



## ARTICLES

### SPECIAL SECTION – THE NEW FRONTIERS OF EU ADMINISTRATIVE LAW: IS THERE AN ACCOUNTABILITY GAP IN EU EXTERNAL RELATIONS?

#### “EFFECTIVE JUDICIAL REVIEW IS OF THE ESSENCE OF THE RULE OF LAW”: CHALLENGING COMMON FOREIGN AND SECURITY POLICY MEASURES BEFORE THE COURT OF JUSTICE

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TABLE OF CONTENTS: I. Introduction. – II. The legal framework. – III. Limiting the Court's jurisdiction. – IV. The Exception: judicial review of CFSP acts. – V. Grounds for and intensity of review. – VI. Conclusion.

ABSTRACT: This *Article* discusses the role of the Court of Justice in reviewing acts adopted under the Common Foreign and Security Policy (CFSP), seeking to determine to what extent the “exceptionalism” of the CFSP, its characterisation as a field of executive action largely shielded from judicial scrutiny, is an accurate assessment. The Court's role is constrained in two ways. First, although the CFSP has been integrated into the overall legal structures of EU external relations by the Lisbon Treaty, it is still subject to “specific rules and procedures” (Art. 24, para. 1, TEU) and among these specific rules are limitations on the jurisdiction of the Court of Justice. Second, is the self-restraint of the Court itself when reviewing acts adopted within the framework of external policies in which the decision-making institutions have a wide discretion; this self-restraint is not specific to the CFSP but the CFSP is a clear case of broad policy discretion. Despite these constraints we are seeing a growing number of cases in which the Court is asked to assess the legality of CFSP acts. The *Article* will address three main questions: 1) What is the scope of the limitation to judicial review in the CFSP? 2) What is the scope of the Treaty-based exceptions to this limitation? 3) Does the degree and intensity of judicial scrutiny of CFSP acts demonstrate a particular judicial reticence with respect to CFSP?

KEYWORDS: Common Foreign and Security Policy – judicial review – rule of law – validity – interpretation – restrictive measures.

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## I. INTRODUCTION

The range of EU action under the Common Foreign and Security Policy (CFSP) is broad, including international agreements, different types of restrictive measures (counter-terrorist, and different types of regime-sanctions), and civilian and military missions. These actions are implemented through administrative as well as operational action; thus for example, as we shall see, a CFSP civilian mission will entail many implementing decisions, including procurement decisions. Indeed, in the words of one Advocate General, “most of the acts envisaged in Chapter 2, Title V, of the TEU could be regarded as ‘administrative’, if by that is meant that they regulate the conduct of the EU or national administrations”.<sup>1</sup> This *Article* will discuss the role of the Court of Justice in reviewing acts adopted under and within the context of the CFSP, with the aim of exploring the degree to which administrative action in the CFSP is subject to judicial control.

The CFSP represents perhaps the most quintessential “foreign policy” of the Union and given the traditionally restricted role for courts in national foreign policies, it might be surprising that the Union’s CFSP is subject to judicial control at all.<sup>2</sup> However Art. 19 TEU requires the Court to “ensure that in the interpretation and application of the Treaties the law is observed”; this has been described by the Court itself as a “rule of general jurisdiction”<sup>3</sup> and represents a fundamental constitutional characteristic of the EU as an international actor. It is certainly the case that in the external relations field in general the Court is restrained in reviewing the broad policy discretion of the EU institutions; it allows the institutions a wide policy space within which to act. The Court’s role is rather to ensure that the EU and its institutions operate within the limits of their powers, that the institutional balance is maintained, that the Member States adhere to their commitments and – most importantly – that the rule of law and fundamental rights are upheld.<sup>4</sup>

In the case of the CFSP, the position is complicated by the fact that, although the CFSP is integrated into the overall legal structures of EU external relations,<sup>5</sup> it is still sub-

<sup>1</sup> Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 59.

<sup>2</sup> On the role of the Court of Justice in relation to the CFSP, see among others R.A. WESSEL, *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*, in *European Papers*, 2016, Vol. 1, No 2, <http://www.europeanpapers.eu/it/e-journal/lex-imperfecta-law-and-integration-european-foreign-and-security-policy>, p. 439 *et seq.*; C. HILLION, *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, in M. CREMONA, A. THIES (eds), *The European Court of Justice and External Relations Law - Constitutional Challenges*, Oxford: Hart Publishing, 2014.

<sup>3</sup> Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council* [GC], para. 70.

<sup>4</sup> M. CREMONA, *Structural Principles and their Role in EU External Relations Law*, in *Current Legal Problems*, 2016, p. 35 *et seq.*

<sup>5</sup> See further M. CREMONA, *The CFSP-CSDP in the Constitutional Architecture of the EU*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *The EU’s Common Foreign and Security Policy. A Research Handbook*, Cheltenham/Northampton: Edward Elgar, 2018, forthcoming.

ject to “specific rules and procedures”,<sup>6</sup> which both impact the administrative framework and place limitations upon the jurisdiction of the Court of Justice. These derogations from the rule of general jurisdiction are in turn subject to exceptions designed to preserve the Court’s ability to ensure respect for the rule of law and the balance of competences. Amid this complicated arrangement of a general jurisdictional rule, limitations of jurisdiction, and exceptions to the limitations, we are presented with the question: how exceptional is the CFSP within the overall framework of the EU’s legal order and, more particularly, within the constitutional and administrative framework of EU external action? The CFSP’s place within the EU’s constitutional architecture has a number of different dimensions; here we will take the possibility of judicial review as our focus since this perhaps represents the hard core of EU administrative law and also since the limitations on the Court’s jurisdiction in the CFSP represent – it might be argued – one of the clearest instances of an accountability gap. Whether this is indeed the case is the question at the heart of the *Article*. We will break it down into three questions. First, what is the scope of the “specific rule” which limits judicial review of CFSP acts? On what criteria is an act characterised as “CFSP” and thereby subject to the limitation (section III)? Second, what is the scope of the exception to the limitation? What types of act may be covered, and what types of jurisdiction (section IV)? Third, is the question of the degree or intensity of review where CFSP acts are subject to scrutiny, including examination of legal basis, compliance with procedural decision-making rules, as well as compliance with the rule of law and human rights (section V). Before turning to these questions, however, we should first briefly address the legal framework of the CFSP, and, in particular, the types of act that may be adopted within this policy field and the authors of those acts for the purposes of legal challenges, so as to provide the administrative and legal context necessary for the discussion of judicial review (section II).

## II. THE LEGAL FRAMEWORK

Since the Lisbon Treaty, the CFSP has formed part of the EU’s external action, governed by the overall mandate established in Art. 3, para. 5, TEU and the “General Provisions of the Union’s External Action” set out in Arts 21-23 TEU. This means that it shares the principles, objectives, strategic interests and general orientations of EU external action,<sup>7</sup> and is covered by the general principles of EU law, including respect for fundamental

<sup>6</sup> Art. 24, para. 1, TEU.

<sup>7</sup> See for example European Union, *Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union’s Foreign And Security Policy*, approved by the European Council on 28 June 2016, [eas.europa.eu](http://eas.europa.eu), which brings together the CFSP and other external policies, including trade and development.

rights and the rule of law.<sup>8</sup> The European Code of Good Administrative Behaviour applies to the administration in its conduct of the CFSP.<sup>9</sup> In terms of decision-making and institutional structures, it is subject to “specific rules”, but in the absence of such specific rules the general rules apply. Thus, for example, the procedure for negotiating and concluding treaties is governed by Art. 218 TFEU. This contains specific rules for the appointment of the EU negotiating team where the treaty “relates exclusively or principally” to the CFSP, and for the conclusion of treaties which relate exclusively to the CFSP (conclusion in such cases being by the Council without the consent or consultation of the European Parliament). But where Art. 218 TFEU does not establish a special rule, the general provision – for example, Art. 218, para. 10, TFEU requiring the European Parliament to be kept informed – will then apply.<sup>10</sup>

As this example suggests, the institutional balance within the CFSP is different from that within other external policies, which generally reflect the standard institutional roles defined in Arts 14-17 TEU. The Commission as an institution does not have a right of initiative in CFSP decision-making, although one of its Vice-Presidents, the High Representative of the Union for Foreign Affairs and Security Policy (HR), has the right to make proposals.<sup>11</sup> Primary responsibility for implementation of the CFSP lies with the HR and the Member States, “using national and Union resources”.<sup>12</sup> The HR is also responsible for external representation of the Union in matters relating to the CFSP, as opposed to the Commission which has general responsibility for ensuring the Union’s external representation.<sup>13</sup>

The treaty provisions that deal with the CFSP allow for the adoption of only one type of legally binding act: the decision.<sup>14</sup> When used in the CFSP context, the decision is not a legislative act and is not therefore adopted according to the ordinary or special legislative procedures, but rather by either the Council or the European Council.<sup>15</sup> The exclusion of legislative acts carries a number of implications for administrative law: delegated acts and comitology are also excluded, and the principles of subsidiarity and leg-

<sup>8</sup> Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], para. 47: “As regards [...] compliance with the principles of the rule of law and human rights, as well as respect for human dignity, it must be stated that such compliance is required of all actions of the European Union, including those in the area of the CFSP, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU”.

