



“RESTRICTIVE MEASURES” UNDER ART. 215 TFEU: TOWARDS A UNITARY LEGAL REGIME? BRIEF REFLECTIONS ON THE *BANK REFPAH* JUDGMENT

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ABSTRACT: In *Bank Refpah* (judgment of 6 October 2020, case C-134/19 P) the Court of Justice provides important clarifications on the type of judicial remedies available in relation to CFSP decisions establishing restrictive measures. As in *Rosneft*, the Court seems to extend its jurisdiction beyond the so-called “claw-back” provision of Art. 275, para. 2, TFEU. However, in *Bank Refpah* the Court of Justice does not build upon the logic developed in *Rosneft*, but it takes a different approach. This *Insight* focuses on the line of argument used by the Court and seeks to identify its implication for the post-Lisbon framework of relations between CFSP and other EU policies.

KEYWORDS: Art. 215 TFEU – Art. 275, para. 2, TFEU – restrictive measures – action for damages – CFSP – judicial protection.

I. INTRODUCTION

Following the entry into force of the Treaty of Lisbon, the Common Foreign and Security Policy (CFSP) has retained its specific character in relation to TFEU policies.¹ Despite the abolition of the pillars structure and the establishment of an integrated system of external action,² the CFSP continues to be subject to institutional and regulatory mecha-

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¹ Art. 24, para. 1, second subparagraph, TEU states that “[T]he common foreign and security policy is subject to specific rules and procedures.”

² Art. 21, para. 2, TEU assigns a set of objectives, mainly of a political character, to the full range of policies which are part of the EU’s external action, including the external aspects of all the EU’s substantive policies. A textual interpretation of Art. 21, para. 2, thus seems to indicate that the EU acts falling within the realm of external action can freely pursue the objectives assigned in that provision, including those which appear as purely political and which were, in the pre-Lisbon system, assigned only to the CFSP. This new system undoubtedly attempts to attenuate the regime of mutual exclusion between CFSP and other EU substantive policies. However, the means employed are not fully appropriate to attain this aim. For a discussion see E. CANNIZZARO, *Unity and Pluralism in the EU’s Foreign Relations Power*, in C.



nisms inspired by intergovernmental dynamics. Moreover, Art. 40 TEU, in its current wording, seems to maintain the logic of the pre-Lisbon system, based on the distinction between the CFSP, retains the exclusive competence to pursue political objectives, and the TFEU EU policies, which are to pursue the substantive objectives respectively assigned to them.³ This special regime is also reflected in the limited jurisdiction of the Court of Justice of the European Union (ECJ) in the area of CFSP.⁴

Against this background, the field of economic sanctions, as provided for by Art. 215 TFEU, constitutes the only EU policy that explicitly straddles the foreign policy competence and the substantive competences of the EU.⁵ The exercise of this competence entails a sequence of acts based on different and perhaps irreconcilable decision-making procedures: a CFSP decision to be taken through intergovernmental mechanisms determines the conditions for the adoption of restrictive measures to be taken through the procedure laid down by Art. 215 TFEU. The role of Art. 215 TFEU is precisely to establish a link – the only one expressly provided for on the legal plan – between the political and the substantive dimensions of the EU. The complexity of this legal paradigm is at the origin of a number of legal issues, some of which still remain unsolved.⁶

One of these issues concerns the asymmetrical jurisdiction conferred on the ECJ by the Treaties. While the regulations adopted on the basis of Art. 215 TFEU are subject to full judicial review, the Court has only jurisdiction “to review the legality” of CFSP restrictive measures pursuant to the so-called “claw-back” clause enshrined in Art. 275, para. 2, TFEU.⁷ Whereas the Treaty of Lisbon thus created a limited competence for the Court in relation to CFSP decisions targeting persons, the precise contours of that competence are not fully clear.⁸

BARNARD (ed.), *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate. Collected Courses of the Academy of European Law*, Oxford: Oxford University Press, 2007, p. 193.

³ Pursuant to Art. 40 TEU the Court has the jurisdiction to determine the boundaries between CFSP and non-CFSP in its border-policing role. For a closer analysis on Art. 40 TEU, I refer to my work *Politica estera e azione esterna dell'Unione europea*, Napoli: Editoriale Scientifica, 2012.

