



ARTICLES

THE REVISED DRAFT AGREEMENT ON THE ACCESSION OF THE EU TO THE ECHR

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THE (IM)POSSIBILITY OF A CFSP “INTERNAL SOLUTION”

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ABSTRACT: There is one obstacle to the EU’s accession to the ECHR that the negotiators were unable to overcome in the revised DAA: the CJEU’s limited jurisdiction over the Union’s Common Foreign and Security Policy (CFSP). Carving out CFSP cases from the ECtHR’s jurisdiction was taken off the table already during the first round of DAA negotiations back in 2010–2013. During the renegotiations the parties made several attempts at drafting a DAA provision that would otherwise solve the issue. Ultimately, the EU side conceded and promised to resolve it internally. After abandoning the idea of an interpretative declaration that would “clarify” that the CJEU has jurisdiction over human rights violations in the CFSP area, the EU side were hoping that the *KS and KD* case would magically solve the issue for them. However, while *KS and KD* does provide some answers, serious questions remain. This could force the EU side to find a proper solution to the CFSP issue.

KEYWORDS: EU accession to the ECHR – Common Foreign and Security Policy (CFSP) – Court of Justice of the European Union (CJEU) – *Opinion 2/13* – judicial protection – political questions doctrine.

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I. INTRODUCTION

One of the CJEU's key objections to the 2013 Draft Accession Agreement (DAA) was its failure to "have regard to the specific characteristics of EU law with regard to the judicial review" of the Union's own conduct under the Common Foreign and Security Policy (CFSP).¹ These specific characteristics are set out in art.24(1) TEU and art.275(1) TFEU, according to which the CJEU "shall have no jurisdiction" over the treaty provisions relating to the CFSP and acts adopted on the basis of them. This jurisdictional carve-out is subject to two exceptions (claw-backs).² Firstly, the CJEU has jurisdiction to prevent the encroachment of purported CFSP acts on other policy areas.³ Secondly, the CJEU has jurisdiction to review the legality of "restrictive measures" adopted under TFEU art. 275.

Upon accession to the European Convention on Human Rights (ECHR), as envisaged in the 2013 DAA, it would be possible for litigants to file applications against the Union itself before the European Court of Human Rights (ECtHR). In *Opinion 2/13* the CJEU held that, post-accession, the ECtHR would have jurisdiction to rule on the ECHR compatibility of the Union's conduct under the CFSP – "notably [conduct] whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights".⁴

During the (re-)negotiations of the DAA between 2020 and 2023, the issue of how to properly take into account the specific characteristics of the CFSP when it comes to judicial review proved difficult to resolve – not due to negotiations bogging down, but because the proposed solutions proved to be unworkable.

Ultimately, the negotiators gave up on resolving the CFSP issue in the accession agreement, with the EU side promising to resolve it internally.⁵ However, no consensus emerged among the EU Member States and Union institutions on such an internal solution.⁶ The EU side for a long time appeared to be in "wait-and-see" mode, hoping that the CJEU would cut this Gordian knot with its judgment in *KS and KD*.⁷

In this article, I analyse and assess the different ways of solving this CFSP issue. Which solutions are legally possible and workable in practice?

In section II, I outline and discuss the two options considered in some depth during and after the DAA (re-)negotiations: a "retribution mechanism" (II.2) and an "interpretative declaration" to extend the CJEU's jurisdiction over the CFSP (II.3). In doing so, I will demonstrate that both options are legally impossible and/or practically unworkable.

¹ *Opinion 2/13 Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 257.

² The scope of the carve-out and the claw-backs have been the subject of significant academic debate and a long line of CJEU case law. See section III below for an overview.

³ See the reference to art. 40 TEU in both art. 24(1) TEU and art. 275(1) TFEU.

⁴ *Opinion 2/13* cit. para. 254.

⁵ 46+1 ad hoc group, Report of the 18th Meeting, 46+1(2023)R18 of 17 March 2023 on the Accession of the European Union to the European Convention on Human Rights.

⁶ Steering Committee for Human Rights (CDDH), Report of the 99th Meeting CDDH(2023)R99 of 11 December 2023, para. 7.

⁷ *Ibid.* para. 7.

Then, in section III, I consider the extent to which the CJEU itself can and will resolve the issue by interpreting the scope of its jurisdiction over the CFSP so widely that it encompasses all potential ECHR violations. Finally, in section IV I conclude by defending the only option that is both guaranteed to work and technically simple: extending the jurisdiction of the CJEU by amending the EU treaties.

II. THE MAIN OPTIONS CONSIDERED BY THE NEGOTIATORS

II.1 INTRODUCTION

From a high-level perspective, there are essentially three possible ways to approach the CFSP issue: (a) carving out the CFSP from the jurisdiction of the ECtHR, (b) extending the CJEU's jurisdiction over the CFSP, or (c) ensuring that only EU Member States, and not the Union, are held responsible in CFSP cases before the ECtHR.

Option (a) was taken off the table more than a decade ago, during the first round of accession negotiations.⁸ Option (b) was deemed unattractive at the outset of the re-negotiations, since there is little appetite among EU Member States for amending the EU treaties.⁹

Thus, unsurprisingly, the negotiators focused their initial effort towards option (c). Many ideas were mooted and discarded.¹⁰ Only one of them was discussed at length, namely the establishment of a mechanism that would “reattribute” CFSP conduct from the Union to (one or more) EU Member States.

⁸ 47+1 ad hoc group, Chairperson's proposal on outstanding issues, 47+1(2013)004, 14 January 2013, 3; 47+1 ad hoc group, Fourteen non-EU parties to the ECHR, 'Common Paper on Major Concerns Regarding the Draft Revised Agreement on the Accession of the EU to the ECHR', 47+1(2013)003, 21 January 2013, para. 9; 47+1 ad hoc group, Report of the Fourth Negotiation Meeting 47+1(2013)R04 of 23 January 2013 between the CDDH and the European Commission on the Accession of the European Union to the European Convention on Human Rights, para. 9.