<sup>9</sup> See for example Decision of the EU Ombudsman of 4 December 2014, case OI/15/2014/PMC.

<sup>10</sup> *European Parliament v. Council* [GC], cit.

<sup>11</sup> Art. 27, para. 1, TEU. Member States may also propose Common Security and Defence Policy missions: Art. 42, para. 4, TEU.

<sup>12</sup> Art. 26, para. 3, TEU.

<sup>13</sup> Arts 17, para. 1, and 27, para. 2, TEU.

<sup>14</sup> Art. 25 TEU. See further R.A. WESSEL, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, in *European Foreign Affairs Review*, 2015, p. 123 *et seq.*

<sup>15</sup> The European Council acts unanimously; the Council generally acts unanimously, although some possibility for qualified majority voting exists: Arts 24, para. 1, and 31 TEU.

islative transparency do not apply.<sup>16</sup> On the other hand, the general principle of transparency is not excluded and the right of access to documents applies also to the CFSP. Regulation 1049/2001 governs public access to European Parliament, Council and Commission documents and there is no general exclusion for CFSP documents.<sup>17</sup> Access is to be refused where disclosure would undermine the protection of the public interest as regards (*inter alia*) public security, defence and military matters, and international relations; while these grounds may of course apply to some CFSP documents they are not exclusively directed at the CFSP.<sup>18</sup> The rules on access to documents are made applicable to the European External Action Service (EEAS) by means of the decision establishing the EEAS,<sup>19</sup> implemented by a decision of the HR.<sup>20</sup>

CFSP decisions may be used for a variety of purposes: they may define general guidelines and strategies;<sup>21</sup> they may define operational action to be undertaken by the Union, including civilian and military missions,<sup>22</sup> and positions of the Union on specific issues;<sup>23</sup> or they may conclude international agreements.<sup>24</sup> In addition to these binding acts, the Council frequently adopts formal but non-binding “Conclusions”, which set out Union policy on specific issues. Additionally, the HR issues public statements taking a position on behalf of the Union. Although not binding in themselves, Council Conclusions will often prepare the way for the adoption of binding acts or will signal to the third country the conditions under which the Union will adopt (or revoke) a formal decision. Decisions of the type just mentioned, and implementing decisions, are binding acts and may be challenged on the basis of Art. 263 TFEU, as long as the Court has jurisdiction in the specific

<sup>16</sup> Art. 24, para. 1, TEU. The Protocol on the Application of the Principles of Subsidiarity and Proportionality applies to legislative acts. On legislative transparency see Art. 15, para. 2, TFEU.

<sup>17</sup> Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The preamble, at para. 7, makes it clear that the right of access also applies to documents related to the CFSP.

<sup>18</sup> Art. 4, para. 1, of Regulation 1049/2001. See also Art. 9 on the treatment of sensitive documents. One of the seminal cases on the application of these exceptions, proportionality and partial access in fact concerned the CFSP: Court of Justice, judgment of 6 December 2001, case C-353/99 P, *Council of the European Union v. Heidi Hautala*. See generally P. LEINO, *The principle of transparency in EU External Relations Law – Does diplomatic secrecy stand a chance of surviving the age of twitter?*, in M. CREMONA (ed), *Structural Principles in EU External Relations Law*, Oxford: Hart Publishing, 2018, forthcoming.

<sup>19</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, Art. 11.

<sup>20</sup> High Representative Decision 2011/C 243/08 of 19 July 2011 implements access to documents for the EEAS. The Decision provides that the right of access to EEAS documents will operate “according to the principles, conditions and limits” laid down in Regulation 1049/2001.

<sup>21</sup> Arts 25, let. a), and 26, para. 1, TEU. Note that decisions may be used for this purpose but not all strategic positions are adopted by binding decision; Council conclusions and public statements of the HR are frequently used.

<sup>22</sup> Arts 25, para. b), let. i), and 28 TEU.

<sup>23</sup> Arts 25, para. b), let. ii), and 29 TEU.

<sup>24</sup> Art. 37 TEU and Art. 218, para. 5, TFEU.

case (as discussed in the following sections). Their challenge is subject to the usual standing requirements. Decisions in individual cases adopted by (for example) a Head of Mission may be challenged if they produce legal effects, although, as we shall see, it will be necessary to identify the institution to which the act can be attributed.

Implementation is of course important from the perspective of administrative law because it is in the process of implementation that the individual is likely to come into contact with the exercise of Union power. Within the CFSP, as already mentioned, implementation is primarily the responsibility of the HR, assisted by the EEAS,<sup>25</sup> in some cases by a Special Representative,<sup>26</sup> and Member States. A decision adopted by the Council under CFSP to impose restrictive measures against a third country may therefore be implemented directly by the Member States (a visa ban or arms embargo), or by Council Regulation adopted under Art. 215 TFEU (economic or financial restrictions). A decision launching an operational action will establish its “objectives, scope, the means to be made available to the Union, if necessary [its] duration, and the condition for [its] implementation”.<sup>27</sup> Implementation may involve EEAS staff based in Brussels or in Union delegations, staff seconded by Member States, or independent contractors, and financial commitments which are managed by the Commission. Implementing decisions may be adopted by the Council.<sup>28</sup>

In the case of restrictive measures, amendments to the originating CFSP decision (for example, to amend the list of targeted individuals) is done by way of an amending decision adopted, like the original, on the basis of Art. 29 TEU. The subsequent regulation adopted under Art. 215 TFEU will normally contain provision for equivalent amendments to the Annexes by implementing acts of the Commission or Council on the basis of Art. 291, para. 2, TFEU.<sup>29</sup> In *National Iranian Oil Company*, the Court of Justice rejected an argument that amendments to a regulation imposing restrictive measures should be adopted under the primary legal basis (Art. 215 TFEU) rather than Art. 291, para. 2, TFEU.<sup>30</sup> In the first place it took the view that the adoption of implementing acts was not precluded by Art. 215 TFEU and that the difference in procedure between the two provisions was not a barrier since the joint proposal by the High Representative for Foreign Affairs and Security Policy and the Commission required by Art. 215 TFEU is not a procedural guarantee, and a listed individual was able to have re-

<sup>25</sup> Art. 27, para. 3, TEU.

<sup>26</sup> Art. 33 TEU.

<sup>27</sup> Art. 28, para. 1, TEU.

<sup>28</sup> Art. 291, para. 2, TFEU, referring to Arts 24 and 26 TEU. This is an exception to the general rule whereby implementing decisions are adopted by the Commission.

<sup>29</sup> For an account of the decision-making procedures for restrictive measures see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures: Does the Adversarial Principle Survive the Necessity of Secrecy?*, in *European Papers*, 2017, Vol. 2, No. 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 649 *et seq.*

<sup>30</sup> Court of Justice, judgment of 1 March 2016, case C-440/14 P, *National Iranian Oil Company v. Council*[GC].

course to the CJEU whichever of the two provisions was used as a legal basis.<sup>31</sup> In the second place it held that the conditions for granting implementing powers to the Council under Art. 291, para. 2, TFEU were satisfied. The basic Regulation conferred implementing powers to amend the Annexes on the Commission in most cases (e.g. the lists of goods or technologies covered) but reserved to the Council the ability to amend the Annexes insofar as they listed natural or legal persons. The sensitive nature of individual listings and their impact on fundamental rights justified their adoption by the Council. Interestingly for our subject here, the Court of Justice also relied on the fact that the original listing decision is taken by the Council under the CFSP and that it is important that the CFSP decision (and any amendments) are reflected immediately in the implementing Regulation; the Court referred to the need “to ensure the consistency of the procedures” and held that coordination between the amendment of the CFSP decision and the Regulation is necessary to ensure speed: normally the two acts will be adopted on the same day.<sup>32</sup> Here then we see the specific decision-making procedures of the CFSP impacting the allocation of implementing powers under the Regulation as a result of the close links between the two.

Under the Common Security and Defence Policy (CSDP), a decision may launch a civilian or a military mission (the “tasks” defined in Art. 43 TEU). These missions are implemented using Member States resources (civilian and military capabilities) and are subject to the political control and strategic direction of the Political and Security Committee and the coordination of the HR acting under the responsibility of the Council. Thus, even where Member State resources are used, the chain of command is headed by the HR, acting under the Council’s authority. The Political and Security Committee may also be authorised by the Council to take decisions.

