sincere cooperation to the CFSP, Article 40 TEU emphasizes distinct nature of the CFSP.[179] At the same time, the CFSP has been integrated into the Union's legal framework which grants the CFSP the ability to take precedence over national foreign policies, despite the lack of a formal hierarchy between the two. For instance, EU sanctions or restrictive measures implemented under the CFSP are a combination of CFSP decisions made under Title V TEU and CFSP regulations, as defined by Article 288 TFEU.[180] This integration employs two distinct legal bases and legal instruments, thereby strengthening the overall objectives of the CFSP through the direct applicability of TFEU regulations. However, this approach contradicts the explicit intention stated in Article 40 TEU which calls for a clear distinction between the CFSP and other policies outlined in the TFEU:

"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."[181]

Therefore, it can be argued that the Lisbon Treaty skillfully managed to preserve the isolating intergovernmental character of the CFSP, while simultaneously bolstering its position within the legal framework of the EU through its integration into the overarching EU principles. This underscores the argument regarding the CFSP's hybrid nature, as it combines elements of both isolation and integration.[182] This aligns to a considerable degree with the clear-cut intergovernmentalism established by the Maastricht Treaty. It could be said that the Treaty creators contributed to *lex imperfecta* status of the CFSP within the hierarchy of the EU legal order, thereby

[178] Consolidated version of the Treaty on European Union, Title V, Article 21(1).
[179] Ibid, Article 4(3): "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties."
[180] C. Eckes (2018), 208.
[181] Consolidated version of the Treaty on European Union, Title V, Article 40(1).
[182] Christina Eckes, "The CFSP and Other EU Policies: A Difference in Nature?", *European Foreign Affairs Review*, No. 20/2015, 550.

giving the Member States (through the institution of the Council) a prominent role in decision-making functions.

2.2. The CJEU and the transformative impact of the Lisbon Treaty

Speaking of technical aspects of the CJEU, as reinforced by the Lisbon Treaty, it was divided into two separate courts of law: the Court of Justice dealing with preliminary ruling requests from Member States, actions for annulment and appeals, and the General Court tasked with actions for annulment brought by individuals, companies and in certain cases EU governments.[183] The Court of Justice consists of one judge from each Member State and eleven Advocates General, while the General Court's size has been doubled to 54 judges. Furthermore, the judicial framework that emerged after the implementation of the Lisbon Treaty revolves around the established case-law that acknowledges, *inter alia*, the principle of effective judicial protection as a fundamental principle of EU law, derived from the constitutional traditions of Member States.

Additionally, this framework emphasizes the importance of a "complete system of legal remedies" to guarantee adequate judicial review of EU acts.[184] In other words, the judicial system of the EU, as established by the Lisbon Treaty, expands the application of Articles 263 TFEU (regarding admissibility before the CJEU), Article 19 TEU (pertaining to the mission and structure of the EU judicial branch) as well as Article 47 of the EU Charter (ensuring the right to an effective remedy and a fair trial). The Article 19 TEU serves as the cornerstone of post-Lisbon judicial practice, shaping the contours of the Court's jurisdiction. This is exemplified by the Court's Opinion 1/09, in which it affirmed its authority, along with that of national courts of Member States, by stating that both levels of judiciary act as "guardians of the EU legal order and the EU judicial system."[185] Apart from that, the Court confirmed that "the judicial system of the European Union is a complete system of legal remedies and procedures designed to ensure review of legality of acts".[186]

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[183] For further reference *see* Consolidated version of the Treaty on the Functioning of the European Union, Article 263.

[184] Steve Peers, Marios Costa, "Judicial Review of EU Acts After the Treaty of Lisbon", *European Constitutional Law Review,* No. 8/2012, 94-95. Also *see Unión de Pequeños Agricultores v Council of the European Union,* Case C-50/00 P, Judgment of the Court of 25 July 2002, ECLI:EU:C:2002:462, para. 39; *Commission of the European Communities v Jégo-Quéré & Cie SA,* Case C-263/02 P, Judgment of the Court (Sixth Chamber) of 1 April 2004, ECLI:EU:C:2004:210, para. 1.

[185] Opinion 1/09 of the Court (Full Court), Case C-1/09, 08.03.2011., para. 66.

[186] *Ibid,* para. 70.

As evident, the CJEU is generally deprived of jurisdictional competences in the field of CFSP. According to some authors, the case law of the CJEU, followed by adoption of the Treaties indicates that the CFSP comprises of procedural and substantive rules that are clearly distinct from traditional notion of international law and foreign relations of Member States.[187] Exeptions to the general rule are envisaged by Article 40 TEU and Article 275(2) TFEU. Besides, Article 218 TFEU (ex-Article 300 EC) can be perceived as an additional exception. According to Article 40 TEU, the Court is granted the power to review demarcation line between the CFSP and CSDP as well as other areas of EU policy. This authority is derived from the textual interpretation of Article 40 TEU which specifies 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".[188] The aforementioned provision was specifically designed to prevent possible extension of CFSP intergovernmentalism to communitarised areas of EU action. As some authors claim, such distinction made the CJEU more flexible as regards political interests of Member States.[189] Besides, it has a purpose of maintaining institutional balance and safeguarding the applicability of the principle of conferral.

When it comes to Article 275(2) TFEU, it empowers the Court to review legality of restrictive measures against natural and legal persons adopted by the Council of the basis of Chapter 2 of Title V TEU, while making no distinction between EU or UN origins of sanctions. It states the following:

"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 or 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".[190]

The exception provided by Article 275(2) serves to strengthen the EU's capabilities in its sanctions policy by granting the Court jurisdiction in this specific context. However, it is important

[187] Peter Van Elsuwege, "EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency", *Common Market Law Review*, No. 47/2010, 994.
[188] Consolidated version of the Treaty on European Union, Article 40(1).
[189] A. Bendiek, R. Bossong, 18.
[190] Consolidated version of the Treaty on the Functioning of the European Union, Article 275(2).

to note that the jurisdiction granted to the Court under Article 275(2) TFEU has certain limitations. Hence, it does not extend to other aspects of the CFSP, such as the actual execution of the CSDP missions, which remains primarily the responsibility of the Member States involved. The provision for restrictive measures under Article 275(2) TFEU also holds significant relevance in terms of the relationship between the CFSP and other external policies of the EU. This Article, along with Article 215 TFEU[191], brings together the overall framework of the EU's external relations by aligning the CFSP with other areas of external policy. Nevertheless, it is crucial to avoid an excessive reliance on this approach, as the limitations set forth in Article 275(2) TFEU should prevent its overwhelming use.

As for Article 218 TFEU, it establishes the procedure for negotiation and conclusion of international agreements by the EU, including those falling within the scope of CFSP.[192] Since the Lisbon Treaty introduced changes in the field of international agreements following the abolition of the Maastricht's three pillar structure, the key question was whether the CJEU should be awarded jurisdiction to issue prior rulings on the compatibility of the CFSP agreements with third countries or international organizations in relation to the Treaties. This matter was approached through the broad formulation of Article 218 TFEU. The absence of exceptions in the wording of this Article indirectly allowed for the Court's jurisdiction to be applicable in this area. Additionally, there were differing perspectives among scholars on how Article 218 TFEU should be interpreted. Some advocated for a broad and comprehensive interpretation, suggesting that it should encompass a wider range of the Court's activities such as advisory opinions.[193] On the other hand, there were arguments against this viewpoint, asserting that international agreements should fall outside the Court's jurisdiction since it lacks the power over the EU's actions in matters related to the CFSP, pursuant to limitations set forth in Article 275 TFEU.[194]

Considering the Court's practice in the field, it can be contended that the Court does not interpret the Treaties in a restrictive manner, which extends to opinions regarding the CFSP international agreements. This is particularly evident from the Court's reasoning in the

[191] *Ibid*, Article 215.
[192] Consolidated version of the Treaty on the Functioning of the European Union, Article 218.
[193] Takis Tridimas, "The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?", *Research Paper in Law,* No. 8/2003, 1-41.
[194] Koen Lenaerts, Piet Van Nuffel, *European Union Law,* Sweet & Maxwell, London, 2011. For further reference also *see* Loreta Saltinyte, "Jurisdiction of the European Court of Justice over issues relating to the Common Foreign and Security Policy under the Lisbon Treaty", *Jurisprudencija: Mokslo darbu žurnalas*, No. 119(1)/2010, 274-275.

abovementioned case of *Gestoras Pro Amnistia* where it explicitly acquired jurisdiction over interpretation of conventions as well as implementing measures.[195] Having in mind the applicable legal framework, it is evident that the CJEU's jurisdiction can extend to certain aspects of the CFSP-related international agreements, such as trade or competition policy, despite the initial lack of judicial competence in the particular domain. The relationship between Article 218 TFEU, the CFSP and the CJEU underscores the delicate balance between intergovernmental decision-making in foreign policy and the role of the CJEU in interpreting and applying EU law. In contrast to Article 40 TEU and Article 275 TFEU, Article 218 TFEU is perceived as an implicit exception to the Court's lack of jurisdiction in CFSP matters.

Moreover, it is important to recognize that the CJEU has previously asserted its *kompetenz-kompetenz* power, which is the capability to define the extent of EU competencies. The *kompetenz-kompetenz* doctrine, also known as the principle of attribution of powers, empowers courts to establish their jurisdictional boundaries. This principle, originating from the Federal Constitutional Court of Germany with the *Solange I* case in the 1970s, confronted the ECJ's claim to exclusive jurisdiction. The German court maintained its role in monitoring the boundaries of Community legislation as per German constitutional law, thereby challenging the ECJ's view on the ability of national courts to declare Community law invalid. During that period, a number of national constitutional courts raised objections to the ECJ's authority to serve as the ultimate arbiter in cases concerning the competences of Member States. For instance, the Italian constitutional court examined the permissible limits of states' sovereignties in the case of *Frontini v. Ministero delle Finanze*[196]. The Court concluded that the EEC Treaty formed a part of the Italian constitutional system, while European Regulations had direct applicability and binding effect across all Member States. However, the Italian court underlined certain restrictions on the application of the Community law, particularly when it comes to safeguarding fundamental principles of the national constitutional system and individual human rights.

The delineation of competences between the EU and Member States has become one of the most complex issues in EU law ever since the introduction of the *kompetenz-kompetenz* doctrine in the early 1970s. In essence, the Court does not hesitate to assert its supremacy over Member

[195] *Gestoras Pro Amnistia and Others v Council,* C-354/04 P, para. 45.
[196] *Frontini v. Minister delle Finanze, 2 CMLR 372, Judgment of Italian Constitutional. Court n. 183 of 18 December 1973, IA/00692-D.*

States' competences, even if it conflicts with the Member States' constitutional preferences. This was also evident in *ERTA's* judgment, which established the doctrine of implied external powers. Such an approach taken by the CJEU often clashes with the position of national constitutional courts, which assert that Member States are "masters of the Treaties" and should determine the extent of competences conferred to the EU.[197] Ever since the enactment of the Single European Act the general rule regarding the Court's lack of competence in foreign policy matters has remained unaltered. However, there have been notable developments in this area, primarily driven by the Court's adaptable approach to adjudication and the establishment of limited judicial exceptions. It is evident that the *rationae materiae* jurisdiction of the CJEU has been subject to different interpretation following the introduction of the Lisbon Treaty. Hence, the absence of jurisdiction in matters related to the CFSP has been regarded as an exception to the general jurisdiction rule under Article 19 TEU. This exception has been reinforced and affirmed through several significant cases before the ECJ, such as *H. v. Council*[198], the so-called *Mauritius Agreement*[199] and *Elitaliana v. EULEX Kosovo*[200]. To understand the Court's specific approach to the CFSP after the Lisbon Treaty, it is important to consider the following paragraph from the *H. v. Council* judgment:

"Pursuant to the final sentence of the second subparagraph of Article 24(1) and the first paragraph of Article 275 TFEU, the Court does not, in principle, have jurisdiction with respect to the provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions. However, the aforementioned provisions introduce a derogation from the rule of general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly".[201]

The quoted paragraph highlights the fact that the CJEU lacks jurisdiction over provisions and acts related to the CFSP and recognizes that these provisions create an exception to the rule of

[197] Inge Govaere, "Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon", *Cambridge Yearbook of European Legal Studies,* No. 13/2011, 93.
[198] *H v Council of the European Union and Others,* C-455/14 P, Judgment of the Court (Grand Chamber) of 19 July 2016, ECLI:EU:C:2016:569.
[199] *European Parliament v Council of the European Union,* Case C-658/11, Judgment of the Court (Grand Chamber), 24 June 2014, ECLI:EU:C:2014:2025, para. 69.
[200] *Elitaliana SpA v EULEX Kosovo,* Case C-439/13 P, Judgment of the Court (Fifth Chamber) of 12 November 2015, ECLI:EU:C:2015:753, para. 41.
[201] *H v Council of the European Union and Others,* C-455/14 P, paras. 39 and 40.

general jurisdiction. Besides, it underlines that exceptional provisions must be interpreted restrictively, implying that the CJEU's jurisdiction in CFSP matters is limited and subject to careful interpretation. Based on the aforementioned, it can be deducted that the CJEU is primarily focused on protecting its own authority in the face of derogating CFSP provisions within the TFEU. In other words, the Court aims to ensure that its adjudicative powers are not compromised by exceptions applicable to the CFSP legal basis and for these reasons "they must be interpreted narrowly", as emphasized in the *H. v. Council* judgment. Consequently, it is important to bear in mind restrictions set out in Article 275 TFEU, which prohibit the Court from exercising law or decision-making powers in the CFSP domain. Thus, the CFSP should be treated as a separate entity from the broader framework of the EU's external relations. As the dissertation unfolds, it will become apparent that the Court's interpretative style extends beyond explicit provisions in the Treaties, particularly when exceptional rules govern the CFSP.

2.3. Exceptions to the rule: what type of competence does the CFSP belong to?

In addition to examining the CJEU's competence in the CFSP, it is also crucial to analyze the EU's competence within the CFSP itself more thoroughly. Given the hybrid nature of the CFSP, determining the specific type of EU competence within it has proven to be a significant challenge. The introduction of the Lisbon Treaty further influenced the evolutionary path of the CFSP as a distinct EU competence. The Treaty transformed the CFSP from "a purely intergovernmental system based on consensus and international law" into "a fully-fledged system based on treaty law which includes institutions that operate under the rule of law and which have been given law-making powers".[202] Therefore, it is valid to assert that the CFSP is indeed an integral component of the EU's legal framework, irrespective of its distinctive features. Regarding the CFSP as an exception to the CJEU's general jurisdiction under Article 19(1) TEU, the issue becomes less straightforward when considering the EU's catalogue of competences. In terms of the EU competences, the principle of conferral holds particular importance since it has outlined how division of powers should occur within the EU institutional and normative frameworks. Under this fundamental principle laid down in Article 5 TEU, the EU can act "only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set

[202] Ricardo Gosalbo Bono, "Some Reflections on the CFSP Legal Order", *Common Market Law Review,* No. 43/2006, 393.

out there in" while "competences not conferred upon the Union in the Treaties remain with the Member States".[203]

The Advocate General Kokott also recognized this stance in relation to the Court's famous Opinion 2/13 on the EU accession to the European Convention on Human Rights (hereinafter: ECHR)[204], emphasizing that competences not attributed to the EU by the Treaties resides in the Member States.[205] If systematically interpreted, the principle of conferral or attribution of competences prevents the potential expansion of EU competences beyond the scope of the founding Treaties, thereby protecting the Member States' position in this regard. Furthermore, it is the principle that "prevents the ECJ from exercising its jurisdiction over EU acts adopted under the CFSP that neither encroach upon the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 TFEU, nor impose restrictive measures against natural or legal persons".[206] In addition to the principle of conferral, EU areas of action are also guided by the principles of proportionality and subsidiarity as already discussed in the previous section.

Regarding the CFSP specifically, it neither falls within the scope of exclusive, shared nor supporting competences of the EU, which can be derived from both the textual wording and teleological interpretation of Article 2(4) TFEU. Hence, the latter states that "the Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defense policy"[207]. The specific Article being discussed does not explicitly address the CFSP as a separate competence within the EU, nor does it define the precise category of competence to which the CFSP belongs. However, subsequent paragraphs of the same Article provide clear definitions of exclusive, shared and supporting competences within the EU.[208]

Additionally, Article 24(1) TEU stipulates that "the Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating

[203] Consolidated version of Treaty on European Union, Article 5(2).
[204] *Opinion pursuant to Article 218(11) TFEU*, Case Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454.
[205] View of Advocate General Kokott delivered on 13 June 2014, *Opinion procedure 2/13 initiated following a request made by the European Commission*, ECLI:EU:C:2014:2475, para. 45.
[206] Koen Lenaerts, José Gutierrez-Fons, "A Constitutional Perspective", *Oxford Principles of European Union Law,* (eds. Robert Schütze, Takis Tridimas), Oxford, 2018, 113.
[207] Consolidated version of Treaty on the Functioning of the European Union, Article 2(4).
[208] *Ibid*, paras. 2, 3 and 5.

to the Union's security"[209] thus broadening the scope of the abovementioned Article 2(4) TEU. Considering the language used in Article 24(1) TEU, it can be assumed that the EU possesses a wide range of actions within the CFSP. The scope of the Union's activities under the CFSP has indeed significantly expanded, covering diverse areas such as civilian and military actions, as well as the implementation of restrictive measures or sanctions. This expansion of CFSP actions raises concerns as it directly impacts individual rights, which contradicts the original intentions of the creators of the Maastricht Treaty. Nevertheless, textual interpretation of the Lisbon Treaty's provisions suggests that the CFSP competence lacks further explanations unlike competences in other fields of the EU actions. A discrepancy can also be observed between the foreign policy and security and defense elements under the CFSP. On one hand, provisions on CSDP are unambiguously elaborated in the Lisbon Treaty, more precisely Article 43(1) TEU which states that the use of military and civilian means shall include "joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories".[210] On the other hand, the foreign policy aspects of the CFSP are ill-defined and ambiguously associated with the overall EU objectives in the external relations field pursuant to Article 21(2) which states the following:

"The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

[209] Consolidated version of Treaty on European Union, Article 24(1).
[210] Consolidated version of Treaty on European Union, Article 43(1).

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance".[211]

As evident from the aforementioned points, all components of the CSDP are explicitly enlisted in the relevant provisions of the Treaty, in contrast to broadly described actions within the CFSP. It follows that the primary challenge in defining the EU's competence in the CFSP lies in the absence of necessary clarification regarding the scope and nature of these competences. In this regard, the relationship between the CFSP and other EU competences can be characterized as a combination of *lex specialis* and *lex generalis*. Moreover, the concept of shared or concurred competence has often been associated with the CFSP, despite the deliberate omission of any definition by the Lisbon Treaty's drafters. These discussions were particularly intense and confusing prior to the Lisbon Treaty adoption. On a particular note, in the Praesidium discussion paper[212], some argued that CFSP competences are concurrent with those of Member States, while others advocated for intergovernmental nature of these competences or even their complementary/supporting nature. However, the majority positioned the CFSP somewhere between shared and complementary competences.[213] The viewpoints have undergone changes following the adoption of the Lisbon Treaty and subsequent processes of constitutionalization, including the introduction of the Court's limited oversight role in the CFSP field for the first time.

The search for a category of competence for the CFSP arises from a paradox between the EU's expanding scope of actions under CFSP and the lack of a solid legal foundation for such types of actions. One possible reason for linking the CFSP with shared competences could be the perception that shared competences have a pre-emptive or limiting impact, as suggested by some

[211] Consolidated version of Treaty on European Union, Article 21(2).
[212] The European Convention, *Final report of Working Group VII on External Action*, CONV 459/02, Brussels, 16.12.2002.
[213] Maja Brkan, "Exploring EU Competence in CFSP: Logic or Contradiction?", *Croatian Yearbook of European Law and Policy*, No. 2/2006, 184.

authors as well.[214] According to Article 2(2) TFEU, shared competences are divided between the Union and Member States which means that both "may legislate and adopt legally binding acts in that area" while "Member States shall exercise their competence to the extent that the Union has not exercised its competence or has decided to cease exercising its competence".[215] If considering Article 24(1) TEU in parallel with the Article 2(2) TFEU, the CFSP cannot be perceived as shared competences because Article 24(1) TEU excludes the possibility of adopting legally binding acts within the sphere of CFSP. It would be accurate to claim that the CFSP stands alone as a *sui generis* competence of the Union, rather than attempting to establish a loose and somewhat arbitrary connection with existing EU competences. However, the conceptual analysis of the Union's competence in the CFSP does not resolve practical hardships stemming from the lack of legal clarifications in the Treaties.

Even though Article 24(1) TEU may suggest that the Union's capacities under the CFSP are all-powerful, this is not the case, as the CJEU is exempted from exercising jurisdiction over the main aspects of the CFSP, particularly those of a purely political nature that naturally belong to Member States. It is worth recalling here that a general principle of law calls for a narrow interpretation of exceptional rules, which should be also applied to the matter at hand.[216] It is worth recalling that the Court had been eager to follow this rule prior to adoption of the Treaty of Lisbon, as demonstrated in the *Segi* case. On a particular note, the Court initially constrained itself to only exercise jurisdiction over competences explicitly granted by the TEU and declined to rule on actions for damages in the context of CFSP. However, as will be demonstrated later, this position was subsequently overturned, indicating a shift in the Court's approach and signaling a different perspective on the matter.

Continuing with Article 24 TEU, which is specifically pertinent for analyzing the ambiguous competence of the Union in the CFSP, its second paragraph highlights several key elements, by stating the following:

"The Union shall conduct, define and implement a common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification

[214] Piet Eeckhout, „The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism", *EU Law After Lisbon,* (ed. Andrea Biondi), Oxford, 2012, 268.
[215] Consolidated version of Treaty on the Functioning of the European Union, Article 2(2).
[216] Paloma Plaza Garcia, "Accession of the EU to the ECHR: Issues Raised with regard to EU Acts on CFSP Matters", *ERA Forum,* No. 16/2015, 491.

of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions. 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."[217]

There are two aspects to be noted in relation to Article 24 TEU, namely the EU's and Member States' respective responsibilities and positions in the field. Although the paragraph begins by referring to the EU's competence in conducting, defining and implementing the CFSP, it does not explicitly specify whether the CFSP is exclusively the EU's competence or not. Additionally, it emphasizes the role of the Member States, who are obligated to support and adhere to the Union's action in the CFSP, based on principles of loyalty and mutual solidarity. Consequently, it is evident that the EU establishes rules and legal obligations for its Member States, while the Council and the European Council hold prominent roles as institutional representatives of the Member States. Such a dynamic can indicate the absence of a clear institutional hierarchy with respect to the CFSP. This observation indicates that, under the post-Lisbon framework, the CFSP exists as a *sui generis* notion, situated in a realm between shared and exclusive competence.

2.3.1. EU competence in the CFSP: plagued by the sui generis problem?

Considering the fact that the Lisbon Treaty does not provide for any specific definition of EU competences in the CFSP, it is reasonable to argue that the CFSP should be considered as a *sui generis* competence, thereby being heavily influenced by the principle of conferral. It is indeed noteworthy that the principle of conferral is not expressly mentioned in the Treaties concerning the provisions on the CFSP, such as Article 24 TEU. From a teleological perspective, it can be argued that the principle of conferral was fundamental for the drafters of the Treaty when formulating rules on the CFSP. Additionally, the voting mechanism established by the Treaties provides insights into the characteristics of the EU competence in the CFSP. As previously mentioned, the CFSP operates under a qualified majority voting mechanism, which indicates that its position does not hold the highest level of authority within the overall hierarchy of EU norms. In contrast with that, the majority and/or unanimity voting mechanism usually involves more autonomous decision-making with a lower degree of influence from Member States. This distinction is evident in CFSP matters where Member States have a significant influence.

[217] Consolidated version of Treaty on European Union, Article 24(2).

Furthermore, some claim that the approach of institutional independence can help determine the type of EU competence in the CFSP. According to this perspective, relevant institutions like the Council, despite consisting of representatives from Member States, possess a certain degree of independence, implying that the CFSP primarily belongs to the Union's competence.[218] However, it would be impractical and inaccurate to strictly adhere to this one-dimensional approach to the CFSP competence, as the authority of EU institutions ultimately derives from the conferral of powers by the Member States. However, determining the extent of conferral or distribution of competences within the CFSP is challenging due to its hybrid or *sui generis* nature.

On a relevant note, Articles 2-6 TFEU provide a clear framework for delineating the EU's competences, categorizing them as exclusive, shared, and complementary/supporting, which is important for defining the scope and nature of the EU action in various policy areas. Besides, the Lisbon Treaty enlists different modalities and consequences of the competence conferral. On a particular note, Article 2 TFEU reads as follows:

"1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if empowered by the Union or for the implementation of Union acts.

2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".[219]

As astutely argued by Brkan, the current categorization of EU competences into three types (exclusive, shared and complementary/supportive) is not exhaustive, and each type implies a different level of conferral.[220] For example, the EU enjoys exclusive competences to legislate and adopt legally binding acts on its own and Member States can step in only if explicitly enabled by the Union. According to Article 3 TFEU, the EU enjoys exclusive type of competence in areas such as international agreements, customs union, competition rules in terms of internal market, monetary policy for Euro-zone (Member States whose currency is euro), conservation of marine

[218] *Ibid*, 183.
[219] Consolidated version of the Treaty on Functioning of the European Union, Article 2.
[220] *Ibid*, 184.

biological resources under the common fisheries policy as well as common commercial policy.[221] On the other hand, shared competences are divided between the EU and Member States as specified in Article 4 TFEU. These include areas such as: internal market, social policy, economic social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom security and justice, common safety concerns in public health matters, research, technological development and space, development cooperation and humanitarian aid.[222] Finally, supporting or complementary competences do not impose any legal obligations for harmonizing national laws with EU legally binding acts. These competences relate to policy areas such as: protection of human health, industry, culture, tourism, education, civil protection and administrative cooperation.[223]

The aforementioned enumeration of EU competences reinforces the notion that the CFSP does not fall exclusively within any of these categories, thus supporting the argument regarding its hybrid nature. Scholars such as Petersmann and Dashwood shared this perspective, describing CFSP competences as "a special category of competences *sui generis* […] whose constitutional regulation remains imprecise in many ways"[224] because they "obey a different logic".[225] Wessel also acknowledges the distinctive character of CFSP competence, setting it apart from both implicit and explicit external competences.[226] Despite notable efforts to address these issues, these credible viewpoints have not been able to precisely define the scope and effects of the EU's *sui generis* competence in the CFSP, largely due to lack of clearer definitions in the relevant Treaties' provisions. It follows that the Lisbon Treaty has generated more questions than answers regarding the division and clarification of the EU's external competences, particularly in the CFSP domain.

While academic endeavors have sought to untangle this the matter to some extent, it is worth recalling discussions that took place during the Laeken Summit of 2001. Among other topics, the Summit touched upon the challenges posed by the EU's exhaustive catalogue of competences under the Lisbon Treaty. The need for a more transparent differentiation between the three types

[221] Consolidated version of Treaty on the Functioning of the European Union, Article 3.
[222] *Ibid*, Article 4.
[223] *Ibid*, Article 6.
[224] Ernst Urlich Petersmann, "A New Constitutional Paradigm?", *Europa und Seine Verfassung,* (ed. Charlotte Gaitanides), Baden, 2005, 184.
[225] Alan Dashwood, "The Relationship Between the Member States and the European Union/European Community", *Common Market Law Review,* No. 41/2004, 370.
[226] Ramses A. Wessel, "Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe", *The European Union: An Ongoing Process of Integration,* (eds. Zwaan de Jaap W, Alfred E. Kellermann *et. al.*), The Hague, 2004, 126.

of competence - the exclusive competence of the EU, competence of Member States and the shared competences of the EU and Member States - was emphasized, while also emphasizing the preservation of the *acquis communautaire* and the fundamental provisions of the Treaties.[227] Additionally, it was underscored that any redefinition of competences should not result in an excessive expansion of the EU's existing competences, as it would impede the constitutive positions of Member States and hinder the overall European dynamic. It was further highlighted that the Union must be responsive to future challenges and developments, remaining open to exploring new policy areas whenever necessary. Similarly, Pernice observed that "the process of integration does indeed entail the progressive creation of new powers as well as reorganization of existing powers at both levels of governance"[228] meaning that the EU's list of competence should rather be open-ended as to gradually include the specificities of the CFSP area. Thus, the quest for deeper conceptualization and understanding of the CFSP competence proves to be more complex than initially perceived.

However, a potential solution lies in adopting a more flexible approach to the current (exhaustive) list of the EU competences. Also, greater clarity should be achieved with regards to *sui generis* CFSP competence in order to minimize legal uncertainty in the jurisprudence of the Court. This entails recognizing the expansion of the Union's external powers due to emergence of new missions under the CFSP, which naturally call for a more adaptable and transparent catalogue of EU competences to effectively address future challenges. At the same time, the Member States' traditional competences in the foreign relations field should be safeguarded in line with the principles of mutual solidarity, subsidiarity, and conferral of powers. In the absence of conceptual clarity, the CJEU may be required to provide additional explanations and guidelines on this specific issue in due course.

2.4. Delimitation of competences between former pillars

Delimiting competences within the CFSP involves determining which matters fall under the EU's exclusive competence, which fall within the realm of Member States, and which are shared. In other words, the post-Lisbon delimitation rules present a dichotomy between the CFSP and non-

[227] Presidency Conclusions, European Council Meeting in Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1, 21.
[228] Inglof Pernice, "Rethinking the Methods of Dividing and Controlling the Competences of the Union", *The Treaty of Nice and Beyond Enlargement and Constitutional Reform,* (eds. Mads Andenas, John A. Usher), Oxford, 2003, 121-146.

CFSP areas of action, leading to numerous conflicts among the EU institutions. The CJEU holds a vital role in interpreting and clarifying the scope of competence within the CFSP, ensuring the uniform application of EU law. The Treaties, which establish a constitutional framework with inherent gaps, provide only a vague outline of the Court's limited jurisdiction in CFSP matters. As such, it was almost inevitable that the Court would be tasked with determining the division between the former pillars of EU law under the current Treaty system.[229] Since the Treaties are not entirely explicit on what constitutes CFSP matters, it has fallen to the CJEU to delineate the extent of this boundary.

Defining the line between CFSP and non-CFSP issues is inherently complex. Courts with constitutional authority are often responsible for resolving conflicts between different actors, whether institutions or Member States, within a constitutional framework. Although the Court was not originally expected to play such an extensive role in the development of EU law, it has increasingly been required to address the gaps in the Treaties, ensuring consistency in the interpretation of Union law through its well-established judicial mechanisms. Although there is no hierarchical relationship among different EU policy areas and the relevant institutions and legal instruments, the field of EU external relations is particularly challenging when it comes to choosing the right legal basis to address international concerns. The intertwined nature of policy areas such as development and cooperation under the CFSP, the CFSP aspects of the AFSJ as well as external dimension of internal policies, lacks a clear-cut solution making the delimitation of competences occasionally burdensome.

It is important to recognize that each policy area is governed by different EU instruments that establish specific procedures and institutional roles. For instance, in the field of development cooperation policy, which has been a traditional component of the Community's foreign relations, the European Instrument for Democracy and Human Rights Worldwide (hereinafter: EIDHR)[230] and the EU Instrument Contributing to Stability and Peace (hereinafter: ICSP)[231] played significant roles in supporting and promoting human rights, peace, stability and democracy in developing

[229] G. Butler (2019), 148.
[230] Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, O*fficial Journal*, L 77/85, 15.03.2014. (out of force as of 31.12.2020).
[231] Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, *Official Journal,* L 77/1, 15.03.2014., (out of force as of 31.12.2020).

countries. However, it is noteworthy that the role of the EEAS differed between these two instruments, as the ICSP was more closely aligned with the provisions concerning the organization and functioning of the EEAS, compared to EIDHR.[232] The difference in alignment adds to the complexity of delimitation cases for the CJEU, among other challenges.

The CFSP's unique nature presents both a political necessity and a legal requirement to ensure a coherent foreign policy for the EU, aligning with the principles of primacy and direct effect. This coherence is reinforced by the dual role of the HR/VP and the enhanced involvement of the Parliament in the CFSP as stipulated in Articles 207 and 218 TFEU. Simultaneously, it is crucial to maintain the traditional fragmentation of EU external relations and the intergovernmental character of the CFSP. These conflicting ideas are reflected in the *sui generis* nature of the CFSP, which continues to operate under specific rules and procedures. As said, the specificity of the CFSP stems from the absence of the CJEU's jurisdiction in the field, although it does not apply to the matters related to delimitation of competences. Consequently, the CJEU often faces a challenging task of defining the boundaries between the two opposing objectives - those of integration and fragmentation. In other words, while there is a logical demand for an integrated EU foreign policy and the CSFP in response to global issues, Member States are keen on preserving their sovereign powers in the conduct of their own national foreign policies.

2.4.1. The principle of conferral and the mutual non-encroachment rule

As already stated, the delimitation of competences primarily concerns the relationship between the EU and its Member States, governed by the principle of conferral as outlined in Article 5(2) TEU. Accordingly, the Union is authorized to exercise its powers solely within the confines of the competences conferred upon it by the Member States in the Treaty, while also abiding by the principles of subsidiarity and proportionality. Additionally, Article 13(2) TEU stipulates that each EU institution must operate within the limits of its powers established by the Treaty while adhering to the procedures, conditions and objectives in a manner consistent with the principle of mutual sincere cooperation. The delimitation of competences also affects the relations between the Union and its Member States with third countries and international organizations. It is of paramount importance to determine whether a subject matter falls within the ambit of the EU

[232] *Ibid,* para. 13. Also *see* Mireia Estrada Cañamares, "Coherence in EU External Relations and the Law": the Case of the CFSP Development Cooperation Nexus in the Union's Action in Somalia", *European University Institute – Department of Law,* doctoral dissertation, Florence, 2016, 16.

autonomous legal order (and the subsequent CJEU's exclusive jurisdiction), or within the realm of Member States' powers. Since the Court enjoys only limited jurisdiction in the field of CFSP pursuant to Article 24 TEU, it becomes necessary to distinguish between the CFSP and non-CFSP policy areas, as each requires different procedural steps and decision-making processes.

Also, the need for delimitation of competences arises from the supranational context of other EU policies, which raises concerns about potential contamination by the intergovernmental CFSP. Some authors have rightly argued that the hybrid nature of the CFSP could result in a "crippled" or partial conferral of powers which means that the competence is shared internally between the EU and its Member States without a corresponding conferral to the autonomous legal order.[233] This is because the CFSP still largely remains outside the jurisdiction of the Court and democratic control of the European Parliament, in line with the relevant provisions. The entry into force of the Lisbon Treaty has resulted in changes to the rules governing the delimitation of different areas of EU competence. These modifications have moved away from the previous pillar structure established by the Maastricht Treaty, which gave priority to the first Community pillar over the subsequent two pillars. Therefore, Article 40 TEU (ex-Article 47 TEU) now provides for the following mutual non-affection rule:

"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".[234]

This mutual non-affection principle implies that implementation of the CFSP and other non-CFSP policies under the TFEU should not have an adverse effect on each other. When combined with Article 1(3) TEU, which states that the EU's two Treaties - TEU and TFEU have the same legal strength, it could be said that the CFSP is now placed on an equal legal footing with other Union's competences in the field of foreign relations. This supports the argument that there are no

[233] Inge Govaere, "To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon", *College of Europe (European Legal Studies) - Research Papers in Law*, No. 4/2016, 3.
[234] Consolidated version of the Treaty on European Union, Article 40.

hierarchal relationships within the EU legal order. It is worth recalling here that both Treaty's provisions stand in contrast to the old Maastricht's regime and its three-pillar structure under the former Article 47 TEU. This is because the fear of encroachment on supranational decision-making bodies, particularly the first Community pillar and *acquis communautaire*, by the intergovernmental pillars of CFSP and JHA, formed the basis for ex-Article 47 TEU. The post-Lisbon legal framework grants equal weight to various aspects of EU foreign policy, including the CFSP and non-CFSP areas of action. In turn, this, however, creates difficulties for the CJEU when delimitating between different aspects of the Union's external competence. The systematic favoring of full competence conferral to the EU over the crippled one is no longer a prevailing approach, at least in theory, although it may be argued that the post-Lisbon tendencies lean more towards preserving the autonomous legal order and the CJEU's preference for EU autonomy therefrom.

2.4.2. Navigating the challenges of mixed dual legal bases: a complex scenario

The current normative framework reveals that the CFSP is now subject to a unified approach to EU law, resulting from the Union's single legal personality introduced by the Lisbon Treaty in Article 47 TEU. However, the consolidation of the Union's foreign policy becomes complex when different legal bases are involved, thus combining the CFSP with other aspects of the EU external action. This is particularly evident in Article 218 TFEU, which lays down procedural rules on conclusion of international agreements. Implementing multiple legal bases presents challenges as different levels of democratic and judicial control apply to different areas of the EU's foreign policy, as exemplified by the CFSP. Reconciling different legal bases and procedural rules to achieve a single measure with multiple objectives can be difficult, especially when prescribed procedures are incompatible.[235] In such cases, a choice must be made between the CFSP and other external actions, as a measure cannot simultaneously fall within and outside the EU's autonomous legal order. In a landmark *Smart Sanctions* case[236], the ECJ affirmed the complexities of combining legal bases in EU law, particularly between the CFSP and TFEU. The Parliament challenged the Council's use of Article 215 TFEU, a rather hybrid CFSP-TFEU provision

[235] Geert De Baere, Tina Van den Sanden, "Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action", *European Constitutional Law Review,* No. 12/2016, 89.

[236] *European Parliament v Council of the European Union,* Case C-130/10, Judgment of the Court (Grand Chamber) of 19 July 2012, ECLI:EU:C:2012:472, para. 49. For further information on this case refer to Chapter 3 of the dissertation.

requiring a prior CFSP decision, for implementing UNSC sanctions against terrorist suspects. The Parliament advocated for Article 75 TFEU, which involves the ordinary legislative procedure and pertains to counter-terrorism sanctions within the area of AFSJ. However, the Court upheld the Council's choice of Article 215 TFEU. This case is notable for the CJEU's detailed exploration of when different legal bases can be combined, employing the "center of gravity test" to identify the main aim of a measure for determining its legal basis. The Court clarified that while measures with multiple, closely linked objectives could potentially be founded on various legal bases, combining legal bases is unfeasible when their respective procedures are incompatible. This decision further highlights the procedural nuances and constraints of blending legal bases within EU treaties, especially in CFSP and TFEU contexts.

In addition, the allocation of competences between the EU and Member States is a fundamental question raised by the Lisbon Treaty. Also, uncertainty persists regarding the applicability of core EU principles such as direct effect and primacy to the CFSP and the criteria for distinguishing between the CFSP and non-CFSP actions. There is a lack of case law on the possible existence of primacy and direct effect in the CFSP matters because the CJEU is, at least theoretically, deprived of any possibility to further clarify these issues pursuant Article 24 TEU which prevents the Court from exercising general jurisdiction in the field of CFSP. While the current (exhaustive) list of the EU competences provides greater clarity compared to the pre-Lisbon framework, challenges arise when the subject matter involves different policies belonging to different types of competences. In such cases, the delineation of competences becomes more complex as it requires careful examination and analysis, creating difficulties in maintaining legal certainty. Concerns regarding delimitation issues have resulted in a significant number of cases before the CJEU, often leading the Court to engage in judicial activism beyond the applicable legal framework. Moreover, the absence of a precise definition on the part of the CFSP competence has generated some additional difficulties when it comes to delimitation issues. On one hand, the EU as a single legal personality was never envisaged to overthrow the Member States' sovereign powers. Besides, the core concept of European integration rests upon the notion of nation-states meaning that Member States have willingly given up only a part of their sovereignties to the EU while remaining fully-fledged subjects of international law themselves.[237] But on the other hand, the principles of direct effect and supremacy of the EU legal order, as established by the landmark

[237] I. Govaere (2011), 91.

cases of *Van Gend en Loos* and *Costa v. ENEL* now decades ago, have significantly curtailed the sovereign powers of Member States. These principles dictate that the EU takes precedence over national laws, thereby undermining the primacy of Member States' legal systems.

The delimitation of competences in the post-Lisbon era is also complicated by the fact that restrictive measures or sanctions have contributed to blurring the line between the CFSP and other EU policy areas. For instance, dual legal bases and mutual involvement of the EU and Member States are required for arms embargoes, trade and financial restrictions imposed upon targeted individuals or groups. Moreover, arms embargoes are intended to prohibit the export of weapons and other related goods set out in the EU's common military list to individuals, non-state entities and states.[238] Besides the EU's common military list which regulates the notion of "arms" at the EU territory, there is also a list of dual-use items set up by the Council's Regulation No. 428/2009.[239] This arrangement of arms embargos exemplifies a situation in which both the EU and its Member States must take action within the realm of the CFSP. Member States are required to authorize the sale of military equipment, highlighting the need for joint engagement at both the EU and national levels. Similar considerations apply to trade and financial restrictions, such as freezing of assets, prohibition of loans and payments, prohibition on selling specific products or services to targeted groups and/or individuals and more. Such actions necessitate the involvement of both levels of governance, making it challenging to determine which competences belong to the EU and which are reserved for Member States. It is worth recalling here that the Council's regulations are directly applicable across the entire Union in accordance with Article 215 TFEU. However, regulations pertaining to the CFSP are often formulated as directives, providing Member States with more flexibility during the implementation phase.[240]

An argument can be made that a growing tension exists between the delineation of competences within the CFSP and the imperative for coherence and consistency in the EU's foreign action through the consolidation of common objectives, as provided for by Article 21(2). The complex legal framework allows for overlaps due to potential utilization of multiple legal bases, which, if not properly delimited, can undermine the effectiveness of the Union's external

[238] Common Military List of the European Union adopted by the Council on 17 February 2020, *Official Journal of the European Union,* C 85/1, 13.03.2020.
[239] Council Regulation No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (recast), *Official Journal of the European Union,* L 134/1, 29.05.2009.
[240] For further reference *see* Francesco Giumelli, Willem Geelhoed *et. al.,* "United in Diversity? A Study on the Implementation of Sanctions in the European Union", *Politics and Governance,* No. 10/2022, 36-46.

action. To address this, further clarification is crucial regarding the vertical and horizontal division of competences to determine the roles and responsibilities of different actors. Such clarification could be achieved through possible Treaty amendments or through judicial activism that aligns with the Court's prescribed powers and scope of authority. Failing to do so may risk the perception of the Union as an arbitrary international actor with inconsistent and unpredictable legal, political and judicial actions. The inclusion of common objectives and the pursuit of coherence in the EU's foreign relations can indeed negatively impact the other side of the coin: the delimitation of competences, institutional balance, and the principle of conferral.

Nevertheless, it is important to acknowledge that the traditional fragmentation of the Union's external relations remains inherent due to the diverse procedures and instruments that guide each policy area, even if they share common goals. More importantly, fragmentation is necessary for enhancing interoperability and preserving the core principle of conferral of powers between the Union and the Member States. By maintaining this fragmentation, the EU can ensure that its actions in foreign relations are carried out effectively and efficiently, while respecting the distinct competences of both the Union and Member States. This is, however, not to underestimate the ongoing "normalization" of the CFSP through the Lisbon Treaty's provisions, allowing for the use of dual legal basis and limited jurisdiction of the CJEU in the field. Nevertheless, it remains to be seen how far the CJEU can continue pushing the "normalization" of the CFSP considering the prescribed boundaries of the Lisbon Treaty.

It follows that delimitation is an essential tool in ensuring coherence of the EU's foreign relations. At the same time, there is a need for maintaining the balance between principles of conferral and institutional balance on one hand, and sincere cooperation and mutual solidarity on the other hand. This unusual quest for a (conditional) coherence of the EU's external relations combines ideas of both functional unity and institutional fragmentation. As a result, it faces the CJEU with numerous challenges when adjudicating upon delimitation issues which is further complicated by the hybrid and undefined nature of the CFSP competence itself. While the notions of sincere cooperation and mutual solidarity apply to the EU-Member States relations, the Court is eager to underline the importance of a coherent and effective approach to the EU's foreign affairs in its case law, as will be demonstrated in subsequent chapters.

2.5. Restrictive measures (sanctions) under CFSP

Restrictive measures or sanctions are crucial instruments within the CFSP, often complemented by international agreements and civilian and military missions under the CSDP. These measures primarily target individuals, third states, and non-state entities, imposing both general application and personalized obligations on the affected groups. As they are unanimously adopted by the Council, they are binding on all EU Member States and entities falling under EU jurisdiction. The concept of restrictive measures, governed by Articles 215 and 275 TFEU, along with Article 29 TEU, constitutes a comprehensive array of sanctions designed to address unlawful behavior by non-EU countries, entities and/or individuals. These EU sanctions may take different forms, targeting government officials, companies, organizations, and individuals through measures such as arms embargoes, diplomatic sanctions, travel bans, asset freezes, and other economic restrictions like import and export limitations. The open-ended nature of this category allows for adaptive and customized responses, ensuring the EU's ability to address distinct circumstances effectively.

Article 215 TFEU serves as the legal basis for adopting restrictive measures, including sanctions, when the Union's essential interests are at stake. It grants the Council the authority to take appropriate measures to achieve CFSP objectives, including the imposition of economic, financial and/or other restrictive measures. Also, Article 215 TFEU broadly defines restrictive measures as actions that entail "interruption or reduction, in part or completely, of economic and financial relations with one or more third countries".[241] There is no doubt that restrictive measures or sanctions primarily manifest as economic and financial sanctions, as will be evident from the relevant case law of the CJEU. Moreover, Article 275 TFEU further elaborates on the adoption and implementation of restrictive measures within the CFSP. It empowers the Council to adopt decisions and regulations that define and implement such measures. These decisions and regulations are legally binding on all Member States, with the Council determining the scope and conditions of their implementation, in accordance with Article 29 TEU. Together, these articles, along with other relevant provisions, establish the legal framework for the adoption, implementation and enforcement of restrictive measures within the CFSP. It is apparent that they provide the necessary authority for the Council to address situations that jeopardize the Union's

[241] Consolidated version of the Treaty on Functioning of the European Union, Article 215(1).

essential interests, enabling the imposition of targeted measures to promote peace, security and adherence to international norms.

An analysis of the EUR-Lex database covering the period from 2009 to 2020 reveals that the Council has adopted 506 decisions on sanctions, 245 decisions on EU missions and operations, 123 decisions on appointment of special representatives and 86 decisions on arms control within the CFSP.[242] In total, 1045 legally non-binding CFSP decisions have been adopted during this period. The abundance of measures in this context suggests that CFSP decisions often have a punitive rather than constructive character. Scholars such as Giumelli, Hoffmann and Książczaková, have observed a significant increase in the use of restrictive measures since the Treaty of Maastricht, particularly the use of smart or targeted sanctions against private individuals. Although it could be argued that the EU's actions under the CFSP should focus more on constructive policy solutions and result-oriented actions beyond mere punitive measures, the current state of international affairs often demands swift and strong responses from the EU. A recent example is the EU's imposition of unprecedented sanctions against Russia following its military invasion of Ukraine on 24 February 2022. As of May 2023, the EU has adopted its 10th package of sanctions against Russian decision-makers, government officials, private individuals and entities directly or indirectly involved in the war against Ukraine. The sanction list currently includes almost 1,500 individuals and over 200 entities.[243]

2.5.1. Exploring differentiations of restrictive measures in the CFSP and the CJEU's jurisdiction

Restrictive measures under the CFSP can be distinguished based on several factors, including their legal bases, objectives, implementation mechanisms, scope and targets, as well as international coordination. When it comes to objectives of the CFSP restrictive measures, they can vary depending on the specific situation and context. Thus, objectives can include maintaining international peace and security, preventing conflicts or human rights abuses, combating terrorism, addressing proliferation of weapons of mass destruction, or responding to other threats to the Union's interests. The measures are designed to exert pressure, influence certain behavior or

[242] Ramses A. Wessel, Elias Anttila, Helena Obenheimer *et. al.*, "The Future of EU Foreign, Security and Defense Policy: Assessing legal options for improvement", *European Law Journal,* No. 26/2020, 373.

[243] For further information *see* "EU sanctions against Russia explained", available at: *https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/,* 22.04.2023.

impose consequences on individuals, entities or states involved in activities deemed detrimental to these objectives. As for the implementation mechanisms, restrictive measures are implemented through the Council's decisions and/or regulations pursuant to Article 29 TEU.

The Council plays a central role in defining the scope, conditions and duration of such measures, while Member States are obliged to conform to the Union's positions in this regard. Moreover, the CFSP restrictive measures can be targeted at individuals, entities and/or states and they encompass a range of (economic or financial) actions such as asset freezes, travel bans, arms embargoes and so on. The scope and targets of the measures are determined based on the specific circumstances and the objectives pursued. Finally, restrictive measures can also involve international coordination, particularly when the measures are adopted in response to global challenges or in coordination with other international organizations. Hence, the EU may align its measures with those adopted by the UNSC or other regional organizations, enhancing the effectiveness and coherence of the international response to a particular situation.

When considering the character of restrictive measures under CFSP, it becomes evident that the EU has the authority to adopt both autonomous and quasi-autonomous measures to comply with other international sanction regimes, such as those imposed by the UNSC under Chapter VII of the UN Charter to maintain international peace and security. Moreover, the implementation of measures or sanctions can occur at either the EU or national levels, depending on the specific nature of a measure. For example, Member States are responsible for implementing measures such as arms embargoes or restrictions on admission, as they are legally bound to comply with CFSP Council Decisions under Article 29 TEU. On the other hand, measures aimed at disrupting economic relations with third countries, such as freezing funds and economic resources, are adopted by the Council (acting by a qualified majority) on a joint proposal of the HR/VP and the Commission. These measures are enacted in the form of Council Regulations under the provisions of Article 215 TFEU.[244] Both decisions and regulations are subject to judicial review of the CJEU in accordance with an exception provided for by Article 275 TFEU, which goes as follows:

"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.

[244] Consolidated version of the Treaty on Functioning of the European Union, Article 215.

Regarding the Court's jurisdiction in this field, it does have the authority to monitor compliance with Article 40 TEU and to adjudicate on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU. This includes reviewing the legality of decisions made by the Council, which provide for restrictive measures against natural or legal persons and are based on Chapter 2 of Title V of the Treaty on European Union".[245] It is evident that Article 275 TFEU establishes both the exclusion of the Court's general jurisdiction in the field of CFSP and the exceptional judicial review of the legality of CFSP decisions on restrictive measures against individuals or entities. This exceptional review is necessary due to the direct impact of such measures on individual human rights resulting from the pursuit of CFSP objectives in third countries. According to Harpaz, this judicial breakthrough highlights the EU's capacity to act in sanction policy within its foreign policy framework.[246]

It is worth noting here that Article 275(1) TFEU, when read together with Article 24(1) TEU stating that "the Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security", can be interpreted broadly to exclude the Court's jurisdiction from all aspects of the CFSP, not just specific ones.[247] Furthermore, Article 275 TFEU not only emphasizes the importance of the reciprocal mutual non-encroachment rule, aimed at maintaining institutional balance between the CFSP and other Union's policies as established by Article 40 TEU, but also relies on Article 263 TFEU, which grants the CJEU jurisdiction to examine four grounds of illegality: lack of competence, infringement of an essential procedural requirement, any infringement of the Treaties or the EU Charter as well as the misuse of powers.[248] Moreover, the reference to Chapter 2 of Title V is also significant because it contains specific provisions on the Union's external action, thereby reinforcing the exclusion of the CJEU's jurisdiction from the CFSP, except for cases concerning compliance with Article 40 TEU and Article 275 TFEU.[249]

Clarification on the exercise of judicial power to review the legality of CFSP acts is not explicitly provided in the aforementioned articles. However, the case law of the CJEU has

[245] Consolidated version of the Treaty on Functioning of the European Union, Article 275. Also *see* Council of the European Union, Sanctions Guidelines – update, 4 May 2018, available at: *https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf*, 05.05.2023.
[246] Guy Harpaz, "Common Foreign and Security Policy, Counter-Terrorism Measures and Judicial Review: Hamas and LTTE", *Common Market Law Review*, No. 55/2018, 1917-1940.
[247] Consolidated version of the Treaty on European Union, Article 24(1). Also *see* J. Heliskoski, 5.
[248] Consolidated version of the Treaty on Functioning of the European Union, Article 263(2).
[249] Consolidated version of the Treaty on European Union, Title V, Chapter 2.

established that such review can be conducted through both actions for annulments and the preliminary ruling procedure. Before the *Rosneft* ruling, the Court's jurisdiction did not include this expansion, a topic that will be further examined in subsequent discussions. In addition, the wording of the Lisbon Treaty suggests that EU sanctions or restrictive measures in the CFSP operate independently from other EU policies. This is because they are implemented on a cross-treaty basis, involving provisions from both the TEU and the TFEU. As a result, restrictive measures can be seen as a hybrid combination of a CFSP decision (Title V TEU) and a TFEU regulation (Article 215 TFEU).

It is important to highlight that the shift from the pre-Lisbon to post-Lisbon legal contexts marked a substantial change in the adoption of restrictive measures targeting individuals. In the past, there were no explicit provisions for targeted sanctions against individuals, with the focus primarily on economic sanctions against third countries, interpreted teleologically based on EC Treaty provisions. The EU's imposition of targeted sanctions against individuals during the Milošević regime in former Yugoslavia in the 1990s exemplifies this flexible approach.[250] The Lisbon Treaty resolved this legal uncertainty by introducing two legal bases for targeted sanctions against individuals and non-state entities: Articles 75 and 215(2) TFEU. Article 75 TFEU sets forth the legal ground for adoption of targeted restrictive measures through the ordinary legislative procedure, which involves both the Council and the Parliament in determining the scope and content of the measures in question. On the other hand, Article 215(2) TFEU allows for the adoption of these measures by the Council through qualified-majority voting upon a proposal from the HR/VP and the Commission. The distinction between these two articles lies in decision-making processes and the roles played by different institutions. The implementation methods of targeted restrictive measures can pose challenges, particularly as they heavily rely on individual Member States. Given that Member States have some flexibility in their implementation approaches, these differences can impede the desired consistency and coordination necessary for effective enforcement.

[250] For more detailed information refer to Branko M. Rakić, *European Court of Justice and Sanctions Imposed on Serbia,* (Evropski sud pravde i sankcije prema Srbiji), The Faculty of Law University of Belgrade, Belgrade, 2015, 19-65.

