



ARTICLES

LAW AND FOREIGN POLICY BEFORE THE COURT: SOME HIDDEN PERILS OF *ROSNEFT*

LUIGI LONARDO*

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ABSTRACT: The landmark decision of the Court of Justice in *Rosneft* (judgment of 28 March 2017, case C-72/15) has been mostly praised by academic commentators for opening the doors of preliminary rulings in the Common Foreign and Security Policy (CFSP), and for upholding the rule of law in that area. While this *Article* mostly welcomes the momentous pro-integrationist implications of the mechanism of preliminary ruling through the immediacy of dialogue between Member States' and EU Courts, it also criticises the decision in *Rosneft*. In particular, it argues that the Court's reasoning to establish jurisdiction over a restrictive measure perpetuates a line of case law that hides risks, both for the judicial protection of individuals, and for the institutional balance and the separation of powers. By such critique, this *Article* partially departs from mainstream scholarship, which sees in *Rosneft* a positive development for the respect for the rule of law in CFSP. While that progress is entirely commendable, this *Article* elaborates upon and criticises other potential consequences of the Court's decision on what constitutes a reviewable act pursuant to Art. 275 TFEU.

KEYWORDS: Common Foreign and Security Policy – Rosneft – restrictive measures – integration – jurisdiction – preliminary ruling.

I. INTRODUCTION

Law and politics pulsate with different rhythms. The first develops steadily, somewhat silently, almost hidden from the clamour of press coverage, and, absent revolutionary events, with minor variations over the long run. The other is by nature more volatile, public and publicised, and is interested in a shorter time-horizon.¹

* PhD Candidate, King's College London, luigi.lonardo@kcl.ac.uk.

¹ The idea of diverging time horizons is in K. ALTER, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, in *International Organization*, 1998, p. 121. See generally

Like two planets orbiting in the dense universe of human action, sometimes, law and politics align before courts, and when they do, they generate an awesome spectacle for intellectual contemplation. It happened before the Court of Justice in *Rosneft*.²

Since the end of 2013, unrest and military activities in Eastern Ukraine, including Russia's annexation of Crimea, have resulted in highly tense relationships between the EU and Russia. Western leaders widely condemned Russia's action, and as an answer to what it perceived as an aggressive, illegitimate, and illegal Russian foreign policy, in 2014 the EU adopted economic sanctions aimed at targeting Russian economy, with the ultimate aim of bringing peace to Ukraine.

In *Rosneft*, the CJEU was asked to review the validity of some of these measures. It was the first request ever received for a preliminary ruling under Art. 267 TFEU on the interpretation and on the validity of an act adopted in the field of the Union's political and security international relations, the Common Foreign and Security Policy (CFSP).³ The political, symbolic, and economic repercussions of the issues at stake would, alone, make the case worthy of analysis. However, apart from the outcome on the substance of the case – the Court confirmed the sanctions established by the Council – *Rosneft*'s greatest significance lies in how the Court adjudicated on two procedural issues: its power to give preliminary rulings and its jurisdiction to review CFSP acts.

The Court's decision follows a well-established trend of affirming jurisdiction on certain CFSP acts in order to further the rule of law,⁴ a line of cases that has been widely praised by scholars.⁵ This *Article*, instead, takes issue with the reasoning – developed in previous cases and followed by the Court in *Rosneft* – adopted to establish jurisdiction on restrictive measures,⁶ as it opens the door to possible perilous intrusions in the substance of political CFSP decisions, while at the same time not fully guaranteeing to applicants the right to an effective remedy.⁷

the seminal study of H.J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge: Harvard University Press, 1983.

² Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC].

³ Previously, the Court had judged on restrictive measures during preliminary ruling procedures, but never on CFSP acts. Court of Justice: judgment of 14 March 2017, case C-158/14, *A and others* [GC]; judgment of 29 April 2010, case C-340/08, *M and others*.

⁴ The "integration thread" is described by P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, in *International and Comparative Law Quarterly*, 2018, p. 4.

⁵ Recent contributions are P. VAN ELSUWEGE, *Upholding the Rule of Law in the Common Foreign and Security Policy*: H v. Council, in *Common Market Law Review*, 2017, p. 841 *et seq.*; C. ECKES, *Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction*, in *European Law Journal*, 2016, p. 492 *et seq.*; S.O. JOHANSEN, H v Council et al., *A Minor Expansion of the CJEU's Jurisdiction over the CFSP*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1297 *et seq.*

⁶ This contribution only addresses the decision on the second limb of Art. 275 TFEU, and not the decision on compliance with Art. 40 TEU.

⁷ Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter).