⁹ See e.g. 47+1 ad hoc group, Report of the Eighth Negotiation Meeting 47+1(2021)R8 of 4 February 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 7.

¹⁰ Including, rumours suggest the creation of an administrative CFSP complaints procedure within the framework of the EU Council. The idea apparently was that the decisions of such an administrative review mechanism/board could be brought before the EU courts (likely as an action for annulment before the General Court). The only trace of this in publicly available documents is an oblique reference to a “third option” in Steering Committee for Human Rights (CDDH), Report from the 98th Meeting CDDH(2023)R98 of 20 July 2023 para. 10.

II.2 A “REATTRIBUTION MECHANISM” TO ENSURE THAT EU MEMBER STATES ARE EXCLUSIVELY RESPONSIBLE FOR CFSP CONDUCT OUTSIDE THE SCOPE OF CJEU JURISDICTION

The so-called “retribution mechanism”, proposed by the EU side during the DAA re-negotiations, constituted the most developed attempt at solving the CFSP issue in the accession agreement. Yet, it was not the object of much real discussion. The EU side tabled a text, received a bucketload of critical and clarifying questions they were not able to answer, and ultimately withdrew the proposal. It is still worth briefly outlining it, in order to explain why such a mechanism is unworkable in practice. In particular because the impossibility of this option led the EU side to decide to resolve the CFSP issue internally.

The mechanism evolved gradually. After some exploratory discussions during the first few (re-)negotiation meetings in 2020,¹¹ the EU side presented some “building blocks” towards a solution of the CFSP issue at the ninth meeting of the 47+1 *ad hoc* group in March 2021.¹² What the EU side suggested was a mechanism that would reattribute any Union act under the CFSP that falls outside the scope of CJEU jurisdiction to (one or more) EU Member State(s). It argued that such a mechanism would essentially circumvent the issue by ensuring that no CFSP conduct would ever be attributable to the Union itself in cases that reached the ECtHR.

The EU side was then invited to submit concrete proposals for how such a mechanism could be worded.¹³ Taking up this challenge, it submitted a non-paper in November 2021 containing the following proposal for a new DAA art. 1(4a):

“Where an application has been brought against the European Union in relation to an act, measure or omission of a European Union institution, body, office or agency or of persons acting on their behalf which falls in the scope of the Common Foreign and Security Policy according to the assessment by the European Union, that act, measure or omission shall be attributed to one or more member States of the European Union, for the purposes of the Convention, of the protocols thereto and of this Agreement, if the European Union has designated that member State or those member States of the European Union as responsible for that act, measure or omission by means of a reasoned declaration.

To that end, in case the Court of Justice of the European Union has not yet had the opportunity to assess its jurisdiction in relation to the compatibility with the rights at issue contained in the Convention and/or of the protocols thereto of the EU act, measure or omission, upon a reasoned request by the European Union to the Court, sufficient time shall be afforded to the Court of Justice of the European Union to make such an assessment on the basis of which the Union or the Member State(s) shall be the respondent.

¹¹ See e.g. 47+1 *ad hoc* group, Report of the Sixth Negotiation Meeting 47+1(2020)R6 of 22 October 2020 on the Accession of the European Union to the European Convention on Human Rights, para. 38.

¹² 47+1 *ad hoc* group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 of 25 March 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 11.

¹³ *Ibid.* para. 116.

In the latter case, the Member State(s) designated will become respondent(s) and the action shall be deemed to be directed against the designated member State(s).

Where remedies have not been exhausted in at least one Member State jurisdiction, the proceedings before the Court are to be stayed in order to allow the applicant to pursue domestic remedies in the designated Member State(s), if those remedies are still available”.¹⁴

During the 12th negotiation meeting, in December 2021, negotiators considered the EU proposal. Non-EU delegations asked an array of pertinent questions, such as the criteria for reattribution, how the exhaustion of domestic remedies would be handled in practice, and how judgments could be enforced in the absence of the EU as a respondent.¹⁵

The EU side was asked to provide “more elaborate answers” to the many questions asked.¹⁶ However, during the next negotiation meeting, in May 2022, the EU side found itself unable to provide proper answers, and explained that the difficulty in answering the questions had led them to reconsider the reattribution mechanism altogether.¹⁷

Between those two negotiation meetings, scepticism of the mechanism had materialised within the EU Council working party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP). Discussions there had revealed worries that “such a decentralized mechanism of control of EU legal acts by national courts would pose legal difficulties of principle in terms of the judicial architecture of the Union”.¹⁸ Indeed, this would mean accepting the review by domestic courts of Union conduct without the key mechanisms ensuring uniformity in interpretation and determination of the validity of EU acts – notably the preliminary ruling procedure and the *Foto-Frost* doctrine.¹⁹ This is possibly the situation even today, since art. 274 TFEU strips the Union of its jurisdictional immunity *vis-à-vis* the domestic courts of its Member States in cases where the CJEU lacks jurisdiction.²⁰ Yet, openly admitting that fact was probably uncomfortable.²¹ Moreover,

¹⁴ 47+1 ad hoc group, Negotiation Document of the 12th Meeting on the Accession of the European Union to the European Convention on Human Rights, Proposals in the Area of Basket 4 (“Common Foreign and Security Policy”) rm.coe.int.

¹⁵ 47+1 ad hoc group, Report of the 12th Negotiation Meeting 47+1(2021)R12 of 10 December 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 12.

¹⁶ *Ibid.* para. 13.

¹⁷ 46+1 ad hoc group, Report of the 13th Negotiation Meeting 46+1(2022)R13 of 13 May 2022 on the Accession of the European Union to the European Convention on Human Rights, para. 37.