2.5.2. The CFSP restrictive measures in the light of the UNSC targeted sanctions

The UN sanction regime under the authority of the UN Security Council (hereinafter: UNSC sanctions) holds significant relevance for the EU and its Member States. This is because it constitutes an essential component of the broader EU sanction policy, which encompasses EU autonomous measures as well as third countries' sanctions with extraterritorial reach, such those often imposed by the United States in response to conflict-related foreign regimes. The UNSC sanctions are binding on Member States as same as the Council's decisions and regulations under the CFSP, which results from their concurrent EU and UN memberships. The majority of sanctions imposed by the UNSC have been in reaction to different threats to international peace and security, including terrorism and the proliferation of nuclear weapons.

The use of targeted or smart sanctions against individuals and non-state entities by both the EU and UN has particularly intensified in the aftermath of the 9/11 terrorist attacks on the US soil in 2001. Even prior to these events in the early 21st century, the UN had shifted its attention towards targeted sanctions, aiming to mitigate severe humanitarian consequences and avoid collective punishment of entire populations for internationally wrongful acts. The US counter-terrorism measures served as a catalyst for the entire international community, including the EU, driven by security concerns and threats. This resulted in a major revision of the EU sanction practice already in 2003 when the Council adopted the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy[251] with the aim of improving effectiveness and consistency of restrictive measures within the EU.

Similar to EU restrictive measures, UN sanctions are legally binding on all members as mandated by Chapter VII as well as Article 2(2) of the UN Charter, which establish a general obligation to comply with the mandatory provisions of the UN Charter.[252] Additionally, Article 103 of the UN Charter further clarifies that "in the event of conflict between obligations of the Member States of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[253] This

[251] The Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 3 December 2003, available at: *https://data.consilium.europa.eu/doc/document/ST%2015579%202003%20INIT/EN/pdf*, 07.06.2023. For further reference *see* P. Van Elsuwege (2011), 488-499.
[252] United Nations, *Charter of the United Nations*, Article 2(2): "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter".
[253] *Ibid*, Article 103.

might indicate that, in theory, EU restrictive measures should be subordinate to the UN sanction regime. However, from a legal perspective, both regimes carry equal legal weight once the UNSC sanctions are incorporated into EU law. It is important to note that the EU has the authority to strengthen UN sanctions by implementing additional and stricter measures in response to specific peace-threatening situations in third countries. Additionally, all EU restrictive measures must comply with the Union's and Member States' obligations under international law, including the World Trade Organization (hereinafter: WTO) agreements.

Regarding the EU legal framework relevant for the application of UNSC sanctions within the EU, Article 3(5) TEU states that "the Union shall contribute to […] strict observance and the development of international law, including respect for the principles of the United Nations Charter".[254] Besides, Article 347 TFEU requires Member States to consult with each other when fulfilling obligations imposed upon them in relation to preservation of international peace and security.[255] These references to the UN Charter in the Treaties indicate that the EU is legally obligated to adhere to UNSC resolutions when making decisions under Article 215 TFEU. Moreover, UNSC sanctions are embedded into the EU legal order through the adoption of Council's regulations based on the TFEU and a joint proposal by the HR/VP and the Commission, usually within 30 days of the adoption of the UNSC resolution.[256] This immediate adoption requirement is due to the binding nature of UNSC Resolutions under Chapter VII of the UN Charter, which applies directly to EU Member States. This means that no exceptions to the original UNSC resolution is allowed under international law unless they are consistent with the content of the resolution itself. The direct applicability criteria also indicates that no further action is required from EU Member States to implement the UNSC Regulation. However, the practical implementation modalities primarily lie with individual Member States, which can create difficulties if there are diverging approaches. To ensure consistent and uniform application of various EU sanction regimes, including those transposed from the UNSC, the EU has taken steps to develop useful guiding tools, such as the EU Sanctions Map.[257] These tools aim to facilitate the implementation of different sanction regimes across Member States.

[254] Consolidated version of the Treaty on European Union, Article 3(5).
[255] Consolidated version of the Treaty on Functioning of the European Union, Article 347.
[256] Council of the European Union, Sanctions Guidelines – update, 2018, para. 41.
[257] EU Sanctions Map, available at: *https://sanctionsmap.eu/#/main*, 06.06.2023.

It follows that the application of targeted restrictive measures necessitates substantial interaction and extensive cooperation between the EU and UN to guarantee the efficacy and coherence of the international response to the specific situation or entity. As a result, the relationship between EU and international law becomes crucial in this context. However, this long-standing relationship encountered a significant challenge in landmark *Kadi* cases[258] presented before the CJEU, which played a critical role in clarifying the potential conflict between the two normative orders regarding the implementation of UNSC targeted measures within the EU territory. These cases have elevated the level of judicial review in the CFSP context, starting with the UNSC resolutions in 1999 and 2000 that targeted terrorist networks linked to Usama Bin Laden, Al-Qaeda, and the Taliban.[259] The addition of Mr. Kadi to the sanctions list in 2001, leading to an asset freeze under the UN Charter, brought into sharp focus issues of human rights and the competence of the Council. The Court of First Instance initially stated its lack of jurisdiction to review the Council's implementation of UNSC resolutions.[260] However, the ECJ on appeal asserted that fundamental human rights are an integral part of EU principles, taking precedence over the UN Charter.[261]

In *Kadi I*, the ECJ identified breaches of due process and property rights in the Council's regulations, challenging the traditional supremacy of international law and leading to the UNSC's adoption of a narrative summary approach for sanctions lists, which improved procedural rights. In *Kadi II*, the Court reinforced these principles, emphasizing the need for specific and substantial reasoning in sanctions cases and discarding the notion of limited judicial review to uphold the ECJ's judicial sovereignty.[262] These cases illuminate the institutional dynamics between the EU

[258] *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005, ECLI:EU:T:2005:332; *European Commission and Others v Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment of the Court (Grand Chamber), 18 July 2013, ECLI:EU:C:2013:518.

[259] United Nations Security Council, Resolution 1267/1999 adopted by the Security Council at its 4051st meeting, 15.10.1999.; United Nations Security Council, Resolution No. 1333/2000 adopted by the Security Council at its 4251st meeting, 19.12.2000.

[260] *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005, ECLI:EU:T:2005:332. Also *see* United Nations, *Charter of the United Nations*, Articles 25 and 103.

[261] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, paras. 283-285.

[262] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Official Journal,* L 139, 29.05.2002.

judiciary and the UNSC, paving the way for the detachment of EU law from international law. A thorough examination of these cases will be undertaken in the following chapters, aiming to scrutinize the CJEU's stance on human rights, CFSP objectives, and commitments to international law.

2.6. The scope of the CJEU's jurisdiction in international agreements involving the EU

The international agreements under the CFSP serve as essential tools for the EU to advance its foreign policy objectives, strengthen its international partnerships, and promote its interests and values in the global arena. These agreements can cover a wide range of topics, including political cooperation, trade, cooperation in the field of security and defense, development cooperation and the promotion and protection of human rights. The conclusion of CFSP international agreements involves a complex decision-making process within the EU institutions. The HR/VP leads the negotiations and represents the EU in the international arena, with the Council decision approving the agreement adopted by unanimity or qualified majority voting, depending on the agreement's provisions and the scope of CFSP in that area. The negotiation and conclusion of international agreements in the CFSP domain are primarily the responsibility of the Council, following recommendations from the High Representative/Vice President (HR/VP) or the Commission, while the enforcement of CFSP international agreements is monitored by various EU institutions, including the Commission and the EEAS. As mentioned earlier, relevant disputes may be subject to the CJEU's jurisdiction. Furthermore, the Lisbon Treaty enhanced the Parliament's role in concluding international agreements through the "assent procedure", providing the Parliament with final consent, thus enhancing transparency and democratic legitimacy in the EU's decision-making processes.[263]

In the area of CFSP agreements, it is crucial to remember that the CJEU's jurisdiction is generally excluded under Article 24(1) TEU. As a result, the Court may appear limited in comparison to other EU institutions when dealing with CFSP international agreements, not due to the legal basis of these agreements, but because the Treaties intentionally restrict its role in this field. This limitation means the CJEU does not have full authority across all areas of Union law, and therefore does not function as a regular court.[264] Nevertheless, the Court retains a narrowly

[263] Consolidated version of the Treaty on Functioning of the European Union, Article 218(6).
[264] Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy,* Hart Publishing, Oxford, 2019, 7.

defined jurisdiction in exceptional cases, particularly when the EU is a signatory to international agreements. These exceptions allow the CJEU to intervene in specific instances, even within the constraints imposed by the Treaties. Moreover, through its mandate, the CJEU provides guidance on the compatibility of these agreements with EU law, ensuring the Union's commitment to international obligations while safeguarding its own legal order. When the CJEU exercises its exceptional jurisdiction over CFSP international agreements, it focuses primarily on ensuring that the agreements do not violate fundamental rights protected under EU law, such as the right to an effective remedy, the right to a fair trial, and the right to property. It is important to note that the Court's review is confined to these specific grounds and does not extend to broader issues of policy or political considerations.

2.6.1. The various forms of the CJEU's jurisdiction in international agreements

It follows that the Lisbon Treaty brought about changes regarding the CJEU's jurisdiction in the field of international agreements. It is crucial to emphasize that the CJEU's jurisdiction in international agreements is now separate and narrower compared to its overall jurisdiction in other areas of EU law. The CJEU exercises several types of jurisdictions in this context, broadly classified as opinions on compatibility, preliminary rulings, review of legality and grounds of violation, contractual and non-contractual liability (Article 340 TFEU), and enforcement actions. This wide-ranging jurisdiction allows the CJEU to address different aspects of international agreements, depending on whether they are still in the negotiation phase or have already been concluded. Prior to the conclusion of an agreement, the CJEU can be requested to provide an Opinion on its compatibility with the Treaties, as specified in Article 218(11) TFEU. This enables the Court to assess whether the agreement aligns with EU law. Once the agreement is concluded and has entered into force, questions regarding the interpretation of its provisions can be referred to the CJEU for preliminary rulings, as outlined in Article 267 TFEU. International agreements can be invoked to challenge the legality or validity of an institution's act through direct actions for annulment under Article 263 TFEU. Breaches of the provisions of an international agreement can also be raised in claims concerning the EU's non-contractual liability, as described in Articles 268 and 340 TFEU. Furthermore, the Commission or a Member State may rely on an agreement concluded by the EU in an enforcement action against a Member State under Article 258 TFEU.[265]

[265] For further information *see* P. Eeckhout (2011), 268.

The jurisdiction of the CJEU regarding advisory opinions on the compatibility of international agreements with EU law is now governed by Article 218(11) TFEU, which is formulated in more general terms. According to this provision, "a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties".[266] It is apparent that private parties are unable to request an Opinion from the Court, which is understandable given their lack of direct involvement in the negotiation of international agreements. Also, permitting private requests for an Opinion could potentially disrupt the negotiation processes in this regard.[267] Also, the broad wording of Article 218 TFEU has led to differing viewpoints. Some claim that it allows for advisory opinions in the CFSP field, while others argue for a narrow interpretation due to the specific exclusion of the CJEU's jurisdiction from the CFSP in Article 275 TFEU.[268] Given the CJEU's progressive evolution in case law, adapting to changing political and legal dynamics, it appears improbable that the CJEU lacks the authority to provide opinions on international agreements related to the CFSP. A notable example demonstrating this authority is the ECJ's reasoning in the already mentioned *Gestoras Pro Amnistia* case. Thus, a limited interpretation of the CJEU's jurisdiction in this respect would impede the EU's capacity to guarantee the harmonization of CFSP agreements with EU law and foreign policy objectives. Also, the significance of this harmonization is emphasized by the wording of Article 218(11) TFEU, as it stipulates that an agreement cannot come into force if the Court's opinion is negative. This provision implicitly confirms that CJEU opinions hold binding authority over EU institutions, despite the term "opinion" not *prima facie* indicating so on its face value.[269]

Notably, the CJEU's very first Opinion 1/75[270] is relevant for understanding the Court's jurisdiction to rule on the legality of international agreements concluded by the EU and clarifying the scope of the term "agreements" under Article 218(11) TFEU. The Opinion confirmed a broad approach, encompassing any undertaking by entities subject to international law that has binding force, regardless of its legal designation. Once an agreement is concluded under international law,

[266] Consolidated version of the Treaty on Functioning of the European Union, Article 218(11).
[267] P. Eeckhout (2011), 269.
[268] Professor Tridimas advocated for a broader interpretation of the relevant Treaty provisions, whereas Lenaerts *et. al.* argued for the opposite viewpoint. For further reference *see* T. Tridimas (2003), 129; Koen Lenaerts, Piet Van Nuffel, Robert Bray, *Constitutional Law of the European Union*, Thomson-Sweet & Maxwell, London, 2005, 811.
[269] P. Eeckhout (2011), 269.
[270] *Opinion given purusant to Article 228 (1) of the EEC Treaty (Opinion 1/75), Opinion* of the Court of 11 November 1975, ECLI:EU:C:1975:145.

a contracting party cannot invoke its unlawfulness under its domestic law, except under the restrictive conditions of Article 46 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT).[271] Additionally, the Opinions 1/94 and 2/94 have significantly influenced and shaped the Court's authority to provide opinions on international agreements, further validating the undisputable jurisdiction of the CJEU in this field, which is currently based on Article 218(11) TFEU. Opinion 1/94 confirmed the exclusive competence of the EC (now the EU) to conclude (WTO) international agreements related to CCP. Besides, it emphasized the importance of avoiding agreements that create parallel structures with their own institutional systems and judicial bodies, which could potentially undermine the autonomy and primacy of EU law. Similarly, Opinion 2/13 addressed the EU's accession to the ECHR, highlighting concerns about protecting the autonomy of EU law and its institutional and legal structure. While criticisms have been raised regarding the Court's approach[272], these opinions remain significant precedents guiding the Court in assessing the compatibility of international agreements with EU law, protecting fundamental rights, and upholding the autonomy of the EU's legal order and institutional balance.

In addition, the CJEU has the authority to issue preliminary rulings on questions of interpretation, thus allowing agreements concluded under Article 218 TFEU to become subject to such rulings under Article 267 TFEU. It is important to note that the CJEU's jurisdiction to issue preliminary rulings is not limited to the legality of international agreements under EU law. Instead, it extends to any question of interpretation or validity of these agreements, ensuring that their application aligns with the principles and objectives of the EU's legal order. Over the course of its case law on international agreements, the CJEU has consistently affirmed its jurisdiction over the validity of these agreements, and it has even expanded its authority to cover acts adopted under them. Challenges, however, arise concerning the Court's jurisdiction over mixed agreements, where competences overlap between the EU and its Member States. The broad wording of Article

[271] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Article 46.

[272] Various authors have acknowledged the potential impact of the Court's political stance on its legal interpretation, and this aspect will be comprehensively explored and analyzed throughout the dissertation. For further reference *see* C. Eckes (2015), 545; G. Butler, 678; Luigi Lonardo, "The Political Question Doctrine as Applied to Common Foreign and Security Policy", *European Foreign Affairs Review,* No. 4/2017, 571-588; Celia Challet, "The Impact of the Adjudication of Sanctions against Russia before the Court of Justice of the EU", *Principled Pragmatism in Practice: The EU's Policy towards Russia after Crimea,* (eds. Fabienne Bossuyt, Peter van Elsuwege), Leiden, 2021, 129.

218 TFEU grants the Court full jurisdiction, adding complexity to cases involving mixed agreements.[273]

In this regard, further clarification of Article 218 TFEU is necessary to avoid inconsistency in jurisprudence and to prevent the Court from overstepping the institutional powers envisioned by the Treaties. The subsequent chapters covering the CJEU's case law will demonstrate the Court's tendency to adopt a broader approach to the limits of its own jurisdiction, including matters related to international agreements, including mixed agreements. Such an approach, along with the capacity to issue preliminary rulings on international agreements, illustrates the Court's proactive stance in addressing the complexities of EU competences and ensuring coherence in its decision-making processes in matters relating to such agreements, even if it means occasionally diverging from the interests of individual Member States. Furthermore, it will be shown that the CJEU has been hesitant to rule on sensitive political issues concerning the validity of international agreements. This can be attributed to its restricted authority, which is limited to reviewing these agreements solely based on EU law and the provisions of the Lisbon Treaty, even though the broad wording of Article 218 TFEU might suggest otherwise. However, this approach comes into question when examining Opinion 2/13 on EU accession to the ECHR, as it delves into aspects that extend beyond the strict legal obligations outlined in the Lisbon Treaty.

It is essential to acknowledge that the CJEU, in accordance with Article 263 TFEU, possesses the authority to review the legality of acts adopted by EU institutions, which includes the examination of international agreements. As a result, both the conclusion of an agreement and internal acts of EU institutions can be subject to judicial scrutiny, ensuring the alignment of agreements with EU law. It is important to highlight that internal acts of EU institutions may at times conflict with provisions of an international treaty where the EU is a signatory party. In such cases, the question arises as to whether a violation of such an international agreement can be invoked to challenge the legality and/or validity of such EU acts. In this regard, there seems to be a tension between the EU's commitment to its international obligations and its overprotective stance towards its own legal order, as will be exemplified in its relevant case law. Notably, the CJEU's approach has been questioned, particularly in cases involving commitments made under

[273] Christophe Hillion, Ramses A. Wessel, "The Good, the Bad, and the Ugly: three levels of judicial control over the CFSP", *Research Handbook on EU Common Foreign and Security Policy*, (eds. Steven Blockmans, Panos Koutrakos), Cheltenham/Northhampton, 2018, 73.

international agreements like the General Agreement on Tariffs and Trade (hereinafter: GATT) and the WTO, where the Court found that these commitments lack direct effect and cannot be directly invoked before national courts.

In addition, the CJEU holds the authority to review non-contractual liability of the EU within the framework of international agreements, applying general principles of EU law, such as the principle of state liability, also commonly referred to as the *Francovich* principle. This principle, with its origins in the landmark case of *Francovich v. Italy*[274], is of paramount importance among the EU's general principles of law. It establishes that the EU, as a legal entity, can be held accountable before the CJEU for damages resulting from the unlawful actions or breaches of EU law committed by its institutions or bodies.[275] Moreover, Articles 340(2) and 263 TFEU enable the CJEU to review non-contractual liability, mandating the EU to compensate for damages caused by its institutions or bodies in performance of their duties, including actions taken within the context of international agreements. International agreements can be relevant to the application of general principles, and a breach of provisions within such agreements that bind the EU may form the basis for a claim in damages.[276] This mechanism gains significance as the conclusion of an international agreement can potentially be detrimental to individuals. In practical terms, meeting all the necessary requirements to avoid any harm becomes a challenging task.

Nonetheless, the existence of such a possibility before the Court should be greatly appreciated as it allows for a fair examination of potential damages and accountability for actions taken in relation to international agreements. Furthermore, enforcement actions before the CJEU in the context of international agreements primarily fall under Article 258 TFEU which allows the Commission, as the guardian of the Treaties, to initiate infringement proceedings against a Member State for failing to fulfill its obligations arising from an international agreement that the EU has concluded. In these cases, the Court possesses the authority, as per Article 258 TFEU, to determine whether such a breach has occurred. In the context of both non-contractual liability and

[274] *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and C-9/90, Judgment of the Court of 19 November 1991, ECLI:EU:C:1991:428.
[275] The Francovich principle was further expanded as to include the liability of Member States for damages caused to individuals by a breach of EU law by their national courts. On a particular note, *see: Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93, Judgment of the Court of 5 March 1996, ECLI:EU:C:1996:79; *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities*, Case C-352/98 P, Judgment of the Court of 4 July 2000, ECLI:EU:C:2000:361.
[276] P. Eeckhout (2011), 299.

enforcement action, the Court's role is pivotal in ensuring the EU's compliance with its commitments and obligations in its international relations.

As Eeckhout aptly pointed out, the issue arises when interpreting international agreements that bind the EU, as they hold equal status within both EU law and international law.[277] The challenge lies in the presence of provisions in certain international agreements that mirror or overlap with EU law provisions, prompting discussions about the relationship between these two legal systems, as exemplified by the Opinion 2/13. To address this issue, it is essential to empower Member States with greater tools to challenge breaches of the EU's obligations under international agreements. Eeckhout suggests an action for declaration in this regard, although it is not foreseen in the Treaty of Lisbon.[278] However, the practical usefulness of the proposed mechanism may be subject to debate, as actions for annulment already exist as a viable recourse. While the CJEU's stance protects the EU's legal order, it may present challenges in fully respecting the binding nature of international agreements under Article 216(2) TFEU. Thus, it becomes imperative for the CJEU to continuously refine its approach in this domain, taking into account the evolving dynamics of EU external action and international relations.

[277] P. Eeckhout (2011), 321.
[278] *Ibid.*

3. THE BOUNDARIES OF THE COURT OF JUSTICE OF THE EUROPEAN UNION'S JURISDICTION IN THE COMMON FOREIGN AND SECURITY POLICY: EXPANSIONARY JURISDICTION V. LIMITED COMPETENCES

The CJEU's role in providing judicial protection within the Union has always been a matter of interest, particularly when dealing with sensitive domains of Union law where the Court's jurisdictional powers are limited by the Treaties' provisions.[279] Over time, the CJEU's approach to the CFSP domain has been a subject of scrutiny due to existence of legal gaps in its review, sometimes aligned with the Treaties' provisions and sometimes not. The practical challenges arising from the Court's judicial approach to CFSP were not fully addressed by the Lisbon Treaty, as certain provisions, like the open-ended Article 19 TEU which requires that "the law is observed in the application and interpretation of the Treaties", allowed for substantial discretion in reviewing CFSP measures. Consequently, the CJEU tends to exercise judicial oversight in CFSP cases even in areas where the Treaties may not explicitly grant full jurisdiction.

Moreover, the Lisbon Treaty introduced significant changes to the EU's constitutional aspects, impacting CFSP and the restrictive measures regime. However, it maintained the intergovernmental character of CFSP, rendering it relatively isolated from a legal perspective. From the perspective of relevant case law, the CJEU's influence has been instrumental in shaping the future of CFSP and integrating it further into the EU legal order. This development is partly attributed to the legally binding effect of the EU Charter, leading to greater expectations in terms of human rights protection and judicial oversight of Union's law and policies.[280]

As a result, the CJEU's case law in CFSP has undergone substantial evolution, often extending beyond the provisions of the founding Treaties. The Court has frequently expanded its jurisdiction, playing a crucial role in shaping CFSP and broader aspects of EU's external relations in a more constitutional manner. The case law on restrictive measures or sanctions illustrates the Court's delicate role in preserving coherence, consistency, and the EU's commitment to human rights and the rule of law within the CFSP. At the same time, it positions the EU as a significant global political actor. The considerable number of cases arising from limited judicial review under Article 275 TFEU, pertaining to restrictive measures before the CJEU, emphasizes the crucial requirement for comprehensive judicial oversight and strong protection of human rights.

[279] G. Butler, 675.
[280] *Ibid.*

Ultimately, it becomes evident that the CJEU's case law has significantly influenced the CFSP and shaped how its jurisdiction is understood and addressed within the Union. While not explicitly stated, there are strong indications that the CJEU's jurisdiction is not only of a general character, as stipulated by Article 19 TEU, but also a gradually emerging general principle of EU law, particularly evident in the post-Lisbon era.[281]

3.1. The question of CJEU's jurisdiction: adhering to procedural norms in CFSP cases or not?

Over time, numerous cases have explored the complexities of CJEU's jurisdiction in CFSP, specifically concerning the interplay between Article 19 TEU, which confers the CJEU with a broad jurisdiction, and Article 275 TFEU, which restricts the Court's jurisdiction in CFSP to exceptional circumstances. These cases have emphasized that the exceptions to the Court's jurisdiction under Articles 275 TFEU and 24 TEU should be narrowly interpreted. In general, the Court's role in CFSP is more confined to ensuring that procedural norms are followed, rather than substantive review of CFSP actions. However, the growing involvement of the CJEU in this area has started to challenge this narrow procedural mandate, particularly as it grapples with the complexities of the rule of law, which often blur the lines between what is a non-justiciable political decision and what is subject to legal scrutiny. Indeed, the primary function of the Court is to safeguard the EU and its institutions by ensuring they operate within their constitutionally prescribed powers, maintain institutional balance, and compel Member States to comply with their obligations. Paramount to these duties is the Court's role in upholding the rule of law and safeguarding fundamental rights. However, questions arise as to whether this mandate is spilling over its traditionally defined procedural boundaries within the CFSP. What is becoming clear is that the Court's jurisdiction is gradually stretching past its original constraints, evolving from an exceptional role to one that more closely aligns with a general rule. This expansion adds complexity to the already delicate balance between the EU's overarching objectives and constitutional principles, and the Court's historically procedural focus within the CFSP.

The Court often cites its procedural role, particularly in sensitive cases that straddle the line between procedural and substantive CFSP issues. This tendency is exemplified in the *Elitaliana* case, where the Court confirmed its jurisdiction over general administrative regulations in the framework of a CFSP mission. In doing so, it clarified that special provisions related to CFSP do

[281] *Ibid*, 676.

not restrict its authority to oversee administrative matters that also pertain to CFSP. To be more precise, the Court articulated:

"The scope of the limitation, by way of derogation, on the Court's jurisdiction […] cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement".[282]

The *Elitaliana SpA v. EULEX Kosovo* case involved *Elitaliana* challenging the awarding of a public procurement contract for helicopter maintenance services intended to support the EULEX mission in Kosovo. The applicant brought the matter before the General Court, asserting that the procurement process was flawed. EULEX Kosovo countered that the case was inadmissible, claiming that the Court had no jurisdiction over matters related to the CFSP and that EULEX itself could not be considered a legitimate defendant. While the General Court initially dismissed the case, the decision on the lack of Court's jurisdiction was later overturned on appeal. Endorsing the Advocate General's reasoning, the CJEU affirmed its jurisdiction, especially when such CFSP issues have budgetary (or procedural) implications for the EU. Hence, the Court stated the following:

"Having regard to the specific circumstances of the present case, the scope of the limitation, by way of derogation on the Court's jurisdiction, which is provided for in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU, cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement".[283]

The Court's ruling aligns with EU foreign policy objectives and emphasizes the procedural nature of public procurement, which typically falls outside sensitive CFSP matters. It further clarified that, while the Court does not generally have jurisdiction over CFSP provisions or acts based on them, any restrictions on its competence should be narrowly construed. The judgment also fits into a larger objective of maintaining a comprehensive system of legal remedies and procedures within the EU. Moreover, it led to discussions about whether a specialized chamber within the CJEU should be established to handle such procedural matters, or whether alternative dispute resolution mechanisms might be more appropriate.[284] Importantly, the *Elitaliana* ruling's

[282] *Elitaliana SpA v EULEX Kosovo,* Case C-439/13 P, paras. 48-49.
[283] *Elitaliana SpA v EULEX Kosovo,* Case C-439/13 P, para. 49.
[284] "CJEU confirms its jurisdiction to review procurement decisions linked to EU's external action (C-439/13 P)", available at: *https://www.howtocrackanut.com/blog/2015/11/cjeu-confirms-its-jurisdiction-to.html,* 02.08.2023.

implications are less contentious when the EU's budget is not tied to missions with military or defense aspects, as was the case with EULEX's rule of law mission in Kosovo. For politically sensitive missions involving defense or military elements, extending the Court's procedural jurisdiction in this sense could be fraught with issues. While the Court's findings might not be inherently problematic, they could introduce future ambiguities in distinguishing between procedural and substantive facets of CFSP actions.

Similarly, the subsequent case, known as *H. v. Council*, represents a significant juncture in the discussion surrounding the CJEU's procedural jurisdiction over EU missions under the frameworks of CFSP and CSDP. The appeal judgment by the ECJ's Grand Chamber centered on assessing the validity of a staffing decision made within the EU Police Mission in Bosnia and Herzegovina. Faced with limitations outlined in Articles 275 TFEU and 24 TEU, the Court made an affirmative ruling, leveraging Article 270 TFEU as an alternative route for establishing jurisdiction.[285] This provision empowers the CJEU to address disputes between the Union and its servants, offering a reconciliation between the restrictive articles and the EU's rule of law objectives. The Court's interpretation rested on the broader understanding of effective judicial protection, as set forth in Article 19(1) TEU. It thereby underscored the need for a limited interpretation of any clauses that would narrow its jurisdiction. This stands as a landmark case because it solidified the Court's procedural authority to adjudicate annulment actions against decisions made by the heads of EU missions under the CFSP framework. Advocate General Wahl's opinion reinforced this by delineating the Court's role as largely procedural within the CFSP domain, going on to indicate that "most of the acts envisaged in Chapter 2, Title V of the TEU could be regarded as administrative".[286]

While the immediate consequences of the judgment were procedural, they cast a longer shadow on potential impacts to Member States' substantive policies. This is particularly evident in questions raised concerning the Court's jurisdiction over staffing issues with a CFSP legal basis. Should such issues be considered as routine prerogatives of the Union, they could potentially escape the jurisdictional limitations specific to CFSP. This becomes even more intricate when

[285] Christophe Hillion, "A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy", *The European Court of Justice and External Relations Law: Constitutional Challenges*, (eds. Marise Cremona, Anne Thies), London, 2014, 51.
[286] Advocate General's Opinion - 7 April 2016, *H v Council and Commission*, Case C-455/14 P, ECLI:EU:C:2016:212.

examining dual legal bases situations, such as missions implemented under both CFSP and non-CFSP tasks. Addding further complexity is the subsequent *Jenkinson* case, where the General Court declared limited competence of attribution, contradicting the precedent set by *H. v. Council*. In *Jenkinson*, the Court stated that the Court of First Instance is not competent to adjudicate disputes arising from the execution of the applicant's employment contracts prior to the last fixed-term contract, which expressly assigns competence to the Belgian courts.[287]

As the Court's decision in *H. v. Council* serves to expand and clarify the Court's jurisdiction it simultaneously raises a number of complex questions. These complexities generate a certain level of ambiguity, leading to consequences that not only have jurisdictional ramifications but also affect the broader legal landscape, especially concerning the vertical division of competences. This particular case illustrates the Court's hesitant but evolving position on its role within the complex and overlapping structure of CFSP and CSDP, amplifying uncertainties especially concerning the application of dual legal bases and the delineation between substantive and procedural aspects within CFSP. The recent case of *SatCen v. KF*[288] contributes to the discourse on staff-related disputes. In parallel with the questions raised in the *H. v. Council* case concerning the extent of the CJEU's jurisdiction over staff management actions, the *SatCen* case bears notable relevance. In this instance, the appellant was the SatCen agency, an EU establishment resulting from the Council's decision on space cooperation within the Western EU. The controversy emerged when SatCen members lodged complaints against the Head of Administration Division due to alleged mistreatment in their workplace. The respondent pursued action for both annulment and compensation before the General Court of the CJEU, invoking Articles 263 and 268 TFEU, which pertain to staff-related conflicts and non-contractual liability. The Court extended its reasoning to argue that its authority to review administrative decisions is not limited to staff management activities in the context of civilian CSDP missions. Rather, the Court indicated that its competences also extend broadly to similar administrative acts under the framework of CFSP. In this way, the *SatCen* case serves as an additional milestone in defining the CJEU's jurisdiction, expanding it beyond what may have been initially understood from prior cases. Interestingly, the Court diverged from the Advocate General's recommendation, which had proposed that the Court should decline

[287] *Liam Jenkinson v Council of the European Union and Others*, Case T-602/15 RENV, Judgment of the General Court (Second Chamber, Extended Composition) of 10 November 2021, ECLI:EU:T:2021:764.
[288] *European Union Satellite Centre v KF*, C-14/19 P, Judgment of the Court (Second Chamber) of 25 June 2020, ECLI:EU:C:2020:492.

jurisdiction, leaving it to the national courts of EU Member States to provide the judicial protection mandated by Article 19(1) TEU. Instead, the Court adopted a more expansive viewpoint, underlining the importance of the rule of law in addressing shortcomings within the EU's current system of judicial protection.

Furthermore, the landmark ruling in the *Mauritius* case before the CJEU serves as another pivotal moment that explores the intricate details of the Court's jurisdiction within CFSP. The decision effectively extended the Court's jurisdictional reach, particularly concerning procedural requirements for conclusion of international agreements under the CFSP framework. The case centered around the Council's decision on the signing and conclusion of an international agreement with the Republic of Mauritius, regulating the transfer and treatment of suspected pirates and their seized property as part of the EU's anti-piracy operation "Atalanta". The European Parliament contested the Council's decision, claiming that it had not been adequately involved in the process. The Court's response revolved around interpreting the new legislative rules on EU external action introduced by the Lisbon Treaty, particularly concerning the conclusion of international agreements under Article 218 TFEU. The Court affirmed its jurisdiction in CFSP matters and emphasized the importance of ensuring equal powers for both the Council and the Parliament in their respective fields. Furthermore, the Court clarified that if a measure's sole legal basis is CFSP, with other aspects being incidental, it can be exclusively related to CFSP under Article 218(6) TFEU, thus eliminating the need for parliamentary consultation. Conversely, if a measure pursues multiple objectives or includes several components, it will be founded on various corresponding legal bases.[289]

The Court ruled in favor of the Parliament, resulting in the annulment of the Council's decision due to its failure to meet the information requirement necessary for democratic scrutiny of the EU's external action. Also, it identified CFSP as the correct legal basis pursuant to Article 40 TEU. In asserting its jurisdiction, the Court relied on Article 19 TEU, extending its powers over Article 218 TFEU, as the latter is designed to be universally applicable to all international agreements concluded by the EU across its various fields of activity, including CFSP. Also, Article 19 TEU was understood to grant the Court general jurisdiction to ensure the observance of the law in the interpretation and application of the Treaties. Hence, the Court's perception of jurisdictional

[289] *European Parliament v Council of the European Union,* Case C-658/11, para. 43.

constraints laid out in Articles 275 TFEU and 24 TEU was restrictive, emphasizing its role in overseeing the EU's external actions and ensuring democratic scrutiny.

The case's outcome not only had significant benefits in terms of upholding fundamental rights of arrested piracy suspects (such as due process rights and humane treatment), but also affirmed the Parliament's role in exercising democratic scrutiny even if limited to the provision of information without decision-making powers, given the special nature of CFSP. It follows that the Court's jurisdiction over procedural rules on conclusion of international agreements remains unaffected by the exemption applicable to the substantive CFSP legal basis. By monitoring a full compliance with Article 219 TFEU, the Court was allowed not only to adjudicate on the appropriate choice of legal basis but also to safeguard the balance of powers among the EU institutions.[290] The CJEU's increasing involvement in scrutinizing EU external actions, even in the limited sphere of CFSP, underscores its dedication to democratic oversight and legal accountability.

In addition, the *Tanzania* case[291], occurring two years after the *Mauritius* case, shared a similar legal and circumstantial background. It also involved an inter-institutional dispute between the Parliament and the Council over a pirate-transfer agreement concluded by the EU. This international agreement specified the conditions for transferring suspected pirates and associated seized property from the EU-led naval force to Tanzania and their treatment thereafter. As a part of the operation "Atalanta", it aligned with its objectives. Following the established case law, the Court reaffirmed that the choice of legal basis for an EU act, including international agreements, must be based on objective factors subject to judicial review, considering the measure's aim and content. Echoing the reasoning in the *Mauritius* case, the Court confirmed that the agreement primarily fell within the realm of CFSP and should be based on Article 37 TEU, excluding the possibility of dual legal basis involving PJCCM.[292] It was also emphasized that although the Parliament is excluded from the negotiation and conclusion procedures of international agreements relating to CFSP, it retains some rights to scrutiny. This underscores Parliament's crucial role in legislative processes within the EU, even if it is limited to the information requirement, which remains an essential aspect of democratic control.

[290] M. Cremona (2017), 683.
[291] *European Parliament v Council of the European Union*, Case C-263/14, Judgment of the Court (Grand Chamber) of 14 June 2016, ECLI:EU:C:2016:435.
[292] *Ibid*, para. 55.

Moreover, the Court stressed the importance of coherence among EU institutions in pursuing Union's foreign policy objectives and the need for proper prosecution of suspected pirates in line with obligations stemming from relevant UNSC resolutions. Contrastingly, the Court refrained from delving deeply into jurisdictional issues in the *Tanzania* case, primarily because these questions have already been settled in the Mauritius case, where the Court expanded its scope in relation to procedural aspects of concluding international agreements. Nonetheless, when considered alongside other cases, *Tanzania* contributed to the CFSP case law on the Court's jurisdiction and reaffirmed implications of the Court's broad approach to its own powers. Therefore, the Council's subsequent acknowledgment of the Court's full jurisdiction under Article 218 TFEU for diverse types of international agreements, encompassing both CFSP and non-CFSP agreements, represented a noteworthy development in the Court's jurisdiction within the realm of CFSP after the *Mauritius* judgment.[293] Both cases certainly had a notable impact on further embedding the CFSP into the legal framework of the EU, even though the former is subject to special rules and procedures.

Based on the foregoing discussion, it is evident that the CJEU has increasingly asserted its jurisdiction, particularly in procedural matters, while conscientiously avoiding interference in substantive or political domains, at least from the surface. This self-imposed demarcation aligns with foundational constitutional principles, yet it has sparked debate among scholars and policymakers. While some academics fault the CJEU for its ambiguous stance on jurisdiction, arguing that it blurs the lines between procedural and substantive policies[294], others take issue with its narrow focus on procedural matters. The latter critique is especially relevant in the context of CFSP actions, like EU sanctions against Iran and Syria, where the Court's procedural emphasis has been seen as insufficiently impactful in changing the conditions for those affected.[295] Although such criticism is often aimed at the Court, it would be more fitting to direct it at the Council, considering the limitations imposed on the Court's jurisdiction. It follows that the interpretation of the Court's jurisdictional scope becomes a matter of how one reads the Treaties - either teleologically to unveil their broader intent or literally based on the specific wording. The Court's

[293] G. Butler, 677.
[294] Carolyn Moser, Berthold Rittberger, "The CJEU and EU (de-constitutionalization): Unpacking jurisprudential responses", *International Journal of Constitutional Law,* No. 3/2022, 1038-1070.
[295] Elena Chachko, "Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence", *The Yale Journal of International Law,* 1/2019, 37.

jurisprudence suggests a preference for a teleological interpretation that supports a constitutional approach to the CFSP. Yet, this reliance on teleological reasoning could be problematic, as it may risk exceeding the Court's explicitly defined limitations and create further ambiguities in legal interpretation.

Therefore, it becomes imperative for the CJEU to exercise caution and clarify its jurisdictional parameters. Specifically, the Court needs to clearly outline the scope of its authority, especially when dual legal bases are in play, and make precise distinctions between substantive and procedural issues to prevent any jurisdictional overreach. In other words, a feasible way forward may also involve clearly distinguishing between high-level political actions *(actes du gouvernement)* and more routine administrative or procedural matters under CFSP.[296] While scholars like Koutrakos argue that the line between high politics and administrative actions is not inherently clear, their arguments merit consideration, especially in light of Article 19 TEU exceptions to the Court's general jurisdiction.[297] There seems to be a pressing need to maintain a foundational differentiation between political and non-political issues within the CFSP. This is particularly important given the inherent differences between the operational character of the CSDP and the "legal facts" arising from the substantive and procedural aspects of CFSP.[298] The ambiguity is further complicated by the Court's unexpectedly expansive approach, introducing unpredictability and concerns about potential overreach, which Koutrakos also notes.[299]

In the *SatCen* case, Advocate General Bobek concurred with Koutrakos's stance, asserting that the Court's extended jurisdiction should not include awards for damages beyond non-material harm.[300] Accordingly, the Court's authority cannot be disproportionally amplified, not even in administrative affairs bereft of political sensitivity.[301] This is because an overly broad interpretation of the Court's jurisdiction is at odds with the exclusionary provisions governing the CFSP. Given the dynamic nature of today's political and legal environment, clear guidelines for the Court's jurisdiction become increasingly essential. Determining whether an issue is politically sensitive or has substantive legal ramifications serves as a foundational criterion for effective

[296] T. Verellen, 1051.
[297] P. Koutrakos (2018), 13.
[298] Wessel argues that regardless of their "soft" or "hard" nature, CFSP norms can be seen as legal facts that impose obligations upon Member States. *See* R. A. Wessel (2015), 126.
[299] P. Koutrakos (2018), 13.
[300] Opinion of Advocate General Bobek delivered on 19 March 2020, *European Union Satellite Center v KF*, Case C-14/19 P, para. 39.
[301] P. Koutrakos (2018), 13.

adjudication within the CFSP. This is especially vital given that the CFSP encompasses issues with potential legal consequences, while the CSDP creates standards that frequently carry political sensitivity and are therefore outside the scope of the Court's jurisdiction. Therefore, striking a balance between adaptability and strict adherence to original jurisdictional limitations is crucial to prevent undue authority expansion, a tension also underscored by Koutrakos.

3.1.2. Harmonizing judicial constraints and general jurisdiction: A Rosneft case study

The interplay between judicial restrictions and the broader jurisdictional mandate of the CJEU is primarily manifested in the tension between the TFEU and TEU. A notable pattern emerging in the case law surrounding the CFSP is the Court's use of its general jurisdiction under Article 19(1) TEU as a basis for expansive interpretation of limitative Treaty provisions, such as Article 275 TFEU, all with the aim of advancing EU goals and reinforcing constitutional tenets. In this complex legal landscape, the Rosneft[302] case stands as a pivotal turning point, marking the first occasion when the CJEU integrated the preliminary ruling procedure into the realm of CFSP. This landmark decision not only serves to emphasize the evolving trends in the Court's approach to its jurisdiction, but also magnifies the nuanced and often contentious debates about procedural dimensions within the CFSP framework. The incorporation of the preliminary ruling procedure in the Rosneft case adds another layer of complexity, further highlighting the tension between Article 19(1) TEU and Article 275 TFEU.

It is worth recalling here that Article 19(1) TEU establishes the CJEU's general jurisdiction over matters of EU law, while Article 275 TFEU introduces exceptions to this rule via so called claw-back and carve-out provisions, thus providing derogations for specific circumstances, particularly those arising within the CFSP context. Moreover, the Rosneft case revolved around the Council's imposition of restrictive measures on the Russian oil sector, partly in response to Russia's destabilization of the Ukrainian situation in 2014. These measures encompassed export prohibitions to the specified sector and limitations on access to the EU's capital market. The intention was to hold Russia accountable for its actions at the Ukrainian territory and facilitate peaceful resolution to the crisis. Subsequent to the Council's adoption of these measures, a handful of Russian entities affiliated with the Rosneft oil and gas group, initiated legal action for annulment before the CJEU's General Court. Following the dismissal of the action in 2017, the Court of

[302] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, Judgment of the Court (Grand Chamber) of 28 March 2017, ECLI:EU:C:2017:236.

Justice upheld the validity of the restrictive measures against Rosneft through the preliminary ruling procedure, thereby underlining constitutional significance of the case at hand, as emphasized by Elsuwege.[303]

The Rosneft case's outcome has significant implications. It allows all national courts to question the validity of EU secondary law, specifically CFSP targeted sanctions under Article 267 TFEU, which was not the case before. Additionally, it expands the reach of the EU's judicial protection framework concerning restrictive measures targeting both natural and legal persons, while also extending the Court's authority in CFSP to encompass the preliminary ruling procedure. Operating within the TFEU's legal framework, the Court invoked principles established in the *Kadi* ruling, unequivocally affirming its jurisdiction to assess the legality of all measures based on this specific legal foundation.[304] Regarding the implications for Member States' competences, the Court clarified that the rules and procedures specific to the CFSP do not prevent Member States from fulfilling their obligations under the CFSP. Thus, incorporation of the preliminary ruling procedure was perceived as a critical step in harmonizing the Treaties' interpretation and application with the Union's foundational constitutional principles, thereby strengthening safeguards across all facets of EU law. On a particular note, the Court stated the following:

"[…] With respect, in the first place, to the jurisdiction of the Court to monitor compliance with Article 40 TEU, it must be observed that the Treaties do not make provision for any particular means by which such judicial monitoring is to be carried out. That being the case, that monitoring falls within the scope of the general jurisdiction that Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed. In establishing this general jurisdiction, Article 19(3)(b) TEU states, further, that the Court is to give preliminary rulings, at the request of national courts or tribunals, on, inter alia, the validity of acts adopted by the institutions of the European Union."[305]

This passage shows that the Court achieved a milestone in the *Rosneft* case by expanding its jurisdiction to include preliminary rulings on the validity of CFSP actions and targeted sanctions. Concurrently, it determined that its oversight is not strictly limited to annulment actions, contrary

[303] Peter Van Elsuwege, "Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case", available at: *https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/*, 30.08.2023.
[304] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, para. 106.
[305] *Ibid*, para. 62.

to what might be inferred from Article 24(1) TEU and 275 TFEU. These claw-back provisions, as they stand, merely establish the CJEU's jurisdiction to oversee compliance with Article 40 TEU without specifying the precise procedural means. This situation gives rise to two distinguishable perspectives. On one hand, the CJEU's authority to review CFSP matters (compliance with Article 40 TEU) through the preliminary ruling procedure is unquestionable, stemming from the silence of relevant provisions. Therefore, the general jurisdictional rule of Article 19 TEU is applicable in its entirety.

On the other hand, however, a challenge arises when the preliminary ruling procedure is introduced into the realm of targeted sanctions, as seen in the *Rosneft* case. This is because a strict interpretation of Treaty provisions could indicate that a direct action for annulment is the exclusive avenue for scrutinizing the legality of individual sanctions under CFSP. To support the latter perspective, it is essential to recall that Article 24 TEU only empowers the Court to review the legality of decisions in accordance with Article 275(2) TFEU (claw-back provision), which pertains to compliance with Article 40 TEU and proceedings under Article 263 TFEU. Taken at face value, these aforementioned articles appear to leave no room for the preliminary ruling procedure, indicating that a direct action for annulment is the exclusive recourse. Nevertheless, the Court continued to employ a teleological method of interpretation, broadly construing the claw-back provisions. Hence, it did not view these provisions as dictating specific procedural methods but instead as delineating the categories of decisions eligible for legality review.

Even before *Rosneft*, legal theory tended to assume that silence of Article 263 TFEU regarding the preliminary ruling procedure did not preclude the Court from affording possibilities in this area based on established case law. For instance, the *Foto-Frost* case asserted that national courts lack the authority to invalidate Community acts, suggesting that the preliminary ruling procedure is a legitimate procedural option to ensure uniform interpretation and application of EU law among Member States.[306] These assumptions were subsequently validated by the *Rosneft* judgment, setting a precedent and allowing the preliminary ruling procedure to apply to targeted sanctions. Additionally, the Court aligned itself with the opinion of Advocate General Wathelet, who also adopted a teleological approach in his arguments, potentially going beyond the original intent of the Treaties' drafters. He also emphasized persistent prevalence of general jurisdiction

[306] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2014, 458.

rule under Article 19 TEU and the claw-back provisions of Article 275(1) TFEU, even when faced with carve-out provisions of Article 24(1) TEU and 275(2) TFEU that exclude the Court's jurisdiction from the CFSP domain.[307] While the Court's adaptable stance toward Treaty provisions may draw criticism for seeming to disregard the Treaty's language, it is important to note that from a procedural perspective, the introduction of preliminary rulings does not diminish the direct actions available to individuals in their legal proceedings against certain acts of EU institutions.[308]

In retrospect, the Court might have been better served by emphasizing the unity and primacy of EU law as foundational argument, rather than invoking the rule of law principle, to mitigate criticism and clarify its position. Both principles are rooted in primary law, but the concept of EU's unity and primacy has its origins in the CJEU's own jurisprudence, as evidenced by landmark cases like *Costa v. E.N.E.L*. and *Van Gend en Loos.* On the other hand, the rule of law is explicitly outlined in the EU Treaties, which constitute primary law. Applying such explicit constitutional principles to secondary legislation like Council's CFSP decisions and regulations can attract more scrutiny and criticism, particularly from those who adhere to a strict intergovernmentalist viewpoint. Leveraging jurisprudential doctrines could help the Court sidestep immediate concerns about the constitutionalization of CFSP, thus alleviating questions about its jurisdictional legitimacy. While the language employed could be refined, the core message is clear: the *Rosneft* decision both unifies the CFSP framework and encroaches on the purview of Member States. This poses a challenge, as national courts have an important role in overseeing CFSP measures. Some legal scholars even argue that national courts are better positioned to challenge national enforcement measures linked to CFSP actions, since these actions are attributed to Member States, not the EU itself.[309]

Moreover, the Court's consistent and explicit invocation of constitutional principles is far from accidental; it underscores the Court's inclination towards constitutionalizing aspects of the CFSP. Given that preliminary rulings have historically acted as pivotal moments for the

[307] 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, ECLI:EU:C:2016:381.
[308] Stian Øby Johansen, "Judicial control of EU foreign policy: the ECJ judgment in Rosneft", available at: *http://eulawanalysis.blogspot.com/2017/03/judicial-control-of-eu-foreign-policy.html*, 01.09.2023.
[309] José M. Cortés-Martin, "The Long Walk to Strasbourg: About the Insufficient Judicial Protection in Some Areas of the Common Foreign and Security Policy before the European Union's Accession to the ECHR", *The Law and Practice of International Courts and Tribunals,* No. 17/2018, 393-414.

constitutionalization and legal integration of the EU, the capability of the Court to issue such judgments on specific CFSP matters enhances its potential for further constitutionalizing its role.[310] This jurisprudential trend, traceable back to *ERTA* and *Les Verts* cases, suggests that the CFSP domain should not be treated in isolation but rather as an integral part of the EU's constitutional order.[311] The *ERTA* case affirmed that the scope of the Court's judicial review hinges more on the purpose rather than formal characteristics, a principle also evident in the *Rosneft* case. Similarly, *Les Verts* famously linked the Court's power to the foundational rule of law principle within the European Community, also underscoring its tendency to broadly construe its jurisdiction, and conversely, restrictively interpret any limitations in this context. This perspective also reinforces the idea that restrictions on the CJEU's jurisdiction ought to be narrowly construed.

Despite its expansionist underpinnings, the *Rosneft* case arguably has more positives than negatives. Relying solely on national courts for issues in this sphere could lead to inconsistent interpretations of the same legal issues - a precarious situation that underscores the need for a unified approach. From a procedural standpoint, the judgment is largely defensible, even as it raises questions regarding the continued application of Article 19(1) TEU in realms traditionally under Member States' control. Given this, any furtherance of this judicial trend could upset the existing balance between the EU and its Member States. Against the broader context of an evolving CFSP landscape, *Rosneft* emerges as comparatively less controversial. Its legitimacy chiefly rests on the EU's pressing need for legal uniformity in an increasingly complex CFSP environment. However, caution is needed, the Court's expansive interpretation of Article 275 TFEU's carve-out provisions has the potential to invite scrutiny. Specifically, the Court's willingness to address Treaty ambiguities by broadly invoking Article 19(1) TEU, as demonstrated in the *Rosneft* judgment, can be problematic. This approach could risk unintended alterations in the EU's institutional power dynamics and bring about uncertainties in the legal landscape.

3.2. The role of EU constitutional values and principles in expanding the CJEU's jurisdiction: a focus on the rule of law

The dismantling of the EU's pillar system has been a pivotal moment, paving the way for EU values and constitutional principles like the rule of law to be broadly applicable across all

[310] C. Moser, B. Rittberger, 1056-1057.
[311] Mirka Kuisma, "Jurisdiction, Rule of Law, and Unity of EU Law in Rosneft", *Yearbook of European Law,* No. 37/2018, 10.

policy sectors, including the CFSP. Despite the traditionally limited jurisdiction of the CJEU over the CFSP, key constitutional principles, including the rule of law, have become increasingly influential in shaping this area. Apart from the CFSP, the rule of law is a foundational element of the AFSJ. This is bolstered by the principle of mutual trust among Member States, a concept advanced by the CJEU and considered by many as a crucial aspect of the EU legal order, with some even categorizing it as a structural principle of EU constitutional law.[312] Mutual trust is fundamentally based on the assumption, as articulated in Article 2 TEU that every Member State shares a set of common values upon which the Union is built. This period of transformation is part of a larger evolutionary trajectory for the rule of law within the EU. Initially serving as a foundational element primarily within the realm of national constitutional traditions, the rule of law has transformed into a pivotal component of EU constitutional law, largely thanks to milestone rulings such as the seminal *Les Verts* case. These judicial milestones were crucial in influencing subsequent treaties like Maastricht, Amsterdam, and Lisbon, and in establishing the rule of law as the fundamental foundation of the European Community.[313]

The end of Cold War saw the term increasingly cited by international organizations and Western societies, marking its emergence as a universally accepted democratic norm. The CJEU also joined this growing consensus by integrating the rule of law into its judicial interpretations. Interestingly, despite its widespread adoption, the rule of law encountered little initial criticism, largely because it lacked explicit definition in CJEU rulings, Community treaties, or even national constitutions. Despite initial reservations from some Member States about the implications for national sovereignty, the Amsterdam Treaty formally recognized the rule of law as a fundamental principle under ex-Article 6(1), placing it alongside the core values such as such as liberty, democracy and respect for human rights.[314] This milestone was further reinforced by the introduction of a sanctioning mechanism in ex-Article 7, providing a means to enforce compliance with these principles. Although there were concerns about the potential for political misuse or inconsistent application of these sanctioning mechanisms, the principle of the rule of law was

[312] Sacha Prechal, "Mutual Trust Before the Court of Justice of the European Union", European Papers, No. 2/2017, 75.
[313] *Parti écologiste "Les Verts" v European Parliament*, Case 294-83, para. 23.
[314] Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 1997, Article 6(1).

ultimately successfully incorporated into the Treaty.[315] This evolution, initially set in motion by the extensive enlargement of the EU at the time, played a crucial role in redefining EU foundational treaties. Thus, it transformed them from mere international agreements into constitutional documents deeply anchored in the rule of law.[316]

Following these developments, the rule of law has transcended from being just a guiding principle to becoming a prevailing organizational paradigm in contemporary European constitutional law, as aptly noted by Kokott.[317] The enactment of the Lisbon Treaty has expanded the rule of law into a multifaceted entity within EU law, embodying a value, an objective, and a principle, thereby introducing a level of conceptual ambiguity into the primary legal framework. While Article 2 TEU designates it as a foundational value, and Article 21(1) TEU positions it as an aim within the realm of EU foreign policy, Article 7 TEU establishes a structured mechanism for sanctioning violations of the rule of law. The presence of these enforcement measures underscores that the rule of law is not simply an aspirational goal, but a legal mandate that all Member States are required to comply with. Moreover, from a legal standpoint, the terms "value" and "objective" fall within the realm of soft law, signaling a departure from the Lisbon Treaty's predecessors that labeled it as a "principle", which certainly has stronger legal implications. While it may seem that the language around the "rule of law" has become less robust, this shift was mitigated by the formalization of the EU Charter. The Charter not only enhances the rule of law's significance but also keeps its categorization a "principle" in its preamble, in line with how it was originally portrayed in the Amsterdam Treaty. The diverse terminology surrounding the rule of law - alternatively described as a "value," "objective," or "principle" - grants the CJEU significant interpretative flexibility.