Indeed, while commentators have essentially endorsed the Court's case law on jurisdiction on restrictive measures, including the one in *Rosneft*⁸ – this *Article* seeks to show the danger from a “dynamic” perspective, that is, considering how the Court may decide future cases.⁹

The Court found that it has jurisdiction on restrictive measures targeting persons “defined by reference to specific entities”, not on measures of general application. This decision is unconvincing and passible of three criticisms. First, the distinction is arbitrary, and appears not to be honoured by the Court itself. Second, the distinction is problematic because it appears to conflate the requirements for jurisdiction with those for *locus standi* of applicants; together with the very strict interpretation of rules on standing, this means that applicants can challenge only provisions that refer to them individually, and not restrictive measures adversely affecting them but contained in rules of general application.¹⁰ Third, and this is the dynamic aspect, the distinction does not sufficiently guarantee that the Court will not breach the fundamental principle of separation of powers, if, in the future, it reviewed political decisions.¹¹

⁸ G. BUTLER, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*, in *European Constitutional Law Review*, 2017, p. 691: “In light of the jurisdiction CFSP cases, and the Court's assertion of jurisdiction in them, more questions seem to have been raised than answered. This is by no means a negative development, as it assumes that the Treaties will eventually level the differentiation between CFSP and non-CFSP, despite the specific limitation imposed on the Court”; P. VAN ELSUWEGE, *Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case*, in *Verfassungsblog*, 6 April 2017, verfassungsblog.de: “The Court's preliminary ruling in *Rosneft* is important in many respects. It upholds the coherence of the EU system of judicial protection as far as the adoption of targeted sanctions is concerned and brings further legal clarity about the validity and interpretation of those sanctions”.

⁹ Similarly, albeit much more radically, to what S. Poli did in her article: S. POLI, *The Common Foreign Security Policy After Rosneft: Still Imperfect but Gradually Subject to the Rule of Law*, in *Common Market Law Review*, 2017, p. 1828 *et seq.*; G. BUTLER, *The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy*, *cit.*, p. 685 criticises future implications for forum shopping.

¹⁰ That is, a set of criticisms similar to those that can be moved to the strict doctrine of *locus standi* developed by the Court passible. See T. TRIDIMAS, S. POLI, *Locus Standi of Individuals Under Article 230(4): The Return of Euridice?*, in A. ARNULL, P. EECKHOUT, T. TRIDIMAS (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford: Oxford University Press, 2008, p. 70 *et seq.*

¹¹ Arguably, it has already reviewed a political decision, in *H* (Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]). In that case, AG Wahl wrote in his opinion that “the decision – taken by the Head of Mission of the [European Union Police Mission (EUPM)] – to fill a position of prosecutor in a regional office of the mission, instead of having a legal officer in its headquarters, is an operational decision and not a purely administrative matter. That decision has, indeed, significant consequences on the manner in which the EUPM discharges its tasks and the effectiveness of its action. The administrative element in the contested decisions (the allocation of human resources) is thus only secondary to the main foreign policy element, which concerns the reorganisation of EUPM's operations at theatre level”, and that “the General Court was correct to conclude that it did not have jurisdiction to review the validity of the contested decisions”; see opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, paras 85 and 89. P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, *cit.*, p. 14.

At the same time, the Court's decision to hear preliminary rulings on CFSP, albeit sustained by shaky teleological arguments, may have far-reaching positive repercussion for EU integration in this policy area. With *Rosneft*, the Court has deliberately opened the tap of preliminary ruling: a spring, *splendidior vitro*,¹² through which the lymph of the immediacy of judicial dialogue between national and EU Courts may flow and shape the future of CFSP.

II. BACKGROUND TO THE DISPUTE AND THE QUESTIONS REFERRED

The EU imposed sanctions against Russian and Ukrainian companies since March 2014,¹³ with further measures being adopted on 31 July 2014 as the crisis unfolded.¹⁴ The restrictions consist of travel or import bans,¹⁵ asset freeze, targeted measures against individuals associated with threats to Ukraine's territorial integrity and, crucially for the action begun in *Rosneft*, the prohibition for EU natural or legal persons from engaging in contractual relations with certain Russian state-owned companies and banks.

Rosneft, whose majority is owned by a company that belongs to the Russian Federation,¹⁶ is the leading Russian petroleum company. It lodged a case for judicial review before the High Court of Justice of England and Wales.¹⁷ *Rosneft* challenged, via the UK's domestic implementing act, the provisions of Regulation 833/2014 ("the Regulation") imposing the requirements of prior authorisation for the sale of some items, the prohibition to supply services related to oil exploration and production in Russia, and the obligation for Member States to establish the rules on penalties;¹⁸ and those of Decision 2014/512 ("the Decision") prohibiting the provision of financial services to Russian entities, establishing a system of prior authorisation for the sale, supply, transfer or export of certain technologies suited to specific categories of oil exploration and produc-

¹² Brighter than glass.

¹³ Council Decision (CFSP) 2014/145 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and Regulation (EU) 269/2014 of the Council of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, subsequently amended several times.

¹⁴ Council Decision (CFSP) 2014/512 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine and 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, and later amendments.

¹⁵ Council Decision (CFSP) 2014/386 of 24 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, as later amended.

¹⁶ See *Rosneft*, *Rosneft at a glance*, www.rosneft.com.

