



IN THE NAME OF THE RULE OF LAW? CJEU FURTHER EXTENDS JURISDICTION IN CFSP (*BANK REFAH KARGARAN*)

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ABSTRACT: In *Bank Refah Kargaran* (case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793), the Court of Justice decided that it has jurisdiction to award damages for non-contractual liability incurred by the EU for harm caused by certain restrictive measures in Common foreign and security policy (CFSP) decisions. In so doing, the Court of Justice further extends its jurisdiction within the CFSP. The Court interprets narrowly the limits to its jurisdiction provided for in arts 24 TEU and 275 TFEU. This Insight finds the Court's reasoning insufficient to justify a departure from the Treaty text, which limits the jurisdiction the Court of Justice of the EU to "proceedings [...] reviewing the legality of decisions providing for restrictive measures". The action for damages is no such proceeding.

KEYWORDS: Common foreign and security policy (CFSP) – jurisdiction – action for damages – restrictive measures – unity of the EU legal order – right to an effective remedy.

I. INTRODUCTION

On 8 October 2020, the Grand Chamber of the Court of Justice rendered judgment in an appeal procedure against the General Court judgment in the case of *Bank Refah Kargaran* (T-552/15 and C-134/19 P).¹ As explained also in a recent issue of *European Papers*,² the case concerned an action for annulment brought by the Iranian Refah Kargaran bank against a number of Council decisions and regulations imposing restrictive measures (sanctions) on the Iranian bank. Some of these decisions had been adopted on the basis of art. 29 TEU (CFSP); others on the basis of art. 215 TFEU (the latter served to implement the former, as is customary in the field of restrictive measures). Bank Refah Kargaran

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¹ Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793 and case T-552/15 *Bank Refah Kargaran v Council* ECLI:EU:T:2018:897.

² ME Bartoloni, "Restrictive Measures" Under art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment' (2021) *European Papers* www.europeanpapers.eu 1361-1362.



challenged the Council's decision *inter alia* on the grounds that the Council had not properly motivated its decisions. In a judgment delivered on 6 September 2013, the General Court had agreed with that argument and had proceeded to annul the above decisions and regulations in so far as they concerned the Iranian bank.³

On 25 September 2015, Bank Refah Kargaran brought a new action against the Council, this time to obtain damages in reparation of the injury the annulled decisions and regulations had caused to the bank. In so doing, the Iranian bank invited the General Court (and subsequently the Court of Justice) to address a jurisdictional question: does the CJEU have jurisdiction to award damages for harm caused by restrictive measures contained in CFSP decisions? The question was raised as the abovementioned decisions (not the regulations) were adopted on the basis of art. 29 TEU, a CFSP legal basis. Jurisdiction of the CJEU in the area of the CFSP is limited, as explained in art. 24 TEU. This article provides that "[t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [of Ch. 2 of the TEU on the CFSP], with the exception of its jurisdiction to monitor compliance with art. 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of art. 275 of the Treaty on the Functioning of the European Union".

Art. 275 TFEU adds:

"The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with art. 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 art. 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 Ch. 2 of Title V of the Treaty on European Union".

II. THE JUDGMENT AND THE AG OPINION

Since the entry into force of the Lisbon Treaty now over ten years ago, the Court of Justice has on several occasions been invited to interpret the above-mentioned jurisdictional "carve-outs".⁴ The Court of Justice has been generous towards itself: it has interpreted its jurisdiction broadly in the name of the rule of law and the requirement that the EU

³ Case T-24/11 *Bank Refah Kargaran v Council* ECLI:EU:T:2013:403. In following, *Bank Refah Kargaran v Council* will refer to the appeal case before the Court of Justice mentioned in note 1 and initially brought on the basis of art. 268 TFEU.

⁴ After the terminology used by Advocate General Wathelet in *Rosneft*, who referred to the limits on the jurisdiction of the CJEU in arts 24 TEU and 275 TFEU as "carve-outs" from the general jurisdiction of the CJEU to ensure that in the interpretation and application of the Treaties the law is observed, and to the exceptions to the above "carve-outs" as "claw-backs". See Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft* ECLI:EU:C:2016:381 paras 36-66.