⁴ See Art. 24, para. 1, second subparagraph, TEU and Art. 275, para. 2, TFEU.

⁵ As is well known, Art. 75 TFEU also provides a legal basis for the adoption of restrictive measures. Unlike Art. 215 TFEU, which is based on a combination of CFSP and material policies acts, Art. 75 TFEU is fully drawn up within the substantive competences.

⁶ See E. CANNIZZARO, *The EU Antiterrorist Sanctions*, in P. EECKHOUT, M. LOPEZ-ESCUADERO (eds), *The European Union's External Action in Times of Crisis*, Oxford: Hart Publishing, 2017, p. 531 *et seq.*

⁷ Art. 24, para. 1, TEU reads that “[t]he Court of Justice of the European Union shall not have jurisdiction with respect to these [CFSP] provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions [establishing restrictive measures] as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union”. This is a so-called “claw-back” provision that is an “exception to the exception”, in the sense that the Court is competent to monitor compliance with Art. 40 TEU and to review the legality of decisions providing for restrictive measures.

⁸ The question of the precise jurisdiction of the Court arises, *a fortiori*, for CFSP acts other than sanctioning ones. In opinion 2/13, for instance, the ECJ declared that “[it had] not yet had the opportunity to

In *Bank Refah*,⁹ which is the focus of this case note, the Court of Justice was requested to determine whether a CFSP decisions providing for restrictive measures can be challenged through an action for damages, as is the case with regard to the regulations adopted on the basis of Art. 215 TFEU. This judgment is noteworthy because the Court adds another piece to a series of recent cases that have contributed to clarify the post-Lisbon relations between CFSP and TFEU policies.¹⁰

II. BACKGROUND

Between July 2010 and September 2013, the appellant, Bank Refah Kargaran, had been included in a list of entities involved in nuclear proliferation in Iran, annexed to various CFSP decisions and EU regulations.¹¹ As a result, its financial funds were frozen. Bank Refah brought an action for annulment in front of the General Court. In case T-24/11, the GC found that the reasons for its listing were inadequate, annulled the restrictive measures and ordered the delisting of Bank Refah.¹² The appellant brought an action

define the extent to which its jurisdiction is limited in CFSP matters” and therefore simply observed that “as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice” (Court of Justice, opinion 2/13 of 15 December 2014, paras 251-252). Without providing a comprehensive answer to this question, a series of recent cases helps to understand the post-Lisbon framework for judicial review in relation to CFSP. See, Court of Justice: judgment of 19 July 2016, case C-455/14 P, *H v. Council and Commission* [GC]; judgment of 12 November 2015, case C-439/13 P, *Elitaliana v. Eulex Kosovo*; judgment of 14 June 2016, case C-263/14, *European Parliament v. Council of the European Union* [GC]; judgment of 24 June 2016, case C-658/11, *European Parliament v. Council of the European Union* [GC]. For a discussion see P. VAN ELSUWEGE, *Upholding the rule of law in the Common Foreign and Security Policy: H v. Council*, in *Common Market Law Review*, 2017, p. 841 *et seq.*; S.O. JOHANSEN, *H v Council et al., A Minor Expansion of the CJEU's Jurisdiction over the CFSP*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1297 *et seq.*

⁹ Court of Justice, judgment of 6 October 2020, case C-134/19 P, *Bank Refah Kargaran v. Council and European Commission* [GC]. See, among the first comments, P. VAN ELSUWEGE, J. DE CONINCK, *Action for damages in relation to CFSP decisions pertaining to restrictive measures: A revolutionary move by the Court of Justice in Bank Refah Kargaran?*, in *EU Law Analysis*, 9 October 2020, eulawanalysis.blogspot.com; C. ECKES, *Constitutionalising the EU Foreign and Security Policy. The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP)*, in *Verfassungsblog*, 18 October 2020, verfassungsblog.de; F. BESTAGNO, *Danni derivanti da misure restrittive in ambito PESC e azioni di responsabilità contro l'UE*, in *Eurojus*, 9 December 2020, rivista.eurojus.it.

¹⁰ See footnote 8 above.