¹⁷ High Court of Justice of England and Wales, judgment of 9 February 2015, *R (OJSC Rosneft Oil Company) v. Her Majesty's Treasury et al.*

¹⁸ Art. 3, Art. 3a, Art. 4, para. 3, Art. 4, para. 4, Art. 5, para. 2, let. b) to d), Art. 5, para. 3, Arts 8 and 11 of Regulation 833/2014, cit.

tion projects in Russia, and a prohibition on the provision of associated services necessary for those projects.¹⁹ The Decision and the Regulation list Rosneft in their annexes as a company subject to some of the restrictions they provide for. Rosneft also brought a direct action pursuant to the fourth paragraph of Art. 263 TFEU against the same measures: it promises to be another highly sensitive case.²⁰

The UK Court filed for a preliminary ruling as it held that, in order to resolve the dispute, it needed to determine whether certain provisions of the Decision and the Regulation were invalid – and that it could not do so without referring three questions to the Court of Justice.

By question 1, the referring court asked whether the Court of Justice had jurisdiction to give a preliminary ruling on the validity of an act adopted on the basis of provisions relating to the CFSP, such as Decision 2014/512.

By question 2, let. a), the referring court sought a ruling on the validity of some provisions of the Decision and of the Regulation. Before answering this question, the Court made some preliminary observations on its own jurisdiction to review restrictive measures pursuant to Art. 24 TEU and Art. 275 TFEU. The Court then proceeded to reject Rosneft's pleas, and to confirm, on the substance, the validity of the Decision and of the Regulation.

By questions 2, let. b), and 3, the referring court asked whether the principles of legal certainty precluded a Member State from imposing criminal penalties for the infringement of the provisions of Regulation 833/2014 before the scope of those provisions and, therefore, of the associated criminal penalties, had been clarified by the Court. The Court replied in the negative.

This *Article* only addresses some procedural questions touched upon by the Court, as these carried the most far-reaching consequences.²¹ Building on this author's analysis of the Court's reasoning on its jurisdiction over restrictive measures (jurisdiction on question 2, let. a), and question 1), the *Article* explores and contextualises the legal and political significance of *Rosneft* – here departing from mainstream scholarship.

III. JURISDICTION: THE CRITICISM

The much awaited judgment on the highly technical issue of the scope of the CJEU's review restrictive measures still resulted – albeit only implicitly – in the Court scrutiny of the Decision and, ultimately, of the EU's choices to target the Russian petroleum sector. This also implied a rejection of the political question (*acte de gouvernement*) doctrine, proposed by the Commission in its submission and discussed at the oral hearing, which

¹⁹ As defined in Art. 1, para. 2, let. b), and Arts 4, 4a and 7 of, and Annex III to, Decision 2014/512, cit.

²⁰ General Court, judgment of 13 September 2018, case T-715/14, *NK Rosneft and others v. Council*.

²¹ This *Article* does not discuss the Court's judicial review on the ground of Art. 40 TEU.

would have entailed the Court's refusal to review the political choices underling restrictive measures.²²

There is fundamental uncertainty over the scope of the Court's Jurisdiction on CFSP: Art. 24 TEU reads that "The Court of Justice of the European Union shall not have jurisdiction with respect to these [*scil.*, CFSP] provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions [establishing restrictive measures] as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

That second paragraph mandates that

"the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

In *Rosneft*, the Court was asked to review the validity of the CFSP Decision and of the Regulation. The Court's judgment did not involve much reasoning on the delicate issue of the jurisdiction on the Decision, nor did it recall its previous hesitant case law.²³ Instead, the Court acknowledged that it only has jurisdiction to review a CFSP act in two cases: either if it is a restrictive sanction, or to monitor compliance with Art. 40 TEU. Logically, the next step was to decide what provisions of the CFSP Decisions were restrictive measures against natural or legal persons.²⁴

In order to identify the restrictive measures reviewable under Art. 275 TFEU, in *Kala Naft*,²⁵ confirmed by the Court of Justice on appeal because no appellants had challenged the finding,²⁶ the General Court used the distinction, first appeared in *Kadi*, between measures of "general nature, their scope being determined by reference to objective criteria and not by reference to identified natural or legal persons" and "decision providing for restrictive measures against natural or legal persons within the meaning

²² Discussed below. S.O. JOHANSEN, *EU Sanctions Against Non-EU Countries: The CJEU Will Soon Address Some Key Legal Issues*, in *EU Law Analysis*, 26 February 2016, eulawanalysis.blogspot.com.

²³ Court of Justice: opinion 2/13 of 15 December 2014; judgment of 21 July 2016, case C-455/14 P, *H v. Council and Commission* [GC], cit.

²⁴ As mentioned, this *Article* does not discuss the Court's decision on compliance with Art. 40 TEU.

²⁵ General Court, judgment of 24 April 2012, case T-509/10, *Manufacturing Support & Procurement Kala Naft v. Council*.