Treaties provide for a “complete system of legal remedies and procedures” – a notion first introduced in the *Les Verts* judgment of 1986,⁵ and for the sake of ensuring that EU law is interpreted and applied uniformly across all Member States. Most notably, the Court of Justice decided in *Rosneft* that the CJEU has jurisdiction to assess the validity of decisions providing for restrictive measures not only in the framework of an annulment action (art. 263 TFEU), as mentioned expressly in the above art. 275 TFEU, but also in the framework of a preliminary ruling procedure (art. 267 TFEU).⁶ In addition, the Court of Justice has proceeded to a piecemeal expansion of its jurisdiction in specific areas. For example, in *H v Council*,⁷ a case I discussed in *European Papers*,⁸ the Court of Justice decided the CJEU had jurisdiction to rule on the legality of a decision to redeploy an officer in the context of a CFSP mission. Such a decision constituted an act of staff management, the Court held, and thus fell within the scope of the CJEU’s jurisdiction.⁹

In *Bank Refah Kargaran*, the Court continued in a similar vein. On the issue of jurisdiction, it concluded that the CJEU has jurisdiction to award damages on the basis of art. 268 TFEU for non-contractual liability incurred by the EU for harm caused by restrictive measures imposed by means of CFSP decisions. The Court considered that the above-mentioned “carve-outs” are exceptions to the general rule that the CJEU has jurisdiction.¹⁰ This general rule, the Court explained, is set out in art. 19 TEU, which holds that “the [CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed”. The Court of Justice interprets this provision as endowing the CJEU with a “jurisdiction of general scope”. It follows that these carve-outs are to be interpreted narrowly.¹¹ The Court added that every individual whose rights protected by EU law have been violated has the right to an effective remedy, as provided for in art. 47 of the Charter of Fundamental Rights of the EU (the Charter) as well as, ultimately, the principle of the rule of law itself.¹² Since individuals do have the possibility to claim damages caused by the EU in adopting art. 215 TFEU regulations, the coherence of the above system of remedies of procedures requires that the same opportunity exists also for

⁵ Case 294/83 *Parti écologiste Les Verts v European Parliament* ECLI:EU:C:1986:166 para. 23.

⁶ Case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

⁷ Case C-455/14 P *H v Council and Commission (“H v Council”)* ECLI:EU:C:2016:569.

⁸ T Verellen, ‘H v Council: Strengthening the Rule of Law in the Sphere of the CFSP, One Step at a Time’ (2016) *European Papers* www.europeanpapers.eu 1041. See also S O Johansen, ‘H v Council et al., A Minor Expansion of the CJEU’s Jurisdiction over the CFSP’ (2016) *European Papers* www.europeanpapers.eu 1297.

⁹ *H v Council* cit. paras 54-55. It is interesting to note that in the ensuing procedure before the General Court upon *renvoi*, the General Court dismissed the applications application for damages on the basis of art. 268 TFEU on the merits, without tackling the preliminary question of whether it had jurisdiction to rule. See case T-271/10 RENV *H v Council* paras 166-173.

¹⁰ *Bank Refah Kargaran v Council* cit. para. 32.

¹¹ *Ibid.* para. 32.

¹² *Ibid.* paras 35-36.

decisions adopted on the basis of art. 29 TEU, the Court concluded.¹³ Consequently, the CJEU has jurisdiction to award damages on the basis of art. 268 TFEU (non-contractual liability) for damage caused by the EU in the exercise of its CFSP competence to impose restrictive measures on individuals.¹⁴

It is interesting to note the ease by which the Court of Justice reached its conclusion on the jurisdictional issue. Advocate General Hogan had appeared more hesitant, contrasting arguments in favour and arguments against recognising CJEU jurisdiction (in particular the need to take into account the wishes of the Treaty framers to limit the CJEU's jurisdiction in the area of the CFSP).¹⁵ He mentioned that "[f]rom one viewpoint, the Court's jurisdiction is, by virtue of the second paragraph of art. 275 TFEU, confined simply to reviewing the legality of the restrictive measures imposed on natural or legal persons in the context of an action for annulment under the second paragraph of art. 263 TFEU",¹⁶ and he added that "[f]rom this perspective, this jurisdiction does not extend to any consequential or related damages claim. After all, it is settled case-law to the effect that an action for damages is not, as such, part of the system of review of the legality of EU acts".¹⁷ The AG did however go on to conclude, on the basis of a "holistic and harmonious"¹⁸ interpretation of the Treaties, that the Court did have such jurisdiction to award damages. The AG considered, in particular, that it may very well have been the intention of the Treaty framers to exclude CJEU jurisdiction for CFSP acts, with the exception of decisions pertaining to restrictive measures.¹⁹