¹¹ See Council Decision (CFSP) 2010/664 of 25 October 2010 amending Decision 2010/413 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP; Council Decision (CFSP) 2011/783 of 1 December 2011 amending Decision 2010/413 concerning restrictive measures against Iran; Regulation (EU) 961/2010 of the Council of 25 October 2010 on restrictive measures against Iran and repealing Regulation 423/2007; Implementing Regulation (EU) 1245/2011 of the Council of 1 December 2011 implementing Regulation 961/2010 on restrictive measures against Iran.

¹² General Court, judgment of 6 September 2013, case T-24/11, *Bank Refah Kargaran v. Council*.

for the damages suffered in consequence of the listing without specifying the legal basis upon which it was founded.

In its judgment,¹³ the General Court started from the premise that it only possesses limited jurisdiction on the lawfulness of CFSP measures, namely a control on the compliance with Art. 40 TEU and on the legality of restrictive measures under Art. 275, para. 2, TFEU. On that basis, the General Court concluded that it did not have jurisdiction to rule on an action for damages caused by CFSP decisions. Nonetheless, since the measures were adopted pursuant to Art. 215 TFEU, the General Court retained its jurisdiction but rejected the action on the ground that a breach of the duty to state reasons is not sufficient to give rise to non-contractual liability. Consequently, the General Court dismissed the action.

On appeal, the Court of Justice was called upon to determine whether the limited jurisdiction of the Court under Art. 275, para. 2, TFEU also entails a corresponding limitation of the jurisdiction of the Court to adjudge actions for damages against CFSP restrictive measures.

In a lengthy and detailed Opinion,¹⁴ Advocate General Hogan highlighted the incoherence of an interpretation according to which the Court would have no jurisdiction on CFSP restrictive measures while it does possess jurisdiction where the Council has also adopted a regulation pursuant to Art. 215 TFEU, which, to all intents and purposes, has simply reproduced the original restrictive measures decision adopted under the CFSP.

III. THE RATIONALE FOR *ROSNEFT*

The broad issue underlying *Bank Refah* is not entirely new. A similar issue was dealt with by the ECJ in *Rosneft*¹⁵ where the Court upheld its jurisdiction to review the validity of CFSP acts in a preliminary ruling procedure¹⁶, in spite of the limited scope of the “claw back” clause formulated in Art. 275, para. 2, TFEU.¹⁷ In particular, the Court found that a

¹³ General Court, judgment of 30 November 2016, case T-65/14, *Bank Refah Kargaran v. Council*.

¹⁴ Opinion of AG Hogan delivered on 28 May 2020, case C-134/19 P, *Bank Refah Kargaran v. Council*.

¹⁵ Court of Justice, judgment of 28 March 2017, case C-72/15, *Rosneft* [GC]. For a more comprehensive analysis of the judgment see S. POLI, *The Common Foreign Security Policy After Rosneft: Still Imperfect but Gradually Subject to the Rule of Law*, in *Common Market Law Review*, 2017, p. 1828 *et seq.*; 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; G. BUTLER, *A Question of Jurisdiction: Art. 267 TFEU Preliminary References of a CFSP Nature*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 201 *et seq.*; L. LONARDO, *Law and Foreign Policy Before the Court: Some Hidden Perils of Rosneft*, in *European Papers*, 2018, Vol. 3, No 2, www.europeanpapers.eu, p. 547 *et seq.*

¹⁶ *Rosneft* [GC], *cit.*, ruling 1 of 3.

¹⁷ Firstly, Art. 24, para. 1, TEU, *inter alia*, states that “[t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions [CFSP], with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union”. Secondly, Art. 275,

restrictive interpretation of such a clause, which confined the review of validity of CFSP acts to the proceedings brought under Art. 263 TFEU, would not be consistent with the principle of effective judicial protection.¹⁸ Along this line of thinking, the Court held that the expression “review of the legality” of acts of the Union is broad enough to encompass also preliminary ruling proceedings, brought under Art. 267 TFEU.¹⁹

This finding was hinged on the analogous function performed by the preliminary ruling and the action for annulment: they both constitute “a means for reviewing the legality of European Union acts”.²⁰

The rationale for *Rosneft*, however, could hardly apply to actions for damages. Actions for damages, indeed, are not part of the system of review of the legality of EU acts²¹. They perform the different function of providing for a redress of natural or legal persons damaged by an illegal conduct of the EU Institutions or agents. As the ECJ consistently stated, the action for damages is “an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions for its use dictated by its specific purpose”.²²