²⁶ Court of Justice, judgment of 24 January 2014, case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, para. 99. See also General Court, judgment of 2 June 2016, case T-160/13, *Bank Mellat v. Council*, paras 33-37.

of the second paragraph of Article 275 TFEU".²⁷ The General Court found jurisdiction only on the latter.

In *Gbagbo*, the Court of Justice found – when deciding on locus standi of the applicants! – that “as regards measures adopted on the basis of provisions relating to the Common Foreign and Security Policy, such as the contested measures, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, permits access to the Courts of the European Union”.²⁸

In *Rosneft*, the Court found that the articles of the Decision providing for a system of prior authorisation and prohibition to enter in certain contractual relationships with Russian companies “prescribe measures the scope of which is determined by reference to objective criteria, in particular, categories of oil exploration and production projects. [...] those measures do not target identified natural or legal persons, but are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies that are subject to the prior authorisation requirement and to all the suppliers of associated services”.²⁹ Since those were measures of general application, the Court found it did not have jurisdiction to review their validity.³⁰ The Court of Justice instead exercised its jurisdiction over the restrictive measures introduced pursuant to the other provisions of Decision 2014/512 that were at issue, namely Art. 1, para. 2, let. b) to d), and Art. 7, para. 3, and Annex III. It held that “it is clear that the persons and entities subject to those measures are defined by reference to specific entities. Those provisions prohibit, inter alia, the carrying out of various financial transactions with respect to entities listed in Annex III to that decision, one of those entities being Rosneft”.³¹

Moreover, the Court justified its findings by specifying, at para. 102, that it is “settled case-law that restrictive measures resemble both measures of general application, in that they impose on a category of addressees determined in a general and abstract manner a prohibition on making available funds and economic resources to entities listed in their annexes, and also individual decisions affecting those entities” (the *Kadi* distinction). And, at para. 103, it recalled that “as regards measures adopted on the basis of provisions relating to the CFSP, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU, permits access to the Courts of the European Union” (the *Gbagbo* principle).

²⁷ Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat International Foundation v. Council and Commission* [GC], para. 37.

²⁸ Court of Justice, judgment of 23 April 2013, case C-478/11 P, *Gbagbo and others v. Council* [GC], para. 57.

²⁹ *Rosneft* [GC], cit., para. 98.

³⁰ *Ibid.*, para. 99.

³¹ *Ibid.*, para. 100.

As far as the Regulation was concerned, the Council maintained that the Court could not adjudicate on it because Rosneft was essentially trying to challenge a decision of principle which falls within CFSP.³² AG Wathelet had taken the view that since the Regulation was adopted on the basis of Art. 215 TFEU, “even if it merely repeats verbatim, or adds to, or further specifies measures laid down in a CFSP decision, as is the case here with Decision 2014/512 and Regulation No 833/2014” this implies that the measures (both Decision and Regulation) are subject to judicial review because they became “dependent on compliance with the TFEU” (this crucial passage is dealt with in a footnote of the AG opinion!).³³ The Court followed the AG’s opinion, and recognised that the Regulation is a TFEU act, on which the Treaty confers jurisdiction.

On the point of jurisdiction on the CFSP Decision, *Rosneft* is passible of at least three critiques. First, for the purposes of jurisdiction, the distinction between “measures [that] do not target identified natural or legal persons” and measures that do is purely arbitrary. It is not warranted by the fundamental Treaties, be it by literal, systematic, or purposive interpretation.

Most importantly, the Court itself appears not to follow this arbitrary distinction: in *Rosneft*, while the Court stated it does not have jurisdiction over measures of general application, it nonetheless adjudicated on the compatibility of the Decision’s objectives with Art. 21 TEU.³⁴ To this author’s mind, however, the objectives of the Decision “do not target identified natural or legal persons, but are applicable generally to all operators”³⁵ and therefore, following the Court’s own finding, should not have been reviewed. Arguably, moreover, they constitute a “political choice” by EU institutions and therefore should have not been reviewed in any case (see the third point below).

Second, and following from the previous comment, the arbitrary distinction is problematic because, together with the over formalistic interpretation of the fourth paragraph of Art. 263 TFEU, the Court bars applicants from challenging sanctions having a “substantial adverse effect on their interests”³⁶ but that are contained in rules of general application.

Indeed, the Court in *Rosneft* appears to conflate the condition for reviewability with the requirements for *locus standi*. The requirement mentioned in Art. 275 TFEU (“proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty”) is, it is submitted, exclusively for the purposes of *locus standi* and of the kind of action. One might reasonably argue that Art. 275 TFEU excludes, for example, that restrictive measures may be reviewed in proceedings originating from prelim-

³² *Ibid.*, para. 102.

³³ Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft*, para. 103.

³⁴ *Rosneft* [GC], cit., para. 116.

³⁵ *Ibid.*, para. 98.

