



The Many Facets of the Autonomy of EU Law:

Inside and Outside Views

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**New Dimensions of the Right to an Effective Remedy
in the Jurisprudence of the CJEU:
At the Intersection of Legal Orders**

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ABSTRACT: One of the defining features of the European Union’s (EU) autonomous legal order is its foundation on the rule of law, guaranteed by the Treaties’ establishment of a complete system of legal remedies—an essential precondition for the right to an effective remedy and the principle of effective judicial protection. However, it is the CJEU’s case law that has developed and completed this system, particularly in recent years through dynamic interpretation and application of the rule of law as articulated in Article 2 TEU. This paper examines three emerging dimensions of the right to an effective remedy and effective judicial protection: (1) the CJEU’s jurisprudence on the completeness of remedies within the Common Foreign and Security Policy (CFSP), highlighting tensions between Member States’ intent to keep CFSP legally distinct and the need for remedies in all policy areas; (2) the impact of potential EU accession to the European Convention on Human Rights (ECHR) on remedies within the CFSP, including prospects for external review by the Strasbourg Court and persistent judicial protection gaps; (3) the extension of standing to third states before the CJEU and its implications for effective judicial protection under EU law. These three areas function as case studies on how the autonomy of the EU legal order shapes judicial protection both internally (CFSP) and externally (ECHR accession, standing of third states). The article investigates how the autonomy of the EU legal order influences CJEU jurisprudence regarding the right to an effective remedy and the limits to expansive interpretation.

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1. The autonomy of EU law and the right to an effective remedy

The right to an effective remedy is an essential human right enshrined in various international law instruments.¹ The essence of the right, in a broad sense, is to guarantee effective legal redress against acts by public entities.

Within the EU's autonomous legal order, this right has reached fundamental significance via the case law of the Court of Justice of the EU (CJEU) and is connected to the concept of the autonomy of the EU legal order. Article 2 of the Treaty on European Union (TEU)² positions the rule of law as one of the foundational values of the EU. Although the academic literature on what the rule of law encompasses could no doubt fill the shelves of at least a smaller library, it is accepted that the right to an effective remedy is an essential component of the rule of law principle; the view of the CJEU regarding this issue is also clearly affirmative.³ The right to an effective remedy is enshrined in the EU Charter of Fundamental Rights (Article 47)⁴ interpreted as an obligation of the EU on the one hand, and, on the other hand, its Member States when implementing EU law.⁵

Already decades before the Lisbon Treaty, the CJEU has utilised the concept of the rule of law to establish that the EU Treaties had intended to create a complete system of judicial remedies. The foundational judgment of this notion is the frequently cited *Les Verts*, where it was introduced in an institutional – and constitutional – context, allowing an act of the European Parliament to be challenged before the Court – effectively *contra legem*, relying on the general scheme of the EU Treaties rather than their wording.⁶

¹ See e.g. Universal Declaration of Human Rights (10 December 1948) UNGA Res 217 A(III), Art 8; International Covenant on Civil and Political Rights [1966], Art 2; European Convention on Human Rights [1950] (ECHR), Art 13.

² Consolidated version of the Treaty on European Union [2012] OJ C326/26, Art 2.

³ See, e.g. Case C-362/14 *Schrems v Data Protection Commissioner*, EU:C:2015:650, para 95. For a concise reflection on the various dimensions of the rule of law and their interaction, see P Craig, 'The Rule of Law: National, International and Regional Dimensions', in B Faedda (ed), *The Rule of Law: Cases, Strategies and Interpretations* (Ronzani Edizioni Scientifiche 2021) 61–65.

⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 47.

⁵ Cf. Art 47 as regards the right to an effective remedy, and Art 51 as regards the scope of the Charter in general.

⁶ Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, EU:C:1986:166, paras 23–25. In *Les Verts*, the Court referred only to "institutions", but, as the Court later explained in *Sogelma*, the principle logically had to cover all EU bodies, not merely those which were listed and designated as "institutions" *stricto sensu* by the Treaties, Case T-411/06 *Sogelma v AER*, EU:T:2008:419, para 37.

The CJEU introduced the notion of ‘a complete system of judicial remedies’ first and foremost to ensure that neither the institutions or other bodies and agencies, nor the Member States can avoid a review of the compatibility of their actions with the basic constitutional charter, the EU Treaties and the Charter. Thus, contrary to a textual interpretation of the Treaties, the CJEU decided to guarantee the availability of a direct judicial action – a remedy – against all measures intended to have legal effects.⁷ In the interpretation of the Court, the complete system of judicial remedies is thus a *sine qua non condition* for exercising the right to an effective remedy – and a *sine qua non* element for a community based on the rule of law.⁸

The autonomy of the EU legal order already comes into play in determining the scope of the right to an effective remedy. Although the right is enshrined in the European Convention on Human Rights (ECHR, Article 13)⁹ as well, the regulation of the right in the EU Charter takes a slightly different approach and aims to provide more extensive protection in at least two ways. Firstly, the Charter requires that individuals have access to review by a tribunal (as opposed to an ‘authority’ under the ECHR).¹⁰ Secondly, and once again, as opposed to the ECHR [Art 6(1)], the Charter does not limit the scope of the right to disputes relating to civil law rights and obligations and criminal charges.¹¹

Even more relevantly, the autonomy of the EU legal order and the rule of law as an overarching value are closely linked to the right to an effective remedy and the principle of effective judicial protection in the jurisprudence of the CJEU. By emphasising the constitutional relevance of both the aforementioned right and the principle, the CJEU at the same time reinforces the external autonomy of EU law since a similar constitutional relevance is not found in international law. A further aspect of the autonomy of the EU legal order comes into play as well, as the CJEU seems to increasingly emphasise the rule of law as an autonomous concept under EU law.¹²

In *Solgema*, the action was brought against an EU agency (the European Agency for Reconstruction) established by an EU regulation.

⁷ *Les Verts* (n 6) para 25.

⁸ That being said, the ‘complete’ nature of the system of legal remedies under EU law can in and of itself be questioned, even if its evolving nature is accepted. For a multifaceted approach to the issue, see M Fink ‘Conclusions’ in M Fink (ed), *Redressing Fundamental Rights Violations by the EU: The Promise of the ‘Complete System of Remedies’* (Cambridge University Press 2024), 424.

⁹ ECHR (n 1).

¹⁰ Cf. Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/02.

¹¹ *Ibid.*

¹² The autonomy of the EU legal order is commonly understood to encompass three aspects. Internal autonomy means the autonomy of EU law vis-à-vis international law. External autonomy refers to the separation of EU law from international law. Last but not least, autonomy encompasses the autonomous interpretation of EU law, an aspect that cuts across both internal and external autonomy. Autonomous interpretation serves the uniform application of EU law across all EU Member States, and thus also the rule of law. Cf HP Hestermeyer, ‘European Union Law, Autonomy of’ in A Peters (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2025) opil.oupilaw.com.

Recent CJEU jurisprudence has introduced new dimensions to the right to an effective remedy, driven by teleological interpretation and the application of the rule of law as enshrined in Article 2 TEU. These emerging dimensions cover three interrelated areas that this Article explores. In Section 2, the CJEU's jurisprudence and the completeness of legal remedies within the Common Foreign and Security Policy (CFSP) are elaborated, highlighting tensions between Member States' intent to keep the CFSP legally distinct and the CJEU's efforts to ensure effective remedies in this policy as well. Section 3 focuses on the impact of EU accession to the European Convention on Human Rights (ECHR) on effective remedies in the CFSP, especially as regards attribution questions regarding CFSP acts in the light of external human rights review by the European Court of Human Rights (ECtHR). Subsequently, developments regarding the standing of third states before the CJEU and its implications for effective judicial protection are discussed (Section 4), raising interpretative questions under both international and EU law. Finally, Section 5 provides a conclusion.

