



## ARTICLES

# DECENTRALISED INTEGRATION? FUNDAMENTAL RIGHTS PROTECTION IN THE EU COMMON FOREIGN AND SECURITY POLICY

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TABLE OF CONTENTS: I. Introduction. – II. Mandatory respect for EU fundamental rights in CFSP. – II.1. CFSP as distinct framework embedded in the EU legal order. – II.2. Horizontal obligation to respect fundamental rights in the EU. – II.3. Mainstreaming fundamental rights in CFSP decision-making. – III. Derogatory enforcement of EU fundamental rights in CFSP. – III.1. Limited ECJ jurisdiction in CFSP: an exception to the rule. – III.2. Broad exercise of limited ECJ jurisdiction. – IV. Complementary national enforcement of EU fundamental rights in CFSP. – IV.1. Member States' courts as EU courts. – IV.2. Practical implications of Member States' courts involvement in reviewing CFSP. – V. Concluding remarks.

ABSTRACT: This paper examines how fundamental rights are protected in the specific context of the EU Common Foreign and Security Policy, against the backdrop of the European Court of Justice's Opinion 2/13 on the EU accession to the ECHR. As any area of EU law, the CFSP must be implemented in compliance with EU fundamental rights. The jurisdiction of the European Court of Justice plays a critical if limited part in ensuring such compliance, which Member States' judiciaries complement, acting as "guardians of (the) legal order and the judicial system of the (EU)". Such a mixed judicial control over the CFSP derives from the Court's established case law, as well as from the Treaty of Lisbon, and the deeper integration of the CFSP in the EU legal order that it envisages.

KEYWORDS: European Union – foreign and security policy – fundamental rights – Court of Justice – national courts – preliminary reference – European integration.

## I. INTRODUCTION

In its Opinion 2/13,<sup>1</sup> the European Court of Justice (CJEU) found that "the agreement envisaged [for the European Union (EU) to accede to the European Convention of Human Rights (ECHR)] fail[ed] to have regard to the specific characteristics of EU law with re-

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<sup>1</sup> Court of Justice, opinion of 18 December 2014, opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

gard to the judicial review of acts, actions or omissions on the part of the EU in [Common Foreign and Security Policy (CFSP)] matters”.<sup>2</sup> In particular, the Court considered that the agreement disregarded the specific (i.e. limited) jurisdiction it exercises in the CFSP area by granting the European Court of Human Rights power to review certain acts which it itself (i.e. the CJEU) cannot review,<sup>3</sup> adding that “jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU”.<sup>4</sup>

Undeniably, the limited jurisdiction of the Court of Justice in CFSP matters is a specific feature of EU law. But is it so significant as to warrant protection from the Court?<sup>5</sup> In her preliminary View, Advocate General (AG) Kokott did not find it decisive, on the contrary:

“with regard to the CFSP [...] the proposed accession of the EU to the ECHR can be completed without the creation of new competences for the Court of Justice of the EU, since, in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (Article 275(2) TFEU) and partly by national courts and tribunals (Article 19(1), second sentence, TEU and Article 274 TFEU)”.<sup>6</sup>

This paper argues that the CFSP is indeed not as distinctive as suggested in Opinion 2/13. In particular, the general EU obligation to respect fundamental rights is fully applicable to the CFSP context (section one), and the Court of Justice has power, albeit limited, to enforce such an obligation (section two), which it *shares* with Member States’ courts *qua* EU courts (section three).

This specific mixed judicial control derives from the established case law of the Court and the Treaty of Lisbon. It epitomises the balance between the increasing integration of the CFSP into the EU constitutional order,<sup>7</sup> and the recurrent role that Mem-

<sup>2</sup> *Ivi*, para. 257.

<sup>3</sup> *Ivi*, para. 255.

<sup>4</sup> *Ivi*, para. 256.

<sup>5</sup> According to Art. 1 of Protocol (No 8) relating to Art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms: “The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the European Convention) provided for in Art. 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (a) the specific arrangements for the Union’s possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”.

<sup>6</sup> View of Advocate General Kokott delivered on 13 June 2014, and preceding CJEU opinion 2/13, cit., para. 103.