³⁶ Opinion of AG Jacobs delivered on 21 March 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 60.

inary rulings³⁷ (whereas the Court did not even consider this hypothesis, see the reasoning outlined *infra*, section V). The requirement that the act individually targets the applicant is not relevant for the establishment of jurisdiction,³⁸ but only for establishing the interest of the applicant in the proceedings. Such was the opinion of AG Wathelet,³⁹ who criticised the opposite finding of the General Court in *Sina Bank*⁴⁰ and *Hemmati*.⁴¹

Quite a distinctive issue, in theory, is that the Court opted for an over formalistic reading of the fourth paragraph of Art. 263 TFEU which may be detrimental to the effectiveness of judicial protection in CFSP.

If this author's interpretation of *Rosneft* is correct, such development is hardly tenable for an organisation, such as the EU, which is built on the respect for the rule of law (Art. 2 TEU) and recognised the right to an effective remedy as a fundamental right.⁴²

Third, the distinction does nothing to prevent the potential breach of the fundamental principle of separation of powers, if the Court reviewed political decisions.⁴³ The exclusion of the Court's jurisdiction from CFSP acts in Art. 24 TEU was meant to safeguard this principle,⁴⁴ not to bar individual applicants from challenging sanctions. Partially moved by this concern, in *Rosneft*, the Commission suggested the introduction of a "political question doctrine" to help defining boundaries of the Court's jurisdiction. Under this doctrine, the Court could not review purely political choices. While it would be almost revolutionary for the EU – there is no textual provision for such a doctrine – this is a tool well known in other jurisdictions,⁴⁵ especially in the United States, where, especially in the highly sensitive domain of foreign affairs, it has been object of debate for centuries.⁴⁶ The objections to the introduction of a political question doctrine are that there is no mention of this in the treaties; that it would only increase the uncertainty; and that it would be difficult to reconcile it with the exertion of upholding the rule of law in EU's action.⁴⁷

³⁷ A point raised, and refuted, by S. POLI, *The Common Foreign Security Policy After Rosneft*, cit., p. 1805.

³⁸ It appears to be the opinion of AG Mengozzi delivered on 30 May 2018, case C-430/16 P, *Bank Mellat*.

³⁹ Opinion of AG Wathelet, *Rosneft*, cit., paras 88-89.

⁴⁰ General Court, judgment of 4 June 2014, case T-67/12, *Sina Bank v. Council*.

⁴¹ General Court, judgment of 4 June 2014, case T-68/12, *Hemmati v. Council*.

⁴² Art. 47 of the Charter; Art. 6 of the European Convention on Human Rights.

⁴³ A similar critique is expressed by P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 13, with regard to case *H v. Council and Commission* [GC], cit.

⁴⁴ Opinion of AG Wahl, *H v. Council and Commission*, cit.

⁴⁵ Opinion of AG Wathelet, *Rosneft*, cit., para. 52; G. BUTLER, *Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law*, in *Columbia Journal of European Law*, 2018, forthcoming.

⁴⁶ The classic is T. FRANCK, *Political Questions, Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton: Princeton University Press, 1992. The seminal work on the role of law in international relations is E.H. CARR, *The Twenty Years Crisis 1919-1939*, London: Palgrave, 2016, published for the first time in 1939.

⁴⁷ P. VAN ELSUWEGE, *Upholding the Rule of Law in the Common Foreign and Security Policy*, cit.

IV. THE COURT AND PRELIMINARY RULINGS

The decision on the very first question asked by the referring court, the affirmation of the Court's jurisdiction on preliminary rulings in CFSP, might prove to be the most important and long-lasting effect of *Rosneft*. This is where it most clearly appears that divergence between the rhythm of politics and the rhythm of law mentioned in the beginning of this *Article*.

IV.1. LAW

The United Kingdom, Czech, Estonian, French and Polish Governments, and the Council argued that, pursuant to the last sentence of the second subparagraph of Art. 24, para. 1, TEU and Art. 275 TFEU, the Court does not have jurisdiction to give a preliminary ruling on the validity of CFSP measures.⁴⁸ The Court reached the opposite conclusion.

To ascertain whether it has jurisdiction on CFSP measures, that is, on the two exceptions provided for in Art. 24 TEU, the Court split its reasoning into two questions: first, does the Court have jurisdiction to monitor compliance with Art. 40 TEU in preliminary rulings procedures? Second, does the Court have jurisdiction to review sanctions in preliminary ruling procedures?

On the first, the Court correctly noted that nothing in the Treaties specifies the procedure to ensure compliance with Art. 40 TEU. As such, the general rule that the Court shall have jurisdiction to give preliminary rulings on the validity of EU institutions' acts is applicable.⁴⁹

On the second, the Court grounded its jurisdiction on several textual and teleological arguments,⁵⁰ the first of which was the consideration of the architecture of judicial protection under EU law. Such system, the Court recalled, consists of both the action for annulment and the preliminary ruling procedures: an applicant can avail itself of both in order to challenge the validity of an act of the institutions, and these include CFSP acts.⁵¹

In addition, declaring jurisdiction on preliminary rulings of measures falling within CFSP – the Court's argument goes – avoids the potential deterioration of the protection of fundamental rights which would derive from each national court being able to monitor CFSP decisions in the absence of a centralised mechanism. If national courts had jurisdiction when the Court of Justice of the EU does not, this might lead to diverging and

⁴⁸ *Rosneft* [GC], cit., para. 58.