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[315] Opposition to substantial changes brought by the Amsterdam Treaty came from various quarters within the EU. The usually cohesive Franco-German partnership was fractured, particularly on institutional matters. The UK, before its 1997 general elections, rejected major institutional changes primarily for domestic political reasons, leaving the other 15 Member States to carry out most of the negotiation. Denmark had its own set of concerns, specifically objecting to reforms that involved transferring powers to the Community framework. For further information *see* Michel Petite, "The Treaty of Amsterdam", available at: *https://jeanmonnetprogram.org/archive/papers/98/98-2--INTRODUC.html,* 20.10.2023.

[316] L. Pech (2010), 360.

[317] Juliane Kokott, "From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization", *Constitutionalism, Universalism and Democracy: A Comparative Analaysis,* (ed. Christian Starck), Baden, 1999, 71-134. For further reference to key legal principles of the EU's constitutional legal order *see* Henry G. Schermers, Denis F. Waelbroeck, *Judicial Protection in the European Union,* Kluwer Law International, The Hague, 2000, 28.

Fernandez Esteban has noted and critiqued this approach for its contribution to ambiguity and the complexities it introduces in applying the rule of law.[318] She astutely differentiates between "values," which can be interpreted more fluidly, and "principles," which are anchored in a more definitive legal framework conducive to judicial scrutiny and policy formulation by the Court. Jovanović also echoes this sentiment, highlighting the lack of precision in defining the core attributes of the EU's values, principles, and goals.[319] Accordingly, such indistinctness may pose challenges within the EU, as these concepts are prone to diverse interpretations influenced by ideological and political perspectives, deviating notably from a purely legalistic approach. This nuanced choice of language by the architects of the Lisbon Treaty may represent a deliberate strategy to provide the Court with broader interpretative scope, with the intention of fostering unity among Member States within a comprehensive EU legal system.

The lack of a formalized definition of the rule of law within the Treaties and national constitutions might initially appear advantageous, offering flexibility for the concept's evolution. This ambiguity enables the CJEU to tailor its judgments to the ever-changing legal and political environments, in harmony with the varied values and aims delineated in Articles 2 and 21 TEU. However, this indeterminacy not only risks complicating the delineation of powers between EU and national judicial systems but also opens the door to interpretations driven by political agendas.

When viewed from a wider perspective, the ambiguity associated with the rule of law is not solely a characteristic of the EU; it also has historical precedents in the legal traditions of individual nations. For instance, the UK, a former EU member, also left the interpretation of the rule of law to judicial discretion. As a result, critiquing the CJEU expansive use of the rule of law and the absence of a clear definition, becomes complex. This is further complicated by recent rule of law "backsliding" in Member States such as Poland and Hungary, making the Court's approach appear not just defensible but perhaps even necessary in turbulent times. Yet, a clear limit must be maintained, indicating that, in the end, judicial institutions are not the ones authorized to make primary decisions. At this point, it is crucial to remind that the Court's jurisdiction, particularly in matters related to CFSP, is not without bonds, as per limitations outlined in Article 275 TFEU and

[318] Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, Kluwer Law International, The Hague, 1999, 40-41.
[319] Miloš Jovanović, „Pojam „evropskih vrednosti": između snažne proklamacije i suštinske neodređenosti", (The Concept of "European values": Between Strong Proclamation and Essential Ambiguity), *European Legislation*, No. 76/2021, 20-21.

24 TEU. Cases such as *H. v. Council* and *Rosneft* illustrate the Court's willingness to interpret the rule of law extensively, even navigating through these jurisdictional limitations to extend its review scope in CFSP.[320] Any foray beyond procedural considerations in CFSP areas is poised to attract intense scrutiny unlike in other less restrictive areas. Adding to the complexity is the practical challenge of delineating between procedural and substantive elements in CFSP actions.

Moreover, the CJEU's evolving jurisprudence has placed growing emphasis on the rule of law within the realm of CFSP, thus further contributing to its constitutional importance. This elevates the rule of law from a political aspiration to a complex, operating principle with ramifications in both legislative and judicial dimensions. This comprehensive approach to the rule of law is aligned with the scholarly work of Pech, who posits that the CJEU's interpretation surpasses mere procedural considerations.[321] Consequently, the rule of law has not only become a crucial criterion for states aspiring to join the Union according to Article 49 TEU, but also a principle that the Court increasingly invokes, thanks to the enhanced legal status it has gained as a foundational principle upon which the EU is built. This jurisprudential trend increasingly underscores the CJEU's function akin to that of a federal constitutional court, entrusted with the responsibility of safeguarding the rule of law and overseeing the actions of both EU institutions and Member States.[322] Such developments point to an expanded judicial remit, propelled in part by the rule of law's enhanced significance in Union constitutional law. Far from being a symbolic rhetorical device, the rule of law has matured into a multi-faceted principle with both formal and substantive elements.[323] It serves as a shared societal good, encompassing and reinforcing other fundamental principles like legality, legal certainty, and effective judicial protection.[324] Additionally, it resonates with core values such as dignity, freedom, equality and justice, all explicitly outlined in the EU's primary law. This intricate blend of EU principles and values that

[320] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, paras. 72-73.; *H v Council of the European Union and Others*, C-455/14 P, para. 41.
[321] L. Pech, 368.
[322] Monica Claes, Maartje De Visser, "The European Court of Justice as a Federal Constitutional Court: A Comparative Perspective", *Federalism in the European Union*, (eds. Elke Cloots, Geert de Baere, Stefan Sottiaux), Oxford, 2012, 83-109.
[323] Marija Vlajković, "Rule of Law: EU's Common Constitutional "Denominator" and a Crucial Membership Condition on the Changed and Evolutionary Role of the Rule of Law Value in the EU Context", Lessons from the Past and Solutions for the Future, No. 4/2020, 238.
[324] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory, Cambridge University Press*, Cambridge, 2004, 1.

bolster the commitment to the rule of law is vividly demonstrated in cases such as *Kadi* and *Unión de Pequeños Agricultores*.[325]

It follows that the rule of law has grown into a key lever for judicial expansion and a primary constitutional pillar, uniting various elements of the EU's legal and institutional landscape. As highlighted in the landmark *Les Verts* case, the rule of law is progressively seen as a foundational constitutional principle, necessary for filling gaps in the judicial protection system. Despite certain ambiguities surrounding the rule of law, it continues to exert its influence across all sectors of EU policy, including the CFSP, primarily through the CJEU's extensive jurisprudence. This intricate relationship between the rule of law and other foundational values and principles demonstrates the Court's integrated approach; it views the rule of law as inherently tied (but not limited) to effective judicial protection, which in turn supports comprehensive judicial review, including the right to an effective remedy. These have effectively become keystones in the EU's legal architecture and are frequently invoked by the CJEU when evaluating the legality of EU actions, even in areas traditionally outside its purview like the CFSP.

3.2.1. Leveraging effective judicial protection to expand jurisdiction under the rule of law framework

The evolution of the concept of effective judicial protection within the jurisprudence of the CJEU has been a gradual yet transformative process that eventually became deeply entangled with the rule of law. Originating in the 1980s as an implicit but foundational principle of EU/Community law, effective judicial protection initially emphasized procedural safeguards. It worked in parallel with the *Rewe* principles of effectiveness and equivalence, which were derived from the *Rewe*[326] case and had invoked the principle of direct effect first introduced in the *Van Gend en Loos* case. The Court ruled that in the absence of specific Community laws, national courts of Member States must establish procedural rules to protect citizens' rights stemming from Community law. It specified that these regulations must be on par with or more favorable than

[325] *Unión de Pequeños Agricultores v Council of the European Union*, Case C-50/00 P, paras. 38-39; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461, para. 316.
Foundation v Council and Commission, EU:C:2008:461, para. 316; Uni´on de Peque˜nos Agricultores v Council, supra n. 8, paras. 38-39;

[326] *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case 33-76, Judgment of the Court of 16 December 1976, ECLI:EU:C:1976:188.

those governing domestic actions, with exceptions applied only when such conditions hinder the exercise of rights that national courts are duty-bound to safeguard.

It is also noteworthy that the rulings in *Von Colson*[327] and *Johnston*[328] referred to the doctrine of effective judicial protection when sanctioning unlawful discrimination, specifically in the context of equal opportunities for men and women and direct sex discrimination in employment. This marked the first time such a reference has been made, and during this early period, the Court routinely employed it to influence both the EU and national procedural regulations. Following the Lisbon Treaty, it took on an even more prominent role within the EU multi-level judicial structure. It was not just an adjunct principle but gained constitutional status, a transformation eloquently described by Bonelli as an "evolving principle of constitutional nature".[329] This was solidified through the inclusion of Article 19 TEU and Article 47 of the EU Charter, making it both a fundamental right and a structural principle closely tied to the rule of law. A clear illustration of this can be observed in the *Rosneft* case, where the concept of effective judicial protection is employed in a dual capacity – as both an individual right under the EU Charter and a structural principle underpinning Articles 2 and 19 TEU.

Presently, the right to effective judicial protection stands as a guiding principle within the EU's judicial system, ensuring accessible legal remedies for individuals and entities to enforce their rights under EU law. This comprehensive integration emphasizes the central role that effective judicial protection holds within the EU's legal framework, serving as both an essential individual entitlement and a foundational element of the broader rule of law, thereby empowering the Court to extend its jurisdictional scope. This multifaceted application shows that the concept of effective judicial protection and the rule of law have co-evolved within the sphere of CFSP jurisprudence, illustrating their intertwined and continually evolving relationship. However, as demonstrated by the *Portuguese judges*[330] case, the Court tends to prioritize the principle of effective judicial protection as a structural element reflecting the values of the rule of law. This underscores the challenges of implementing effective judicial protection within the scope of CFSP,

[327] *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, Case 14/83, Judgment of the Court of 10 April 1984, ECLI:EU:C:1984:153, para. 23.
[328] *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, Judgment of the Court of 15 May 1986, ECLI:EU:C:1986:206.
[329] Matteo Bonelli, "Effective Judicial Protection in EU Law: An Evolving Principle of Constitutional Nature", *Review of European Administrative Law,* No. 2/2019, 35-62.
[330] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, Case C-64/16, Judgment of the Court (Grand Chamber) of 27 February 2018, ECLI:EU:C:2018:117, para. 32.

which are mainly due to the Court's circumscribed jurisdiction and the inherent political complexities associated with foreign affairs. Despite this, there has been a notable extension of effective judicial protection into more contentious territories like EU sanction policy. The Court's engagement in this area has led to tighter scrutiny over Council's decisions, mandating a compelling and fact-based link between targeted individuals and any malfeasant activities.

Emblematic cases such as *Rotenberg*[331], *Anbouba*[332], *Kadi*[333], *Bank Mellat*[334], *Hamas*[335] and *LTTE*[336] have precipitated these changes, thus enhancing procedural rights and due process for those targeted either by EU autonomous or UN-related measures. Specifically, the *Hamas* case served as a cornerstone in stressing the need for strengthening human rights protection. The Court insisted on impartial and independent legal recourse for those facing sanctions, thereby bolstering the principle of effective judicial protection. In this case, the Court identified rights violations as the listing process hindered the accused's access to a fair defense and trial.[337] Interestingly, while the General Court and Advocate General Rantos leaned towards a procedural focus in their reviews, the CJEU adopted a more comprehensive approach. The Court evaluated both procedural and substantive dimensions, thus extending its reach into areas often seen as off-limits, particularly when it serves to protect human rights and uphold effective judicial protection.[338] This nuanced stance reflects the CJEU's evolving perspective on harmonizing objectives under the CFSP with the crucial need to safeguard fundamental rights.

Yet jurisdictional boundaries, particularly concerning the scope of *rationae personae* for restrictive measures or their criteria for designation within the EU sanction policy, continue to curb the Court's ability to fully apply effective judicial protection as a fundamental right. This is

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[331] *Arkady Romanovich Rotenberg v Council of the European Union*, Case T-720/14, Judgment of the General Court (Ninth Chamber) of 30 November 2016, ECLI:EU:T:2016:689.
[332] Issam Anbouba v Council of the European Union, Case C-605/13 P, Judgment of the Court (Grand Chamber) of 21 April 2015, ECLI:EU:C:2015:248.
[333] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, para. 119.
[334] *Bank Mellat v Council of the European Union*, Case T-496/10, Judgment of the General Court (Fourth Chamber) of 29 January 2013, ECLI:EU:T:2013:39.
[335] *Council of the European Union v Hamas*, Case C-79/15 P, Judgment of the Court (Grand Chamber) of 26 July 2017, ECLI:EU:C:2017:584, para. 110.
[336] *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, Case C-599/14 P, Judgment of the Court (Grand Chamber) of 26 July 2017, ECLI:EU:C:2017:583.
[337] *Council of the European Union v Hamas*, Case C-79/15 P, para. 247; *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, Case C-599/14 P, para. 33.
[338] *Hamas v Council of the European Union*, Case T-400/10 RENV, Judgment of the General Court (First Chamber, Extended Composition) of 14 December 2018, ECLI:EU:T:2018:966; Opinion of Advocate General Rantos delivered on 3 June 2021, *Council of the European Union v Hamas*, Case C-833/19 P, ECLI:EU:C:2021:448.

especially notable when contrasted with its broader (structural) role in upholding the principle of the rule of law.[339] While the principle of effective judicial protection fully applies to the field of restrictive measures as per CJEU case law, the Council retains considerable latitude and independence in administering counterterrorism designations. As indicated by the case law cited, the Court generally exercises restraint in its language and avoids a deep examination of the case merits. This allows the Council to either collaborate with national authorities for each designation or act independently, consistent with EU counterterrorism measures enacted against ISIL and Al Quaida in 2016.[340] Such cautious stance of the Court, however, invites scrutiny. As previously mentioned, drawing a clear line between procedural and substantive aspects in judicial decisions is sometimes a complex endeavor, illustrated by cases like *Rosneft*. While the introduction of the preliminary ruling procedure aimed to uphold the rule of law and ensure effective judicial protection, this ostensibly procedural move could be interpreted as substantive, given its far-reaching impact on the allocation of institutional powers.

This calls into question the Court's frequent assertion of its purely procedural role, as demonstrated by cases like *Kadi* and *Unión de Pequeños Agricultores v Council of the European Union,* where the Court tended to adopt a more substantive interpretation of the rule of law. Thus, the Court's approach not only navigates tricky jurisdictional waters but also prompts inquiries about the very nature of its role in upholding key principles like effective judicial protection and the rule of law. It follows that the Court's current position on effective judicial protection exerts a dual influence: it shapes both the protection of fundamental rights and the inter-institutional relationships within the EU, particularly those between Member States and EU bodies, as well as between EU judicial mechanisms and their national counterparts. In this context, Cremona correctly asserts that the Court's role encompasses two facets: one is to ensure that the EU and its institutions operate within their prescribed powers and in alignment with the principle of institutional balance, while the other is to uphold the rule of law and protect fundamental rights.[341]

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[339] Sara Poli, "Effective Judicial Protection and Its Limits in the Case Law Concerning Individual Restrictive Measures in the European Union", *Constitutional Issues of EU External Relations,* (eds. Eleftheria Neframi and Mauro Gatti), Baden, 2018, 288.

[340] As of September 20, 2016, the Council has the authority to independently impose sanctions on individuals or organizations linked to ISIL and Al Quaida. For further reference *see* Council Regulation (EU) 2016/1686 of 20 September 2016 imposing additional restrictive measures directed against ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them, *Official Journal of the European Union,* L 255/1, 20.08.2016.

[341] M. Cremona (2017), 690.

Additionally, it would be reasonable to argue that the Court's political ambition to reinforce the EU legal order through judicial assertion and subsequent constitutionalization of specific fields, such as the CFSP, represents another facet of its role that warrants examination. Considering the interconnected relationship between effective judicial protection and the rule of law, it is intriguing to examine the dynamics between Articles 2 and 19 TEU. This reveals an emerging trend where these articles are increasingly used in a complementary manner to bolster the constitutional authority of the Court. Article 2 TEU outlines the foundational values of the EU, which include respect for freedom, democracy, equality and importantly, the rule of law. However, it does not serve as a sole basis for adjudication and therefore is not part of EU law *stricto sensu.* Article 19 TEU, on the other hand, operationalizes these values by outlining the judicial architecture responsible for upholding them. It entrusts not only the CJEU, but also national courts and tribunals with the task of ensuring judicial review within the EU legal order which automatically widens the applicability of Article 2 TEU. In CFSP cases, the Court often invokes these articles in tandem to affirm or expand its jurisdiction, particularly in cases involving Member States' adherence to the rule of law. For example, Article 19 TEU can be invoked to stress the necessity of effective judicial protection and oversight in CFSP matters, based on the foundational values set forth in Article 2 TEU. Further depth is added by Article 19(1) second subparagraph which states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law",[342] thus reinforcing the concept of effective judicial protection as a subset of the right to an effective remedy.[343] The synergetic application of these articles culminated in heightened judicial activism in 2014, amid significant internal challenges to the rule of law within the Union, as exemplified by the case involving *Portuguese judges.*[344] One might contend that this accelerated an existing trend toward expanding the applicability of the rule of law within the scope of CFSP as well.

It is worth noting here that effective judicial protection in CFSP may appear more constrained than in other EU areas due to the CFSP's inherently political character, regulated by unique rules set forth in Article 24(1) TEU. However, this procedural aspect has evolved significantly over time, becoming enshrined in both Article 19 TEU and Article 47 of the EU Charter, which itself

[342] Consolidated version of the Treaty on European Union, Article 19(2).
[343] In Article 19(2) TEU, the term "effective legal protection" is used, and from a conceptual standpoint, it can be considered synonymous with "effective judicial protection".
[344] M. Vlajković, 241.

has gained primary law status. These developments signify that effective judicial protection, along with the rule of law, has moved beyond procedural importance to assume broader constitutional relevance. This evolution is substantiated by a number of pivotal cases such as *Abdida*[345], *H. v. Council*[346], *Kadi*[347], and *Rosneft*[348], which illuminate the dynamic relationship between the EU's foundational values and the Court's broad interpretative jurisdiction. These judgments confirm that the right to a fair trial and effective remedy is essentially a reaffirmation of the principle of effective judicial protection. Such cases also argue for a narrow reading of any limitations on the CJEU's role in CFSP, as stipulated by carve-out provisions in Article 24(1) TEU and 275 TFEU.

Further, cases like *SatCen v. KF*[349] and *A.K. and Others*[350] make it clear that Articles 2 and 19 TEU are often used in conjunction by the Court in shaping the EU's sanction policy. They also affirm that Article 19 TEU serves as an operational mechanism for the rule of law values outlined in Article 2 TEU. These judgments further solidify the Court's exclusive authority to provide ultimate interpretation of EU law, thereby strengthening its constitutional standing and jurisdictional reach. Moreover, this judicial responsibility extends not only to the CJEU, but also to national courts, with the aim of ensuring uniform application of EU law across all Member States and safeguarding effective judicial protection of individuals under this system. As articulated in the *SatCen* case, this legal framework comprises a comprehensive system of legal remedies and procedures, meticulously crafted to facilitate the scrutiny of the legality of actions undertaken by EU institutions, bodies, offices, and agencies.[351]

In examining the language and nuances of these judicial decisions, it is apparent that the Court skillfully skirts deep engagement with the EU's substantive sanction policy to avoid exceeding its authority. This cautious approach grants the Council and the Court more latitude by encouraging a slightly broader interpretation of the law. This not only allows the Court to wield greater influence but also nudges EU policymakers to refine their approach to sanctions. While the Court's assertive stance on jurisdiction could be seen as stretching the limits of its Treaty-defined

[345] *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, Case C-562/13, Judgment of the Court (Grand Chamber), 18 December 2014, ECLI:EU:C:2014:2453, para. 45.
[346] *H v Council of the European Union and Others*, C-455/14 P, para. 41.
[347] *European Commission and Others v Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, paras. 65-70.
[348] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, para. 73.
[349] *European Union Satellite Centre v KF*, C-14/19 P, para. 59.
[350] *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, para. 167.
[351] *European Union Satellite Centre v KF*, C-14/19 P, para. 60.

powers, it also resonates with its obligation to ensure the uniform interpretation and application of EU law. Critics like Weiler have expressed concerns over the Court's tendency to infringe upon political areas, like the inherently political aspects of the EU's sanction policy, by "effectively rewriting legislation".[352] Likewise, Barnard suggests that the Court should re-evaluate its role, embracing a more decentralized approach and allowing Member States greater involvement in judicial policymaking.[353] While such views align with strict legal interpretations and the spirit of the Treaties, they are not devoid of political ramifications. Although ample criticism can be directed at such a judicial maneuver, it is challenging to definitely claim that the Court acts *ultra vires* in these instances *per se*.

In a more encompassing view, the Court's open stance is grounded in its understanding of pertinent EU regulations and its intrinsic duty to ensure uniform application and interpretation of EU law. This function, however, clearly extends beyond mere procedural duties, veering into a more forward-thinking, quasi-legislative direction while navigating a fine line between substantive and procedural responsibilities. Yet, two prevailing perspectives appear to be in stark contradiction; while the rule of law is universally applied throughout the entire framework of EU law, including the CFSP, effective judicial oversight is also regarded as a crucial component of the rule of law, as established in prior case law. Given the restricted scope of judicial review within the CFSP, one could convincingly argue that the application of the rule of law is inherently limited in this context, as it is intrinsically tied to the principle of effective judicial review.[354] Despite this, the Court appears to overlook this cause-and effect relationship, directing its attention instead toward guaranteeing the rule of law's broad applicability across all areas of EU law. To borrow a phrase from Lukć, such contradictions are better understood at the level of values, rather than at the level of logic.[355]

3.2.2. Interplay between the rule of law and other foundational values and principles

The CJEU persistently employs an expansive understanding of the rule of law, weaving it together with other foundational EU principles and values to form a richer jurisprudential tapestry, which is influenced by national constitutional traditions. Rather than treating the rule of law as an

[352] Joseph Weiler, "Epilogue: Judging the Judges – Apology and Critique", *Judging Europe's Judges,* (eds. Maurice Adams, Hendri de Waele, Johan Meeusen *et. al.*), Oxford, 2013, 235.
[353] Catherine Barnard, "Van Gend en Loos to(t) the Future", *50th Anniversary of the Judgment in Van Gend en Loos,* (Antonio Tizzano, Juliane Kokott, Sacha Prechal), Luxembourg, 2013, 117-122.
[354] C. Hillion, 52.
[355] M. Lukić (2015), 335.

isolated concept, the Court views it as a versatile "umbrella" principle, serving both as an interpretative lens and as a catalyst for developing nuanced legal standards.[356] This dual function serves as a prime example of the Court's blended approach to interpretation, which diverges from the original, purely procedural understanding of the rule of law. While some scholars like Arnull initially interpreted Article 2 TEU as suggesting that the rule of law was a distinct yet complementary concept to other foundational values of the Union, he also observed early on that the Court was inclined to weave these principles and values its conception of the rule of law. This led to a nuanced and multifaceted understanding that challenges the conventional distinctions between the formal and substantive elements of the rule of law.[357]

The complexity of the current legal and judicial landscape also arises from the need to distinguish between values, which are subject to political oversight, and principles, which are subject to judicial review. Although Article 13(2) TEU places certain restrictions on the Court's jurisdiction, including its oversight of values enumerated in Article 2 TEU, the Court has long engaged in a purposive interpretation of the rule of law in the absence of a clear guidelines from the founding Treaties. Consequently, narrow readings of Article 2 TEU have become increasingly untenable, especially given the Court's growing jurisdiction and its enhanced reliance on Article 19 TEU. The latter provision strengthens its judicial powers and allows the Court to further obscure the conceptual boundaries between principles and values within the context of its rule of law interpretations.

In spite of existing conceptual difficulties, the Court's jurisprudence reveals a commitment to synthesizing the Union's various principles, values, and objectives to achieve maximum coherence, effectively moving away from initial formal categorizations. In its rulings, the Court has pinpointed an extensive array of principles related to the rule of law, which collectively serve as the cornerstone for a Union "based on the rule of law".[358] Case law not only cites the principle of effective judicial protection, which is notably prevalent in matters related to the CFSP, but also highlights other key principles such as legality, legal certainty, proportionality, and sincere

[356] L. Pech, 369.
[357] Anthony Arnull, "The Rule of Law in the European Union", *Accountability and Legitimacy in the European Union,* (eds. Anthony Arnull, Daniel Wincott), Oxford, 2002, 254.
[358] *Unión de Pequeños Agricultores v Council of the European Union*, Case C-50/00 P, paras. 38-39; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461, para. 316.; *European Commission v Republic of Poland,* Case C-619/18, para. 46.

cooperation. Altogether, they also reflect the Union's core values enumerated under Article 2 TEU, such as fundamental rights, equality, solidarity, and non-discrimination, and more recently - democracy. This demonstrates that the rule of law's scope and applicability go well beyond procedural elements, encapsulating a diverse and interrelated set of principles and values, all integrated into a unified framework guided by rule of law.

The principle of legality mandates that public authorities must act in accordance with a legal system that respects hierarchy of norms and provides effective judicial protection, including the right to an effective remedy before a competent court when individual rights are at stake. Such a framework also bars any arbitrary use of executive powers. [359] In the post-Lisbon era, Article 263 TFEU has empowered the Court to scrutinize the legality of Council actions that have implications for third parties. This expansion of jurisdiction has addressed a previously identified incongruity with the overarching principle of the rule of law.[360] The intertwining of the principle of legality with the rule of law can be traced back to seminal cases like *Les Verts*. In this case, the Court emphasized that the principle of legality serves as a cornerstone for an exhaustive system of legal remedies, ensuring that there is effective judicial oversight over the decisions of European institutions. [361] This enduring perspective reinforces the idea that the EU is a community founded on the principles of the rule of law.

The relationship between the principle of legality and the rule of law was further crystalized in the *Succhi di Frutta SpA*[362] where the Court explicitly invoked these principles, positioning them as fundamental pillars of the Union's legal order. Moreover, the principle of legality is not just a theoretical construct; it has practical implications in areas such as sanctions listing by the Council. Cases like *Rosneft* and *Kadi II* exemplify how this principle is applied to ensure that individuals or entities placed on or removed from sanctions lists are treated in accordance with established legal standards.[363] The Court unambiguously articulated that the ability to seek judicial review of executive decisions is not just a formal legality, but a fundamental right integral to the

[359] *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary,* Case 222/84, Judgment of the Court of 15 May 1986, ECLI:EU:C:1986:206.
[360] L. Pech, 372.
[361] *Parti écologiste "Les Verts" v European Parliament,* Case 294-83, para. 23
[362] *Commission of the European Communities v CAS Succhi di Frutta SpA,* Case C-496/99 P, Judgment of the Court (Sixth Chamber) of 29 April 2004, ECLI:EU:C:2004:236, para. 59.
[363] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others,* C-72/15, para. 34.; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, para. 134.

concept of effective judicial protection and, therefore, the broader rule of law. These cases further intersect with the principle of equality before the law, specifically in the context of procedural rights.

Additionally, the CJEU upholds not only the principle of legality, but also the complementary principle of legal certainty. Together, these principles contribute to making EU legislation both transparent and foreseeable. The intellectual origins of these principles also have a considerable significance. According to member of the Venice Commission, Mazák, the European model of constitutional review is rooted in the assurance of legal certainty, a concept highly valued since its introduction by Kelsen.[364] Particularly noteworthy is the Court's focus on these principles in the context of procedural matters, such as the questions of proportionality and legitimate expectations, and in substantial issues related to fundamental rights like the right to an effective judicial review and remedy. In the *Unión de Pequeños Agricultores* case, the Court encapsulated the multifaceted aspects of the rule of law in the following statement:

"The European Community is … a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order…"[365]

Through this pronouncement, the Court sheds light on the dynamic interplay between elements typically categorized as procedural principles, such as judicial review, proportionality, certainty and legality, and substantive dimensions like values of fundamental human rights. In a similar vein, the Court adopted a nuanced approach to fundamental rights in cases like *Kadi II, H. v. Council, Segi v. Council,* and *Akzo Nobel Chemicals,* thus intertwining these rights with the principle of proportionality and values of equality, all under the umbrella of the rule of law.[366] In *Kadi II* for example, the Court delicately balanced national security concerns against individual freedoms, using the rule of law in such a multifaceted way. The Court went on to assert that the

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[364] Ján Mazák, "The European Model of Constitutional Review of Legislation (1)", available at: *https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm*, 23.10.2023. For an in-depth examination of Kelsen's principles of legality and legal certainty *see* Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, Oxford University Press, Oxford, 2006.

[365] *Unión de Pequeños Agricultores v Council of the European Union*, Case C-50/00 P, para. 1.

[366] *H v Council of the European Union and Others*, C-455/14 P, para. 41.; *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union*, Case C-355/04 P, para. 51.; *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, Case C-550/07 P, Judgment of the Court (Grand Chamber) of 14 September 2010, ECLI:EU:C:2010:512.

elements of the rule of law should always be interpreted through the lens of fundamental rights, stating:

"The review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system".[367]

Additionally, the *Oriol Junqueras* case[368] serves as a seminal benchmark in elucidating the profound constitutional significance it holds, specifically in the context of enriching the discourse surrounding fundamental rights as they relate to the rule of law. The case is important for being the first to explicitly connect democracy, considered as a component of fundamental rights, with the rule of law. While not tied to the CFSP *prima facie,* it invokes Article 10 TEU on representative democracy to reinforce the democratic values outlined in Article 2 TEU. This parallels how Article 19 TEU serves to substantiate the rule of law principle.[369] The ruling in this case transcends individual rights and personal circumstances to address the interplay between national and EU rules concerning representative democracy. This holistic interpretative stance has also been reflected in CFSP cases, where the Court leverages Articles 2 and 19 TEU to lend greater breadth and applicability to the rule of law principle, thus contributing to ongoing constitutionalization efforts.

The importance of legal certainty becomes particularly evident in cases that deal with restrictive measures under the CFSP. For instance, in cases involving sanctions against officials from Belarus, the Court has maintained that legal rules must be "clear, precise and predictable", particularly when they have the potential to negatively impact individuals and entities. [370] This stance is further supported within the broader framework of rule of law, democracy, transparency, and equality, illustrating how these principles and values are interwoven with the concept of legal certainty. In cases like *Nabipour and Others v Council*,[371] which addressed the sanction regime

[367] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined cases C-402/05 P and C-415/05 P, para. 316.
[368] *Criminal proceedings against Oriol Junqueras Vies,* Case C-502/19, Judgment of the Court (Grand Chamber) of 19 December 2019, ECLI:EU:C:2019:1115.
[369] Peter Van Elsuwege, "A Matter of Representative Democracy in the European Union", available at: *https://verfassungsblog.de/a-matter-of-representative-democracy-in-the-european-union/,* 10.10.2023.
[370] *Yury Aleksandrovich Chyzh and Others v Council of the European Union,* Case T-276/12, Judgment of the General Court (First Chamber) of 6 October 2015, ECLI:EU:T:2015:748, para. 68.
[371] *Ghasem Nabipour and Others v Council of the European Union*, Case T-58/12, Judgment of the General Court (Fourth Chamber) of 12 December 2013, ECLI:EU:T:2013:640, para. 250.

against Iran's nuclear activities, the Court reasserted the centrality of legal certainty, aligning it with the overarching principle of the rule of law.

Also, in the case of *Jean Arizmendi and Others v Council,*[372] the Court not only explored legal certainty but also extended its examination to include principles like non-discrimination, proportionality and property rights. In another case, *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others* case[373], the Court highlighted the necessity for EU legislation to provide a predictable framework, arguing that such predictability is crucial for upholding legitimate expectations and thereby contributing to a stable and equitable legal environment. Furthermore, the principles of legal certainty and transparency can also emerge together as recurring themes, notably in cases like *Western Sahara Campaign*[374] and *Access Info Europe v. Council*.[375] These judgments scrutinize the EU's institutions' decision-making process and exemplify the Court's commitment to these principles in upholding the rule of law.

It is worth recalling that the Court's role within the CFSP sometimes diverges due to its intergovernmental character, leading to a more limited or procedural-focused judicial oversight. This poses challenges in upholding consistent legal standards and impacts the principle of legal certainty. Such difficulties are not limited to the realm of CFSP; they are also evident in other sectors of EU law. The unique or *sui generis* nature of the EU's legal framework, arising from the delicate constitutional balance between EU and national law, can lead to divergent approaches by national courts when it comes to recognizing the supremacy of EU law and applying judgments from the CJEU, as Koutrakos has highlighted as well.[376] The Lisbon Treaty further complicates matters, creating ambiguities over the appropriate legal bases for different cases and blurring the lines between what is legal and what is political. Criticism of the CJEU concerning legal certainty is particularly prominent in the EU's autonomous restrictive measures under CFSP against specific

[372] *Jean Arizmendi and Others v Council of the European Union and European Commission*, Joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04, Judgment of the General Court (Third Chamber) of 18 December 2009, ECLI:EU:T:2009:530, para. 46.
[373] *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others; Ditta Italo Orlandi & Figlio and Ditta Vincenzo Divella v Amministrazione delle finanze dello Stato,* Joined cases 212 to 217/80, Judgment of the Court (Third Chamber) of 12 November 1981, ECLI:EU:C:1981:270.
[374] *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, Case C-266/16, Judgment of the Court (Grand Chamber) of 27 February 2018, ECLI:EU:C:2018:118.
[375] *Council of the European Union v Access Info Europe*, Case C-280/11 P, Judgment of the Court (First Chamber), 17 October 2013, ECLI:EU:C:2013:671.
[376] P. Koutrakos (2018), 33.

political regimes that violate international norms. For instance, in EU-Russia relations, the Court near-unanimous dismissal of actions for annulment against Russian sanctions has been viewed as a strong political stance by the EU, inviting criticism from a legal certainty perspective.[377] This renders it difficult for individuals to anticipate if and why they might be targeted by EU measures. Additionally, the Court's inclination to extend its jurisdiction into previously unexplored areas of CFSP raises further questions about the stability and predictability of legal standards within further aspects of this policy domain.

The rule of law is a pervasive concept that extends its influence across various domains of EU law, from the CFSP to areas like the independence of the national judiciary and the broader scope of interim measures under Article 279 TFEU. This expansive reach becomes especially evident amid concerns about rule of law erosion in certain Member States. For example, in the case of *Commission v. Poland,* the Court made the following statement:

"The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law". [378]

Hence, the Court interlinked the independence and impartiality of national courts with effective judicial protection and the right to a fair trial, framing them as integrated components under the overarching principle of the rule of law. Furthermore, the Court underlined the importance of the separation of powers which "characterizes the operation of the rule of law".[379] This interconnectedness extends even further when considering financial matters under the EU budget. The Court emphasized that the budget operates on the premise of mutual trust among Member States and that the rule of law servers as the foundation for mechanisms that can curtail funding to Member States violating the rule of law principle, as seen in the cases of Poland and Hungary.

[377] C. Challet, 128-129.
[378] *European Commission v Republic of Poland,* Case C-619/18, Judgment of the Court (Grand Chamber) of 24 June 2019, ECLI:EU:C:2019:531, para. 58.
[379] *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, Joined Cases C-585/18, C-624/18 and C-625/18, Judgment of the Court (Grand Chamber) of 19 November 2019, ECLI:EU:C:2019:982, para. 124.

The sophisticated interpretation of the rule of law within the EU's legal system merges procedural guidelines with substantive ethical and social justice considerations, transforming it into a composite principle with both legal and political dimensions. Its broad application in the CFSP introduces a level of complexity that raises questions about the original judicial limitations envisaged by the Treaties, as well as the formal clarity between the values and principles. This reckless expansion could risk judicial inconsistencies and muddle the Court's legal reasoning. The layered approach to the rule of law becomes even more intricate when set against the backdrop of Article 51(2) of the EU Charter, which unambiguously stipulates that the Charter should not modify the competences and functions delineated in the Treaties. This dynamic creates a fertile ground for debate about the boundaries of judicial authority, especially when the Court leverages Article 47 of the EU Charter (pertaining to effective judicial protection) in a manner that could be perceived as conflicting with the limitations imposed by Article 51(2). Propelled by the extensive use of Article 19 TEU, the rule of law extends its reach across diverse areas of EU policy, including those traditionally seen as restricted, like the CFSP.

3.2.3. An (un)expected CJEU reach into the field of legal remedies

While the Court's recent expansive interpretations, rooted in its commitment to the rule of law and the principle of effective judicial protection, can find some grounding in the Treaties (albeit with some liberties taken), certain shifts have raised eyebrows. These deviations, both substantive and procedural, were surprising not only due to the constraints of the Treaties' text but also in the light of past CJEU jurisprudence. A prime example of this is the recent *Bank Refah Kargaran* case[380] which delved into the domain of legal remedies, an area traditionally within the purview of Member States. Drawing from both Article 19 TEU and Article 47 of the EU Charter, the Court extended its reach into areas like the right to an effective remedy, as underscored in both Article 13 TEU and Article 19(1) TEU. Though these provisions emphasize that Member States should guarantee effective legal remedies, with Article 13 TEU particularly entrusting this to national courts, the Court's judgment marked a distinct departure from this principle. On the other hand, the *Bank Refah Kargaran* judgment did not come as a surprise given the CJEU's evolving

[380] *Bank Refah Kargaran v Council of the European Union*, Case C-134/19 P, Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:793.

jurisdiction and previous General Court decisions like *Safa Nicu Sepahan Co. v. Council*[381], *Syria International Islamic Bank PJSC v. Council*[382] *and Jannatian v. Council*[383].

These prior cases, rooted in TFEU regulations, granted compensation for non-material harm under Article 340 TFEU due to wrongful listings related to Iran's nuclear activities. They also highlighted the complex interplay between the TEU and TFEU when it comes to sanctions that serve dual purposes, encompassing both foreign policy (TEU) and economic objectives (TFEU). The judgments set the stage for potential damages in cases of serious breaches of EU law, as articulated by the General Court.[384] Before the *Bank Refah Kargaran* judgment, the CJEU was not officially empowered to grant damages for sanctions under the CFSP, as constrained by Articles 24 TEU and 275 TFEU. However, this ruling certainly changed that, in a move that was somewhat foreshadowed by earlier General Court decisions which had set precedents for the permissibility of such legal actions in improper sanctions cases.

As for the case itself, Bank Refah Kargaran, an Iranian institution, faced EU sanctions in the context of concerns over Iran's nuclear activities. These sanctions, consisting of restrictive measures based on both Article 29 TEU and Article 215 TFEU, led to the freezing of the bank's assets. The bank contested these decisions, mainly citing inadequate motivations by the Council. In 2016 the bank sought damages for the harm caused by the Council's previously annulled decisions and regulations.[385] This move posed a significant jurisdictional query: can the CJEU award damages stemming from restrictive measures contained in CFSP decisions? Given the Court's limited jurisdiction in CFSP matters, as laid out in Article 24 TEU, this became a pivotal issue to address. The Court affirmed that "it has jurisdiction to rule on an action for damages in so far as it concerns restrictive measures provided for by regulations based on Article 215 TFEU" in order to "avoid lacuna in the judicial protection of the natural or legal persons".[386] Therefore, the judgment highlighted the CJEU's mandate to go beyond mere procedural evaluation, diving into the substantive rationale of decisions and showcasing an expansive use of its judicial power. This

[381] *Safa Nicu Sepahan Co. v Council of the European Union*, Case T-384/11, Judgment of the General Court (First Chamber), 25 November 2014, ECLI:EU:T:2014:986.
[382] *Syria International Islamic Bank PJSC v Council of the European Union*, Case T-293/12, Judgment of the General Court (Ninth Chamber) of 11 June 2014, ECLI:EU:T:2014:439.
[383] *Mahmoud Jannatian v Council of the European Union*, Case T-328/14, Judgment of the General Court (Seventh Chamber) of 18 February 2016, ECLI:EU:T:2016:86.
[384] *Ibid*, paras. 30-31.
[385] *Bank Refah Kargaran v Council of the European Union*, Case T-65/14, Judgment of the General Court (First Chamber) of 30 November 2016, ECLI:EU:T:2016:692.
[386] *Bank Refah Kargaran v Council of the European Union*, Case C-134/19 P, paras. 37 and 39.

case thus stands as a pivotal juncture, merging the principle of effective judicial protection with the right to an effective remedy, challenging the traditional power dynamics between EU entities and Member States. Furthermore, it suggests the CJEU's earnestness in championing rule of law and fundamental rights across varied EU policy arenas.

Yet, this extended jurisdiction has its critics. Many viewed the CJEU's stance in the *Bank Refah Kargaran* case as an overreach into territories traditionally governed by national authorities.[387] Prior judgments, such as *Segi, Gestoras Pro Amnistia, Unión de Pequeños Agricultores, Jégo Quéré*[388], along with the post-Lisbon *Rosneft* case, emphasized the unique authority of Member States over legal remedies. They emphasized a harmonized judicial review aligned with the Treaties, granting Member States the autonomy to delineate the breath of judicial oversight.[389] Notably, in the *Rosneft* case, it was clarified that national courts bear the duty to guarantee sufficient legal remedies for effective judicial protection within the CFSP, in line with the second subparagraph of Article 19(1) TEU.[390] The deviation seen in the *Bank Refah Kargaran* case, therefore, signals not only a shift in the CJEU's understanding of its role, from a narrower perspective, but also raises questions about the appropriate balance of power between the EU and its Member States.[391] This expanded jurisdiction means that only decisions of high political and strategic significance, including policy priorities, deployment and senior-level appointments, remain beyond the CJEU's purview.[392] However, from a wider constitutional standpoint, tracing back to *Les Verts* era and emphasizing the rule of law and effective judicial protection, this trajectory, as observed by Elsuwege, is not entirely surprising.[393] Instead, it underscores an ongoing pattern of interpreting Treaties selectively and showcases the evolving trend of integrating CFSP into the constitutional fabric, ensuring its equivalence within the EU's legal domain.

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[387] Thomas Verellen, "In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)", *European Papers,* No. 1/2021, 17-24; Maria Eugenia Bartoloni, "Restrictive Measures under Article 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment", *European Papers,* No. 3/2020, 1359-1369.

[388] *Commission of the European Communities v Jégo-Quéré & Cie SA,* Case C-263/02 P, Judgment of the Court (Sixth Chamber) of 1 April 2004, ECLI:EU:C:2004:210.

[389] For further reference *see* J. Tošić, 154.

[390] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others,* C-72/15, para. 51.

[391] M. Kuisma, 20.

[392] C. Moser, B. Rittberger, 1057.

[393] Peter Van Elsuwege, "Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice", *Common Market Law Review,* No. 58/2021, 1731-1760. 1741

It is worth mentioning that in the *Bank Refah Kargaran* case, the Court's approach diverged from its stance in *Rosneft.* Distinct from preliminary rulings and annulment actions, actions for damages are not integral to the EU's system of legality review. This distinction casts uncertainty on the applicability of the "claw-back" provisions in Article 24(1) TEU and Article 275(2) TFEU to this specific case. Against this background, the Court posited that these actions are central to the wider EU legal remedy system, crucial for protecting the rights of every individual and legal entity. Without a clear mention of an autonomous action in the Treaties, the Court defined actions for damages as "an autonomous form of action with a particular purpose to fulfil within the system of legal remedies and subject to conditions for its use dictated by its specific purpose",[394] thereby setting them apart from the domain of Member States. A strict legal assessment prompts the question: if the CJEU and Member States' courts jointly ensure the EU's judicial protection as per Article 19(1) TEU, why would there be a protection gap or lacuna? Should the CJEU falls short, Member States should intervene. In other words, Member States were able to independently determine the EU's non-contractual liability and demand compensation. Also, if any questions arose, they could be settled through the preliminary ruling procedure.

While this earlier decentralized structure seemed theoretically functional and legitimate, its practical efficacy required uniform rule of law protection across Member States, a condition not consistently met due to the political deviations of certain Member States. Therefore, it can be inferred that the CJEU's stance in *Bank Refah Kargaran* was driven more by political considerations than by a strict legal interpretation of effective legal remedy and judicial protection. It aimed to uphold the EU's legal unity, address non-compliance with the rule of law, and rein in Member States by limiting their Treaty-based rights, reflecting the long-established *Foto-Frost* logic. Apart from the *Bank Refah Kargaran* case, the Court's jurisprudence on effective judicial protection and legal remedy - both integral aspects of the rule of law—indicates that Article 19 TEU has a broader application than Article 47 of the EU Charter in the realm of CFSP. This could indicate that the unity of EU law, arising from the Court's broadening authority, could overshadow human rights protection to a certain degree. If Article 19(1) TEU is given more weight than the rights detailed in the Charter, it could inadvertently amplify judicial powers, possibly resulting in "over-constitutionalization" at the expense of legal certainty and the respective competences of Member States. This pattern has been seen in the previously elaborated case law, such as *Rosneft,*

[394] *Bank Refah Kargaran v Council of the European Union*, Case C-134/19 P, para. 33.

Portuguese judges case, and *Bank Refah Kargaran.* In these instances, the Court accentuated the importance of effective judicial protection under both Article 2 TEU and Article 19 TEU, thereby broadening its reach and applicability.

From a more expansive viewpoint that includes political insights, Pech provides an explanation for these judicial actions, suggesting they resonate with the EU's inherently neo-functionalist nature, continuously evolving to meet latest geopolitical challenges.[395] It is also posited by other scholars that the CJEU does not operate in isolation from the political, institutional, or societal currents; it is inevitably influenced by the socio-political dynamics of EU governance.[396] Looking beyond strict legalities, the rule of law, coupled with effective judicial protection, has solidified as a cornerstone for EU's legitimate decision-making. However, it remains crucial to recognize the ambiguities and galps in CJEU's rulings, given the inherent challenges of differentiating between politics and law in the EU. Therefore, the constraints on the Court's authority in CFSP should be viewed in tandem with the overarching framework and rationale of the Treaties as well. It is pivotal to remember that, in essence, Court decisions should strictly align with legal principles, with any deviation sparking contention.

However, while the fundamental nature of these decisions should be legal, their repercussions can span both legal and political spheres, necessitating a clear distinction, as emphasized by Mijović in the context of the ECHR's recent judicial trends.[397] This reasoning also pertains to the confines of CJEU's authority in CFSP. As evidenced, the principles of effective judicial protection and rule of law have assumed a foundational role in the EU's legal framework, impacting legal remedies too. This trajectory seems to prioritize the Court's overarching jurisdiction under Article 19 TEU over the more specific provisions of the Treaties and EU Charter, likely driven by political ambitions to strengthen the EU legal system, even if it means compromising Member States' competences. This focus, grounded in the principle of legal certainty, could paradoxically undermine that very principle in certain situations, as presented above.

[395] L. Pech, S. Platon, 1841.
[396] C. Moser, B. Rittberger, 1040.
[397] Ljiljana Mijović, ekspert za međunarodno pravo, za „Glas Srpske": Zahtjev Kovačevića apstraktan, sudska praksa ignorisana (Ljiljana Mijovic, international law expert for "Glas Srpske": Kovacevic's request is abstract, case law ignored), available at: *https://www.glassrpske.com/lat/novosti/vijesti_dana/ljiljana-mijovic-ekspert-za-medjunarodno-pravo-za-glas-srpske-zahtjev-kovacevica-apstraktan-sudska-praksa-ignorisana/484988,* 15.09.2023.

3.3. The impact of the CJEU's jurisdictional approach: a rule rather than an exception within the EU

Upon scrutiny of the CJEU's case law in the realm of CFSP, it is evident that the Court's jurisdictional parameters remain indistinct. Despite the lack of clarity, a distinct pattern emerges in the Court's legal reasoning that frames its wide jurisdictional scope more as a standard practice than an occasional deviation. This orientation is underscored by a recurring theme in the case law: the narrow interpretation of the limits imposed on its general jurisdiction by Article 19 TEU. This expansive view is particularly observable when the Court grapples with the dichotomy between "carve out" clauses, which limit its jurisdiction, and "claw-back" clauses, which extend it. When faced with the task of reconciling broad institutional goals, fundamental principles and values with the restrictions set forth in the Treaties, the Court frequently favors "claw-back" clauses. This approach allows the CJEU to assert its jurisdictional authority even in areas conventionally perceived as beyond its remit. As Butler aptly argues, the post-Lisbon case law suggests that the CJEU's jurisdiction can appropriately be viewed as a general principle of Union law.[398]

Therefore, in the realm of CFSP, the CJEU exhibits a notably proactive and expansive approach to its jurisdiction, a stance that starkly contrast with its more recent behavior in other policy areas like social policy. For example, in cases like *Römer*[399], which touched upon the relationship between the EU Charter and general principles of EU law, including the question of whether non-discrimination on grounds of sexual orientation should be considered a new general principle, the Court offered ambiguous interpretations and avoided making definitive rulings. This cautious approach was attributed to the limitations imposed by Article 51 of the EU Charter, which constrained the horizontal application of Charter rights. Conversely, the Court displayed no such restraint when dealing with Article 47 of the EU Charter in the context of CFSP matters, which pertains to fundamental right to effective judicial protection. In these instances, the Court opted for a more forthright exercise of its jurisdiction, despite the fact that both sets of rights under discussion hold fundamental significance.

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[398] G. Butler, 684.

[399] *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C-147/08, Judgment of the Court (Grand Chamber) of 10 May 2011, ECLI:EU:C:2011:286. For further reference also *see* Laurent Pech, "Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez", *Common Market Law Review,* No.49/2012, 1841.

This dichotomy not only uncovers the Court's uneven adherence to EU principles, values and objectives across various policy areas, but also highlights its targeted assertiveness in CFSP issues, an approach that could be interpreted as encroaching upon the realm of policymaking. Besides, the Court's willingness to stretch its jurisdictional boundaries in CFSP cases emphasizes the strategic importance of foreign relations to the EU, reflecting an urgency to adapt to rapidly evolving geopolitical landscape to safeguard EU interests. It also underscores the Court's multi-faceted role, which goes beyond a purely legal function to include significant influence on policy direction. This nuanced behavior implies that the CJEU functions not only as a legal authority but also as a strategic actor in influencing the CFSP.

It follows that the CJEU is consistently proactive in bolstering the autonomy of the EU's legal system, even in the face of institutional constraints within the CFSP. Despite these limitations, which stem from historical intergovernmental frameworks that minimize the Court's role in CFSP, the CJEU effectively leverages its general jurisdiction and rule of law mandates to uphold the EU's legal autonomy. It does so through various means, including CFSP agreements and autonomous CFSP decisions. The *Commission v. Council*[400] case is illustrative of this, affirming that Article 218 TFEU is a constitutional cornerstone that requires coherence between the judiciary and democratic processes within the broader EU legal realm. Likewise, the Court's handling of cases involving *Mauritius* and *Tanzania* exemplifies its capacity to "clear hurdles" by addressing non-CFSP issues and their relevance to CFSP, such as the applicability of Article 218 TFEU. The *Rosneft* case certainly adds another layer of the Court's ambition to expand its jurisdiction. By leveraging the expansive interpretation of procedural guidelines in Article 263 TFEU, the Court established its authority and affirmed the use of preliminary ruling procedure within the framework of CFSP.

The *Rosneft* decision was both revealing and impactful, shedding light on the Court's inclination to broadly assert its jurisdiction as a general rule. This is particularly noteworthy because the Court had the discretion to either address or sidestep questions pertaining to its own jurisdiction. Thus, the Court could have dismissed the *Rosneft* case, directing it to the General Court as part of direct-action procedure. Had the General Court ruled that the litigant lacked legal standing, the case could have been appealed to the Court, allowing it to address the matter

[400] *European Commission v Council of the European Union*, Case C-425/13, Judgment of the Court (Grand Chamber) of 16 July 2015, ECLI:EU:C:2015:483, para. 62.

indirectly. Instead of adhering to a restrained approach, the Court chose to be more assertive, highlighting its intent and ambition to broaden its jurisdiction over CFSP matters, thus distancing itself from a traditionally restrictive role.

It is crucial to underline the unintended and somewhat paradoxical internal ramifications of the CJEU's expansive approach to jurisdiction. While the Court aims to curtail forum-shopping - a practice where litigants strategically select a court or jurisdiction to gain a more favorable verdict, it inadvertently fosters such behavior within the EU legal framework.[401] This is particularly evident when it comes to matters involving the CFSP. Specifically, the CJEU's approach to jurisdictional flexibility, best exemplified by the *Rosneft* ruling, allows for a transfer of CFSP jurisdiction to itself through the mechanism of preliminary rulings. This creates a strategic dilemma: while the Court is the only body permitted to receive preliminary rulings, both the Court and the General Court can address direct actions. As a result, preference could be given to preliminary ruling procedure before the Court, potentially at the expense of General Court, whose caseload on direct actions could substantially diminish. This is not an entirely new issue in the EU law; similar phenomena have been observed before, as evidenced by the *Masterfoods*[402] case. Thus, the Rosneft decision sets a precedent for future cases and influences litigants' choices. Although similar issues were previously flagged in the *Segi* case, those concerns never came to fruition due to the Lisbon Treaty's abolition of disputed common positions.[403]

Particular emphasis should also be placed on the principle of primacy, which could emerge as another potential, and perhaps less probable consequence of the Court's wide-ranging jurisdictional authority within the CFSP. As it stands, the notion of primacy remains a grey area within CFSP, having neither been definitively accepted nor rejected. The most pertinent mention of primacy in this sphere is found in Opinion 2/13 relating to the EU's accession to the ECHR, where it was identified as one of the "essential characteristics that have given rise to a structured network of principles, rules and mutually interdependent legal relations."[404] This warrants heightened vigilance, as any declaration of primacy over national courts in the realm of CFSP would precipitate a significant allocation of power, thereby casting doubt on established CFSP

[401] Friedrich K. Juenger, "Forum Shopping, Domestic and International", *Tulane Law Review*, No. 63/1989, 553-574.
[402] *Masterfoods Ltd v HB Ice Cream Ltd*, Case C-344/98, Judgment of the Court of 14 December 2000, ECLI:EU:C:2000:689.
[403] For more information *see* G. Butler, 685-688.
[404] *Opinion pursuant to Article 218(11) TFEU*, Case Opinion 2/13, para. 167

decision-making mechanisms.[405] Alongside the evolving legal landscape of actions for damages which were previously under the exclusive purview of Member States, there exists a risk of the principle of primacy gradually permeating the CFSP domain, particularly in the absence of any explicit legal safeguards against it. Afterall, what is not explicitly forbidden might well become permissible. Additionally, the CJEU's assertive approach could strain its relationship with Member States' courts, adding another layer of complexity to the broad EU jurisdictional landscape.