¹⁸ Council Legal Service Opinion 10360/22 of 16 June 2022, Interpretative Declaration Concerning the Last Sentence of the Second Subparagraph of Article 24(1) TEU and the First Paragraph of Article 275 TFEU (Competence of the Court of Justice in CFSP Matters) – Compatibility with the Treaties, para. 11.

¹⁹ C Timmermans, ‘EU Common Foreign and Security Policy and Protection of Fundamental Rights’, in J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice* (Brill Nijhoff 2017) 291, 304.

²⁰ RA Wessel, ‘Immunities of the European Union’ (2014) *International Organizations Law Review* 395, 401 ff.

²¹ As it probably also was for the CJEU in Opinion 2/13 cit., see C Timmermans, ‘EU Common Foreign and Security Policy and Protection of Fundamental Rights’ cit. 304.

delegations from several EU Member States pointed out practical and legal difficulties that such a solution would pose for their national law.²²

A reattribution mechanism could also have faced legal difficulties under Union law. The EU treaties establish the CFSP as a Union competence, which is to be exercised by its organs (notably the Council and its subsidiary bodies).²³ At least at first glance there appears to be a tension between this distribution of competences and a reattribution mechanism *post facto* recharacterising Union acts under the CFPS as acts of the Member States. That said, attribution of conduct is conceptually distinct from the issue of competences. Attribution is concerned with conduct: acts and omissions. It is irrelevant for attribution purposes whether, for example, an international organisation's act is *ultra vires*.²⁴ What matters is whether an organ or agent of the international organisation performed the act in question. Attribution is thus conceptually distinct from competence distribution. A reattribution mechanism would therefore perhaps not threaten the autonomy of Union law after all.

The proposed reattribution mechanism continued to appear in consolidated drafts of the DAA until February 2023.²⁵ However, the EU side had in reality moved on.

II.3 AN “INTERPRETATIVE DECLARATION” TO EXTEND THE CJEU’S JURISDICTION OVER THE CFSP

As it became clear that the “reattribution mechanism” would be unworkable, discussions of possible EU-internal solutions deepened within the FREMP working party. During the spring of 2022, the idea of an interpretative declaration on the scope of the CJEU’s jurisdiction emerged as a promising alternative.²⁶ In mid-May 2022, the Commission submitted a non-paper containing a draft text of such a declaration, which had been drafted in consultation with the Council Presidency.²⁷

²² Council Legal Service Opinion 10360/22, cit. para. 11.

²³ See e.g. arts 26 and 28–29 TEU, which set out a range of competences that “shall” be exercised by the Council. For civilian and military missions under the Common Foreign and Defence Policy, arts 42–44 TEU provide that the Union “may” entrust such missions to a group of Member States. However, such missions are typically carried out under Union command, with Member States seconding assets to the mission.

²⁴ See International Law Commission, Draft Articles on the Responsibility of International Organisations of 2011, UN Doc A66/10 legal.un.org art. 7.

²⁵ 46+1 ad hoc group, Consolidated Version of the Draft Accession Instruments (as of 16 December 2021) of the 12th Negotiation Meeting 47+1(2021)17 of 16 December 2021 on the Accession of the European Union to the European Convention on Human Rights; 46+1 ad hoc group, Consolidated Version of the Draft Accession Instruments (as of 2 February 2023) of the 18th Negotiation Meeting 46+1(2023)31 of 16 February 2023 on the Accession of the European Union to the European Convention on Human Rights.

²⁶ Council Legal Service Opinion 10360/22 cit. para. 2.

²⁷ *Ibid.*

Sadly, this draft text is not available to the public.²⁸ However, the substantive content of the draft interpretative declaration can be deduced from a legal opinion of the Council Legal Service, which assesses the declaration’s compatibility with the EU treaties.²⁹

The first part of the draft interpretative declaration consists of three paragraphs recalling three key points:³⁰ (a) that the EU is under an obligation to accede;³¹ (b) that accession is only possible if jurisdiction to carry out judicial review over Union conduct is not conferred exclusively on the ECtHR;³² (c) that the EU has a complete system of legal remedies to ensure judicial review of Union conduct based on the EU treaties and the Charter of Fundamental Rights.³³

The second part of the draft declaration recalls that the CFSP is subject to specific rules and procedures, notably that the jurisdiction of the CJEU is “very limited”.³⁴ However, this jurisdictional carve-out must be interpreted narrowly due to its character as an exception to the general jurisdiction of the CJEU laid down in art. 19 TEU.³⁵

The crux of the draft interpretative declaration is its third and final part, which constitutes an attempt to resolve the tension between the points recalled in the two first parts. It does so by first establishing the need to ensure the consistency between provisions in the EU treaties that provide for accession and access to justice³⁶ and the CFSP jurisdictional carve-out³⁷. Then it expresses the interpretation of the EU Member States of those provisions, the purpose of which is to ensure both consistency between, and the effectiveness (*effet utile*) of, all those provisions:

“the Treaties must be interpreted as granting the Court of Justice jurisdiction related to, and strictly within the limits of, actions introduced by applicants who claim they are victims of violations of fundamental rights caused by acts, actions or omissions by the European Union that, following the Union’s accession to the European Convention on Human Rights, would be amenable to judicial review by the European Court of Human Rights (strict parallelism between the jurisdiction of the two courts)”.³⁸

²⁸ It should be contained in EU Council Working Document WK 7238/2022, which I have been refused access to.

²⁹ Council Legal Service Opinion 10360/22 cit. particularly at paras 22–28.

³⁰ *Ibid.* para. 23.

³¹ Art. 6(2) TEU.

³² Opinion 2/13 cit. para. 256.

³³ See e.g. case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 66, with further references.

³⁴ Council Legal Service Opinion 10360/22 cit. para. 26.

³⁵ *Ibid.* paras 25–26. In making this point, the draft declaration allegedly cites case C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025 para. 70.