Since the purpose of an action for damages is not to review the legality of a given EU act, such a remedy cannot be considered covered by the “claw-back” clause.²³ In this

para. 2, TFEU states that the Court has the jurisdiction to “rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union”. This consequently points to Art. 263 TFEU and its fourth paragraph stating “[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. Art. 263 TFEU does not appear to envisage the possibility for the Court of Justice to have the ability to answer questions on preliminary references from national courts. For a discussion see G. BUTLER, *A Question of Jurisdiction*, cit., p. 203.

¹⁸ *Ibid.*, paras 70 and 75.

¹⁹ *Ibid.*, para. 65.

²⁰ *Ibid.*, para. 68.

²¹ See Court of Justice, judgment of 12 September 2006, case C-131/03, *Reynolds Tobacco and Others v. Commission*, para. 83; judgment of 10 September 2019, case C-123/18 P, *HTTS v. Council*, para. 40.

²² *Bank Refah*, [GC], cit., para. 33.

²³ See the Opinion of AG Hogan, *Bank Refah Kargaran v. Council*, cit., para. 59: “[f]rom this perspective, this jurisdiction does not extend to any consequential or related damages claim.” See also the Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft*, footnote 36: “[...] actions for damages which relate to a CFSP act are covered by the ‘carve-out’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, but not by the ‘claw-back’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU.” See, in contrast to this position, C. ECKES, *Constitutionalising the EU Foreign and Security Policy*, cit.: “the wording of Article 275(2) TFEU does not address (and hence not exclude) actions for damages”; S. POLI, *The Common Foreign Security Policy After Rosneft*, cit., p. 1831: “it could be argued that although the purpose of an action in damages is not to review the legality of a given EU act, such a remedy is complementary to the possibility of contesting the validity of a CFSP decision and therefore should be

perspective, it is not surprising that the Court, in *Bank Refah*, departed from *Rosneft* and used a different approach to establish its jurisdiction as regards actions for damages in relation to CFSP decisions providing for restrictive measures.²⁴

IV. THE APPROACH IN *BANK REFAH*

In its judgment, the Court of Justice, while dismissing the appeal of Bank Refah, held that “the principle of effective judicial protection of persons or entities subject to restrictive measures requires, in order for such protection to be complete, that the Court of Justice of the European Union be able to rule on an action for damages brought by such persons or entities seeking damages for the harm caused by the restrictive measures taken in CFSP Decisions.”²⁵

In order to reach this conclusion, the Court essentially identifies four arguments. First, the Court recalls that the limited jurisdiction in CFSP matters constitutes an exception to its general jurisdiction under Art. 19 TEU and must, therefore, be interpreted narrowly.²⁶ Second, the ECJ indicates that, while an action for damages is conceptually distinct from legality review, it remains an integral component of the EU system of legal remedies, as well as the right to an effective remedy.²⁷ Third, the Court recalls the rule of law upon which the Union is founded, as well as the right to an effective remedy enshrined in Art. 47 of the Charter of Fundamental Rights, which require that affected parties have access to effective judicial protection.²⁸ Finally, closely related to the latter, the Court emphasizes the need of coherence of the system of judicial protection with particular regard to the functioning of Art. 215 TFEU.²⁹

At first glance, the Court seems to use a number of argumentative fragments, collected in no particular order, without recomposing them into a unitary argument. Indeed, the logical process leading the Court to establish its jurisdiction, as well as the legal basis for this, remains apparently unclear.

On closer examination, however, there is an argument which, more than any other, permeates the overall reasoning of the Court (and bestow coherence on it), namely the need to safeguard the proper functioning of Art. 215 TFEU. The logic of *Bank Refah* seems indeed to be based on the function of the quite complicate procedure laid down

permitted in a system of remedies where the right to effective judicial protection is recognized by Art. 47 of the EU Charter.”

²⁴ See, in contrast to this position, P. VAN ELSUWEGE, J. DE CONINCK, *Action for damages in relation to CFSP decisions pertaining to restrictive measures*, cit. In their view, the Court builds upon the logic which was developed in *Rosneft*.