2. The right to an effective remedy in the CFSP

The claimed complete system of judicial remedies and the right to an effective remedy have played a central role in the line of CJEU cases that developed the judicial system in the specific context of the Common Foreign and Security Policy (CFSP). The Court has been working on 'de-pillarising' this policy as regards the judicial remedies available within its special system¹³ – step by step, or, one could say, from *Kadi* to *KD*. The detailed analysis of this process is not the subject of this paper – it has been done elsewhere¹⁴ – but two aspects need to be mentioned. Firstly, the *Kadi I* judgment of the Court of Justice was instrumental in reaffirming that the individuals' right to an effective remedy was the embodiment of the principle of effective judicial protection, which the Court sees as a general principle of EU law originating from the common constitutional traditions of the Member States.¹⁵ This principle's

¹³ For an excellent overview until 2017, see P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) 67 *International & Comparative Law Quarterly* 1.

¹⁴ See e.g. M Cremona, "'Effective Judicial Review Is of the Essence of the Rule of Law': Challenging Common Foreign and Security Policy Measures Before the Court of Justice' (2017) 2 *European Papers*, 2, 671; L Grossio, 'One Step Too Far, One Step Too Close: The Rocky Road Towards Defining the Scope of Judicial Review in CFSP Matters in Light of *KS* and *KD v Council and Others* and *Neves*' (2024) 3 *Review of European Litigation* 1; S Poli, 'The Right to Effective Judicial Protection with Respect to Acts Imposing Restrictive Measures and its Transformative Force for the Common Foreign and Security Policy' (2022) *Common Market Law Review* 59, 1045; P Budai, 'The Scope of Jurisdiction of the CJEU in the Field of Common Foreign and Security Policy for Human Rights Violations and the EU's Accession to the ECHR: Is Schrödinger's Cat Alive or Dead?' (2026) 11 *European Papers* 1273

¹⁵ Joined Cases C-402/05 P and C-415/05 P *Kadi*, EU:C:2008:461, para 335, with reference to Case C-432/05 *Unibet*, EU:C:2006:755, paragraph 37. In *Unibet*, the principle was invoked in the context of the relationship between EU law and national law, more specifically, the requirement that national law guarantee effective remedies to protect rights stemming from EU law.

‘unwritten’ nature was instrumental at the time, as the Charter of Fundamental Rights had not yet been endowed with legal binding force.

Secondly, the entire CFSP case law saga revolves, in essence, around the right to an effective remedy against EU measures. Measures that, based on a strict textual interpretation, seem to have been excluded from judicial review by Title V of the TEU. However, just like in *Les Verts* some decades ago, the measures in question are also quite capable of producing legal effects vis-à-vis third persons. Instead of attempting to cover the entirety of the saga, we will highlight the relevance of the right to an effective remedy in the argumentation of selected relevant judgments of the Court, without attempting to cover all aspects of the jurisprudence.

For the purposes of this paper, *Kadi I* is regarded as a stepping stone for further judicial development as it establishes a constitutional context based, once more, on the essential requirement of maintaining the rule of law via a complete system of judicial remedies.¹⁶ At the same time, and relevantly for the broader context of this paper, *Kadi I* is instrumental in reinforcing the autonomy of the EU legal order: in order to circumvent the problem of the special legal nature of United Nations (UN) Security Council measures, the Court had to decidedly emphasise the ‘detachment’ of the EU legal order from international law in general.

2.1. *Elitaliana*

In *Elitaliana*, the dispute revolved around the question of whether the CJEU can review CFSP acts if the legality of the act is challenged based on compatibility with acts falling outside the scope of the CFSP – in the case at hand, the applicant requested the annulment of measures adopted by Eulex Kosovo for non-compliance with the Financial Regulation¹⁷ governing EU budgetary expenditures, in the context of an invitation for tenders for a public service contract.¹⁸ The application was dismissed by the General Court (GC) on the basis of Eulex Kosovo’s lack of legal personality (i.e., the applicant addressed the claim to the wrong defendant).¹⁹ Nevertheless, relevant to this analysis, the GC recalled the ‘general principle’ that any measure adopted by an institution, body or agency of the EU that is intended to have legal effects vis-à-vis third parties must be subject to judicial review.²⁰ The GC avoided,

¹⁶ Á Mohay, ‘A Kadi-doktrína és a nemzetközi jog érvényesülése az uniós jogrendben’ (2017) 10 *Közjogi Szemle* 36.

¹⁷ Regulation (EC, Euratom) No 1605/2002 of the Council of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities OJ L248/1.

¹⁸ Order of the General Court of the European Union in Case T-213/12 *Elitaliana v Eulex Kosovo*, EU:T:2013:292.

¹⁹ *Ibid* para 35.

²⁰ This was relied upon by the applicant; the GC agreeingly referenced *Les Verts* and *Sogelma*. *Ibid* para 34.

however, addressing whether it had jurisdiction to examine the application at all, taking into account the special rules applicable to the CFSP.

However, in the appeals procedure, the Court of Justice decided to examine this issue based on the argument that the existence or lack of jurisdiction of the EU judicial institutions constituted a matter of public policy that the Court could consider at any stage of its procedure, even of its own accord.²¹ In doing so, the Court of Justice construed its own interpretation as to how the ‘carve-out’ and the ‘claw-back’ are meant to be applied. It reiterated that according to ‘the final sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court does not, in principle, have jurisdiction’ over CFSP provisions or acts adopted on their basis, but, since those special provisions were derogations from Article 19 TEU – the core provision on the mandate of the CJEU in the public law framework of the EU – they had to be interpreted narrowly.²² Thus, the claw-back is to be interpreted as a reference (or one could say: call-back) to the *general rules* on the jurisdiction of the Court, i.e. Article 19 TEU: the CJEU does not see the claw-back as a distinct, exceptional jurisdiction over the CFSP specifically, but as an exceptionally restricted manifestation of its general jurisdiction.²³ In subsequent cases, this approach became the backdoor through which the Court stepped further and further into the domain of the CFSP, gradually extending its jurisdiction, stretching the text of the Treaties quite strongly.²⁴

2.2. *H v Council*

H v Council was a case revolving materially speaking around a contested staff decision taken by the European Union Police Mission (EUPM) in Bosnia and Herzegovina. The case had a lengthy procedural history as it was first declared inadmissible by the GC based on a lack of jurisdiction to hear the case.²⁵ On appeal, the Court of Justice set aside the order and referred the case back to the GC to rule on the merits of the action insofar as it was directed against the Council.²⁶ The Court based the decision on a combined reading of Article 19(1) TEU and Article 47 of the Charter,

²¹ Case C 439/13 P *Eulex Kosovo v Elitaliana*, EU:C:2015:753, para 37.

²² This was already similarly outlined in Case C-658/11 *Parliament v Council*, EU:C:2014:2025, para 69.

²³ RA Wessel, ‘Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality’ *Contemporary Challenges to EU Legality*, European University Institute, 2019, 6–7 at ris.utwente.nl.

²⁴ See e.g. T Verellen, ‘In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)’ 6 *European Papers* (2021) 17, 21–22.

²⁵ Case T-271/10 *RENV H v Council*, EU:T:2014:702.

²⁶ Case C-455/14 P *H v Council and Commission*, EU:C:2016:569. The Court, however, dismissed the action as inadmissible insofar as it was directed against the Commission and the EUPM.

ascertaining that the CJEU did have jurisdiction to review acts which were staff management acts, even if adopted in the context of the CFSP.²⁷

The Court thus applied a contextual and teleological reading of EU primary law to guarantee, in principle, access to judicial review regarding a further aspect of CFSP-related acts.