⁴⁹ *Ibid.*, para. 62. See Art. 19, para. 3, let. b), TEU.

⁵⁰ P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 22.

⁵¹ *Rosneft*, cit., para. 78. This is the "complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions". See also para. 71 of the judgment and G. BUTLER, *Implementing a Complete System of Legal Remedies in EU Foreign Affairs Law*, cit.

potentially even conflicting interpretations of the same CFSP measure.⁵² Furthermore, as the Court noted, preliminary rulings on the validity of a decision providing for restrictive measures might be necessary, since implementation is in part the responsibility of the Member States.⁵³ Moreover, even though this was not mentioned in *Rosneft*, the lack of the Court jurisdiction to hear on preliminary rulings would be at issue with the third paragraph of Art. 267 TFEU and the *CILFIT* doctrine, in case the request arose “in a case pending before a court or tribunal of a Member States against whose decisions there is no judicial remedy under national law”.⁵⁴

Other arguments on which the Court based its jurisdiction were the respect for the rule of law (derived from Arts 2, 21 and 23 TEU and the precedent of *H*), and the right to effective judicial remedy as enshrined in Art. 47 of the Charter. Completely excluding the Court’s jurisdiction from an area of EU law such as CFSP would seriously hinder the system of judicial protection.⁵⁵ Even though it is left to the discretion of national courts to decide whether to make a reference for a preliminary ruling as well as what are the questions to be referred, completely ruling out the opportunity for an applicant (or the national court) to make such a request is indeed against Art. 47 of the Charter. This is so even though, as mentioned, Art. 275 TFEU appears to say that the Court only has jurisdiction to review restrictive measures in direct actions. All the more so if one accepted the submission of the Council in its appeal in *H*, that is, that the national court does not have the power to annul the CFSP decision. This would leave a legal vacuum for the annulment of the provision (differently from *Inuit*,⁵⁶ where the Court found that existence of alternative legal remedies allowed for a restrictive rule on judicial remedy).

As Professor Koutrakos correctly points out, this decision is based, ultimately, on a teleological approach which is inconsistent with the letter of Art. 24 TEU and Art. 275 TFEU.⁵⁷ Indeed, the very rationale for the role of national courts – so downplayed in *Rosneft* – is the express constitutional limitation of power of the CJEU over CFSP decisions.

The teleological reasoning of the Court in this occasion, albeit of far-reaching consequences detailed in the next section of this *Article*, is perfectly in line with decades of the Court’s pro-integrationist case law. It would be disingenuous to be surprised by it.

⁵² This is also one of the concerns of the referring court in *Rosneft*. See opinion of AG Whatelet, *Rosneft*, cit., para. 27. For this reason, the AG suggested that the Court can issue preliminary rulings in CFSP. Opinion of AG Whatelet, *Rosneft*, cit., paras 61-62.

⁵³ *Rosneft* [GC], cit., para. 71.

⁵⁴ Court of Justice, judgment of 6 October 1962, case 283/81, *CILFIT v. Ministry of Health*. See also T. TRIDIMAS, *The European Court of Justice and the National Courts: Dialogue and Instability in the Shadow of a Centralised Constitutional Model*, in D. CHALMERS, A. ARNULL (eds), *The Oxford Handbook of European Union Law*, Oxford: Oxford University Press, 2015, p. 403 *et seq.*

⁵⁵ See *Rosneft* [GC], cit., para. 75, and case law there cited.

⁵⁶ Court of Justice, judgment of 3 October 2013, case C-583-11 P, *Inuit Tapiriit Kanatami and others v Parliament and Council* [GC].

⁵⁷ P. KOUTRAKOS, *Judicial Review of EU’s Common Foreign and Security Policy*, cit., p. 24.

Despite the questionable reading of the Treaties through which the Court reached its decision, however, *Rosneft* is likely have pro-integrationist consequences.

IV.2. POLITICS

The importance of preliminary ruling in the historical and legal construction of the European Union cannot be overestimated. This is why the “jewel in the crown of the [Court of Justice]’s jurisdiction”⁵⁸ has been object of a vast amount of scholarship.⁵⁹ Mention will only be made, schematically, of two opposing views on the relationship between Member States and the Court.

A narrative of EU integration through law⁶⁰ assumes that the Court of Justice could bring about closer integration between Member States, even against the interests of some of those countries. Thus, “national governments paid insufficient attention to the Court’s behaviour during the 1960s and 1970s when the Court developed a powerful set of legal doctrines and co-opted the support of domestic courts for them”.⁶¹ The doctrines at issue were, most notably, those of direct effect and supremacy, which resulted in increasingly more integration, giving rise to Weiler and Stein’s “constitutionalisation” of European law,⁶² to historians’ constitutional practice,⁶³ or to Haas’s process of functional spill-over.⁶⁴

By contrast, others have developed an account of EU integration and Court of Justice decision-making that acknowledges the leading role of Member States.⁶⁵ The relationship between Member States and the Court is, the argument goes, one of principal

⁵⁸ The metaphor is in P. CRAIG, G. DE BÚRCA, *EU Law. Texts, Cases and Materials*, Oxford: Oxford University Press, 2013, p. 442.