These structures – which contain multiple actors – have implications for judicial review: to whom is a decision attributed and against whom can a legal challenge be brought? Given the different actors involved, and the presence of seconded staff, the answer may not always be obvious. The case of *H* illustrates the issues well. A national official seconded to the EU’s Police Mission in Bosnia and Herzegovina (EUPM) sought to challenge a decision taken by the Head of Mission; the action was originally brought before the General Court against the Council, Commission and the EUPM. In an Order refusing an application for the interim suspension of the decision, the President of the General Court held that, as a mission, the EUPM was a “simple activity” of the Union, and did not have the status of a body, office or agency within the meaning of Art. 263 TFEU; it thus did not have the capacity to defend legal proceedings and the case should have been brought against the Council and Commission.<sup>33</sup> As the staff member was se-

<sup>31</sup> *Ibid.*, paras 33-46.

<sup>32</sup> *Ibid.*, paras 47-58.

<sup>33</sup> General Court, order of 10 July 2014, case T-271/10 R, *H v. Council and Commission*, paras 18-21.

conded by a Member State, there was also the possibility of bringing an action in the relevant national court, something which the applicant had, in fact, also done. The General Court, taking the view that it lacked jurisdiction on the ground that the case did not fall within the Court's limited CFSP jurisdiction, pointed to the provision of the Council's decision establishing the EUPM, according to which:

"The State or EU institution having seconded a staff member shall be responsible for answering any claims linked to the secondment, from or concerning the staff member. The State or EU institution in question shall be responsible for bringing any action against the seconded person".<sup>34</sup>

Under this decision, operational control is transferred by the seconding State to the Civilian Operation Commander and command and control is to be exercised by the Head of Mission; however, "[a]ll seconded staff shall remain under the full command of the national authorities of the seconding State or EU institution concerned".<sup>35</sup> The General Court's conclusion was that "whilst the contested decisions were taken by the Head of Mission, they can in principle be attributed to the Italian authorities" and that "[a]ccordingly the legality of those measures must be reviewed by the Italian court".<sup>36</sup> This enabled the Court to find that, although (in its view) judicial review before the General Court was excluded under Art. 275 TFEU, there would be no denial of the right to an effective remedy. We will return later to the question of complementarity of remedies before national and EU Courts; for now it should be noted that the Court of Justice, on appeal in the *H* case, held that the EU Courts did in fact have jurisdiction since the decision should not be qualified as a CFSP act.<sup>37</sup> In referring the case back to the General Court for decision, the Court of Justice took the view that the case was nevertheless inadmissible against the Commission, since it did not involve a contractual or budgetary issue and "the Commission is not involved in the chain of command of the EUPM in Bosnia and Herzegovina".<sup>38</sup> The Council, in contrast, is at the apex of that chain of command: the Head of Mission who actually adopted the decision acts under the authority of the Civilian Operation Commander who acts under the authority of the Political and Security Committee (PSC) and HR; the PSC exercises political control and strategic direction of the EUPM under the responsibility of the Council; the contested decision was therefore imputable to the Council.<sup>39</sup> On the other hand where a decision taken by

<sup>34</sup> Art. 8, para. 2, of Council Decision 2009/906/CFSP of 8 December 2009 on the EUPM in Bosnia and Herzegovina (BiH).

<sup>35</sup> *Ibid.*, Art. 5, para. 4.

<sup>36</sup> *H v. Council and Commission*, cit., paras 50 and 52.

<sup>37</sup> Court of Justice, judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]. See further *infra*, section III.

<sup>38</sup> *Ibid.* para. 65.

<sup>39</sup> *Ibid.*, paras 66-67.



a Head of Mission concerns matters for which financial responsibility lies with the Commission – such as a procurement process – he or she will be acting under delegated authority from the Commission. In that case it is to the Commission that the act will be attributed.<sup>40</sup>

This is also the approach taken by the EU Ombudsman when investigating cases of alleged maladministration in relation to CFSP missions, although in his decision on an own-initiative inquiry in 2013 the Ombudsman commented that “the situation was characterised by significant uncertainties as to which EU institution or body would be competent to remedy possible instances of maladministration in this type of situation (i.e., the Council, the Commission or the HR/EEAS)”.<sup>41</sup> His conclusion – which has since been applied in subsequent cases – was that:

“the Ombudsman will address himself, as regards future complaints and inquiries concerning the activities of EU missions, (i) to the Commission in so far as issues relating to budget implementation in civilian missions are concerned and (ii) to the High Representative/EEAS in so far as all other allegations of maladministration in relation to CSDP missions are concerned”.<sup>42</sup>

The same reasoning applies to Union delegations, which according to the General Court in *Elti* are not a “body, office or agency” within the meaning of Art. 263 TFEU.<sup>43</sup> In order to bring annulment proceedings with respect to an act adopted by a Head of Delegation, therefore, it is necessary to decide to which EU institution the act is to be attributed. Before the Treaty of Lisbon, representation in third countries was carried out by Commission delegations and acts of delegations could be imputed to the Commission for the purposes of legal responsibility.<sup>44</sup> Under the Lisbon Treaty, the position is more com-

<sup>40</sup> Court of Justice, judgment of 12 November 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, paras 56-67. Note that procurement by EU institutions and bodies falls under different (though not dissimilar) rules from procurement by Member State authorities; EU procurement, including in the context of external action, is governed by the Financial Regulation, i.e. by Arts 190 and 191 of Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation 1605/2002, and is subject to the European Court of Auditors. See further, especially on the difficulty of bringing non-contractual liability claims against the EU institutions in procurement cases, R. CARANTA, *The Liability of EU Institutions for Breach of Procurement Rules*, in *European Procurement and Public Private Partnership Law Review*, 2013, p. 238 et seq.

<sup>41</sup> European Ombudsman Decision of 30 August 2013 closing his own-initiative inquiry OI/12/2010/(BEH)MMN concerning the Council of the European Union, the European Commission and the High Representative/European External Action Service, para. 28.

<sup>42</sup> *Ibid.*, conclusions.

<sup>43</sup> General Court, order of 4 June 2012, case T-395/11, *Elti d.o.o v. Delegation of the European Union to Montenegro*, para. 73.

<sup>44</sup> General Court, order of 30 June 2011, case T-264/09, *Technoprocess Srl v. Commission and Delegation of the European Union to Morocco*, para. 70.

plicated. Union delegations, staffed by members of the EEAS and the Commission, are under the authority of the HR; the Head of Delegation is accountable to the HR.<sup>45</sup> Despite the fact that the Head of Delegation may conclude contracts and be a party to legal proceedings in the third country of accreditation, the delegation is not an independent entity from the point of view of liability before the EU Courts and is treated as a division of the EEAS, that is as “an integral part of its hierarchical and functional structure”.<sup>46</sup> Despite this hierarchical relationship with the HR and Council, where the decision taken in the delegation concerns financial or budget issues – such as procurement for which the Commission is responsible under the financial regulation – the Commission will be the proper addressee of a legal challenge before the EU Courts.<sup>47</sup> As the General Court put it in *Elti*, “the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission”.<sup>48</sup>

How does the European External Action Service (EEAS) fit into this picture? The EEAS is not an institution of the Union;<sup>49</sup> according to Art. 27, para. 3, TEU, the EEAS exists to assist the HR. It is a “functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives”.<sup>50</sup> It therefore qualifies as a “body” within the meaning of Art. 263 TFEU and those of its acts which have legal effects may in principle be challenged before the EU Courts. However, Gatti makes a convincing argument that we need to distinguish between the different aspects of EEAS action.<sup>51</sup> In terms of its own administration, the EEAS is indeed autonomous and it should therefore take responsibility for its acts before the EU Courts. This would include staff disputes under Art. 270 TFEU, decisions on access to documents and the handling of confidential information, and the administration of its budget under the Financial Regulation. However, as Gatti rightly argues,<sup>52</sup> the EEAS does not have autonomous powers when it comes to the implementation of EU policies; here, it assists the HR (acting under Council authority) and Commission. As we have seen in the case of EU delegations (which are themselves part of the EEAS) and EU missions, the precise nature of a measure needs to be assessed so as to impute an act to either the Council or the Commission.

<sup>45</sup> Art. 221 TFEU; Art. 5 of Council Decision 2010/427/EU, cit..

<sup>46</sup> *Elti d.o.o v. Delegation of the European Union to Montenegro*, cit., para. 35.

<sup>47</sup> Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the financial regulation applicable to the general budget of the European Communities, as amended by Regulation 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending [the Financial Regulation] as regards the European External Action Service.