In contrast with the AG's hesitance, the Court presented the above-mentioned line of reasoning as the *only* viable option. Council efforts to "ring-fence" the CFSP by invoking pre-Lisbon case law on the lack of CJEU jurisdiction to award damages in the then second pillar (*Gestoras Pro Amnistía* and *Segi*²⁰) were firmly rebuked.²¹ The Court emphasised how the Lisbon Treaty had changed the very structure of the EU Treaties: the CFSP had been integrated into the "general framework" of EU law,²² and the EU had

¹³ *Ibid.* para. 39.

¹⁴ *Ibid.* para. 43.

¹⁵ Case C-134/19 P *Bank Refah Kargaran v Council of the European Union* ECLI:EU:C:2020:396, opinion of AG Hogan, paras 58-59.

¹⁶ *Ibid.* para. 59.

¹⁷ *Ibid.*

¹⁸ *Ibid.* para. 68.

¹⁹ *Ibid.* para. 66.

²⁰ See case C-354/04 P *Gestoras Pro Amnistía and Others v Council* ("*Gestoras Pro Amnistía*") ECLI:EU:C:2007:115 para. 46, where the Court concluded that "art. 35 EU confers no jurisdiction on the Court of Justice to entertain any action for damages whatsoever". See in the same sense case C-355/04 P *Segi, Aritz Zubimendi Izaga and Aritz Galarraga v Council of the European Union* ("*Segi*") [2007] para. 46.

²¹ *Bank Refah Kargaran v Council* cit. paras 45-48. On the notion of "ring-fencing" the CFSP, see P J Cardwell, 'On Ring-Fencing the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) Northern Ireland Legal Quarterly 443.

²² *Bank Refah Kargaran v Council* cit. para. 47.

been endowed with a single legal personality (art. 47 TEU).²³ For these reasons, pre-Lisbon case law and Treaty provisions were no longer relevant, the Court concluded.²⁴

III. COMMENT: STRETCHING THE TEXT OF THE TREATIES IN THE NAME OF THE RULE OF LAW?

Is all of this persuasive? One could respond to the Court that it is selective in its reading of the Lisbon Treaty. Surely, the Treaty framers “normalised” the CFSP in certain ways, including by doing away with CFSP-specific objectives²⁵ and, indeed, by merging the pre-Lisbon European Community and Union into an EU endowed with a single legal personality.²⁶ As a consequence, the EU legal order now without any doubt extends to the CFSP.²⁷ There are, however, indications also that the Lisbon Treaty framers simultaneously wished to constitutionalise a policy of “ring-fencing” the CFSP and keeping the CJEU out of a policy area perceived as too closely related to national sovereignty and “high politics” such as the CFSP.²⁸

The text of arts 24 TEU and arts 275 TFEU is fairly clear in this regard. As far as the action for damages is concerned: art. 275 TFEU limits the “claw-back” to “proceedings, brought in accordance with the conditions laid down in the fourth paragraph of art. 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Ch. 2 of Title V of the [TEU]” (emphasis added). AG Hogan rightly pointed out,²⁹ and the Court acknowledged the point,³⁰ that the action for damages is an independent action that does not form part of the system of legality review established by the Treaties. It is, in other words, not a “proceeding [...] reviewing the legality” of CFSP decisions imposing restrictive measures. It follows that, since the action for damages is not covered by the “claw-back”, the action for damages for harm caused by CFSP decisions falls within the scope of the “carve-out”,

²³ *Ibid.*

²⁴ *Ibid.* para. 48.

²⁵ Art. 21(1) TFEU.