2.3. *SatCen*

In *SatCen*, the applicant (a former employee) contested a staff decision by the European Union Satellite Centre (SatCen), a body established by the Council under the CFSP.²⁸ The GC – contrary to the arguments of SatCen and the Council – established its jurisdiction to review the acts of CFSP bodies provided that they concerned administrative issues: it argued that the provisions on the exclusion of the jurisdiction of the CJEU in the CFSP cannot be interpreted as broadly as to exclude the judicial review of such acts (not of a political nature) as that would deprive the applicant of the right to an effective remedy.²⁹ The GC supported its decision by referring to the rule of law as an Article 2 TEU value and the need to ensure effective judicial review.³⁰ The GC annulled SatCen's decision.

SatCen appealed, but the Court upheld the jurisdiction of the EU judiciary, based on essentially the same reasoning. The rule of law is a fundamental value of the EU, articulated more concretely in Article 19 TEU and the principle of effective judicial protection. Were the Court to find a lack of jurisdiction, that would leave the contested decision 'exempt from any judicial review', a situation incompatible with the principle of effective judicial protection.³¹

2.4. *Rosneft*

Rosneft concerned the validity of restrictive measures adopted by the EU. The referring UK court was faced with an action that *inter alia* concerned the validity of acts of EU law. The UK court questioned whether a restrictive interpretation of the CJEU's jurisdiction regarding the CFSP was in line with primary law, and mildly suggested that, at least from the point of view of the protection of the fundamental

²⁷ Ibid paras 58–59. The GC, then, proceeded to rule on the merits and dismissed the action (T-271/10 *RENV H v Council*, EU:T:2018:180). This post-referral GC judgment did address an aspect of the right to an effective remedy, albeit a different one: namely, that the EU judiciary is to ensure, in line with the Charter, that decisions affecting a person concerned individually are taken on a sufficiently solid factual basis (para 157); the related plea of the applicant was nonetheless rejected. The applicant appealed again, and the Court referred the case back to the GC once more (Case C-413/18 P *H v Council*, EU:C:2019:1044). The GC, in Case T-271/10 *RENV II*, EU:T:2020:548, finally dismissed the action on the merits.

²⁸ Case T-286/15 *KF v SatCen*, EU:T:2018:718.

²⁹ Ibid paras 96–97.

³⁰ Ibid para 86.

³¹ Case C-14/19 P *SatCen v KF*, EU:C:2020:492, paras 84–85.

right of individuals (especially: the right to have access to a court to review the legality of acts), the CJEU *should* have jurisdiction to rule on preliminary rulings concerning the validity of CFSP acts.³² To answer the question, the Court of Justice provided an interpretation based on a combined reading of Articles 19, 24 and 40 TEU, Article 275 TFEU, and Article 47 of the Charter.³³ One more provision played a pivotal role in the argumentation: Article 2 TEU, more specifically, the rule of law as a fundamental value, as the Court confirmed, applies to the CFSP as well.³⁴

The CJEU outlined that it views Article 47 of the Charter as a ‘reaffirmation of the principle of effective judicial protection’ and that the principle requires an effective remedy before a tribunal to be available to those whose rights and freedoms are guaranteed by EU law are violated.³⁵ Even if Article 47 of the Charter cannot on its own establish the jurisdiction of the Court where it is excluded by written primary law, nonetheless, the principle of effective judicial protection requires a narrow, strict interpretation of the rules on the exclusion of the Court’s jurisdiction in the CFSP.³⁶ The principle of effective judicial protection precludes an interpretation that would rule out the Court’s jurisdiction to determine the validity of CFSP measures constituting restrictive measures against natural or legal persons in a preliminary ruling.³⁷

2.5. *Bank Refah Kargaran*

Bank Refah Kargaran is one of Iran’s larger banks. It submitted an action for damages under Article 268 TFEU for the damage that it allegedly suffered as a result of restrictive measures taken against it by the EU. The contested measures comprised three CFSP decisions³⁸ adopted under the TEU (Article 29), and a number of acts and an implementing act adopted on the basis of the TFEU (Article 215). Though the action was ultimately dismissed by the General Court, it did consider the jurisdiction issue in a detailed way.³⁹ Firstly, it ascertained a lack of jurisdiction regarding

³² Case C-72/15 *Rosneft*, EU:C:2017:236, paras 33–34.

³³ Ibid para 46.

³⁴ Ibid para 72.

³⁵ Ibid para 73.

³⁶ Ibid para 74.

³⁷ Ibid para 76. The Court also made it clear that the task of ensuring effective judicial protection cannot be left to national courts: they are unable to fill the gap represented by the special jurisdictional rules of the CFSP as they are simply unable to do so due to them not having jurisdiction over the validity of EU law measures themselves (ibid paras 77–78).

³⁸ Decision 2010/413/CFSP of the Council of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ L 195/39; Decision 2010/644/CFSP of the Council of 25 October 2010 amending Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, OJ L281/81; Decision 2011/783/CFSP of the Council of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, OJ L319/71.

³⁹ Case T-552/15, *Bank Refah Kargaran v Council*, EU:T:2018:897.

claims for damages vis-à-vis CFSP acts, relying on a strict reading of Article 24(1) TEU and Article 275 TFEU.⁴⁰ It did, however, find that it had jurisdiction as regards the acts based on Article 215 TFEU – though in the end it rejected the action for damages on substantive grounds.⁴¹ The bank appealed.

The Court of Justice, however, reconsidered the jurisdiction issue, continuing the line of reasoning outlined above – as in *Elitaliana*, the appellant did not dispute this jurisdiction question as such, but the Court of Justice chose to address it as a matter of public policy of its own motion.⁴² It once again relied on the completeness of the system of judicial remedies in EU law, stating that the action for damages must be assessed ‘having regard to the whole of the system established by the treaties for the judicial protection of the individual’⁴³ The Court laid out its reliable tools to reach the desired conclusion, a truly complete system of review: Article 19 TEU to outline the broadly interpreted institutional destiny of the Court, Article 2 TEU to reaffirm the rule of law as a foundational value of the EU, and Article 47 of the Charter to reaffirm the constitutional relevance of the principle of effective judicial protection. The final step was then taken relatively easily: the coherence of the system of judicial protection under EU law required that, in order to avoid a lacuna in the judicial protection of private persons, the CJEU ‘must also have jurisdiction’ to rule on the harm allegedly caused by restrictive measures provided for in CFSP Decisions.⁴⁴

2.6. *KS and KD*

In *KS and KD*, the applicants were seeking compensation for damages that they allegedly suffered due to acts and omissions by EU bodies in connection with CFSP missions. The actions centred around a perceived failure by the EU to adequately protect the applicants’ fundamental rights during or in connection with EU CFSP operations in Kosovo. *KS* and *KD* brought actions for damages before the GC, claiming the non-contractual liability of the Council, the Commission and the European External Action Service. The GC declared that it manifestly lacked jurisdiction to hear the action brought by *KS* and *KD* on the basis of Articles 268 and 340 TFEU and dismissed the actions by an order,⁴⁵ arguing *inter alia* that the contested measures concerned political or strategic issues of the CFSP, and that previous case law of the Court of Justice establishing its own jurisdiction in CFSP-related issues was inapplicable to the cases at hand.

⁴⁰ Ibid para 30.

⁴¹ Ibid paras 59–60.

⁴² Case C-134/19 P *Bank Refah Kargaran v Council*, EU:C:2020:793, para 25.