<sup>7</sup> Further on this, see C. HILLION, *Cohérence et action extérieure de l’Union*, in E. NEFRAMI (dir.), *Objets et compétences de l’Union européenne*, Bruxelles: Bruylant, 2012, p. 229 *et seq.*

ber States, including their judiciaries, play in this process. To be sure, this role challenges the Court's allegation that EU accession to the ECHR "would effectively entrust the judicial review of [CFSP] acts, actions or omissions on the part of the EU *exclusively* to a non-EU body"<sup>8</sup> (emphasis added).

## II. MANDATORY RESPECT FOR EU FUNDAMENTAL RIGHTS IN CFSP

### II.1. CFSP AS DISTINCT FRAMEWORK EMBEDDED IN THE EU LEGAL ORDER

The specific characteristics of the EU CFSP are briefly evoked in Art. 24, para. 1, of the Treaty on European Union (TEU). The provision refers to its particular "rules and procedures", and to the distinct nature of acts adopted in its context, in the sense that adoption of legislative acts is excluded in the CFSP.

In the same vein, Art. 40, para. 2, TEU, which establishes the legal mandate for preserving the integrity of the CFSP, requires the protection of the *application of the procedures and the extent of the powers of the institutions* as set out in the specific CFSP chapter of the TEU.<sup>9</sup> The integrity of the CFSP is thus to be preserved from the "implementation of the [EU] policies listed in [...] Arts [3 to 6 TFEU]", i.e. not from other provisions of the Treaties. The combined reading of Arts 21, para. 1, and 23, TEU makes clear that the CFSP is, as any other EU external policy, guided by the principles which have inspired the Union's own creation, development and enlargement, and particularly respect for human rights.

In short, the specificity of the CFSP, as envisaged and protected under EU primary law, is essentially of a procedural and institutional nature. Neither Art. 24, para. 1, TEU nor Art. 40, para. 2, TEU shields the CFSP from the application of *principles* governing the EU external action in particular, and of those underpinning the EU legal order in general. The various principles contained in the Common Provisions of the TEU, where the CFSP chapter is located, are therefore applicable to the CFSP. That is particularly so with regard to the obligation to respect fundamental rights.

<sup>8</sup> Opinion 2/13, cit., para. 255.

<sup>9</sup> According to Art. 40 TEU: "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Arts 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter".

## II.2. HORIZONTAL OBLIGATION TO RESPECT FUNDAMENTAL RIGHTS IN THE EU

That fundamental rights ought to be respected also in the context of the CFSP equally flows from the post-Lisbon primary law of the EU. Art. 6, para. 1, TEU, included in the Common Provisions, foresees that the “*Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] which shall have the same legal value as the Treaties*” (emphasis added). It is thus the Union, as a whole, that is bound by the Charter as part of EU primary law, regardless of whether it acts in the framework of the Treaty on the Functioning of the European (TFEU) or that of the CFSP.

In addition, Art. 5, para. 1, of the Charter makes clear that its provisions are addressed to the “*institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof* in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties” (emphasis added). The Charter therefore binds all EU institutions and Member States, irrespective of whether they operate in the context of CFSP or outside it.

The early post-Lisbon case law of the Court of Justice further supports this view. Building on what it had already established in its famous *Kadi I* ruling,<sup>10</sup> the Court held in its *Smart Sanctions* judgment<sup>11</sup> that:

“the duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, *on all the institutions and bodies of the Union*. [...] [T]he duty to respect fundamental rights bears also on Union measures giving effect to resolutions of the Security”.<sup>12</sup>

The distinction between CFSP and non-CFSP (implementing) measures is therefore of no relevance when it comes to EU institutions’ obligation to respect the fundamental rights enshrined in the Charter.

<sup>10</sup> 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*.

<sup>11</sup> Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council (Smart Sanctions)*, paras 83-84.

<sup>12</sup> Emphasis added. The Court referred to its judgment in *Kadi and Al Barakaat International Foundation v. Council and Commission*, cit., notably paras 285, 299 and 326.

### II.3. MAINSTREAMING FUNDAMENTAL RIGHTS IN CFSP DECISION-MAKING

Indeed, fundamental rights have been mainstreamed into the EU decision-making process, including in the CFSP area.<sup>13</sup> Required by the Charter, this phenomenon also corresponds to the general ambition of the EU to promote its values, enshrined in Art. 2 TEU and which include the protection of human rights.<sup>14</sup> Thus according to Art. 3, para. 1, TEU: “The Union’s aim is to promote peace, its values and the well-being of its peoples”, while following Art. 13, para. 1, TEU, “[it] shall have an institutional framework which shall aim to promote its values”.