<sup>48</sup> *Elti d.o.o v. Delegation of the European Union to Montenegro*, cit., para. 46.

<sup>49</sup> EU institutions are listed in Art. 13, para. 1, TEU.

<sup>50</sup> Art. 1, para. 2, of Council Decision 2010/427/EU, cit.

<sup>51</sup> M. GATTI, *Diplomats at the Bar: The European External Action Service Before EU Courts*, in *European Law Review*, 2014, p. 664 *et seq.*

<sup>52</sup> *Ibid.*

In the case of CFSP missions and Union delegations, therefore, acts will need to be attributed to the appropriate institution for the purposes of legal challenge before the EU Courts. Measures may be imputed to the EEAS where they concern its own administration; however where it is implementing the CFSP (or other external policies) then it is not acting under independent powers and a legal challenge should be addressed to the Council or Commission. As expressed by Advocate General Jääskinen in *Elitaliana*, “[t]he present case illustrates [...] the extent to which the European Union’s external action is fragmented, lacks transparency and makes it difficult to determine the legal liability of its various actors”.<sup>53</sup> This complexity gives rise to the risk of error on the part of an applicant who may well wrongly attribute the act, resulting in the action being declared inadmissible.<sup>54</sup>

In the foregoing discussion we have seen the CFSP operating within the general framework of legal accountability; the rules applied in attributing an act for the purposes of judicial review are not specific to the CFSP although as we have seen they may well be complex to apply given the multiplicity of actors involved in implementing CFSP, their sometimes ambiguous legal status and hierarchical relationships. The identification of the act and the question of attribution is of course only an initial step. If the act is found to “relate to” the CFSP, the CJEU’s jurisdiction will be severely limited by the “specific rule” contained in Art. 275 TFEU. It is to this that we now turn.

### III. LIMITING THE COURT’S JURISDICTION

According to the first paragraph of Art. 275 TFEU, “[t]he 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”. In the *Mauritius* case the Court held that this provision creates “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 [it] must, therefore, be interpreted narrowly”.<sup>55</sup> The reference to Art. 19 TEU is both logical and significant; it signals that the CFSP is part of the Union’s legal order,<sup>56</sup> albeit subject to some special rules concerning procedure and institutional powers, and the

<sup>53</sup> Opinion of AG Jääskinen delivered on 21 May 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo*, para. 19.

<sup>54</sup> In *Elitaliana* the Court, in finding that the CFSP mission Eulex Kosovo did not have legal capacity and the action in question was to be attributed to the Commission, also rejected an argument that since “the complex legal situation of the contract in question made it difficult to identify the party to whom the measures at issue were attributable” the applicant’s error was excusable (*Elitaliana SpA v. Eulex Kosovo*, cit., para. 71).

<sup>55</sup> *European Parliament v. Council* [GC], case C-658/11, cit., para. 70.

<sup>56</sup> See for example, R.A. WESSEL, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, in *European Constitutional Law Review*, 2009, p. 117.

general jurisdiction of the Court of Justice is an important part of that legal order. As a policy field, the CFSP is integrated into the Union's general principles, such as the rule of law, which pertain to the exercise of administrative discretion.<sup>57</sup>

Indeed, in addition to its reliance on Art. 19 TEU, the Court has also based its interpretation of Art. 275 TFEU on the fundamental principles of the rule of law and effective judicial protection, in particular where an individual challenge to the validity of CFSP acts is concerned. The rule of law is found among the Union's values in Art. 2 TEU and its application to the CFSP is made clear by Arts 21, para. 1, and 23 TEU.<sup>58</sup> The principle of effective judicial protection is contained in Art. 47 of the Charter of Fundamental Rights of the European Union. As the Court of Justice pointed out in a recent judgment, "the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law",<sup>59</sup> and

"[w]hile, admittedly, Article 47 of the Charter cannot confer jurisdiction on the Court where the Treaties exclude it, the principle of effective judicial protection nonetheless implies that the exclusion of the Court's jurisdiction in the field of the CFSP should be interpreted strictly".<sup>60</sup>

As a sign of this strict interpretation, despite the potential ambiguity in the reference to "these provisions" in Art. 24, para. 1, TEU, and in the phrase "provisions relating to" the CFSP in Art. 275 TFEU, they have been interpreted as including only the provisions of the CFSP chapter of the TEU (Chapter 2 of Title V, TEU) and acts based on them.<sup>61</sup> Other treaty provisions which may be connected to CFSP action, including procedural provisions, are not covered by the exclusion of jurisdiction. This allows the Court – while granting the CFSP full scope as a policy field<sup>62</sup> – to ensure that "CFSP exceptionalism" with respect to its own jurisdiction does not creep beyond its proper bounds. The *Mauritius* and *Tanzania* cases illustrate this well.

<sup>57</sup> R. GOSALBO BONO, *Some reflections on the CFSP legal order*, in *Common Market Law Review*, 2006, p. 347; P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 498; C. HILLION, *A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy*, cit.; 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.

<sup>58</sup> See also *European Parliament v. Council* [GC], case C-263/14, cit., para. 47.

<sup>59</sup> Court of Justice, judgment of 28 March 2017, case C-72/15, *PJSC Rosneft Oil Company* [GC], para. 73.

<sup>60</sup> *Ibid.*, para. 74.

<sup>61</sup> See Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *PJSC Rosneft Oil Company*, paras 42-46, rejecting an argument that the phrase in Art. 275 TFEU could be interpreted more broadly.

<sup>62</sup> Art. 40 TEU makes clear that the CFSP has equal status to other EU policies and is not a residual competence, a significant difference from the pre-Lisbon position expressed in Art. 47 TEU and Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council* [GC].

Both cases concerned international agreements concluded by the Council under a CFSP legal basis, which was in both cases accepted by the Court.<sup>63</sup> The procedure for the conclusion of CFSP agreements is governed by the procedural rules of Art. 218 TFEU, a provision which “is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP”.<sup>64</sup> The Court’s jurisdiction over these procedural treaty-making rules is not affected by the derogation applicable to the substantive CFSP legal basis.<sup>65</sup> Thus it had jurisdiction to rule on the Council’s compliance with Art. 218, para. 10, requiring the Parliament to be kept informed of the negotiation of all agreements, including – it was held – CFSP agreements. In this way, the Court preserves the power to adjudicate not only over the proper choice of substantive legal basis (Art. 40 TEU), but also to ensure respect for the powers of the institutions (institutional balance).<sup>66</sup>

Art. 275 TFEU also limits the Court’s jurisdiction over “acts adopted on the basis of” CFSP provisions. This covers acts adopted with a CFSP legal basis, such as Arts 28, or 29, TEU, but does not extend to acts simply because they were adopted *in the context of* a CFSP measure or mission. In *Elitaliana*, the Court held that its jurisdiction was not excluded since the act in question concerned the procurement of helicopters (for the CFSP mission Eulex Kosovo) and was covered by the EU’s procurement rules and the general financial regulation.<sup>67</sup> Here the Court is ensuring that the CFSP derogation does not compromise its jurisdiction over the EU’s general rules of administration:

“the measures at issue, whose annulment was sought on the basis of an infringement of the rules of EU public procurement law, related to the award of a public contract which gave rise to expenditure to be charged to the European Union budget. Accordingly, the contract at issue is subject to the provisions of the Financial Regulation. [...] [T]he scope of the limitation, by way of derogation, on the Court’s jurisdiction [...] cannot be considered to be so extensive as to exclude the Court’s jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement”.<sup>68</sup>

<sup>63</sup> *European Parliament v. Council* [GC], case C-658/11, cit.; *European Parliament v. Council* [GC], case C-263/14, cit. The agreements were concluded with the third country partners in the context of the EU’s naval anti-piracy mission off the coast of Somalia (known as “Operation Atlanta”) and concerned the conditions under which those suspected of piracy could be transferred to the third country for detention and trial. See S.R. SÁNCHEZ-TABERNERO, *The choice of legal basis and the principle of consistency in the procedure for conclusion of international agreements in CFSP contexts: Parliament v. Council (Pirate-Transfer Agreement with Tanzania)*, in *Common Market Law Review*, 2017, p. 899 *et seq.*

<sup>64</sup> *European Parliament v. Council* [GC], case C-658/11, cit., para. 72.

<sup>65</sup> *Ibid.*, para. 73.

<sup>66</sup> P. VAN ELSUWEGE, *Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v Council (Pirate Transfer Agreement with Mauritius)*, in *Common Market Law Review*, 2015, p. 1379 *et seq.*

<sup>67</sup> *Elitaliana SpA v Eulex Kosovo*, cit.

<sup>68</sup> *Ibid.*, paras 48-49.