⁴³ Ibid para 34.

⁴⁴ Ibid para 39.

⁴⁵ Case T-771/20 *KS and KD v Council and Others*, EU:T:2021:798.

In the appeals procedure, the applicants attempted *inter alia* to rely on *Bank Refah Kargaran* to argue for the CJEU's jurisdiction to hear the matter.⁴⁶ The Court of Justice did reconsider the jurisdiction question, but first differentiated the situation in *KS and KD* from *Rosneft* and *Bank Refah* clearly by stressing that in the case at hand, the actions did not concern individual restrictive measures, a deciding factor in its earlier ruling, and commended the GC for making the same distinction, rejecting this part of the pleas.⁴⁷

The appellants also claimed that the GC erred in law when deeming the judgments of the Court in *Elitaliana* and *H v Council* inapplicable;⁴⁸ while the intervening Commission additionally claimed that reasoning based on the categorisation of the measures as 'political or strategic' was inadequate.⁴⁹ The Court of Justice did not do away with this categorisation but nuanced its meaning and introduced a two-step jurisdiction test to be applied to actions concerning acts or omissions falling within the scope of the CFSP: firstly, it had to be ascertained whether the situation fell within one of the situations provided for in Article 24(1) TEU or Article 275 TFEU, expressly allowing for the jurisdiction of the CJEU. If that was not the case, then, secondly, it had to be considered whether 'jurisdiction of the Court of Justice of the [EU] may be based on the fact that the acts and omissions at issue are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the CSDP'.⁵⁰ To explain the latter category of acts, the Court found that it included, acts or omissions directly related to the conduct, definition or implementation of the CFSP, and 'especially' the Common Security and Defence Policy (CSDP) – in particular, that covered the identification of the EU's strategic interests and the definition of the actions to be taken and the positions to be adopted by the EU as well as the general guidelines of the CFSP.⁵¹ Whether that was the case or not, a specific, case-by-case analysis was required. According to the Court, this test did not prejudice the right to an effective remedy 'unduly' while maintaining the effectiveness of the Treaty provisions which laid down the special legal framework of the CFSP.⁵² As for the case at hand, the Court set aside the order of the GC and referred the case back to it.

KS and KD is an interesting judgment. It confirms CJEU jurisdiction and previous case law, introduces a two-step test to ascertain jurisdiction in the CFSP, but at the same time cordons off political and strategic decisions from it. With some sarcasm, one could say that the right to an effective remedy must be guaranteed – unless

⁴⁶ Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others*, EU:C:2024:725, para 85.

⁴⁷ *Ibid* paras 86–87 and 96.

⁴⁸ *Ibid* para 97.

⁴⁹ *Ibid* para 100.

⁵⁰ *Ibid* paras 115–116.

⁵¹ *Ibid* para 118.

⁵² *Ibid* para 119.

the decision is really important. In more serious terms, the judgment points towards an EU version of the US Supreme Court's political question doctrine.⁵³ It should also be noted that the Court points to *Elitaliana*, *H v Council*, and *SatCen* to explain the lack of jurisdiction concerning political and strategic decisions, but those judgments provide little to no elaboration (and definitely no express discussion) of this concept.⁵⁴

2.7. Interim conclusion

Evaluating and interpreting the case law of the Court regarding its own jurisdiction in the CFSP from the point of view of a fundamental right (or rather, fundamental rights in general) is a conflicting task. On the one hand, it is difficult not to applaud the efforts of the CJEU to narrow the gap in judicial protection in a policy where fundamental rights compliance is perhaps even more crucial than in other policies. On the other hand, it is equally difficult to infer the Court's jurisdictional expansion from a strict, textual reading of the Treaties.

Based on the TEU, it is difficult to doubt that the will of the 'Herren der Verträge', the Member States, was to separate and delimit the CFSP from other EU policies by the special rules applicable to it, rooting the policy in a more intergovernmental legal framework. The public international law principle of restrictive interpretation⁵⁵ could also be mentioned as an argument against the dynamic interpretation of the law by the CJEU. However, the autonomy of the EU legal order renders the latter argument all but moot. As we have seen, the right to an effective remedy, and the principle of effective judicial protection serve as indispensable elements of the rule of law as an Article 2 TEU value for the Court, which emphasises the autonomous nature of EU law *inter alia* by conceptualising EU law as system where the system of judicial remedies needs to be complete: this concept is foreign to international law and can be understood more in the context of a constitutional system. The evolving jurisdiction of the CJEU in the CFSP is in many ways a reaffirmation and strengthening of the right to an effective remedy, which, in turn, reinforces the autonomy of the EU legal order.

⁵³ T Verellen, 'A Political Question Doctrine for the CFSP: The CJEU's Jurisdiction in the KS and KD Case' (Verfassungsblog, 24 September 2024), at verfassungsblog.de.

⁵⁴ L Lonardo, 'How the Court Tries to Deliver Justice in Common Foreign and Security Policy. Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. Joined Cases C-29/22 P and C-44/22 P KS and KD' (2024) 9 *European Papers* 2, 830, 839.

⁵⁵ See J Bruhács, B Kis Kelemen and Á Mohay, *Nemzetközi jog I.* (Ludovika 2023) 139. The principle of restrictive interpretation is traced back to the Lotus case, where the Permanent Court of International Justice proclaimed that restrictions on the 'independence' of States cannot be presumed (*SS Lotus* (France v. Turkey) (ICJ, September 7 1927). The principle is, of course, not without question marks, see e.g. L Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 *European Journal of International Law* 3, 681.

That is not to say that counter-arguments do not exist beyond a reference to a textual interpretation of the TEU. For instance, one cannot help but wonder whether the institutional balance created by the Treaties⁵⁶ remains intact if the Court's jurisdiction and thus power of judicial review is considerably increased by the Court itself.⁵⁷ A similar query can be raised regarding the principle of conferral, as the limits on the Court's jurisdiction can also be interpreted as an expression of this foundational principle of EU law.⁵⁸

3. EU accession to the ECHR and the right to an effective remedy in the CFSP⁵⁹

3.1. The accession of the EU to the ECHR

Since the Lisbon Treaty, the EU is obliged by primary law (Article 6(2) TEU) to accede to the ECHR. Following a long and conflicted legal odyssey, the accession of the EU can at least be deemed a realistic option at the time of writing of this Article.⁶⁰

⁵⁶ *Nota bene*, institutional balance started out as a judge-made principle in EU law (see Case 9/56 *Meroni*, EU:C:1958:7) and was only codified by the Lisbon Treaty in Article 13(2) TEU. On the evolution of the principle and its effects on treaty making in the EU, see P Koutrakos, 'Institutional balance and sincere cooperation in Treaty Making Under EU Law' (2019) 68 *International and Comparative Law Quarterly* 1.

⁵⁷ This issue was raised by Finland in *KS and KD* (n 46) (para 104), claiming that maintaining the exclusion of the CJEU in the CFSP and the CSDP is to maintain the institutional balance. The Court itself reflected on institutional balance in *KS and KD*, but only to say that a 'claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights is not in itself sufficient for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action' (para 73).

⁵⁸ *Lonardo* (n 54) 840.

⁵⁹ This section partly builds upon arguments previously advanced by the author. Cf. Á Mohay, 'Attribution and Responsibility Regarding CFSP Acts in Light of the Renegotiation of the EU's Accession to the ECHR' (2023) *Croatian Yearbook of European Law and Policy* 19, 281 and Á Mohay, 'EU Accession to the ECHR: At the End of the Long and Winding Road?' (2024) *Pécs Journal of International and European Law* 9, 7.

