



INSIGHT

A QUESTION OF JURISDICTION: ART. 267 TFEU PRELIMINARY REFERENCES OF A CFSP NATURE

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ABSTRACT: Can the Court of Justice of the European Union assert jurisdiction and provide a national court with an interpretation of Union law in a case referred to it from a national court under an Art. 267 TFEU preliminary reference, when the subject matter is in regard to the Common Foreign and Security Policy (CFSP)? This was one of a number of questions referred to the Court of Justice from the High Court of England and Wales in *Rosneft* (judgment of 28 March 2017, case C-72/15). In March 2017, the Court of Justice meeting in a Grand Chamber formation, answered this jurisdictional question in the affirmative. Given the significance of this judgment for the law of CFSP, and the Opinion of the Advocate General in 2016, this judgment was hotly anticipated given its implications for the “specific rules and procedures” that are applicable to the law of CFSP. As the Court of Justice continues in a line of case law to clarify its jurisdiction in CFSP, it is ultimately a question of constitutional importance for the EU’s external relations.

KEYWORDS: Court of Justice of the European Union – Common Foreign and Security Policy – preliminary reference – restrictive measures – sanctions – jurisdiction.

I. AMBIGUITY OF THE TREATIES: JURISDICTION

Rosneft concerns the EU’s restrictive measure regime, more popularly known as sanctions.¹ The governance scheme surrounding sanctions is a developed body of case law, in which individuals subject to them have the possibility to challenge them directly before the General Court, the administrative court of the EU. Given that the *locus standi* (standing) of taking actions to the CJEU is a narrow right, the use of preliminary references, otherwise known as referrals from national courts, also functions as an indirect means for legal entities to access the Court for adjudication on matters of EU law. What

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¹ Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC].

makes the *Rosneft* case noteworthy, in comparison to other aspects of Common Foreign and Security Policy (CFSP) and sanctions case law, is that it is the first case on the Court of Justice's jurisdiction to rule on sanctions not taken directly to the General Court. Rather, the *Rosneft* case arrived at the Court of Justice through the preliminary reference procedure from a national court, in this case, the High Court of Justice (England and Wales) in the United Kingdom, upon the basis of Art. 267 TFEU.

Sanctions have a peculiarity in their procedural sense. Firstly, it requires a CFSP Decision, done on an Art. 29 TEU legal basis. Secondly, a subsequent Regulation is decided upon an Art. 215 TFEU legal basis, which allows sanctions to be implemented throughout the EU. Accordingly, in *Rosneft*, on the table was Council Decision (CFSP) 2014/512,² Council Decision (CFSP) 2014/659,³ and Council Decision (CFSP) 2014/872 (collectively, "the Decision").⁴ Furthermore, there was Regulation 833/2014,⁵ Regulation 960/2014,⁶ and Regulation 129/2014 (collectively, "the Regulation").⁷ The Decision taken by the Council, where Member States as a general rule act unanimously, was directly in response to the alleged actions of Russia in Ukraine. Substantively, the applicant contested the implementation measures by way of Regulation taken by the British Government as a result of the Decision, of which it too was part of, on the grounds that it contained ambiguities. Accordingly, the substantive question was whether the Decision was on the one hand sufficiently clear, or on the other, imprecise?

In *Rosneft*, both the Decision and accompanying Regulation were challenged. Yet, it is unclear whether the Court of Justice has the jurisdiction to fully answer the questions asked of it, given the first legal act is adopted on a CFSP legal basis (the Decision), and the second legal act on a *non*-CFSP legal basis (the Regulation). The Court's jurisdiction in the latter is undisputed given its adoption on Art. 215 TFEU, however, much more speculative and up for question is the Court's jurisdiction on the Decision, given its adoption on a CFSP legal basis. Prior to recent treaty revision, questions surrounding

² Council Decision (CFSP) 2014/512 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

³ Council Decision (CFSP) 2014/659 of 8 September 2014 amending Decision (CFSP) 2014/512 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁴ Council Decision (CFSP) 2014/872 of 4 December 2014 amending Decision (CFSP) 2014/512 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and Decision (CFSP) 2014/659 amending Decision (CFSP) 2014/512.