In *H* we again see the Court ensuring its general administrative jurisdiction, in this case relating to staff management, despite a CFSP context.<sup>69</sup> The Commission sought in this case to make a distinction between different types of CFSP act and to limit the Art. 275 TFEU derogation to “CFSP acts which are an expression of sovereign foreign policy (*actes de gouvernement*), as opposed to acts merely implementing that policy”.<sup>70</sup> The Commission also argued that the CFSP derogation only applies to cases where an act was alleged to breach a CFSP Treaty provision, but not where the alleged breach was of a non-CFSP provision; this latter argument was based on *Elitaliana* where, as was seen, the alleged breach was of the financial regulation and procurement rules. AG Wahl did not find the attempt to distinguish between the types of CFSP act as suggested by the Commission and the appellant convincing. On the one hand, he pointed out that since legislative acts are excluded from the CFSP much of its action is in fact executive, operational or implementing in nature:

“most of the acts envisaged in Chapter 2, Title V, of the TEU could be regarded as ‘administrative’, if by that is meant that they regulate the conduct of the EU or national administrations. ... By its very nature, the CFSP appears to be an operational policy: one by means of which the Union pursues its (broadly defined) objectives through a set of (broadly defined) actions, mainly of an executive and political nature”.<sup>71</sup>

If administrative acts were excluded from the CFSP derogation then – the Advocate General argued – its scope would be reduced to an extent not reconcilable with the wording of Art. 24, para. 1, TEU and Art. 275 TFEU. The Advocate General also argued that the distinction between “*actes de gouvernement*” and acts of implementation was both unclear and lacking any basis in the Treaties. The CFSP Chapter of the TEU contains a number of provisions which may form the legal basis for acts of implementation and “those acts may often be of great political significance and sensitivity”.<sup>72</sup>

The Court in *H* did not pursue this line either. Instead it argued that the CFSP context in which an act is adopted “does not necessarily lead to the jurisdiction of the EU judicature being excluded”.<sup>73</sup> Its finding that it had jurisdiction was based on two somewhat different arguments. The first started from the principle of equality between EU and national seconded staff. Art. 270 TFEU grants the Court jurisdiction in relation to EU staff seconded to the CFSP mission; the Court referred to equality as a value of the Union alongside the rule of law,<sup>74</sup> and found that although staff seconded by the EU

<sup>69</sup> *H v. Council and Commission* [GC], cit.

<sup>70</sup> Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 33; see also *H v. Council and Commission* [GC], cit., para. 32.

<sup>71</sup> *Ibid.*, para. 59.

<sup>72</sup> *Ibid.*, para. 62.

<sup>73</sup> *H v. Council and Commission* [GC], cit., para. 43.

<sup>74</sup> *Ibid.*, para. 41.

and those seconded by Member States were not subject to the same rules in all respects, they were “subject to the same rules so far as concerns the performance of their duties ‘at theatre level’”, and the decision in question related to the allocation of such duties.<sup>75</sup> Second, the Court held that, although decisions on the allocation of staff have an “operational aspect” falling within the CFSP, “they also constitute, by their very essence, acts of staff management”.<sup>76</sup> The conclusion brings together both these arguments: the limitation on the Court’s jurisdiction

“cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions”.<sup>77</sup>

These cases, in which the Court has determined the scope of the derogation, are based on two types of argument. The first is based on general principles, including the rule of law, of which effective judicial review is an inherent part, but also including other principles such as equality. This is important in establishing that the CFSP is not excluded from the operation of these principles which form part of the EU *acquis*. The Court links its own jurisdiction to the protection of those principles. The second is based on distinguishing between CFSP acts and those which are adopted “in the context of” the CFSP. Although the Court is (ostensibly) not seeking to differentiate between types of CFSP acts, the *H* case is striking in this respect since the Court seems to accept that the decision under challenge could have a CFSP character – “an operational aspect falling within the CFSP” – while also constituting an act of staff management. And although the Court in *H* did not directly engage with the Commission’s argument that it should take into account the higher norm which the act is alleged to violate, the fact that it was the staff management character of the decision which prevailed in this case was presumably linked to the fact that the alleged illegality related not to the management of the CFSP operation but to the operation of the Staff Regulations.

To the question of identifying the institution to which a CFSP act should be imputed, discussed in the previous section, we must therefore add the need to determine whether the act is in fact a CFSP act or whether it is adopted “in the context” of a CFSP policy, but essentially pertains to rules within the Court’s jurisdiction. Where the act under challenge is adopted directly on a CFSP legal basis, then both authorship and the application of the derogation is clear and the task will be to decide whether one of the exceptions to the derogation – discussed in the next section – applies. It is where the act

<sup>75</sup> *Ibid.*, para. 50.

<sup>76</sup> *Ibid.*, para. 54.

<sup>77</sup> *Ibid.*, para. 55.

is a decision of a person in a hierarchical relation to the Council, HR, EEAS or Commission (such as a Head of Mission) that both the attribution of the act and its characterisation as a CFSP act becomes more difficult.

#### IV. THE EXCEPTION: JUDICIAL REVIEW OF CFSP ACTS

The scope of the limitation of the Court's jurisdiction is of course not the whole story. That limitation, or derogation, is itself subject to exceptions. Under the second paragraph of Art. 275 TFEU, judicial review of the validity of CFSP acts is possible in two cases. First, to "monitor compliance" with Art. 40 TFEU, and second in the case of "proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU] reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council" under CFSP powers. Art. 24, para. 1, TEU refers more generally to "jurisdiction [...] to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union".

Art. 40 TEU essentially requires the Court to ensure that the appropriate legal basis is used and is thus a constitutional rather than an administrative control. For that reason, we will make only brief reference to it here in order to show that the Court has not attempted to constrain the limits to its jurisdiction over the CFSP by limiting the scope of the CFSP as a policy field. Instead it has insisted on a strict reading of the derogation itself, as we saw in section III, combined with a flexible reading of the exceptions to the derogation, as we will see in this section.

Unlike its predecessor,<sup>78</sup> Art. 40 TEU does not establish a preference for using non-CFSP powers where possible. In fact it is striking that in its post-Lisbon case law the Court of Justice has applied its standard approach to legal basis, based on identifying the predominant aim or purpose of the measure, together with an analysis of content. Art. 40 TEU is cited in order to justify the Court's jurisdiction, but does not appear to influence the reasoning on legal basis one way or the other.<sup>79</sup> In contrast to the Court's insistence that the limitations on its own jurisdiction should be interpreted strictly, it accepts the limits on the role of the European Parliament in decision-making that apply where a CFSP legal basis is chosen as simply the result of the political choices made by the drafters of the Treaty. According to the Court of Justice, although Parliamentary participation in law-making is an expression of the principle of democratic representation, the Parliament's exclusion from CFSP decision-making should not influence the choice of legal basis, but is "the result of the choice made by the framers of the Treaty of Lis-

<sup>78</sup> Art. 47 TEU.

<sup>79</sup> See for example *European Parliament v. Council* [GC], case C-658/11, cit.; *European Parliament v. Council* [GC], case C-263/14, cit.



bon conferring a more limited role on the Parliament with regard to the Union’s action under the CFSP”.<sup>80</sup>

These cases on legal basis have all involved the European Parliament, a privileged applicant under Art. 263 TFEU where its own prerogatives are concerned. In most cases where the validity of a legal act is in issue, an individual is unlikely to have an interest in pleading legal basis,<sup>81</sup> but the case of the CFSP is different as a result of the Court’s limited jurisdiction. Art. 40 TEU can also be pleaded by a natural or legal person seeking the annulment of a CFSP act on the ground of an incorrect legal basis, either via a direct action under Art. 263 TFEU or via a preliminary ruling. In *Rosneft*, the Court pointed out that, in referring to “monitoring compliance” with Art. 40 TEU, Art. 275 TFEU does not specify any particular type of action; the Court therefore has jurisdiction to rule on compliance with Art. 40 TEU on a request for a preliminary ruling.<sup>82</sup> It will nonetheless prove difficult for an individual to successfully challenge the exercise of executive discretion under CFSP powers using Art. 40 TEU.<sup>83</sup>

The second exception is more directly relevant to administrative law. It will be recalled that the Court has jurisdiction in “proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU] 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 CFSP chapter]”. This provision, introduced by the Lisbon Treaty, reflects the *Kadi* case law on the need for effective judicial protection where restrictive measures are adopted against individuals. Measures adopted under Art. 215 TFEU are challengeable under the normal rules of standing set out in Art. 263, para. 4, TFEU, which require direct and individual concern. In practice, standing is not difficult to establish in the case of restrictive measures since the individuals concerned will be identified by name in Annexes:

“any inclusion in a list of persons or entities subject to restrictive measures [...] allows that person or entity access to the Courts of the European Union, in that it is similar, in

<sup>80</sup> Court of Justice, judgment of 19 July 2012, case C-130/10, *European Parliament v. Council* [GC], para. 82. As a result, the decision to choose a CFSP legal basis is ultimately in the hands of the Council and, given the breadth of the policy field, the application of the standard legal basis test makes it difficult in practice to challenge that choice. For further discussion on establishing the boundary between the CFSP and other external action, see M. CREMONA, *The CFSP-CSDP in the Constitutional Architecture of the EU*, in S. BLOCKMANS, P. KOUTRAKOS (eds), *The EU’s Common Foreign and Security Policy*, cit.