3.4. The changing dynamics between the CJEU and national courts

The expansive approach taken by the CJEU towards its jurisdiction in CFSP matters presents a nuanced landscape of evolving interactions between EU legal doctrine and the sovereignty of Member States. Particularly, this strategy exerts an influential pull on national legal systems, since it constraints the procedural autonomy of Member States in adherence to principles laid out in the ECHR Articles 6 and 13, as well as national constitutional traditions.[406] For example, in the *Union de Pequeños Agricultores* case, the Court delineated that Member States are bound to allow judicial scrutiny of their actions for compliance with EU Treaties and fundamental rights. This aligns with the constitutional traditions commonly shared among Member States and mirrors the values enshrined in the ECHR, thereby construing an elaborate system of legal remedies. This paradigm requires Member States to facilitate judicial review of CFSP measures to ascertain their fidelity to fundamental rights and effectiveness of EU law, encapsulated by the principle of sincere cooperation under Article 4(3) TEU.[407] In this regard, the role of ensuring the exhaustive enforcement of EU law across all Member States, as well as safeguarding individual legal rights under this framework, falls to both national judicial bodies and the CJEU.

Through a collaborative effort, these two entities share a collective responsibility to maintain the rule of law by interpreting and applying Treaty provisions faithfully.[408] Such jurisprudence serves to affirm that the architecture of the EU's legal system is dualistic, comprised of both EU courts and national courts, both of which are equally invested in safeguarding effective judicial protection. Yet, this judicial setup has stirred debate, particularly concerning the concept of "over-

[405] G. Butler, 694.
[406] Matteo Bonelli, Mariolina Eliantonio, Gulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection Volume 1,* Hart Publishing, Oxford, 2022, 3.
[407] P. Koutrakos (2018), 34.
[408] Christophe Hillion, "Decentralized Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy", *European Papers,* No. 1/2016, 62.

constitutionalization" by the CJEU, as introduced by Grimm.[409] Hence, the Court's ambit to review national judicial reforms against the backdrop of EU legal principles raises questions about the balance of power between EU institutions and Member States.

Central to this discussion is the semantic distinction between "the fields covered by EU law" and "the scope of EU law", both used in the CJEU's relevant jurisprudence. The phrase "scope of EU law" implies that if a situation is not encompassed within the boundaries of EU law, the Court lacks authority to make rulings based on any provisions of the EU Charter. This was affirmed in *Åkerberg Fransson*[410] case, which adheres to the more limiting Article 51 of the EU Charter concerning the application of Union law. Conversely, the term "fields covered by EU law" suggests a broader interpretation of where EU law is applicable, as demonstrated in decisions like *Rosneft* and *Portuguese judges* cases. It follows from the CFSP case law that the Court is inclined to utilize the latter phrase, cited in the second subparagraph of Article 19(1) TEU, to broaden its jurisdictional scope, even in the face of existing constraints which serve to protect Member States' interests. Moreover, scholars like Prechal argue that the expansive interpretation of Article 19(1) TEU could encroach upon the operational autonomy of national courts.[411] She rightly posits that both Article 19(1) TEU, which defines the Court's general jurisdiction, and Article 47 of the EU Charter, which guarantees the right to an effective remedy and a fair trial, ought to be construed in a manner that firmly ties the subject matter to the narrower concept of "scope of EU law", which inherently offers more deference to Member States.

This viewpoint is echoed in the CJEU's judgment in the *Hernandez*[412] case as well. However, the judicial pattern observed in cases like *Portuguese judges* and *Rosneft* cases indicates a preference for the material scope of Article 19(1) TEU over Article 47 of the EU Charter, possibly for political and procedural motivations. This preference allows the Commission to bring more easily infringement cases against Member States not adhering to the unity of EU legal order and rule of law standards. While infringements based on Article 47 of the EU Charter are not impossible, they pose more challenges, requiring evidence of rights and freedoms violations under

[409] Dieter Grimm, *The Constitution of European Democracy*, Oxford University Press, Oxford, 2017.
[410] *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, Judgment of the Court (Grand Chamber), 26 February 2013, ECLI:EU:C:2013:105.
[411] Sacha Prechal, "Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?", *Article 47 of the EU Charter and Effective Judicial Protection*, (eds. Matteo Bonelli, Mariolina Eliantonio, Giulia Gentile), Oxford, 2022, 24.
[412] *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others*, Case C-198/13, Judgment of the Court (Fifth Chamber), 10 July 2014, ECLI:EU:C:2014:2055.

EU law. Over-relying on the latter could hinder the EU and the CJEU from holding Member States accountable. Ideally, both Article 19(1) TEU and Article 47 of the EU Charter should be viewed in concert. Their collective interpretation would emphasize the EU's unwavering commitment to the rule of law and effective judicial protection, bridging the Court's institutional roles with individual rights, vital for upholding the broader rule of law.

The intricate dynamics between national courts and the CJEU are significantly complicated by the inclination of national courts to uphold state sovereignty against the EU's claim of autonomy. A notable example is the German Federal Constitutional Court, which stringently delineated integration boundaries as perceived through the lens of the German Constitution.[413] In this instance, the Court found no constitutional conflicts with the Lisbon Treaty. However, it simultaneously established constraints on further integration, identifying a range of state functions that should be preserved at the national level and exempt from integration. Other national courts, including the Danish Supreme Court and the Spanish Constitutional Tribunal, express even more rigid stances, fearing the erosion of their respective statehood and sovereignty through excessive competence transfer to the EU. These assertions are underpinned by the premise that national law sets limits to the evolution of the EU legal order, starkly contrasting with the CJEU's "original rights" position.[414] In certain extreme instances, national courts have outright rejected CJEU's preliminary rulings when deemed to contravene these boundaries.

The *Ajos* case,[415] where the Danish Supreme Court dismissed the disapplication of a conflicting national provision, serves as a prominent example of such direct judicial confrontations. In this case, the Danish Supreme Court challenged the CJEU to reconsider its established legal position, which requires private employers to comply with anti-discrimination principles. Despite the CJEU upholding its previous decisions, the Danish Supreme Court refused to follow suit and based its judgments on the premise that such legislative authority had not been transferred to the EU. Therefore, it determined that the EU's general principles of law and the provisions of the EU Charter should not be enforceable upon private parties in Denmark. Likewise,

[413] *Bundesverfassungsgericht, 2 BvE 2/08, Judgment of the Second Senate of 30 June 2009.*
[414] C. Eckes (2020), 11.
[415] *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen,* Case C-441/14, Judgment of the Court (Grand Chamber) 19 April 2016, ECLI:EU:C:2016:278.

the Spanish Constitutional Tribunal asserted that the constraints set by the Spanish Constitution regarding the transfer of competences to the EU are designed to safeguard Spanish sovereignty.[416]

These challenges underscore the willingness of national courts to question the CJEU's interpretations of EU law which can be applicable to the CFSP as well. The autonomy of national courts, stemming from a non-hierarchical legal structure where compliance with Union law does not dictate the validity of their decisions, significantly contributes to the CJEU's cautious stance.

Despite these challenges, the system has shown resilience against sporadic confrontations rooted more in national constitutional logic than EU law. The absence of a formal normative hierarchy between Member States' courts and the CJEU allows such conflicts to persist. The CJEU can only declare national law incompatible with EU law and require its discontinuation for legal coherence. The division of functions and powers in the preliminary ruling procedure, as outlined in Article 267 TFEU, exemplifies this, where national courts seek interpretation from the CJEU but retain the authority to apply it to facts or national law. Moreover, the perpetuation of competing claims to autonomy between the EU and national law is crucial in avoiding a normative hierarchy. This pluralist legal situation, as MacCormick articulates, stems from the independent constitutional roots and legitimacy of Member States, juxtaposed against the EU's legal order which does not derive validity from any state's constitutional order.[417] Thus, these claims remain irreconcilable, stemming as they do from distinct epistemological frameworks without a shared foundational reference.[418] Essentially, the EU is constructed upon a delicate balance of conflicting assertions regarding the essence of EU law. This intricate structure necessitates the persistence of diverse, competing claims to autonomy for the EU to function as it currently does.

Regarding the CFSP, the question remains as to whether national courts might be better positioned for judicial review than the CJEU. While the CJEU's stance, influenced by *Foto-Frost* logic, typically excludes national review, an adapted *Solange* logic suggests that national courts might exercise jurisdiction over CFSP in instances where the CJEU is unable. This interpretation finds support in Article 19(2) TEU as well as the *Unified Patents* Court Opinion,[419] positing that national courts could address fundamental rights violations within CFSP contexts beyond the

[416] Spanish Constitutional Tribunal, *Declaration 1/2004 (Constitutional Treaty), in Case No. 6603-2004.*
[417] Neil MacCormick, "The New European Constitution: Legal and Philosophical Perspective: Lecture in Honor of Leon Petrazycki", *Fundacja "Ius et Lex",* 2003, 1-28.
[418] C. Eckes (2020), 12.
[419] *Opinion pursuant to Article 300(6) EC*, Opinion 1/09, Opinion of the Court (Full Court) of 8 March 2011, ECLI:EU:C:2011:123.

CJEU's competence. This aligns with the principle of attribution of competences, indicating that competences not explicitly attributed to the EU by the Treaties remain with Member States.

Furthermore, the principle enshrined in *Foto-Frost* ruling, which restricts national courts from evaluating the legality of EU law, certainly plays a vital role in ensuring legal stability and safeguarding the autonomy of the EU. However, within the context of the CFSP, an inherently intergovernmental area, the CJEU's general jurisdiction does not apply uniformly. Thus, the *Foto-Frost* doctrine should be applicable only to CFSP actions where the CJEU has clear jurisdiction, as interpreted literally.[420] Consequently, national courts may be in a more advantageous position to facilitate justice for individuals impacted by CFSP decisions, especially when such actions are attributed to Member States rather than the EU itself. This perspective does not consider the practical efficacy of such an approach, which depends on the political landscape and the demand for enhanced autonomy within the EU. This need often arises from the non-adherence of specific Member States to EU legislation.

Ultimately, treating the CJEU's general jurisdictional to the EU law as a norm rather than an exception carries significant ramifications for the relationship between the EU and its Member States. Such a viewpoint also markedly impacts the intergovernmental CFSP, as evidenced by pertinent case law. This multifaceted dynamic creates a legal ecosystem that underscores adherence to the rule of law, while managing the delicate task of allocating power judiciously between the CJEU and national courts. This equilibrium is rightfully subject to scrutiny and controversy, particularly in the light of the Court's progressive case law that sometimes encroaches upon the competences of Member States. A discerning interpretation of Article 19(1) TEU is crucial, as it bestows broad jurisdiction on the Court, which must not be interpreted *contra legem.* Therefore, national judicial competences need to be harmonized with the Court's general jurisdiction. This delicate balance is further refined by the limiting provisions of Article 275 TFEU, Article 24(1) TEU and Article 40 TEU, thoughtfully formulated to safeguard the sovereign functions of Member States within the CFSP domain. Nevertheless, the practical implementation of this complex legal framework introduces a distinctive array of intricate challenges.

3.5. The impact of the CJEU's broad jurisdictional reach on the interplay between CFSP/CSDP and AFSJ

[420] Christina Eckes, "Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction", *European Law Journal,* No. 4/2016, 497.

The CJEU exercises extensive jurisdictional power that significantly shapes the CFSP and the CSDP, particularly in their interplay with the AFSJ. This influence is magnified by the broad wording of Article 24(1) TEU, which delineates the CFSP's reach as encompassing all realms of the EU's foreign policy and security questions. This expansive mandate grants the CJEU a pivotal role in shaping the contours of the EU's external action, including the CSDP, which is entrenched as a vital element of the EU's strategic apparatus for crisis response and conflict prevention. Within this framework, the CSDP facilitates the EU's operational capacity for crisis management, melding civil and military efforts. Although the EU itself does not maintain a standing military force, it relies heavily on the contributions of Member States to supply the civilian and military capabilities necessary for executing CSDP missions. This dependency not only blurs the lines between EU and national responsibilities in these missions but also complicates the legal landscape in which the CJEU operates, particularly concerning issues of attribution, representation and judicial competence. The AFSJ, while principally concentrated on safeguarding the rights and freedoms of EU citizens, has seen its scope and objectives evolve significantly due to the growing interconnection with CFSP/CSDP matters. This evolution has been propelled by the CJEU's jurisdictional reach, which has expanded into areas traditionally reserved for CFSP, and has led to externalization of AFSJ concerns. The Lisbon Treaty amendments further amplify this trend by situating the protection of EU citizens within the broader objectives of the Union's external relations.

The CJEU's navigates a complex and delicate intersection with the EU's institutional framework. Its authority over the CFSP is circumscribed, with the foundational treaties of the EU establishing specific rules and procedures that emphasize unanimity among Member States and reduce the influence of the Parliament. Moreover, the CSDP operations, quintessential to the CFSP's mandate, fall outside the CJEU's jurisdiction, underscoring the principle that such sensitive military and defense matters remain under the sovereign domain of individual Member States. This demarcation in jurisdiction is stark, particularly as it affects individuals who are denied recourse to the CJEU for grievances arising from CSDP missions. The very essence of the CSDP's operational activities, deeply embedded within the CFSP framework, necessitates that the CJEU abstain from involvement, thereby maintaining the integrity of the "carve-out" provisions intended to delineate its judicial reach. In marked divergence, AFSJ operates under a regime of shared competences. Here, the legislative process follows ordinary legislative procedure, with the

Parliament actively engaged as a co-legislator alongside the Council, all within the full jurisdiction of the CJEU. This delineation showcases the intricate balance the EU seeks to strike: striving for a consolidated and effective external policy framework while carefully navigating the complex tapestry of Member States' sovereignties, especially in sensitive domains like foreign policy and defense.

Despite the CJEU's traditionally constrained jurisdiction over CFSP matters, which ultimately affects the CSDP, the Court's wide interpretative power has progressively influenced the development of the external facets of the AFSJ, as well as on certain aspects of the CSDP that are now more amendable to judicial review. This development is also intertwined with and propelled by the Lisbon Treaty's amendments, which underscore the Union's aim to protect its citizens as part of its global relations, thereby leading to the expansion of judicial competences for the sake of human rights protection.[421] Additionally, the Lisbon Treaty stipulates that security, as an objective, is pertinent not only to the EU's external actions, as laid out in Article 21(2) TEU, but also to the external dimensions of other EU policies, as referenced in Article 24(3) TEU. Moreover, the nexus between CFSP/CSDP and AFSJ is emblematic of the complexities inherent in the EU's attempt to consolidate its external action to become a more influential international actor. This convergence has been driven by a broad interpretation of security within the EU, the diverse instruments at its disposal to address global security challenges, and the permeable relationship between its internal and external policies. These dimensions have not only shaped the CFSP/CSDP and AFSJ nexus but also have come to symbolize the EU's wide approach to foreign and security policy.

The CSDP is a significant part of the EU's framework for crisis management and conflict prevention, which operates within the broader scope of the CFSP. The CJEU traditionally has had limited jurisdiction over matters related to CFSP, which by extension includes the CSDP. Engaging in CSDP operations that range from civil to military endeavors, the EU collaborates closely with its Member States, leveraging both EU and national resources. However, the Union lacks an autonomous military and specialized workforce, like judicial or law enforcement staff, to forge and enact military or civil missions under the CSDP/CFSP. Thus, the EU is reliant on Member States' contributions of civilian and military capabilities for its crisis management efforts. This reliance intricately entwines the Union in the operational deployment of these missions,

[421] Consolidated version of the Treaty on the European Union, Article 3(5).

muddling the legal landscape of the CFSP and the CJEU's jurisdiction, and stirring issues of attribution and judicial competence.

On the matter of attribution, the Lisbon Treaty asserts that the CJEU is not permitted to make rulings on matters of liability that stem from a Member State's unlawful conduct. Therefore, assigning such actions to the EU is essential for incurring liability under Article 340 TFEU. In addition to the complexity of assigning responsibility, there are differences in the judicial capacity when it comes to the Union's contractual and non-contractual liabilities. Contractual liability, which arises from agreements that the Union has entered into, allows for a straightforward judicial scrutiny - the CJEU's review can be called upon by an arbitration clause in the contract. However, non-contractual liability can be more complex because it is harder to establish who is responsible for a given action - whether it is the EU or a Member State, as demonstrated in the *H. v. Council* case. Therefore, it appears that a distinct legal responsibility for operational activities under the CSDP/CFSP is not clearly defined.

It is worth recalling here that the Court is not vested with jurisdiction in matters that are strictly CFSP or CSDP related, particularly when conflicts arise concerning the decision-making processes. The responsibility held by the forces engaged is indirect, rooted in the jurisdictional and fundamental rights adherence of the dispatching Member States. Consequently, bodies such as the Commission or the Parliament are precluded from bringing legal actions against the Council for potentially overlooking its designated decision-making role under the CFSP. Such actions are only feasible if there is a dispute over the CFSP's scope of competence, which includes its boundaries with the CSDP and other EU policies like AFSJ, as outlined under Article 40 TEU. The responsibility for interpreting and applying the CFSP provisions, including the adherence to the established procedures, thus rests with the Council or, in some instances, with the individual Member States.[422]

Instead, the function of the Court is primarily to guarantee that the EU institutions act within the confines of their respective competences, to preserve the institutional balance, to ensure Member States fulfil their obligations, and most critically, to maintain the rule of law and protect fundamental rights. Also, the Member States' executive authority regarding political decisions or deployment of CSDP missions is initially not subject to judicial examination, which also applies to operations with mixed (internal and external) foreign policy objectives. This intertwining of

[422] C. Hillion, R. A. Wessel, 74.

mixed competences and diverse objectives obscures the clarity of responsibility and complicates the identification of the judicial entity for recourse. Cremona draws on the "Chinese wall" metaphor to illustrate the essential separation between CFSP and other EU policy areas, underscoring the need for distinct and unambiguous competences to ensure legal precision and uphold the proper authority of the judiciary, in light of the CJEU's expanding interpretative role.[423]

Furthermore, some scholars highlight the responsibility gaps in the deployment of CSDP missions as especially troubling due to the prevalent immunity from local jurisdiction as well as the minimal options available for administrative complaints.[424] Others even advocate for the creation of an EU-driven accountability mechanism within CSDP agreements between the EU and host states. Another suggestion is to permit national courts to evaluate the legality of CFSP actions, whether they are national implementation measures or enacted at the EU level independently.[425] However, under the established *Foto-Frost* doctrine, which precludes national courts from annulling EU laws, this proposal appears to be legally untenable under the Lisbon Treaty. On the other hand, the establishment of an EU-specific accountability mechanism seems more feasible. This could take a form akin to the EULEX mission in Kosovo, incorporating particular oversight arrangement such as a Human Rights Commission. This would be on the condition that the criticisms noted by the Venice Commission about inadequacy of judicial review, as per Articles 6 and 13 of the ECHR and Article 47 of the EU Charter, are addressed and rectified.[426] Nonetheless, the notion (and the obligation set forth by the Lisbon Treaty) of the EU acceding to the ECHR and thereby committing its human rights duties to the authority of the ECtHR, emerges as the most favorable approach, albeit met with reluctance from the EU, a point to be delved into in later discussions.

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[423] Marise Cremona, "Defining Competence in EU External Relations: Lessons from the Treaty Reform Process", *Law and Practice of the EU External Relations*, (eds. Alan Dashwood, Marc Maresceau), Cambridge, 2009, 44.
[424] Stian Ø. Johansen, "Accountability Mechanisms for Human Rights Violations by CSDP: Common Security and Defence Policy Missions: Available and Sufficient?", *International & Comparative Law Quarterly*, No. 1/2017, 181-207; Joni Heliskoski, "Responsibility and Liability for CSDP Operations", *Research Handbook on the EU's Common Foreign and Security Policy*, (eds. Steven Blockmans, Panos Koutrakos), Cheltenham, 2018, 132–153.
[425] J. M. Cortés-Martin, 409-413.
[426] The Venice Commission, while commending the establishment of a Human Rights Mechanism, has indicated that the EULEX mission requires more rigorous scrutiny to ensure compliance with international and European standards. For further reference *see* European Commission for Democracy Through Law (Venice Commission), *Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo*, Opinion No. 545/2009, Strasbourg, 21 December 2010.

When it comes to the AFSJ, this area is well-equipped to engage with both the CFSP and the CSDP due to its focus on security. Originating from the imperative to protect the internal stability of the EU, the AFSJ has since adapted to counteract the increasing number of security threats, in line with the understanding that traditional borders no longer offer the same levels of protection. Consequently, the AFSJ has broadened its scope, now addressing external dimensions that were not part of its original remit. These include managing migration policy, fighting against organized crime and terrorism, and combating offenses like money laundering, corruption, and human trafficking. The CFSP's comprehensive mandate, covering all aspects of the EU's foreign policy and security matters, naturally suggested that it would intersect with the AFSJ objectives. Additionally, the AFSJ is involved in counteracting drug trafficking and supporting the development and strengthening the rule of law in nations transitioning towards democracy.[427] These priorities reflect a comprehensive approach to fostering a widely understood concept of security that applies both within and outside the EU's borders. Moreover, the Council has expounded on this crucial convergence between the CFSP/CSDP and AFSJ within the discourse of its strategic orientations of the Global Strategy as follows:

"Protecting the Union and its citizens covers the contribution that the EU and its Member States can make from a security and defense perspective, notably through CSDP in line with the Treaty, to tackle challenges and threats that have an impact on the security of the Union and its citizens, along the nexus of internal and external security, in cooperation with Freedom, Security and Justice (FSJ) actors. Respecting that CSDP missions and operations are deployed outside the Union, the EU can contribute from a security and defense perspective to strengthening the protection and resilience of its networks and critical infrastructure; the security of its external borders as well as building partners' capacity to manage their borders; civil protection and disaster response; ensuring stable access to and use of the global commons, including the high seas and space; countering hybrid threats; cyber security; preventing and countering terrorism and radicalization; combatting people smuggling and trafficking; complementing, within the scope of CSDP, other EU efforts concerning irregular migration flows, in line with the October 2016 European Council Conclusions; promoting compliance with non-proliferation regimes and

[427] Panos Koutrakos, "The Nexus Between CFSP/CSDP and the Area of Freedom, Security and Justice", *Research Handbook on the EU's Common Foreign and Security Policy,* (eds. Steven Blockmans, Panos Koutrakos), Cheltenham, 2018, 296-298.

countering arms trafficking and organized crime. Existing EU policies in these areas should be taken forward in a comprehensive manner."[428]

An illustrative instance of the increasing integration of CSDP missions into AFSJ's policies and goals is the civilian mission EUCAP Sahel Niger. This mission was established with the aim of preventing the overflow of terrorism and conflict effects from Libya into the EU, as such events could have indirect repercussions on EU citizens and regional interests. A significant number of these CSDP civilian missions are initiated in Africa, a region that holds considerable importance for the Union's AFSJ-related interests, which also indicates the growing entanglement between the two domains.[429] A further exemplification of this synergy is seen in the naval operation EUNAVFOR MED Sophia in the Southern Central Mediterranean. Initiated in 2015 in reaction to the worldwide migrant crisis, the principal aim of the operation was to disrupt the infrastructure and capabilities of networks engaged in human trafficking and smuggling. Operation Sophia was implemented through a phased strategy starting with maritime surveillance to identify and track smuggling routes. It then moved to direct enforcement with boarding and seizing of suspected vessels, primarily in international waters, with potential actions in territorial seas. Its objectives, under the CSDP framework but serving AFSJ goals, illustrate the EU's coordinated and integrated policy efforts to combat security challenges in the Mediterranean, albeit with debated efficacy in disrupting illegal migration and smuggling.[430]

The interaction between CSDP and AFSJ extends beyond migration to other security domains. An example is the EUJUST THEMIS mission in Georgia, where the EU's security contributions diverged from the Georgian government's expectations of more conventional security measures. Similarly, the EU's focus on organized crime in its missions in Bosnia and Herzegovina was met with mixed reactions, indicating the unique interpretation of security within the Union's operations. The cross-pollination of CFSP and AFSJ influences is also evident in other policy areas, such as Frontex's search and rescue operations in the Eastern Mediterranean, which

[428] Council Conclusions on implementing the EU Global Strategy in the area of Security and Defense, No. 14149/16, Brussels, 14 November 2016, 5.
[429] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee EU Strategy for Africa: Towards a Euro-African pact to accelerate Africa's development, SEC(2005)1255, Brussels, 12 October 2005.
[430] For instance, the EU's House of Lords Committee in the United Kingdom has described Operation Sophia as a "failed mission". Additionally, reports indicate a rise in the number of migrants reaching Italy by sea in 2017 compared to the previous year. *See* European Union Committee Operation Sophia: a failed mission, 2nd Report of Session 2017-19, 12 July 2017.; UNHCR, "Refugees and Migrants Arrivals to Europe in 2017", available at: *https://data.unhcr.org/en/documents/details/62023,* 07.11.2023.

aim to control migration from regions like Syria, Afghanistan, and Somalia.[431] These missions demonstrate a convergence of mandates and objectives that challenges traditional policy boundaries. This fusion of roles has sparked a robust debate on the increasing security focus within the external facets of the AFSJ, as it surpasses the constraints set by the Treaties.[432]

In examining the relationship between the CFSP/CSDP and the AFSJ, the CJEU faces the challenge of defining competences and selecting the appropriate legal basis for actions under Article 40 TEU. As stated in previous chapters, this is crucial aspect of the Court's role, in line with the principle of conferral under Article 5 TEU, which ensures that the EU only acts within the limits of the powers granted to it by the Treaties. The matter of choosing the correct legal basis has frequently arisen in the context of international agreements, notably in the previously mentioned *Mauritius* and *Tanzania* cases. In the former, the CFSP was deemed the adequate legal basis, particularly Article 37 TEU, which led to the exclusion of other policies. However, the *Tanzania* case presented a more complex scenario where the CJEU refrained from defining the exact boundaries between the international security aspects of the CFSP and the internal security concerns of the AFSJ, making a broad distinction between the two without delving into their respective scopes. This suggests that the Court may prefer to maintain a degree of flexibility in these domains to allow the EU to adapt to evolving political situations. This judicial approach is also apparent from the *H. v. Council* case, which originated from a CSDP's crisis management mission. Rather than invoking the expected jurisdictional carve-outs of Article 24 TEU and Article 275 TFEU, the Court embraced a wider interpretative lens, considering the CSDP mission within the broader context of the CFSP, and concluded that such an angle "did not necessarily lead to the jurisdiction of the EU judicature being excluded".[433]

This stance represented another significant breakthrough of the CJEU into the CFSP.[434] Despite its benefits, it could be argued that because the mission falls under the CSDP and the contested decision had its legal foundation in the CFSP - which ought to be exempt from the

[431] For further reference *see* European Council, Council of the European Union, "Saving lives at sea and fighting migrant smuggling", available at: *https://www.consilium.europa.eu/en/policies/eu-migration-policy/saving-lives-sea/,* 10.11.2023.
[432] P. Koutrakos (2018), 307.; Also *see* Peter Seeberg, "Mobility Partnerships and Security Subcomplexes in the Mediterranean: The Strategic Role of Migration and the European Union's Foreign and Security Policies Towards the MENA Region", *European Foreign Affairs Review*, No. 1/2017, 91-110.
[433] *H v Council of the European Union and Others*, C-455/14 P, para. 43.
[434] Graham Butler, "H. v. Council: Another Court Breakthrough in the Common Foreign and Security Policy", available at: *https://eulawanalysis.blogspot.com/2016/07/h-v-council-another-court-breakthrough.html,* 07.11.2023.

CJEU's scrutiny - this should have not been the case. This is particularly relevant given that personnel in question were seconded by Member States, not by the EU itself. A careful review of the relevant Court's jurisprudence, including cases involving the EULEX Kosovo mission and Satellite Center *(SatCen)*, reveals an eagerness by the Court to broadly construe certain facets of the CSDP missions (such as missions' expenses and staff management activities) as procedural or administrative elements falling under its jurisdiction, although such interpretation may have political ramifications and even encroach upon Member States' competences. Therefore, the CJEU's determined efforts to navigate the sensitive domain of the CSDP, coupled with its cautious execution of judicial review, also highlight the shortcomings of the Lisbon Treaty which remained ambiguous on such important matters.

In addition, the Court's approach to sanctions provides further insight into how it handles legal basis issues that arise from the CFSP-AFSJ overlap. On one side, CFSP measures that require the imposition of sanctions fall under Article 215 TFEU, which allows for action against individuals and entities via a qualified majority voting in the Council. Conversely, the Council can also utilize Article 75 TFEU to restrict capital movements, such as freezing assets, to achieve AFSJ objectives as outlined in Article 67 TFEU, following the ordinary legislative procedure. In resolving the *Smart Sanctions* case concerning sanctions against Usama bin Laden and Al-Qaeda network, the CJEU adjudicated on whether measures to freeze assets linked to terrorism financing should be classified under the AFSJ or the CFSP. The Court ultimately endorsed Article 215 TFEU, situating such measures within the scope of CFSP. This determination aligns with the EU's overarching strategy to preserve international peace and security, a core objective of its external actions, rather than the internal security focus of the AFSJ.

This interpretation was supported by the broad objectives of the EU's role in global affairs, which includes strengthening international security, and by the specific mandate of the CFSP, which encompasses all areas of foreign policy and security. Also, the *Smart Sanctions* case offered a nuanced interpretation of Article 215 TFEU, which has since become the foundational legal basis for the EU's imposition of targeted sanctions, particularly those aimed at combating terrorism. Such a stance has relegated Article 75 TFEU, a potential alternative for imposing sanctions within the AFSJ's internal security framework, to a secondary role. The CJEU's deliberation also considered whether a dual legal basis, incorporating both Articles 75 and 215 TFEU was

permissible. However, following the precedent set in the *Titanium Dioxide* case,[435] the Court dismissed this dual approach, highlighting procedural inconsistencies between the two articles and cementing Article 215 TFEU's preeminence for targeted sanctions within the CFSP purview. The Court's strategic avoidance of relying on Article 75 TFEU, as pointed out by Elsuwege, sidesteps complex legal quandaries.[436] This is particularly pertinent regarding the extraterritorial implications of using an internal security-based legal basis for sanctions that have a global reach and must align with the competences defined under Article 40 TEU, as well as with international law and UNSC Resolutions.

It is important to note that besides AFSJ interaction with CFSP/CSDP, a shift in relations has been evident in terms of development cooperation, which is being increasingly highlighted for its role in advancing the Union's international aims and interests. The intricate interplay with the AFSJ and the development cooperation policy has significantly reshaped the CFSP and the CSDP, steering them away from the purely security-oriented framework defined by the Treaties, specifically in Articles 42(1) and 43(1) TEU.[437] The broad and flexible language of Article 21 TEU, which demands a high degree of cooperation across all sectors of international relations and consistency across the Union's various external actions, as well as between these actions and its other policies, has introduced further complexity into the legal structuring of the EU's external relations. This complexity has become a fertile basis for the expansion of the Union's objectives and has led to an increasing convergence of the CFSP with other interconnected policy domains, including development cooperation.

Turning to the realm of development cooperation, it is crucial to reflect on the previously mentioned pre-Lisbon's *ECOWAS* case, where the Grand Chamber took a surprising stance at the time. Thus, the Court determined that the Council's use of a CFSP decision to support ECOWAS in combating the spread of small arms and light weapons had overstepped into the European Community's domain. The Court's decision highlighted that, despite the Council Decision

[435] *Commission of the European Communities v Council of the European Communities*, Case C-300/89, Judgment of the Court of 11 June 1991, ECLI:EU:C:1991:244.
[436] P. Van Elsuwege (2011), 495.
[437] Article 42(1) TEU mentions missions beyond the Union's borders that are geared towards peacekeeping, preventing conflict, and reinforcing global security, all in line with the principles set out by the UN Charter. Meanwhile, Article 43(1) TEU details these responsibilities to include a range of tasks such as joint disarmament operations, humanitarian and rescue missions, providing military advice and assistance, efforts in conflict prevention and peacekeeping, as well as the deployment of combat forces for crisis management, which encompasses peace-making and stabilizing post-conflict situations.

ostensibly aiming to contribute to economic and social development, its principal objectives were not rooted in development cooperation but were instead an execution of the CFSP.[438] This ruling underscored the hierarchic relationship between the former first pillar Community method under which development cooperation existed, and the second pillar of CFSP, thereby significantly limiting the scope for CFSP actions and posing challenges to inter-pillar coherence in the EU's external relations. This pre-Lisbon landscape, as presented in the *ECOWAS* case, underwent a significant transformation due to the increasing interaction between the CFSP/CSDP and other policy spheres. This evolution is particularly evident in *Tanzania* and *Mauritius* cases, where the CJEU showcased a preference for an interwoven approach to expand the EU's foreign policy reach and legal competence.

In this context, the Court's stance has shifted from the precedent set in the *ECOWAS* case, which prioritized development cooperation. Now, the Court leans towards bolstering the CFSP, reinforced by Article 40 TEU which positions the CFSP as legally coequal with other EU policies. While acknowledging the complementary nature of the AFSJ and CFSP, the Court has made it clear that their scopes are distinct.[439] Thus, the Court's current focus is on the substance of the policies themselves. This means that actions taken under the CFSP to address issues like terrorism are broadly interpreted as aligning with the EU's foreign policy goals outlined in Article 21 TEU. Consequently, the CFSP takes precedence over potentially conflicting policies, whether they be the AFSJ or development cooperation, reflecting a comprehensive perspective that prioritizes the EU's overarching foreign policy objectives. Drawing on Cremona's well-founded arguments, the analyzed case law reflects the Court's endorsement of merging the CFSP/CSDP into the constitutional fabric of the EU, a development that merits commendation for its human rights dimension.[440] Yet, there is a pressing need to address the ambiguities surrounding the exact boundaries of each area of competence - whether it be the CFSP/CSDP, the AFSJ or development cooperation - and their associated objectives, such as the expansive interpretation of "security". This uncertainty leaves room for increased overlap and thus a blurring of the lines regarding competency division. Resolution of this issue hinges on potential Treaty reforms or on the Court

[438] *Commission of the European Communities v. Council of the European Union,* Case C-91/05, para. 72.
[439] *European Parliament v Council of the European Union,* Case C-130/10, para. 66.
[440] For further reference *see* Marise Cremona, "The Position of CFSP/CSDP in the EU's Constitutional Architecture", *Research Handbook on the EU's Common Foreign and Security Policy,* (eds. Steven Blockmans, Panos Koutrakos), Cheltenham, 2018, 5-22.

defining the extent of its jurisdiction with precision. The latter, however, seems improbable in light of the current trend towards a teleological construal of delegated powers.

4. THE COURT OF JUSTICE OF THE EUROPEAN UNION'S APPROACH TO RESTRICTIVE MEASURES WITHIN THE COMMON FOREIGN AND SECURITY POLICY: BALANCING HUMAN RIGHTS PROTECTION AND CFSP OBJECTIVES

The CJEU plays a critical role in shaping the EU's sanctions policy, ensuring that while it serves the CFSP's objectives, it also respects the fundamental rights and legal protections afforded to individuals and entities. The Court exercises judicial review to ensure sanctions comply with fundamental human rights, assessing their proportionality and necessity in relation to CFSP goals. It emphasizes the rights of individuals and entities affected by sanctions to be informed and to defend themselves, thereby ensuring fairness and due process. Furthermore, the CJEU contributes to the transparency and accountability of the sanctions process, interpreting legal frameworks dynamically to adapt to evolving international norms and security threats. This approach underscores the Court's pivotal role in guaranteeing that the EU's sanctions policies not only adhere to democratic principles, the rule of law and individual rights, but also effectively pursue externally focused CFSP goals like crisis management, conflict resolution and promotion of peace and security. Moreover, the CJEU emerges as a pivotal and self-directed entity, possessing significant independence from Member States' influences and pursuing its distinct mandate of ensuring the consistent application of EU law throughout the Member States' territories. However, this autonomy is not absolute; it is shaped by the human rights standards and strategic imperatives of Member States, especially where their fundamental competences are concerned. Therefore, the Court wields considerable self-rule that influences the legal framework of the EU, yet it operates within certain limits set by Member States, positioning it as an entity that is both strategic and autonomous.[441]

It is worth noting that integrating human rights into the foreign policy agenda, initially through political means and progressively through legal frameworks that guide the imposition of CFSP restrictive measures, has been a complex endeavor. This process has sparked intense debates among experts in law and international relations. A notable example is the perspective provided by Vincent, who underscores the tension between human rights and various national objectives. Traditional international relations theory often posits that ethical considerations like human rights

[441] Andreas J. Obermaier, "Fine-Tuning the Jurisprudence: The ECJ's Judicial Activism and Self-Restraint", *Institute for European Integration Research*, Working Paper Series, No. 2/2008, 5.

should not sway foreign policy. In contrast, Vincent presents a counterargument, advocating that human rights considerations are not only pertinent but can be effectively integrated into a country's foreign affairs.[442] The deep-rooted incorporation of fundamental rights and freedoms in international customary law, and their integration into a range of international and regional treaties and conventions binding on EU Member States, highlight their escalating importance. The CJEU's engagement in the CFSP following the Lisbon Treaty, though limited in scope, reinforces this trend by aiming to enhance the effective judicial protection for those adversely impacted by CFSP restrictive measures. This indicates a growing recognition of human rights within the intricate domain of foreign relations. Consequently, there is an evident need for transparent mechanisms to challenge sanctions for affected individuals, signaling a shift from traditional foreign relations theories that often marginalize human rights concerns.

Moreover, the CJEU exhibits a commitment to upholding human rights and adhering to international law, particularly in the context of the CFSP and its related restrictive measures, a stance that should align with the obligations set forth in the Treaties. This dedication spans a comprehensive range of restrictive measures, including the EU's own autonomous measures, those derived from the UNSC, and extraterritorial sanctions imposed by third countries. At the same time, the EU's commitment to its foreign policy objectives, which are inherently political, sometimes influences the actualization of human rights within the CFSP sanctions framework. This interplay between the CJEU's commitment and the political objectives of the EU raises questions about the balance of power and the harmonious execution of responsibilities and competences as envisioned by the Treaties. Therefore, examining this issue through a lens of proportionality is crucial. This duality sparks a pivotal debate in EU constitutional law: does the CJEU primarily endeavor to protect human rights, reinforce the EU's political goals, or does it skillfully balance these important mandates? Any discernible bias could lead to critical scrutiny, as the Court's primary obligation is to judiciously reconcile the imperatives of human rights protection with the demands of the foreign policy agenda, while focusing solely on the procedural considerations behind the CFSP rather than substantive ones.

[442] Raymond J. Vincent, *Human Rights and International Relations,* Cambridge University Press, New York, 1986, 130.

4.1. Evolution and impact of CFSP restrictive measures: from state-level economic restrictions to targeted individual sanctions

Since their inception in the 1980s, the EU's restrictive measures have undergone significant transformation, influenced by the founding treaties and CJEU jurisprudence. Now fully integrated into the EU's legal framework, these sanctions must adhere to fundamental human rights, particularly due process. The trajectory of EU sanctions has seen a marked shift from broad measures like embargoes to more targeted sanctions that are bound by specific, pre-established criteria. Designed to be preventive, temporary, proportionate, and reversible, these targeted sanctions are increasingly being complemented by a blend of individual and broader third-country sanctions, particularly with an emphasis on human rights protection. This indicates a carefully calibrated strategy designed to harmonize EU foreign policy objectives with evolving global challenges and geopolitical dynamics. Within its extensive experience in "designing, implementing, enforcing and monitoring" restrictive measures under the CFSP framework, the EU acknowledges the importance of enhancing the implementation and enforcement strategies of its sanction regime.[443]

This shift in international policy from broad, state-level economic and trade sanctions to more targeted measures against individuals and non-state entities occurred after the 9/11 terrorist attacks. The change was largely driven by escalating global security concerns and the fear of terrorism. It also arose in response to criticism of the general ineffectiveness of widespread economic sanctions and the challenges in directly targeting a specific nation as a form of retribution for the damage.[444] These precisely designed targeted sanctions aim at specific individuals or entities, such as those involved in financing terrorism, proliferating weapons of mass destruction, and political leaders who violate international law. Their objective is to neutralize threats to international peace and security while minimizing adverse effects on the general population. The extensive body of case law on this matter, coupled with the CJEU's ongoing efforts to establish a consistent approach, highlights the significance of this issue. Additionally, the escalating political instability has led to an increase in targeted sanctions under different EU

[443] Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, as discussed by the Foreign Relations Counsellors Working Party on 7 and 14 December 2009, Brussels, 15 December 2009.
[444] Davide Rovetta, Laura Carola Beretta, "EU Economic Sanctions Law Against Russia After the "Rosneft" Judgment by the Grand Chamber of the Court of Justice of the European Union: Get Me A Lawyer!", *Global Trade and Customs Journal,* No. 6/2017, 242.

regimes, exerting considerable strain on EU courts.[445] This poses challenges to EU constitutional principles, prompting ongoing efforts to enhance procedural review standards.

The development of the CFSP targeted sanctions is now becoming increasingly interwoven with broader economic sanctions, affecting various sectors and countries through the expansion of listing criteria. This evolving strategy reflects a diversification in objectives, extending beyond internal conflicts to address global concerns such as nonproliferation, counter-terrorism, democratization, conflict prevention, and, importantly, the protection of civilians and human rights. This multifaceted approach demonstrates the EU's dedication to addressing human rights violations, but it also brings to light concerns about the potential widespread impact of these measures on third countries and their civilian populations. Despite these advancements, there remains a need for a more unified and legally certain approach, as well as simpler rules and improved internal controls. These improvements are crucial not only to reduce the frequency of sanctions being overturned but also to uphold the EU's image as a lawful and trustworthy entity.[446] The recent adoption of a global human rights sanctions regime in 2020 and its proposed expansion in 2022 to include corruption further emphasizes the need to scrutinize the purposes and effects of these targeted sanctions.[447] In this context, the role of the CJEU is pivotal as it is tasked with developing fundamental legal standards while ensuring it respects the balance of competences with Member States. This responsibility highlights the Court's crucial role in shaping the legal framework for sanctions, balancing the need for effective measures with the imperative of upholding the rule of law within the Union.

Moreover, the evolution of targeted sanctions embodies a core notion of discrimination, striving to affect only those responsible for harmful actions, thereby representing a more refined approach to maintaining global order and upholding international law. According to scholars and policymakers such as Biersteker and then-Swiss Foreign Minister Joseph Deiss, the intent is to apply coercive pressure on offending parties - be it government officials, supporting elites, or non-governmental entities - while ideally sparing the broader population and international trade

[445] The EU currently maintains more than 40 distinct sanctions regimes. For further reference *see* "EU Sanctions – A Guide to EU Sanctions", available at: *https://www.carter-ruck.com/international-sanctions-guides/eu/,* 29.09.2023.
[446] Christina Eckes, "EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions", *Common Market Law Review*, No. 51/2014, 869-906.
[447] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, *Official Journal of the European Union,* L 410I, 07.12.2020; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, *Official Journal of the European Union*, L 410I, 07.12.2020.

relations.[448] This reflects a heightened sensitivity to humanitarian concerns, seeking to avoid excessive suffering among civilians in the target country, at least theoretically. Such sanctions, while strategic, intersect with complex legal and procedural considerations, especially within the EU's framework. The evolving landscape of targeted sanctions illuminates a complex interplay between international law, EU law and the preservation of fundamental rights - all under the umbrella of a Union rooted in the principle of rule of law.

Prior to the implementation of the Lisbon Treaty, the EU's legal framework lacked specific provisions for targeted sanctions, and the pillar structure of the EU considerably hindered the process of imposing these sanctions. Nevertheless, the Union leveraged existing provisions for economic sanctions against third countries to augment its sanction regime and adjust to the evolving global political landscape influenced by security threats. The Lisbon Treaty marked a significant shift in this area, notably increasing the CJEU's authority in protecting individual human rights. It introduced Articles 75 and 215(2) TFEU, each serving distinct functions within the Union's legal framework. Article 75 TFEU provides an explicit legal basis for adopting administrative measures such as asset freezing in the context of AFSJ, particularly aimed at combating terrorism. In contrast, Article 215(2) TFEU focuses on the Union's external actions, allowing for economic and financial restrictions against third countries as well as natural or legal persons, thereby broadening the scope of entities that could be targeted with sanctions.[449]

In the landmark *Smart Sanctions*[450] case, the ECJ provided a comprehensive interpretation of Article 215 TFEU, guiding the EU to primarily rely on this Article for the legal foundation of targeted sanctions against individuals. This interpretation notably strengthened the Council's central role in the area of targeted sanctions, while concurrently diminishing the Parliament's influence over these crucial security measures. Additionally, this ruling refined the EU's sanctions framework, indirectly establishing that dual legal bases from both the CFSP and TFEU cannot be used simultaneously for the imposition of sanctions. Yet, even though it provided some procedural clarity and streamlined the sanction implementation process, this decision did not completely

[448] Thomas Biersteker, Sue Eckert, Aaron Halegua *et. al., Targeted Financial Sanctions: A manual for design and implementation – Contributions from the Interlaken process*, Watson Institute for International Studies, Providence, 2001. Also *see* Joseph Deiss, "Preface", *Targeted Financial Sanctions: A manual for design and implementation – Contributions from the Interlaken process*, (Thomas Biersteker, Sue Eckert, Aaron Halegua *et. al.*), Providence, 2001, vi-vii.
[449] P. Van Elsuwege (2011), 493.
[450] *European Parliament v Council of the European Union,* Case C-130/10, paras. 55-66.

resolve the issues surrounding the distribution of competences and the selection of the appropriate legal basis in practical terms. On a related note, the nature of restrictive measures and their targets necessitate diverse instruments and decision-making procedures. For example, visa or travel bans under the CFSP are influenced by Member States' legislation on non-nationals' admission, whereas economic restrictions rely on Union regulations.

These distinctions shed light on the interplay between the CFSP and other EU policies, such as the AFSJ, balancing the Union's wider objectives with national legal frameworks. However, creating this balance can seem impractical due to intersecting objectives, resulting in these matters being regularly brought to the Court for resolution. The *Bank Refah Kargaran* case further refined the application of Article 215 TFEU, underscoring that CFSP decisions and regulations under this Article should not be substantively identical. Noteworthy, this ruling is crucial in demonstrating the CJEU's approach to expanding the scope and reach of targeted sanctions, acknowledging the potential reputational harm caused by such measures. This emphasizes the Court's essential function in maintaining a careful equilibrium between enforcing targeted sanctions and protecting individual rights and access to legal remedies in the EU's legal framework. However, this extension into legal remedy territory challenges the existing distribution of competences, as evidenced in prior discussions.

The expansion of the EU's targeted sanctions, driven by the reasons previously mentioned and the growing scope of CFSP objectives, presents multiple challenges. These challenges affect both EU autonomous sanctions and those originating from the UNSC. A key difficulty lies in establishing a clear link between the individuals or entities listed and the destabilizing political scenarios in third countries. Furthermore, the blending of targeted sanctions with economic measures, a growing trend in international relations, adds another layer of complexity. This mix raises critical questions about maintaining a balance between CFSP goals and human rights protections in these restrictive practices. A prime illustration of this evolving sanctions strategy is the EU's response to Russian actions in 2014 and 2022. The sanctions following Crimea's annexation in 2014 combined asset freezes and travel bans with sector-specific economic measures aimed at influencing behavior to align with EU diplomatic goals. The 2022 sanctions, in response

to the war in Ukraine, marked a significant escalation, targeting nearly 1,800 individuals and entities, and extending to Belarus and Iran for their involvement in the conflict.[451]

These comprehensive sanctions, including travel bans, asset freezes, and broad trade restrictions, demonstrate the EU's sophisticated sanctioning capabilities. Yet, they also prompt a reassessment of the proportionality between the measures taken and their intended objectives. It raises the question of whether these sanctions maintain their targeted precision or have shifted back to broader economic and trade restrictions, reminiscent of earlier strategies. Moreover, the frequent annulment of certain sanctions by the CJEU due to procedural issues, such as insufficient evidence, underscores the need for due process and substantial justification in sanction listings. Ensuring procedural accuracy and basing decisions on robust evidence are crucial for preserving the legitimacy and effectiveness of the EU's sanctions framework.

4.1.1. Dilemmas in classification: punitive v. preventive

Implementing targeted sanctions within the framework of the CFSP presents significant complexities in terms of both categorization and execution. Analyzing these sanctions necessitates a detailed understanding of their types, the scope of their operations, and how they adhere to the relevant provisions. The Lisbon Treaty, while it significantly overhauled the EU's structure and functionality, did not concretely specify the nature of CFSP targeted measures. It provided a general framework and principles for the EU's external actions. The Treaty enables the application of restrictive measures (sanctions) under the CFSP to achieve the aims outlined in Article 21 TEU. The particulars of these measures, including their criteria, targets, and the exact form of the sanctions, are predominantly shaped by the Council's decisions and regulations, adhering to the guidelines of the Treaty. This framework ultimately allows for the evolving nature of sanctions in line with shifting CFSP objectives and in the absence of clearer definitions.

The range of EU sanctions includes country-specific actions against nations like Russia, Iran, Libya, and Belarus, as well as more expansive international initiatives focusing on counter-terrorism. These wider initiatives impact both EU citizens and global entities, including figures and groups like Al-Qaeda, PKK, and LTTE.[452] Moreover, the EU's horizontal sanctions target suspected terrorists, users of chemical weapons, and perpetrators of cyberattacks. These targeted

[451] For additional information *see* "EU sanctions against Russia explained", available at: *https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/*, 28.09.2023.
[452] C. Eckes (2014), 873-874.

sanctions predominantly focus on leaders and members of oppressive regimes, along with their associates, reflecting the complexity of the EU's foreign policy. While the intent of these sanctions is to specifically target individuals or entities, they can inadvertently impact entire sectors or populations, leading to concerns about their overarching effects. In this context, a pivotal legal question arises: are these restrictive measures, which are the only CFSP tool directly affecting individual rights, sometimes harshly, still serving a preventive function, or have they transitioned into being punitive? This is particularly significant given the widespread application of such sanctions and concerns regarding their potential disproportionality.

Several scholars, including Wessel, Doxey, Nossal, Miadzvetskaya, and Challet, contend that EU sanctions have shifted towards a more punitive approach, moving away from their initial preventive or constructive purpose.[453] They highlight the presence of coercion, social stigma, and restrictions in CFSP sanctions, characteristics usually associated with criminal penalties. While some argue that a penalizing tendency is inherent in CFSP sanctions enforcement, this view may be overly rigid, particularly in light of the increasing emphasis on human rights standards.[454] Nevertheless, it is also misleading to universally categorize all targeted sanctions as punitive. Not all of them exhibit the same characteristics of punitive measures, indicating a need for a more nuanced understanding of each situation's unique context and objectives within the CFSP framework.

In contrast, the ECJ consistently upholds that EU sanctions are fundamentally preventive, a stance reinforced in cases like *Kadi v. Commission*[455], *HTTS v. Council,*[456] *Sport-Pari v. Council*[457], *Ezz and Others v. Council*[458] and more. The Court emphasizes that these measures are

[453] Ramses A. Wessel, Elias Anttila, Helena Obenheimer *et. al*., "The Future of the EU Foreign, Security and Defense Policy: Assessing Legal Options for Improvement", *European Law Journal*, No. 26/2022, 371-390.; Margaret P. Doxey, *International Sanctions in Contemporary Perspective,* Palgrave Macmillan, London, 1987.; Kim R. Nossal, "International Sanctions as International Punishment", *International Organization*, No. 43/1989, 301-322. Yuliya Miadzvetskaya, Celia Challet, "Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus", *Europe and the World: A Law Review*, No 6(1)/2022, 1-20.

[454] Kim Richard Nossal, "International Sanctions as International Punishment", *International Organization,* No. 2/1989, 301-322.

[455] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, para. 130.

[456] *HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union,* Cases T-128/12 and T-182/12, Judgment of the General Court (Fourth Chamber) of 12 June 2013, ECLI:EU:T:2013:312, para. 42.

[457] *Sport-pari ZAO v Council of the European Union,* Case T439/11, Judgment of the General Court (First Chamber) of 9 December 2014, ECLI:EU:T:2014:1043, para. 89.

[458] *Ahmed Abdelaziz Ezz and Others v Council of the European Union*, Case T256/11, Judgment of the General Court (Third Chamber), 27 February 2014, ECLI:EU:T:2014:93, para. 77.

not penal in nature and do not imply criminal allegations, but are instead aimed at maintaining and restoring international peace and security. Specifically, in *Ezz and Others v. Council*, the Court clearly affirmed that the freezing of assets, as a form of restrictive measure under EU law, is not to be considered a criminal law matter.[459] This was backed by referencing the *M. v. Germany* case from the ECtHR, which noted that the severity of a measure is not the determining factor in classifying its nature and that numerous non-penal preventive measures can significantly affect the individual involved as well.[460] However, this distinction appears more political than legal, aimed at preserving the EU's independent foreign policy objectives, which is initially beyond the Court's jurisdiction.

Against this background, Eckes highlights that the duration and impact of sanctions should be key factors in determining whether they are punitive or preventive in nature.[461] Long-standing sanctions risk impinging on individual rights in a manner similar to criminal or punitive measures, leading to concerns about how well the EU's anti-terrorist sanctions align with other international frameworks, notably the UN's counter-terrorism structure. The UN regime, for instance, allows for sanctions not just for explicit violations of international law, but for any situation perceived as a threat to peace, according to Article 39 of the UN Charter.[462] The EU's sanction policy aims to reflect this approach as well. Eckes points out a critical issue here - when measures are labeled punitive or criminal, they typically offer individuals more robust protection under international legal frameworks, a safeguard that is often absent in the EU's preventive measures. These measures can frequently prioritize overarching goals at the expense of individual rights.

In practical scenarios, distinguishing between preventive and punitive measures under the CFSP can be challenging, particularly in cases involving terrorism and the interplay with international humanitarian law. From a strict legal perspective, CFSP targeted measures significantly differ from criminal sanctions. They are administrative, based on international law rather than criminal codes, and do not offer procedural protections like the presumption of innocence essential in criminal law. Typically, they involve asset freezes rather than confiscations, highlighting their preventive, behavior-modifying intention. However, recent sanctions against

[459] *Ibid*, para. 77.
[460] *M. v. Germany*, Case No. 19359/04, Judgment 17.12.2009, [Section V].
[461] C. Eckes (2018), 240.
[462] United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24.10.1945, Chapter VII, Article 39.

Belarus and Russia challenge the notion of these measures being purely preventive.[463] The EU's enactment of 11 sanction packages following Russia's 2022 military action against Ukraine, and the rapid imposition of four rounds of sanctions shortly after the invasion, suggest a more deliberate, arguably punitive stance.[464] If these actions were purely preventive, they would logically have been directed only at the regime and its associates involved in the war, rather than impacting the entire country's economy, thus affecting the civilian population.