⁵⁹ Apart from the contributions cited in the footnotes below, see T. TRIDIMAS, *Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, in *Common Market Law Review*, 2009, p. 9 *et seq.*; P. CRAIG, *The ECJ, the National Courts and the Supremacy of Community Law*, in I. PERNICE, R. MICCU (eds), *The European Constitution in the Making*, Berlin: Nomos Verlagsgesellschaft, 2004, p. 25 *et seq.*, available at www.ecln.net; the importance of judicial dialogue between the CJEU and national courts has been repeatedly affirmed in the Court’s case law: Court of Justice, opinion 1/09 of 8 March 2011; *CILFIT v. Ministry of Health*, *cit.*

⁶⁰ The phrase is borrowed from the seminal work by M. CAPPELLETTI, M. SECCOMBE, J.H.H. WEILER (eds), *Integration through Law*, Berlin, New York: De Gruyter, 1986.

⁶¹ G. GARRETT, D. KELEMEN, H. SCHULZ, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, in *International Organization*, 1998, p. 149 *et seq.*

⁶² E. STEIN, *Lawyers, Judges and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.*; and J.H.H. WEILER, *The Transformation of Europe*, in *Yale Law Journal*, p. 2403 *et seq.*

⁶³ B. DAVIES, M. RASMUSSEN, *Towards a New History of European Law*, in *Contemporary European History*, 2012, p. 305.

⁶⁴ E. HAAS, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*, Notre Dame: University of Notre Dame Press, 1958.

⁶⁵ Among many, A. STONE SWEET, *The European Court of Justice and the Judicialization of EU Governance*, in *Yale Law School Faculty Scholarship Series*, no. 70, 2010.

to agent. This approach suggests that the Court's autonomy, and even activism, was not bestowed by judges on passive national governments, but instead favoured by, and indeed the outcome of precise calculations of, the Member States.

One does not necessarily need to subscribe to either of these two narratives, however, to acknowledge the fact that the Luxembourg Court, throughout its history, has indeed given judgments whose indirect consequences were not immediately challenged, commented upon, or possibly even grasped, by Member States governments.⁶⁶ A new wave of historical scholarship of European integration has recently emerged⁶⁷ and cast light on the fact that the development of EU law did not happen on the public scene nor it attracted the attention and coverage of contemporary press.⁶⁸ Rasmussen's study of archival sources on the history of *Van Gend en Loos*,⁶⁹ for example, is telling of the diverging rhythms of law and politics. While the Dutch and Belgian governments argued that the Court of Justice did not even have jurisdiction to hear the preliminary reference in *Van Gend en Loos*, the potential effect of which was clear to the legal service's lawyers,⁷⁰ national governments accepted almost completely passively the judgment.⁷¹ This comparison is not meant to play-up the significance of *Rosneft* and to equate its revolutionary impact to that of *Van Gend en Loos*, but rather to provide a famous example of how judicial logic defies – indeed, escapes – the political will of Member States.⁷²

Ultimately, it may be the task of the historian, rather than of the lawyer, to ascertain to what extent a given decision is a turning point in the history of European integration, whether its consequences were intended, and by whom. However, it is already possible to draw attention on two key features that make *Rosneft* a significant decision: the time-horizon of the Court, and the role it assigns to individuals, is at odds with that of Member States.

The Court confirmed that the Council could target the Russian oil sector, and as such entered into the realm of politics by completely endorsing EU choices. But, while the substance of the case was politically very pleasant for EU Member States (and conversely, *Rosneft*'s representative lamented that the decision was “illegal, groundless and

⁶⁶ K. ALTER, *Who Are the “Masters of the Treaty”?*, cit., p. 147.

⁶⁷ M. RASMUSSEN, *Rewriting the History of European Public Law: The New Contribution of Historians*, in *American University International Law Review*, 2013, p. 1187 *et seq.* And the special issues of the *Journal of European Integration History*, 2008.

⁶⁸ M. RASMUSSEN, *Revolutionizing European Law: A History of the Van Gend en Loos Judgment*, in *International Journal of Constitutional Law*, 2014, p. 137 *et seq.*

⁶⁹ Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*.

⁷⁰ M. RASMUSSEN, *Revolutionizing European Law*, cit., p. 159.

⁷¹ *Ibid.*, p. 161.

