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" EU liability towards individuals due to CFSP acts imposing smart sanctions"

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TABLE OF ABBREVIATIONS

AG	Advocate General
Art.	Article
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CSDP	Common Security and Defence Policy
EC	European Community
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
e.g.	exempli gratia
etc.	et cetera
EU	European Union
GC	General Court
Ibid.	Ibidem
i.e.	id est
para.	paragraph
p.	page
pp.	pages
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
v.	versus
WTO	World Trade Organisation

PREFACE

Aim of the present dissertation is to stress out the liability that the EU may incur when imposing smart sanctions through CFSP acts as well as the extent of the judicial protection that individuals enjoy in such a case. The distinct character of the CFSP is also reflected in the CJEU's role. The CJEU has a restricted ambit of jurisdiction in the CFSP, since according to specific provisions laid down in the TEU and the TFEU, the CJEU may exercise judicial review over CFSP acts in exceptional cases, including the review of CFSP acts imposing restrictive measures, and only under certain conditions. Albeit its limited jurisdiction, the CJEU tends to extend its power in the name of the fundamental principle of the rule of law and the right to effective judicial protection that individuals enjoy pursuant to Article 47 of the Charter of Fundamental Rights of the European Union.

The introduction of the dissertation seeks to provide an insight into the distinctiveness of the CFSP reflected in the distinct rules that govern it, and at the same time, to highlight the role of smart sanctions. More precisely, it will present certain points of the EU's Common Foreign and Security Policy after the Lisbon Treaty, and the framers' will to unify the policies of the EU's external action, while the differentiated nature of smart sanctions and their specific role as well as the issues that arise regarding their judicial review and matters of individuals' compensation, will be stressed out as well.

Next, the main body of the dissertation is divided in two parts: in the *first part* it is examined whether the judicial scrutiny of smart sanctions is feasible and under which conditions, particularly in view of the specificities and the distinctiveness of the Common Foreign and Security Policy, while the *second part* focuses on the possibility of individuals to bring an action for damages in this specific area of law and in particular, for immaterial damage. More specifically, the first part will seek to elaborate on the judicial scrutiny that the CJEU has the power to exercise over CFSP acts that provide for restrictive measures. In this chapter two issues will be examined. *Firstly*, the action for annulment of a CFSP act providing for smart sanctions brought by an individual within the meaning of the fourth paragraph of Article 263 TFEU, in order to contest this act. This section will examine the special requirements for this action to be brought, as well as other issues arising regarding the content of Article 263 (4) TFEU, such as, in view of recent case law, whether a third country can be an applicant within the meaning of Article 263 (4) TFEU.

Secondly, it will be explored if the CJEU is allowed to deliver preliminary rulings pursuant to Art. 267 TFEU over CFSP acts imposing restrictive measures. In this context, the significance of the individuals' right to a complete system of legal remedies and procedures as well as the need for a coherent legal system of the EU will be highlighted, while the role of the national courts in the review of CFSP acts will be stressed out.

The second part will highlight the possibility of individuals to establish non-contractual liability of the European Union. More particularly, the first part will note the possibility of individuals to bring an action for damages on the basis of Article 340 TFEU in this particular field despite the inexistence of a relevant explicit provision. Moreover, the analysis will examine the issue of the CJEU's possibility to award immaterial damages due to EU liability in the field of restrictive measures. The second part will focus on the conditions required for the establishment of an

action for damages and will seek for any particularities due to the distinctiveness of the CFSP. In this framework, various issues will be discussed, such as the assessment of the discretionary power of the Council in the field of targeted sanctions, and the exercise of this power in view of an increasing recognition of EU non-contractual liability vis-à-vis individuals, the need for the CJEU to avoid a lacuna in the judicial protection system of the EU etc.

The legal analysis in the main body of the dissertation is based on literal, contextual and teleological interpretation of the Treaties. The conclusion of the dissertation will assess the CJEU's tendency to extend its jurisdiction on this sector in the name of EU fundamental principles, such as the rule of law, and will provide thoughts about the future impact of this CJEU's case law.