⁶⁰ One should, of course, note that accession has been deemed realistic before, without actual success. In any case, the European Commission has decided on 25 July 2025 to seek the opinion of the Court of Justice regarding the new draft accession agreement (see Decision of the Commission of 25 July 2025 on a request for an opinion of the Court of Justice pursuant to article 218(11) TFEU in relation to the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, [C(2025)3950]). The new opinion procedure is underway under case number 1/25. The new opinion procedure is underway under case number 1/25 [OJ C 2026/275]. Commentators have already pointed to the *KS and KD* ruling as a source of an 'uneasy feeling' regarding a possible CJEU review of the redrafted accession agreement. See Kluwer Law International Editorial Comments, 'From Opinion 2/13 to *KS and KD*: Confronting a Legacy of Constitutional Tensions' (2024) *Common Market Law Review* 61, 1455, 1468.

EU accession would have a considerable impact on the right to an effective remedy in a number of ways. Generally speaking, accession in and of itself enhances individuals' right to an effective remedy by allowing for external human rights review by the European Court of Human Rights (ECtHR).

In more concrete terms, the most crucial effects include direct access to the ECtHR against acts and omissions of EU institutions, agencies and bodies. EU accession would most probably mean the end of the Bosphorus presumption, ending the special (and most would argue: preferential) treatment of EU law by the Strasbourg Court.⁶¹ Secondly, judgments of the ECtHR would be binding on the EU as such, requiring compliance with the Court's ruling (and, where applicable, the provision of just satisfaction) in accordance with the Convention.⁶²

Furthermore, the co-respondent mechanism to be established by the Accession Agreement would prevent forum shopping and ensure more coherent jurisprudence; the ECtHR would not require the appellant to identify all necessary and appropriate respondents, as the co-respondent mechanism would allow the Strasbourg court to invite the co-respondent needed.⁶³

Two remarks definitely need to be made regarding the abovementioned effects. Firstly, all three points can be the subject of detailed and profound elaboration that would go beyond the scope of this paper.⁶⁴ Secondly, the autonomy of EU law is relevant in this context as well: the unique draft accession instrument is moulded to accommodate the *sui generis* nature of EU law (an obligation under primary law⁶⁵), especially following *Opinion 2/13* of the CJEU, a much criticised opinion that set up a veritable wish-list of modifications in order to allow the accession of the EU while preserving the autonomy of its legal order.⁶⁶

From among numerous possible issues, this paper focuses only on an especially elaborate one, namely the issue of attribution vis-à-vis CFSP measures before the ECtHR.

⁶¹ Š Imamović, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024) 39 *Utrecht Journal of International and European Law* 17.

⁶² *Opinion 2/13 Accession of the European Union to the ECHR*, EU:C:2014:2454, para 185.

⁶³ Of course, the draft co-respondent mechanism is not without question marks. Cf. D-L Franklin and VP Tzevelekos, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the Bosphorus Doctrine' (2024) 9 *European Papers* 2, 745.

⁶⁴ For a discussion of some additional aspects, see Budai (n 14).

⁶⁵ See Protocol No. 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (2012), OJ C 326/273.

⁶⁶ See e.g. Á Mohay, 'Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR' (2015) 2 *Pécs Journal of International and European Law* 28.

3.2. ECHR accession and reattribution of responsibility in the CFSP

In the relaunched negotiations of the draft accession agreement, the EU proposed a solution that, at least in its own view, avoids the conflict of jurisdiction perceived by the CJEU (or, in other words, the challenge to the autonomy of the EU legal order) and at the same time avoids a gap in jurisdiction within the CFSP. Such a solution would mean the introduction of a ‘reattribution’ rule applicable to CFSP acts. According to the solution proposed in March 2021, the EU would allocate responsibility for an act adopted under the CFSP to one or more Member States where the act does not fall within the jurisdiction of the CJEU.⁶⁷ In practice, this would mean that acts for which the EU could not be held accountable by either the CJEU or the ECtHR would be ‘reattributed’ to one or more EU Member States by the Union. In essence, the concept would therefore not follow a classic approach of attribution of liability (adhesive to the conduct), but instead shift the responsibility to an actor that is otherwise not responsible, in order to fill the accountability gap.

With a reattribution rule, the EU would deviate from the overall logic of attribution under international law,⁶⁸ however, the EU has not further clarified how or on what basis it would ‘redistribute’ responsibility to some Member States in the situation outlined above. Conceptualising attribution of responsibility an internal issue could, in principle, make the situation of potential applicants easier (i.e. they have an entity they can sue), yet the doctrinal background of such a concept is unclear, at least in the absence of official documents on the details.⁶⁹ The sensitivity of the CFSP problem is illustrated by the fact that, among the numerous working documents submitted to the Ad Hoc Negotiation Group on accession, the document entitled ‘Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union’ was one of the very few documents not publicly available.⁷⁰ Also, even in light of (especially) the *KS and KD* judgement, gaps in judicial review in the CFSP remain: apart from the strategic or political decisions

⁶⁷ 9th meeting of the CDDH ad hoc negotiation group (“47+ 1”) on EU accession to the European Convention on Human Rights, Meeting Report 25 March 2021, 3.

⁶⁸ The cornerstones of responsibility and attribution in international law are (primarily) the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) (UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83) and (albeit with a much more debated character) the Articles on the Responsibility of International Organizations (ARIO) (UNGA Res 66/100 (9 December 2011) UN Doc A/Res/66/100). Of course, international responsibility in itself raises numerous questions of interpretation and application.

⁶⁹ The representatives of the EU have themselves pointed out the difficulty of the issue or indeed finding an alternative solution. See 13th Meeting of the CDDH Ad Hoc Negotiation Group (“46+1”) on the Accession of the European Union to the European Convention on Human Rights, CDDH46+1(2022)R13, 7–8.

⁷⁰ See e.g. Report on the 13th meeting of the CDDH Ad Hoc Negotiation Group (“46+1”) on the Accession of the European Union to the European Convention on Human Rights, 46+1(2022)R13.

mentioned by the Court, the concept of factual *conduct* as a source of fundamental rights infringements seems to be absent from the CJEU's line of thought as it focuses strongly on 'decisions'.⁷¹

3.3. Interim conclusion

Internalising the (re)attribution issue could have detrimental effects for applicants as well as it could complicate and/or draw out access to justice – Pergantis and Johansen rightly question whether this represents an ideal solution in light of the right to effective judicial review, enshrined *inter alia* in the EU Charter for Fundamental Rights.⁷² It would also definitely mean that the EU would not be on an equal footing with other contracting parties,⁷³ and would partly weaken the external judicial review provided by the ECtHR, as it would ultimately *not* have the power to decide on whom to attribute responsibility to.⁷⁴ The details of how the decision on reattribution would be taken are not known at this point, although it raises a number of additional questions; from the perspective of the judicial remedies available to individuals, one of the most significant ones would be whether the internalised attribution can be subjected to 'internal' judicial review by the CJEU? As outlined earlier, according to the CJEU, the Treaties aim to establish a complete system of judicial remedies; however, the jurisdiction of the CJEU in the CFSP remains limited even if one takes the relevant jurisprudence into account. Thus, if the reattribution decision itself will be taken on a CFSP legal basis (which can be assumed), the right to an effective remedy could see another setback, especially as such a decision would fall neither within the scope of Articles 24(1) and 40 TEU nor Article 275 TFEU.⁷⁵ This would affect not

⁷¹ SØ Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) 9 *European Papers* 2, 797.

⁷² V Pergantis and SØ Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and a Hard Place?' in C Kaddous, Y Kaspirovich, N Levrat and RA Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 247.