²⁶ Art. 47 TEU. On the “normalisation” of the CFSP, see P Van Elsuwege and G Van der Loo, ‘Legal basis litigation in relation to international agreements: Commission v Council (Enhanced Partnership and Cooperation Agreement with Kazakhstan)’ (2019) CMLRev 1333, 1352 and the references to the literature mentioned there.

²⁷ See art. 1(3) TEU, which holds that the two Treaties shall have the same legal value and that the Union shall be founded on both Treaties. For an argument that (then) EC constitutional principles already applied to the CFSP pre-Lisbon, see generally R Gosalbo-Bono, ‘Some Reflections on the CFSP Legal Order’ (2006) CMLRev 337.

²⁸ In this sense, see e.g. P Koutrakos, ‘Primary law and policy in EU external relations: moving away from the big picture’ (2008) *European Law Review* 669: “[The Lisbon Treaty] introduces a legal formula which merely replaces the tripartite pillar structure with a dual pillar structure in all but name.”

²⁹ *Bank Refah Kargaran v Council*, opinion of AG Hogan, cit. para. 59.

³⁰ *Bank Refah Kargaran v Council* cit. para. 33.

which, as mentioned, provides that “[t]he [CJEU] shall not have jurisdiction with respect to the provisions relating to the [CFSP] nor with respect to acts adopted on the basis of those provisions.” A CFSP decision imposing restrictive measures is clearly an act adopted on the basis of a CFSP Treaty provision. For this reason, even if the CJEU holds a “general jurisdiction” on the basis of art. 19(1) TEU, the CJEU lacks jurisdiction to award damages for harm caused by restrictive measures in a CFSP decision such as the one at issue in *Bank Refah Kargaran*. Hence, a strictly textual analysis of art. 275 TFEU suggests that the CJEU does *not* have jurisdiction to award damages for harm caused by restrictive measures in CFSP decisions.

The Court does not tackle the textual hurdle posed by art. 275 TFEU. This is regrettable as the legitimacy of the CJEU depends, to an important extent, on the persuasiveness of its legal reasoning.³¹ The omission is doubly unfortunate, since there may very well be compelling reasons to interpret art. 275 TFEU in a way that does grant the CJEU jurisdiction to award damages for harm caused by restrictive measures in CFSP decisions, even if, in doing so, the Court reads the Treaty text in a less than obvious way.³² The point the Court makes on the existence of a lacuna in the system of judicial protection within the EU is worth considering here. In para. 39 of the judgment, it stated that “the necessary coherence of the system of judicial protection provided for by EU law requires that, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned, the [CJEU] must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP Decisions”.

The Court essentially holds that the CJEU should have jurisdiction to award damages for non-contractual liability incurred by the EU for harm caused by restrictive measures in CFSP decisions, since absent such jurisdiction individuals would be deprived of an effective remedy.

Would a lacuna really exist? And if yes, why? If the CJEU lacks jurisdiction to award damages, would Member State courts not have the necessary competence to do so? A gap would exist only if Member States cannot take up the baton where the CJEU left it. It is worth remembering, at this juncture, that the responsibility for ensuring the effective judicial protection of individuals is shared between the CJEU and the national courts.³³ Where the CJEU lacks jurisdiction to award damages, national courts could, hypothetically, take up the baton and ensure that individuals obtain satisfactory relief by applying art. 340 TFEU, i.e. the Treaty provision that contains the substantive rules on the non-

³¹ Drawing on John Rawls, Christina Eckes spoke of “reason-based legitimacy”. See C Eckes, ‘International Rulings and the EU Legal Order: Autonomy as Legitimacy?’ (2016) CLEER Working Papers 2016/2, 9.

³² It should be recalled that, while the Court of course cannot ignore individual Treaty provisions, it does and must interpret those provisions in light of the whole of EU law. See case 283/81 *CLFIT* para. 20. On the subject, see generally K Lenaerts and J-A Gutierrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant 2020).