⁵ Regulation (EU) 833/2014 of the Council of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁶ Regulation (EU) 960/2014 of the Council of 8 September 2014 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

⁷ Regulation (EU) 129/2014 of the Council of 4 December 2014 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, and amending Regulation (EU) 960/2014 amending Regulation (EU) 833/2014.

the Court's jurisdiction rumbled for decades.⁸ However, the Treaty of Lisbon saw a flipping effect, in that jurisdiction of the Court was to be assumed, unless specifically derogated from by the Treaties. One of these derogations was acts adopted upon a CFSP legal basis, which is elaborated in Art. 24, para. 1, TEU and in Art. 275 TFEU.

Firstly, Art. 24, para. 1, TEU, *inter alia*, states that

"The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

Secondly, Art. 275 TFEU states that the Court has the jurisdiction to

"rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

This consequently points to Art. 263 TFEU and its fourth paragraph stating

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

The first and second paragraphs in Art. 263 TFEU do not appear to envisage the possibility for the Court of Justice to have the ability to answer questions on preliminary references from national courts. The leading academic material of EU procedural law previously acknowledged that the Court "may afford possibilities" in this area,⁹ recognising that it is by no means a settled question. This is, until the right opportunity arose to address it, which was *Rosneft*.

So what did the Advocate-General (AG) say firstly? AG Wathelet said the Court of Justice did have the jurisdiction to answer the substantive questions of it by the national court. Yet how did he reach this view in light of the treaties, and their apparent formulation to exclude the Court in such matters? Whilst acknowledging the Court's jurisdiction in CFSP matters appears to be limited by Art. 24, para. 1, TEU and by Art. 275 TFEU "at first sight",¹⁰ he skirted a narrow interpretation of Art. 263 TFEU and its apparent lack of foresight for seeing preliminary references in the equation. For the aforementioned Art.

⁸ For earlier discussion, see G. BEBR, *Development of Judicial Control of the European Communities*, The Hague: Martinus Nijhoff Publishers, 1981.

⁹ K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, J.T. NOWAK (ed), Oxford: Oxford University Press, 2014, p. 458.

¹⁰ Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft*, para. 39.

24, para. 1, TEU and Art. 275 TFEU, it can be assumed there was a need for them to have the intended same effect. However, they are worded differently, and thus, the AG said, might put out the “false impression”, that the Court had no jurisdiction. Thus, he said, the two articles enables the Court, “to review the compliance with Article 40 TEU of all CFSP acts”,¹¹ regardless of what way the question ends up at the Court, that is, through a direct action, or a preliminary reference. The Opinion of the AG demonstrates how the restatement of provisions in primary law can go wrong, when it is assumed the intention of the drafters was for them to have equal meaning. Given this part of the Opinion of the AG on jurisdiction, which was non-binding, what did the Court of Justice say, and did it reach the same conclusion?

II. JUDGMENT

In the judgment issued on 28 March 2017, the Grand Chamber, before going onto matters of substance, had to handle the important question of jurisdiction, and furthermore grapple with the admissibility of the question of jurisdiction. The Council had queried whether the questions referred by the national court could have been answered in respected of the Regulation alone (*non*-CFSP), rather than contesting the validity of the Decision (CFSP).¹² Thus, along this line of thinking, the Court would then not have to assert any jurisdiction on the CFSP legal basis, for which the Council has always viciously defended against any judicial incursion by the Court.¹³ The Court rejected this Council viewpoint, stating that it is up to national courts alone to ask questions of the Court on the interpretation of Union law.¹⁴ The Court was therefore only in a position not to answer a reference when it fails to have a legal question in need of answering, or is only a hypothetical question.¹⁵ The Court furthermore stated that only focusing on reviewing the legality of the *non*-CFSP Regulation, and not the other questions asked of it, would not be adequately answering the national courts questions.¹⁶ Moreover, despite the sharp distinction between a CFSP act and a *non*-CFSP act, in order to impose a sanction within the EU legal order, the Court noted that they are inextricably tied. Given how sanctions are imposed in the EU legal order, it is a perfect demonstration of the possibility of close-knit relations between CFSP and *non*-CFSP legal bases, given the Court of

¹¹ *Ibidem*, para. 65.