³⁶ Arts 6(2) and 19 TEU, as well as art. 47 of the Charter of Fundamental Rights of the European Union [2012].

³⁷ Art. 24(1) TEU and art. 275 TFEU.

³⁸ Council Legal Service Opinion 10360/22 cit. para. 27 (underline in original). This is probably not the exact wording of the declaration, but a paraphrasing by the Council Legal Service.

The legal effect of such an interpretative declaration is not evident. In the opinion of the Council Legal Service, such an interpretative declaration would limit itself to “reflect an agreed interpretation rendered necessary by the introduction of art. 6(2) TEU by the Treaty of Lisbon, [which] would not contradict the Treaties nor amend them”.³⁹ This, however, seems to mask the purpose of making such a declaration in the first place. Its actual purposes seems to be to rebut the CJEU’s finding in *Opinion 2/13* that, post-accession, there would indeed be CFSP cases over which the ECtHR would have jurisdiction, but not the CJEU.⁴⁰ The declaration seems premised on a reading of this part of *Opinion 2/13* as a mere assumption, rather than a final determination – probably because the CJEU’s finding is prefixed by the statement that “the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters”.⁴¹

There may, in other words, be a straw to grasp here. There is, moreover, some precedence for such interpretative declarations. In *Rottmann*, the CJEU held that similar interpretative declarations were relevant for the interpretation of the EU treaties.⁴² However, it remains unclear whether such declarations carry much weight. Perhaps for that reason the Council Legal Service admits that “it cannot be excluded that the Court of Justice would make a literal reading of Article 24(1) TEU and Article 275 TFEU, and may decide that such a declaration is insufficient”.⁴³

Moreover, the interpretative declaration is problematic for other reasons, which are not discussed in the Council Legal Service’s opinion.

One particularly problematic aspect is that the proposed interpretation defines the scope of the CJEU’s jurisdiction in a manner that threatens the autonomy of Union law. The proposed declaration seeks to ensure “strict parallelism between the jurisdiction of the two courts” by delimiting the scope of the CJEU’s jurisdiction over CFSP cases to those cases which are amenable to judicial review by the ECtHR. Thus, the scope of the CJEU’s jurisdiction over the CFSP would not be finally determined by the CJEU itself, but by the ECtHR. Given how dearly the CJEU guarded the autonomy of Union law in *Opinion 2/13*, it seems highly unlikely that such a parallelism would be deemed acceptable.

Another problematic aspect is that the content of the declaration is very difficult to square with the language used in art. 24(1) TEU and art. 275 TFEU. The critique that such a declaration would not entail a (re)interpretation, but rather a rewriting of those treaty provisions, has already been voiced by the French Senate, which in March 2023 declared the proposed interpretative declaration unacceptable: “such a declaration would be contrary to the Treaties which have been ratified by the Member States in accordance with their respective constitutional rules and would in fact amount to a revision of the Treaties,

³⁹ Council Legal Service Opinion 10360/22 cit. para. 28.

⁴⁰ Opinion 2/13 cit. para. 254.

⁴¹ Opinion 2/13 cit. para. 251 in fine.

⁴² Notably in case C-135/08 *Rottmann* ECLI:EU:C:2010:104 para. 40.

⁴³ Council Legal Service Opinion 10360/22 cit. para. 30.

exempt from the control of national parliaments, according to methods which are not provided for in Article 48 of the Treaty on European Union”.⁴⁴

The rejection of the interpretative declaration by the French Senate may explain why the FREMP working party of the EU Council seemed to turn their attention elsewhere during 2023.

III. EXTENSION BY INTERPRETATION – WITHOUT A DECLARATION – AS THE WAY FORWARD?

After years of going down blind alleys, a case before the CJEU offered an opportunity for a dramatic conclusion to the (re-)negotiation process. The case in question was *KS and KD*, an action for damages against the Council, the Commission, and the European External Action Service.

The applicants – KS and KD – are relatives of persons who disappeared or were killed in Kosovo in 1999. They claim that EULEX Kosovo failed to carry out an effective investigation into those deaths, thus violating their procedural rights under arts 2 and 3 ECHR, as well as art. 13 ECHR (and corresponding provisions of the Charter of Fundamental Rights).

Previously, the applicants had successfully argued their cases before the EULEX Kosovo Human Rights Review Panel (HRRP).⁴⁵ However, as an inspection and review panel, the HRRP merely had jurisdiction to make recommendations to the EULEX head of mission.⁴⁶ Those recommendations were only partially implemented.⁴⁷

Dissatisfied with the outcome of the HRRP proceedings, KS and KD decided to pursue their cases before the courts. KS brought an action before the General Court in 2017, but it was dismissed for manifest lack of jurisdiction.⁴⁸ Rather than file an appeal, KS joined KD (and others) in a lawsuit before the High Court of Justice (England & Wales). They argued that UK Courts should assert jurisdiction, pointing to art. 274 TFEU and the General Court’s dismissal of the action brought by KS. However, also the High Court dismissed their case due to lack of jurisdiction, and refused permission to appeal.⁴⁹

⁴⁴ French Senate, *Résolution Européenne sur le volet relatif à la politique étrangère et de sécurité commune des négociations d’adhésion de l’Union européenne à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales* www.senat.fr (my translation).

⁴⁵ HRRP, *L.O. v EULEX* (Decision and findings, 11 November 2015) Case 2014-32; HRRP, *Veselinović and Others v EULEX* (Decision and findings, 19 October 2016) joined cases 2014-11 to 2014-17.

⁴⁶ SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020) 170 ff.

⁴⁷ Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others* ECLI:EU:C:2023:901, opinion of AG Ćapeta para. 19, with further references.

⁴⁸ General court, order of 14 December 2017, case T-840/16, *KS v Council and Others* ECLI:EU:T:2017:938.