By closing this preface, I would like to thank my supervisor, Associate Professor Emmanuel Perakis, as well as Associate Professor Revekka-Emmanuela Papadopoulou and Assistant Professor Anastasios Gourgourinis for their invaluable guidance, as well as for broadening my knowledge-horizons, and enhancing my interest in EU law. Furthermore, I would like to thank my family and friends for their support throughout my studies.

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INTRODUCTION

a. The distinctiveness of the CFSP

Beginning with the placement of the Common Foreign and Security Policy provisions in the Treaties, they are included in the TEU and not in the TFEU, where other sectors of the EU's external relations are provided for, such as the Common Commercial Policy, international agreements, the economic, financial and technical cooperation with third countries. Nevertheless, the framers of the Lisbon Treaty decided to include the CFSP rules within the section regarding the external action. In this way, they aimed at the maintenance of the architectural link with other external aspects of the EU policy, and at the same time, by placing the CFSP within the TEU, they have acknowledged that the CFSP is subject to distinct rules[1]. The Lisbon Treaty has reshaped the Union's constitutional framework by eliminating the three-pillar structure and, for the first time in the Union's constitutional history, articulating a set of principles and objectives in Art. 21 TEU that characterise all external policies[2]. Consequently, the CFSP is conducted within a unified legal framework and is based on principles and objectives shared with other facets of the EU's external activities[3]. In this context, the Treaties introduce the term "external action" for the first time, to refer to EU's activities in the world, including in the CFSP. Such a comprehensive term used in the Treaties signifies an understanding of the fact that the various aspects of the Union's external policies (e.g., economic, trade, development, security, social, political) constitute an integrated whole.

The objectives outlined in Art. 21 TEU, as a general provision on the EU's external action, apply to all external actions of the EU, both the CFSP and the non-CFSP ones, regardless of their legal basis. Article 23 TEU, which falls within the CFSP Chapter, refers back to the principles and objectives of the General Chapter of the EU's external action, hence reinforcing these overall EU objectives and creating a unified EU legal framework. The CFSP possesses unique characteristics that distinguish it from other areas of external relations law and other sectors of EU law. One key distinction is that the decision-making in the CFSP often requires unanimity within the Council. This separation of the CFSP from other Union policies in the TEU has led to situations where inconsistencies have emerged between CFSP and non-CFSP issues. This has prompted ongoing questions about the sustainability, from a legal standpoint, of truly keeping the CFSP distinct within the single Union legal framework. Although the Treaty of Lisbon has introduced more institutional pluralism into Union decision-making in most policy areas, the CFSP was intentionally left unchanged through treaty amendments. This decision was likely made with the aim to prevent the alteration of the essence of the CFSP, as already established since the Treaty of Maastricht.

Unlike almost all other areas of Union policies, the Court of Justice of the European Union does not have full jurisdiction in the CFSP, as specified in Articles 24 (1), second subparagraph, last sentence, first limb of the TEU and 275 (1) TFEU[4]. These articles prevent the CJEU from having

[1] Craig, P., The Lisbon Treaty, (2010) Oxford University Press, p. 381.
[2] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 6.
[3] *Ibid.*, p. 6.
[4] Butler, G., The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy, (2017) European Constitutional Law Review (13), p. 674.

jurisdiction over CFSP matters, with limited exceptions stated in Articles 24 (1), 2nd subparagraph, last sentence, second limb, of the TEU and 275 (2) TFEU, which will be analyzed hereinafter. The Treaty of Lisbon introduced significant changes to the CFSP, affecting its constitutional status and the regime governing restrictive measures[5]. This implies that over time, the Treaties may reduce the distinctions between the CFSP and the non-CFSP[6]. Yet, the Court's jurisdiction in the CFSP still is and will likely continue to be a subject of debate. There have been, of course, some clarifications in the Treaties regarding the Court's jurisdiction in the CFSP, but its role in this field remains largely restricted. Recent CFSP cases and the Court's assertion of jurisdiction in these cases have generated more questions than they have answered. And yet, the absence of political checks underscores the potential need for a prominent role for the CJEU in CFSP matters[7]. For example, national systems have a system of check and balances, including judicial and political oversight over governmental actions, while the EU lacks effective parliamentary control over its Common Foreign and Security Policy.