⁷³ Yet this was one of the stated principles of the elaboration of the original draft accession agreement. See Steering Committee for Human Rights: Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, 16). This principle is also the strongest argument against maintaining the Bosphorus presumption post-accession. See L F M Besselink, 'Should the European Union ratify the ECHR?' in A Føllesdal, B Peters and G Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 310–312. Even without Bosphorus, many see the EU's position as envisaged by the original draft accession agreement as privileged. See, e.g. F Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015) 99–100. The same can be said regarding the revised agreement.

⁷⁴ Pergantis and Johansen (n 72) 248.

⁷⁵ Cf. focusing specifically on CSDP missions J De Coninck, 'Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?' (2023) 24 *German Law Journal* 342, 351–352.

only individuals, of course, but Member States as well, should they strive to contest the reattribution.

From the point of view of the individual seeking access to justice, the doctrinal soundness of the attribution of responsibility is of less concern (the primary consideration being access to justice⁷⁶), but as we have seen above, the newly proposed internal reattribution system is not irrelevant from the point of view of individual applicants either, possibly affecting access to an effective judicial remedy.

4. The *locus standi* of third states and the principle of effective judicial protection

Standing (*locus standi*) before the CJEU is an issue that could be analysed from multiple perspectives: from an inter-institutional perspective,⁷⁷ in the context of the Plaumann-test,⁷⁸ or, as it were, the possibility of active standing of third states. From the theoretical perspective of the principle of effective judicial protection and the right to an effective remedy, it is unquestionable that an entity subject to a measure should be able to initiate judicial review of the legality of the act concerned. However, under EU law, strict requirements regulate active standing before the CJEU regarding the annulment of EU measures.

Under Article 263 TFEU, appellants are grouped into privileged, quasi-privileged and non-privileged categories. The first two categories concern EU institutional actors and Member States. As regards non-privileged applicants, according to Article 263(4) TFEU, ‘any natural or legal person’ can challenge EU acts that concern them directly and personally. What this means (and what it should mean) in practice has been the subject of decades-long jurisprudential and academic discussions. Recently, the *locus standi* of third states has emerged as a new dimension of this question. This issue fits into a broader context as well, as the CJEU has already had to deal with the *locus standi* of special non-state entities based outside the EU⁷⁹ as well as with the recognition of third states in the context of the EU’s external activities.⁸⁰

⁷⁶ F Naert, ‘European Union Common Security and Defence Policy Operations’ in A Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017) 699; J De Coninck (n 75) 361.

⁷⁷ Most notably in the context of the *locus standi* of the European Parliament. See e.g. Á Mohay, ‘The locus standi of the European Parliament in annulment proceedings’ in Zs Gy Balogh (ed), *Selected Essays of Faculty of Law University Pécs* (University of Pécs 2009) 193.

⁷⁸ See e.g. T Tridimas and S Poli, ‘Locus Standi of Individuals under Article 230(4): The Return of Euridice?’ in A Arnall, P Eeckhout, and T Tridimas (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) 77.

⁷⁹ Case C-104/16 P *Council v Front Polisario* (Western Sahara), EU:C:2016:973.

⁸⁰ Case C-632/20 P *Spain v Commission* (Participation of Kosovo in BEREC), EU:C:2023:28. Among other things, the judgment contains an amusing discussion of whether ‘state’ and ‘country’ mean the same thing, with the Court concluding that they in fact do (paras 39–40).

The key judgments for the purposes of this Article are *Cambodia v Commission*⁸¹ and *Venezuela v Council*.⁸²

4.1. *Cambodia*

In *Cambodia*, the issue revolved around the reintroduction of tariffs on Indica rice originating from Cambodia. Cambodia previously enjoyed preferential status under EU customs rules, as it was allowed to export rice to the EU without the obligation to pay a tariff.⁸³ However, the Commission later decided on a temporary reintroduction of customs tariffs: based on requests from Member States, the Commission ascertained that rice was being imported in volumes and at prices that were causing severe difficulties to the EU rice industry. Cambodia (and the Cambodian Rice Federation) wished to contest this implementing regulation.⁸⁴ The Commission submitted a plea of inadmissibility, contesting Cambodia's standing under Article 263 TFEU.⁸⁵

The GC, however, found that 'any natural or legal person' as per Article 263(4) TFEU should be interpreted as covering third states as well. To underpin this interpretation, the GC relied on an argument based on the principle of effective judicial protection, requiring that 'all persons', even if they were non-EU states, should be able to seek judicial review of measures affecting them directly and individually.⁸⁶ The GC added that the wording of the TFEU further did not explicitly exclude third states from bringing actions for annulment.⁸⁷ As in the context of the CFSP jurisdiction, the constitutional framework relied on includes the completeness of the system of judicial remedies and the rule of law.⁸⁸

4.2. *Venezuela*

In *Venezuela*, the measures at issue were 'sanctions', i.e., restrictive measures adopted by the EU against Venezuela.⁸⁹ The state submitted an action for annulment

⁸¹ Case T-246/19 *Kingdom of Cambodia and Cambodia Rice Federation (CRF) v Commission*, EU:T:2022:694.

⁸² Case C-872/19 P *Venezuela v Council*, EU:C:2021:507.

⁸³ Regulation No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation No 732/2008, OJ L303/1.

⁸⁴ By way of Implementing Regulation 2019/67 of the Council of 16 January 2019 imposing safeguard measures with regard to imports of Indica rice originating in Cambodia and Myanmar/Burma, OJ L15/5.

⁸⁵ *Cambodia* (n 81) para 16.

⁸⁶ *Ibid* para 38.

⁸⁷ *Ibid* para 49.

⁸⁸ *Ibid* paras 36–37.

⁸⁹ Regulation 2017/2063 of the Council of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, OJ L295/21; Implementing Regulation 2018/1653 of the Council of 6 November 2018 implementing Regulation 2017/2063, OJ L276/1; Decision 2018/1656 of the Council

at the General Court, which found the action to be inadmissible: although it regarded the state as a ‘legal person’ under Article 263(4) TFEU, it held that the state was not *directly* concerned by the measures in question. Among its objections of inadmissibility, the Council did argue that Venezuela should not be regarded as a legal person in the abovementioned context, but the GC did not address this.⁹⁰

In its appeal, Venezuela only challenged the GC’s decision on standing, arguing that it misinterpreted the requirement of direct concern.⁹¹ In the appeals procedure, the Court of Justice requested the parties to the case, as well as the Commission and the Member States, to submit a position specifically on whether a ‘third state’ is to be regarded as a legal person in this context.⁹² The appellant, in essence, relied on Article 19 TEU, Article 47 of the Charter and *Cambodia*.⁹³ The Council – apparently unconvinced by the *Cambodia* ruling – submitted that it did not consider third states to fall under the category of legal persons in the context of Article 263(4) TFEU, unless specific rights have been conferred on the state in question via an international agreement concluded with the EU.⁹⁴ The Council based its argument mostly on public international law, upon which relations between the EU and third states are based, highlighting the consequences of sovereign equality and the prevailing need for consent in international law, also in relation to the jurisdiction of international courts.⁹⁵ The Council also claimed that allowing third states asymmetrical access to the EU judicial system will put the EU at a disadvantage, as third countries do not allow the EU to challenge decisions taken by them regarding their international relations, or trade or economic policies before their domestic courts, undermining the EU’s external action.⁹⁶ The Commission seemed more flexible by presenting different options of interpretation: it seems to have initially favoured a more restrictive interpretation, suggesting that third states would, taking into account the international law tenet of the equality of states, only fall under ‘legal person’ if they were acting *de iure gestionis*, but not when carrying out *de iure imperii* acts.⁹⁷ However, the Commission also outlined that voluntary submission to the jurisdiction of the CJEU should not be ruled out, and was in fact in line with a teleological reading of the

of 6 November 2018 amending Decision 2017/2074 concerning restrictive measures in view of the situation in Venezuela, OJ L276/10.