From the perspective of the CJEU jurisprudence, the *Rosneft* case, challenging the EU's sanctions against Russia, exemplifies the inherent tension between the punitive and preventive objectives of EU sanctions. While the CJEU upheld the sanctions, analysts like Giumelli highlight their broader human rights impacts, affecting not just the intended targets but the Russian economy and EU businesses.[465] Critics also question the economic repercussions and potential adverse effects on individuals, casting doubt on their proportionality and efficacy, and raising concerns about due process protections.[466] The broad economic impact of these targeted sanctions on entire countries brings into question their precision, effectiveness, and compliance with the rule of law. Therefore, understanding what "targeted" truly means within the CFSP framework and CJEU jurisprudence, and assessing the proportionality of these sanctions relative to their objectives, is critical. Despite their intent to minimize humanitarian issues associated with international sanctions, EU targeted sanctions have faced significant scrutiny, necessitating a deeper examination of their application and effects.

Moreover, both the CJEU and the Council appear hesitant to recognize the punitive nature of EU restrictive measures, a stance driven by practical considerations. This reluctance to label the EU's targeted measures as punitive is grounded in a pragmatic approach. Designating these actions as punitive might involve venturing into the domain of international criminal law, which is

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[463] For additional information refer to Alexandra Hofer, "The Proportionality of Unilateral Targeted Sanctions", *Revisiting Proportionality in International and European Law,* (eds. Ulf Linderfalk, Eduardo Gill-Pedro), Leiden, 2021, 145-167.

[464] "Timeline – EU response to Russia's invasion of Ukraine", available at: *https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/timeline-eu-response-ukraine-invasion/,* 03.06.2023. Also *see* European Council, "Joint Statement by the Members of the European Council", available at: *https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/joint-statement-by-the-members-of-the-european-council-24-02-2022/,* 03.06.2023.

[465] Francesco Giumelli, "Winning Without Killing: The Case for Targeted Sanctions", *Winning Without Killing – The Strategic and Operational Utility of Non-Kinetic Capabilities in Crisis,* (eds. Paul Ducheine, Frans Osinga), The Hague, 2017, 91-106.

[466] Maja Lukić, "The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context", *Annals of the Faculty of Law University of Belgrade*, No. 3/2009, 243.

typically overseen by central judicial bodies such as the International Criminal Court (hereinafter: ICC). Miadzvetskaya and Challet aptly point out that this shift towards a punitive classification could present challenges within the EU framework, primarily due to the lack of a central international authority with the mandate to define specific rules for acts of wrongdoing, unlike the UN system. Additionally, labeling these measures as punitive instead of preventive could further complicate the already complex legal landscape.[467] In the eyes of the EU institutions, conforming to the UN system to this degree could undermine the legitimacy of the EU sanction regime as well as the autonomy of the Union's legal order which, *inter alia,* stems from the Court's extensive jurisprudence in the field. It could also jeopardize some general principles of criminal law like *ne bis in idem*, which protects individuals from facing criminal charges more than once for the same offence, given that other judicial mechanisms have the authority to examine prosecutions related to human rights abuses resulting from CFSP targeted sanctions.

On a related note, the Court dealt with this specific issue in the case of *A and Others*[468] and famously stated that the listing of persons involved in terrorist activities did not constitute a sanction but rather a preventative measure aimed at suppressing threats to international peace and security. The case itself revolved around individuals who were listed on a counter-terrorist list of sanctions for being associated with the terrorist group LTTE according to the EU system of sanctions. The EU restrictive measures were adopted in accordance with the UN obligations, more specifically the Resolution 1373 (2001) of the UNSC brought in the aftermath of 9/11 terrorist attacks. The CJEU was faced with a question as to whether terrorist attacks can be viewed through the lens of an armed conflict or the CFSP restrictive measures. The Court derived its rationale from a broader understanding of the access to the Court and the preliminary ruling procedure, as introduced by *Rosneft* case, regarding the legality of restrictive measures against natural and legal persons. It went on to determine that the exclusions of restrictive measures from the EU criminal law, international humanitarian law or relevant international conventions did not automatically result in exclusion from the EU counter-terrorist regime under the CFSP.

Furthermore, the EU's hesitancy to accede to the ECHR - a step mandated by the Lisbon Treaty, serves as an illuminating indicator of the intricate political dynamics at work within the

[467] Yuliya Miadzvetskaya, Celia Challet, "Are EU Restrictive Measures Really Targeted, Temporary and Preventive? The Case of Belarus", *Europe and the World: A Law Review,* No. 6/2022, 17.
[468] *A and Others v Minister van Buitenlandse Zaken*, Case C-158/14, Judgment of the Court (Grand Chamber) of 14 March 2017, ECLI:EU:C:2017:202.

Union. While the CJEU is technically an independent judicial and legal entity, it operates within a broader political context influenced by the EU's strategic objectives and internal interactions. The reluctance to formally join the ECHR suggests a calculated intention on the part of the EU to maintain a level of autonomy and discretion in its foreign policy decisions and sanctions framework. It also helps further explain why both the CJEU and the Council are cautious about labelling CFSP targeted measures as punitive, opting instead for language that emphasizes their original preventive nature. Therefore, a more nuanced interpretation is warranted - CFSP targeted measures function as hybrid instruments, straddling the line between prevention and punishment. According to CJEU jurisprudence, their essential preventative character remains, but their application suggests a more complex reality.

Undoubtedly, the CJEU plays an instrumental role in confirming that CFSP targeted measures adhere to their designated guidelines of being preventive, temporary and proportionate, while skillfully aligning with the EU's multifaceted foreign policy goals. However, the Court's stance is likely to remain a subject of critique as long as it neglects to acknowledge the transformative character of these measures, which have undoubtedly deviated from their foundational aims in response to overarching political developments and pressing security threats. Considering the aforementioned legal constraints and complexities that would result from a hypothetical formal shift of CFSP targeted measures into the realm of criminal law, the onus largely falls on the Council, rather than the Court. In particular, the Council faces the challenging task of carefully crafting CFSP targeted sanctions that not only comply with established legal standards and norms, but also achieve political efficacy. However, the transformation is evident, underscoring the intensity and importance of restrictive measures in response to today's global security challenges. This is further highlighted by the Council's 2022 decision to add the violation of restrictive measures to the list of EU crimes in the TFEU, aiming to prevent varying interpretations and enforcement levels among Member States.[469] This raises a logical question: if restrictive measures are still considered preventative, how can their violation be classified as a crime?

[469] "Sanctions: Council adds the violation of restrictive measures to the list of EU crimes", available at: *https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/sanctions-council-adds-the-violation-of-restrictive-measures-to-the-list-of-eu-crimes/*, 25.05.2024.

This metamorphosis of sanctions, as seen in the cases of Syria, Iran, and Russia, indicates a shift towards broader economic sanctions. While these sanctions are still conceptually regarded as targeted, they carry the risk of unintended effects on civilian populations. Moreover, this change of dynamic underscores the EU's growing determination to confront violations of key international law principles, marking a pivot from solely preventive measures to a more proactive approach in addressing wrongdoings.[470] It is vital to highlight that while there has been a strategic transition, it has not consistently been matched with the necessary enhancements in planning and monitoring. This has, on numerous occasions, brought to the forefront significant humanitarian, ethical, and practical dilemmas. As Moret emphasized, if the EU is gravitating towards stricter measures, it must recognize and address the resulting humanitarian implications and the associated moral and practical obligations.[471] Hence, there is a pressing need to ensure that the level of protection afforded to individuals targeted by sanctions is consistent across both EU and UN frameworks. Achieving this harmony is crucial for maintaining coherence, legal certainty, and the safeguarding of human rights. This calls for a more strategic approach in the EU's sanction policy, one that aligns closely with international norms and principles of human rights, bridging any gaps and mitigating disparities between different international sanction regimes.

4.2. Evaluating CFSP sanctions in relation to the proportionality criterion

The principle of proportionality, central to contemporary legal thought and a key aspect of both positive and natural law, plays a crucial role in CFSP, particularly in the context of sanctions. This principle, rooted in Aristotle's concept of justice as a proportional relationship between two entities guided by an overarching principle, requires a careful balancing of collective welfare and individual liberties.[472] In the CFSP framework, sanctions, initially not intended as punitive measures, echo early natural rights theories from the 17th and 18th centuries that advocated punishment for crime prevention. However, the moral philosophy of Kant from that era, with its emphasis on the "categorical imperative", presents a challenge to this approach.[473] Kant asserts

[470] Clara Portela, "Are European Union sanctions "targeted"?", *Cambridge Review of International Affairs*, No. 3/2016, 925.
[471] Erica Moret, "Humanitarian impacts of economic sanctions on Iran and Syria", *European Security*, No. 1/2015, 14.
[472] For additional insights into Aristotle's perspectives on justice, particularly regarding his concept of justice as proportionality, *see* Aristotle, *Nicomachean Ethics*, (eds. David. W. Ross, Lesley Brown), *Oxford University Press*, Oxford, 2009.
[473] For additional information refer to Immanuel Kant, *Groundwork of the Metaphysics of Morals*, (eds. Mary Gregor, Christine M. Korsgaard), Cambridge University Press, Cambridge, 1997.

that individuals should be treated as ends in themselves and not merely as means to broader political or social goals, posing a conflict with the typical use of sanctions.

The legal principle of proportionality, which gained prominence in the 19th century Prussian courts and globally after World War II, is fundamental in comparative constitutional law, legal theory, and the international humanitarian law, particularly regarding the use of force. When it comes to the case law of CJEU, this principle appeared in EU/Community law in the 1950s, but it was not until 1970s that it started to be recognized as a general principle of law in terms of individual rights.[474] On a particular note, it was stated in early 1970s in *Solange I* cases that "the freedom of action of individuals should not be limited beyond what is required for public interest purposes."[475] The judgment introduced the requirement of proportionality to the Community's interference in the rights of the individual, apart from penetrating the supremacy and direct effect into the Community law.

Nowadays, distinguished from simple balancing, proportionality requires a comprehensive analysis involving legitimacy, suitability, necessity, and strict proportionality of a measure, ensuring that balance between its purpose and individual rights.[476] This multi-stage analysis, developed by legal theorist Robert Alexy, is crucial in modern constitutional adjudication and rights protection. Thus, Alexy's framework, when applied to CFSP sanctions, offers a structured method for ethical and legal assessment, balancing the sanctions' impact against their objectives and ensuring transparent, justifiable decisions in international relations and sanctions policy.[477] According to Alexy, in this specific context, "constitutional judgments are only correct if they correspond to the outcome of an appropriate balancing of principles".[478]

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[474] The proportionality principle's initial and implicit mentions in the CJEU's case law appeared in the *Federation Charbonniere de Belgique* judgment of 1956, stating, "In accordance with a generally accepted rule of law an indirect reaction by the high authority to illegal action on the part of undertakings must be in proportion to the scale of that action". *See Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, Case 8-55, Judgment of the Court of 16 July 1956, ECLI:EU:C:1956:7.

[475] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* Case 11-70, para. 2.

[476] Benjamin Goold, Liora Lazarus, Gabriel Swiney, "Public Protection, Proportionality, and the Search for Balance", *Ministry of Justice Research Series,* No. 10/2007, 1.

[477] For further reference *see* Robert Alexy, *A Theory of Constitutional Rights,* Oxford University Press, Oxford, 2002.; Jan R. Sieckmann, *Proportionality, Balancing and Rights: Robert Alexy's Theory of Constitutional Rights*, Springer, Cham, 2021.; Robert Alexy, "Constitutional Rights and Proportionality", *Journal for Constitutional Theory and Philosophy of Law,* No. 22/2014, 51-65.

[478] R. Alexy (2002), 210.

Throughout the years, the principle of proportionality has undergone a remarkable transformation, evolving from its foundational association with basic equality to an autonomous and all-encompassing guideline for restricting liberties. This pivotal development was underscored in the Treaty of Lisbon, where Article 5 TEU formally institutionalized the principle of proportionality as an integral component of the EU's legal architecture. This formal recognition was intended to guarantee that the activities of EU institutions remain within established boundaries, thereby solidifying the principle's significance in the sphere of EU law and policymaking. The CJEU plays a pivotal role in this context, conducting judicial reviews to evaluate the necessity and suitability of EU measures against the standards set by this principle. In doing so, the CJEU applies a stringent four-criteria test to any infringement of basic treaty rights, involving the assessment of legitimate objectives, public interest justification, suitability for the intended goal, and necessity. In line with proportionality, EU Member States are mandated to incorporate this principle in the implementation of EU law, ensuring a consistent and balanced application throughout the Union.

The proportionality principle, demanding a clear alignment between the means and ends, is not only integral to the domestic legal frameworks of the Member States but also forms a peremptory norm in international law. The intertwining of proportionality with the subsidiarity principle under the Lisbon Treaty bolsters legal certainty, rational policy-making, and the safeguarding of both individual and state rights. This dual principle approach significantly influences the EU's internal and external policies, including the CFSP. Therefore, proportionality largely guides the imposition of CFSP sanctions, aiming to set boundaries on subjective responsibility. However, implementing this principle within CFSP encounters numerous obstacles, largely due to the complex nature of international relations and the subjective nature of determining what is "necessary" or "proportionate". This balancing act occasionally results in the EU's reluctance to precisely define its objectives and provide clear justifications for targeting specific entities or individuals under its sanction regime.[479]

In its approach to reviewing targeted sanctions under the CFSP, the CJEU generally places the responsibility of proving disproportionality on those challenging the act. Therefore, parties objecting to the legality of sanctioning measures on disproportionality grounds are expected to provide substantial evidence or persuasive arguments to support their case. However, the

[479] C. Eckes (2018), 220.

application of this principle is not always consistent, particularly in instances involving "complex" or technical considerations within the CFSP framework. In these more intricate situations, the CJEU tends to rely on EU institutions to supply the necessary evidence or justifications, acknowledging their superior capacity to do so. Although challenged parties are initially tasked with demonstrating disproportionality, the Court may require EU institutions to substantiate their measures, ensuring they align with the broader objectives and principles of EU law, including those specific to the CFSP. The ambiguity in defining what constitutes "complex" considerations can lead to the CJEU adopting different approaches in similar cases. Nevertheless, the Court has reiterated its commitment to ensure "in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order".[480]

It is noteworthy, however, that the CJEU's comprehensive review in CFSP matters should be focused on procedural rather than substantive aspects, thereby underlining the protection of fundamental rights from this angle. Thus, the Court avoids delving into the substantive aspects of policy decisions, such as the necessity of designating specific individuals or entities and the criteria for imposing sanctions. Consequently, although claims often arise contesting the proportionality of such designations under EU law, or challenging the criteria's legality, the invalidation of individual sanctions by the courts is typically grounded in procedural considerations, particularly those related to due process, rather than on the substance of the policy itself. On a related note, Michael Bishop, a senior legal adviser at the Council, emphasized that it is not within the Court's jurisdiction to decide on individual listings or evaluate their appropriateness or correctness. He pointed out that such decisions are policy-related and fall under the Council's domain of responsibilities.[481]

Furthermore, the CJEU has acknowledged the principle of proportionality in a series of landmark cases. Among these, the *Fedesa* case,[482] alongside the influential *Solange I* decision from the 1970s, stands as a fundamental milestone within the intricate landscape of EU legal history.

[480] *European Commission and Others v Yassin Abdullah Kadi,* Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, para. 97.
[481] House of Lords, "The Legality of EU Sanctions", available at: *https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justicesubcommittee/eu-sanctions/oral/41152.pdf*, 20.11.2023.
[482] *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others,* Case C-331/88, Judgment of the Court (Fifth Chamber) of 13 November 1990, ECLI:EU:C:1990:391.

This case is particularly notable for being the first in which the Court elaborated on the classical proportionality test with remarkable precision and depth, thereby initiating the incorporation of the now-referenced four-step method for applying the proportionality principle. On that occasion, the Court stated the following:

"In accordance with the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, it being understood that when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[483]

This evolution has been instrumental in refining the jurisprudential approach of the CJEU, offering a more defined understanding of proportionality, *i.e.* favoring less intrusive measures to prevent undue suffering and consequences. Further illustrating the proportionality principle's application are notable cases like *Kala Naft, Bank Melli Iran, Kadi II,* and *OMPI.* In *Kala Naft* and *Kadi II,* the Court specifically invoked Article 52(1) of the EU Charter, underscoring the necessity of respecting the essence of fundamental rights while applying proportionate limitations to achieve recognized EU general interest objectives.[484] Both *Kala Naft* and *Kadi II* dealt with similar situations, focusing on the annulment of EU's restrictive measures. In the case of *Kala Naft*, the sanctions targeted an Iranian company owned by the National Iranian Oil Company, marking individuals and entities involved in nuclear proliferation. Here, paralleling the approach in *Kadi*, the Court emphasized the importance of effective judicial review. It asserted that EU decisions of this nature must be founded on a robust and substantial factual basis. Similarly, in the *Bank Melli Iran case*, the CJEU emphasized that restrictions on trade or property rights must align with general interest objectives and avoid disproportionate interference with guaranteed rights. [485] In the *OMPI* case, the Court evaluated an emergency measure, concluding that it was not disproportionate to its intended objective and maintained a fair balance between public interest needs and the protection

[483] *Ibid*, para. 13.
[484] *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co.,* Tehran, Case C-348/12 P, para. 69.; *European Commission and Others v Yassin Abdullah Kadi,* Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, para. 101.
[485] *Bank Melli Iran v Council of the European Union*, Case C-548/09 P, Judgment of the Court (Grand Chamber) of 16 November 2011, ECLI:EU:C:2011:735, para. 114.

of fundamental rights.[486] Each of these cases contributes to the evolving narrative of proportionality's role in EU law, reinforcing its essential place in the CJEU's adjudication.

Meanwhile, in some other cases the CJEU has critically engaged with the proportionality principle, specifically dismissing challenges to broad sanctions measures on grounds of alleged disproportionality. Notable among these are the *IRISL,*[487] *Sina Bank,*[488] and *Rosneft* cases. Through these decisions, the Court emphasized the importance of allowing the EU legislature significant discretion, particularly in politically sensitive matters. This perspective underscores that, while the Council wields substantial power in the execution of targeted sanctions, the CJEU maintains an essential duty to verify that these actions conform to the procedural standards, *i.e.* due process rights in individual cases. Additionally, in the *IRISL* case, the Court referred to Article 52(2) of the EU Charter, emphasizing that limitations on the exercise of rights and freedoms recognized by the Charter must be legally established, respect their essence, and adhere to the principle of proportionality. In this specific instance, the Court upheld the General Court's ruling, affirming that the restrictions imposed on property rights and the impact on the appellants' reputation were proportionate to the objective of combating nuclear proliferation.[489] In the *Sina Bank* case, the General Court, following a similar reasoning, dismissed the notion that measures intended to deter nuclear proliferation amounted to an infringement of property rights or a transgression of the proportionality principle connected to these rights.[490]

Finally, in the Rosneft case, the ECJ's assessment of proportionality revealed that the sanctions aligned well with their intended purpose, particularly in escalating costs for the Russian Federation due to its actions compromising Ukraine's territorial integrity, sovereignty, and independence.[491] The targeting of a major Russian State-owned entity in the oil sector was found to be in line with this objective, and not excessively inappropriate. Additionally, in the *Kiselev v. Council* case, the Court affirmed that the freedom of expression as outlined in Article 11 of the EU Charter could be restricted for objectives like "terminating Russian destabilization of Ukraine."[492]

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[486] *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, Case T-228/02, para. 80.
[487] *Islamic Republic of Iran Shipping Lines and Others v Council of the European Union,* C-225/17 P, Judgment Of The Court (Fourth Chamber), 31 January 2019, ECLI:EU:C:2019:82.
[488] *Sina Bank v Council of the European Union,* Case T-15/11, Judgment of the General Court (Fourth Chamber), 11 December 2012, ECLI:EU:T:2012:661.
[489] *Islamic Republic of Iran Shipping Lines and Others v Council of the European Union,* C-225/17 P, para. 114.
[490] *Sina Bank v Council of the European Union,* Case T-15/11, para. 83.
[491] *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others,* Case C-72/15, para. 147.
[492] *Dmitrii Konstantinovich Kiselev v Council of the European Union,* Case T-262/15, Judgment of the General Court (Ninth Chamber) of 15 June 2017, ECLI:EU:T:2017:392, para. 76.

This, however, was contingent on the measures being proportionate to the pursued legitimate aim and broader public interest. The applicant in this case challenged the Council's measures, which were aimed at addressing actions that compromised the territorial integrity and sovereignty of Ukraine. He argued that these measures violated his freedom of expression in his capacity as a journalist endorsing the Kremlin's regime. Nevertheless, the Court ruled in favor of the Council's application of restrictive measures, concluding that they did not excessively infringe upon the applicant's freedom of expression, especially given his involvement in disseminating Russian propaganda.

The aforementioned case law illustrates the Court's tendency towards a broader interpretation of proportionality, possibly influenced by the Council's significant discretion in such matters. Yet, this broader approach contrasts sharply with the Court's detailed attention to procedural matters, such as upholding the due process rights of applicants. This perspective is reinforced by the Court of Justice's current president, Koen Lenaerts, who has acknowledged that while there is judicial deference regarding "substantive outcomes", there is a corresponding strictness in "process review".[493] This approach of the CJEU reflects its complex duty to balance substantive and procedural considerations, a task often fraught with sensitivity and subject to scrutiny. Despite concerted efforts, there remains a persistent uncertainty in how the CJEU applies the proportionality principle, particularly in procedural contexts. This issue underscores broader concerns about the consistency and transparency with which the Court navigates the overlapping demands of substantive legal principles and procedural fairness.

Despite the Council's numerous attempts to align the adoption and implementation of sanctions with the principle of proportionality, the concerns regarding the CJEU's inconsistent application of this principle in its case law are still warranted. In certain cases involving conflicting interests and proportionality assessments, the CJEU has appeared to lean towards decisions that bolster European integration, introducing a discernible political dimension into its decisions.[494] This tendency is notably visible in CFSP cases concerning targeted sanctions, where the Court's rulings often seem to favor objectives that serve the broader interests of the EU, even in the absence of clear-cut definitions. Illustrative of this trend are the abovementioned cases before the CJEU,

[493] Koen Lenaerts, "The European Court of Justice and Process-oriented Review", *College of Europe - Research Paper in Law*, No. 1/2012, 3.
[494] Gino Scaccia, "Proportionality and the Balancing of Rights in the Case-Law of European Courts", *Federalismi.it,* No. 4/2019, 14.

especially *Kadi*, which saw the Court balancing security concerns against individual rights, and *Rosneft*, involving an evaluation of the proportionality of sanctions against Russia. These decisions demonstrate the CJEU's commitment to promoting the EU's interests, especially within the context of the CFSP and targeted sanctions. Moreover, they underscore the CJEU's role in not only shaping EU policy through legal interpretation but also in steadfastly maintaining the EU's autonomy. This is particularly evident in how the Court navigates between external factors like the UNSC and the internal intricacies of Member State relations.

4.3. Assessing the CFSP's sanction policy: does it comply with human rights norms?

While targeted restrictive measures are primarily designed as temporary, preventive, and specific tools to prompt changes in the policies or behaviors of involved parties, their potential to significantly infringe upon the fundamental rights and freedoms of those affected must be carefully considered. The broad implications of these sanctions, such as the freezing of funds and assets, can breach the right to peaceful enjoyment of property. Additionally, the stigma associated with being under sanctions can adversely affect an individual's private and family life, including their reputation and dignity. Travel bans, as another form of sanction, can significantly restrict freedom of movement. Given these far-reaching consequences, it is imperative that the implementation of any EU sanction policy strictly adheres to the principles of fundamental rights, as aligned with due process requirements and the principle of effective judicial protection. This includes ensuring rights to an effective remedy in accordance with the CJEU jurisprudence. The human rights at stake encompass both substantive aspects (such as the rights to private and family life, property, and freedom of movement) and procedural due process rights (including defense and the right to be heard before the Court, exemplified by the principle *of audi alteram partem*).[495] Furthermore, there is an obligation to clearly state the reasons for the implementation of restrictive measures, underscoring the need for transparency and accountability in sanction policies.

4.3.1. CJEU's standard of review for targeted sanctions

The increasing criticism of targeted sanctions, primarily those focused on counter-terrorism, led to a growing demand for clear and fair procedures. This culminated in the 2005 World Summit's call for enhanced safeguards for individuals on sanction lists, alongside advocating for

[495] 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", *Collection of Papers Faculty of Law Niš,* No. 93/2021, 125.

humanitarian exemptions.[496] These exemptions, later incorporated into the EU's autonomous measures regime, allow for asset freezes to make exceptions for humanitarian aid and other activities essential for basic human needs, applicable to specific entities. Additionally, the CJEU has progressively refined its standard of review. This evolution means that the listing of targeted individuals and entities must be consistently updated and include a detailed justification to legally validate such measures. As highlighted by Perju, this evolution underscores the importance of transparency and the necessity to provide reasons, affirming them as integral components of EU law.[497]

These elements not only reinforce the legitimacy and credibility of the CJEU's decisions in the view of the European public but also relate to the duty outlined in Article 296 TFEU. This duty compels EU institutions to furnish detailed justifications to those adversely affected by an EU action, like targeted sanctions, enabling them to contest these measures before the Court and access their right to effective judicial protection. In the period following the Lisbon Treaty, the European Council's criteria for imposing sanctions have evolved, emphasizing human rights as the primary basis for their application. This shift is in line with the principles outlined in Chapter 1 of Title V TEU which also advocates for democracy, equality, solidarity, and the rule of law.[498] This approach marks a departure from the pre-Lisbon era, where procedural safeguards in the EU's sanctioning process were minimal. The Lisbon Treaty, responding to numerous legal challenges and annulments of sanctions due to these inadequacies, mandates in Article 215(3) TFEU that any measures concerning sanctions must include necessary legal safeguards. This requirement significantly boosts the standard of judicial protection within the EU.

However, challenges emerge from the CJEU vague guidelines regarding the extent of detail required in these justifications. The CJEU's stance, which suggests that the necessary detail for justifications varies on a case-by-case basis, has led to inconsistent practices in sanctioning. This inconsistency has drawn criticism, as it complicates the process of ensuring uniform application and effectiveness of the EU's sanction measures, especially in upholding the values enshrined in

[496] United Nations General Assembly, *Resolution adopted by the General Assembly on 16 September 2005,* No. 60/1, 2005 World Summit Outcome, 24 October 2005, para. 109.
[497] Vlad Perju, "Reason and Authority in the European Court of Justice", *Virginia Journal of International Law,* No. 2/2009, 308-377.
[498] Sara Poli, "Effective Judicial Protection and Its Limits in the Case Law Concerning Individual Restrictive Measures in the European Union", *Constitutional Issues of EU External Relations,* (eds. Eleftheria Neframi and Mauro Gatti), Baden, 2018, 287-306.

the TEU and TFEU.[499] In addition, the Court's handling of sanctions on Iran and Syria demonstrates a lack of consistent methodology. In certain cases, the Court readily accepts the Council's concise justifications, allowing it considerable latitude. This implies that even succinct explanations may be deemed adequate, provided they effectively rationalize the reasons for imposing sanctions on individuals or entities. For instance, in *OMPI*, *Kala Naft*, and *Bank Mellat*, the Court did not rigorously analyze the Council's reasons.[500] Conversely, the *Kadi II* case highlights the Court's insistence on additional evidence and the Council's responsibility to prove its case, particularly when sanctioning individuals linked to a sanctioned entity, in order to maintain effective judicial protection.[501] This was further expounded in *Sedghi,*[502] *Nabipour,*[503] and *Bateni,*[504] where the Court clarified that mere association with a listed entity is insufficient for sanctions unless independently justified.

On the other hand, in the case of *Sharp Shipping Agencies,*[505] it simply reiterated the Council's logic without independent reasoning. This inconsistency is also starkly evident in the *Central Bank of Iran*[506] case, where the Bank was sanctioned for supporting the Iranian Government without a separate justification. Meanwhile, in the *Fulmen* case, the Court rejected the Council's reluctance to disclose classified information as a justification for sanctions, emphasizing the need for substantiated evidence against sanctioned parties.[507] Similarly, in the *IRISL* case, the Court annulled sanctions due to the Council's vague reasons, specifically rejecting the claim that IRISL was involved in nuclear proliferation based on insufficient evidence.[508] Therefore, the Court's approach, often seen as contentious and lacking in transparency, has led to

[499] E. Chachko, 14-15.
[500] *Organisation des Modjahedines du peuple d'Iran v Council of the European Union,* Case T-228/02, para. 159.; *Bank Mellat v Council of the European Union*, Case T-496/10, paras. 115-116.; *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co.,* Tehran, Case C-348/12 P, para. 120.
[501] *European Commission and Others v Yassin Abdullah Kadi,* Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, paras. 119-123.
[502] *Ali Sedghi and Ahmad Azizi v Council of the European Union,* Case T-66/12, Judgment of the General Court (First Chamber) of 4 June 2014, ECLI:EU:T:2014:347, para. 69.
[503] *Ghasem Nabipour and Others v Council of the European Union,* Case T-58/12, Judgment of the General Court (Fourth Chamber) of 12 December 2013, ECLI:EU:T:2013:640, para. 107.
[504] *Naser Bateni v Council of the European Union,* Cases T-42/12 and T-181/12, Judgment of the General Court (Fourth Chamber) of 6 September 2013, ECLI:EU:T:2013:409, paras. 64-66.
[505] *CF Sharp Shipping Agencies Pte Ltd v Council of the European Union,* Case T-53/12, Judgment of the General Court (Fourth Chamber), 26 October 2012, ECLI:EU:T:2012:578, para. 38.
[506] *Central Bank of Iran v Council of the European Union*, Case C-266/15 P, Judgment of the Court (Second Chamber) of 7 April 2016, ECLI:EU:C:2016:208.
[507] *Council of the European Union v Fulmen and Fereydoun Mahmoudian,* Case C-280/12 P, para. 101.
[508] *Islamic Republic of Iran Shipping Lines and Others v Council of the European Union,* C-225/17 P, paras. 63-67.

a substantial number of cases being brought before it. This trend began in the early 2000s, with numerous individuals and legal entities affected by various EU sanctions regimes seeking judicial review to challenge their designations in EU courts.[509] This highlights the significance of the issue and points to the necessity for a more structured and transparent method in the Court's handling of sanctions cases.

As the EU's sanction regime increasingly targets a broader range of entities, the imperative for enhanced judicial protection within the EU has risen, in accordance with Article 47 of the EU Charter. This necessity to bolster judicial safeguards coincides with the expanding scope of the CFSP. The regime has extended beyond state leaders and government officials to non-state entities or individuals indirectly supporting arbitrary governance systems. This extension, influenced by the Lisbon Treaty and CJEU case law, marks a significant shift in the EU's approach to sanctions. Cases like *OMPI* and *Segi* exemplify this transition, showcasing the Court's expanded jurisdiction under the former Articles 15, 34, and 35 TEU, to more broadly address sanctions against third parties.[510] This evolution, preceding formal authorization under the Treaty of Lisbon as per Article 275(2) TFEU, highlights the transformation of non-state actors from passive targets to active subjects of restrictive measures, reflecting a substantial development in the EU's sanction policies. In this context, where substantive powers in relation to the EU's sanction regime are limited, the CJEU's reliance on procedural judicial review becomes critical. This review process, focusing on the due process rights of those listed and targeted, fosters a collaborative dialogue between courts and policymakers. It indirectly influences the improvement of substantive decisions, adapting to the expanding complexities of EU sanction regimes.

Procedural theories of judicial review emphasize the process leading to a particular outcome rather than the outcome itself. This approach advocates for stringent procedural review to exert maximum influence on policymakers.[511] The primary benefit of procedural judicial review is its capacity to guide policymaker decisions without directly engaging in politically or morally contentious issues, thus avoiding conflicts over institutional competence and democratic

[509] In addition to the cases previously mentioned, the following are also pertinent: *Council of the European Union v Bank Saderat Iran,* Case C-200/13 P, Judgment of the Court (Fifth Chamber) of 21 April 2016, ECLI:EU:C:2016:284.; *Johannes Tomana and Others v Council of the European Union and European Commission,* Case C-330/15 P, Judgment of the Court (First Chamber) of 28 July 2016, ECLI:EU:C:2016:601.

[510] *Organisation des Modjahedines du peuple d'Iran v Council of the European Union,* Case T-228/02, paras. 6-8.; *Segi and Others v Council of the European Union,* Case C-355/04 P, paras. 5-8.

[511] William Eskridge Jr., Philip Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, West Publishing Co., Minnesota, 1988, 341.

legitimacy. However, critics of procedural legal theories have raised concerns about the attempt to disentangle law from politics and procedure from substance.[512] They argue that procedural judicial review inherently involves substantive assumptions about due process, the values it upholds, and its overarching goals - whether they pertain to individual rights, as seen in CJEU cases, epistemic correctness, democratic representation, or public welfare. This critique underscores the intertwined nature of procedural and substantive aspects in legal reasoning, challenging the notion of their separability. The CJEU's procedural review has notably influenced the Council's substantive policies, particularly in enhancing due process requirements for individual listings. This development has necessitated the Council to critically reassess its sanction policy decisions, fostering a significant elevation in procedural protection standards.[513]

Previously, these standards were largely absent, highlighting the transformative effect of judicial intervention. Consequently, the CJEU's procedural oversight has not only improved due process in individual cases but has also prompted a comprehensive review and enhancement of the Council's procedural standards in sanction policy implementation. Although this rigorous procedural review and the frequent overturning of sanctions place considerable pressure on the Council, but also enhance human rights protections at the same time, the expansion of criteria for sanctions, particularly in complex cases like Iran's nuclear program, presents challenges. Broader criteria, such as "supporting the Iranian government," are often favored over more specific, harder-to-prove allegations related to nuclear proliferation.[514] This preference stems partly from the difficulty in revealing confidential information, leading to broader sanction criteria and inadvertently increasing the number of individuals subjected to sanctions, potentially compromising human rights further. Thus, a robust human rights framework becomes increasingly necessary. Despite these challenges and the strain on both the EU courts and the Council, there is little evidence that judicial oversight has deterred the EU from employing sanctions.[515] Furthermore, EU Courts have signaled potential limits to the Council's authority in expanding designation criteria, as demonstrated in the *Central Bank of Iran case*. Here, the Court restricted broad criteria to activities significantly encouraging proliferation, irrespective of their direct or

[512] Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories", *The Yale Law Journal*, No. 6/1980, 1063-1064.
[513] E. Chachko, 41.
[514] House of Lords, "The Legality of EU Sanctions", 29.
[515] E. Chacko, 42.

indirect link to it.[516] This nuanced approach, however, calls for more detailed guidelines to mitigate legal uncertainties surrounding the Council's power in this regard.

4.4. The interaction between human rights and CFSP objectives as illustrated by the *Kadi* cases

The Kadi cases have played a crucial role in refining the EU's sanctions regime, steering it towards greater conformity with advancements in human rights. These include enhanced judicial protection, due process, and the right to a fair trial, along with achieving a more nuanced balance between human rights and the objectives of the CFSP within the ambit of EU foreign policy. However, this was accomplished by overlooking the fundamental and duties arising from international law. A significant constitutional issue raised by these cases relates to the degree to which core EU principles such as liberty, democracy, respect for human rights, and fundamental freedoms take precedence over other norms within the CFSP framework, particularly when complying with obligatory UNSC Resolutions. Notably, the Court's discussions on EU constitutional principles and foundational values did not explicitly mention the rule of law. This omission, possibly inadvertent, is significant, though it should be understood that the principles discussed by the Court do not formally rise to the level of supra-constitutional norms, as Pech correctly claims.[517] Instead, these principles constitute the core foundations of the Union's legal order. What the Court achieved in *Kadi* was to underscore the essential nature of these principles from a substantive standpoint. In practical application, this dictates that all Union norms should be interpreted consistently in a way that strengthens and ensures adherence to these foundational principles, while not elevating them to a supra-constitutional status, which is contrary to the Court's actual approach.

Expanding on the ECJ's stance in the *Kadi* cases, it is important to highlight how the Court tackled the transparency aspect of listing criteria in the targeted sanction regime, which is significant for ensuring effective judicial protection. Hence, the Court determined that the evidence against Mr. Kadi, as provided in the UNSC narrative summary, was inadequate for a comprehensive statement of reasons. These findings highlight the obligation of the EU to guarantee that individuals have the capacity to effectively challenge accusations made against them. This requires providing clear, precise, and individualized justifications for imposing

[516] *Central Bank of Iran v Council of the European Union*, Case C-266/15 P, para. 66.
[517] L. Pech (2010), 365.

sanctions, thereby drawing attention to deficiencies in the UN's approach. In addition, another key element in the *Kadi* proceedings was the doctrine of equivalent protection. This concept suggests that a court should relinquish its jurisdiction over actions from another legal system only if that system provides a level of fundamental rights protection comparable to its own. The doctrine aims not to resolve conflicts between different legal values but to balance the interests involved and facilitate the integration of the conflicting legal systems. In the *Kadi* cases, the ECJ's approach was focused on safeguarding fundamental rights within the EU legal framework, and to project these principles onto the international legal arena.

Moreover, the emphasis on procedural rights, particularly highlighted in *Kadi II*, led to significant changes in the EU's General Court's Rules of Procedure in 2015. A key development was the adoption of the "closed material procedure" within EU law, which permits principal entities, typically the Council, to submit evidence to the CJEU for use in targeted EU restrictive measures, while keeping this information confidential from the individuals involved.[518] This development marked a departure from previous constraints where the CJEU was unable to consider evidence disclosed to only one party, a limitation that often led to the annulment of the Council's decisions due to an insufficient factual basis. At the same time, this reform influenced the role of the UN Ombudsperson, amplifying their responsibility to ensure that listings are backed by sufficient, plausible, and trustworthy evidence.[519] These alterations demonstrate the UN's continuous commitment to improving human rights norms worldwide. Furthermore, the adjustments made in response to the *Kadi* judgments highlighted an increasing focus on finding a balance between secrecy and openness in the EU's decision-making processes, in accordance with core principles like those expressed in Article 1 TEU.

4.4.1. Transparency, legality, and the balance of external and internal obligations

The current state of transparency in the EU's sanction regime, particularly regarding the inadequate distinction between economic sanctions against third countries and targeted sanctions against suspected terrorists, is not entirely satisfactory. Economic sanctions have far-reaching consequences and present significant challenges for affected individuals, especially in contesting CFSP decisions, unlike individuals targeted for terrorist activities. Despite this, commendable

[518] Rules of Procedure of the General Court, *Official Journal*, L 105, 23.04.2015.

[519] United Nations Security Council, "Approach and Standards", available at: *https://www.un.org/securitycouncil/ombudsperson/approach-and-standard*, 08.12.2023.

efforts have been made to enhance the Parliament's role in this field and to revise the Court's Rules and Procedures, recognizing the legitimacy concerns associated with the EU's sanction regime under the CFSP. Specifically, the Parliament's influence in the CFSP has been bolstered through measures like the 2014 resolution, which established collaboration with the Council and the HR/VP for access to classified CFSP information.[520] Nevertheless, while these attempts to adjust to the evolving aspects of CFSP restrictive measures aim to preserve EU security, internal legitimacy, and external credibility, the efficacy of the newly established procedural framework continues to be unclear. As Rosa notes, there's ambiguity over whether the new procedural safeguards will prompt the Council and EU Member States to share confidential information with the Court when needed.[521] This uncertainty is compounded by the UK's abstention from adopting the Court's revised Rules of Procedure.

Additionally, the argument highlighting deficiencies in transparency is bolstered by the fact that the right to access documents and justice still faces limitations within the existing framework. A significant volume of classified information within the CFSP area exists for clear, justified reasons, making public access to CFSP measures highly contentious, especially in the EU's political dealings with third countries. Thus, reconciling the need for security and the Council's discretion in the CFSP with the imperative to uphold procedural rights of suspects and accused individuals poses a significant challenge. Given the intense economic impact of the EU sanction regime on targeted groups and broader populations, as seen in Iran, Syria, and the Russian Federation, the EU must be more cognizant of the "humanitarian ramifications and the moral and practical responsibilities arising from that choice," as Moret highlights.[522] Closed judicial proceedings on the legality of restrictive measures can adversely affect fundamental rights like the right to effective judicial protection. However, further advancement in this area does not have to conflict with international public law principles, as demonstrated in this instance.

Given the lack of a specific legal mandate beyond the broad obligation of sincere cooperation outlined in Article 4(3) TEU, which allows flexibility for Member States and potentially affects their independent exercise of international powers, practical challenges arise in applying these new

[520] European Parliament resolution of 13 March 2014 on the implementation of the Treaty of Lisbon with respect to the European Parliament 2013/2130(INI), C 378/218, *Official Journal of the European Union*, 09.11.2017.
[521] Allan Rosas, "EU Restrictive Measures against Third States: Value Imperialism, Futile Gesture Politics or Extravaganza of Judicial Control?", *Diritto dell'Unione europea*, No. 4/2016, 637-651.
[522] Erica Moret, "Humanitarian Impacts of Economic Sanctions on Iran and Syria", *European Security*, No. 24/2014, 1-21.

procedural mechanisms in the Court. It could even be argued that sincere cooperation under Article 4(3) TEU leads more to the politicization than the legalization of EU sanction policy, given the Parliament's limited role and the Council's broad discretion in imposing autonomous EU targeted measures. Importantly, the duty of sincere cooperation mandates that Member States collaborate with the EU to ensure the fulfillment of its obligations. Similarly, it is expected that this principle should reciprocally apply to the EU in relation to the obligations of Member States under international law, thereby ensuring a balanced and effective implementation of both EU and international law.

The principle of sincere cooperation holds significant legal weight in the context of this discussion, especially when considered alongside the principle of autonomy. As highlighted by Lukić-Radović, these principles navigate a delicate balance, bridging the gap between EU law and the political domain.[523] The principle of sincere cooperation is, however, subject to limitations and intricacies due to its interplay with the principles of conferral, proportionality, and subsidiarity. This interrelation adds complexity to the dynamics between Union and Member State interests in external affairs.[524] The role of sincere cooperation is crucial in maintaining the integrity of the EU's institutional framework and the balance it establishes. In contrast, the principle of autonomy is primarily focused on safeguarding the EU's and the CJEU's independent legal status within its internal jurisdiction. The *Kadi* decisions underscore this aspect by enhancing the EU's internal autonomy through the reinforcement of its legal principles, especially in the realm of fundamental rights. Yet, this internal fortification has implications for the EU's external autonomy, leading to intricate interactions with international legal systems and frameworks. While the internal aspects of sincere cooperation have been strengthened, ensuring that EU laws and obligations are effectively implemented within Member States, the external dimensions, particularly those concerning the alignment of Member State obligations with international law, have faced challenges, as illustrated by *Kadi* decisions.

4.4.2. The CJEU's role: champion of human rights or guardian of CFSP objectives?

The complexity of the *Kadi* saga extends beyond just a focus on human rights, highlighting the considerable influence of the CJEU and calling for a more expansive understanding of

[523] Maja Lukić-Radović, "Loyalty Within the European Union – A Legal or Merely a Political Duty", *Annals of the Faculty of Law University of Belgrade*, 3/2018, 235-249.
[524] P. Van Elsuwege (2019), 284.

international law. Notably, in these rulings, the Court deviated from the Advocate-General's recommendation for limited judicial review in cases involving UNSC sanctions. The Advocate-General had suggested this restrained approach as a means to balance the dominance of EU courts with respect for the international legal framework.[525] Yet, the Court opted not to adhere to this proposal, choosing instead to fully exercise its judicial power and affirm its influential position in the realm of international law. As De Búrca insightfully points out, this decision reflects the ECJ's distinct dualist attitude towards international law, reminiscent of the stance taken by the US Supreme Court in *Medellin v. Texas.*[526] While *Kadi* cases signify progress in human rights protection, particularly regarding judicial protection rights, they also mark a shift in the EU's approach to international law and institutions, a point noted by scholars like De Búrca and Pech.[527]

In other words, the CJEU's handling of the *Kadi* cases indicates a pronounced constitutional inclination towards reinforcing the EU legal order, potentially even at the cost of deviating from international public law. This approach suggests that the CJEU's decisions may have been driven more by the objectives of the CFSP and political considerations, rather than a genuine commitment to enhancing the global human rights system. This interpretation of the Court's actions points to a strategic prioritization of EU internal legal frameworks and political goals over the broader principles of international law, highlighting a complex interplay between legal and political dimensions in the EU's decision-making process. This aligns with Ziegler's concept of constitutionalism on the inside and fragmentation on the outside, and Rakić's view of a blend of constitutionalization and Eurocentrism, posing challenges to the adherence to international law principles.[528] The outcomes of *Kadi* cases continue to generate debate in legal circles. Many scholars view the judgments as pivotal in advancing fundamental human rights, especially against the backdrop of the UNSC resolutions and the UN's individual listing mechanism falling short of basic due process standards. This is seen in the context of upholding the rule of law principle

[525] Opinion of Mr Advocate General Bot delivered on 19 March 2013, *European Commission and Others v Yassin Abdullah Kadi*, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:176.
[526] Supreme Court of the United States, *Medellín v. Texas*, 06-984, 5 August 2008.
[527] L. Pech (2010), 365.; G. De Búrca (2010), 1. Also *see* Marise Cremona, "Extending the Reach of EU Law: the EU as an International Legal Actor", *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law,* (eds. Marise Cremona, Joanne Scott), Oxford, 2019, 79.
[528] Katja S. Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights", *Human Rights Law Review*, No. 9/2009. 295.; Also *see* Branko M. Rakić, „Fragmentacija međunarodnog prava i evropsko pravo – na zapadu nešto novo", (Fragmentation of International Law and European Law – Someting New in the West), *Annals of the Faculty of Law University of Belgrade*, No. 57/2009, 141.

amidst increasing global security challenges, even though the rule of law was not directly addressed in the judgments.[529]

Furthermore, some analysts believe that *Kadi* decisions were inspired by *Solange* decisions of the 1970s.[530] They argue that acknowledging the absolute authority of UNSC resolutions might have undermined the primacy of EU law over national laws. Kokott and Sobotta, in particular, commend these decisions for bolstering fundamental rights and for critically examining the legality of EU measures that implement UNSC Resolutions.[531] They dispute the notion of a wholesale rejection of international law suggested by the *Kadi* decisions. Additionally, they highlight the ambiguity surrounding the EU's adherence to UNSC measures, given its indirect membership through Member States, as opposed to being a direct member of the UN.

Nonetheless, these perspectives can be contested by the objectives of the UN Charter, which emphasize "the promotion and encouragement of respect for human rights and fundamental freedoms for all".[532] This stance aligns with Rakić's argument that within the UN framework, a human rights system is established, reflecting values that are fundamental to European integration.[533] Additionally, the UN Charter's Article 24, Paragraph 2, mandates the UNSC to honor the goals and principles of the UN, including the respect for human rights within its system. This requirement presents EU courts with a chance to strike a balance between upholding human rights and pursuing effective anti-terrorism measures, thereby avoiding a clash between the EU legal order and the legal framework set by the UN Charter and preventing the detachment of EU law from UN law.

In truth, the ECJ avoided engaging deeply with the core issues of the cases in question. Rather than advocating for tangible enhancements in due process rights within the UN's sanction regime, including the listing and de-listing procedures, the Court adopted a somewhat detached stance, merely reiterating that the UN Charter does not specify a particular method for integrating sanctions into domestic legal systems. This strong pluralist approach could have been supplanted by a "soft constitutionalist approach," as De Búrca aptly suggests, which would facilitate the

[529] Antonios Tzanakopoulos, "Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ", available at: *https://www.ejiltalk.org/kadi-showdown/,* 09.07.2023.
[530] Stefan Griller, "International Law, Human Rights and the Community's Autonomous Legal Order; Notes on the European Court of Justice Decision in Kadi", *European Constitutional Law Review,* No. 4/2008, 552.
[531] J. Kokott, C. Sobotta, 1017.
[532] UN Charter, Chapter XII, Article 76.
[533] B. M. Rakić (2009), 141.

harmonization of differing legal norms and systems.[534] The complexity of the *Kadi* dilemma is further heightened by the diverse and often contentious constitutional trajectories in the CJEU's jurisprudence. Although the Court has consistently pushed the boundaries of the Treaties over time, its approach to constitutionalization in jurisprudential practice has been somewhat inconsistent, fluctuating between dualist and monist interpretations. Thus, the *Kadi* cases represent both a continuation of the monist logic seen in cases like *Les Verts* and *Foto-Frost*, and an extension of the dualist principle from landmark cases like *Van Gend and Loos* and *Costa v. E.N.E.L.*, which highlighted both the autonomous nature of the new legal order *vis-à-vis* Member States and underscored the supremacy of the international legal order.

The approach of the Court in the *Kadi* cases can arguably be seen as bordering on constitutional hypocrisy and ambiguity, particularly when juxtaposed with its stance in the *Western Sahara* case. In the latter, the Court emphasized the EU's duty to fully adhere to international law, including general, customary laws, and binding international conventions.[535] Intriguingly, the Court referenced the *Kadi* case in this context, despite the fact that it showcased the EU's seeming indifference to the UN Charter and international legal standards, thus appearing to reinforce the notion of constitutional hypocrisy, rightfully sparking debate and discussion. Critically, striking a balance between the EU's internal autonomy and adherence to international law was feasibly within reach, particularly if there was a focused effort on enhancing human rights standards. This possibility is underscored by the UNSC's willingness and awareness of procedural shortcomings, evidenced by its openness to procedural reforms and improvements. Despite varied perspectives among scholars, the *Kadi* cases are widely recognized as a pivotal moment, marking a departure from the EU's historical commitment to international law and institutions. These cases signify a shift, suggesting that the EU may prioritize its internal legal principles and CFSP objectives, particularly in the area of human rights, even when this could potentially conflict with its obligations under international law. This shift represents a critical juncture in the EU's legal and institutional evolution, highlighting the ongoing tension between its internal legal autonomy and its role within the global legal framework.

[534] G. De Búrca (2010), 4.
[535] *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs,* Case C-266/16, Judgment of the Court (Grand Chamber) of 27 February 2018, ECLI:EU:C:2018:118, paras. 47-48.

4.5. CJEU and ECtHR: ECHR accession as a remedy for CFSP human rights issues

The relationship between the CJEU and the ECtHR brings into focus the ECHR as a potential solution to human rights challenges in the CFSP sanction regime. As seen, the CFSP sanctions, aimed at international peace and security, often involve measures that can infringe on human rights, necessitating a framework for protection and oversight. The ECHR, under the purview of the ECtHR, provides such a framework, but the EU's obligation to adhere to it has been met with reluctance, particularly in the context of the CFSP. This reluctance aligns with arguments suggesting that the CJEU prioritizes CFSP objectives over human rights protection, despite recent movements within the EU, particularly from the European Commission, emphasizing the importance of ECHR accession. The Commission asserts that accession to the ECHR remains a priority, arguing that it will "reinforce our common values, improve the effectiveness of EU law, and enhance the coherence of fundamental rights protection in the EU." [536] However, the CJEU's limited jurisdiction over CFSP matters and the complex balance between security and individual rights complicate this integration. While the ECtHR could offer a complementary mechanism for addressing human rights violations from CFSP sanctions, the EU's incomplete accession to the ECHR and the need to reconcile different legal orders without undermining the sanctions' effectiveness present significant challenges.

Since the 1970s, the European Union has been on a path towards joining the ECHR. This direction was underscored in the *Nold v. Commission* case, where the Court declared that "fundamental rights form an integral part of the general principles of law."[537] This pronouncement highlighted two concurrent sources of influence: the constitutional traditions prevalent among the Member States, and the international treaties focused on human rights protection, to which Member States have either contributed or are signatories.
In 1979 the Commission advocated for the EU's accession to the ECHR. This proposal aimed to bolster Europe's image as a stronghold of freedom and democracy, enhance the protection of human rights, and fortify the EEC institutions. The Commission noted that joining the ECHR would enable direct legal challenges to the EEC's actions, moving beyond reliance on legal actions against individual member states responsible for implementing specific measures. A key aspect of

[536] European Commission, "2016 Report on the Application of the EU Charter of Fundamental Rights", available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017SC0162*, 08.12.2023.
[537] *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, Case 4-73, Judgment of the Court of 14 May 1974, ECLI:EU:C:1974:51, para. 2.

this accession was to maintain the supremacy of Community law, introducing a comprehensive set of human rights standards binding on EEC institutions. This initiative gained particular relevance in light of a decision by the German Constitutional Court, which questioned the precedence of Community law. This decision led to the notable *Solange I* case before the ECJ, wherein it was determined that fundamental principles from national constitutions should not override the directly applicable Community law.[538]

Although not mandatory, the ECJ increasingly began to reference the ECtHR, integrating its legal interpretations into its own decisions. This approach is clearly illustrated in a variety of cases, with *Kadi* being a prominent example.[539] However, in 1996, the ECJ declared that Community treaties at that time did not facilitate the EU's accession to the ECHR, rendering the ECHR non-binding on the European Community prior to the Lisbon Treaty. This position was further highlighted in the 1999 *Mathews v. The United Kingdom* case[540], where the ECtHR established the EU's non-liability under the ECHR due to its non-signatory status, a stance differing from the situation with GATT, where EU Member States' participation did not extend EU obligations to areas under Member State jurisdiction. Notably, *Mathews v. The United Kingdom* marked the first instance in which the ECtHR found that an EU Member State had breached the Convention as a result of EU law.[541]

The relationship between the ECJ and the ECtHR was notably exemplified in *Bosphorus v Ireland,*[542] where the ECtHR clarified that individual EU Member States, not the EU, were accountable for European Community actions violating the ECHR. This ruling, arising from Ireland's seizure of an aircraft under an EC regulation based on a UN Security Council Resolution, established that Member States remain responsible for their actions within international organizations. The *Bosphorus* decision, distinguishing from *Matthews v. The United Kingdom*,

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[538] I. Krstić, B. Čučković, 52.

[539] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, para. 283.; *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others*, Case C-260/89, Judgment of the Court of 18 June 1991, ECLI:EU:C:1991:254, para. 41.; *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, Case C-305/05, Judgment of the Court (Grand Chamber) of 26 June 2007, ECLI:EU:C:2007:383, para. 29.

[540] *Matthews v. The United Kingdom,* Application No. 24833/94, Judgment Strasbourg 18 February 1999.

[541] Tobias Lock, "Beyond Bosphorus: The European Court of Human Rights'Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights", *Human Rights Law Review*, No. 10/2010, 530.