⁴⁹ UK High Court of Justice of England and Wales judgement of 5 December *Tomanović and Others v the European Union and Others* [2019 EWHC 263 (QB)]. For an analysis of the rather complex reasoning of

KS and KD then turned their attention back to the EU courts, filing an action for damages. In the first instance, the General Court dismissed the case due to manifest lack of jurisdiction in November 2021.⁵⁰ This time around, the applicants appealed, and the Grand Chamber of the CJEU heard the case in June 2023.

KS and KD is a litmus test for whether the CJEU's jurisdiction covers all potential human rights violating conduct under the CFSP, because the alleged violations are a result of the operational conduct of personnel in the field. This is far removed from actions for annulment against "restrictive measures", which is the terms used in the key claw-back provision in art. 275 TFEU.⁵¹

In November 2023, unfazed by such linguistic considerations, Advocate General Tamara Čapeta in her opinion in *KS and KD* concluded that the CJEU nevertheless *has* jurisdiction over *all* fundamental rights violations resulting from CFSP conduct.⁵² Her conclusion rested on rather lofty premises. Echoing *Les Verts* and *Kadi*,⁵³ she postulated that "[i]n a Union based on the rule of law, it could not have been the intention of the authors of the Treaties to allow for breaches of fundamental rights in the CFSP".⁵⁴ According to AG Čapeta, it follows from this that the CJEU's jurisdiction to review the fundamental rights compatibility of CFSP conduct "cannot be excluded by" art. 24(1) TEU and art. 275 TFEU.⁵⁵ To her, then, the reference to restrictive measures in art. 275 TFEU is merely an example of potential fundamental rights violating CFSP conduct, rather than a narrow jurisdictional claw-back.⁵⁶

As a supporting argument, she pointed to the unworkability of leaving CFSP cases to domestic courts, as art. 274 TFEU provides for where the CJEU lacks jurisdiction.⁵⁷ She also emphasised that her interpretation would smoothen the EU accession to the ECHR, by overcoming the CFSP obstacle.⁵⁸

At the same time, she recognized that the CFSP jurisdictional carve-out may serve a (legitimate) purpose, namely to shield sensitive political choices in the foreign policy field

the High Court, see SØ Johansen, 'Suing the European Union in the UK: *Tomanović et. al. v. the European Union et. al.*' (2019) European Papers www.europeanpapers.eu 345.

⁵⁰ Case T-771/20 *KS and KD v Council and Others* ECLI:EU:T:2021:798.

⁵¹ SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* cit. 142 ff.

⁵² *KS and KD v Council and Others*, opinion of AG Čapeta, particularly at cit. paras 116 and 154.

⁵³ Case 294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166, particularly at para. 23; joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* ECLI:EU:C:2008:461, particularly at paras 278–284.

⁵⁴ *KS and KD v Council and Others*, opinion of AG Čapeta, cit. para. 115.

⁵⁵ *Ibid.* para. 116.

⁵⁶ *Ibid.* paras 127–133.

⁵⁷ *Ibid.* paras 134–144.

⁵⁸ *KS and KD v Council and Others*, opinion of AG Čapeta, cit. paras 145–151.

from the jurisdiction of the CJEU.⁵⁹ Still, she stood by her conclusion, asserting that “the breach of fundamental rights cannot be a political choice in the European Union”.⁶⁰

AG apeta’s conclusion may be normatively laudable. It also avoids threatening the autonomy of EU law, since it does not tie the scope of CJEU jurisdiction to the material scope of the ECtHR, like the proposed interpretative declaration would.⁶¹ However, the legal reasoning supporting it is rather weak.

First, her line of reasoning represents a paradigm shift compared with the CJEU’s existing CFSP-related case law. While the CJEU has not yet declined to exercise jurisdiction in a CFSP case, all such cases so far decided have either concerned restrictive measures, or have had some connection with non-CFSP areas of Union law.⁶² In *Elitaliana*, the contested act was alleged to be in violation of EU public procurement law and had implications for the EU budget and Financial Regulation.⁶³ In *H v Council* and *SatCen v KF*, the contested acts were of a staff management nature.⁶⁴

While one can question the degree to which the connections so far identified by the CJEU are solid,⁶⁵ it remains that the CJEU consistently requires a connection to non-CFSP areas of Union law. An action for damages against operational conduct, like *KS and KD*, lacks any plausible non-CFSP connection. By asserting that the CJEU would nevertheless have jurisdiction, AG apeta is thus proposing a paradigmatic shift, which would require entirely novel reasoning and justification from the CJEU.

Second, AG apeta’s interpretation would override the rather clear wording of TEU art. 24(1) TEU and art. 275 TFEU. While it is true that the CJEU in *Les Verts* did use lofty rule of law arguments to override the clear wording of the EU treaties at the time, it did so to correct what appeared to be a drafting oversight.⁶⁶ The situation here is different. Art. 24(1) TEU and art. 275 TFEU expressly carve out much of the CFSP from the jurisdiction of the CJEU. This is not an oversight, but the explicit purpose of those provisions.⁶⁷

⁵⁹ *Ibid.* paras 117–119.

⁶⁰ *Ibid.* para. 155 in fine.

⁶¹ See section II.3 above.

⁶² P Van Elsuwege, ‘Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice’ (2021) CMLRev 1731, 1753.

⁶³ Case C-439/13 P-DEP *EULEX Kosovo v Elitaliana* ECLI:EU:C:2020:14.

⁶⁴ Case C-455/14 P *H v Council and Commission* ECLI:EU:C:2016:569; case C-14/19 P *CSUE v KF* ECLI:EU:C:2020:492.

⁶⁵ Particularly the use of “staff management” as a linking criterion has been criticised. P Koutrakos, ‘Judicial Review in the EU’s Common Foreign and Security Policy’ (2018) ICLQ 1, 12 describes the CJEU’s approach in *H v Council and Commission* as “interpretative acrobatics”, while J Heliskoski, ‘Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ (2018) *Europe and the World: A Law Review* 1, 10 considers the CJEU’s characterization of the contested act in *H v Council and Commission* to be “highly artificial”.