As an *aim* of the Union and of its institutional framework, the promotion of human rights triggers the general obligation of sincere cooperation, binding Member States<sup>15</sup> and institutions<sup>16</sup> alike. In particular, they must assist the Union in fulfilling its tasks, and pursue its objectives, including that of protecting and promoting fundamental rights.

In sum, the CFSP specificity has no impact on the EU’s obligation to respect fundamental rights. As in any other EU policy field, both Member States and EU institutions are bound to respect and promote them when developing and implementing the CFSP. It is rather at the level of enforcement that the specific character of the CFSP has significance, albeit relative, as discussed in the next section.

## III. DEROGATORY ENFORCEMENT OF EU FUNDAMENTAL RIGHTS IN CFSP

### III.1. LIMITED ECJ JURISDICTION IN CFSP: AN EXCEPTION TO THE RULE

The EU Treaties endow the Court of Justice with a *limited* jurisdiction in the context of the CFSP. Thus, Art. 24, para. 1, TEU foresees that the CJEU “shall not have jurisdiction with respect to [the] provisions [on the common foreign and security policy], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review

<sup>13</sup> See in this regard the Joint Communication COM (2011) 886 of the European Commission to the European Parliament and the Council, *Human rights and Democracy at the Heart of EU external Action: Towards a more effective approach*.

<sup>14</sup> Art. 2 TEU stipulates that: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

<sup>15</sup> Art. 4, para. 3, TEU provides: “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”.

<sup>16</sup> According to Art. 13, para. 2, TEU: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. *The institutions shall practice mutual sincere cooperation!*” (emphasis added).

the legality of certain decisions as provided for by the second paragraph of Art. 275 TFEU". Art. 275 TFEU articulates the principle of limited jurisdiction in the following way:

"The [CJEU] shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

The Court of Justice has interpreted these specific jurisdictional arrangements as *exception* to the principle of general jurisdiction established by Art. 19 TEU. Thus in the first *Anti-piracy (Mauritius)* case,<sup>17</sup> the Court opined that:

"the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a *derogation from the rule of the general jurisdiction* which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be *interpreted narrowly*".<sup>18</sup>

### III.2. BROAD EXERCISE OF LIMITED ECJ JURISDICTION

The Court's jurisdiction in CFSP matters, including the power to control compliance of certain CFSP acts with fundamental rights, cannot therefore be understood restrictively. This may have, at least, four applications.

First, the notion of "restrictive measures", referred to in Art. 275, para. 2, TFEU, could be interpreted broadly so as to encompass, for example, *detention* in the context of a Common Security and Defence Policy (CSDP) mission,<sup>19</sup> thus beyond the well-established individual sanctions, such as the one adopted to fight international terrorism.

Secondly, the case could be made for the Court to exercise jurisdiction also in relation to international agreements concluded by the EU in the area of CFSP. After all, CFSP agreements are negotiated and concluded in the context of the general procedure set out in Art. 218 TFEU, over which the Court has unfettered jurisdiction. Indeed, in the *Mauritius* case mentioned above, the Court found that the right of the European Parliament to be informed on negotiations of EU external agreements, stipulated in Art. 218, para. 10, TFEU, concerned all EU external agreements including those concluded in

<sup>17</sup> Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council (Mauritius)*.

<sup>18</sup> *Ivi*, para. 70. Emphasis added.

<sup>19</sup> For instance on the basis of Joint Action 2008/851/CFSP of the Council on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, 10 November 2008.

the area of CFSP. Based on this approach, the Court's *a priori* control envisaged in Art. 218, para. 11, TFEU could also concern CFSP agreements, so as to ensure the latter's compatibility with EU fundamental rights.

Thirdly, the reference in Art. 275, para. 2, TFEU to the "conditions laid down in the fourth paragraph of Article 263" TFEU should not be understood as excluding all other courses of action of the complete system of judicial remedies.<sup>20</sup> For instance, challenging the legality of CFSP acts by reference to EU fundamental rights should also be possible indirectly, by allowing recourse to the preliminary ruling procedure,<sup>21</sup> thereby involving Member States' courts.