[542] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98, Judgment Strasbourg 30 June 2005.

addressed violations stemming from secondary EU legislation and emphasized the role of the ECJ in challenging such acts. It was viewed as an effort to align the EU legal order's autonomy with the principles set out in *Matthews v. The United Kingdom*, especially in the context of the EU's potential ECHR accession and the overlapping jurisdictions of the ECtHR and the ECJ. It is important to remember that these decisions regarding the specific issues of the relationship between the EU and the ECHR were deemed inadmissible *rationae personae*, primarily because the EU, both then and now, is not a signatory party to the ECHR. Furthermore, the importance of the *Bosphorus* case lies in its reaffirmation of the "equivalent protection" principle, initially established in the *M & Co v. Germany*[543] case by the ECtHR. This concept implies that the ECtHR regards the human rights protection under EU law as comparable to that offered by the ECHR. The judge Rees, in his concurring opinion in the *Bosphorus* case, cautioned against the concept of assumed Convention compliance by international organizations, particularly the Community. He argued that this presumption might be unnecessary and potentially harmful to future human rights safeguards in Contracting States when they delegate parts of their sovereignty to an international entity. He emphasized that the judgment should not be interpreted as endorsing a double standard and insisted that the presumption of Convention compliance should not preclude a thorough, individual examination by the ECtHR of each case to determine if there was an actual violation of the Convention.[544] The Lisbon Treaty served as a pivotal moment for the EU's accession to the ECHR, providing a legal foundation through Article 6 TEU. This Article not only established the legal framework for accession but also mandated it, stating the following:

"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."[545]

However, EU accession to the ECHR also depends on the consent of all 46 Member States of the Council of Europe, necessitating additional provisions. Within this framework, Protocol No. 8 to the EU Treaties specifies that a comprehensive agreement is necessary for the EU's accession to the ECHR. This agreement must tackle complex matters and establish specific provisions for

[543] *M & Co. v. Federal Republic of Germany*, Application No. 13258/87, Judgment Strasbourg 9 January 1990.
[544] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Concurring opinion of judge Rees, para 2. Also *see* Frank Schorkopf, "The European Court of Human Rights' Judgment in the Case of Bosphorus Hava Yollari Turizm v. Ireland", *German Law Journal*, No. 9/2005, 1263.
[545] Consolidated version of the Treaty on European Union, Article 6(2).

the EU's potential involvement in the ECHR's oversight bodies. Additionally, it must create a mechanism to ensure that legal proceedings initiated by non-EU Member States and individual applications are appropriately directed to either Member States or the EU. A key feature of this mechanism is the co-respondent system, which allows the EU to become a co-respondent in cases where an EU Member State is acting based on EU law. This provision applies particularly in situations where the alleged human rights violation could only be averted by contravening an obligation under European law.[546]

On the other hand, the amendment of Article 59 of the ECHR through Protocol No. 14, which came into effect on 1 June 2010, signaled a basic willingness of the states parties to the ECHR to accept the EU's accession. This amendment allowed for the EU, not just individual Member States, to join the ECHR, although it did not specify whether further modifications to the ECHR would be required. The explanatory report to Protocol No. 14 indicated that legal and technical changes would be necessary, referencing a 2002 report by the Steering Committee for Human Rights (hereinafter: CDDH) that identified relevant issues.[547] Reflecting these requirements, the Council of Europe's Member States and the EU Commission drafted an agreement for accession, incorporating amendments to the Convention. However, the ECJ found these drafts incompatible with the TEU in its Opinion 2/13, mirroring its earlier reservations in Opinion 2/94. The ECJ had previously declared that the EU's accession to the ECHR is not feasible due to insufficient legal basis.[548]

4.5.1. Opinion 2/13 on the EU accession to the ECHR

The ECJ's Opinion 2/13 significantly impacted the EU's efforts to join the ECHR, leading to an unexpected outcome. Despite the legal groundwork laid by Article 6(2) TEU, which provided a framework for accession, along with Protocol 8 to the Treaties and Article 218 TFEU, the Court ruled that the proposed Draft Agreement for EU's accession to the ECHR was not compatible with EU law. The decision came as a particular surprise given the earlier modification of Article 59 of

[546] For further information on the co-respondent mechanism, *refer* to Ivana Krstić, Bojana Čučković, "EU Accession to the ECHR: Enlarging the Human Rights Protection in Europe", *Annals of the Faculty of Law University of Belgrade,* No. 64/2016, 68-70.

[547] Steering Committee for Human Rights (CDDH), Abridged Report of the 52nd Meeting (Strasbourg, 6-9 November 2001), available at: *https://rm.coe.int/16805e2702,* 10.12.2023. Also *see* Tonje Meinich, "EU Accession to the European Convention on Human Rights: Challenges in the Negotiations", *The International Journal of Human Rights*, No. 7/2020, 994.

[548] *Opinion pursuant to Article 228 of the EC Treaty*, Opinion 2/94, Opinion of the Court of 28 March 1996, ECLI:EU:C:1996:140.

the ECHR via Protocol 14. This amendment facilitated the EU's potential accession by removing the stipulation that only state parties were eligible to join the Convention, effectively signaling the readiness of all Convention parties to move forward with the EU's accession. The Court's adverse opinion was met with disbelief by many, given the longstanding negotiations and general consensus that the EU should join the ECHR to enhance its human rights protection. This consensus was underpinned by the fact that all EU Member States are contracting parties to the ECHR, and the Convention is considered an integral part of Europe's cultural and political heritage.[549]

Negotiations for the EU's accession to the ECHR commenced in 2010 but were quickly halted by the EU due to concerns with the initial document's handling of the CFSP. These issues were eventually addressed, and the Commission, utilizing its authority under Article 218 TFEU, submitted the revised accession agreement to the Court for review. Article 218 TFEU allows the Court to opine on international agreements, and in this case, the Court's negative response meant that the agreement could not take effect without further amendments or revisions to the Treaties, which was the situation that unfolded. The ECJ highlighted multiple discrepancies between the proposed Draft Accession Agreement and existing EU Treaties, creating significant obstacles for the EU's accession to the ECHR. At the heart of these issues was the requirement under Article 6(2) TEU, which mandates that the EU's accession must not modify the competencies established in the Treaties. This position conflicted with the ECtHR's autonomy in its proceedings. The Opinion cast doubt on the effectiveness of Article 6(2) TEU, which mandates the EU's accession to the ECHR, with some critics considering it a "dead letter".[550] Additionally, the realm of the CFSP became a focal point of contention. The CJEU's limited jurisdiction in CFSP matters clashed with the principle of equal treatment for EU and Member State acts under the CFSP, creating potential biases against applicants.

The proposed co-respondent mechanism within the Draft Accession Agreement also presented a complex issue. This mechanism stemmed from the fact that the majority of EU law is implemented by Member States. Typically, an applicant can bring a case against a Member State,

[549] Sionaidh Douglas-Scott, "Opinion 2/13 on EU Accession to the ECHR: a Christmas bombshell from the European Court of Justice", available at: *https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/,* 14.12.2023.
[550] Tobias Lock, "The future of EU Accession to the ECHR After Opinion 2/13: Is It Still Possible and Is It Still Desirable?", *University of Edinburgh School of Law,* Research Paper No. 2015/18, 1.

but often these states have little to no discretion in how they implement actions directed by the EU. In such situations, the actual issue may originate from an EU measure rather than the implementing Member State. To address these complexities, Protocol 8 to the Treaties proposed the establishment of a co-respondent mechanism. This mechanism raised challenging questions regarding the apportionment of responsibility between the EU and its Member States. It allowed for a contracting party to become a co-respondent either by accepting an invitation from the ECtHR or through the ECtHR's decision upon the contracting party's request. However, implementing this review process would necessitate the ECtHR to evaluate EU law's rules concerning the division of powers between the EU and its Member States, even though the mechanism was not designed to be mandatory. The ECJ expressed concerns that allowing the ECtHR to make such assessments could potentially disrupt the balance of powers. This apprehension was echoed by Advocate General Kokott, highlighting the delicate nature of the EU's internal division of powers and its implications for external legal assessments by bodies like the ECtHR.[551]

Furthermore, the proposal on the prior involvement procedure was intended to reinforce the EU's autonomy. This was to be achieved by granting the Court of Justice the initial opportunity to interpret and pass judgments on matters related to EU law, ensuring that these issues are addressed within the EU judicial framework before potentially being escalated to the ECtHR. Despite these intentions, the ECJ rejected this method, expressing concerns that it would relegate its role to merely validating EU law, transferring interpretative authority to the ECtHR. The Court of Justice argued that decisions regarding prior involvement should be made by a relevant EU institution, rather than the ECtHR, fearing that this shift might grant the latter jurisdiction over interpreting the ECJ's case law. Contrasting this viewpoint, Advocate General Kokott argued that this procedure would not undermine the EU's legal autonomy. Kokott emphasized that the ECtHR would invoke the prior involvement procedure only if the ECJ had not previously resolved the legal issue at hand in a current application.[552] This approach is in line with the Draft Accession Agreement, which stipulates that the ECtHR should defer to the ECJ, allowing it adequate time to determine if an EU law provision aligns with human rights standards, assuming the ECJ has not already made such a determination. Therefore, this structured approach, as advocated by Kokott,

[551] *Opinion pursuant to Article 218(11) TFEU,* View of Advocate General Kokott delivered on 13 June 2014, para. 175.
[552] *Ibid*, para. 184. Also *see* T. Lock (2018), 4.

suggests that the EU's autonomy and the Court's authoritative position would remain intact and unthreatened by the prior involvement procedure.

Crucially, the ECJ addressed the area of the CFSP in its Opinion 2/13, examining the unique aspects of EU law in relation to this type of judicial review. The Court famously noted its inability to fully define the limits of its CFSP jurisdiction but asserted that certain acts are outside its scope.[553] The Court noted that its limited jurisdiction over CFSP acts meant it wouldn't have the opportunity to interpret EU law regarding the human rights compliance of CFSP measures. This could lead to a scenario where the ECtHR interprets EU law independently of the CJEU, potentially undermining the autonomy of Union law and the CJEU's exclusive interpretative authority as outlined in Article 344 TFEU. An example provided was the possibility of human rights violations claims arising from EU military actions, leading to cases against the EU in the Strasbourg court. This situation would effectively give the ECtHR sole jurisdiction over reviewing the EU's compliance with ECHR-guaranteed rights, a role outside the EU's judicial structure. The ECJ argued that the Draft Agreement did not adequately consider the specificities of EU law in CFSP judicial review, emphasizing that special treatment of the EU and its Member States under the CFSP could undermine the principle of equal treatment and disadvantage applicants.

Critics argue that this stance delivered by the ECJ is detrimental to human rights protection.[554] They suggest that the ECtHR, as a supervisory Court, could effectively address gaps in CFSP areas due to the limited CJEU jurisdiction. However, the Court's emphasis on maintaining its autonomy and position as the primary arbiter of EU law seems to overshadow a commitment to addressing human rights issues authoritatively. Considering the statement made in 2014 by the President of the ECJ, which emphasized that the Court is not a human rights tribunal but rather the Supreme Court of the Union, this stance aligns coherently with that perspective.[555] Furthermore, this approach, along with the reasoning applied in *Kadi* cases, suggests that the Court does not prioritize human rights concerns to the extent expected. The ECJ's insistence on accepting the Draft Agreement under its terms raises concerns about the protection of human rights, potentially shielding the EU from various human rights claims, especially in sensitive areas like CFSP and AFSJ. Consequently, the current situation does not significantly enhance human rights protection,

[553] *Opinion pursuant to Article 218(11) TFEU*, Case Opinion 2/13, para. 251.
[554] S. Douglas-Scott; I. Krstić, B. Čučković, 72.
[555] International Federation for European Law (FIDE), *Proceedings: Speeches from the XXVI FIDE Congress*, Vol. 4, 2014, 155.

leading to calls for Treaty amendments or renegotiation of the Draft Agreement. Finally, it is important to note that the apprehensions raised by the ECJ regarding the ECtHR are often considered baseless and rightly so. This is because the ECtHR does not pass judgment on the validity or legality of national laws, but rather evaluates their conformity with the ECHR. Such a perspective indicates that the ECtHR's supervision over the CJEU would not undermine the EU law's autonomy; instead, it could enhance the protection of human rights within the EU.

Despite the Lisbon Treaty paving the way for the EU's accession to the ECHR, the EU has shown reluctance to fully commit. This hesitancy leaves the ECHR non-binding on the EU, meaning the Union is not legally accountable under the Convention's rights. In the current context of declining political stability in Europe, enhancing the human rights protection system is of paramount importance. Particularly concerning are the moves by the UK, Switzerland, and other countries to withdraw from the ECHR, coupled with Russia's expulsion from this regional framework due to its actions in the Ukrainian conflict. Opinion 2/13 of the Court, which plays a significant role in this hesitancy, appears to be more politically driven than legally justified. Most of the issues raised in this opinion are surmountable and do not realistically impact the EU's competencies or the unique features of EU law. Accession to the ECHR, while potentially expanding the influence of the Strasbourg court, should also be viewed as a means to bolster human rights within the EU and enhance the EU's standing as a credible international entity, as Krstić and Čučković have rightly emphasized.[556]

The necessity of the EU's accession to the ECHR can also be viewed through the lens of the *Bosphorus* presumption of equivalent protection, a principle that was notably evident in the Kadi cases as well.[557] This presumption operates on the principle that as long as the EU's protection level mirrors that of the ECHR, it is assumed that a state adhering to EU obligations has not strayed from its commitments under the Convention. This presumption has historically afforded the EU a special status, even without being a formal party to the Convention.[558] The proposed accession agreement acknowledges the EU's unique position and seeks to formalize and institutionalize it in a different manner, simultaneously removing the Bosphorus privilege, which is currently deemed

[556] I. Krstić, B. Čučković, 74.
[557] Maja Brkan, "The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future", *EU External Relations Law and Policy in the Post-Lisbon Era,* (ed. Paul James Cardwell), The Hague, 2012, 106-107.
[558] Christina Eckes, "One Step Closer: EU Accession to the ECHR", available at: *https://ukconstitutionallaw.org/2013/05/02/christina-eckes-one-step-closer-eu-accession-to-the-echr/,* 14.12.2023.

necessary. However, the challenges surrounding the accession process cannot be overlooked. These challenges encompass two main scenarios: amending the founding Treaties of the EU and revisiting negotiations for the EU's accession. Both of these scenarios present significant political hurdles. Amending the treaties is inherently complex, while renegotiating the accession would necessitate the consensus of all 46 member states and subsequent ratification procedures through the European Parliament. Nevertheless, the notion that challenges can be overcome with adequate political will and consensus suggests a pathway to surmounting these obstacles.

Recently, there has been notable advancement in the EU's efforts to accede to the ECHR. Since 2019, progress has been made, beginning with the EU Commission's announcement to the Council of Europe Secretary General about resuming negotiations, leading to the renegotiation process starting in 2020.[559] This development, breaking years of deadlock, indicates a mutual willingness to revise the 2013 Draft Accession Agreement, potentially in the form of a provisional agreement. This progress, particularly the advancements made in 2023, should be embraced enthusiastically. The negotiations involving the 46+1 group (all Council of Europe Member States plus the EU) have yielded technical-level advancements, including a consensus on the voting rules of the Council of Europe Committee of Ministers. This will oversee the EU's implementation of ECHR judgments in line with Article 7 of the Draft Accession Agreement. The final report from the 46+1 group has been submitted to the Council of Europe Steering Committee for Human Rights, laying the groundwork for further consultations. Even with these developments, the area of CFSP continues to pose intricate challenges, seemingly to be addressed internally, especially in terms of how CFSP acts are managed given the CJEU's lack of jurisdiction in this area. Moreover, the accession process will require an affirmative stance from the CJEU and subsequent ratifications by both the EU Parliament and all national parliaments.

The dedication of the Council of Europe to this endeavor is clear, as seen in the ECtHR case of *Avotiņš v. Latvia*.[560] In this case, the Court reinforced the Bosphorus presumption, confirming that states implementing EU law must adhere to their commitments under the ECHR. The judgment highlighted the principle of mutual trust, which the ECJ had underscored in Opinion

[559] Delegation of the European Union to the Council of Europe, "Major progress on the path to EU accession to the ECHR: Negotiations concluded at technical level in Strasbourg", available at: *https://www.eeas.europa.eu/delegations/council-europe/major-progress-path-eu-accession-echr-negotiations-concluded-technical-level-strasbourg_en?s=51*, 16.12.2023.
[560] *Avotiņš v. Latvia*, Application No. 17502/07, Judgment Strasbourg 23 May 2016, para. 101.

2/13 as being critically important in EU law for fostering an area without internal borders.[561] This principle is relevant only when domestic authorities are constrained and function within the EU law's extensive supervisory system. Krstić and Čučković correctly see this as an attempt to align the perspectives of the two European courts, thereby reinforcing the principle of mutual trust.[562]

The prevailing mood within the ECJ casts doubt on its readiness to endorse a renegotiated Draft Accession Agreement. Halleskov Storgaard critically observes the ECJ's unyielding stance towards Strasbourg in Opinion 2/13.[563] Lock expands on this critique, indicating that the ECJ might be unnecessarily externalizing issues that could be resolved internally.[564] He highlights that the Draft Accession Agreement allows for the preservation of the EU's unique features while giving the ECtHR exclusive responsibility for enforcing ECHR compliance. This Agreement also ensures that Member States adhere to the principle of sincere cooperation, outlined in Article 4(3) TEU, and respects Article 344 TFEU, which forbids Member States from seeking solutions to Treaty interpretations or applications outside the established judicial mechanisms. Also, Advocate General Kokott has argued that concerns about the EU's autonomy could be mitigated with minor modifications, and these issues would not affect EU primary law.[565] She further explains that EU law, while unique, is not self-sufficient and can maintain its autonomy while complying with the ECHR.

Moreover, the ECJ's position overlooks the role and judicial power of the ECHR and the ECtHR. It seems that the Court is intent on prioritizing the EU Charter above the ECHR, a move that potentially risks diminishing the efficacy of human rights and overall judicial protection. The ECJ has been seen to expand its authority, as evidenced in cases like *Bank Refah Kargaran*, where it asserted jurisdiction over damages caused by CFSP decisions. This trend aligns with the *Rosneft* logic and reflects the self-protective stance observed in the *Kadi* cases. The ECJ's statement in Opinion 2/13, which mentioned the undefined scope of its authority in CFSP matters, suggests a broad judicial discretion that may lead to another negative opinion on the renegotiated Accession Agreement. Such a stance could be counterproductive in the current political climate, where human

[561] *Opinion pursuant to Article 218(11) TFEU*, Case Opinion 2/13, 191.
[562] I. Krstić, B. Čučković, 73.
[563] Louise Halleskov Storgaard, "EU Law Autonomy versus European Fundamental Rights Protection-On *Opinion 2/13* on EU Accession to the ECHR", *Human Rights Law Review*, No. 15/2015, 511.
[564] Tobias Lock, "Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR", available at: *https://verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu-2/,* 16.12.2023.
[565] *Opinion pursuant to Article 218(11) TFEU,* View of Advocate General Kokott delivered on 13 June 2014, para. 278.

rights concerns are escalating and the UK's desire to extricate itself from Convention obligations is growing, particularly regarding migrant detention and non-refoulement principles.[566] The irony of the UK, a key originator of the Convention, considering withdrawal alongside Russia's exclusion, poses a significant risk to human rights protection in Europe, especially when it is most needed to "square the European fundamental rights circle" and ensure coherence between EU and Council of Europe systems.[567] It is hoped that the ECJ, recognizing the shifts over the past decade, will agree to subject its decisions to ECtHR review. This could prompt the ECJ to revise its stance to avoid being overridden by the Strasbourg court, leading to a potentially affirmative response in the future. As Opinion 2/13 was unexpected, the forthcoming opinion might similarly surprise, hopefully with a more positive result this time. In light of recent developments, it becomes crucial for the ECJ, which historically has not concentrated on human rights, to utilize the expertise and capabilities of the ECtHR by acceding to the ECHR.

[566] *Non-refoulement*, a core principle in international refugee law, bars returning asylum seekers to places where they may face persecution. Central to the 1951 Refugee Convention, it's part of customary international law. The UK's withdrawal from the ECHR would lift specific obligations but not those under customary law. However, this limits individual human rights recourse, as the International Court of Justice addresses only state-level, not individual, complaints.

[567] Jörg Polakiewicz, "EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?", available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331497,* 15.12.2023.

5. THE CJEU'S ROLE IN ESTABLISHING THE EU AS A SUI GENERIS AUTONOMOUS ACTOR VIA THE COMMON FOREIGN AND SECURITY POLICY

"The time for petty politics is over: the next century will bring the struggle for the domination of the earth – the compulsion to great politics".[568]

From an external viewpoint, the CJEU has evolved into a unique, *sui generis* international entity through its distinctive approach to the CFSP. This evolution marks it as an unconventional yet influential player on the global stage. Conversely, from an internal perspective, the ECJ functions akin to a constitutional court within the EU, focusing on the interpretation and application of EU law. However, a critical aspect seems to be overlooked in the Court's approach: its role as an international court, which necessitates prioritizing international law obligations. Therefore, the Court's judgments should primarily reflect these international responsibilities, ensuring compliance with broader legal frameworks beyond the EU's boundaries. Yet, there is a tendency for the ECJ to predominantly view itself as a constitutional court, primarily committed to fostering the acceptance and enforcement of EU treaties amongst Member States.[569] This internal focus, while crucial for maintaining the legal cohesion of the EU, potentially narrows the Court's perspective, limiting its full engagement with and contribution to the international legal order.

Significantly, the CJEU's jurisprudence demonstrates a diverse stance regarding its autonomy and its relationship with international law. This indicates that the CJEU's approach is not monolithic; there are instances where it aligns with decisions of external courts and complies with mandatory obligations imposed by the UNSC. However, there is a noticeable trend where the CJEU prioritizes the preservation of its own autonomous legal order. This autonomy is marked by a high degree of judicial independence, which often translates into a limited degree of compliance with the rulings of international courts. This particular aspect of the CJEU's approach is vividly illustrated in cases such as Opinion 2/13. This resistance to external oversight underscores the CJEU's emphasis on maintaining its independent judicial framework. Such instances highlight the complexity and nuance in the CJEU's engagement with international law and external judicial

[568] Friedrich Nietzsche, *Beyond Good and Evil,* Penguin Classics, London, 2013, (first published 1886), para. 208.
[569] Gráinne De Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", *Maastricht Journal of European and Comparative Law,* No. 20/2013, 181.

bodies, revealing a delicate balance between international cooperation and judicial autonomy. Before delving into a more detailed exploration of the CJEU preferences regarding its role from an external, international law viewpoint, it is crucial to first reflect on the principle of autonomy as employed by the Court and established within the EU's legal framework.

The principle of autonomy is pivotal to the operations of the CJEU and is a fundamental element in interpreting its decisions and positions within the wider realm of international law. This principle necessitates a dual perspective analysis, considering both internal and external dimensions. In the realm of external relations, the EU exercises its autonomy through a unique legal framework and exclusive competences, particularly evident in areas like trade agreements. The EU's ability to negotiate and finalize international agreements within its areas of competence further exemplifies this autonomy. However, it is the ECJ that emerges as the primary custodian of the EU's legal autonomy. Through its judicial interpretations, the ECJ ensures that international agreements or actions align with EU law, thus safeguarding the EU's legal sovereignty. The Court plays a critical role in delineating how international law should be integrated and applied within the EU context. By doing so, it actively employs the principle of autonomy, not just as a concept, but as a practical and guiding framework in its legal deliberations and decisions. This approach highlights the ECJ's influential role in maintaining the distinct identity of the EU legal order, especially when interacting with international legal norms and obligations.

5.1. Reassessing the EU autonomy in contemporary context

Autonomy is a recurring theme in the discourse on the core attributes of EU law. It is commonly argued that this autonomy includes the power to assess the validity and interpretation of EU law, establishing it as a unique and self-reliant legal order, distinct from national and international legal systems. The substantial body of case law from the CJEU is a critical resource for understanding the development of this concept. Through various rulings, the ECJ has shaped a perspective of autonomy that positions EU law as fundamentally independent. According to De Witte, the EU's autonomy is considered relative, contrasting with the ECJ's judicial perspective, which leans towards an absolute view of autonomy. Specifically, De Witte notes that:

"The autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its Member States, nor that it has ceased to belong to international law."[570]

Therefore, scholars like Eckes appropriately characterize the EU's autonomy as "relative factual autonomy" and "absolute conceptual autonomy."[571] Within this framework, landmark cases such as *Costa v. E.N.E.L.* and *Van Gend en Loos* are particularly influential. These cases are frequently examined together because they jointly affirm the EU as an autonomous legal entity, noted for its direct effect and dominance over the national laws of Member States. Consequently, they have played a key role in shaping a strong sense of EU autonomy, paving the way for a legal hierarchy where EU law takes precedence over national legislations. From these decisions, two main doctrinal viewpoints have emerged. The first views these cases as marking the constitutionalization of EU law and a fragmentation of international law, advocating for what is termed "primary autonomy." The second perspective sees EU autonomy as "secondary autonomy", arising from the collective will of the Member States.[572] Considering the breadth of case law from the CJEU and the definitive statements in key decisions, it becomes evident that the concept of EU autonomy operates on dual fronts.

On the internal front, as articulated in *Costa v. E.N.E.L.*, the EU asserts its autonomy through the primacy of Community law over national legal systems. This concept is rooted in the assertion that "by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."[573] This highlights the integrated and superior nature of EU law within Member States. Externally, the case of *Van Gend en Loos* sheds light on EU autonomy in the sphere of international law. It is encapsulated in the statement, "the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the

[570] Bruno De Witte, "European Union Law: How Autonomous is its Legal Order?", *Zeitschrift für öffentliches Recht,* No. 1/2010, 142.
[571] C. Eckes (2020), 3.
[572] Maja D. Lukić, *Autonomija prava Evropske unije u svetlu novije prakse evropskih sudova,* (Autonomy of European Union Law in the Light of the Recent Case-Law of European Courts), Faculty of Law University of Belgrade, doctoral dissertation, Belgrade, 2013, 7.
[573] *Flaminio Costa v E.N.E.L.,* Case 6-64, para. 3.

subjects of which comprise not only the Member States but also their nationals."[574] This pronouncement emphasizes the unique legal standing of the EU in the international legal arena, marking a limitation of state sovereignty in favor of a collective legal framework. These foundational rulings collectively demonstrate the multifaceted nature of EU autonomy. They reveal a nuanced balance where the EU maintains its distinct legal identity, internally asserting supremacy over Member State laws, and externally positioning itself as a novel entity within the domain of international law. This dual aspect of EU autonomy is crucial for understanding its legal and political interactions both within and beyond its borders.

In the sphere of EU autonomy, there is a rich and varied spectrum of doctrinal approaches, highlighted by the notable discourse among scholars like Schilling, Weiler, and Haltern. Schilling's perspective, for example, categorizes autonomy into three distinct types: absolute constituent power or original autonomy, original constituent power or derivative autonomy, and interpretive autonomy, which is the authority to interpret the highest rules within a legal order. He posits that the EU Treaties hold derivative autonomy, granted through the Member States' authority.[575] Conversely, scholars such as Weiler and Haltern present a different viewpoint. They contend that Member States cannot exercise authority beyond the stipulations of the Treaties, despite the practice of defining competences between the EU and its Member States.[576] This stance places the CJEU as the paramount judicial authority within the EU legal framework. This authority is rooted in critical provisions within the EU Treaties: Article 260 TFEU requires Member States to adhere to the jurisprudence of the CJEU; Article 263 TFEU delineates the division of competences; and Article 267 TFEU compels national courts to request preliminary rulings from the ECJ on issues related to the interpretation of Treaties or EU legislative acts. This exclusive interpretative jurisdiction of the ECJ over EU law, as opposed to national courts, is affirmed by the principle of *kompetenz-kompetenz*. Additionally, perspectives like those of Öberg suggest that both the CJEU and national courts view the EU legal order as possessing derivative autonomy, yet having

[574] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration,* Case 26-62, para. 3.
[575] Theodor Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations", *Harvard International Law Journal,* No. 2/1996, 389.
[576] Joseph H. H. Weiler, Ulrich R. Haltern, "The Autonomy of the Community Legal Order: Through the Looking Glass", *Harvard International Law Journal*, No. 2/1996, 411-448.

achieved interpretative autonomy.[577] This implies that the ECJ is the authoritative body for interpreting EU law and assessing the validity of secondary legislation against the Treaties.

A more nuanced viewpoint indicates that while national courts consider EU law to have autonomy derived from Member States, the ECJ adopts a middle path, striking a balance between absolute and interpretative autonomy. This stance has gradually led the Court to seek an expansion of its autonomy over time. By adopting this approach, the ECJ is effectively equipped to determine and implement measures essential for preserving the autonomy of the EU legal order, thereby reinforcing and maintaining its independent authority. According to some scholars like Lukić, the EU's legal autonomy does not completely disconnect it from the international legal framework. It remains subject to, and influenced by, international law obligations. Lukić posits that the ECJ portrays a stance of robust sovereignty, increasingly interpreted through the lens of autonomy.[578]

From this viewpoint, the ECJ asserts that international norms conflicting with EU norms should not be directly applied in the EU context in their original form. Accordingly, this approach demonstrates the Court's commitment to preserving the EU legal order's uniqueness while also interacting with and adjusting to international law.[579] Although this perspective is largely valid, recognizing that the ECJ typically maintains a regard for international norms, it is evident that the Court is proactively striving for enhanced autonomy, sometimes in ways that provoke contention. Nevertheless, it is essential to recognize that the quest for autonomy is not intended to be absolute, particularly within the formal legal framework. This reinforces the perspective previously articulated by Eckes, indicating that the relevant legal environment tends to favor a form of autonomy that is relative, factual, or grounded in Treaty obligations. This contrasts with the absolute conceptual autonomy frequently demonstrated by the CJEU, which views the Treaties as an independent and distinct source of legal authority.

Additionally, in light of certain landmark rulings and opinions, the Court has markedly proclaimed EU autonomy in a manner that observers like Rakić view as a seeming indifference to international law.[580] This perspective reinforces the idea that, in practical terms, EU law functions

[577] Marja-Liisa Öberg, "Autonomy of the EU Legal Order: A Concept in Need of Revision?", *European Public Law*, No. 3/2020, 711.
[578] M. D. Lukić, 12.
[579] Bruno de Witte, "International Law as a Tool for the European Union", *European Constitutional Law Review*, No. 5/2009, 265-283.
[580] Branko M. Rakić, „Evropski sud pravde između ljudskih prava i borbe protiv terorizma – odnos međunarodnog i evropskog prava", (European Court of Justice between Human Rights and the Fight Against Terrorism - The

with a greater degree of independence from international law, maintaining only a formal and occasional adherence to obligations under international law. Such interpretation becomes particularly clear in judgments such as Opinion 2/13 and the later Opinion 1/17. In these decisions, the ECJ has developed an understanding of autonomy that positions EU law as inherently self-sufficient, deriving its legitimacy not from national or international law, but from a unique legal foundation: the Treaties.[581] These Treaties establish a comprehensive set of principles, rules, and legal relationships that shape the interactions between the EU and its Member States, and among the Member States themselves. Within this framework, there is minimal reliance on international law. Instead, the focus is squarely on the notion of EU autonomy as a separate and independent legal paradigm.

Nevertheless, the main concern in this context is not just the effect on international law, which the ECJ manages to balance through its jurisprudence, but more significantly the implications for human rights standards. By steadfastly focusing on the autonomy of EU law, the Court might be overlooking vital chances to enhance its human rights judgment, a situation clearly illustrated by Opinion 2/13 and the hesitation to accede to the ECHR. Taking a different approach to this issue could guarantee that its protection standards are in harmony with relevant regional and international norms. Additionally, by adopting this self-referential and isolated approach, the CJEU risks compromising the quality, fairness, and legitimacy of its judgments, despite its internationalist stance and respect for international law, as De Búrca notes.[582] For these reasons, the CJEU is often viewed by many as overly protective of its autonomy, sometimes to the detriment of other important values and norms.[583] This includes the maintenance of judicial dialogue and the adherence to high standards of human rights protection, which are fundamental to the EU's own principles. It follows that these complex debates highlight the evolving and intricate nature of EU autonomy, with scholars presenting diverse viewpoints on the EU's legal autonomy. Such

Relationship between International and European Law), *Annals of the Faculty of Law University of Belgrade*, No. 2/2009, 181-182.

[581] *Opinion 1/17 of the Court (Full Court),* Opinion pursuant to Article 218(11) TFEU, 30.04.2019., para. 109.

[582] G. De Búrca (2013), 183.

[583] Bruno de Witte, "A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union", *The European Court of Justice and External Relations Law: Constitutional Challenges,* (eds. Marise Cremona, Anne Thies), Oxford, 2014, 33-46.; Eleanor Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13", *Maastricht Journal of European and Comparative Law,* No. 1/2015, 35-56.; Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky", *Fordham International Law Journal,* No. 4/2015, 955-992.

discussions are crucial, as they illuminate the ongoing conversation about power distribution and the relationship between the EU and its Member States.

5.2. EU autonomy *vis-à-vis* Member States - monist approach

The CJEU, along with national courts, has established through its jurisprudence that Member States have ceded a portion of their sovereignty to the EU. This transfer is a key factor in affirming the autonomous nature of the EU legal order, as initially demonstrated in landmark cases like *Van Gend en Loos* and *Costa v. E.N.E.L.*, and further echoed in the *Solange* decisions. Therefore, allowing Member States the power to override the EU legal system's authority would contradict the Treaties' spirit and the unity of the legal order. Considering that Member States have only transferred a segment of their sovereignty to the EU and retained their full sovereignty, this implies that the EU's autonomy is not all-encompassing. Autonomy is applicable solely in areas where Member States have delegated their sovereign powers to the Union. However, the ECJ often adopts a broader interpretation, as seen in the progressively expanding powers in the CFSP domain.

As previously discussed, from the perspective of Member States, the EU's autonomy is derived from the Member States themselves. However, the ECJ complicates this narrative by frequently asserting its dominance, sometimes encroaching on the competences of Member States. Though EU autonomy originated from Member States, the interpretation of EU law has evolved to become autonomous, no longer anchored in the sovereignty of Member States - a trajectory that the ECJ decidedly pursues. This internal autonomy, or independence from national law and courts, is crucial in the dialogue concerning the relationship between EU autonomy and the legal orders of Member States. It empowers the Court to direct national courts to guarantee the effective and uniform application of EU law throughout the EU in varying national contexts.

In analyzing the EU's internal autonomy, it becomes evident that it draws inspiration from the concept of state sovereignty, aiming to uphold the unity and coherence of the EU legal order. However, it is crucial to note that despite the sovereignty-like qualities and the Court's emphasis on the supremacy of EU law, the EU does not qualify as sovereign in the conventional sense as defined by international law. Sovereignty, as defined in the landmark *Lotus* judgment by the Permanent Court of International Justice (the precursor to the International Court of Justice), is a characteristic reserved exclusively for states.[584] This ruling reinforced the notion of state sovereignty in international law, clarifying that state sovereignty remains unimpeded unless

[584] *France v. Turkey*, (S.S. Lotus), PCIJ Series A No. 10, ICGJ 248, 1927.

explicitly limited by international law. The judgment also clarified that the application of international law within domestic courts is determined by the domestic legal systems themselves, which they do with complete freedom.

It is notable that, in contrast to the EU, sovereign nations inherently presume that their constitutions are foundational, thus not necessitating an external source for validation. Their inherent authority to determine the applicability of laws within their territories is largely uncontested in international law, serving as an independent and paramount justification. The situation for the EU differs markedly. The EU must not only establish its competence to legislate but also justify its claim to autonomy. This inherent challenge in establishing its nature sets the EU apart from other global entities, whether they are sovereign states, whose sovereignty is acknowledged, or international organizations, whose bodies do not assert the same fundamental autonomy. This scenario highlights an intriguing aspect of the CJEU's approach to internal autonomy. In its narrative, the CJEU appears to claim a form of jurisdictional sovereignty for the EU - a liberty to exercise its jurisdiction in applying EU law. This assertion seems to mirror the jurisdictional aspect traditionally linked to state sovereignty.

Additionally, the influence of sovereignty principles on the EU is particularly apparent in its adherence to concepts such as primacy, effectiveness, and sincere cooperation. The principle of direct effect, which exists in both vertical and horizontal forms, is particularly significant. Vertical direct effect pertains to instances where parties invoke EU law against the state or any public authority, whereas horizontal direct effect relates to scenarios without any party exerting public authority, like disputes between private companies. The CJEU has determined that most Treaty provisions are directly applicable, allowing their use in both these scenarios. Supremacy complements direct effect, signifying an implicit hierarchical relationship between the EU and its Member States. In this context, Košutić has pointed out that the principles of primacy and direct effect have notably strengthened the Community/Union's oversight over Member States in ensuring compliance with obligations under Community/Union law.[585]

However, the concept of internal autonomy does not extend the CJEU's authority over national laws. Its jurisdiction is specifically limited to evaluating the validity and interpretation of

[585] Budimir Košutić, *Osnovi prava Evropske unije*, (Fundamentals of European Union Law), Faculty of Law University of Belgrade, Belgrade, 2010, 265. For the subsequent reference *refer* to Budimir P. Košutić, Branko Rakić, Bojan Milisavljević, *Uvod u pravo evropskih integracija*, (Introduction to the Law of European Integration), Faculty of Law University of Belgrade, Belgrade, 2017.

EU law, showcasing a balanced approach to autonomy and legal authority within the EU's legal structure. This approach aligns with the EU Treaties, which are distinct and independent from national laws. This form of autonomy, manifesting as the primacy of EU law over Member States, was accentuated in the *Solange I* ruling and further underscored in the *Simmenthal case*,[586] as well as in the verdict pertaining to *La Comercial Internacional de Alimentación SA.*[587] In *Simmenthal*, the ECJ affirmed that EU law's supremacy includes national legislation enacted subsequently and national constitutional laws. The ruling in *La Comercial Internacional de Alimentación SA* clarified that Member States must interpret their national legislation in accordance with the objectives and text of the relevant EU act. Consequently, these decisions establish that EU law's supremacy is applicable to all national laws, regardless of their enactment time relative to the EU act. When EU law conflicts with national law, the latter is not automatically voided or repealed. However, national authorities and courts are obliged to set aside such national provisions in favor of the applicable EU laws. Moreover, Opinion 1/09 cemented the Court's stance on an unequivocal supremacy doctrine *vis-à-vis* Member States, as evident from the following statement:

"It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves."[588]

Although the autonomy granted by the Treaties does not sever national institutions and judiciaries from the EU's institutional structure, as they collectively contribute to the shared EU judicial network, it is important to note the distinct roles within this framework. Article 4 TEU mandates the CJEU to honor the national identities of Member States, which are integral to their fundamental political and constitutional frameworks. Nonetheless, under Article 267 TFEU, the CJEU holds the definitive authority to provide binding interpretations of EU law, affirming its

[586] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11-70, para. 3.; *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, Judgment of the Court of 9 March 1978, ECLI:EU:C:1978:49, para. 2.
[587] *Marleasing SA v La Comercial Internacional de Alimentacion SA*, Case C-106/89, Judgment of the Court (Sixth Chamber) of 13 November 1990, ECLI:EU:C:1990:395, para. 7.
[588] *Opinion 1/09 of the Court (Full Court),* Case C-1/09, para. 65.

pivotal position in the EU's legal system. Despite no formal hierarchy, the Court's practices often suggest it views itself as superior to national courts of Member States. However, it is crucial to acknowledge that the ECJ does not exclusively interpret EU law, due to the division of roles and competencies, along with principles of subsidiarity and national margins of discretion. The inherent tensions within the EU legal structure are unavoidable, but they can be mitigated through a commitment to judicial cooperation and dialogue, fostered by the principle of mutual trust.

5.2.1. The dynamics of constitutionalization of EU law

Additionally, the internal autonomy of the EU is intimately connected to the constitutionalization of its law. Numerous scholars view the development of normative principles like the rule of law, direct effect, and primacy as signs of the EU's constitutionalization.[589] Consequently, they concur that this transformation has been in progress since the pivotal rulings of the 1960s. These decisions have evolved EU law from a framework rooted in international law to a distinct, autonomous legal system, bearing resemblance to national constitutional traditions. This evolution is broadly acknowledged as constitutionalization, a phenomenon where a legal framework, particularly at the international or supranational level, begins to mirror the attributes typically associated with a constitutional system. This transformation encompasses the introduction of fundamental principles and rights, the formation of a clear hierarchy of legal norms, the establishment of judicial review mechanisms, and the fostering of autonomy and independence in the legal structure.

Scholars, including Rakić, have highlighted the constitutionalization of the EU's legal framework, advising vigilance to prevent potential conflicts with international law.[590] Furthermore, Craig delineates the concepts of constitutionalism and constitutionalization.[591] He explains that constitutionalism implies the existence of a constitution, which is not the case with the EU. In contrast, constitutionalization refers to the gradual adoption of constitutional or constitution-like features, a description fitting the EU's situation. Thus, in this context,

[589] Joris Larik, "From Specialty to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union", *International and Comparative Law Quarterly,* No. 63/2014, 952.
[590] B. M. Rakić (2009), 144. Additionally, *refer* to Richard Bellamy, Dario Castiglione, *Constitutionalism in Transformation: European and Theoretical Perspectives,* Wiley-Blackwell, Hoboken, 1996.; Thomas Christiansen, Christine Reh, *Constitutionalizing the European Union,* Palgrave Macmillan, London, 2009.; Gráinne de Búrca, Joseph H. H. Weiler, *The Worlds of European Constitutionalism,* Cambridge University Press, Cambridge, 2012.; Paul Craig, "Constitutions, Constitutionalism, and the European Union", *European Law Journal,* No. 2/2001, 125-150.
[591] P. Craig, 128.

constitutionalization signifies the EU's legal order's shift from an international to a constitutional legal framework, a transition that is indeed occurring. It is also important to recognize, as highlighted by scholars like Wouters, Verhey, and Kiiver, that the post-Lisbon Treaty constitutionalization of the EU diverges from the classical notion of constitutionalization.[592] Rather, it aligns more closely with the concept of political constitutionalization, evident in the fruitless debates over an EU Constitution. Additionally, the phenomenon of judicial constitutionalization has become increasingly relevant, especially in light of the ECJ's efforts in advancing constitutionalization and safeguarding autonomy. These developments, though originating from the Treaty of Lisbon, have been taken further by the CJEU than what might have been initially anticipated by the Treaty.

The EU's constitutionalization process is effectively summarized by the notions of "internal monism" and "external dualism," which accurately reflect its distinctive dynamics.[593] These terms, originating from discussions on international and constitutional law, articulate the interactions between various legal systems. Monism proposes a unified legal framework encompassing both international and national laws, whereas dualism perceives these as two separate entities.[594] Concerning EU law in relation to Member States, especially in light of its principles of supremacy and direct effect, the interpretation tends to be more monistic. This internal monism is closely in line with Kelsen's approach, which is both monist and positivist in nature.[595] Kelsen separated law from morality, treating it as a set of rules governed by a political system. He argued that the legitimacy of a legal norm derives not from moral values but from its origin in a superior norm, ultimately rooted in the "Grundnorm" or "Basic Norm", thus forming a single, cohesive legal system.

This monist perspective, echoed in the works of Verdross and Sander, contrasts with Hart's empirico-positivist theory, which intertwines law with social realities.[596] Although Hart did not specifically concentrate on dualism, his ideas, notably the rule of recognition and the societal dimensions of law, provide substantial insights into the dualist approach, particularly the nexus

[592] Jan Wouters, Luc Verhey, Philipp Kiiver, *European Constitutionalism Beyond Lisbon,* Intersentia Publishers, Cambridge, 2009, 12.
[593] C. Eckes (2020), 6.
[594] For additional insights into monism and dualism *refer* to Ljiljana Mijović, *Osnove međunarodnog javnog prava – prvi dio,* (Foundations of International Public Law – part I), Comesgrafika, Banja Luka, 2019, 17-20.
[595] Hans Kelsen, *Pure Theory of Law,* Lawbook Exchange Ltd, New York, 1967.
[596] For further reference *see* Henry Janzen, "The Legal Monism of Alfred Verdross", *The American Political Science Review,* No. 3/1935, 387-402.; Herbert L. A. Hart, *The Concept of Law,* Oxford University Press, New York, 1961.

between international and domestic law. This stands in contrast to Kelsen's monism, which aims to depoliticize law and conceptualize it as a non-ideological, borderless tool for societal regulation and formation. Within the EU context, the devolution of sovereign rights from Member States to EU institutions has facilitated the development of an autonomous legal system, deeply rooted in Kelsen's monist ideology. This is evident in the CJEU's approach, adopting the concept of transferring sovereign rights and thus shielding EU law from the direct sway of national legislation. The *Foto-Frost* presumption, affirming that national courts cannot annul EU institution acts, exemplifies this principle. This approach underscores the independent and self-sufficient nature of EU law, reflecting the essence of Kelsenian monism. Furthermore, it can be argued that the Court strategically modified its stance regarding Member States to maximize the benefits derived from the legal framework of the Community/Union. This shift is evident in its adoption of a monist approach, particularly at a critical juncture when there was a pressing need to permeate and impact national legal systems.[597]

In examining the CJEU's handling of the CFSP, it is important to recognize the interplay of both monist and dualist elements in its approach. When the CJEU's jurisdiction is restricted or non-existent, the role of ensuring legal oversight often falls to the national courts of Member States. Hillion's analysis suggests that under such circumstances, national courts are equipped to intervene.[598] However, it appears that the CJEU has somewhat neglected this aspect, as seen in various case laws, especially those related to CFSP and the provision of effective judicial protection. The recent expansion of the CJEU's jurisdiction, extending beyond its traditional scope to ensure such protection, underscores a judicially led trend towards constitutionalization and internal monism. This is further evidenced by the Lisbon Treaty's Article 215 TFEU, which stipulates that both CFSP and TFEU sanctions are subject to identical judicial processes, indicating a move towards a more unified approach within the CFSP and a departure from the fragmentation present in other domains. Moreover, the CJEU's internal shift towards monism, particularly within CFSP, becomes more apparent in the context of the preliminary ruling procedure. The *Rosneft* case, for instance, significantly broadened the CJEU's involvement in CFSP matters, especially in instances where decisions have direct implications for individuals or entities. This marks a notable development in the Court's jurisprudence, illustrating a deeper engagement with CFSP issues and

[597] M. Lukić (2015), 337.
[598] C. Hillion (2014), 67.

a movement towards a more monist interpretation within its internal structure. The *H. v. Council* case further explores this, where the CJEU examined its jurisdiction within the traditionally restrictive framework of CFSP, asserting its authority to review actions against CFSP decisions related to personnel appointments made by Member States. These cases collectively underscore the Court's inclination towards a monist stance concerning the national laws of Member States.

This approach aligns with the Court's firm belief that autonomy is a vital characteristic of the EU legal order, arguably a foundational condition enabling the development of key principles like primacy and direct effect. Altering or compromising this inherent legal autonomy would fundamentally change the nature of EU law and disrupt the balance of powers within the EU legal framework. Also, there is a widespread recognition and acceptance of these core principles of primacy and direct effect among all relevant stakeholders, including national courts and governments.[599] They are deemed "essential" in the sense that the nature of EU law would be fundamentally different without their structural functionality and acceptance; in other words, EU law's effectiveness hinges on these principles. As a result, the EU's internal autonomy curtails the direct impact of national courts on the CJEU, further solidifying its unique and independent legal framework. This internal autonomy is also associated with the ongoing normalization of the CFSP, indicating a reduction in the distinct rules and procedures specific to CFSP.[600]

The *Kazakhstan* case is particularly illustrative in this context, where the ECJ was observed applying general constitutional principles, such as the EU's institutional balance, and methodologies like the center of gravity test, rather than affording special treatment to CFSP issues.[601] This process, often referred to as the normalization or constitutionalization of CFSP, becomes evident through preliminary references. These references allow national courts to play a role and assist the CJEU in asserting its jurisdiction over CFSP matters, even in instances extending beyond Article 275 TFEU. This approach has frequently led to an expansion of the CJEU's jurisdiction, gradually integrating CFSP into the EU legal framework. This integration is facilitated by the Court's teleological and purposive interpretation, thereby reducing the constitutional distinctiveness of CFSP, which is principally exempt from judicial scrutiny.

[599] C. Eckes (2020), 9.
[600] For additional information *refer* to Luigi Lonardo, "May Member States' Courts Act as Catalysts of Normalization of the European Union's Common Foreign and Security Policy?", *Maastricht Journal of European and Comparative Law*, No. 3/2021, 287-303.
[601] *Commission v. Council,* Case C-244/17, paras. 21-24.

While the CJEU exhibits a pronounced inclination towards internal monism, there exists a discernible reluctance among some Member States to fully embrace the Court's authority. This hesitance is rooted in the constitutional courts of these states, which uphold the traditional concept of sovereignty associated with statehood. Foreign and security policy, being intimately linked to the notion of statehood, often leads Member States to believe that national laws set boundaries on the evolution of the EU legal order, a point previously discussed. National courts may exhibit a cautious stance towards the EU's autonomy, given the theoretical absence of a hierarchical legal and judicial structure where the validity of national court decisions is not contingent upon conformity with Union law. Nonetheless, these challenges posed by national courts underscore the resilience and robustness of the EU as a legal system capable of navigating and surmounting such obstacles. Furthermore, the ongoing tensions and divergences between the CJEU and national constitutional courts are pivotal in reflecting the power dynamics between the EU and its Member States. The divergences within the EU not only exemplify its distinctive, *sui generis* essence but also illuminate the complex dynamics between the sovereignty of Member States and the EU's autonomy, seamlessly integrated into a unified legal system. Reflecting on this pluralistic constitutional scenario, MacCormick insightfully notes:

"None of the Member States is indebted to the Union for the terms or the provisions of its constitution. Each has a constitution whose roots and whose basic legitimacy are independent of any grant by the Union. […] Conversely, the validity of the Union's constitution and legal order is not derivative from the validating power of any state's constitutional order".[602]

Contrasting with the EU's external autonomy, its internal autonomy proves to be quite effective and manageable, largely because all involved parties share a common goal: to ensure a well-functioning and efficient Union. This shared objective is crucial as any deviation from it could result in significant costs. Moreover, there is an intricate interplay between EU law and national law; national law facilitates the implementation of EU law, while EU law concurrently acknowledges and incorporates national constitutional traditions. This interconnection persists despite occasional hesitations from Member States. Additionally, it is important to note that Member States have institutional representation within the EU framework, further cementing this interconnected relationship. However, when internal conflicts arise, the independence of the EU legal order is evident as the CJEU claims itself to be the ultimate interpreter of the principles

[602] N. MacCormick, 7.

inherent to EU legal order. The CJEU's consistent overriding of Member States' attempts to challenge the refusal of EU institutions to recognize national laws and autonomy underscores the Court's role as the ultimate authority within the EU's general institutional framework when it comes to EU law.

This tendency has been noticeable since the early days of the EC/EU, as exemplified by several landmark rulings such as *Stork v. High Authority,*[603] *Alegra v. Common Assembly,*[604] *Humblet,*[605] among others. In these instances, the Court emphasized its authority to enforce Community law, while simultaneously creating a clear separation from the laws of Member States. This approach effectively shields Community law from interpretations by national courts of Member States, thus limiting Member States' jurisdiction exclusively to their domestic law. Despite this enduring inclination to safeguard the EU legal system from both internal and external influences, the EU's autonomy is designed to be reciprocal and demands cooperative engagement, especially in the context of international obligations like treaties and agreements. This is intrinsic to the EU's system, aiming for unity through collaboration between the Union, Member States, and their judiciaries, as exemplified in mixed international agreements. Specifically, in the *Merck Genéricos*[606] case, the ECJ ruled that although national courts are responsible for interpreting specific provisions of mixed agreements, maintaining consistency across the EU requires the CJEU to determine how competencies are divided. This responsibility extends to deciding whether provisions of mixed agreements directly affect areas within the scope of Member States' authority.

In addition, the *Kadi II* case acts as a further testament to the endeavors aimed at upholding the coherence of the EU's legal framework. This case is not only particularly crucial for its revelations about the EU's engagement with international law, but it is also vital regarding the profound influence it exerts on the EU's internal legal structures. It brought to the forefront the Court's responsibility to scrutinize the legality of acts within the Community/Union context. The Court asserted that obligations arising from international agreements must not undermine the

[603] *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, Case 1/58, Judgment of the Court of 4 February 1959, ECLI:EU:C:1959:4.
[604] *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*, Joined Cases C-7/56 and C-3/57 to C-7/57, Judgment of the Court of 12 July 1957, ECLI:EU:C:1957:7.
[605] *Jean Humblet v Kingdom of Belgium, Case C-6/60-IMM,* Judgment of the Court of 16 December 1960, ECLI:EU:C:1960:48.
[606] *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld,* Case C-431/05, Judgment of the Court (Grand Chamber) of 11 September 2007, ECLI:EU:C:2007:496.

foundational principles of the EC Treaty. Furthermore, it highlighted that fundamental rights are integral to legal legitimacy, capable of invalidating both Community/Union and national actions that contravene them, extending beyond their traditional use as mere interpretative principles.

This discussion, however, does not imply that managing the EU's internal autonomy, as navigated by the CJEU, is a straightforward task. The gradual erosion of the rule of law in certain Member States presents a complex challenge, necessitating a more robust political response. In this scenario, the role of the CJEU is somewhat constrained, as national courts ultimately have the autonomy to either enforce or overlook Union law, particularly in the context of the CFSP, where they wield considerable authority. These courts have been instrumental in driving European integration but could also potentially contribute to its dismantling.[607] Conversely, while national constitutions hold primacy within the domestic frameworks of Member States, this does not grant them the liberty to overlook the essential principles of the rule of law, even under authoritarian excesses. Comparing the EU's internal and external autonomy, the former appears more manageable and less contentious. In contrast, maintaining external autonomy as the CJEU has attempted raises debates and controversies about adhering to international law, which ought to be a paramount consideration in the overall legal hierarchy. Nevertheless, as Lukić Radović aptly observes, the constitutionalization of the EU, which extends to the CFSP and even the CSDP, is undeniably underway.[608]

Despite the political nature of these areas, which traditionally resist legal codification, the process has introduced legally binding obligations, particularly in the realm of security. A notable example is the 2017 PESCO agreement, which emerged in response to global challenges and threats.[609] Introduced under Article 42(6) of the TEU, PESCO allows Member States with more advanced military capabilities and stronger commitments to one another to engage in permanent structured cooperation within the EU framework for the most demanding missions. This development is part of the broader constitutionalization process of the EU, driven by its

[607] Bruno Lasserre, "National Courts and the Construction of Europe: United in Diversity", available at: *https://geopolitique.eu/en/articles/national-courts-and-the-construction-of-europe-united-in-diversity/*, 15.12.2023.
[608] Maja Lukić Radović, "The Strategic Compass for Security and Defense In Light of the Prospects for the EU Common Security and Defense Policy", *Collection of Papers Presented at the International Scientific Conference "The Relationship Between International Criminal Law and National Criminal Law" - International Criminal Law Association*, Vol. 1/2024, 234. For further reference *see* also Maja Lukić Radović, "How Long Before a Bundle of Treaties Becomes Sovereign? A Legal Perspective on the Choices Before the EU", *SEE|EU Cluster of Excellence in European and International Law, South Eastern Europe and the European Union - Legal Aspects*, Vol. 1/2015, 127-137.
[609] Permanent Structured Cooperation – PESCO, available at: *https://www.pesco.europa.eu/*, 16.09.2024.

institutional evolution and unfolding independently of the Member States. It is set to significantly influence the future trajectory of the CFSP and the CSDP. As the EU continues to assert its strategic autonomy, this ongoing evolution signals a deepening integration of defense and security initiatives within the Union. The constitutionalization process, underpinned by the EU's expanding institutional framework, is expected to play a pivotal role in shaping these policies moving forward, further reinforcing the Union's role as a cohesive and independent actor in global security.