²⁵ *Bank Refah*, [GC], cit., para. 43.

²⁶ *Ibid.*, para. 32.

²⁷ *Ibid.*, paras 33 and 34.

²⁸ *Ibid.*, paras 35 and 36.

²⁹ *Ibid.*, paras 37, 38 and 39.

by Art. 215 TFEU. In the words of the Court, this provision establishes a “bridge” between the objectives of the EU Treaty in CFSP matters and the EU actions involving economic measures falling within the scope of the TFEU.³⁰ This assumption prompts the Court to argue that this “bridge”, by combining the two spheres of competencies, creates a regime on restrictive measures in which there is no reason to distinguish, as regard judicial protection, sanctions based on regulations from those based on CFSP acts. In the words of the Court, if the European judicature has jurisdiction to rule on an action for damages with regard to restrictive measures set out in regulations based on Art. 215 TFEU,³¹ the necessary coherence of the system of judicial protection “requires that, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned, the Court [...] must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP Decisions”.³²

Based on that logic, the solution of extending the action for damages to CFSP decisions therefore derives from the need to ensure the coherence of the system of judicial protection with respect to the overall restrictive measures, regardless of their nature CFPS, non-CFSP.³³ Since this need ultimately stems from the “bridge” built by Art. 215 TFEU, it seems reasonable to consider that the legal basis implicitly conferring jurisdiction on the Court is precisely that Art.³⁴

V. ART. 215 TFEU AS THE LEGAL BASIS OF A LEGAL SUB-SYSTEM

The extension of the Court’s jurisdiction deriving from Art. 215 TFEU may have significant effect on the EU legal order, in both practical and theoretical terms. If Art. 215 requires the ECJ to extend the availability of the action for damages to CFSP acts, that Art. is not only a “bridge” linking CFSP decisions to substantive policies; it is also a “bridge” in a different

³⁰ *Ibid.*, para. 38. The expression “bridge” was first used in *Kadi I* (Court of Justice, judgment of 3 September 2008, joined cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para. 197). The Court considered that Art. 215 TFEU constitutes “a bridge [...] constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU Treaty in the sphere of external relations, including the CFSP.”

³¹ *Bank Refah*, [GC], cit., para. 37.

³² *Ibid.*, para. 39.

³³ If the rationale for this solution is therefore based on the need to preserve the unity and coherence of the sanctioning regime, this implies that, in contexts where there is no such a need, the right to compensation could not be invoked. This would happen, for example, within the context of EU Common Security and Defence Policy (CSDP) military missions for purported human rights violations occurring in the context thereof. See, for a different approach, P. VAN ELSUWEGE, J. DE CONINCK, *Action for damages in relation to CFSP decisions pertaining to restrictive measures*, cit.

³⁴ This effect can be legally explained by recourse to the doctrine of the implied powers, by virtue of which the organization or institution is reputed to possess, besides the powers expressly transferred to it, other powers, necessary to carry out its tasks efficiently.

and deeper meaning. By extending the system of judicial protection to CFSP decisions providing for sanctions, Art. 215 TFEU has the additional effect of incorporating such decisions into the judicial framework of the TFEU and making them subject to its rules.

Against this background, Art. 215 TFEU cannot be regarded as a mere legal mechanism that links two autonomous acts, each based on its own legal basis and each adopted through its own procedure, as the Court seems to assume in *Bank Mellî*.³⁵ Suggestive as it may be, the metaphor of the “bridge” fails to explain why two autonomous acts, albeit linked, need to be subject to the same judicial remedies.

Rather, by connecting a CFSP decision to a regulation and subjecting the former to the judicial remedies provided for the latter, art. 215 TFEU seems to create a regime on restrictive measures with its own unity and coherence. A simply logical argument, more than any other, supports this finding. As already noted, in extending the action for damages to CFSP decisions, the Court stresses the importance of the “coherence of the system of judicial protection”.³⁶ Since the need for consistency arises in relation to a legal regime, the Court’s emphasis on the need for consistency in the legal protection of persons affected by both regulations and CFSP decisions would make little sense if the mechanism established by art. 215 TFEU did not create a unitary system of sanctions. If this assumption is correct, *Bank Refah* conveys the idea that Art. 215 TFEU, far from establishing a sequence of autonomous acts, instead establishes an integrated, albeit *sui generis*, regime in which CFSP decisions and regulations are interdependent of each other.³⁷

From this partially different perspective, it is therefore not unreasonable to assume that Art. 215 TFEU, by allowing the Court to extend its jurisdiction over CFSP decisions despite the “claw-back” clause precluding it, cannot be regarded as a simply “bridge” between the CFSP and other substantive competences, but as a kind of “integration clause”.