[5] Butler, G., The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy, (2017) European Constitutional Law Review (13), p. 675.
[6] *Ibid.*, p. 691.
[7] Hinarejos, A., Judicial Control in the European Union, (2009) Oxford University Press, p.172.

b. Smart sanctions in the EU's external relations

Imposing sanctions is a traditional tool of exercising external action. This is, in fact, a policy of the United Nations, which has been developed after the World War II[8] with the incorporation of sanctions into the United Nations Charter. A classic category of sanctions recognised by the United Nations is the so-called "comprehensive sanctions", which include measures such as arms embargoes, diplomatic isolation, and trade restrictions.

However, in the last thirty years there has been a growing trend towards what is called "smart sanctions". This is because of two main reasons: First, the imposition of comprehensive sanctions has led many times to disappointing results. Characteristic is the case of the sanctions imposed on Iraq, due to its invasion of Kuwait in 1990[9]. The sanctions imposed, consisting of a restriction of food and medical imports, led to the death of over half a million children under the age of five[10]. Second, the collapse of the Communist Regimes of the '90's and the prevalence of the liberalism doctrine reinforced the assumption that state leaders are rational actors who adopt their behaviour on the basis of cost-and-benefit calculations, especially in a globalised and interdependent world. Consequently, when in the '90's the imposition of sanctions increased, there was much more attention paid to the humanitarian problems related to sanctions[11], and their design was reevaluated with the aim to make them effective without causing "collateral damage" to civilians that were not meant to be targeted by them[12].

Moreover, the creation of "smart sanctions" was the result of a trend in the international sanctions policy to move away from the complete economic isolation of a country (an embargo), towards more targeted restrictive measures. This would maximise the sanctions' effectiveness in succeeding both the affection of the targets and the avoidance of negatively affecting those not targeted, including the general population of a targeted state[13]. Aim of the sanctions is to produce negative effects to those regarded liable for the adverse policy, to those who support or take advantage of such a policy, and to the sources of funding that are needed and used for the implementation of this policy. In other words, smart sanctions are addressed to specific individuals and groups accused of conducting activities such as terrorism, territorial aggression and human violations. They consist of specific measures, mainly the freezing of assets, financial and travel restrictions, arms embargoes, and boycotts on specific commodities. Their characterisation as "smart" is due to their targeted nature, in order no negative unintended consequences to occur. Economic sanctions are regarded to be "targeted" and "smart"[14].

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[8] Gordon, J., Smart Sanctions Revisited, Ethics and International Affairs, 25, no. 3 (2011), p. 316.
[9] Peou, S., Why "Smart" Sanctions Still Cause Human Insecurity, (2019) Asian Journal of Peacebuilding, Vol.7 No.2, p. 268.
[10] Cashen, E., The impact of economic sanctions, (2017) World Finance, https://www.worldfinance.com/special-reports/the-impact-of-economic-sanctions .
[11] Gordon, J., Smart Sanctions Revisited, Ethics and International Affairs, 25, no. 3 (2011), p. 317.
[12] Cashen, E., The impact of economic sanctions, (2017) World Finance, https://www.worldfinance.com/special-reports/the-impact-of-economic-sanctions .
[13] Pursiainen, A., Targeted EU Sanctions and Fundamental Rights, Pursiainen, A., Targeted EU Sanctions and Fundamental Rights, https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751, p.4.
[14] In literature one can also find the terms "targeted sanctions" or "restrictive measures" used as synonyms for "smart sanctions". The terms are also used as synonyms in this dissertation.

In the EU framework, smart sanctions are used as a tool of the EU's external action, and more specifically, of the exercise of the Common Foreign and Security Policy (CFSP). More specifically, the smart sanctions imposed by the EU can be categorised in three distinct groups. First, the EU enforces UN sanctions via EU law. In this case, EU Institutions do not have any real discretion on selecting the targets, since the UN lists are enforced as they are. Second, the EU has established a counter-terrorism sanction system in which individual Member States suggest the targets to the Council[15]. These targets are under investigation or face legal proceedings associated with terrorism in a Member State or a third country. Although the Council ultimately decides whether to include a person on the EU's sanctions list, the main responsibility for the measure, including its factual basis, lies with the respective Member State. If the target successfully contests the underlying national measure, the Council is obliged to remove the EU measure. The third category consists of autonomous third country sanctions of the EU, like those imposed against the Assad regime in Syria. In this case the Council independently decides who to target. In this framework, the Member States and the European External Action Service make proposals, contributing to the Council's decision making process[16]. Nonetheless, the Council is solely accountable for ensuring the accuracy of designations and the appropriateness of the decision-making process, as there are no external decisions, either by the UN or a Member State, upon which it can depend for guidance or validation.