³³ Art. 19(1) TEU.

contractual liability of the EU. National courts could, again hypothetically, rule on the existence on non-contractual liability of the EU and, if appropriate, compel the EU to pay damages. This would be a different, more decentralised arrangement from the centralised arrangement outside of the CFSP context where the CJEU is understood to hold exclusive jurisdiction on the basis of art. 268 TFEU to award damages for non-contractual liability of the EU. However, absent CJEU jurisdiction, national courts alone are charged with the responsibility of ensuring effective legal protection. If questions arise on the interpretation of art. 340 TFEU, national courts could request a preliminary ruling from the Court of Justice. Surely, such a system would be more challenging to operate, but it would – provided the rule of law is upheld in all Member States – allow individuals to find relief for harm caused by the EU.

Against this backdrop, the Court of Justice's insistence in *Bank Refah Kargaran* that it is, and should remain, the *only* court within the compound EU polity with competence to award damages for non-contractual liability draws attention. Such insistence would seem to be motivated by other considerations than (merely) that of ensuring effective judicial protection. Indeed, had the Court of Justice been concerned solely with ensuring that individuals have access to an effective remedy, the Court might not have objected against the above-mentioned decentralised system whereby national courts decide, as they do for the EU's contractual liability,³⁴ whether the EU has incurred non-contractual liability and, if yes, whether this liability calls for the award of damages. The Court of Justice rejected this option and maintained, albeit implicitly, that only the CJEU can make the above determinations.

In the case of *Rosneft*, decided by the Court of Justice in March 2017, the Court had invoked *Foto-Frost*³⁵ and the need to protect the unity of the EU legal order to make the case that the CJEU should have jurisdiction to rule on requests for preliminary rulings on the validity of CFSP decisions imposing restrictive measures.³⁶ In *Bank Refah Kargaran*, the Court of Justice did not invoke *Foto-Frost*; it relied instead on the need to ensure effective judicial protection, the need to safeguard the right to an effective remedy, and the value of the rule of law, and it submitted that it would not be coherent for the Court to have jurisdiction to award damages for harm caused by non-CFSP regulations, while lacking such jurisdiction for harm caused by CFSP decisions. Nevertheless, there is reason to believe that in *Bank Refah Kargaran*, too, the Court of Justice is driven – in whole or in part – by a *Foto-Frost* inspired logic whereby the Court is concerned not only with ensuring that the individual concerned receives appropriate relief, but also with protecting the unity of the EU legal order – in this case: the uniform interpretation of art. 340

³⁴ Art. 268 TFEU only grants the CJEU jurisdiction with regards to the second and third subparagraphs of art. 340 TFEU, which cover, respectively, the non-contractual liability of the EU and liability caused by the European Central Bank and its servants in the performance of their duties.

³⁵ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

³⁶ *Rosneft* cit. paras 78-80.

TFEU, which would be at greater risk in a decentralised system as the one described earlier, compared to a centralised system whereby individuals have direct access to the CJEU.³⁷

A *Foto-Frost*-related concern would explain why the Court does not entertain the possibility that Member States could fill the “lacuna” that would exist should the CJEU’s jurisdiction not extend to CFSP restrictive measures. Yet, legal certainty would have benefited had the Court explained in greater detail why, in its view, a lack of CJEU jurisdiction to award damages would indeed have created a gap in the system of judicial protection. Perhaps because the jurisdiction of the Court to award damages for non-contractual liability of the EU has been considered exclusive for such a long time,³⁸ there is something intuitive in maintaining that only the CJEU can award damages. Yet, the fact that art. 275 TFEU limits CJEU jurisdiction to proceedings to *review the legality* of CFSP decisions imposing restrictive measures makes this point less than self-evident.

³⁷ One could imagine a scenario whereby courts in different Member States fail to involve the Court of Justice by means of a request for a preliminary ruling, and reach different conclusions when applying art. 340 TFEU. In the absence of a uniform application of art. 340 TFEU, a risk of forum shopping would also arise.

³⁸ See e.g. case 101/78 *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten* ECLI:EU:C:1979:38 para. 14: ‘The determination of the Community’s liability under the second paragraph of art. 215 of the Treaty [current art. 340 TFEU] falls within the Treaty (sic) falls within the jurisdiction of the Court of Justice as provided for in art. 178 of the Treaty, and lies outside that of any national court.’ It should be recalled, however, that the text of art. 268 TFEU does not characterise CJEU jurisdiction as exclusive in nature.