⁷² La Bruyère wrote that “to think only of oneself and of the present time is a source of error in politics”: J. DE LA BRUYÈRE, *Les Caractères ou les Mœurs de ce siècle, 1688*, Paris: Folio, 2011, p. 483.

politicised”),⁷³ the Court found a way to formally review, for the time being, this kind of highly sensitive foreign policy decisions. In other words: this judgment might pass unnoticed because the Court did nothing surprising on the substance. What if, in the future, it found that it was “unnecessary” to target Russia?⁷⁴

The Court is also enhancing the role of individuals in CFSP by granting them an immediate avenue to justice through preliminary ruling. While the Treaties explicitly anchor individuals’ role in CFSP to the review of sanctions for actions “brought in compliance with Article 263 TFEU”, the Court has potentially opened the doors of dialogue between legal or physical persons and EU Courts on matters of foreign policy. This is all the more relevant since the Commission cannot initiate infringement proceedings under Art. 258 TFEU against Member States for failure to meet CFSP obligations. Even though the infringement procedure is not aimed at protecting individual rights, individuals do “cooperate” with the Commission by providing news over non-compliance of Member States in other areas of EU law.⁷⁵ Not so in CFSP.

Where the lymph of preliminary ruling might lead, it is impossible to foresee. But it is not impossible that this mechanism will act as a catalyst for further integration in CFSP, not dissimilarly from what happened in other areas of EU law.⁷⁶ The seminal work by Poiares Maduro, *We the Court*, is enlightening as to the developments allowed by preliminary rulings, which put private actors in direct touch with the Court of Justice in the context of Art. 34 TFEU.⁷⁷ Such communication shaped themes of governance around the prohibition of restrictions to trade, an area of fundamental constitutional dialogue⁷⁸ in which the Court has restricted the power of Member States while “in return” conferring rights upon individual. May the same dialogue happen in CFSP? Moreover, preliminary rulings are certainly beneficial for domestic and EU Courts, but, like any dialogue, are prone to be the space of confrontations and even challenges⁷⁹ – whose appropriateness is doubtful in foreign policy matters.

⁷³ A. BEESLEY, H. FOY, *European Court Upholds Russia Sanctions After Rosneft Challenge*, 28 March 2017, www.ft.com.

⁷⁴ The test of necessity – with regard to the attainment of the objective of Art. 21, para. 2, TEU “maintaining peace and international security” – is in *Rosneft* [GC], cit., para. 115.

⁷⁵ On the role of individuals in initiating infringement proceedings see P. CRAIG, G. DE BÚRCA, *EU Law. Texts, Cases and Materials*, cit., p. 410.

⁷⁶ P. KOUTRAKOS, *Judicial Review of EU's Common Foreign and Security Policy*, cit., p. 23, criticises the “distinctly integrationist” perspective of *Rosneft*.

⁷⁷ See M. POIARES MADURO, *We the Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

⁷⁸ T.K. HERVEY, *Miguel Poiares Maduro, We The Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 EC*, in *European Public Law*, 2000, p. 629.

⁷⁹ See recently, the German Constitutional Court reference in Court of Justice, judgment of 16 June 2016, case C-62/14, *Gauweiler* [GC], and the Danish Supreme Court reference in Court of Justice, judgment of 19 April 2016, case C-441/14, *Dansk Industry* [GC] and subsequent developments, see R.

V. CONCLUSION

The Court in *Rosneft* established its jurisdiction on the basis of an incorrect distinction.

Differentiating between measures of general applications and measures targeting specifically individuals is not a basis on which the fundamental Treaties established the jurisdiction of the Court. If such a distinction exists in the TFEU, it is purely for the purposes of establishing *locus standi*. Conflating the conditions for jurisdiction with those for *locus standi* may lead to poor effectiveness of the fundamental rights of judicial protection of those who try to challenge the sanctions. Moreover, the distinction does not prevent the Court from adjudicating upon purely political acts – which was, arguably, the purpose of the exclusion of its jurisdiction from CFSP.

Granted, in *Rosneft*, both the reasoning on the compatibility of the measures with the EU-Russia agreement, and on their compliance with the principle of proportionality show that the Court has left a wide margin of discretion to the Council. It would seem that, as the case law now stands, the Council discretion's only limit would be that of manifest unreasonableness. Any measure that is not obviously inappropriate is acceptable.

However, by confirming the Council's choices, the Court has basically assumed the prior logical step: that it can, indeed, decide whether or not to confirm what the Council does.

If, and only if, the case law continued with this utterly unobtrusive approach it would be in line with the EU constitutional principle of separation of powers and with the legal distinctiveness of CFSP. At the moment, the Court is adjudicating upon political questions,⁸⁰ albeit admittedly, since it has so far left broad discretion to the Council, it has always confirmed that institution's choice.

In *Rosneft*, the Court confirmed EU's foreign policy choices and seconded the political palpitation: this time round. Any change to this reasoning, and it will be obvious where the hidden consequences of *Rosneft* lay.

HOLDGAARD, D. ELKAN, G.K. SCHALDEMOSE, *From Cooperation to Collision: the ECJ's Ajos Ruling and the Danish Supreme Court's Refusal to Comply*, in *Common Market Law Review*, 2018, p. 1 *et seq.*

⁸⁰ Such as that on the very necessity to target Russia in order to maintain international peace and security, *Rosneft* [GC], *cit.*, para. 115.