<sup>81</sup> Exceptions would include cases where a possible legal basis contains limitations on the type of action that may be taken, such as excluding harmonisation. See e.g. Court of Justice, judgment of 10 December 2002, case C-491/01, *R v. Secretary of State for Health, ex parte British American Tobacco and Imperial Tobacco*.

<sup>82</sup> *PJSC Rosneft Oil Company* [GC], cit., paras 62-63.

<sup>83</sup> See further discussion in section V below.

that respect, to an individual decision, in accordance with the fourth paragraph of Article 263 TFEU".<sup>84</sup>

A regulation adopted under Art. 215 TFEU must be preceded by a CFSP decision, and the CFSP decision may contain measures – a visa ban for example – which will be implemented by the Member States directly rather than by the EU via Art. 215 TFEU. The exception in Art. 275 TFEU is then important to allow the individual to challenge the underlying CFSP decision, as well as the Art. 215 TFEU regulation which gives (some of) its effect.

The listing of natural and legal persons takes place in the context of two distinct types of restrictive measure. First, counter-terrorism measures, where the primary targets are the individuals or entities concerned (whether derived from UN listings or autonomous EU listings) and second, measures directed at a third country (sometimes called "regime sanctions") in which natural and legal persons may be targeted as members of, or closely connected to, the regime. From the point of view of the Court's jurisdiction, the exception in Art. 275 TFEU, and standing, the two types of restrictive measure are indistinguishable; from the point of view of intensity of review they differ in practice, as we shall see in section V. Here we will focus on restrictive measures directed at a third country which include sanctions directed at listed individuals.<sup>85</sup>

The exception in Art. 275 TFEU only gives the Court jurisdiction to decide on the validity of the decision insofar as it actually refers to the listed individual bringing the action; it does not have jurisdiction in relation to any parts of the decision that are not targeted at specific individuals, for example those prohibiting the sale of specific products or the provision of specific services to the third country concerned. These are not "restrictive measures against natural or legal persons" within the meaning of Art. 275 TFEU.<sup>86</sup> Here we see a distinction in the reviewability of different types of restrictive measure which may be contained in the same decision. In principle this is not a question of the standing of a specific individual (direct and individual concern) but rather a determination of whether the particular restrictive measure is of individual or general application; however in practice the criteria are substantially the same.

A more open question concerns whether "restrictive measures against natural or legal persons", limits the exception to sanctions of the type envisaged by Art. 215 TFEU which must be preceded by a CFSP decision, or might be interpreted more broadly to cover other types of CFSP act prejudicial to an individual. In the *H* case, the Commission suggested that the more general wording of Art. 24, para. 1, TEU could include "any act

<sup>84</sup> *National Iranian Oil Company v. Council* [GC], cit., para. 44. On standing, see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

<sup>85</sup> For further discussion of counter-terrorist sanctions, see L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

<sup>86</sup> General Court, judgment of 25 April 2012, case T-509/10, *Kala Naft v. Council*, paras 36-38, affirmed by the Court of Justice in judgment of 28 November 2013, case C 348/12 P, *Council v. Kala Naft*, para. 99. See also *PJSC Rosneft Oil Company* [GC], cit., paras 95-99.

adopted by an EU institution against a person which produces legal effects in relation to him that potentially infringe his fundamental rights” and that this interpretation was in line with the respect for fundamental rights required by the Treaties.<sup>87</sup> AG Wahl was not convinced by this argument.<sup>88</sup> The Court did not rule on the point but it seems unlikely that it would broaden the exception to the derogation by giving such an extensive interpretation to “restrictive measures”; instead it has preferred to narrow the scope of the derogation itself. As we have seen, the Court did cite fundamental rights (Art. 47 of the Charter of Fundamental Rights of the European Union, the right to an effective remedy) in support of its jurisdiction in the case.

A second question relates to the forms of action covered by the exception. At first sight this might seem clear: unlike the exception in respect of compliance with Art. 40 TEU, the exception in respect of restrictive measures against individuals makes an explicit reference to direct actions for annulment under Art. 263 TFEU. Art. 24 TEU, on the other hand, merely refers to “reviewing the legality” of certain CFSP decisions. The possibility of applying the exception where the validity of an act is challenged via preliminary ruling was raised by *Rosneft*. The Court, following AG Wathelet<sup>89</sup> and differing from the view of AG Kokott in Opinion 2/13,<sup>90</sup> held that, where the validity of a CFSP act is concerned, preliminary references are also covered by the exception. Its reasoning is revealing. The Court starts by referring to the two procedures for contesting the validity of EU acts (direct actions and preliminary rulings) as complementary and as ensuring “a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts”.<sup>91</sup> The language is of course familiar and the Court cites the classic cases on standing and judicial review, *Les Verts*, *Unión de Pequeños Agricultores* and *Inuit Tapiriit Kanatami*.<sup>92</sup> It then argues that, while CFSP decisions on restrictive measures will need to be implemented by Member States, national courts do not have the jurisdiction to declare Union acts invalid; the preliminary ruling procedure enables the issue of validity to be referred to the Court of Justice.<sup>93</sup> This is

<sup>87</sup> *H v. Council and Commission* [GC], cit., para. 33.

<sup>88</sup> Opinion of AG Wahl, *H v. Council and Commission*, cit., paras 73-80.

<sup>89</sup> Opinion of AG Wathelet, *PJSC Rosneft Oil Company*, cit.

<sup>90</sup> View of AG Kokott delivered on 13 June 2014, opinion procedure 2/13.

<sup>91</sup> *PJSC Rosneft Oil Company* [GC], cit., para. 66.

<sup>92</sup> Court of Justice: judgment of 23 April 1986, case 294/83 *Les Verts v. Parliament*; judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores v. Council*; judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami et al. v. Parliament and Council*.

<sup>93</sup> As our concern here is with judicial review, I will not enter into the question as to whether questions of interpretation of CFSP acts could also be referred to the Court via preliminary ruling. The Advocate General in *Rosneft* concluded that questions of interpretation would be covered: Opinion of AG Wathelet, *PJSC Rosneft Oil Company*, cit., paras 73-75; the references in the Court’s judgment in the same case to the purpose of Art. 267 TFEU and the need to preserve the unity of Union law might suggest that the Court would also be open to this extension. In other cases the Court has been able to side-step the issue by interpreting the parallel provisions in the regulation and then referring to the CFSP decision and

significant in indicating that the Court is prepared to assess the scope of the exception in the context of the overall Treaty framework, and, in particular, of its role in ensuring the legality of Union acts: “That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP”.<sup>94</sup>

It had been suggested that were it not possible to apply the judicial review exception to the preliminary ruling procedure, national courts would be required, by the principle of effective judicial protection, to decide upon that validity themselves.<sup>95</sup> The Court explicitly rejects this argument, and its reasoning – which also refers to effective judicial protection – treats the Art. 275 TFEU exception as being as much concerned with its own judicial monopoly on controlling the validity of EU law and the unity of the Union legal order as with individual rights.<sup>96</sup>

What of the wording of Art. 275 TFEU itself, containing as it does a reference to Art. 263 TFEU? According to the Court, “proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263” refers not to the type of procedure “but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality”.<sup>97</sup> It seems also that the reference to “conditions” does not refer to standing, since the Art. 263 standing rules do not apply in the case of preliminary rulings; however, as already mentioned, the act must be directed at an individual and not of general application, so this particular consequence of *Rosneft* is not of great practical importance.

Therefore, while the CFSP decisions (or provisions of such decisions) which may be reviewed are limited to restrictive measures directed against natural or legal persons, the procedures under which such review may take place are aligned to non-CFSP review.

## V. GROUNDS FOR AND INTENSITY OF REVIEW

In the scope of the Court’s jurisdiction as regards the CFSP, we can see the two dimensions to its role with which we started this *Article*: to ensure that the EU and its institutions operate within the limits of their powers and the institutional balance is main-

the regulation together; see for example Court of Justice, judgment of 14 March 2017, case 158/14 *A, B, C, D v. Minister van Buitenlandse Zaken* [GC], para. 97.

<sup>94</sup> *PJSC Rosneft Oil Company* [GC], cit., para. 69. 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.