⁶⁶ *Les Verts v Parliament* cit. particularly at paras 24–25.

⁶⁷ J Heliskoski, ‘Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ cit. 4 ff.

Third, in dismissing the potential role of domestic courts under art. 274 TFEU, AG Ćapeta overlooks that the complete system of remedies provided by EU law is a two-way street.⁶⁸ The potential access to domestic courts is a weighty argument against extending the scope of the CJEU's jurisdiction over the CFSP by way of interpretation. The courts of the EU Member States are Union courts too, and can thus also serve as guardians of the Union's legal order.⁶⁹

Acting as Union courts in this manner, they should be able to offer sufficient judicial protection (at least in most cases). A domestic court faced with a damages claim against a CFSP mission must therefore apply the Union law non-contractual liability regime laid down in art. 340(2) TFEU in CFSP cases. They may not apply their national non-contractual liability law regime, as asserted by AG Ćapeta.⁷⁰ Moreover, they would still be able to ask for preliminary rulings on the interpretation of non-CFSP provisions of Union law that are relevant in CFSP cases – notably provisions of the Charter of Fundamental Rights.⁷¹

That CFSP cases are left to the domestic courts of the EU Member States would undoubtedly cause complications than the Union's ordinary judicial architecture avoids,⁷² but those complications are the result of a deliberate choice by the masters of the treaties. EU accession to the ECHR would not exacerbate those complications.

Fourth, the principle of effective judicial protection cannot override these jurisdictional limitations. While it undoubtedly affects the interpretation of art. 24(1) TEU and art. 275 TFEU, it cannot be used to effectively amend those provisions. It also cannot act as a head of jurisdiction on its own. Moreover, the principle of effective judicial protection entails a duty entrusted to both the CJEU and the domestic courts of EU Member States.⁷³ It is therefore possible to respect the limitations set out in art. 24(1) TEU and art. 275 TFEU, while at the same time ensuring effective judicial protection via the domestic courts of EU Member States.

These apparent objections to AG Ćapeta's lines of reasoning⁷⁴ resonate in the judgment that the CJE Grand Chamber handed down on 10 September 2024. Complex and

⁶⁸ A Alemanno, 'What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 324, 328.

⁶⁹ See e.g. Opinion 1/09 *European and Community Patents Court* ECLI:EU:C:2011:123 para. 66.

⁷⁰ *KS and KD v Council and Others*, opinion of AG Ćapeta, para. 144.

⁷¹ C Hillion and RA Wessel, "'The Good, the Bad and the Ugly': Three Levels of Judicial Control over the CFSP", in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 65, 85.

⁷² C Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' *European Papers* www.europeanpapers.eu 55, 63-66. For a discussion of further difficulties, see SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* cit. 154-160.

⁷³ See e.g. Opinion 1/09 cit. paras 68-69.

⁷⁴ Joined cases C-29/22 P and C-44/22 P *KS and KD v Council and Others* ECLI:EU:C:2024:725. As the judgment was handed down while this special issue was in production, the following paragraphs were added as postscript.

perplexing, the Court’s judgment is not easy to decipher. What we can say for sure, though, is that it does not neatly pave the way for EU accession to the ECHR.

The first, and most thoroughly reasoned, of the two main parts of the judgment opens with an outright acknowledgement that the allegedly fundamental rights-violating acts and omissions in the case “do not concern [...] restrictive measures”.⁷⁵ The CJEU then turns to analyse, in essence, whether it has jurisdiction over all allegations of fundamental rights violations – including within the CFSP.

In doing so, it emphasizes that the CFSP is subject to specific rules and procedures (one of which being the rule that the CJEU’s jurisdiction is in principle excluded), and adds that the principles of conferral and institutional balance also apply in the CFSP.⁷⁶ Consequently, the Court finds that the allegations of fundamental rights violations are “not in itself sufficient” for it to have jurisdiction.⁷⁷ Otherwise, art. 24(1) TEU and 275(2) TFEU would be “deprived of their effectiveness in part and the principles of conferral and institutional balance infringed”.⁷⁸ Moreover, as the CJEU stresses by referencing an array of ECtHR case-law, limitations on the jurisdiction of courts in the foreign policy field are compatible with the ECHR.⁷⁹

That KS and KD are bringing actions for damages rather than actions for annulment is, according to the CJEU, of no relevance for this analysis: “neither the exclusive nature of that jurisdiction nor the independent nature of an action to establish non-contractual liability of the European Union can have the effect of extending the limits of the jurisdiction conferred on [the CJEU] by the Treaties”.⁸⁰

That is because, as the CJEU concludes, the jurisdictional limitations in art. 24(1) TEU and art. 275 TFEU are not concerned with “the type of procedure under which the Court may review the legality of certain decisions, 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”.⁸¹

So far, the judgment reads as a total loss for KS and KD, and a rejection of AG apeta’s fundamental rights-oriented reasoning. The CJEU’s emphasis on conferral, institutional balance, the need to ensure that the jurisdictional limitations in the CFSP are not deprived of their effectiveness, and the ECHR-compliant nature of jurisdictional limitations in the

⁷⁵ *KS v Council and Others*, cit. para. 64.

⁷⁶ *Ibid.* paras 65–72.

⁷⁷ *Ibid.* para. 73.

⁷⁸ *Ibid.* para. 73.

⁷⁹ *Ibid.* paras 77–81.

⁸⁰ *Ibid.* para. 91.