³⁵ In *Bank Mellî* (Court of Justice, judgment of 16 November 2011, case C-548/09 P, para. 71) the Court stressed the autonomy of each of the two acts, which have to be adopted each according to its own procedure. The CFSP act appears thus as a mere condition for the adoption of the restrictive measures by the Council, by a qualified majority, on a joint proposal of the High representative for CFSP and the Commission, whilst Parliament is merely informed. On this regard, see E. CANNIZZARO, *The EU Antiterrorist Sanctions*, cit.: “[H]aving asserted the formal autonomy of the two acts which formed the sequential procedure established by Article 215, the Court abstained from dealing with the insidious issue of their substantial autonomy and did not seize the opportunity to clarify the respective roles of the two components of the ‘bridge’ constructed by that provision.”

³⁶ *Bank Refah*, [GC], cit., para. 39.

³⁷ For the limited purpose of the present contribution, there is no need to enter into this very complex discussion and to determine the various possible implications deriving from this reconstruction.

VI. IS THERE A UNITARY NORMATIVE PARADIGM IN THE AREA OF RESTRICTIVE MEASURES?

Following this line of reasoning, however, one may wonder whether the conclusion that Art. 215 TFEU establishes a new competence – whose decision-making procedure is based on a sequence of acts that not only combines CFSP and a specific substantive competence of the EU, but also establishes a unified legal regime on restrictive measures – is consistent with the general framework of relations between CFSP and substantive policies. In other words, the question arises as to whether the EU system as a whole makes it possible to consider the area of the economic sanctions as a unitary regime endowed with homogeneous judicial rules which apply indifferently to the CFSP and TFEU. As a result, in relation to the area of restrictive measures there would be no difference between the CFSP and TFEU acts as regards the applicable judicial remedies. If this is the case, the paradigm of unity between the CFSP and the TFEU would then be realized in this limited area.

In this respect, without providing a comprehensive answer to this question, the Court seems to add another piece to a series of recent cases which helped to understand the post-Lisbon framework.³⁸ The Court clarifies, at para. 47 of the *Bank Refah* judgment, that

“the Treaty of Lisbon, [...], has, by giving the European Union a single legal personality, enshrined in Article 47 TEU, put an end to the distinction that had previously been drawn between the European Community and the European Union. This has resulted in particular in the integration of CFSP provisions into the general framework of EU law, although the CFSP is nevertheless subject to specific rules and procedures, as laid down in Article 24 TEU”.³⁹

This paragraph is rather ambiguous.⁴⁰ On the one hand, the Court unequivocally confirms that CFSP is a fully integrated part of EU law subject to its constitutional values and provisions. On the other hand, the Court stresses that the CFSP continues to be different from the other substantive policies, as it is subject to its own procedures and norms.

³⁸ See footnote 8 above.

³⁹ *Bank Refah*, [GC], cit.

⁴⁰ It must be considered that this conclusion is used by the Court to exclude that the provisions of the TEU relating to the powers of the ECJ, applicable before the entry into force of the Treaty of Lisbon, and, by extension, its judgments, are relevant “for the purposes of assessing the current scope of the powers of the Court of Justice of the European Union in CFSP matters” (*ibidem*, para. 48). The Council had claimed that it appeared from the *Segi* and *Gestoras* judgments (Court of Justice, judgment of 27 February 2007, cause C-355/04 P, *Segi and Others v. Council*; judgment of 27 February 2007, cause C-354/04 P, *Gestoras Pro Amnistia and Others v. Council*) that the Treaties in force at the time did not confer on the Court of Justice any jurisdiction to hear an action for damages in relation to the CFSP and that that interpretation should be applied in the post-Lisbon framework.