¹² *Rosneft* [GC], cit., para. 48.

¹³ For example, see, Court of Justice: judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]; judgment of 12 November 2015, case C-439/13 P, *Elitaliana v. Eulex Kosovo*; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council of the European Union* [GC]; judgment of 24 June 2016, case C-658/11, *European Parliament v. Council of the European Union* [GC].

¹⁴ *Rosneft* [GC], cit., para. 49.

¹⁵ *Ibidem*, para. 50.

¹⁶ *Ibidem*, para. 53.

Justice in *Kadi I* said the link occurs when it has been made “explicitly”.¹⁷ The Court in *Rosneft* however hypothesized that even if the latter Regulation implementing a CFSP Decision was to be declared invalid, that would still mean that a Member State was to conform to a CFSP Decision. Thus, in order to invalidate a Regulation following a CFSP Decision, the Court would have to have jurisdiction to examine that CFSP Decision.¹⁸

Once the admissibility of the question of jurisdiction was answered, the Court progressed onto answering the jurisdictional questions raised, in which it concluded that

“Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Court of Justice of the European Union has jurisdiction to give preliminary rulings, under Article 267 TFEU, on the validity of an act adopted on the basis of provisions relating to the Common Foreign and Security Policy (CFSP) [...]”.¹⁹

Yet, the Court’s assertion of its jurisdiction was not completely unqualified. Rather, it must meet one of two conditions. The first condition that it may meet, is that it must relate to Art. 40 TEU on the Court having the jurisdiction to determine the boundary between CFSP and *non*-CFSP in its border-policing role. The second condition that the Court’s allows for the assertion of its jurisdiction, is when it involves the legality of restrictive measures against natural or legal persons.

The remarks on Art. 40 TEU is significant from the Court.²⁰ From some corners, the Court has been subject for some scrutiny for not properly utilising this Article for elucidating what the precise boundaries are for CFSP and *non*-CFSP. To date, it has shunned such possibilities provided to it to determine the fine lines of this providing, underlining the fact that CFSP is an obscure area of the treaties, legally speaking. *Rosneft* perhaps elucidates some reasons why Art. 40 TEU has not been used by the Court to date, namely that it does “not make provision for any particular means by which such judicial monitoring is to be carried out”.²¹ Thus, given this lack of guidance, the Court finds itself falling back on Art. 19 TEU to “ensure that in the interpretation and application of the Treaties the law is observed”.²²

It was advocated nearly a decade ago that rule of law concerns could be used to provide justification for the Court’s jurisdiction in CFSP cases upon a preliminary reference.²³ Whilst this can be a common phrase with large recourse in a number of situa-

¹⁷ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [GC] (“Kadi I”), para. 202.

¹⁸ *Rosneft* [GC], cit., para. 56.

¹⁹ *Ibidem*, ruling 1 of 3.

²⁰ *Ibidem*, paras 60-63.

²¹ *Ibidem*, para. 62.

²² *Ibidem*, paras 62 and 75.

²³ G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 186.

tions to justify Court's actions, the Court of Justice instead of utilising this argument alone here,²⁴ went one-step further, and alluded to the EU's Charter on Fundamental Rights (hereinafter, "CFR"), selecting Art. 47 CFR, the right to an effective remedy and a fair trial, ensuring those who possess "rights and freedoms guaranteed by the law of the Union [...] the right to an effective remedy",²⁵ as a basis for clarifying this position on its jurisdiction.