⁸¹ *Ibid.* para.92. This issue had arguably already been settled by the CJEU in case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793 paras 23–52. In that case, the CJEU found that it had jurisdiction to hear an action for damages caused by traditional CFSP restrictive measures (targeted sanctions). To the extent the CJEU has jurisdiction *ratione materiae* over other fundamental rights claims in CFSP cases, the general and principled reasoning in *Bank Refah Kargaran* seems easily extendable to such cases.

foreign policy field points towards dismissal. *KS and KD* is a case concerning factual conduct within a CSDP mission – a type of case that is probably the most difficult to square with the language of “restrictive measures” in art. 275 TFEU.⁸² To assert jurisdiction over such conduct, e.g. by classifying it as a “restrictive measure”, seems impossible without undermining the effectiveness of art. 24(1) TEU and 275 TFEU – thus upsetting the institutional balance and violating the principle of conferral.

Surprisingly, however, this is more-or-less what the CJEU appears to do in the second of the two main parts of its judgment in *KS and KD*.

This part of the judgment opens with the assertion by the CJEU that there are two steps that one must take when assessing whether the Court has jurisdiction over a CFSP case. First one must assess whether the case at hand falls within the scope of art. 24(1) TEU and art. 275 TFEU.⁸³ If that is not the case, one must assess whether the jurisdiction of the CJEU “may be based on the fact that the acts and omissions at issue are not directly related to the political and strategic choices” made by Union organs in the context of the CFSP.⁸⁴

It is in this second step that the novelty is hidden – within three paragraphs that to the untrained eye come across as brief restatements of well-established legal principles.⁸⁵ The CJEU alleges that it is “apparent, in essence” from the above-mentioned cases of *Elitaliana, H*, and *SatCen* that only issues directly related to “political and strategic choices” fall outside the scope of the CJEU’s jurisdiction. However, such a distinction is not drawn in any of these three cases. As pointed out above, the lines of reasoning adopted in *Elitaliana, H*, and *SatCen* emphasize the connection between the CFSP conduct at hand and a non-CFSP policy area. The “political and strategic choices”-test that suddenly appears in *KS and KD* is paradigmatically different.

The CJEU offers no further reasoning for this paradigm shift, that appears to significantly expand its jurisdiction over the CFSP. It merely formulates a new test with no obvious root in provisions of the Treaties. This is perplexing, given the Court’s emphasis on the principle of conferral and institutional balance in the first main part of the judgment.

At the same time, the new test is in line with AG Čapeta’s opinion. She also drew an initial distinction between “political or strategic decisions, on the one hand, and merely administrative CFSP measures, on the other” – based on speculation that this “might reflect the intention of the authors of the Treaties”.⁸⁶ The key difference between her and the Court is thus that AG Čapeta wanted to go further. She claimed that the CJEU had

⁸² M Spornbauer, *EU Peacebuilding in Kosovo and Afghanistan: Legality and Accountability* (Brill Nijhoff 2014) 361; SØ Johansen, *The Human Rights Accountability Mechanisms of international Organizations* cit. 142.

⁸³ *KS v Council and Others* cit. para. 115.

⁸⁴ *Ibid.* para. 116.

⁸⁵ *Ibid.* paras 116–118.

⁸⁶ *KS and KD v Council and Others*, opinion of AG Čapeta, cit. para. 112.

jurisdiction to review “any CFSP measure, including a political and strategic one” in light of fundamental rights.⁸⁷

Having set out its new test, the CJEU turns to applying it to the acts and omissions that were alleged by KS and KD as constituting fundamental rights violations.⁸⁸ It finds that allegations of lack of resources to conduct an effective investigation and the decision to remove EULEX Kosovo’s executive mandate concerns “political and strategic choices” – thus falling outside the jurisdiction of the CJEU. The other allegations, however, were considered to fall within the scope of the CJEU’s jurisdiction. These included allegations of a lack of appropriate personnel to perform an effective investigation, and the failure to take remedial action following KS and KD’s successful complaint to the Human Rights Review Panel.

Having thus reached a different outcome than the General Court, but without having the necessary information to render a final decision, the CJEU remanded the case to the General Court.⁸⁹

From the perspective of EU accession to the ECHR, it is difficult to say what to make of *KS and KD*. On the one hand, the CJEU’s new test seems to expand its jurisdiction over the CFSP quite significantly. Much CFSP conduct that was hard to imagine as falling within the scope of the CJEU’s jurisdiction will, according to the new test, clearly fall within it.

On the other hand, there is fundamental rights-relevant conduct – such as (inadequate) funding – which we now know does fall outside the scope of the CJEU’s jurisdiction. The CJEU also seems quite fixated on *decisions* when applying its new test to the allegations by KS and KD, while many fundamental rights violations are caused by factual conduct. Moreover, while the issue of ECHR accession featured prominently in the arguments of the parties and at the hearing, it is only mentioned once in the judgment – in rather negative terms: “Article 6(2) TEU cannot be interpreted as having the effect of extending the jurisdiction” of the CJEU.⁹⁰

Is this sufficient for the CJEU to be able to find the revised DAA compatible with the Treaties? To what extent is it even possible to understand the scope and application of the new “political and strategic choices”-test before we have a judgment by the General Court and, probably, a new appeal by KS and KD to the CJEU? How stable is an expansion of the Court’s jurisdiction built on such flimsy grounds? While *KS and KD* will probably be hailed for providing answers, serious questions remain.

⁸⁷ *KS and KD v Council and Others*, opinion of AG Ćapeta, cit. para. 116.

⁸⁸ *KS v Council and Others.*, cit. paras 125–137.

⁸⁹ *Ibid.* paras 159–166.

⁹⁰ *Ibid.* para 82.

IV. WHAT WOULD WORK: FORMALLY EXTENDING THE JURISDICTION OF THE CJEU

All the potential ways to overcome the CFSP issue have their problems, either of a legal or practical nature – or both. Overcoming those challenges may not be impossible. However, I submit that it is indeed impossible to resolve the CFSP issue if one takes the CJEU's stance in *Opinion 2/13* for granted *and* at the same time rules out amending or supplementing the EU treaties. The combination of those two positions is what doomed the different options considered by the negotiators.