Initially, the EU's differentiated sanctions regimes led to a fragmentation of EU case law. The standards of due process varied depending on which type of sanctions was challenged each time. However, over time, case law has evolved, and with the pivotal cases in 2013, namely Kadi II[17] and Bamba[18], most experts now believe that the applicable standards have been aligned across all three types of sanctions regimes. From case law dealing with these various sanctions regimes, it is evident that the CJEU consistently demands that any act of sanctions against an individual must meet specific fundamental requirements. These requirements pertain to the general criteria used to determine individual targets (referred to as "the designation criteria"), the rationale or justification for targeting a particular person (mentioned as "the statement of reasons"), and the evidence supporting the stated reasons (referred to as "the supporting evidence"). Nonetheless, some differences are expected to persist, particularly in the practical implementation of these standards due to the structural distinctions in the regimes.

Research on this field worldwide has shown that smart sanctions often do not perform satisfactorily in bringing a change towards more respect for human rights, especially in authoritarian regimes. It is still unclear if the increased effectiveness of smart sanctions in democracies is to be attributed to a high respect of the principle of the rule of law or to their lower capacity to resist sanctions. More precisely, in the EU framework, issues arise, regarding the balancing between the imposed smart sanctions and the underlying policy interest, on the one hand, and the fundamental rights of the addressees, on the other[19]. This emerges from the

[15] Pursiainen, A., Targeted EU Sanctions and Fundamental Rights, https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751, p.5.
[16] *Ibid.*, p.6.
[17] CJEU, 18.07.2013, *Commission and others v Kadi*, *Judgment*, C-584/10 P, ECLI:EU:C:2013:518.
[18] GC, 08.06.2011, *Bamba v Council*, T-86/11, ECLI:EU:T:2011:260.
[19] Pursiainen, A., Targeted EU Sanctions and Fundamental Rights,

hundreds of annulments through which targeted sanctions have been contested up to date, and also from the fact that many of them have been successful. Thus, when imposing smart sanctions, the Council has to ensure their compatibility with the guaranteed fundamental rights.

Taking the above considerations into account, the relative failure of even smart sanctions to avoid the collateral humanitarian damage, has resulted in the effects of the sanctions being passed on to the wider population. In addition, the undiligent imposition of smart sanctions risks the infringement of fundamental rights of the targets. These findings make judicial review of smart sanctions an absolute necessity. Thus, purpose of this paper is to highlight the necessity of the judicial review of smart sanctions imposed by the EU, as well as the importance of establishing the liability that the EU may incur in case of unlawfulness of smart sanctions, in view of the fundamental principle of the rule of law that governs the EU legal order, as well as the right of individuals to effective judicial protection and to a complete system of legal remedies. In the light of various characteristic and important judgments, the bases on which the CJEU establishes its jurisdiction over the above issues are assessed, either as solid or flimsy, and an attempt is made to strike a balance between the special nature of the CFSP, on the one hand, and the need of effective judicial protection of individuals, on the other.

https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751, p.4.

1. JUDICIAL REVIEW OF CFSP ACTS IN THE NAME OF THE RULE OF LAW

1.1. The jurisdiction of the CJEU over actions for annulment in the CFSP

1.1.1. The exceptional judicial review based on the "claw-back" provisions

Within the structure of the EC without legal personality established by the Maastricht Treaty, the ECJ did not have any competence in relation to the second pillar, the Common Foreign and Security Policy. This could be inferred, by contrast, from the old Article 46 EU[20], which was repealed by the TFEU. The Lisbon Treaty abolished the peculiar three-pillar structure and replaced it with the simpler form of the EU which, by acquiring legal personality, substitutes itself for the old EC, while retaining the competences of the old second and third pillars. This would have had the effect of giving the CJEU competence in the area of the Common Foreign and Security Policy (Articles 23 to 46 TEU). The purpose of Article 275 TFEU, is precisely to avoid this by explicitly defining in the first paragraph, that the CJEU shall not have jurisdiction over this sphere[21].