⁹⁰ Case T-65/18 *Venezuela v Council*, EU:T:2019:649.

⁹¹ *Ibid* para 54.

⁹² *Ibid* para 29. Apart from the appellant and the Council, Belgium, Bulgaria, Germany, Estonia, Greece, Lithuania, Netherlands, Poland, Slovenia, Slovakia, Sweden and the Commission submitted a position. For the purposes of the present analysis, only the arguments of Venezuela, the Council and the Commission will be examined.

⁹³ Opinion of Advocate General Hogan in *Venezuela v Council* (n 82), EU:C:2021:37, paras 32–33.

⁹⁴ *Ibid* para 26.

⁹⁵ *Ibid* paras 26–27.

⁹⁶ *Venezuela v Council* (n 82) para 29.

⁹⁷ *Ibid* para 37.

TFEU; the EU executive also indicated that submission to CJEU jurisdiction is preferable to using other international dispute-settlement mechanisms.⁹⁸

As a starting point, the Court posited that the concept of legal person in Article 263 TFEU was an autonomous concept of EU law, not a reference to national or international law.⁹⁹ The Court further outlined its earlier case law to argue that a narrow interpretation of Article 263 TFEU would not be consistent with previous jurisprudence: the Court had already recognised, apart from ‘traditional’ private persons, the standing of local and regional entities, public bodies and organisations lacking legal personality.¹⁰⁰ Against that backdrop, the Court further relied on the rule of law as an Article 2 TEU value to applicable to the CFSP as well, as reaffirmed in *Bank Refah*.¹⁰¹ The principle of effective judicial protection (or ‘review’ as the Court put it in this case) was not far behind: according to the Court the principle ‘militates in favour of finding’ that a third state should have standing to bring proceedings as a legal person.¹⁰² The Court took note of the argument put forward by the Council that allowing third states’ standing would result in an asymmetrical situation, with no guarantee that third states would allow the EU similar status reciprocally – but rejected it. The rule of law, as the Court stated, cannot depend on reciprocity.¹⁰³ The Court accordingly established standing for Venezuela, and annulled the judgment of the GC due to an erroneous decision on the ‘direct concern’ aspect and referred the case back to it for a decision on the merits.¹⁰⁴

4.3. Interim conclusion

The right to an effective remedy, as a fundamental right read in the light of the rule of law, has been utilised by the Court in CFSP-related disputes to establish its jurisdiction to review individual restrictive measures. In *Venezuela*, the measures at issue were not individual sanctions, but sanctions against a state. As the Council argued in the proceedings, these measures were not covered by the individual sanction claw-back based on Article 275 TFEU due to their general nature, the legal basis of such measures being the first paragraph of Article 215 TFEU.¹⁰⁵ In its arguments, the Court adapted: instead of the fundamental right to an effective remedy, the *principle* of effective judicial protection¹⁰⁶ was relied upon to support the broad interpretation

⁹⁸ Ibid para 38.

⁹⁹ Ibid para 42.

¹⁰⁰ Ibid paras 44–47.

¹⁰¹ Ibid. para 49.

¹⁰² Ibid para 50.

¹⁰³ Ibid paras 51–52.

¹⁰⁴ Case T-65/18 *RENV (Venezuela v Council)*, EU:T:2023:529.

¹⁰⁵ AG Hogan in *Venezuela v Council* (n 93) para 37.

¹⁰⁶ The principle as referred to here is an unwritten general principle of EU law as developed by the Court of Justice, starting in the 1980s with Case 14/83 *Von Colson and Kamann*, EU:C:1984:153, and Case 222/84 *Johnston*, EU:C:1986:206. The written version of the principle codified in Article

of legal person – as an autonomous EU law concept. The autonomy of the EU legal order was thus again decisive as a precondition to resolving the question of interpretation in this particular way. In international law, this problem could hardly arise in the same way: even in international courts that have jurisdiction to rule on claims both by individuals and states (e.g., the ECtHR), the technique of categorising a state or similar public entity as a ‘legal person’ has, to the best of our knowledge, not been used.¹⁰⁷ Under international law, states possess ‘original’ legal personality; their right of standing before international courts results from this inherent quality rather than judicial recognition.¹⁰⁸ This contrasts with the standing and legal capacity of private persons (i.e. natural or legal persons), which typically requires some type of determination or recognition in international law.¹⁰⁹ Against this backdrop, the autonomy of the EU legal order is expressed by emphasising its unique constitutional nature, based on public law principles that allow it to show ‘openness’ in terms of allowing external litigants, and hold it to the same principles that govern its internal functioning.¹¹⁰

Remarkably, the argument that the EU Treaties aimed to establish a complete system of judicial remedies is missing from the Court’s reasoning, although it could have been arguably used as an additional element in the ‘contextual and teleological interpretation’¹¹¹ of the legal person concept. It is also interesting to consider that the deciding factor in the case turned out to be the principle of effective judicial protection, an unwritten principle absent in this form from the text of the Treaty. Of course, this is not a unique situation in the EU legal order.

In *Venezuela*, the Court decided not to take into account the specificities of the exercise of foreign policy, where states usually enjoy a higher level of discretion;¹¹²

19(1) TEU refers to the obligation of the *Member States* to provide remedies to ensure effective legal protection in the national legal system. On the origins and dimensions of the principle (without the CFSP aspect), see C Sjöstrand, ‘Effective Judicial Protection of Individuals. A duty for the Court of Justice or the National Courts?’ (CFE Working paper series 47-2012) at www.cfe.lu.se.

¹⁰⁷ Nota bene, the issue of international legal personality and standing before international judicial institutions is, of course, a separate question.

¹⁰⁸ Cf. J Crawford, ‘State’ in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (OUP 2011).

¹⁰⁹ For a comprehensive exploration of the legal status of individuals in international law, see A Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

¹¹⁰ L Lonardo and E Ruiz Cairó, ‘The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures: Case C-872/19 P, *Venezuela v Council*’ (2022) 18 *European Constitutional Law Review* 1, 114, 119–121.

¹¹¹ *Venezuela v Council* (n 82) para 48.

¹¹² See M Perakis, ‘How Many Applicants Can Fit in Article 263 TFEU? Presentation and Criticism of the CJEU’s *Venezuela v. Council* Judgment’ (International Law Blog, 11 March 2022) at internationallaw.blog. Perakis also mentions the consistent case law of ECtHR allowing for certain restrictions on effective judicial protection for the benefit of the states’ international action, e.g. in case *Markovic and Others v Italy* App no 1398/03 (ECtHR, 14 December 2006).

nor did it attempt to bring its judgment closer to its own case law regarding the invocability and the direct effect of international agreements of the EU.¹¹³ By opening the procedural door, the judgment could have significant consequences for the EU's sanctions regime as part of the CFSP, and raises the question of whether the Court would also allow actions for damages by third states before the EU judiciary in the future.¹¹⁴

5. Conclusion, or the triumph of autonomous concepts

The rule of law has had an interesting 'career' in EU law: it was first introduced by the Court of Justice in *Les Verts*, at a time when the EU Treaties said nothing of this principle, let alone called it a foundational value. Owing to the Maastricht and Amsterdam Treaties, the concept was referred to as a foundational value of the EU (with the legal situation of the Union and the Communities differing quite significantly from the current legal framework). The Lisbon Treaty reformulated and reinforced the values of the EU, incorporating the rule of law as one of the values upon which the EU is founded in Article 2 TEU. At the time of the adoption of the Lisbon Treaty, it was uncertain what role the reformulated values will play in the public law of the European Union in practice. In recent years, however, the CJEU has taken a more active role in interpreting and applying – or: operationalising – the rule of law. Interestingly, the two dimensions where this is the case relate firstly to the internal relationship between the EU and its Member States, and, secondly, to the EU's Common Foreign and Security Policy, i.e. its international relations.¹¹⁵

The rule of law requires that the system of remedies under EU law be 'complete', a requirement that is a corollary of the right to an effective remedy and the principle of effective judicial protection. This combination of constitutional requirements is increasingly utilised by the Court to ensure respect for the rule of law in all fields of EU law, including the CFSP, the planned accession to the ECtHR, as well as the

¹¹³ Ibid. On the legal nature of the EU's international agreements in detail, see Á Mohay, 'The Status of International Agreements Concluded by the European Union in the EU Legal Order' (2017) 33 *Pravni Vjesnik* 151.