Fourthly, the restrictions of Art. 275, para. 2, TFEU should not be understood as precluding the judicial enforcement of EU non-CFSP rules if and when applied to a CFSP situation. For instance, the Court has jurisdiction in the context of a CFSP operation if the case concerns the application of EU public procurement rules.<sup>22</sup>

In sum, the Court of Justice has general jurisdiction to ensure that fundamental rights are respected in the EU legal order, and the derogatory judicial regime applying to the CFSP should consequently be understood restrictively. Although many CFSP measures are thus subject to the Court's control, there remains, as pointed out in Opinion 2/13, some CFSP acts, actions or omissions which still fall outside its jurisdiction. As the next section argues, this does not mean that there is no EU judicial control over those acts.

#### IV. COMPLEMENTARY NATIONAL ENFORCEMENT OF EU FUNDAMENTAL RIGHTS IN CFSP

##### IV.1. MEMBER STATES' COURTS AS EU COURTS

Member States' systems of remedies are integrated in the EU judicial system. Thus, Art. 19 TEU foresees that:

<sup>20</sup> For illustration of a broad exercise of limited Court's jurisdiction: see Court of Justice, judgment of 27 February 2007, case C-355/04 P, *Segi et al. v. Council*; and Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council (Ecowas)*.

<sup>21</sup> Clarification has been requested in the pending case C-72/15, *Rosneft*: the High Court of Justice (England & Wales), Queen's Bench Division (Divisional Court) has asked the Court of Justice whether, having regard in particular to Arts 19, para. 1, 24, and 40 TEU, Art. 47 of the Charter and Art. 275, para. 2, TFEU, the CJEU has jurisdiction to give a preliminary ruling under Art. 267 TFEU on the validity of various provisions of Decision 2014/512/CFSP of the Council concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, as amended by Decision 2014/659/CFSP of the Council and Decision 2014/872/CFSP of the Council. The case is still pending: see 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, [www.eulawanalysis.blogspot.it](http://www.eulawanalysis.blogspot.it).

<sup>22</sup> See in this regard, Court of Justice, judgment of 12 November 2015, case C-439/13 P, *Elitaliana v. Eulex Kosovo*.

“The [CJEU] shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

The Court of Justice has further spelled out the role that Member States’ courts play in ensuring that in the interpretation and application of the Treaties, the law is observed. Hence, in its Opinion on the *Unified Patent Court*,<sup>23</sup> the Court held that:

“66. As is evident from Article 19(1) TEU, the guardians of [the] legal order and the judicial system of the European Union are the Court of Justice *and the courts and tribunals of the Member States*. [...]

68. It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law (see, to that effect, Case C-298/96 *Oelmühle and Schmidt Söhne* [1998] ECR I-4767, paragraph 23). Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, *it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law*. [...]

69. The national court, in collaboration with the Court of Justice, fulfils *a duty entrusted to them both* of ensuring that in the interpretation and application of the Treaties the law is observed”.<sup>24</sup>

Based on this general statement, it is arguable that national courts and tribunals, as “guardians of [the] legal order and the judicial system of the European Union”, may be called upon to enforce EU fundamental rights in the context of the CFSP, including in situations where the Court of Justice does not have jurisdiction. Nothing in the Treaties suggests that the restrictions applicable to Court of Justice’s powers, based on Arts 24, para. 1, TEU and 275 TFEU, concern in any way the jurisdiction of Member States’ courts. On the contrary, Art. 274 TFEU stipulates that: “Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States”.

In the context of Opinion 2/13, AG Kokott added that “this follows from the principle of conferral, according to which competences not conferred upon the EU in the Treaties remain with the Member States”.<sup>25</sup> Arguably, the restricted jurisdiction of the Court of

<sup>23</sup> Court of Justice, opinion of 8 March 2011, opinion 1/09, *Creation of a European and Community Patents Court*.

<sup>24</sup> Emphasis added.

<sup>25</sup> See View of Advocate General Kokott, cit., esp. para. 96.