From the Court's perspective, it might not want national courts in CFSP-related cases trying to invalidate Union legal acts.²⁶ It is long-standing jurisprudence of the Court stemming from *Foto-Frost*,²⁷ that it alone has the ability to invalidate Union law, which national courts cannot do. Thus, national courts only have the possibility to invalidate implementing national measures subject to their own national legal order, and not the Union legal acts themselves. The most recent example of the Court clarifying (i.e. extending) its jurisdiction into the CFSP arena was *H v. Council*.²⁸ Unlike *H v. Council* however, in which the Court of Justice asserted jurisdiction, it then proceeded to fling the substantive matter back to the General Court for adjudication.²⁹ The Court here in *Rosneft* however, had to proceed and answer the substantive questions itself, which conclusively, upheld the sanctions in question.

III. ANALYSIS

The Court and the Opinion of AG Wathelet on its jurisdictional points can be commended for not allowing a legal lacuna to be created by further disenfranchising CFSP as a particular sub-set of Union law, and ensuring it was kept as close of the normal rules surrounding Art. 267 TFEU preliminary references as possible. If jurisdiction was not asserted, it could have lead national courts to not send preliminary references to the Court in further questions seeking clarification on points of Union law. This potential chilling effect would most certainly hamper not just the nature of sanctions, but also the coherent interpretation of Union law as a whole, for which the Court is the ultimate adjudicator. By coming to the conclusion that the Court did have the jurisdiction, empowering itself with the ability to answer the substantive questions, AG Wathelet acknowledged he was breaking with the view of his colleague, AG Kokott, from her view provided in Opinion 2/13 on the EU's accession to the European Convention of Human Rights.³⁰ AG Wathelet said that without the Court having jurisdiction would undermine

²⁴ *Rosneft* [GC], cit., para. 72.

²⁵ *Ibidem*, para. 73.

²⁶ *Ibidem*, paras 78 and 79.

²⁷ Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.

²⁸ *H v. Council and Commission* [GC], cit.

²⁹ G. BUTLER, *Attacking or Defending? Jurisdiction of the Court of Justice in the EU's Common Foreign and Security Policy*, in *Europarättslig Tidskrift*, 2016, p. 671 *et seq.*, p. 677.

³⁰ View of AG Kokott delivered on 13 June 2014, in Opinion procedure 2/13.

the Treaties, namely, Art. 23 TEU, which guarantees access to a Court and effective legal protection,³¹ which albeit by an alternative method, the Court broadly arrived at the same conclusion.

Jurisdictional questions are not just inconsequential matters in the exercise of EU foreign policy, but have ramifications for EU procedural law, and the constitutional framework in which Union law operates. The Court's judgment, clarifying jurisdiction for itself, when it was in doubt, further widens the potential for its scope for a role in EU foreign policy. Hence, how broad a deference is there at the Court to questions that ultimately hinge upon "sensitive" areas of policy? Do Member States want the Court to have jurisdiction in CFSP? The Treaties do their best to prevent it, and five of the intervening six Member States and the Council in *Rosneft* pleaded that the Court did not have the ability to rule on the validity of CFSP acts. Yet the Court is no stranger to such questions, as it has dealt with jurisdictional questions on sensitive areas before, albeit in a slightly different context in the Area of Freedom, Security, and Justice ("AFSJ" or "Justice and Home Affairs"). The *Gestoras* and *Segi* cases provide suitable examples.³² In a pre-Lisbon context, the Court said that to decline jurisdiction in cases falling outside the scope of the then Art. 35, para. 1, TEU because they were preliminary references would not be in "observance of the law". Thus, the Court ruled in both *Gestoras* and *Segi* that jurisdiction for the Court in that field were permissible.