Articles 24 (1), subparagraph 2, last sentence, first limb of the TEU and 275 (1) TFEU explicit state that the CJEU shall not have jurisdiction with respect to the CFSP provisions. That is why they are characterised as "carve-outs", meaning that the CJEU exceptionally to its general jurisdiction, does not have jurisdiction over this area[22]. However, the same articles, and more precisely, Art. 24 (1), subparagraph 2, last sentence, second limb of the TEU and Art. 275 (2) TFEU, to which Art. 24 (1), subparagraph 2, last sentence, second limb of the TEU also refers, include the "claw-backs", namely the "exception to the exception", which give to the CJEU the power to exceptionally have jurisdiction over the CFSP in certain cases. Since the entry into force of the Lisbon Treaty, the CJEU has been asked to interpret several times these provisions. In fact, the CJEU has interpreted its jurisdiction broadly, on the basis of the "claw-backs" provisions of Art. 24 (1), subparagraph 2, last sentence, second limb of the TEU and Art. 275 (2) TFEU, and of the rule of law, the necessity of the uniform interpretation and application of EU law across all Member States, as well as on the basis of the principle of a complete system of legal remedies and procedures, to which the Court first referred in the Les Verts judgment of 1986[23].

Accordingly, Article 275 (1) TFEU holds that "the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the Common Foreign and Security Policy nor with respect to acts adopted on the basis of those provisions". However, in paragraph 2 of the same Article it is stated that "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of the TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal

[20] Treaty on European Union (consolidated version 2002), OJ C 325/5, 24.12.2002, See also ECJ, 17.1.2007, Greece v Commission, T 231/04, Coll. II-66, para. 73.
[21] Natsinas, I., [Article 275 TFEU] in Christianos, V., (ed.) [Treaty on the European Union and Treaty on the Functioning of the European Union], 2012, Nomiki Bibliothiki, p. 945.
[22] See CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381.
[23] Case 294/83, Parti écologiste Les Verts v European Parliament, ECLI:EU:C:1986:166, para. 23.

persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

Both the exceptions in the second paragraph of Article 275 TFEU reflect existing pre-Lisbon Treaty case law. The first exception concerns compliance with Article 40 TEU[24], which in the first paragraph defines that: "The implementation of the Common Foreign and Security Policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union". Subsequently, the implementation of the policies listed in those articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under the CFSP Chapter.

Moreover, Art. 40 TEU asks the Court to secure that the suitable legal basis is used, which is a constitutional rather an administrative control. Art. 40 TEU can be invoked by a natural or legal person seeking the annulment of a CFSP act due to an incorrect legal basis, either through a direct action under Art. 263 TFEU or through the indirect way of a preliminary question. The CJEU, in the Rosneft case, which is examined in the second part of the analysis, highlighted that, in mentioning "monitoring compliance" with Art. 40 TEU, Art. 275 TFEU does not refer to any special type of action. Thus, the Court has jurisdiction over compliance with Art. 40 TEU on a request for a preliminary ruling. Nevertheless, in practice it is difficult for an individual to successfully contest the exercise of executive discretion under CFSP powers based on Art. 40 TEU [25].

The second exception in Art. 275 (2) TFEU is more directly associated with administrative law. It concerns decisions imposing restrictive measures on natural or legal persons, against which an action for annulment is permitted under Article 263 (4) TFEU. The decisions referred to by this exception are those "adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union". Title V of the TEU refers to the CFSP, and its Chapter 2 contains the specific provisions governing this field. With regards to the imposition of restrictive measures on individuals, it is Article 29 of this Chapter that is of relevance. The means provided for in this article is the adoption of decisions by the Council. Therefore, the exception of Article 275 (2) TFEU regarding the CJEU's jurisdiction refers to these decisions.