Justice prompts an increased involvement of Member States' judiciaries precisely to offset the Court's inability to ensure that the law is observed in the interpretation and application of the some aspects of the CFSP. Art. 19 TEU points to this complementary role, inspired by the Court's case law,<sup>26</sup> when requiring Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", to avoid "a lacuna [...] in the legal protection system",<sup>27</sup> and thus to fulfil the requirement of Art. 47 of the EU Charter of Fundamental Rights.<sup>28</sup> Given that the Court of Justice itself cannot provide legal protection, the notion of *sufficiency* entails that it is entirely up to the Member States to provide effective remedies.

AG Kokott extensively discussed the role of national judiciaries in her View.<sup>29</sup> The Court, by contrast, did not. In mentioning that accession "would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU *exclusively* to a non-EU body" (emphasis added),<sup>30</sup> it suggested instead, albeit obliquely, that Member States' courts are not able to review the legality of CFSP acts, even those that fall outside its jurisdiction. For the Court of Justice, its exclusion from certain aspects of the CFSP sphere is seemingly tantamount to an exclusion of the whole EU judicial system including Member States' courts as EU courts despite the express provision of Art. 274 TFEU, the unequivocal language of Opinion 1/09, and the obligations enshrined in Art. 19 TEU.

#### IV.2. PRACTICAL IMPLICATIONS OF MEMBER STATES' COURTS INVOLVEMENT IN REVIEWING CFSP

Allowing Member States' courts to review the legality of certain EU acts would undoubtedly complicate the functioning of the EU legal order. This is a well-known concern for the Court of Justice that was forcefully expressed in its *Foto Frost* judgment,<sup>31</sup> in which it concluded that:

<sup>26</sup> See e.g. Court of Justice, judgment of 3 October 2013, case C-583/11, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*; Court of Justice, judgment of 5 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*.

<sup>27</sup> View of Advocate General Kokott, cit., para. 85.

<sup>28</sup> Art. 47 of the Charter stipulates that: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

<sup>29</sup> View of Advocate General Kokott, cit., esp. paras 96-103.

<sup>30</sup> See Opinion 2/13, cit., para. 255. It reiterated that point in the following para.

<sup>31</sup> Court of Justice, judgment of 22 October 1987, case 314/85, *Foto Frost v. Hauptzollamt Lübeck-Ost*. For a recent reiteration of the doctrine it contains, see e.g. Court of Justice, judgment of 6 October 2015, case C-362/14, *Maximilian Schrems v. Data Protection Commissioner*, para. 61 *et seq.*

“15. [...] those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article [267 TFEU] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. *Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty.*”

16. The same conclusion is dictated by *consideration of the necessary coherence of the system of judicial protection established by the Treaty*. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339), ‘in Articles [263] and [277], on the one hand, and in Article [267], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions’.

17. Since Article [263] gives the court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice”. (emphases added)

The invalidation of CFSP acts by Member States’ courts would have implications comparable to those evoked in *Foto-Frost* as regards the unity of the EU legal order and legal certainty. This could indeed explain the Court’s implicit position on Member States’ courts in Opinion 2/13. That said, how could the *Foto-Frost* solution operate in a situation where the Court of Justice has *no* jurisdiction? How can it guarantee the unity of the EU legal order, and particularly the uniformity of application of CFSP rules, if the Court cannot review those rules in the first place? Shouldn’t “the necessary coherence of the system of judicial protection established by the Treaty” require that, if the Court does not have the exclusive jurisdiction to declare void certain CFSP acts, the power to declare such acts invalid cannot be reserved to it? AG Kokott seems to think so:

“in the context of the CFSP, the Court of Justice cannot claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies. The settled case-law of the Court, stemming from the judgment in *Foto-Frost*, cannot, therefore, in my view, be applied to the CFSP. Unlike in supranational areas of EU law, there is no general principle in the CFSP that only the Courts of the EU may review acts of the EU institutions as to their legality”.<sup>32</sup>

<sup>32</sup> View of Advocate General Kokott, cit., para. 100.

Admittedly, the *Foto-Frost* approach could still apply to certain CFSP-related situations. Member States' courts would thus be precluded from invalidating CFSP acts that fall under the Court of Justice's jurisdiction, at least if the preliminary ruling procedure was allowed in such situations. But for CFSP-related cases falling outside the scope of Art. 275, para. 2, TFEU, Member States' courts could not be prevented from exercising what remains their judicial power. To be sure, they can always invalidate the national measure implementing the CFSP act on the grounds that it violates fundamental rights.<sup>33</sup> In this context, EU principles and rules, including the Charter of Fundamental Rights are of relevance given that the Member State would be acting within the scope of EU law within the meaning of Art. 51, para. 1, of the Charter. But, beyond the national implementation measures, Member States' courts, *qua* EU courts, are arguably able to control the validity of CFSP acts as such.