<sup>95</sup> View of AG Kokott delivered on 13 June 2014, opinion 2/13, paras 95-103. For the contrary position, see Opinion of AG Wahl delivered on 7 April 2016, case C-455/14 P, *H v. Council and Commission*, para. 33; see also *H v. Council and Commission* [GC], cit., paras 101-103.

<sup>96</sup> *PJSC Rosneft Oil Company* [GC], cit., paras 77-80.

<sup>97</sup> *Ibid.*, para. 70.

tained; and to uphold the rule of law and fundamental rights. These two dimensions are also unsurprisingly evident when we turn to the question of substantive review.

We have already seen that the Court is concerned with ensuring respect for the powers of the institutions under the relevant decision-making procedures. In the *Mauritius* and *Tanzania* cases, the Court stressed the importance of complying with the obligation in Art. 218, para. 10, TFEU of informing the Parliament of the negotiation and conclusion of CFSP agreements, thereby ensuring it can play its role in democratic scrutiny.<sup>98</sup> In its assessment of compliance with Art. 40 TEU in *Rosneft*, the Court assessed whether the CFSP decision disturbed the decision-making balance foreseen in the Treaties between the CFSP and Art. 215 TFEU, holding that in the case of restrictive measures, and given the broad discretion of the Council in the field of the CFSP, it was reasonable for the Council in its CFSP decision to specify, with a high degree of precision, the types of measures to be adopted and the identities of targeted persons, thereby circumscribing the scope of the regulation.<sup>99</sup>

This emphasis on the Council's discretion has also influenced the Court's willingness to assess the reasons for imposing restrictive measures and more importantly, for listing an individual. Despite the importance of the *Kadi* case law, insisting on the right to effective judicial protection (which was the impetus for the exceptional jurisdiction over restrictive measures granted by Art. 275 TFEU), with its concomitant stress on the duty to state reasons, the Court of Justice's approach to reviewing restrictive measures targeting third countries, and companies and individuals associated with third country regimes, has been restrained. The difference is not a difference in the legal rules applicable – the rights of defence and the right to effective judicial protection apply in both types of case<sup>100</sup> – but reflects the different nature of counter-terrorism and regime sanctions. Counter-terrorism sanctions are directed at “persons, groups and entities involved in terrorist acts” and this criterion is defined in terms of specific types of activity.<sup>101</sup> The listing of an individual therefore implies specific conduct and the case law has attempted to determine the degree of specificity of evidence required to substantiate the listing as well as the right of the individual to be aware of the factual evidence against him or her, based on the rights of defence and the right to effective judicial protection.<sup>102</sup> The CJEU are to ensure that the decision has been taken on “a sufficiently sol-

<sup>98</sup> Although limited, this role includes scrutiny of appropriate use of legal basis and contributing to the overall coherence of Union policy. See further T. RAUNIO, *Control and scrutiny: parliaments as agents of administrative law*, in C. HARLOW, P. LEINO, G. DELLA CANANEA (eds), *Research Handbook on EU Administrative Law*, Cheltenham/Northampton: Edward Elgar, 2017.

<sup>99</sup> *PJSC Rosneft Oil Company* [GC], cit., paras 86-90.

<sup>100</sup> Court of Justice, judgment of 21 April 2015, case C-630/13 P, *Issam Anbouba v. Council* [GC], para. 46.

<sup>101</sup> See for example Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, Art. 1.

<sup>102</sup> See further L. LEPPÄVIRTA, *Procedural Rights in the Context of Restrictive Measures*, cit., p. 649 *et seq.*

id factual basis” and this “entails a verification of the allegations factored in the summary of reasons underpinning that decision”.<sup>103</sup>

Individual listings in the case of third country sanctions, on the other hand, are more various and may be based on broad grounds. They may target those who are members of a regime, or who are associated with a regime. The Council in each case has the discretion to determine the reason for the listing and the demonstration of a link to the regime does not require personal conduct: it may simply require being a member of a category of persons, inferred from a family relationship with a regime leader, from holding a position or simply from prominence in the country concerned.<sup>104</sup> The Court is concerned primarily with ensuring that there is consistency between the aim of the measure as stated and the reason given for the listing of the individual. In a recent example, in the context of the sanctions against Iran adopted in the context of nuclear proliferation, the Court upheld the inclusion of companies on the basis that they “supported the government of Iran”, even if their activities had no direct or indirect connection with nuclear proliferation, rejecting an argument that the criteria were so broad as to grant the Council unconditional powers, thereby contravening the rule of law.<sup>105</sup> The Court relied heavily on the Council’s objectives as stated in the regulation, in the light of an amendment to the regulation which broadened its scope:

“the objective of the amendment of the criterion at issue had been to expand the designation criterion, in order to target the relevant person or entity’s own activity which, even if it has no actual direct or indirect connection with nuclear proliferation, is nonetheless capable of encouraging it”.<sup>106</sup>

The Court emphasised the “broad discretion” granted to the legislature “in areas which involve political, economic and social choices” and “complex assessments”. The legality of a measure in such cases is affected “only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”.<sup>107</sup> In such cases, the Court is concerned with checking that the reason given for designating an individual or company matches the stated aims of the measure; it will not question the Council’s discretion in adopting such broadly-targeted measures. In

<sup>103</sup> Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Council v. Yassin Abdullah Kadi* [GC], para. 119.

<sup>104</sup> See for example Court of Justice, judgment of 21 April 2015, case C-630/13 P, *Issam Anboubaa v. Council* [GC], para. 52, in which the Court of Justice held that “the General Court was entitled to hold that Mr Anboubaa’s position in Syrian economic life, his position as the president of SAPCO, his important functions within both Cham Holding and the Chamber of Commerce and Industry of Homs and his relations with a member of the family of President Bashar Al-Assad constituted a set of indicia sufficiently specific, precise and consistent to establish that he provided economic support for the Syrian regime”.

<sup>105</sup> *National Iranian Oil Company v. Council* [GC], cit.

<sup>106</sup> *Ibid.*, para. 80.

<sup>107</sup> *Ibid.*, para. 77.

some recent examples the aim of the measures is defined in such a way as to arguably take it outside the scope of third country sanctions altogether, but the Court has not raised any difficulty.<sup>108</sup>

These cases are focused on due process within the EU’s own decision-making procedures. However, under some circumstances the standards of due process in third countries may also be relevant. AG Sharpston has recently emphasised the importance of due process, including by the “competent authorities” of third countries for the purposes of Common Position 2001/931 in the context of the EU’s counter-terrorism sanctions.<sup>109</sup> She argued that while the Council may be justified in presuming that the decisions of the competent authorities of a Member State will have been taken in compliance with fundamental rights, the same was not necessarily the case for third countries, and a case by case assessment should be made. It is worth citing the opinion at some length:

“When the Council relies on decisions of competent authorities of Member States acting within the scope of EU law, it is a given that those authorities are under a duty to respect the fundamental rights applicable in the European Union. Thus, the standards of protection and the level of protection — as a matter of EU law— are well established and subject to the Court’s review. When relying on their decisions, the Council will normally be justified in presuming that those decisions have been taken in compliance with applicable fundamental rights, in particular, the rights of defence and effective judicial protection”.<sup>110</sup>

“The situation is different where the Council decides to rely on a decision of a competent authority of a third State. Those authorities do not act within same constraints as the Member States in terms of fundamental rights protection, even if their legal protection of fundamental rights might be at least equivalent to that guaranteed under EU law. ...

It is for the Council to verify whether the level of fundamental rights protection is at least equivalent to that under EU law and whether there is evidence pointing to the possibility

<sup>108</sup> Recent restrictive measures concerning Egypt, Tunisia and Ukraine have targeted individuals on the ground that they were guilty of, or under investigation for, misappropriation of State funds. These measures are not targeted at an existing third country regime; on the contrary they are adopted after a change of government, with the support of the new regime. In *Al Matri* the grounds for including the applicant’s name in the CFSP decision did not mention misappropriation of state funds but instead referred to actions which were under investigation ‘as part of money laundering operations’. On the ground that money laundering was not necessarily the same as misappropriation of public funds, the Court annulled the particular decision as far as it concerned the applicant; however it did not question the appropriateness of the Council using restrictive measures to target those responsible, or under investigation, for misappropriation of State funds: General Court, judgment of 28 May 2013, case T-200/11, *Al Matri v. Council*. See also Court of Justice, judgment of 5 March 2015, case C-220/14 P, *Ezz and others v. Council*.

<sup>109</sup> Opinion of AG Sharpston delivered on 22 September 2016, case C-599/14 P, *Council v. LTTE (Tamil Tigers)* and Opinion of AG Sharpston delivered on 22 September 2016, case C-79/15 P *Council v. Hamas*.