However, it should be accepted that the exception extends to also cover the regulations adopted on the basis of Article 215 of the TFEU. This is because a CFSP decision is a pre-requirement for the adoption of a relevant regulation on the basis of Article 215 TFEU[26]. However, a CFSP decision can include measures, such as a visa ban, that Member States implement directly, thus bypassing the use of Article 215 TFEU, because in this case no subsequent regulation needs to be adopted. The wording of the second exception of Art. 275 (2) TFEU refers to the review of

[24] Natsinas, I., [Article 275 TFEU] in Christianos, V., (ed.) [Treaty on the European Union and Treaty on the Functioning of the European Union], 2012, Nomiki Bibliothiki, p. 946.
[25] Cremona, M., "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, European Papers, Vol. 2, p. 687.
[26] Kuijper, Jan, P., Union External Action under the TFEU, in Kuijper, Jan, P. et al., The Law of the European Union, (2018), Walters Kluwer, p. 1343.

"the legality of decisions providing for restrictive measures against natural or legal persons", which is very similar to the second paragraph of Art. 215 TFEU. This latter states that "where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities". Nevertheless, one could wonder if the exception also covers Article 215 (1) TFEU which follows a different formulation and refers to decisions providing "for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries". The answer to this seems to be affirmative, in the sense that the CJEU has very recently classified the measures adopted in the Regulation 2017/2063 under the first paragraph of Article 215 TFEU and it still reviewed the validity of the said Regulation[27]. In any case, distinguishing between Art. 215 (1) and (2) TFEU is a rather difficult and theoretical exercise, as regulations founded upon this article are typically based on it as a whole. This second exception of Article 275 (2) TFEU echoes previous case-law[28] on the need for effective judicial protection, where restrictive measures are adopted against individuals.

It is noteworthy that Art. 275 (2) TFEU refers to Article 263 (4) TFEU, which concerns actions brought by natural or legal persons. Hence, measures taken according to Art. 215 TFEU can be contested based on the standard standing criteria outlined in Art. 263 (4) TFEU. The possibility for a review procedure by "privileged parties" on the basis of Article 263 (2) TFEU is not relevant here[29]. More specifically, the fourth paragraph of Article 263 TFEU contains the conditions under which natural and legal persons can bring actions for annulment before the CJEU. It holds that the initiations of proceedings can be "against an act addressed to [the applicant] or which is of direct and individual concern to [the applicant], and against a regulatory act which is of direct concern to [the applicant] and does not entail implementing measures".

In practical terms, establishing standing is not challenging when it comes to restrictive measures because the individuals affected are specifically named in annexes: "any inclusion in a list of individuals or entities subject to restrictive measures […] grants them access to the Courts of the European Union, as it is akin, to an individual decision, as described in Article 263 (4) TFEU". CFSP decisions providing for restrictive measures against individuals are typically addressed to those targeted by the restrictive measures. Besides, it is generally true that the essential characteristics of decisions arise from the limitation of the persons to whom they are addressed[30]. In terms of the conditions of individual and direct concern, these are fulfilled on the basis of the so-called "Plaumann test"[31]: "Persons other than those to whom a decision is addressed may only claim to be individually concerned, if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from ail other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed Decision as

[27] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 31.
[28] See the "landmark" judgment in Kadi and Al Barakaat International Foundation v Council and Commission Joined cases C-402/05 P and C-415/05 P. ECLI:EU:C:2008:461 03.09.2008.
[29] Natsinas, I., [Article 275 TFEU] in Christianos, V., (ed.) [Treaty on the European Union and Treaty on the Functioning of the European Union], 2012, Nomiki Bibliothiki, p. 947.
[30] Lenaerts, K., Maselis, I., and Gutman, K., EU Procedural Law (Oxford University Press, 2014), p. 246.
[31] CJEU, 15.07.1963, Plaumann & Co. v Commission of the European Economic Community, C-25/62, ECLI:EU:C:1963:17.

an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee". This is complemented by a specification of concept of direct concern which means that first, a measure directly affects the legal situation of an individual, and second, there is no discretion left to the addressee of the measure who is responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules[32].