Indeed, the Court of Justice may assist the national judge's review of a CFSP act, or its national implementation, through the preliminary ruling procedure. In particular, it may provide interpretation of any EU law provisions, such as a provision of the Charter, which would be relevant for deciding on the case at hand. After all, the limits enshrined in Art. 275, para. 2, TFEU cannot entail restrictions on the Court's jurisdiction in relation to other (i.e. non-CFSP) domains of EU law without potentially breaching the rule of Art. 40, para. 1, TEU,<sup>34</sup> while negating the *exceptional* nature of the judicial arrangements of Art. 275 TFEU, and their consequent narrow interpretation.<sup>35</sup>

In sum, there are grounds to support Member State courts' involvement, as EU courts, in exercising complementary judicial control over the CFSP, where and as long as the Court of Justice is not allowed to exercise it itself. That this approach involves complications for the functioning of the legal order cannot in itself disqualify the only judicial protection against CFSP acts that is available under EU law as it stands. The contrary would amount to a denial of legal protection which would be equally problematic for the EU legal order, based as it is on the rule of law.<sup>36</sup>

Indeed, the implications of a decentralised judicial control might be less damaging than a judicial review by national courts limited to the domestic implementation measures. While in the latter case, national courts would be adjudicating by reference to national and EU law, in the former situation, they would review the legality of the

<sup>33</sup> The High Administrative Court of Nordrhein Westfalen was asked to rule on the alleged responsibility of Germany for the transfer of suspected Somali pirates to Kenya, carried out in the framework of the EUNAVFOR Atalanta mission (Oberverwaltungsgericht NRW, 4 A 2948/11, 18 September 2014).

<sup>34</sup> See note 9 above.

<sup>35</sup> As mentioned above, the Court of Justice considered at para. 70 of its *Mauritius* judgment, cit., that "the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and *they must, therefore, be interpreted narrowly*" (emphasis added).

<sup>36</sup> See Art. 2 TEU, and recently e.g. *Maximilian Schrems*, cit., para. 60.

CFSP measure on the basis of EU law only, including the Charter. In other words, the shared power of national courts in exercising judicial review of CFSP acts may contribute to securing the primacy of EU norms, including the Charter, in situations where the Court cannot ascertain it itself.<sup>37</sup>

## V. CONCLUDING REMARKS

As with any other area of EU law, the development of the CFSP is subject to the obligation to respect EU fundamental rights. What distinguishes it from other EU policy spheres essentially lies in its procedural and institutional arrangements in the form *inter alia* of the circumscribed jurisdiction of the European Court of Justice. Although limited, the Court's jurisdiction nevertheless plays a significant part in ensuring that fundamental rights are respected in the context of CFSP, particularly since such judicial limitation has been interpreted as an exception to the general jurisdiction rule, and as such understood restrictively. Moreover, Member States' judiciaries are fully part of the EU judicial system, acting as "guardians of (the) legal order and the judicial system of the (EU)" alongside the Court of Justice, particularly where the latter cannot intervene.

This specific joined involvement of EU and national courts in ensuring that fundamental rights are respected in the CFSP challenges the Court's allegation in Opinion 2/13 that accession to the ECHR "would effectively entrust the judicial review of [certain CFSP] acts, actions or omissions on the part of the EU exclusively to a non-EU body". It points to an inconsistency in the Court's articulation of the EU judicial architecture, and a failure to draw out the implications of the Lisbon Treaty, in terms of further integration of the CFSP in the EU legal order.

Admittedly, thorny questions remain to be addressed for such a decentralised EU judicial protection of fundamental rights in CFSP to operate and effectively, having in mind the legitimate concerns voiced by the Court of Justice in *Foto-Frost*. Leaving aside the question of whether national courts would readily embrace such a EU role, the effects of their decisions invalidating CFSP acts would have to be meticulously spelled out. Where there is a will...

<sup>37</sup> In this respect, see Court of Justice, judgment of 26 February 2013, case C-399/11, *Melloni v. Ministero Fiscal*.