<sup>110</sup> Opinion of AG Sharpston, *Council v. LTTE (Tamil Tigers)*, cit., para. 62.

that the decision at issue may not have been adopted in compliance with the relevant and applicable standard of protection".<sup>111</sup>

The existence of a duty on the part of the Union's decision-maker to assess and take account of the fundamental rights compliance of a third country and more generally of the fundamental rights implications in third countries when engaging in external action appears to be emerging more clearly as a principle of EU external relations law. The General Court in the *Front Polisario* case recognised the broad discretion of the institutions in conducting EU foreign policy. As a result, its review of the Council's decision to conclude an international agreement was concerned with ensuring that the Council had examined and taken account of all relevant facts. Among those facts were the implications of the agreement for fundamental rights in the territory affected by the agreement.<sup>112</sup> As expressed by AG Wathelet in the same case, the institutions have an "obligation under EU law to examine the general human rights situation in the other party to the international agreement, and more specifically to study the impact which that agreement could have on human rights".<sup>113</sup> The Court of Justice did not rule on this issue, but – as important – it emphasised the need to interpret the EU's international agreement so as to comply with the right to self-determination and other peremptory norms of international law.<sup>114</sup> This particular case concerned trade policy rather than the CFSP, but there is no reason in principle why the same reasoning should not apply to the CFSP. Indeed, in the different context of choice of legal basis, the Court has referred to the obligation on the Union to comply with fundamental rights in the context of all external action, including the CFSP.<sup>115</sup> Although the issue was choice of legal basis, the Court was referring to substantive provisions in the agreement in question designed to ensure substantive human rights compliance by a third country; it refused to see these provisions as a reason for excluding the CFSP legal basis. So far, then, the need to take account of the human rights implications of external action (including the CFSP) has presented itself in terms of a procedural obligation: the need to examine all

<sup>111</sup> *Ibid.*, paras 65-67. In its judgment the Court of Justice agreed (upholding the judgment of the General Court on this point) that "the Council must, before acting on the basis of a decision of an authority of a third State, verify whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection", and that it must "provide, in the statements of reasons relating to those decisions, the particulars from which it may be concluded that it has ascertained that those rights were respected". Court of Justice, judgment of 26 July 2017, case C-599/14 P, *Council v. LTTE (Tamil Tigers)* [GC], paras 22-38.

<sup>112</sup> General Court, judgment of 10 December 2015, case T-512/12, *Front Polisario v. Council*, paras 223-228.

<sup>113</sup> Opinion of AG Wathelet delivered on 13 September 2016, case C-104/16P, *Council v. Front Polisario*, para. 257.

<sup>114</sup> Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC], paras 118-125.

<sup>115</sup> *European Parliament v. Council* [GC], case C-263/14, cit.



relevant facts. The Court of Justice in the *Tanzania* case and *Front Polisario* opens up the issue of substantive compliance and there is no doubt that the obligation to comply with fundamental rights applies to the EU institutions when acting within the frame of the CFSP.<sup>116</sup> As pointed out by De Schutter, the principle is clear; it is its operationalisation which proves more difficult.<sup>117</sup>

## VI. CONCLUSION

This *Article* has sought to explore the application of judicial review to challenge CFSP acts in the context of administrative law. We have seen that in fact the CFSP, in common with other external policy fields, operates through administrative and executive action. The CFSP is part of the EU legal order, albeit subject to some special rules and procedures which affect the institutional balance in decision-making. This means that general EU administrative law and administrative principles apply to the CFSP, including the right to an effective legal remedy. Nevertheless the CFSP's specific rules and procedures do affect the application of administrative law, especially legal accountability through judicial review, and there is no doubt that this is a field in which executive discretion is broadly defined. The absence of legislative acts and the very restricted powers of the Parliament when it comes to the negotiation and conclusion of international agreements in the CFSP underline the importance of executive action. Especially in the case of implementing acts the complex institutional structures and variety of actors in CFSP policy-making, including not only the Council but also the HR, the EEAS, EU Delegations, Heads of EU civil and military missions, and staff seconded by Member States but acting under EU operational control, can make it difficult to identify the author of an act and impute responsibility to the right institution or body for the purposes of judicial review.

Against this background, we considered the scope of the derogation from the Court of Justice's normal powers of judicial review. The Court has not sought to limit the use of the CFSP as a policy field, for example by regarding it as a residuary power to be used only when other external powers are insufficient. On the other hand, it has emphasized

<sup>116</sup> Court of Justice, judgment of 14 June 2016, case C-263/14, *European Parliament v. Council* [GC], para. 47. In Court of Justice, opinion 1/15 of 26 July 2017, the Court ruled for the first time that a draft agreement could not be concluded in its current form as it contained provisions that were incompatible with the Charter of Fundamental Rights of the European Union. The Court held that the prior opinion procedure under Art. 218, para. 11, TFEU, must examine “all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties” and that this includes “the compatibility of an international agreement with the first subparagraph of Article 6(1) TEU and, consequently, with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties.” Opinion 1/15, cit., para. 70.

<sup>117</sup> O. DE SCHUTTER, *The Implementation of the Charter of Fundamental Rights in the EU institutional framework*, Study conducted for the Committee on Constitutional Affairs of the European Parliament, November 2016, p. 63-66, available at [www.europarl.europa.eu](http://www.europarl.europa.eu).

the generalized nature of its own mandate to ensure that the law is observed (Art. 19 TEU), the resulting need to interpret exceptions to its jurisdiction strictly, and the applicability of the rule of law and fundamental rights to CFSP action. In a series of cases it has limited the scope of the derogation and shown flexibility in interpreting the exceptions to that derogation. Thus many administrative acts adopted in the context of the CFSP, even in the operational context of a CFSP mission, will not be excluded from judicial review since they are not “CFSP acts” in the strict sense, adopted on a CFSP legal basis, but are instead part of the EU’s general administrative machinery, including in particular financial and personnel procedures. The jurisdiction to assess the validity of restrictive measures against natural and legal persons adopted under CFSP powers has been held to apply not only to direct actions for annulment (referred to expressly in the Treaties) but also to the preliminary ruling procedure. Standing is not in practice a problem in these cases. As a result the difficulties faced by individuals in seeking to challenge the validity of executive and administrative acts in the CFSP do not flow so much from Treaty-based (constitutional) obstacles or derogations but rather from the familiar administrative law problems of attribution of responsibility in complex administrations and the difficulty of challenging the exercise of wide discretionary powers.

There is little evidence that the Court is particularly sensitive to the CFSP when it comes to the degree and intensity of judicial review. There is no real difference in its approach to the two primary acts involved in adopting restrictive measures, the CFSP decision and the regulation adopted on the basis of Art. 215 TFEU. The difference lies more in the type of restrictive measure or sanction, and in particular between counter-terrorism sanctions and third country sanctions, albeit in both cases the Court is concerned with procedural safeguards for listed individuals. In the case of third country sanctions the Council has very wide discretion in framing the aim and scope of the measures and the Court is concerned to ensure that the reasons provided for listing an individual or legal person (such as familial, economic or political status) relate to those stated aims. In cases where the lack of such a link has led to the annulment of a measure in respect of a specific individual, the act may be amended to broaden its aim and the individual re-listed.

The focus of this *Article* has been judicial review, since that seemed to encapsulate the “exceptional” status of the CFSP. As a final point, however, we should remind ourselves that other types of administrative accountability also apply to CFSP, in particular the role of the EU Ombudsman in ensuring administrative good practice. The Ombudsman has indeed opened more than one procedure involving the CFSP, including an own-initiative inquiry on the EEAS handling of allegations of serious irregularities involv-

ing the EU Rule of Law Mission (Eulex) in Kosovo,<sup>118</sup> and a decision on the way in which Eulex Kosovo implemented restructuring and organised internal competitions.<sup>119</sup>

Our conclusion must be that there is a rich administrative practice in the CFSP and that it is by no means an excluded zone either for administrative law or for the Court of Justice. The Court is far from reticent in ensuring that it has jurisdiction where the validity of EU acts is in question, and where procedural rights (both individual and institutional) are at stake. The Court’s reticence with respect to policy substance and the exercise of discretion is by no means special to the CFSP but reflects its approach to external policy in general.<sup>120</sup> The decisions of the Ombudsman suggest that she has an important role to play in assisting the CFSP administration, including the EEAS, in developing good administrative practice.

<sup>118</sup> EU Ombudsman Decision of 4 December 2014, case OI/15/2014/PMC.

<sup>119</sup> EU Ombudsman Decision of 23 February 2016, case OI/2/2015/MG.

<sup>120</sup> M. CREMONA, *Structural Principles and their Role*, cit., p. 35.