The underlying problem is *Opinion 2/13*. It is simply a wrongly decided case, particularly when it comes to the CFSP issue. Instead of resorting to what Steve Peers aptly termed “judicial politics of the playground”,⁹¹ the CJEU should have recognised that, as a consequence of its limited jurisdiction over the CFSP, the principle of autonomy does not apply equally to this area.⁹² Traditional notions of autonomy and exclusivity of CJEU jurisdiction are particularly difficult to justify in cases where the CJEU itself lacks jurisdiction, since art. 274 TFEU explicitly allows the courts of the Member States to step in to ensure that the EU system of remedies is complete.⁹³

Accordingly, the CJEU's lack of jurisdiction should not have been a bar to the accession to the ECHR. If the EU treaties indeed provide a complete system of remedies, consisting of both the Union courts and the courts of the Member States, the ECHR admissibility criterion of exhaustion of local remedies should protect the autonomy of EU law to a sufficient degree.

Yet, we cannot escape the fact that *Opinion 2/13* exists. It is perhaps too risky to simply re-litigate the CFSP issue in the forthcoming opinion proceedings concerning the revised DAA.

But there is no need for *contra legem* interpretations or legally complex workaround mechanisms when there is a (strictly legally speaking) simple and watertight alternative available: amending or supplementing the EU treaties.⁹⁴ From a legal point of view, all that is needed is one additional treaty provision. This provision would not even need to

⁹¹ S Peers, ‘The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection’ (18 December 2014) EU Law Analysis eulawanalysis.blogspot.com.

⁹² *Opinion 2/13 Accession of the European Union to the ECHR* ECLI:EU:C:2014:2475, view of AG Kokott, para. 101.

⁹³ C Hillion ‘Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy’ cit.; J Heliskoski, ‘Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ cit. 20; C Hillion and RA Wessel, ‘The Good, the Bad and the Ugly’: Three Levels of Judicial Control over the CFSP’ cit. 84-85.

⁹⁴ J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice* cit. 305; P Van Elsuwege, ‘Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice’ cit. 1758; G Butler, ‘Jurisdiction of the EU Courts in the Common Foreign and Security Policy Reflections on the Opinions of AG Ćapeta in KS and KD, and Neves 77 Solutions’ (29 November 2023) EU Law Live eulawlive.com.

give the CJEU general jurisdiction over the CFSP. It could merely add a third claw-back. This exception could be modelled on AG Čápetá's conclusion, by giving the CJEU jurisdiction over all allegations of fundamental rights violations caused by CFSP-related conduct.

Such a provision can only be added to the text of art. 24(1) TEU and art. 275(2) TFEU through the ordinary revision procedure laid down in art. 48(2)–(5) TEU.⁹⁵ This is a rather convoluted process, which would entail a separate procedure that is independent of the package of accession instruments negotiated in the 46+1 *ad hoc* group. Moreover, there is an obvious risk that suggesting one treaty amendment under this procedure could trigger the submission of other suggestions, which in turn could lead to a more comprehensive and drawn-out process with an uncertain outcome.

To ensure that Pandora's box is not opened in this manner, and that the accession instruments remain a tight-knit package deal, the possibility of expanding the CJEU's jurisdiction with a treaty provision *outside* the EU treaties should be considered.⁹⁶ The CJEU has explicitly confirmed that “an international agreement concluded by the [Union] may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court” as conceived in the EU treaties.⁹⁷ There is also precedent for expanding the CJEU's jurisdiction via external treaties. The 1971 Protocol to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters conferred on the Court of Justice jurisdiction to interpret provisions of the 1968 Convention.⁹⁸

Admittedly, that example and the expansion of the CJEU's jurisdiction to cover CFSP cases are not completely parallel cases. An EU-external treaty expanding the CJEU's jurisdiction over the CFSP would give the Court additional jurisdiction over *an area of Union law*, rather than the provisions of the external treaty itself. This could, perhaps, be seen as a treaty amendment in circumvention of the procedure laid down in art. 48 TEU. On the other hand, giving the CJEU jurisdiction over external treaties could have been challenged in the same manner, since its jurisdiction *ratione materiae* is positively delimited to the EU treaties in art. 19 TEU. At the very least it therefore seems useful to explore this option.

If it is indeed possible to expand the CJEU's jurisdiction over the CFSP by separate treaty, it could easily form part of the package of accession instruments. Since the DAA

⁹⁵ The simplified procedure laid down in art. 48(6) TEU cannot be used for amendments to these institutional provisions.

⁹⁶ This possibility was brought up by the Council of Europe's Director for Legal Advice and Public International Law during the (re)negotiation of the DAA, but was not followed up. See Report of the 13th Negotiation Meeting cit. para. 38. See also J Polakiewicz and L Panosch, *Das Spannungsverhältnis zwischen Hammer und Amboss* in C Seitz, RM Straub and R Weyeneth (eds), *Rechtsschutz in Theorie und Praxis: Festschrift für Stephan Breitenmoser* (Helbing Lichtenhahn 2022) 1031, 1039-1040.

⁹⁷ Opinion 1/92 *Draft agreement between the Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area* ECLI:EU:C:1992:189 para. 32.

⁹⁸ Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1990].

will need to be ratified by all EU Member States either way, adding an instrument extending the jurisdiction of the CJEU to the package would thus not significantly increase the legal complexity of the ratification process.

Still, it remains that the legal issues are not the most difficult aspect. The central problem with amending or supplementing the treaties is perceived to be political feasibility. But why is it politically more acceptable that the CJEU's jurisdiction is expanded through a *contra legem* interpretation rather than by the expressed will of the EU Member States? Formally extending the jurisdiction of the CJEU through a political decision, rather than by judicial fiat, would reinforce the position of the EU Member States as masters of the treaties. Thus, perhaps the knee-jerk reaction against amending or supplementing the EU treaties ought to be resisted.