¹¹⁴ E Kassoti and A Carrozzini, 'A Curia Mundi? The CJEU's Judgment in Case C-872/19 P *Venezuela v Council*' (EU Law Analysis, 16 August 2021) at eulawanalysis.blogspot.com.

¹¹⁵ Internally, the starting point of this "operationalisation" of the rule of law combined with Article 19(1) TEU by the Court is Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117. See L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (SIEPS 2021-3) 11 and L Pech and S Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 *Common Market Law Review* 6, 1827. Externally, the trend is demonstrated by the CFSP jurisprudence outlined above. The same two aspects of the rule of law issue are highlighted in P Van Elswege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 *European Constitutional Law Review* 8.

EU's international relations in a broader sense – this underlines the role of the CJEU as the primary constitutional adjudicator of the EU legal order.¹¹⁶

The right to an effective remedy as a fundamental right and the unwritten principle of effective judicial protection are becoming core elements of the 'constitutional identity' of the EU, yet another construct of CJEU case law.¹¹⁷ In this sense, both the right and the principle are gaining increasing relevance as new(ish) guarantors of the autonomy of the EU legal order, both internally and externally.¹¹⁸ The further evolution of the case law of the CJEU deserves continued attention, especially in light of the EU's still ongoing accession process to the ECHR.

The three dimensions of the right to an effective remedy outlined in this article are all dependent on the 'rule of law'-friendly form of teleological interpretation¹¹⁹ employed by the Court of Justice. The rule of law as a concept itself is arguably becoming an autonomous concept within EU law.¹²⁰ The autonomous interpretation of EU law, as a cross-cutting facet of autonomy, is a reliable asset in the toolbox of the CJEU in giving concepts under EU law their *sui generis* – and uniform – interpretation, distinct from both national law and international law, though inevitably also drawing on them as regards methods and principles of interpretation.¹²¹ Autonomous interpretation is not 'jurisdictional' in nature (as opposed to internal and external autonomy), but nevertheless plays out similarly in terms of reinforcing the separation of legal concepts employed by EU law from their interpretation in other legal orders.¹²² An autonomous interpretation of the rule of law by the CJEU is based

¹¹⁶ Van Elswege and Gremmelprez (n 115) 31–32.

¹¹⁷ Mentioned explicitly in a judgment for the first time in Case C-156/21 *Hungary v European Parliament and Council*, EU:C:2022:97, para 127. The roots of the concept can already be found in the seminal decisions in *Kadi* (n 15), *Opinion 2/13* (n 62), Case C-284/16 *Achmea*, EU:C:2018:158 and *Opinion 1/17 CETA*, EU:C:2019:341. For an early analysis of the emerging concept, see Á Mohay, *A nemzetközi jog érvényesülése az uniós jogban* (Publikon 2019) 141–145. On the link between the autonomy and the identity of the EU legal order and their interlinked constitutional functions in upholding the EU's constitutional structure, see K Lenaerts and JA Gutiérrez-Fons, 'Epilogue. High Hopes: Autonomy and the Identity of the EU' (2023) 8 *European Papers* 3, 1495.

For a recent consideration of EU constitutional identity as a possible implicit limit to amending the EU Treaties, see PC Mantilla de los Ríos, 'European Constitutional Identity as the Unamendable Core of the EU Treaties' (2024) 20 *European Constitutional Law Review* 4, 545.

¹¹⁸ The autonomy of EU law manifests itself in two dimensions: it represents 'self-determination' vis-à-vis not only national law, but international law as well. In other words, autonomy is a 'two-in-one' concept: originally mostly relevant regarding national law, subsequently crucial in delimiting EU law from public international law. See T Molnár, 'The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States' (2015) 3 *Hungarian Yearbook of International Law and European Law* 433, 459.

¹¹⁹ Van Elswege and Gremmelprez (n 115) 9.

¹²⁰ See L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Paper 04/09, 2009) 5–6, 11.

¹²¹ Hestermeyer (n 12).

¹²² D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' 8 (2023) *European Papers* 3, 1403, 1418–1419.

on the interpretation of autonomy as a means to protect and promote the foundational values of the EU, inseparably linked to the identity of the common legal order that is EU law.¹²³ Nevertheless, in this context, a further question of interpretation arises. The rule of law is one of the fundamental values of the EU, which have been defined by Article 2 TEU as values ‘common to the Member States’. Accordingly, one may ask whether an autonomous interpretation of the rule of law that *diverges* from its interpretation shared by the Member States is possible at all whilst staying true to the text of the TEU. In any case, a regulatory definition of the rule of law is absent from written primary law, and its conceptualisation as a supranational notion is at the very least unfinished.¹²⁴

Thus, in this respect, and others, tensions of a constitutional nature¹²⁵ remain. As regards CFSP jurisdiction, tension is perceivable between contextual and teleological interpretation on the one hand, and the textual, restrictive interpretation on the other. As regards ECHR accession and attribution of CFSP acts, tensions exist between the internalisation of the attribution problem by the EU (thus applying an ‘autonomous’ solution divergent from ARSIWA and ARIO rules).¹²⁶ And as regards the standing of third states, tension is perceivable between effective judicial protection as a vital constitutional principle and the public international law rules based on sovereign equality and reciprocity – the two systems being separated by the autonomy of the EU legal order. To quote AG Bobek, the obligation to safeguard the right to an effective remedy ‘does not allow the Court to rewrite the EU Treaties, but it does require the Court to interpret the existing provisions so that they can achieve their full potential to provide judicial protection to anyone concerned by acts of EU institutions and bodies’¹²⁷ – a statement which, with a bit of sarcasm and some knowledge of the Hungarian language, could be described as ‘an iron hoop made out of wood’.¹²⁸

¹²³ Lenaerts and Gutiérrez-Fons (n 117) 1496.

¹²⁴ CJ Moreira González, ‘Implementing the Rule of Law in the European Union: How Long Trapped in Penelope’s Spinning Wheel from Article 2 of the TEU?’ (2023) 25 *Cambridge Yearbook of European Legal Studies* 161, 162.

¹²⁵ In a similar vein, see Editorial Comments (n 60) 1455.

¹²⁶ On how the multilayered rules of intra-EU responsibility under EU law and international law interact and overlap, see T Molnár and RA Wessel, *Interactions Between EU Law and International Law. Juxtaposed Perspectives* (Edward Elgar 2024) 199–224.

¹²⁷ Opinion of Advocate General Bobek in *SatCen* (n 31), EU:C:2020:220, para 69.

¹²⁸ In Hungarian, the term ‘fából vaskariká’, which literally translates to ‘an iron hoop made out of wood’, is used to describe something inherently contradictory or paradoxical. In other words, something akin to a ‘square circle’.