Given the Court's judgment here in *Rosneft*, there is no doubt that it had to be slightly inventive given what is clearly a shortcoming in the drafting of the Treaties. For the Court to have not asserted jurisdiction in *Rosneft* would have seemed contrary to the overall premise upon which the Union is a "complete system of legal remedies", which again is cited in *Rosneft*,³³ stemming from *Les Verts*.³⁴ Do the Treaties allow vacuums to be created where judicial review is excluded, or does it by reasonable means provide for judicial review? The latter was not only an easy choice, but also the more logical one. Art. 19, para. 1, TEU states that the Court "ensure that in the interpretation and application of the Treaties the law is observed", and that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This, coupled with the Court's own "Declaration by the Court [...] on the occasion of the Judges' Forum organised to celebrate the 60th anniversary of the signing of the Treaties of Rome" made the day before the *Rosneft* judgment was published, commenced with restating the premise that the EU is "a union governed by the rule of

³¹ Opinion of AG Wathelet, *Rosneft*, cit., para. 66.

³² Court of Justice, judgments of 27 February 2007: case C-354/04 P, *Gestoras Pro Amnistía et al. v. Council of the European Union* [GC]; case C-355/04 P, *Segi et al. v. Council of the European Union* [GC].

³³ *Rosneft* [GC], cit., para. 66.

³⁴ Court of Justice, judgment of 23 April 1986, case 294/83, *Les Verts v. European Parliament*, para. 23.

law".³⁵ Yet such spirited measures are always dampened by other events, and it is hardly in fitting with recent developments at the General Court. The *NF and Others v. European Council* cases, and the Orders by the General Court on 28 February 2017,³⁶ stated that it did not have jurisdiction on the question basis upon with an "EU-Turkey statement" was reached. The likelihood is therefore that such questions about the scope of the Court's jurisdiction in *non*-CFSP matters will rumble on.

Whilst this *Rosneft* judgment has clarified the scope of the Court's jurisdiction on preliminary reference cases dealing with CFSP-related matters, one has to ask why the litigant did not instead seek to go straight to the EU's General Court with an action for annulment claim, seeking the annulment of the sanctions applying Union-wide. The Court of Justice said that the basis for actions for annulment through direct actions from the treaties do not constitute the only means for which sanctions are challengeable.³⁷ Thus, from this, we can deduce that *Rosneft* opens the basis for future forum shopping when legal entities are subjected to the Union's comprehensive sanctions regime under the auspices of CFSP in the future.

Remaining questions on the legal limits of CFSP as a special area of area are yet to be fully answered in a categorical way. One example of such is the doctrine of primacy, with lingering questions on its applicability to CFSP. Even with this, jurisdictional questions in CFSP remain. In a recent Order of the General Court in *Jenkinson v. Council*,³⁸ it found it did not have the jurisdiction to deal with a staffing case stemming from a Common Security and Defence Policy, under the wing of CFSP. This demonstrates the caution of the General Court on leading the way on jurisdictional matter, preferring to let the Court of Justice lead the way.

Nonetheless, *Rosneft* clarifies that CFSP is one (small) step towards wider integration with the rest of the EU legal order. Former Judge at the Court, Federico Mancini said once in a speech at the Danish Supreme Court (Højesteret) in Copenhagen that without the system of preliminary references, that the "roof would collapse".³⁹ Indeed, the *Rosneft* judgment, ensuring that Art. 267 TFEU preliminary references in cases involving CFSP can be heard, upholds this notion rather tightly.

³⁵ Celebration of the 60th anniversary of the signing of the Rome Treaties, in Court of Justice of the European Union Press Release 33/17 of 27 March 2017, available at curia.europa.eu.

³⁶ Orders of the General Court of 28 February 2017: case T-192/16, *NF v. European Council*, case T-193/16, *NG v. European Council*, case T-257/16, *NM v. European Council*.

³⁷ *Rosneft* [GC], cit., para. 70.

³⁸ Orders of the General Court of 9 November 2016, case T-602/15, *Jenkinson v. Council of the European Union et al.*

³⁹ G.F. MANCINI, D.T. KEELING, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, in *Yearbook of European Law*, 1991, p. 1 *et seq.*, pp. 2-3.