5.3. EU autonomy and international law - dualist approach

As the EU solidifies its stature in the international arena, the ECJ is increasingly focusing on external autonomy, especially in how EU law interacts with international law. In the realm of EU sanctions, the ECJ is instrumental in defining the EU's autonomy, particularly within the CFSP. These sanctions highlight the complex interplay between internal EU dynamics and its external relations, including with global systems like the UN. The Court's role in this context is nuanced by jurisdictional limitations as outlined in Article 275 TFEU and Articles 3(5) and 21 TEU. Furthermore, Articles 215-218 TFEU provide a framework for aligning with or supplementing UNSC sanctions, emphasizing adherence to international law and detailing procedures for implementing restrictive measures. Significant rulings by the CJEU illustrate its ambition to expand its authority across different facets of the CFSP, encompassing both its role within the EU's institutional framework and its international activities. This enlargement of jurisdiction is driven by the dual objectives of safeguarding fundamental rights and enhancing the EU's autonomy, especially in the area of restrictive measures. This strategy not only reinforces the protection of human rights but also introduces additional layers of intricacy to the Court's role within the CFSP. This development contributes to an increasingly autonomous EU on the world stage, though this can sometimes result in fragmentation or an isolationist stance.

Moreover, under Chapter VII and Article 2(2) of the UN Charter, UNSC sanctions are binding on all members, including the EU, establishing an overarching duty to comply with the UN Charter's compulsory provisions.[610] This interpretation suggests a superior position for these sanctions in the legal hierarchy, mandating EU Member States' adherence. Additionally, Article 103 of the UN Charter stipulates that in conflicts, obligations under the Charter override those

[610] United Nations, *Charter of the United Nations,* Article 2(2): "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter".

from other international agreements.[611] However, this hierarchy is complicated by the EU's ability to enforce more stringent sanctions in response to specific threats to peace in third countries, potentially leading to conflicts if mandatory cooperation in interpretation and application between the EU and UN is not maintained.

The complex interplay between these two legal orders was exemplified in the *Kadi* cases, which were pivotal in elucidating potential conflicts between the two normative systems concerning the enforcement of UNSC targeted measures within the EU. The cases also illuminated the institutional relationship between the EU judiciary and the UNSC, signaling a further detachment of EU law from international law under the guise of upholding the rule of law. In the *Kadi I* judgment, the Court affirmed the need for EU law to remain independent from international law, asserting that international agreements should not disrupt the power structure established by the EU Treaties or compromise their constitutional principles.[612] This stance is in line with the objectives of the Treaty, as stipulated in Article 24 TEU, to safeguard the values, fundamental interests, security, independence, and integrity of the Union.

While the CJEU appears to favor interpretative and absolute autonomy, positioning itself as the supreme authority within the EU legal framework, it does not dismiss the role of international law within the EU. The Court emphasizes that the interplay between EU law and international law, and the influence of the latter within the EU, should be viewed through the prism of the EU's internal regulations. This perspective, in essence, upholds the EU's ability to engage with international law. As Eckes notes, the challenge lies in conceptualizing a legal system born from international law as an autonomous domestic entity, compelling the CJEU to vigilantly protect the conceptual independence of EU law.[613] The EU's approach of generally aligning with international law, yet contesting it when international obligations seem to encroach on its autonomy, reflects this intricate and reciprocal relationship.

Regarding these mutual relations, the International Court of Justice (hereinafter: ICJ) has acknowledged the autonomy of international organizations, particularly in its advisory opinion concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[614] The ICJ

[611] *Ibid,* Article 103.
[612] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, para. 282.
[613] C. Eckes (2020), 4.
[614] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, I.C.J. Reports, 08.07.1996.

recognized that international organizations are established as new legal entities, endowed with a certain level of autonomy and tasked with fulfilling common goals. When considered in a wider context, the CJEU's stance on autonomy does not conflict with the ICJ's findings in this judgment. However, it is important to consider the distinct character of the EU, which eludes simple classification as either a typical international organization or a state-like entity. The EU's unique *sui generis* nature profoundly influences its relationship with international law, a relationship that is particularly evident in the groundbreaking *Van Gend en Loos* decision. This decision might initially seem to diverge from conventional international law with its introduction of a "new legal order". However, a more thorough examination reveals that this order is not isolated but rather intricately intertwined with the existing international legal framework, thus establishing a significant connection.

Additionally, the concepts of direct effect and primacy, as established in the *Costa v. E.N.E.L.* case, are integral to the EU's legal framework, underscoring its distinctive legal identity. These landmark decisions contribute to a layered and intricate understanding of the EU's stance: it is deeply ingrained in the international legal system, yet concurrently forges an independent path, as evidenced by the Court's efforts towards constitutionalization. This dual nature effectively represents the EU's complexity. Academic discourse, including analyses by scholars like Lukić, reflects this complexity, suggesting that the EU's dealings with international law are more influenced by values and principles than simple logic.[615] This perspective aligns with diverse viewpoints, such as those of Lebeck, who concentrates on the EU's internal constitutionalization, and others like Crawford, who interpret this constitutionalization through the wider prism of international law.[616] Consequently, the two viewpoints - one emphasizing integration with and the other highlighting divergence from the international legal framework - both hold significance and simultaneously exist within the EU's distinctive legal framework.

Contrasting with its internal operations where a monist legal stance prevails, the CJEU exhibits a pronounced dualist stance in its external interactions with international law.[617] Dualism,

[615] M. Lukić (2015), 335.
[616] Carl Lebeck, "The European Court of Human Rights on the Relation between ECHR and EC-law: The Limits of Constitutionalization of Public International Law", *Zeitschrift für öffentliches Recht,* Vol. 62/2007, 195-236.; James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law,* Brill Nijhoff, Leiden, 2014.
[617] Christina Eckes, "Test Case for the Resilience of the EU's Constitutional Foundations International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations", *European Public Law,* No. 3/2009, 351-378.

utilized to minimize norm conflicts, allows domestic courts to function independently from external legal influences. As noted by Gaja, the essence of dualism is the recognition of international law and domestic laws as separate, self-contained legal systems, each acknowledging only its own set of rules.[618] External rules can be incorporated into these systems only if recognized by an existing internal rule. The dualist perspective in law finds its philosophical roots in the ideas of Descartes, who posited a division between the non-material mind and the material body, and Plato, who separated the realm of ideal forms from sensory experiences.[619] In the realm of legal theory, this concept of dualism was further developed by German and Italian scholars, notably Triepel and Anzilotti. They contended that international law and national law are distinct and independent systems, with international law requiring domestic enactment through a state's legislative process to be applicable.[620] This view stands in contrast to Kelsen's monist perspective, which advocates for a more integrated approach between international and national laws.

In the context of the EU, the dualist approach is intricately linked to the notion of EU autonomy, a concept that has been shaped and reinforced by the jurisprudence of the CJEU. There are compelling reasons to adopt a dualist approach, particularly considering the EU's commitment to democracy, human rights, and the rule of law, which may not always align with international standards. A purely monist external view could weaken these commitments and lead to resistance from national constitutional courts regarding EU law's primacy. While there are rational justifications for employing a dualist approach in external affairs, the CJEU's pronounced use of dualism, especially in the area of CFSP, presents considerable challenges. This extreme dualist stance may compromise the EU's adherence to its mandatory obligations under international law, raising concerns about a possible disintegration from the international legal system and the potential negative impact on the protection of human rights. Thus, applying strict dualism to the EU's external relations suggests that, in a conflict, EU law would prevail over international law. The CJEU's pronounced dualist approach might encourage separatist tendencies, potentially destabilizing the international legal order. Moreover, as some authors have rightly pointed out,

[618] Giorgio Gaja, "Dualism – a Review", *New Perspectives on the Divide Between National and International Law,* (eds. Janne E. Nijman, André Nollkaemper), Oxford, 2007, 52.
[619] For further reading on Plato's perspectives, *refer* to Hans Kelsen, "Plato and the Doctrine of Natural Law", *Vanderbilt Law Review,* No. 1/1960, 23-64.; Additionally, for insights into Descartes' views, consult Barbara Gail Montero, *Philosophy of Mind: A Very Short Introduction,* Oxford University Press, Oxford, 2022.
[620] Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal,* Oxford University Press, Oxford, 2015.

there is a notable contradiction in the CJEU expecting national courts to adhere to a monist interpretation of the EU legal framework while it itself employs dualist reasoning in international matters.[621]

This approach, which seems paradoxical, often draws criticism due to its contradictory nature. As De Búrca points out, it might be more beneficial for the CJEU to embrace a "soft constitutionalist" stance towards international law.[622] This would more effectively manage the interactions between the norms of various legal systems. De Búrca further explains that while strong constitutionalist perspectives advocate for a unified system with a core set of rules and principles governing the global domain, soft constitutionalism is distinct. It recognizes the existence of an international community and underscores the importance of common norms and principles to resolve conflicts, prioritizing universal applicability. Unlike strong constitutionalism, soft constitutionalism does not demand a rigid hierarchy of rules but emphasizes the value of mutually agreed upon and shared principles for conflict resolution. Upholding this viewpoint is especially vital in light of the EU's much-awaited accession to the ECHR. This approach would not only help alleviate tensions between the two systems but also contribute significantly to the enhancement and reinforcement of human rights protection.

5.3.1. Fragmentation of international law: interaction between two legal orders

The CJEU's consistent application of a dualist perspective in international law introduces significant issues, particularly the risk of causing rifts in the international legal structure. The International Law Commission (hereinafter: ILC) extensively examined the problem of international law fragmentation in 2006.[623] During these discussions, fragmentation was acknowledged as an inevitable aspect of international law and its accompanying legal pluralism, driven by the ongoing evolution of international law in response to changing circumstances. The ILC recognized this alongside the possibility of conflicts between varying rules and regimes potentially impeding the implementation of international law. Therefore, the ILC suggested that issues of fragmentation could be addressed through established legal techniques traditionally employed to manage normative conflicts. However, it is important to note that the ILC's

[621] Lando Kirchmair, "The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law", *Göttingen Journal of international Law,* No. 3/2012, 677-691.
[622] G. de Búrca (2010), 4.
[623] United Nations, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* A/CN.4/L.702, 18 July 2006.

perspective, which appeared relatively unconcerned about international law fragmentation, was formed before the impactful *Kadi* cases and the consequential Opinion 2/13 which ignited significant debates for valid reasons. Given the recent developments and shifting contexts that highlight the CJEU's firm commitment to EU autonomy, often irrespective of international law obligations, the ILC's report might have differed if it were produced on this subject at a more recent time.

The scholarly debate on the fragmentation of international law and the constitutionalization of EU law showcases diverse perspectives, but there is a common recognition of the influential role played by the CJEU in shaping EU autonomy.[624] This influence extends beyond mere legal interpretation and application, impacting how the EU engages with and situates itself in the larger international legal order. It is also a widely held view among scholars that external fragmentation and internal constitutionalization are happening simultaneously. Authors like Rakić, Guillaume, and Ziegler, as well as some former judges of the ICJ, express concern over the potential negative impacts of this fragmentation.[625] They argue that it could lead to enforcement challenges in international law, particularly in cases where the UNSC is involved. They caution that conflicting obligations might hinder the effectiveness of measures intended to maintain international peace and security. Additionally, these scholars highlight the risk of conflicting jurisprudence, where the same legal rule might be interpreted differently in various cases, leading to legal uncertainty. However, they also acknowledge that if applied judiciously, this fragmentation could enhance the protection of human rights, provided decisions are made strictly on legal grounds without political influence.

On the other side of the debate, scholars like Bartoloni, Zürn, Faude, Alter, and Meunier perceive fragmentation in a more positive light.[626] They do not see it as the disintegration of an existing global order but rather as a sign of the development of a more diverse global polity or

[624] For further discussion *see* M. Lukić, „Da li je evropsko pravo autonomno, samosvojno, unutar ili izvan međunarodnog – šta kriju ključne presude Evropskog suda pravde?", (Is European law Autonomous, Unique, Within or Outside of the International Law – What Exactly is Hidden Behind Key Judgments of the European Court of Justice?), *Papers presented at conference "Harmonization of Domestic with EU Law" - Institute for International Politics and Economy*, No. 1/2011, 1-10.

[625] B. M. Rakić (2009), 122-147.; K. S. Ziegler, 288-305.; Gilbert Guillaume, former president of the International Court of Justice, "Speech to the General Assembly of the United Nations – 30 October 2001", available at: *https://www.icj-cij.org/sites/default/files/press-releases/5/2995.pdf*, 25.12.2023.

[626] M. E. Bartoloni, 1369.; Michael Zürn , Benjamin Faude, "On Fragmentation, Differentiation, and Coordination", *Global Environmental Politics*, No. 3/2013, 119-130.; Karen J. Alter, Sophie Meunier, "The Politics of International Regime Complexity", *Perspectives on Politics*, No. 1/2009, 13-24.

structure. According to this view, fragmentation could pave the way for a more refined and flexible international legal system. They argue that the continuation of fragmentation in the EU's external actions doesn't hinder the formation of unified sub-systems, which can be uniformly subjected to judicial review. Furthermore, international judges have shown a degree of acceptance towards the growing number of international courts and tribunals. This is evident in cases like the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* which recognized the autonomous legal standing of international organizations.

As the CJEU is broadly recognized as a key player in advancing the EU's autonomy and, as a result, the fragmentation of international law, it is crucial to revisit several pivotal decisions in this area, such as the *Kadi*, *Intertanko*, *Commune de Mesquer,* Opinion 2/13, and *Mox Plant* cases. Each of these rulings significantly influences the independence of EU. In the *Kadi* cases, the CJEU's strong commitment to upholding due process rights fortified its legal stance, placing a significant emphasis on safeguarding fundamental rights as a cornerstone of EU constitutional principles.[627] The ECJ's approach of deeply integrating these principles into the EU's legal structure contributes to a fragmentation of international law, as it overrides the mandatory resolutions of the UNSC under Chapter VII. This situation arises from the Court's reluctance to align its interpretation of UNSC resolutions with UN and international human rights laws mandated by Article 24(2) of the UN Charter, which encompass *jus cogens* norms - fundamental principles of international law that are inviolable. The CJEU's cautious approach, rather than leveraging its capacity to implement a more effective domestic enforcement mechanism for these resolutions, reflects a critique of international enforcement systems. By not fully exploiting its ability to enforce international human rights standards robustly at the domestic level, the CJEU misses an opportunity to provide a counterbalance to the perceived inadequacies in international enforcement. The stance of the ECJ in the *Kadi* cases presents a stark contrast to the ECtHR's methodology in the *Behrami* and *Bosphorus* cases. In these instances, the ECtHR advocated for a more restrained scrutiny of UNSC resolutions, acknowledging their obligatory nature. The ECtHR emphasized the growing significance of international collaboration and the necessity of ensuring the effective operation of international organizations, deemed crucial for a supranational entity like the EC/EU.

[627] Maja Lukić, „Kadi protiv Komisije: nasleđe tri presude" (Kadi v. Commission: Legacy of three Judgments), *Legal Capacity of Serbia for EU Integration,* (Faculty of Law University of Belgrade), Belgrade, 2013, 236-249.

This divergence in approaches between the CJEU and ECtHR underscores the EU's pursuit of autonomy. The CJEU differentiated from the ECtHR's jurisprudence primarily on factual grounds, noting that the regulation scrutinized in *Kadi* was an EC Regulation, not directly attributable to the UN, unlike the UNSC Resolution. However, the ECJ's decision to not delve deeper into a more comprehensive argument is seen as a missed opportunity, as the ECtHR's case law itself faces significant challenges. Specifically, it could have highlighted that the delegation of powers does not equate to an unconditional transfer of responsibility. In not doing so, the CJEU missed a chance to indirectly shape the ECtHR's jurisprudence, which has, to some extent, drawn back the minimum protection of human rights as stipulated in the ECHR. This retreat by the ECtHR could be seen as unsuitable for an international human rights court charged with external human rights review and the obligation to uphold a basic standard of human rights protection.[628] Therefore, by concentrating predominantly on the relationship between international law and EU/EC law, without adequately addressing human rights issues, the CJEU reinforces the EU's preoccupation with its autonomy, extending beyond a purely legal viewpoint.

Additionally, the *Intertanko*[629] case serves as a prime example of the ECJ's distinct approach towards the direct effect of WTO and other mixed agreements, showcasing its separationist perspective. In this case, the Court addressed EU's Directive related to ship-source pollution, which was partially based on a supposed violation of the International Convention for the Prevention of Pollution from Ships (hereinafter: MARPOL), ratified by all EU Member States but not by the EU itself. The Court decided that MARPOL was not legally binding on the EU. Consequently, the EU's directive couldn't be judged against the standards of the MARPOL Convention. However, the Court recognized MARPOL's importance, suggesting that the directive be interpreted in harmony with the principles of good faith and Article 4(3) TFEU, achieving a balance between formalistic reconciliation and the preservation of the EU's legal independence. This approach represented a shift from the *International Fruit Company*[630] case, where the EC was considered bound by GATT 1947 without formal ratification, based on the EC assuming the Member States' international trade rights and obligations. This evolution in the Court's perspective

[628] K. S. Ziegler, 299.
[629] *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, Case C-308/06, Judgment of the Court (Grand Chamber) of 3 June 2008, ECLI:EU:C:2008:312.
[630] *NV International Fruit Company and others v Commission of the European Communities*, Joined cases 41 to 44-70, Judgment of the Court of 13 May 1971, ECLI:EU:C:1971:53.

towards international treaties and their resulting obligations mirrors the approach seen in the *Kadi* cases.

A related issue arose in the *Commune de Mesquer v. Total*[631] case, following the 1999 "Erika" oil tanker spill. The municipality of Commune de Mesquer in France pursued compensation from Total France and Total International, the respective owners and charterers of "Erika." Central to this case were two International Maritime Organization (hereinafter: IMO) conventions, the Liability Convention and the Fund Convention.[632] While these conventions were ratified by most EC Member States, they were not by the EC itself. The legal debate focused on an EC Directive regarding waste management and the principle of the polluter paying. The crucial matter at hand was how this Directive correlated with the limitations on liability set by the conventions. The Court determined that while French legislation could adapt to some extent to these conventions within the framework of the Directive, there were constraints to this adaptability. The Court asserted that these conventions did not legally bind the EC, given that the EC had not ratified them and did not wholly take over the responsibilities of its Member States in this area, especially since not all Member States were signatories to these conventions.

The Opinion 2/13 further solidified the Court's dualist approach, highlighting its autonomy and its role as an independent entity in international law, accountable for both its own and its Member States' rights and obligations. This Opinion reflects the CJEU's perception of the EU's "exceptional nature", affirming its jurisdiction as the final arbiter in such matters.[633] Unlike previous cases where the Court underscored the distinction between EC/EU obligations and those arising from international agreements (due to the EU/EC not being a party to these agreements), Opinion 2/13 deals with a unique scenario. Here, the EU is not a party to the ECHR, but there is a Treaty-based obligation for accession, lending greater significance to this case. The Court's reasoning in Opinion 2/13 was influenced by concerns over the ECtHR's external scrutiny of EU law, especially since the ECHR would become an integral part of EU law and a source of EU fundamental rights upon accession. The Luxembourg Court stipulated that the allowance for

[631] *Commune de Mesquer v Total France SA and Total International Ltd.*, Case C-188/07, Judgment of the Court (Grand Chamber) of 24 June 2008, ECLI:EU:C:2008:359.
[632] International Maritime Organization: International Convention on Civil Liability for Oil Pollution Damage, 30.05.1996.; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 30.05.1996.
[633] Turkuler Isiksel, "European Exceptionalism and the EU's Accession to the ECHR", *European Journal of International Law*, No. 3/2016, 565-589.

Member States under Article 53 of the ECHR to provide greater protection than the Convention's standards must be "coordinated" with the CJEU's requirements under Article 53 of the EU Charter.[634]

Essentially, the human rights protection level offered under the ECHR by EU Member States, when acting within the scope of EU law, must not exceed the CJEU's established standard for the corresponding Charter provisions. The Court concluded that assigning exclusive review of fundamental rights to an international court outside the EU's institutional and judicial framework, even if limited to ECHR adherence, would undermine the unique characteristics of EU law. The core of the debate revolves around concerns that joining the ECHR might lead to a disparity in the supervisory roles of the CJEU and the ECtHR.[635] The apprehension is that the ECtHR's ability to directly review such cases could overshadow the CJEU, which does not possess a similar scope of authority. As already elaborated, the CJEU's jurisdiction is limited to verifying adherence to Article 40 TEU and performing reviews of the legality of CFSP decisions that impose restrictive measures on individuals or entities, as specified in Article 215(2) TFEU, exemplified in cases like *Kadi*.

In addition, the *Mox Plant*[636] case is particularly noteworthy, as it established the ECJ's exclusive jurisdiction in interpreting EU treaties and legislation, underscoring the EU legal system's autonomy. This ruling clarified that disputes involving EU law, even those related to international agreements and shared competences in areas like environmental protection and maritime law, must be settled within the EU's legal framework. In particular, the legal conflict involved the European Commission and Ireland, focusing on Ireland's lawsuit against the UK regarding the Mox Plant, as per the United Nations Convention on the Law of the Sea (hereinafter: UNCLOS). Ireland charged the UK with inadequately assessing the plant's effects on the Irish Sea, not cooperating sufficiently with Ireland, and not adequately safeguarding the sea's environment. In 2003, these legal proceedings were paused to determine the impact of EU law on this issue. The pivotal judgment in this matter was delivered by the ECJ in 2006. In this ruling, the Commission accused Ireland of breaching EU law by bringing its disagreement with the UK over the MOX

[634] *Opinion pursuant to Article 218(11) TFEU,* Case Opinion 2/13, para. 183.
[635] Jean P. Jacqué, "The Accession of the European Union to the Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, No. 4/2011, 1005. Also *see* L. H. Storgaard, 497.
[636] *Commission of the European Communities v Ireland,* Case C-459/03, Judgment of the Court (Grand Chamber) of 30 May 2006, ECLI:EU:C:2006:345.

Plant to an UNCLOS tribunal. This action was alleged to violate specific provisions of the EC Treaty, particularly Articles 10 and 292, and their equivalents in the Euratom Treaty. These articles obligated EC Member States to comply with treaty obligations and recognize the ECJ as the exclusive authority on matters related to Treaties.

What is more, Advocate General Maduro underscored the distinct perspectives of the Commission and Ireland regarding the ECJ's involvement in the *Mox Plant* issue.[637] While the Treaties identify the ECJ as the ultimate interpreter of the Treaty and EC law, Ireland, backed by Sweden, argued its case against the UK based on the UNCLOS, contending it was outside the ECJ's remit. In contrast, the Commission held that the ECJ should oversee the dispute, as it involved elements of EC law. This situation called for the ECJ to clarify its jurisdiction, particularly whether it was exclusive. The case is significant for involving mixed agreements, which feature a division of responsibilities between the EC and its Member States. This is different from areas of exclusive Community competence, like the CCP, which is a core part of EC/EU law. Eeckhout elucidated the legal basis for mixed agreements, explaining they are required when an agreement's aspects exceed the Community's jurisdiction, necessitating a collaborative approach between the Community and Member States.[638]

In its *Mox Plant* ruling, the Court aligned with the principle that international treaties cannot modify the responsibilities outlined in the foundational treaties nor affect the autonomy of the Community's legal system.[639] This judgment also directly linked the Community's jurisdictional framework to its autonomy. By asserting its jurisdiction in cases involving mixed agreements, the Court applied the doctrine from the *AETR* judgment. This doctrine states that when the Community establishes common rules for implementing a policy, Member States lose the right to make independent or collective commitments with third countries that impact these rules. This case can be seen as the CJEU's commitment to uphold enforcement and exclusive competence under international (mixed) agreements involving the EC/EU and its Member States, thereby affirming the direct effect doctrine and the supremacy of EC/EU law over international entities. While the Court emphasized the link between the Community's legal autonomy and its sole jurisdiction, it

[637] Opinion of Mr Advocate General Poiares Maduro delivered on 18 January 2006, *Commission of the European Communities v Ireland*, Case C-459/03, ECLI:EU:C:2006:42, para. 13.
[638] P. Eeckhout (2011), 212-213. For further reference *see* Paul J. Cardwell, Duncan French, "Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute", *Journal of Environmental Law*, No. 1/2007, 121-129.
[639] *Commission of the European Communities v Ireland*, Case C-459/03, paras. 123-124.

did not delve deeply into this connection.[640] Nevertheless, the Court's stance is unequivocal: it positions itself as the principal guardian of the EU's legal autonomy.

Besides, the *Åklagaren* and *Melloni*[641] cases demonstrate the CJEU's strong internal constitutionalist and external dualist approach. These cases interpret the EU Charter not just as a treaty but as a *bona fide* constitution, bolstering the EU's internal constitutional framework. The preference shown for national courts over the ECtHR in these rulings indicates a prioritization of the EU's internal legal order, potentially at the expense of external legal influences, notably from international law frameworks like the Council of Europe.[642] This approach, as manifested in these judgments, signals a clear assertion of the EU's legal autonomy and supremacy, especially in relation to its Member States and in the broader international law context. By affirming its constitutional role, the CJEU can certainly contribute to a potential split or deviation from international law. This issue is broadly recognized and deemed valid, especially considering the EU's role as a fundamental part of the international legal framework, despite its unique attributes.[643]

Adding complexity to this legal scenario is the multifaceted and evolving approach of the CJEU towards international law. This is demonstrated in a range of pivotal cases, each highlighting the CJEU's commitment to integrating international legal principles. The *Racke*[644] case of 2008 stands out as an example of the CJEU's openness to international law and the rulings of international courts, like the ICJ. In this case, the ECJ emphasized its jurisdiction to align the EC legal order with public international law to the greatest extent feasible. The case revolved around the suspension of a bilateral agreement between the EC and Yugoslavia due to the EC's sanctions against Serbia and Montenegro, in line with a UNSC Resolution.[645] The ECJ, in this case, focused more on compliance with international public law, especially the principle of *pacta sunt servanda*

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[640] Maja Lukić, „Autoritet Suda ispred pravne sigurnosti – presuda Mox“, (Authority of ECJ More Important than Legal Security – Mox Plant Judgment), *Annals of the Faculty of Law University of Belgrade,* No. 1/2013, 242.
[641] *Stefano Melloni v Ministerio Fiscal,* Case C-399/11, Judgment of the Court (Grand Chamber), 26 February 2013, ECLI:EU:C:2013:107.
[642] M. Lukić (2015), 336.
[643] Jean d'Aspremont, Frédéric Dopagne, "Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders", *ZaoeRV,* No. 68/2008, 947-950.
[644] *A. Racke GmbH & Co. v Hauptzollamt Mainz,* Case C-162/96, Judgment of the Court of 16 June 1998, ECLI:EU:C:1998:293.
[645] Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, *Official Journal, L 315, 15.11.1991. (out of force).*

from the Vienna Convention on the Law of Treaties, rather than on fundamental rights protection.[646] Notably, the Court declared that the EC, despite not being a signatory to the Vienna Convention, was bound by the principles of customary international law codified within it. Such monist approach is also evident in the *Western Sahara* dispute, where the ECJ demonstrated a willingness to conform to international law in situations involving international agreements to which the EU is a signatory.

Additionally, in cases involving *Hamas and LTTE*, the ECJ's rulings aligned with international law, notably referencing the ICJ's 1986 Nicaragua decision.[647] The Court highlighted the importance of international humanitarian law and the interplay between EU and UN sanctions regimes. In other words, it underscored its judicial compliance with UN Security Council resolutions, especially in counter-terrorism matters, demonstrating a cohesive approach to EU restrictive measures and the CFSP. A significant aspect was that CFSP restrictive measures were autonomous EU actions, not predominantly based on the UN legal framework. This illustrated the EU's and the Court's readiness to align the EU legal regime with that of the UN, indicating a harmonious relationship between the two distinct legal systems without foreseeable conflicts or tensions.[648]

In the post-Lisbon Treaty era, a notable shift from a monist to a dualist perspective is observed, particularly highlighted in the seminal *Kadi* cases. These cases marked a turn towards emphasizing the Union's independent status within the international legal framework. They indicated a trend towards prioritizing EU supremacy and security measures in foreign affairs, potentially at the expense of obligations to the UN. As De Búrca articulates, this could be aptly perceived as a deviation from the "conventional presentation and widespread understanding of the EU as an actor which maintains a distinctive commitment to international law and institutions".[649] This development contrasts with earlier instances where the CJEU adopted an integrated stance towards international law, as exemplified in cases concerning the ratification of international agreements.

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[646] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.
[647] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, International Court of Justice, 27 June 1986.
[648] G. Harpaz, 1918.
[649] Gráinne de Búrca, "The European Court of Justice and the International Legal Order after Kadi", *Harvard International Law Journal*, No. 51/2010, 1.

Cremona notes that the CJEU is currently tasked with a dual responsibility in its affairs: it aims to balance institutional harmony and fulfill its obligations to international law, while also preserving its authoritative role in interpreting EU law and protecting fundamental rights.[650] Despite this being the case, it is crucial to highlight the transition from a more integrated (monist) to a more divided (dualist) approach, reflecting the Court's dynamic interaction with international law.[651] This shift does not imply a complete dominance of the dualist perspective; traces of monism can still be found in the CJEU's case law regarding its relationship with international law. Nonetheless, a clear inclination towards a dualist viewpoint is evident. This includes a focus on legal certainty and the protection of human rights, which ironically can be compromised by this very approach. This has led to a complex and at times contradictory legal landscape, contributing to what some scholars describe as "post-modern anxieties" in the realm of jurisprudence.[652]

It follows that the CJEU takes a firmly dualist approach, leading to considerable challenges in maintaining the EU's distinct legal identity while effectively implementing its obligations under international law. This dualist perspective originates from the Court's definition of the EC/EU as an "internal and autonomous" legal order. This interpretation effectively excludes the possibility of reviewing UNSC resolutions, even in scenarios involving peremptory norms *(jus cogens)* of general international law, which are non-derogable and can only be altered by a later norm of the same international legal stature.[653] This position contrasts sharply with Article 103 of the UN Charter, which states that in conflicts between UN Member States' obligations under the UN Charter and any other international agreement, the obligations under the UN Charter take precedence. While international law does not explicitly determine the status of EU law, the supremacy of international law is inferred through Member States' obligations under the UN Charter. The CJEU exploits this gap to overlook UNSC resolutions and the primacy of the UN Charter, thereby maintaining a distinctly dualist approach. Further complicating the interaction between EU law and international law is the specific wording of Article 52 of the EU Charter. This Article introduces an additional layer of intricacy in the EU's approach to managing its interactions with wider international legal systems. Specifically, it permits the limitation of rights to achieve

[650] M. Cremona (2017), 690.
[651] M. Lukić (2015), 332.
[652] Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law,* No. 15/2002, 553-579.
[653] International Law Commission, "Peremptory Norms of General International Law (jus cogens)", available at: *https://legal.un.org/ilc/reports/2019/english/chp5.pdf,* 03.01.2024.

"objectives of general interest recognized by the Union," thereby endowing the EU with substantial autonomy in these matters.[654]

However, this is in stark contrast to the ECHR, which requires that restrictions on rights be "necessary in a democratic society", ensuring proportionality and the protection of a range of public interests. The phrasing of Article 52 in the EU Charter could, in a literal interpretation, enable wider EU aims, including economic ones, to limit fundamental rights, potentially leading to a greater divergence from international law norms. However, it is crucial to acknowledge, as Krstić and Čučković rightly argue, that compliance with international law, including the Council of Europe's framework, does not inherently undermine the EU's autonomy or its commitment to human rights protection.[655] These elements can function coherently and independently from a legal perspective. The EU's engagement with international law calls for a sophisticated approach that transcends the traditional monism-dualism dichotomy. This complexity arises because both monism and dualism are present, with the EU internally favoring monism and externally demonstrating a tendency towards dualism. These facets of the EU's autonomous legal system are, at least theoretically, framed by the roles played by Member States. The ideal strategy would be one that seamlessly integrates these principles, employing legal tactics from both the EU and its Member States to uphold the EU's legal coherence while also respecting international law obligations. The overarching aim should be to uphold and enhance human rights standards. Yet, this goal is eclipsed by the political quest for EU autonomy on the global stage, a pursuit that is markedly apparent in the CJEU's approach.

5.4. The potential political consequences of the CJEU's stance on EU autonomy

The expansion of the CJEU's jurisdiction, as it increasingly ventures beyond the boundaries established by the EU Treaties, underscores a notable tension between legal norms and political objectives in the execution of the EU's foreign policy. This development reflects a complex interplay where the CJEU's assertive legal interpretations intersect with the broader political ambitions of the EU, potentially challenging the delicate balance between legal authority and political intent within the Union's framework. This nuanced role of the CJEU becomes even more apparent in the context of CFSP. While the cross-pillar joint legal basis between the former second pillar (CFSP) and third pillar (now AFSJ) was feasible before the Lisbon Treaty, the post-Lisbon

[654] Charter of Fundamental Rights of the European Union, Article 52(1).
[655] I. Krstić, B. Čučković, 72-74.

legal landscape is more defined, highlighting the separation between these pillars.[656] The CJEU appears to be actively working to bridge the divide between legal and political realms, as evidenced by its case law that responds to external political pressures. These cases have significant political implications and have also influenced the distribution of competences between the EU and its Member States, as well as between the two former pillars of the EU structure.

Furthermore, it can be observed that the CJEU's judicial approach fluctuates between judicial activism and self-restraint. While it often exhibits self-restraint by deferring decisions to the political branches of the government, the Court has also engaged in judicial activism, influencing legal changes. This extends beyond simple judicial policymaking, which typically involves interpreting existing laws, to the creation of new legal concepts and norms, a practice the CJEU has frequently adopted. However, it has also shown self-restraint on many occasions, making its role complex and somewhat unpredictable. This oscillation between restraint and activism is evident in the landmark *Kohll Decker* judgments of 1998, which prompted significant legislative amendments by the EU.[657] In this context, the Court's roles of restraint and activism are often intertwined, even within the same case.

The incorporation of the CFSP into the EU's constitutional structure illustrates the ongoing trend of judiciously maneuvering between two distinct yet overlapping roles that are seemingly paradoxical. In this scenario, the CJEU is sculpting the CFSP not through political negotiations but through authoritative judicial decisions.[658] However, this approach does not entirely rule out the possibility that the Court's push for the constitutionalization of the EU and the CFSP may have underlying political motivations. Nevertheless, the CFSP is gradually harmonizing with the EU's standard external relations, operating on a non-CFSP legal basis. This shift leads to the normalization of CFSP within the EU's legal structure, encompassing comprehensive judicial review and protection, despite its separate treatment in the Treaties. As a result, the Court is perceived as bringing CFSP into greater alignment with the wider legal system of the EU. In the discourse on the expanding role of the CJEU, there is a stark contrast between theories such as neofunctionalism, which underscore the CJEU's political independence, and neorealist

[656] C. Eckes (2015), 544-546.
[657] *Raymond Kohll v Union des caisses de maladie*, Case C-158/96, Judgment of the Court of 28 April 1998, ECLI:EU:C:1998:171.; *Nicolas Decker v Caisse de maladie des employés privés*, C-120/95, Judgment of the Court of 28 April 1998, ECLI:EU:C:1998:167.
[658] G. Butler (2017), 700-701.

perspectives that argue the Court's autonomy is limited due to the potential for Member States to exert control through sanctions.[659]

This debate becomes even more complex when considering the CJEU's evolution from an institution historically in line with European government interests to one that actively challenges them, a shift that has drawn criticism for perceived political motivations. Adding to this complexity, Larsson and Naurin's analysis points to a strong correlation between the CJEU's rulings and the political cues it receives, indicating a trend that transcends legal justification and aligns with the concept of an override mechanism.[660] This multifaceted scenario highlights the challenges in fully understanding the CJEU's changing role and the intricate balance between legal authority and political influence within the EU framework.

Moreover, scholars have extensively discussed the necessity of international judiciaries making autonomous decisions, free from the influence of state governments, to uphold the principles of judicial independence and impartiality, vital for maintaining the rule of law.[661] This concept of judicial independence, as articulated in Opinion No. 3 by the Consultative Council of European Judges of the Council of Europe, is fundamental for ensuring a judge's impartiality, thereby lending credibility and public trust to the judicial system in democratic societies.[662] This aligns with Article 6 ECHR which mandates a fair and public hearing by a law-established independent and impartial tribunal. However, judicial independence does not equate to unfettered power for judges but necessitates strict adherence to the independence and impartiality in legal proceedings. Focusing on the CJEU, in recent years, it has played a pivotal role in establishing and upholding minimum standards of judicial independence as a binding principle for EU Member States, in accordance with Union law. This enforcement is grounded in several legal bases: Article 19 TEU demanding Member States to ensure effective judicial protection in domains governed by EU law; Article 47 of the EU Charter requiring a fair trial and judicial protection in the implementation of EU law; and Article 2 TEU enshrining the rule of law as a foundational value

[659] Karen J. Alter, "Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice", *International Organization*, No. 1/1998, 121-147.
[660] Olof Larsson, Daniel Naurin, "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU", *International Organization*, No. 70/2016, 377-408.
[661] For further reference *see* Anne-Marie Burley, Walter Mattli, "Europe before the Court: A Political Theory of Legal Integration", *International Organization*, No. 1/1993, 41-76.; Laurence R., Helfer, Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", *California Law Review*, No. 3/2005, 899–956.
[662] Consultative Council of European Judges, *CCJE (2002) Opinion No. 3*, Strasbourg, 19.11.2002.

for Member States.[663] The ECJ's emphasis on developing these common standards aims not just at ensuring judicial protection at the national level but also at fostering mutual trust among the judiciaries within the EU.

In its jurisprudence regarding judicial independence, the CJEU has specifically concentrated on maintaining the judiciary's autonomy from legislative and executive branches, the public perception of judicial independence, and the integrity of appointment and disciplinary procedures for judges. The case of *Commission v. Poland* serves as a prominent example, underscoring the importance of effective judicial protection and the obligation of national courts enforcing EU law to comply with the EU's standards of judicial independence.[664] This expectation is indirectly applicable to the CJEU, as the supreme legal authority of the EU. In this judgment, two critical components were delineated: the external and internal aspects of judicial independence. The external component mandates that courts function entirely autonomously, free from any hierarchical constraints or subordination to other bodies, and immune to any external influences or pressures. Conversely, the internal component is closely associated with impartiality, demanding that courts maintain an equitable stance towards all parties in a case, devoid of any biases or vested interests in the outcome, except for the rigorous application of the law. However, as the jurisdiction of the CJEU continues to expand, concerns are raised about its capacity to stay impartial amidst political discourses, a standard it firmly sets and expects from national courts within the Member States.

The international relations theory introduces a compelling perspective on the CJEU's judicial strategy, particularly through the lens of the Separation-of-Powers (hereinafter: SAP) model.[665] This model, which originated in the context of American judicial politics but has since been adapted to international courts, focuses on the dynamics of overriding court decisions. It posits that judges are largely driven by their policy preferences, acting strategically while considering the potential reactions of other influential policy actors and the long-term impact of their decisions on the political system as a whole. In this framework, judges are sometimes compelled to choose suboptimal outcomes to avoid worse scenarios, such as a regression towards greater national

[663] European Parliament, "ECJ Case Law on Judicial Independence: A Chronological Overview", available at: *https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf,* 09.01.2024.
[664] *European Commission v Republic of Poland,* Case C-619/18, paras. 72-73.
[665] For further information *see* Christoph Grabenwarter, "Separation of Powers and the Independence of Constitutional Courts and Equivalent Bodies", available at: *https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Grabenwarter_keynotespeech.pdf,* 09.01.2024.

sovereignty in international courts, or a halt in the progression towards their preferred direction.[666] This strategic choice, while necessary, can potentially impact the judges' status and reputation. The breadth of the judicial discretion zone is a point of contention among legal theorists. Some, like Sweet and Brunell, argue that the CJEU is largely shielded from Member State overrides, while others, like Scharpf, suggest that political corrections of CJEU decisions are theoretically rare and practically almost unfeasible.[667]

Analyzing the CJEU's case law, it would be an oversimplification to label the Court as purely politically driven, just as it would be misleading to assert that the CJEU functions as a completely impartial international judicial body. In reality, the CJEU occupies a nuanced position on the spectrum between these two extremes, skillfully balancing its role and influence to avoid exceeding its authority. This delicate navigation involves a careful application of teleological reasoning and interpretation of the Treaties' provisions. Despite varied opinions, the CJEU judges are recognized for their collective vision of Europe, a point highlighted by Pescatore.[668] Among EU scholars, there is a general agreement that the CJEU demonstrates a tendency towards promoting European integration. This widespread consensus reflects a recognition from various academic disciplines and perspectives that the CJEU has consistently favored the advancement of European integration and the supremacy of EU law over the national laws of Member States.[669] This inclination indicates that the CJEU's goals may extend beyond mere legal principles like direct effect and primacy, veering more towards political ambitions, particularly in fostering European unity.

Regarding the unity of the EU's legal framework, the recent advancements within the EU, highlighted by the Strategic Compass for the EU's emphasis on foreign and security policy and its objective to significantly enhance this area by 2030, have been met with considerable praise.[670] . This newly implemented strategy enhances EU unity by reinforcing security and defense amidst increasing global security challenges, while also underlining the vital importance of collaboration

[666] O. Larsson, D. Naurin, 379.
[667] Alec Stone Sweet, Thomas Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override", *American Political Science Review,* No. 1/2012, 204-213.; Fritz W. Scharpf, "The Asymmetry of European Integration, or Why the EU Cannot be a 'Social Market Economy'", *Socio Economic Review,* No. 2/2010, 211-250.
[668] Pierre Pescatore, "The Doctrine of "Direct Effect": An Infant Disease of Community Law", *European Law Review,* No. 2/2015, 135-153.
[669] Geoffrey Garrett, R. Daniel Kelemen, Heiner Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union", *International Organization,* No. 1/1998, 149-176.
[670] "A Strategic Compass for Security and Defence", available at: *https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf,* 15.03.2024.

with external multilateral partners like the UN and NATO, regional allies such as the OSCE and African Union, and bilateral partners including the United States and United Kingdom. These partnerships play a pivotal role in safeguarding EU autonomy strategically while also enhancing global peace and security. Recent efforts in the realm of economic security, aimed at fortifying the EU's collaborations on both multilateral and bilateral levels, intersect with the CFSP's objectives amidst the current unstable geopolitical climate.[671]

The reinvigoration of the CFSP and the CSDP, in particular, emerges against a backdrop of ongoing global conflicts, cyber threats, pandemics, natural disasters, and climate change, presenting challenges not only to the EU but to the global community at large. The focus of both the CFSP and economic security strategies on partnering with countries worldwide aims to shield against various security risks. This approach underscores a crucial realization; the EU cannot operate in isolation but exists in a mutually dependent relationship with both internal and external actors. Yet, this nuanced and expanded perspective on the CFSP, which affirms the EU's autonomy from both domestic and international viewpoints, has yet to significantly influence the CJEU. Nevertheless, it promises to offer a comprehensive blueprint for the Court's forthcoming evaluations on CFSP-related matters. Furthermore, this approach could facilitate a supportive evaluation of the EU's bid to join the ECHR, enhancing the EU's judicial and autonomous infrastructure. This certainly paves the way to move beyond the outdated viewpoint that EU accession to the ECHR could undermine its internal autonomy.

5.5. Political question doctrine as a viable solution?

The political question doctrine, originating from the U.S. Supreme Court, dictates that federal courts abstain from hearing cases deemed to encompass a political question.[672] This principle is rooted in the notion that certain issues are so imbued with political implications that they are inappropriate for adjudication by federal courts, traditionally regarded as the non-political arm of government. Designed as a judicial tool to keep judges out of political disputes, the doctrine

[671] European Commission, "Joint Communication to the European Parliament, the European Council and the Council of 20 June 2023, on European Economic Security Strategy", available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0020,* 15.03.2024. For additional information on this matter *see* Duško Dimitrijević, „Strategija Evropske unije o ekonomskoj bezbednosti", (European Union Strategy on Economic Security), *European Legislation,* No. 83/2023, 91-109.

[672] Legal Information Institute, "Political Question Doctrine", available at: *https://www.law.cornell.edu/wex/political_question_doctrine,* 05.01.2024.

compels judges to carefully consider the complex interplay between law and politics.[673] Often interchanged with the term "justiciability doctrine", this rule was firmly established in the landmark case of *Marbury v. Madison,*[674] setting a precedent for federal court proceedings. The political question doctrine is both lauded for upholding the separation of powers and criticized as a potentially perilous concept in constitutional law. This discourse fundamentally centers on whether the interpretation of the Constitution should be exclusively within the purview of the courts, or if other branches of government should also possess the authority to interpret certain constitutional provisions.

Pertinently, Blokker highlights a fundamental issue with legal constitutionalism, especially in the context of post-communist transformations.[675] This concern relates to the tendency of legal constitutionalism to detach constitutional deliberations from broader public engagement. While acknowledging that legal constitutionalism can adversely impact new democracies and the general populace, entrusting constitutional interpretation solely to branches outside the judiciary could be dangerous. Such a move might leave constitutional matters vulnerable to populism, a particularly risky prospect in the European context. Unlike the U.S. system, the ECJ has not yet adopted or formulated its own version of the political question doctrine. When prompted, the ECJ has avoided defining or employing this concept. However, comparative studies exploring this topic have shed light on the tactics employed by courts in handling the justiciability of politically sensitive issues. These tactics are deeply intertwined with considerations of institutional balance, legitimacy, and the broader principle of the rule of law.

In assessing the application of the political question doctrine in the context of the CJEU, it is crucial to consider the CJEU's distinctive operational environment, which sets it apart from national constitutional courts. Initially established as an international tribunal with specific characteristics, the CJEU has undergone a significant transformation, evolving into an entity that mirrors the functions of both an administrative and a constitutional court. This evolution marks a deliberate shift in the CJEU's approach to dealing with politically sensitive issues, adeptly navigating legal principles alongside the intricate workings of EU governance. Scholars rightly

[673] Margit Cohn, "Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems", *The American Journal of Comparative Law*, No. 3/2011, 681.
[674] *Marbury v. Madison,* 5 U.S. 137 (1803), 24 February 1803.
[675] Paul Blokker, "From Legal to Political Constitutionalism?", available at: *https://verfassungsblog.de/from-legal-to-political-constitutionalism/,* 18.01.2024.

view this development as the CJEU morphing into a form of a federal constitutional court and a pivotal legislator. This role is vital in directing political governance and molding democratic values at both the European and national levels, further aiding in the formation of a cohesive European identity through the process of judicial harmonization.[676]

However, a critical differentiator for the CJEU is the persistent challenge of legitimacy. Unlike national counterparts, the CJEU's legitimacy has been more rigorously scrutinized, even though the Court's foundational role is constitutionally solidified. The CJEU's authority, rooted in the founding Treaties and particularly emphasized in Article 19(1) TEU, mandates a commitment to law in interpreting and applying these Treaties, paralleling the function of constitutional review. Consequently, the Court's body of case law not only reinforces its constitutional role but also imparts a constitutional dimension to its function. Also, the independence and impartiality of its judges are essential to the Court's legitimacy, standards that the CJEU faithfully adheres to. Nonetheless, the CJEU confronts ongoing legitimacy challenges, primarily due to its operation within a European framework where consensus on shared values is comparatively limited, and the absence of a uniform constitution like those in national jurisdictions. Despite these challenges and its somewhat precarious role as a constitutional adjudicator, the CJEU functions in a manner akin to a constitutional court in a federal system, marked by a substantial division of power between central and state authorities.[677]

To determine the appropriateness of the political question doctrine for the CJEU, it is crucial to compare it with constitutional systems where this doctrine is actively used. Originating from the U.S. Supreme Court's jurisprudence, the doctrine is a staple of the common law tradition, leading to its widespread adoption in common law countries, including the UK and Israel, as well as the U.S. It is crucial to recognize that the application of the political question doctrine in the UK and Israel lacks a strict formula, contrasting with the U.S. approach, where the doctrine is characterized by specific criteria. This precise framework in the U.S. originated from the landmark Supreme Court case of *Baker v. Carr*,[678] a decision that significantly redefined and restricted the scope of the doctrine's use. In his pivotal role in articulating the Supreme Court's stance in *Baker v. Carr*, judge Brennan highlighted that the core of the political question doctrine is found in the

[676] T. Tridimas (2003), 1.
[677] Alicia Hinarejos, "Introduction: The ECJ as a Federal Constitutional Court", *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars*, (ed. Alicia Hinarejos), Oxford, 2009, 1-13.
[678] *Baker et al. v. Carr et al.*, 369 U.S. 186 (1962), 26 March 1962.

relationship between the judiciary and the federal government's other branches, as opposed to its interactions with the states. He argued that the nonjusticiability of a political question largely arises from the principle of separation of powers.

This perspective highlights the essential role of a court as the definitive interpreter of a constitution, charged with striking a delicate equilibrium between its own jurisdiction and the powers of the other branches of government. Delving deeper, judge Brennan explained that assessing whether an issue is constitutionally designated to another branch of government, or whether that branch has overstepped its bounds, involves intricate constitutional interpretation. He summarized this notion by stating: "it is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."[679] This statement underscores the doctrine's adaptive nature and its fundamental link to the concept of separation of powers within the U.S. constitutional structure.

The variation in the use of the political question doctrine among common law jurisdictions such as the UK and Israel stems from their distinct national legal systems. For example, the UK has experienced a significant shift from traditional governance to a constitutional liberal system, influencing how its courts have adapted their approach over time. Despite these evolutionary changes, British courts continue to apply the political question doctrine. This is exemplified in the landmark ruling of the UK Supreme Court in *Miller v. Prime Minister*.[680] This case, deeply entwined with the political complexities of the UK's exit from the EU, or "Brexit," raised critical questions about justiciability, specifically whether the Prime Minister's decision to suspend parliament was a matter beyond the scope of judicial review. In parallel, the U.S. Supreme Court's decision in *Rucho v. Common Cause,*[681] occurring in a similar timeframe, also affirmed the political question doctrine. The comparison of cases from the UK and the U.S. highlights the nuanced differences in how the political question doctrine is interpreted and applied within various common law systems, each shaped by their unique legal and constitutional environments.

Myers captures this contrast in common law approaches to the political question doctrine, by stating that "whereas the UK Supreme Court largely sidelined the manageability inquiry and

[679] *Ibid*, para. 187.
[680] *R (Miller) v The Prime Minister Cherry v Advocate General for Scotland*, UKSC 41, 24 September 2019.
[681] *Rucho et. al. v. Common Cause et. al.*, 18-422 U.S. 588 (2019), 27 June 2019.

instead focused on the dictates of the constitution, the *Rucho Court* was consumed by the question of whether an adequately clear and definite rule of decision could be found".[682] Essentially, the statement delineates a stark contrast in the approach to the political question doctrine between the two judicial systems. The UK Supreme Court demonstrates a tendency to de-emphasize the manageability of political issues by the judiciary, opting instead to prioritize strict adherence to constitutional principles. This orientation implies a readiness to delve into complex political matters, as long as they align with the constitutional context. Conversely, the U.S. Supreme Court centers its examination on the presence of a clear and definitive standard that governs decision-making. This method reflects a more prudent posture, with the Court aiming to steer clear of political entanglements unless guided by a solid, well-articulated legal principle or rule. This emphasis on well-defined, judicially manageable standards serves to delineate a distinct demarcation between judicial adjudication and political discourse. In other words, the UK Supreme Court's operations are chiefly influenced by a firm commitment to constitutional mandates, whereas the U.S. Supreme Court takes a more careful and flexible stance, prioritizing judicial restraint and highlighting the necessity of clear, manageable standards before delving into political questions.

Regarding the Israeli judiciary, another prominent example within the common law system that has adopted the political question doctrine, it has notably diverged from the exact framework of the U.S. version. In fact, the Israeli judiciary has critiqued the U.S. approach as being irrational and unstable. A pivotal moment in the evolution of Israel's interpretation of the doctrine occurred in the late 1980s. It was during this period that judge Barak, through the landmark case of *Ressler v. Minister of Defense,*[683] introduced a transformative vision for the judicial role. This new perspective significantly departed from previous notions by asserting that "every action can be contained within a legal norm, and there is no action regarding which there is no legal norm."[684] This statement reflects a broader and more inclusive approach to legal norms, indicating a readiness to engage with issues that might be considered political questions in other jurisdictions.

This comprehensive comparative analysis of three common law regimes leads to the conclusion that each system adopts a distinct approach to the doctrine of political questions.

[682] Jackson A. Myers, "Transatlantic Perspectives on the Political Question Doctrine", *Virginia Law Review*, No. 4/2020, 1026.
[683] *Ressler v. Minister of Defense*, HCJ 910/86, 12 June 1988.
[684] *Ibid*, para. 10.

Therefore, if the CJEU decides to pursue this path, it is plausible to anticipate that it will forge its own unique methods for addressing this doctrine, as Mercescu and Doroga have aptly argued.[685] Supporting this view, Samuel insightfully notes that contemporary European judges are part of a generation that views the law not as a collection of isolated national systems, each with its own unique concepts, relationships, and symmetries (or asymmetries). Instead, they see it as a complex amalgamation of ideas, interpretative frameworks, structures, sub-systems, and similar elements.[686]

5.5.1. The CJEU's approach: diverging from but closely aligned with the political question doctrine?

Currently, the judicial methodology of the CJEU remains distinct from the political question doctrine. As Lenaert's correctly observes, the CJEU maintains a balance between its established role as a constitutional arbiter and its drive for evolution in substantive EU law, achieved through the interplay of political and judicial processes.[687] He presents a persuasive case that the CJEU, despite being aware of the political aspects present in its cases, chooses to manage these complexities through the use of technical and interpretative methods. This approach is in contrast to creating rules of justiciability that mirror those seen in the political question doctrine. An analysis of the CJEU strategies for establishing legitimacy, particularly through the prism of high/low politics (a concept often linked to the political question doctrine) reveals that the Court's approach lacks uniformity. The CJEU's method fluctuates, influenced by interpretations of the Treaties that range from restrictive to broad, particularly in terms of the distribution of powers between the EU and its Member States. As a result, the CJEU seems to adopt an interpretive strategy that resembles the political question doctrine but remains unique, differentiating itself from the methods used in common law systems. It is important to acknowledge that traces of the political question doctrine can be discerned in the CJEU's treatment of the CFSP. This subtle reflection arises from the Court's constrained jurisdictional authority in CFSP matters and the contention that certain CFSP disputes are inherently political rather than legal.