Hence, the dilemma remains: unity or fragmentation in the EU's external action? There is no conclusive answer to this dilemma in legal theory and practice. Rather, the Court seems to maintain that the essence of the relationship between the CFSP and substantive policies lies precisely in this dilemma. In other words, the Court seems to indicate that the Lisbon Treaty has created a crucible, where different, and possibly antithetical, theoretical options have been put together, without one predominating over the others.

If this reading is correct, the prevalence of the paradigm of unity over that of fragmentation, and vice versa, would ultimately depend on the interaction between CFSP and substantive policies in the concrete case. In this perspective, the post-Lisbon framework would not prevent the area of sanctions provided for in Art. 215 TFEU from being regarded as a unified system in which the various restrictive measures, irrespective of their CFSP and TFEU nature, are subject to the same judicial remedies. Rather, the area of the restrictive measures would exemplify precisely those areas where the paradigm of unity prevails over that of fragmentation.⁴¹

VII. CONCLUDING REMARKS

In what appears to be a rather specific and technical issue relating to the submission of a CFSP decision providing for restrictive measures to an action for damages, the Court provides an explanation of the system of relations between CFSP and substantive competences. The conclusions to be drawn are therefore two.

On the one hand, the judgment is a vivid illustration of the difficulty of integrating the CFSP into the EU framework, without, at the same time, dismantling or reducing the normative and institutional barriers deriving from the co-existence of a plurality of rules and procedures. It is indeed difficult to imagine that CFSP may be fully integrated into the EU framework as long as it is subject to specific rules and procedure. Although the Court emphasizes the new structure of the EU and the end of the distinction between its TFEU and CFSP components, the paradigm of the unity of the EU's external action currently appears to be a chimera.

⁴¹ The model provided for by Art. 215 TFEU has inspired, in other areas, practical arrangements implemented, where the need was felt, to establish an informal coordination between the CFSP and other EU substantive policies. An example, among others, is provided by the rules governing the operation of the European satellite radio-navigation system (see Council Decision 2014/496/CFSP of 22 July 2014 on aspects of the deployment, operation and use of the European Global Navigation Satellite System affecting the security of the European Union and repealing Joint Action 2004/552/CFSP and Regulation (EU) 512/2014 of the European Parliament and of the Council of 16 April 2014 amending Regulation (EU) 912/2010 setting up the European GNSS Agency). Provided that such a regime can be regarded as a unified regime, the question remains whether the Bank Refah judgment may have broader implications, going beyond the specific situation relating to the restrictive measures.

On the other hand, the Court recognizes that, in some areas of interaction,⁴² CFSP and TFEU components can be reconciled in a legally unified framework, which requires homogeneity and coherence. In these circumstances, it is precisely the need for coherence that demands the CFSP component to be subject, as far as possible, to the same judicial remedies as those of the TFEU component. In this conclusion, the paradigm of unity in the interaction between the CFSP and other competences seems to re-emerge. The "integration of CFSP provisions into the general framework of EU law"⁴³ would occur precisely in relation to the sector of restrictive measures which, through Art. 215 TFEU, brings a unified framework between the CFSP and other external policies. Of course, the question remains how far this approach can be stretched, in the light of the clear limitations set out in Art. 275, para. 2, TFEU.

In any case, in *Bank Refah*, without providing a definitive answer, the Court indicates, perhaps for the first time, that the persistence of fragmentation in the EU's external action does not prevent the emergence of a unitary sub-systems, subject to a homogeneous judicial scrutiny. This judicial review is clearly that of the TFEU and not that of the CFSP, even if, in principle, the opposite hypothesis would be possible.⁴⁴ In the light of this finding, it seems reasonable to conclude that the Court adopts a very integrationist approach. Hence the question: are we moving towards a creeping communitarisation of the CFSP?

⁴² Above footnote 41.

⁴³ *Bank Refah*, [GC], cit., para. 47.

⁴⁴ For a discussion on this topic see E. CANNIZZARO, *The EU Antiterrorist Sanctions*, cit., p. 535. In the view of the A., there are at least two ways to bring unity and coherence to the EU's external system: "one leading to the full absorption of the CFSP in EU substantive policies on the external plane; one leading to the opposite extreme, to a creeping intergovernmentalisation of these substantive policies, with an indeterminate number of options in the middle".