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[685] Alexandra Mercescu, Sorina Doroga, "Should the European Court of Justice develop a Political Question Doctrine?", *International Comparative Jurisprudence,* No. 1/2021, 18-19.

[686] Geoffrey Samuel, "Comparative Law and the Courts: What Counts as Comparative Law?", *Courts and Comparative Law,* (eds. Mads Andenas, Duncan Fairgrieve), Oxford, 2015, 64.

[687] Koen Lenaerts, "How the ECJ Thinks? A study on Judicial Legitimacy", *Fordham International Law Journal,* No. 5/2013, 1309.

This perspective is further informed by instances where the CJEU is perceived as extending beyond its Treaty-mandated powers. The range of noteworthy examples is extensive, encompassing cases such as *Rosneft*, where the Court initiated the preliminary rulings procedure, *H. v. Council* dealing with staff management issues, and extending to the *Bank Refah Kargaran* case, which involved claims for damages. Nevertheless, the Court generally avoids explicitly using the term "political question" in its adjudication, as such an acknowledgment might suggest an automatic adoption of this approach. However, in rare instances like the *LTTE* case, the Court makes a fleeting reference to the concept of a political question doctrine. In this context, the Court noted that the decision to maintain LTTE's name on the restrictive measures list is a political question, one that falls within the legislative realm of the Council, which holds considerable discretionary power.[688]

Moreover, in several cases the CJEU had the opportunity to apply the political question doctrine but opted for an alternative approach, focusing more on interpretative techniques aligned with the Treaties and steering clear of deep political analyses. A prime example is the *Kadi I* case, where, instead of delving into potential political questions, the Court emphasized its authority to assess the legality of Community acts against the backdrop of fundamental rights.[689] The Court's decision was grounded in the standards of review and the Council's scope of discretion, rather than the dispute's inherent nature. Similarly, in the *Front Polisario* case, the Court adopted a procedural stance. It ruled that the applicants lacked legal standing under EU procedural law, as the international agreement in question was not pertinent in this context, thus approaching the matter from a purely procedural angle.[690] The *SatCen* case provides another illustration of the Court's procedural focus. Advocate General Bobek offered insights on the political question, highlighting the need for caution and self-restraint by the CJEU in the "grey zone" where issues overlap between CFSP and non-CFSP matters.[691] This suggests a limited or even excluded judicial role in such cases, emphasizing the Court's preference for procedural review over direct engagement with political question doctrine.

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[688] *Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE),* Case C-599/14 P, para. 156.
[689] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Joined cases C-402/05 P and C-415/05 P, para. 326.
[690] *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario),* Case C-104/16 P, para. 125.
[691] Opinion of Advocate General Bobek delivered on 19 March 2020, *European Union Satellite Centre (SatCen) v KF,* Case C-14/19 P, ECLI:EU:C:2020:220, para. 66.

The CJEU's strategy reflects a conscious decision to not directly invoke the political question doctrine, despite facing a multitude of politically sensitive cases. This hesitancy is rooted in the Court's ambition to solidify its position as a constitutional court, marking a significant shift from its initial role. Initially, the EU focused more on economic rather than constitutional law, a transition highlighted by Butler.[692] The challenge for the Court lies in maintaining its traditional role in overseeing economic integration while embracing its growing constitutional authority. Despite the inherent complexities, the CJEU consistently upholds its constitutional role within the EU framework. This resolute stance by the CJEU paves the way for the possible evolution of a distinctive political question doctrine, molded by the dynamic political and legal environment. This prospect is further highlighted by the Court's recognition in Opinion 2/13 of its limited experience in precisely defining its jurisdictional boundaries in CFSP issues, suggesting the potential for future developments in this area.

Moreover, there are indications that a form of the political question doctrine is already subtly present, even though the Court has not established specific legal tests or criteria to delineate political questions. This is exemplified in the *Bangladesh*[693] case, where the Court declined to review collective actions by Member States outside the Council. Similarly, the General Court, without formally adopting a broader test, hinted at the doctrine in *NF and Others v. Council.*[694] In this case where applicants sought to annul the "EU-Turkey statement" or "EU-Turkey deal", the Court chose not to conduct a review, considering it a political statement that fell outside the purview of EU institutional action.

While Member States are granted considerable discretion as long as they adhere to EU law, the Court has not yet defined clear boundaries between justiciable and non-justiciable issues. Hence, there is no explicit definition of the doctrine within EU external relations law, despite its implicit presence, particularly in CFSP matters, where the Court operates on the fringes of its jurisdiction. Also, considering the fundamental characteristics of CFSP, this domain appears to be a more fitting context for the application of the political question doctrine. This is due to the intertwined nature of political and legal decisions in foreign relations, where adherence is typically

[692] Graham Butler, "In the Search of the Political Question Doctrine in EU Law", *Legal Issues of Economic Integration*, No. 4/2018, 334.
[693] *European Parliament v Council of the European Communities and Commission of the European Communities*, Joined cases C-181/91 and C-248/91, Judgment of the Court of 30 June 1993, ECLI:EU:C:1993:271.
[694] *NF and Others v European Council*, Joined Cases C-208/17 P to C-210/17 P, Order of the Court (First Chamber) of 12 September 2018, ECLI:EU:C:2018:705.

governed not by judicial enforcement but through political procedures or non-binding opinions from the Court. Given this complex interplay of political and legal matters on one hand, and substantive and procedural elements on the other hand, drawing clear lines between justiciable and non-justiciable issues before the Court, in alignment with the political question doctrine, would present a significant challenge.

Regarding the potential implementation of the political question doctrine before the CJEU, opinions are divided. Advocates of this doctrine argue that its adoption would empower other EU institutions, like the executive and legislative branches, to make constitutionally significant decisions. A notable concern, however, is the broad application of the doctrine due to its undefined nature. Conversely, proponents suggest that the doctrine could prevent the CJEU from overreaching its jurisdiction, thereby promoting greater legal certainty. Interestingly, this concept of legal certainty is a point of contention among scholars. Supporters like Butler and Lonardo believe that the doctrine would bolster legal certainty in judicial review, particularly in foreign affairs.[695] On the other hand, critics such as Elsuwege and Mercescu contend that the absence of a solid legal basis for the doctrine within the EU Treaties, along with the potential for its excessively adaptable implementation, could undermine legal certainty and thus pose a risk to the rule of law within the European Union.[696] Also, Advocate General Kokott argues in Opinion 2/13 that such a wide interpretation of the CJEU's authority over CFSP conflicts with the language of Article 275 TFEU and deviates from the intentions of the drafters of the Treaties.[697] Consequently, it becomes apparent that the interpretation of the Treaties hinges on the adopted approach, be it literal or teleological. Without a clearly prescribed method for interpretation, all viewpoints remain valid concerning the matter in question, provided that the institutional balance and the principle of sincere cooperation are maintained.

Moreover, the influence of the political question doctrine in handling CFSP matters is evident from the practice of excluding CJEU jurisdiction in CFSP issues, effectively leaving them to executive organs. This exclusion is a clear indication of an existing, albeit informal, political question doctrine. Given this context, it seems logical to consider the formal adoption of this

[695] G. Butler (2018), 351-352.; L. Lonardo (2018), 555.
[696] Peter Van Elsuwege, "Upholding the rule of law in the Common Foreign and Security Policy: H v. Council", *Common Market Law Review,* No. 3/2017, 853-854.; A. Mercescu, 27.
[697] *Opinion pursuant to Article 218(11) TFEU,* View of Advocate General Kokott delivered on 13 June 2014, para. 90.

doctrine by the Court in the future. Such an adoption, provided it comes with well-defined guidelines, is unlikely to significantly alter the existing balance of power. What is more, this notion of an implicit political question doctrine was also echoed by Advocate General Wathelet in his opinion on the *Rosneft* case, where he observed that:

"The reason for the limitation of the Court's jurisdiction in CFSP matters brought about by the 'carve-out' provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers".[698]

Considering the growing importance of the EU's external relations and the judicial expansion leading to the constitutionalization of the CFSP, the time appears ripe for the CJEU to seriously contemplate the adoption of a political question doctrine. Such a step would mirror practices in common law jurisdictions, but with a unique adaptation by the CJEU that reflects the *sui generis* character of the EU. The Court is well-positioned to address cases with political aspects within the CFSP, which will require an evaluation of their legal relevance. The emergence of fundamental doctrines such as primacy, direct effect, and effective judicial protection from the Court's own jurisprudence suggests the possibility for a comparable development of the political question doctrine as well. Such a progression could reinforce the Court's credibility and enhance its influence in the CFSP, provided it maintains a strict judicial review standard. Currently, the lack of a clearly defined political question doctrine forces the CJEU to tread a fine line between adhering to its Treaty-defined powers and the risk of exceeding them, a situation increasingly met with criticism and controversy.

It follows that the Court should not hesitate considering the implementation of the political question doctrine, particularly if it can establish a clear, stringent criterion to prevent its overly flexible application and to maintain legal certainty. Such a strategy would empower the Court to confidently fulfill its responsibilities within the CFSP domain, while carefully avoiding any overextension of its jurisdiction. The future will unfold how the CJEU adapts to the escalating concerns regarding legal certainty and its role in the CFSP, particularly considering the latest

[698] Opinion of Advocate General Wathelet delivered on 31 May 2016, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, para. 52.

reforms to the CJEU, including amendments to its Statute.[699] These reforms indicate a recognition of the need for urgent changes, which may soon be mirrored in the CJEU's jurisprudence. This evolving landscape could potentially lead to groundbreaking shifts in how the Court approaches and interprets its mandate, particularly in the realm of the CFSP.

[699] European Parliament, "Amending the Statute of the Court of Justice of the EU: Reform of the Preliminary Reference Procedure and Extension of the Leave to Appeal Requirement", available at: *https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754559/EPRS_BRI(2023)754559_EN.pdf*, 25.01.2024.

6. CONCLUSIONS AND FUTURE PROSPECTS

In drawing this comprehensive discussion to a close regarding the CJEU and its intricate relationship with the CFSP, it becomes evident that the CJEU has undergone a profound evolution, resulting in a substantial expansion of its powers and influence, particularly within the context of CFSP. This evolution is characterized by a gradual accumulation of authority, originating not solely from the foundational Treaties of the EU, but also, and perhaps more significantly, through the jurisprudential rulings delivered by the CJEU itself. In particular, Article 19(1) TEU plays a pivotal role in the Court's handling of CFSP issues. It broadens the Court's jurisdictional scope, establishing a presumption of general jurisdiction across all areas of EU law, including CFSP, to ensure compliance with the Treaties. Despite specific provisions like Article 275 TFEU that limit the CJEU's jurisdiction in CFSP matters, the Court views these limitations as exceptions to its general trend of expanding its authority, facilitated by a flexible interpretation of Article 19(1) TEU.

Meanwhile, the Court's jurisprudence has been instrumental in shaping its jurisdiction within CFSP, contributing to the development of new legal approaches and doctrines. Landmark cases like *Costa v. ENEL*, *Van Gend en Loos*, *Les Verts,* and more recent ones such as *Rosneft*, *Kadi,* and *H. v. Council* have significantly influenced this transformative journey. The Treaty of Lisbon stands out as a crucial milestone in this evolutionary path, greatly enhancing the Court's influence and introducing an oversight mechanism over CFSP. This transition has effectively shifted the Court's jurisdiction from being non-existent to a limited yet influential role within the CFSP framework. This progress, however, leads to complex inquiries about the character of the competencies under the CFSP, which seem to oscillate between shared and exclusive spheres, thereby creating a *sui generis* type of competence. This uniqueness is due to the absence of a formal definition in the founding Treaties and the lack of a definitive guidelines stemming from the Court's jurisprudence.

On one side, there is the EU's broadening range of activities under CFSP and the increasing authority of the CJEU. On the flip side, the legal foundation for these actions is yet unclear. This underscores the requirement for enhanced clarity, especially in matters related to delineating and categorizing competencies within the EU. Addressing and resolving the current ambiguities arising from the absence of a solid legal basis and methodological framework is imperative. Moreover, the analysis also indicates that, despite formally adhering to its procedural role in CFSP, the CJEU

has successfully extended its authority significantly within the CFSP, leading to modifications in its substantive policies. An important facet of the CJEU's engagement with CFSP pertains to its impact on the development of restrictive measures. At the outset, these measures were characterized by their vagueness and their implementation at the Member States' level. However, it is evident that these measures have undergone a notable evolution under the discernible influence of the Court, leading to increased precision and thereby fortifying the protection of human rights.

Nonetheless, a significant concern arises when considering the recent escalation of geopolitical tensions and the prevalence of conflict-ridden nations. In this context, CFSP restrictive measures appear to have expanded significantly, deviating from their evolved character as precisely tailored sanctions to assume a more expansive and rigorous form, with repercussions that extend beyond individual targets. Thus, in practice, they appear more punitive than preventative, which contradicts their original intent. Moreover, the CJEU's aspirations in championing human rights standards, while certainly commendable, seem to be motivated primarily by political objectives aimed at bolstering the autonomy of the EU legal framework. This inclination becomes notably conspicuous in the Court's interactions with external legal regimes, as exemplified by the *Kadi* cases and its stance in Opinion 2/13 regarding the EU's unfulfilled yet mandatory commitment to accede to the ECHR.

The EU's accession to the ECHR is far more than a legal formality; it is a critical step toward creating a cohesive and comprehensive human rights framework across Europe. This move seeks to harmonize diverse human rights standards among EU Member States while embedding the EU within a broader, well-established human rights system. Importantly, accession to the ECHR would introduce an external mechanism to review EU laws and policies, reinforcing the principle that the EU, like its Member States, is accountable to the same human rights obligations. This would also solidify the EU's commitment to human rights both within its borders and on the global stage, enhancing the legitimacy and credibility of the CJEU by demonstrating a clear commitment to accountability and transparency in human rights matters.

At a time when human rights are increasingly under global scrutiny, the EU's alignment with the ECHR becomes even more significant. The recent adoption of the Strategic Compass for Security and Defense, a successor to the 2003 European Security Strategy and the 2016 Global Strategy for the European Union's Foreign and Security Policy (hereinafter: EUGS), further underscores the EU's intent to strengthen its mutual assistance clause, obligating Member States

to cooperate and provide aid in response to external aggression. The Strategic Compass also marks a pivotal internal shift within the CFSP, moving away from broader concepts such as global or multilateral governance to focus on deepening internal cooperation and fortifying the Union's autonomy.[700] This evolution in the EU's security and defense posture reflects a broader recognition that the Union's unity is shaped by both internal cohesion and its response to external threats. Against this backdrop, it can be argued that the CJEU's favorable stance on EU accession to the ECHR is more attainable than ever before. This moment offers a critical opportunity to bridge historical divides and move beyond political hesitations, signaling a firm commitment to uphold human rights in an era of mounting global challenges.

Furthermore, the CJEU's adoption of a monist approach internally within Member States, and a dualist stance towards international law, carries significant consequences. Domestically, monism is manifested through the reinforcement of the EU legal order via the rule of law. This includes an expansionist interpretation of principles like effective judicial protection and the right to an effective legal remedy, aiming to maximize the CJEU's judicial authority over national courts. However, this often comes at the expense of the principle of conferral of powers, leading to tensions within the EU's legal framework. Externally, the CJEU's dualist approach is marked by its broader application of the rule of law, where restrictive measures or sanctions under the CFSP play a crucial role as well. These measures significantly enhance the EU's external autonomy, sometimes aligning with the UNSC's regime but often diverging from it. The EU's autonomous sanction regime, in particular, has been instrumental in extending its international influence.

This dual stance of the CJEU, however, creates a challenging and somewhat problematic situation, especially in the current international climate where threats to global peace are escalating. The internal expansion of the CJEU's powers, while aiming to strengthen the EU's legal order, might raise concerns regarding overreach and the balance of power within the EU. Conversely, the external application of this approach, especially in the realm of sanctions, underscores the EU's desire to assert its autonomy in global affairs, but it also raises questions about the alignment of EU actions with broader international legal standards and sincere cooperation. Additionally, it casts doubt on the fulfillment of Article 3(5) TEU, which mandates

[700] M. Lukić Radović (2024), 237.

the EU's "strict observance of international law" in its external relations, questioning its adherence to this principle in practice.

However, navigating the balance between these internal and external pressures is a subtle and complex task, calling for a considered approach that respects not only rule of law, but also principles of subsidiarity and proportionality, along with a commitment to upholding international norms and obligations. While the endeavor to fortify the autonomy of the EU legal order, both externally and internally, is comprehensible and imperative, it is crucial to acknowledge that the extent to which the Court has pushed this approach may not be sustainable in the long term. The potential fragmentation of international law resulting from this approach brings with it inherent risks and complexities for the international legal order, which should ideally prioritize a cohesive and harmonious framework. This fragmentation also poses a significant threat to the effective protection of human rights, particularly in a period characterized by shortcomings in international law and instances of non-compliance, particularly in matters concerning the rule of law and other critical issues, by certain Member States. The challenges are intensified by the intricate dynamics of Brexit, the Russia-Ukraine war, ongoing conflicts in the Middle East, the migration crisis, and the global impact of the COVID-19 pandemic. The potential spillover effects could significantly affect Member States and multiple facets of the international legal framework.

In navigating these intricate challenges, a steadfast commitment to international law is imperative, as it actively shapes its evolution to bridge divides and promote cohesion. With the global political landscape transitioning towards a new legal framework, there is an urgent call for proposals advocating a broader perspective to safeguard the integrity of the international legal system. This imperative not only justifies but also demands a reassessment of the EU's fundamental values and interests. As the EU's foreign policy faces challenges both domestically and internationally, an increasing number of states are pushing back against the EU's advocacy of the Western-led liberal order, seeking greater autonomy in defining their sovereignty, security, and economic strategies. In parallel, a significant discourse is unfolding within Europe, centered on fundamental principles, values, and institutions. This has been fueled by the EU's increasing divergence from the specific interests and preferences of its Member States, particularly as the Union pushes for greater autonomy, both internally and externally.

The EU’s evolution toward asserting itself as an independent actor on the international stage is driven by mounting global security challenges that highlight the necessity of self-protection.

While these efforts provide a clear strategic direction, their practical outcomes remain uncertain, as their success hinges largely on the political cooperation of Member States. The inherent challenges of securing political will, combined with the ambiguous jurisdictional authority of the CJEU over the CFSP, underscore the need for a comprehensive review of the existing policy framework. Such a review is essential not only to address emerging global threats but also to prevent the EU's pursuit of autonomy from leading to fragmentation or disillusionment within the Union. By adjusting its policies to the shifting geopolitical landscape, the EU can more effectively position itself to preserve unity and coherence among its Member States while advancing its trajectory toward a more autonomous legal order.

The CJEU has undergone a remarkable transformation from its initial state as a relatively loose judicial body to becoming a robust judicial entity, comparable to a federal constitutional court. Empowered by the Lisbon Treaty and flexible interpretation of its relevant provisions, the Court now significantly shapes the CFSP and integrates it further into the EU legal order, despite the CFSP's lingering intergovernmental elements. This evolution has been driven by the Court's commitment to upholding the rule of law and protecting the autonomy of the EU legal framework at the same time. Although the Court's efforts to enhance human rights protection are commendable, they are often overshadowed by its primary political objectives, which focus on reinforcing the autonomy of EU law. This emphasis is understandable, given that, unlike the ECtHR, the CJEU was not initially established with a primary focus on human rights. Instead, it was originally designed with arbitral tribunal features to resolve economic disputes, and later evolved to safeguard the uniform interpretation and application of EU law. To address ongoing issues and strengthen its legitimacy, the CJEU must strive for greater alignment with international law and adhere more closely to the prescribed competences of EU Member States. Additionally, its judicial policymaking, while understandable and welcomed given the unique nature of the EU, should also reflect this alignment. Ultimately, adhering to international law does not inherently compromise EU autonomy - the two can coexist without excluding one another.

As an international court, it is crucial for the CJEU to remember its role and responsibilities within the global legal order. Achieving a harmonious balance between the EU legal order and the international legal framework is a complex and delicate task, especially considering the unique and *sui generis* nature of the EU. This complexity, however, should not deter the CJEU from seeking and implementing more effective strategies in the future. The Court must continue to

evolve and adapt, finding ways to reconcile its role within the EU with its obligations and positions within the broader context of international law. This endeavor is not just about maintaining relevance; it is about contributing constructively to the evolution of both EU and international legal systems. This path towards integration and coherence is essential for the CJEU to fulfill its role effectively and to ensure that the principles of justice, fairness, and human rights are upheld at every level of governance.

Nevertheless, there is a tangible sense of optimism surrounding the recent reforms implemented by the CJEU, which are characterized by a host of technical advancements and procedural improvements.[701] A key aspect of these reforms is the reallocation of jurisdiction for preliminary rulings to the General Court in certain areas, reserving the Court of Justice's focus on matters of fundamental significance, such as interpreting the Treaties or the EU Charter of Fundamental Rights. This strategic shift, aimed at reducing the burden on the Court of Justice and boosting its efficiency, represents a critical milestone in the evolution of the institution. These reforms extend beyond jurisdictional adjustments. They include an increase in the number of judges at the General Court, the adoption of smaller judicial panels, and the selective bypassing of Advocate General opinions in instances where the legal questions are not unprecedented. These changes collectively serve multiple purposes: they reinforce the robustness of the EU legal system, accelerate the Court's decision-making processes, and address concerns related to lengthy legal proceedings that require referrals to the Court. By doing so, they aim to maintain the motivation and engagement of parties involved and ensure more timely justice. Furthermore, these modifications demonstrate a proactive approach by the CJEU in adapting to the evolving legal landscape and the growing complexities of cases presented to it. By streamlining procedures and reallocating resources more effectively, the CJEU is not only enhancing its operational capabilities but also setting a precedent for judicial efficiency in international legal frameworks.

While the current institutional reforms of the CJEU may not have a direct influence on the CFSP at present, they signal the CJEU's commitment to evolution and adaptation. This openness to change could ideally lead to future advancements in the CJEU's handling of CFSP-related issues.

[701] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, *Official Journal*, L 341, 24.12.2015. In addition, *see* Court of Justice of the European Union, "The General Court of the European Union prepares to welcome additional Judges", available at: *https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-09/cp190111en.pdf*, 25.01.2024.

Echoing the timeless saying, "where there is a will, there is a way", these reforms have the potential to pave the way for judicial processes that are both more efficient and adaptable. Ideally, these changes would lead to their harmonization with a prudent approach to judicial policymaking, one that is nuanced and in sync with the Court's established role in promoting European integration. This approach is preferable to a more aggressive form of judicial activism which, if unchecked, might risk overstepping the Court's boundaries and undermining legal certainty. Nonetheless, the future interplay between CFSP and the CJEU remains a subject of considerable interest. The EU's assertive stance in CFSP matters, exemplified by the severity of sanctions imposed on Russia during the Ukraine conflict, intensifies this interest. The anticipation of whether these issues will be brought before the Court, and how the CJEU would handle such cases - whether by adopting a politically nuanced approach or strictly adhering to legal reasoning - adds an intriguing dimension. This curiosity is also closely associated with broader expectations concerning the development of the CFSP as it engages with the CJEU.

Looking ahead, several critical questions regarding the CJEU's role in CFSP matters remain unresolved and will require future clarification, particularly concerning the Court's limitations in the CFSP. One key issue is the primacy of EU law within CFSP, which remains unclear. Therefore, the Treaties do not explicitly state the extent to which primacy applies in this domain, likely to preserve national constitutional identities, leaving room for future interpretation by the CJEU.[702] Similarly, the scope of the opinion procedure under Article 218 TFEU is broad, covering both CFSP and non-CFSP agreements. However, the practical limits of the Court's involvement in international negotiations, particularly regarding the EU's accession to the ECHR, remain uncertain, especially given the Council's authority in concluding international agreements. Infringement actions in CFSP matters are another area of interest. Currently, the CJEU lacks jurisdiction over Member State non-compliance with CFSP matters, as enforcement primarily falls to the Council and the High Representative, not the Commission or the Court, as outlined in Article 24(3) TEU. Since CFSP acts are non-legislative, they are exempt from infringement proceedings. However, given the Court's increasingly progressive stance, potential changes in this area cannot be ruled out.

The risk of forum shopping has also surfaced, particularly after the *Rosneft* judgment, which allows CFSP cases to be brought to the EU judiciary through both direct actions in the General

[702] G. Butler (2019), 181-215.

Court (Article 263 TFEU) and preliminary rulings before the CJEU (Article 267 TFEU). While these mechanisms ensure effective judicial protection, they also raise concerns about fragmentation, as multiple legal avenues could lead to inconsistent rulings. The evolving role of national courts is another important issue. As the CJEU increasingly ventures into areas traditionally reserved for national courts, potential conflicts between EU and national judicial systems could arise, possibly undermining the principle of sincere cooperation, which is essential for the smooth functioning of the EU legal order. Whether the Court's expanding jurisdiction will foster a cooperation with national courts and development of a complete system of legal remedies, as established by the *Les Verts* judgment, or lead to further division remains to be seen.

Additionally, the political question doctrine may gain more relevance in CFSP matters, as politically charged issues could challenge the Court's capacity to adjudicate without entering the realm of political discretion. The proposal to adopt such a doctrine is emerging as a strategic response to the evolving challenges in external relations and the expanding role of the CJEU in CFSP. While its implementation may present challenges, particularly in balancing flexibility, the doctrine offers a promising framework for managing the CJEU's growing authority in external relations. Although the Court denies the formal existence of such a doctrine, its foundations are already evident in its jurisprudence. For the doctrine's potential formal adoption, clear guidelines and criteria would be necessary to ensure legal clarity, prevent overreach, and maintain governance principles. A structured approach would be beneficial for contributing to the evolving legal framework, particularly in external relations and CFSP.

In conclusion, the CJEU's approach in the coming years will be crucial. Its decisions will not only demonstrate its ability to adapt to contemporary challenges but may also establish new legal standards for the EU's engagement in complex international relations. As the Court navigates these issues, it must carefully define its interpretive methods to avoid further legal fragmentation. These unfolding developments will be significant not only for legal practitioners but also for those invested in the broader trajectory of European integration and international diplomacy.

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8. ANNEXES FOR THE UNIVERSITY OF BELGRADE (PRILOZI ZA UNIVERZITET U BEOGRADU)

Annex 1 - Extended abstract of the doctoral dissertation in Serbian language
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Annex 1 - Extended abstract of the doctoral dissertation in Serbian language
(Prilog 1 - Produženi rezime doktorske disertacije na srpskom jeziku)

Opšte napomene o predmetu istraživanja doktorske disertacije:

Predmet istraživanja doktorske disertacije je odnos Suda pravde Evropske unije (u daljem tekstu: SPEU ili Sud) i Zajedničke spoljne i bezbednosne politike Evropske unije (u daljem tekstu: ZSBP). Iako opšte pravilo propisuje odsustvo sudske nadležnosti u oblasti Zajedničke spoljne i bezbednosne politike, izuzetne situacije trpe određena odstupanja. Shodno tome, Sud poseduje ograničenu nadležnost kada je reč o: *i)* odlučivanju o zakonitosti restriktivnih mera protiv pojedinaca, nedržavnih entiteta i trećih zemalja, *ii)* razgraničenju nadležnosti između nekadašnjih stubova i *iii)* mišljenjima povodom međunarodnih ugovora u kojima se Unija pojavljuje kao ugovorna strana. *Lex imperfecta* priroda pravila iz oblasti Zajedničke spoljne i bezbednosne politike predstavlja nasleđe bivšeg drugog stuba Ugovora iz Mastrihta. Nedostatak obavezujućeg mehanizma za rešavanje sporova sudske prirode odraz je težnje da se zadrži model međudržavne saradnje u ovoj osetljivoj političkoj oblasti, sa akcentom na prioritizaciju političkih interesa država, što je svakidašnja pojava na polju spoljne politike. Iako je sudska nadležnost izostavljena iz ove oblasti u formalno-pravnom smislu, obimna sudska praksa utemeljena na gorepomenutim odstupanjima ukazuje na rastući značaj spoljne i bezbednosne politike, što direktno utiče na praksu Suda u Luksemburgu. Neobičan pristup Suda ovoj oblasti izaziva veliko interesovanje zbog nesvojstvenog metodološkog pristupa koji neretko oscilipa od proceduralnih ovlašćenja striktno propisanih Lisabonskim ugovorom, do fleksibilnog tumačenja sudskih nadležnosti inspirisanog osnovnim vrednostima i principima Evropske unije, poput vladavine prava i efikasne sudske zaštite, pri čemu se prevazilaze normativni okviri.

Disertacija se sastoji od šest poglavlja. U prvom poglavlju analiziran je istorijski razvoj Suda pravde i Zajedničke spoljne i bezbednosne politike, od Evropske političke saradnje do usvajanja Lisabonskog ugovora. Drugo poglavlje istražuje odnos između Suda pravde Evropske unije i Zajedničke spoljne i bezbednosne politike, kao i njihov normativni okvir nakon stupanja na snagu Lisabonskog ugovora. Treće poglavlje ispituje granice nadležnosti Suda pravde Evropske unije u okviru Zajedničke spoljne i bezbednosne politike. Četvrto poglavlje obuhvata analizu restriktivnih mera kroz prizmu zaštite ljudskih prava i opštih ciljeva Zajedničke spoljne i bezbednosne politike. Peto poglavlje se bavi ulogom Suda pravde Evropske unije u jačanju

autonomnog *sui generis* statusa Evropske unije u odnosu na međunarodne i unutrašnje aktere, dok se šesto poglavlje odnosi na zaključna razmatranja.

Kratak pregled poglavlja doktorske disertacije:

Prvo poglavlje pruža detaljnu analizu istorijskog razvoja Suda pravde i Zajedničke spoljne i bezbednosne politike, od Evropske političke saradnje do usvajanja Lisabonskog ugovora. Ovo poglavlje uvodi čitaoca u temu disertacije, obrađuje rani razvoj Suda pravde u kontekstu spoljne i bezbednosne politike i prikazuje evoluciju sudskih ovlašćenja, od deklarativnog do faktičkog karaktera. Dalje se razmatra osnivanje Zajedničke spoljne i bezbednosne politike Ugovorom iz Mastrihta, kao i neuspešan pokušaj konstitucionalizacije ove oblasti kroz predlog Ustava za Evropu. Ovo poglavlje se završava pregledom ključnih aspekata Lisabonskog ugovora, što predstavlja uvod za naredna poglavlja.

Drugo poglavlje istražuje Sud pravde Evropske unije i Zajedničku spoljnu i bezbednosnu politiku, kao i njihov normativni okvir nakon stupanja na snagu Lisabonskog ugovora. Autorka analizira opšte pravilo prema kojem Sud pravde ne poseduje nadležnost u oblasti Zajedničke spoljne i bezbednosne politike. Zatim se obrađuje transformativna uloga Lisabonskog ugovora, koji je proširio nadležnosti Suda pravde i integrisao spoljnu i bezbednosnu politiku u širi okvir komunitarnog prava, ukidajući nekadašnje stubove nadležnosti iz Mastrihtskog ugovora. Dalje se analizira spoljna i bezbednosna politika kao specifičan oblik nadležnosti Evropske unije, koji proizilazi iz *sui generis* prirode prava EU, što dodatno otežava definisanje granica sudske nadležnosti u ovoj oblasti. Na kraju, pruža se detaljan pregled izuzetaka koji omogućavaju Sudu pravde ograničenu nadležnost u oblasti spoljne i bezbednosne politike, poput razgraničenja nadležnosti bivših stubova, restriktivnih mera i mišljenja o međunarodnim sporazumima u kojima je Unija ugovorna strana.

Treće poglavlje ispituje granice nadležnosti Suda pravde u okviru Zajedničke spoljne i bezbednosne politike sa dva aspekta: s jedne strane, široko tumačenje sudskih ovlašćenja, a s druge strane, formalno-pravna ograničenja koja proizilaze iz Lisabonskog ugovora. Detaljna analiza pokazuje da Sud pravde u velikoj meri poštuje proceduralna pravila kada je reč o spoljnoj i bezbednosnoj politici i često se uzdržava od odlučivanja u meritumu, poštujući ograničenja propisana Lisabonskim ugovorom. S druge strane, paradoksalno, Sud koristi osnovne principe i vrednosti Unije, poput vladavine prava i efikasne sudske zaštite, kako bi proširio svoja ovlašćenja

izvan granica Lisabonskih odredbi. Ovaj deo disertacije posebno analizira slučaj *Rosneft* u korelaciji sa drugim relevantnim presudama, kako bi se prikazala interakcija fundamentalnih vrednosti u sudskoj praksi. Ispituje se i dinamika odnosa između nacionalnih sudova i Suda pravde, te se zaključuje da Sud svoju nadležnost nad komunitarnim pravom tretira kao opšte pravilo, što se odražava i na spoljnu i bezbednosnu politiku.

Četvrto poglavlje obrađuje restriktivne mere kroz prizmu zaštite ljudskih prava i opštih ciljeva Zajedničke spoljne i bezbednosne politike. Ovaj deo prati evoluciju restriktivnih mera, koje su se razvile od ekonomskih sankcija protiv država do ciljano usmerenih sankcija protiv pojedinaca. Detaljno se razmatra klasifikacija sankcija, koje su u praksi poprimile karakter kaznenih mera, a ne preventivnih kako je prvobitno zamišljeno. Poseban akcenat stavlja se na princip proporcionalnosti i poštovanje ljudskih prava. Na kraju, analiza značajnih presuda poput *Kadi* I i II prikazuje kompleksnost balansa između zaštite ljudskih prava i političkih ciljeva Zajedničke spoljne i bezbednosne politike. Autorka zauzima afirmativan stav prema pristupanju Evropske unije Evropskoj konvenciji za ljudska prava iz perspektive odnosa Suda pravde i ZSBP.

Peto poglavlje istražuje ulogu Suda pravde u jačanju autonomnog *sui generis* statusa Evropske unije u odnosu na međunarodne i unutrašnje aktere. Ova pravno-politička analiza neophodna je za bolje razumevanje delovanja Suda u ovoj oblasti. Dolazi se do zaključka da Sud primenjuje monistički pristup prema nacionalnim sudovima država članica, dok zauzima dualistički stav prema međunarodnim akterima i drugim pravnim režimima. Takođe, ispituju se politički aspekti sudske prakse u kontekstu autonomije komunitarnog prava, te se predlaže usvajanje doktrine političkog pitanja prilagođene *sui generis* prirodi EU. Uz autonomiju prava EU, razmatraju se procesi konstitucionalizacije prava EU, kao i fragmentacije međunarodnog prava, koji proizilaze iz jedinstvenog sudskog pristupa spoljnoj i bezbednosnoj politici.

Zaključno poglavlje sumira rezultate istraživanja iz prethodnih poglavlja. Autorka ističe da će zaključci doprineti daljim proučavanjima Zajedničke spoljne i bezbednosne politike, koja ostaje aktuelna zbog progresivnih dešavanja i rastuće sudske prakse, uz aktivno učešće Suda pravde u njenom razvoju.

Ciljevi disertacije:

Cilj ove doktorske disertacije jeste sveobuhvatna naučna analiza prakse Suda pravde Evropske unije u kontekstu Zajedničke spoljne i bezbednosne politike. Primarni fokus je na

izuzecima od opšteg pravila prema kojem Sud ne poseduje nadležnost u ovoj oblasti, a koji su doveli do obimne sudske prakse i uspostavljanja novih pravnih standarda kroz fleksibilno tumačenje ugovornih odredaba. Cilj je dublje razumevanje nadležnosti Suda pravde u okviru Zajedničke spoljne i bezbednosne politike, što zahteva detaljnu analizu svih relevantnih činilaca i njihove međusobne interakcije, kako bi se stekao potpun uvid u njihovu prirodu, značaj i praktičnu primenu. U okviru istraživanja sprovedena je analiza odnosa Suda pravde i Zajedničke spoljne i bezbednosne politike, što je rezultiralo zaključcima koji ukazuju na pravne praznine i predlozima za unapređenje postojećih pravnih okvira i sudske prakse. Ukratko, Sud pravde Evropske unije treba jasnije da definiše svoju nadležnost u ovoj oblasti kako bi se izbegle nejasnoće i pravne nesigurnosti u pogledu sudskog delovanja. Takođe, potrebno je da se Sud fokusira na efektivnu zaštitu i unapređenje ljudskih prava, kao i na poštovanje međunarodnopravnih obaveza Unije i nadležnosti nacionalnih sudova, što bi zahtevalo sveobuhvatniji pristup autonomiji prava Evropske unije. Tokom istraživanja sprovedeno je detaljno ispitivanje delovanja Suda pravde u okviru Zajedničke spoljne i bezbednosne politike, uključujući njegov uticaj na pravo Evropske unije, države članice, međunarodne aktere i ljudska prava u vezi sa ovom temom. Nalazi upućuju na potrebu za ujednačavanjem sudske prakse Suda pravde, kao i jasnijim metodološkim pristupom u vezi sa Zajedničkom spoljnom i bezbednosnom politikom i temeljnim principima i vrednostima Unije, uprkos nepreciznostima ugovornih odredaba, što u konačnici opravdava cilj ove disertacije.

Osnovne hipoteze doktorske disertacije:

U izradi disertacije postavljeno je nekoliko hipoteza. Prva potvrđena hipoteza glasi da je uloga Suda pravde Evropske unije u oblasti Zajedničke spoljne i bezbednosne politike od višestrukog značaja, uprkos njenoj *lex imperfecta* prirodi. Iako opšte pravilo propisuje da Sud pravde nema nadležnost na ovom polju, određene situacije ukazuju na primenu izuzetaka od opšteg pravila, koji se odnose na ocenu zakonitosti restriktivnih mera Evropske unije protiv pojedinaca, nedržavnih entiteta i trećih zemalja, na razgraničenje nadležnosti između nekadašnjih stubova, kao i na mišljenja o međunarodnim ugovorima koji obavezuju Evropsku uniju. Na osnovu toga, postavljena je i potvrđena pretpostavka da, uprkos *lex imperfecta* prirodi uloge Suda pravde, razvoj spoljne i bezbednosne politike u velikoj meri zavisi od aktivizma Suda u ovoj oblasti.

Dodatno, potvrđena je i druga hipoteza koja glasi da Sud pravde Evropske unije široko tumači svoju nadležnost u oblasti Zajedničke spoljne i bezbednosne politike. Na osnovu

istraživanja dosadašnje sudske prakse, utvrđeno je da Sud fleksibilno interpretira svoja ovlašćenja u odnosu na ograničenja postavljena Lisabonskim ugovorom, kao što su član 275(1) Ugovora o funkcionisanju Evropske unije i član 24(1) Ugovora o Evropskoj uniji, a takođe i na osnovu opšteg pravila sudske nadležnosti nad tumačenjem i primenom osnivačkih ugovora iz člana 19(1) Ugovora o Evropskoj uniji. Na taj način omogućava se progresivni razvoj komunitarnog prava, kao i dodatna institucionalizacija i integracija Zajedničke spoljne i bezbednosne politike u pravni poredak Evropske unije.

Treća hipoteza ukazuje na to da kvalitet pravne zaštite u okviru Zajedničke spoljne i bezbednosne politike zavisi od Suda pravde Evropske unije, nacionalnih sudova država članica, kao i njihove međusobne saradnje. Polazi se od stava da adekvatnost pravne zaštite ne zavisi samo od Suda pravde, već i od nacionalnih sudova, budući da obe sudske instance dele nadležnost u ovoj oblasti, u skladu sa jedinstvenim sistemom sudske zaštite u Evropskoj uniji. Iako Sud pravde formalno nema mogućnost da ocenjuje zakonitost postupaka iz oblasti spoljne i bezbednosne politike koje sprovode države članice, u praksi se često zanemaruje ovo ograničenje. U domenu nadležnosti nacionalnih sudova, Sud pravde je proširio svoju nadležnost, posebno u pitanjima naknade štete i administrativnim pitanjima, kao što su slučajevi koji uključuju upućene članove misije Evropske unije, koji bi trebalo da budu pod nadležnošću država članica. Izvedeni nalazi potvrđuju treću hipotezu i dolazi se do zaključka da Sud strogo tumači ograničenja svoje nadležnosti, što mu omogućavaju član 19(1) Ugovora o Evropskoj uniji, kao i principi jednakosti, vladavine prava i efikasne sudske zaštite.

Četvrta hipoteza polazi od stava da aktuelni normativni okvir zadržava osnovni model međudržavne saradnje, pri čemu se politički interesi stavljaju ispred zaštite ljudskih prava. Suzdržanost i nepreciznost ugovornih odredaba o spoljnoj i bezbednosnoj politici podržavaju ovu tezu, čime se predmetna oblast izdvaja od ostatka pravnog sistema Evropske unije. Ova hipoteza je delimično osporena, jer normativni okvir, iako nepotpun i oslonjen na nekadašnji model međudržavne saradnje, nije toliko sporan kao njegovo fleksibilno tumačenje od strane Suda, što implicira da upravo Sud u najvećoj meri instrumentalizuje političke ciljeve spoljne i bezbednosne politike na osnovu nejasno definisanog pravnog okvira. Ovaj pristup se naročito ogleda u negativnom stavu Suda prema pristupanju Evropske unije Evropskoj konvenciji za ljudska prava, kao i u presudama u slučajevima *Kadi,* koje jasno ukazuju na političke ambicije Suda u pravcu jačanja komunitarnog prava.

Peta hipoteza upućuje na to da su presude Suda pravde Evropske unije usmerene na očuvanje i zaštitu pravnog poretka Unije od unutrašnjih i spoljašnjih izazova, čime se doprinosi fragmentaciji međunarodnog prava i konstitucionalizaciji komunitarnog prava. Ova hipoteza je potvrđena budući da Sud pravde Evropske unije dosledno brani integritet i autonomiju prava Unije kad god je to moguće. Još od presuda u slučajevima *Van Gend en Loos, Costa protiv ENEL-a, Les Verts,* pa sve do *Kadi* I i II, prisutna je težnja ka formiranju sopstvenog autonomnog pravnog režima. Kada je reč o pravnom poretku Evropske unije, praksa Suda pravde Evropske unije često je izolacionistička i usmerena pretežno na zaštitu komunitarnih interesa. Iako se Sud sporadično poziva na praksu drugih sudskih instanci, preovladava tendencija ka očuvanju jedinstvenog, autonomnog sistema, kroz široku interpretaciju sudskih nadležnosti i restriktivno tumačenje navedenih ograničenja.

Metodi izrade doktorske disertacije:

Disertacija se oslanja na nekoliko metodoloških pristupa, koji su omogućili detaljnu analizu i tumačenje ključnih pojmova. Glavni metodi korišćeni u radu su istorijski i dogmatski metod. Istorijski metod bio je ključan za praćenje normativne i doktrinarne evolucije pojmova povezanih sa Zajedničkom spoljnom i bezbednosnom politikom i praksom Suda pravde Evropske unije, uključujući koncepte autonomije i supranacionalnosti, principe vladavine prava i efikasne sudske zaštite, kao i evoluciju *sui generis* pravnog poretka EU kroz osnivačke ugovore. Ovaj metod takođe osvetljava prelazak sa modela međudržavne saradnje na sadašnji okvir ZSBP.

Dogmatski ili egzetički metod bio je ključan za tumačenje osnivačkih ugovora, Ugovora o Evropskoj uniji, kao i relevantnog primarnog i sekundarnog zakonodavstva EU, uz paralelno razmatranje ustavnog prava država članica. Ovaj metod omogućio je dublje razumevanje pravnih normi koje regulišu odnose u okviru ZSBP i nadležnost Suda pravde u tom domenu.

Normativni metod dopunjuje dogmatski pristup analizom relevantnih pravnih normi EU koje se odnose na ZSBP, ali i nadležnosti Suda pravde i nacionalnih sudova, čime se dobija šira slika pravnih odnosa na nacionalnom i supranacionalnom nivou. Ovaj metod omogućava sagledavanje interakcije između pravnih sistema EU i država članica u kontekstu spoljne i bezbednosne politike.

Uporednopravni metod pružio je uvid u odnos Suda pravde Evropske unije i nacionalnih sudova, kao i u odnos između Suda i drugih sudskih instanci, poput Evropskog suda za ljudska prava. Ovaj metod je ključan za razumevanje sudske prakse u širem pravnom okviru.

Teleološki metod omogućio je analizu ciljeva i namera ugovornih odredaba, kako iz perspective stvaralaca osnivačkih ugovora, tako i iz ugla država članica i Suda pravde Evropske unije. Poseban značaj ovog metoda ogleda se u tumačenju sudske prakse i sudskog aktivizma, koji su oblikovali razvoj pravnih normi u ZSBP.

Konceptualna analiza takođe je imala značajnu ulogu, posebno u delu koji se bavi restriktivnim merama, odnosno sankcijama, omogućivši bolje razumevanje njihovog razvojnog puta, koji sada poprima obrise kaznenih, a ne preventivnih mera kako je načelno propisano. Ova analiza je takođe bila ključna za tumačenje pojmova vladavine prava i efikasne sudske zaštite u kontekstu ZSBP, kao i za razmatranje predložene doktrine političkog pitanja, konstitucionalizacije prava EU i fragmentacije međunarodnog prava.

Jezički i sociološki metodi pružili su dodatnu dimenziju istraživanju, s obzirom na to da se disertacija velikim delom bavi tekstualnom analizom presuda i ugovornih odredaba, dok sociološki metod omogućava razumevanje šireg geopolitičkog konteksta i njegovog uticaja na odnos između Suda i spoljne i bezbednosne politike. Ovi metodi omogućili su dublji uvid u dinamične promene koje su oblikovale sadašnje stanje i buduće tendencije u ovoj oblasti.

Naučni doprinos doktorske disertacije:

Rezultati i naučni doprinos ove doktorske disertacije ogledaju se u analizi prakse Suda pravde Evropske unije u oblasti Zajedničke spoljne i bezbednosne politike. Doprinos se ostvaruje kako na teorijskom planu, tako i u sferi sudske prakse. Na teorijskom nivou, disertacija je značajna zbog objašnjenja pravnih pravila, standarda, instituta, vrednosti i principa koji čine osnovu nadležnosti Suda pravde Evropske unije, kao i same oblasti spoljne i bezbednosne politike. Kroz kritičko sagledavanje postojeće sudske prakse i normativnih okvira, te uz predloge za njihovu dogradnju, proširen je korpus rešenja u pogledu nadležnosti Suda u ovoj oblasti.

Poseban doprinos ogleda se u upoređivanju normativnog i praktičnog pristupa, čime se naučno osvetljava razvoj Zajedničke spoljne i bezbednosne politike i širenje sudskih nadležnosti, uz fokus na nedostatak jasnog i koherentnog metodološkog pristupa. Kroz analizu konkretnih

sudskih predmeta, istražene su granice sudske nadležnosti u ovoj oblasti, kao i uticaj na fragmentaciju međunarodnog prava i konstitucionalizaciju komunitarnog prava.

Nakon analize relevantnih presuda, formulisani su predlozi za unapređenje procesnopravnih dimenzija spoljne i bezbednosne politike u okviru kojih je nadležnost Suda nesporna. Istaknuto je da su uočene nedoslednosti u sudskoj praksi karakteristične za ovu tradicionalno osetljivu oblast, ali je prepoznat i prostor za unapređenje proceduralnih pitanja, naročito ako se Sud fokusira na svoju primarnu pravnu, odnosno sudsku funkciju.

Kritičkom analizom sudske prakse i pregledom izazova koje treba prevazići, omogućeno je integralno sagledavanje sudskih nadležnosti u oblasti spoljne i bezbednosne politike, koje često obiluju nedoslednostima i oprečnim stavovima. U praksi, to znači da se Sud, s jedne strane, pozicionira kao čuvar komunitarnog pravnog poretka, a s druge strane, kao garant poštovanja ljudskih prava. Ovaj dvosmerni pristup dovodi do varijabilnog tumačenja, koje se temelji na specifičnim okolnostima slučaja, umesto na doslednim proceduralnim pravilima.

Primena različitih metodoloških pristupa u odnosu na temu disertacije predstavlja jedan od ključnih rezultata rada. Na osnovu toga izvedeni su dodatni zaključci o nadležnosti Suda, ograničenjima te nadležnosti, kao i specifičnostima spoljne i bezbednosne politike.

Opravdanost istraživanja ove teme potvrđena je ograničenom pažnjom koju je dobila na domaćem akademskom terenu, iako je u stranoj literaturi dobro proučavana. Disertacija nudi značajan doprinos akademskoj zajednici u daljem oblikovanju nastavnih i naučnih sadržaja iz oblasti prava Evropske unije, posebno u kontekstu Zajedničke spoljne i bezbednosne politike i pravnog okvira EU.

Rastući broj presuda Suda pravde Evropske unije u oblasti spoljne i bezbednosne politike, uprkos formalnim ograničenjima sudskih nadležnosti, dodatno potvrđuje značaj ove teme. Disertacija se bavi i ispitivanjem delotvornosti Suda pravde Evropske unije, kao i kritičkim vrednovanjem njegove jurisprudencije.

Na osnovu istraživanja ove teme, zaključeno je da postoji potreba za usklađivanjem sudske prakse Suda u Luksemburgu, kao i njegovog metodološkog pristupa na polju Zajedničke spoljne i bezbednosne politike. Takođe, preporučuje se unapređenje sudske prakse i njeno usklađivanje sa proceduralnim pravilima i ugovornim obavezama EU, čime bi se osigurala koherentnost sudske prakse i postigla pravna sigurnost, u skladu sa propisanim sudskim funkcijama i ograničenim ovlašćenjima.

Annex 2 – Author's biography

Jovana Tošić, born on October 28, 1992, in Banja Luka, Bosnia and Herzegovina, completed her primary education at "Borisav Stanković" school and later the International Baccalaureate Diploma Program - high school program in Banja Luka. Her academic journey led her to the American University in Bosnia and Herzegovina in 2011, where she pursued a bachelor degree in International and Comparative Law in Sarajevo, graduating in 2015. She furthered her education at the Faculty of Law, University of Belgrade, engaging in the International Master's program for European Integration and completing it in 2017 with a thesis on "Challenges of illegal immigration to the European Union in the context of lack of political cooperation among Member States", mentored by Prof. Dr. Maja Lukić Radović.

Eager to deepen her understanding and contribute to her fields of interest, Jovana has participated in several enriching experiences, including seminars on human rights, courses on asylum and migration, and international public law. Among these were programs at the “Vojin Dimitrijević” School on Human Rights, the IOM and AIRE’s course on Asylum and Migration, and online sessions at the Hague Academy of International Law. She also engaged in learning about nonviolent communication and reconciliation with the Communities Without Boundaries Organization and took part in the European Forum Alpbach seminars in Tyrol. For her PhD research, she spent two fruitful months at the Ludwig Boltzmann Institute for Fundamental Rights in Vienna under the guidance of Prof. Dr. Michael Lysander Fremuth.

Jovana's professional path has encompassed roles in private legal practice, the Ministry of European Integration, the nonprofit sector with Club Alpbach Belgrade, and positions within international organizations like the EU Delegation to Bosnia and Herzegovina and the EU Special Representative. With a fervent interest in human rights, gender, asylum and migration law, nonviolent communication and reconciliation, she has anchored her publications in the discourse on European Union law and human rights. Currently, she serves as a Legal Officer, providing legal aid to asylum seekers under the UNHCR project at the Center for Research and Society Development (IDEAS) in Belgrade.

Prilog 2 – Biografija autorke

Jovana Tošić, rođena 28. oktobra 1992. godine u Banjoj Luci, Bosna i Hercegovina, završila je osnovnu školu "Borisav Stanković", a zatim i program Međunarodne gimnazije (International Baccalaureate Diploma Program) u Banjoj Luci. Njeno akademsko putovanje započelo je 2011. godine na Američkom univerzitetu u Bosni i Hercegovini, gde je studirala međunarodno i uporedno pravo u Sarajevu, diplomiravši 2015. godine. Nastavila je obrazovanje na Pravnom fakultetu Univerziteta u Beogradu, upisavši međunarodni master program iz oblasti evropskih integracija, koji je završila 2017. godine sa odbranjenom tezom pod nazivom "Izazovi ilegalnih migracija u Evropskoj uniji u kontekstu nedostatka političke saradnje između država članica", pod mentorstvom prof. dr. Maje Lukić Radović.

Kako bi produbila svoje znanje i doprinela oblastima svog interesovanja, Jovana je aktivno učestvovala na brojnim konferencijama, kursevima i seminarima iz oblasti međunarodnog javnog prava, ljudskih prava, diplomatskog i konzularnog prava, rodne ravnopravnosti, izbegličkog prava i prava azila. Među istaknutim programima su Škola za ljudska prava "Vojin Dimitrijević", kurs o azilu i migracijama u organizaciji IOM-a i AIRE centra, kao i online sesije na Haškoj akademiji međunarodnog prava. Pored toga, usavršavala se u oblasti nenasilne komunikacije i pomirenja kroz rad sa organizacijom Communities Without Boundaries, te učestvovala na prestižnim seminarima Evropskog foruma Alpbach u Tirolu. Za potrebe svog doktorskog istraživanja, provela je dva meseca na Institutu za ljudska prava Ludwig Boltzmann u Beču, pod mentorstvom prof. dr Michaela Lysandera Fremutha.

Jovanin profesionalni put obuhvatao je uloge u privatnoj pravnoj praksi, Ministarstvu za evropske integracije, nevladinom sektoru u Klubu Alpbach Beograd, kao i pozicije u međunarodnim organizacijama poput Delegacije Evropske unije u Bosni i Hercegovini. Sa velikim interesovanjem za međunarodno javno pravo, Jovana je svoje publikacije usmerila na diskurs o pravu Evropske unije i ljudskim pravima. Trenutno radi kao pravna savetnica, pružajući pravnu pomoć tražiocima azila u okviru UNHCR projekta u Centru za istraživanje i razvoj društva (IDEAS) u Beogradu.

List of publications
(Spisak publikacija)

- "The Impact of COVID-19 Restrictions on Human Rights of Irregular Migrants, Refugees and Asylum Seekers in Bosnia and Herzegovina", *Eudaimonia - Journal of Legal, Political and Social Theory and Philosophy*, 6/2022, Belgrade.
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Annex 3 - Accompanying declarations in Serbian language

(Prilog 3 - Prateće izjave na srpskom jeziku)

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