In terms of the third situation, when individuals have standing to bring an action for annulment before the CJEU, it relates to the so-called "regulatory acts", that directly concern the applicant and do not entail implementing measures. This situation was introduced by the TFEU and the aim of the EU legislature was to increase the possibility of applicants to bring an action for annulment, by introducing a more relaxed standing test for private applicants[33]. Regulatory acts are distinct from legislative acts under the new provisions of Articles 288-290 of TFEU, especially as defined in Article 289 (3) TFEU. While there is no specific definition for "regulatory acts", the new Article 290 TFEU deals with "non-legislative acts of general application". The term "regulatory acts" does not cover legislative acts, but a more restricted category of acts that still have a general application. As the CJEU ruled on appeal in Venezuela, a regulation adopted under the non-legislative procedure of Article 215 TFEU that has a general scope, in that case by prohibiting general and abstract categories of addressees from carrying out certain transactions with entities which were also referred to in a general and abstract manner, is a regulatory act within the meaning of the third limb of Article 263 (4) TFEU[34].

The Court rejected attempts made by the EC Court of First Instance and Advocate General Jacobs in the Jégo-Quéré[35] and UPA[36] cases to loose the judicially-made strict conditions for individuals' actions against acts of the Community. Instead, the Court emphasised the responsibility of the Member States, as outlined in Art. 19, para. 1, clause 2 TEU, to ensure remedies sufficient to secure effective legal protection in the fields covered by Union law. It also mentioned the procedure for revising the Treaty in the context of any necessary reforms concerning an individual's access to the Court.

The inclusion of natural and legal persons occurs within the framework of two separate categories of restrictive measures. Firstly, there are counter-terrorism measures, that primarily target specific individuals or entities, whether those designations come from UN listings or autonomous EU listings. Secondly, there are measures aimed at a third country, often referred to as "regime sanctions", in which natural and legal persons may be targeted because of their association with or close ties to the targeted regime. When considering the Court's jurisdiction, the exception in Art. 275 TFEU, and standing, both types of restrictive measures appear similar.

[32] GC, 06.09.2011, Inuit Tapiriit Kanatami and Other v. Parliament and Council, T-18/10, ECLI:EU: T: 2011: 419, para. 71.
[33] Curtin, D., Weimer, M., The Court of Justice of the European Union; Supranational adjudicator and accountability form, in Kuijper, Jan, P. et al., The Law of the European Union, (2018), Walters Kluwer, p. 378.
[34] CJEU,22.06.2021, Venezuela v. Council, 872/19 P, EU:C:2021:507, para. 92.
[35] CJEU, 01.04.2004, Commission v Jégo-Quéré, C-263/02 P, ECLI:EU:C:2004:210.
[36] CJEU, 25.07.2002, Unión de Pequeños Agricultores v Council ,C-50/00 P, ECLI:EU:C:2002:462.

Examining restrictive measures that are directed towards a third country and which include sanctions addressed to listed individuals, the exception outlined in Art. 275 TFEU grants the Court only the power to assess the validity of the decision insofar as it directly pertains to the listed individual who initiated the action. In other words, the Court does not possess jurisdiction over any aspects of the decision that do not target at specific individuals, such as those that impose restrictions on the sale of particular products or the provision of specific services to the third country in question. These measures do not fall under the category of "restrictive measures against natural or legal persons" as defined by Art. 275 TFEU. At this point, we observe a distinction in how different types of restrictive measures within the same decision can be subject to review. This distinction is not primarily related to the standing of a specific individual, i.e., direct and individual concern, but rather hinges on whether a specific restrictive measure is of individual or general application. Nevertheless, in practice the criteria for both scenarios are quite similar.

The Court references to well-established cases regarding standing and judicial review, such as Les Verts[37], Unión de Pequeños Agricultores[38] and Inuit Tapiriit Kanatami[39]. The Court goes on to assert that, even though Member States are responsible for implementing CFSP decisions on restrictive measures, national courts lack the authority to declare Union acts invalid. Instead, the preliminary ruling procedure allows questions regarding the validity to be directed to the Court of Justice. The possibility of national courts to submit preliminary questions with regards to the validity of CFSP decisions, providing for restrictive measures against individuals, is discussed later in this dissertation. This possibility is of high importance, as it demonstrates that the Court is willing to evaluate the ambit of the exception within the broader framework of the Treaty, and specifically, its role in securing the legality of Union acts: "That essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP"[40].

Besides, in an argumentum ad absurdum, if the exception could not be applied to the preliminary ruling procedure, national courts would need to independently determine the validity of these decisions, due to the right to effective judicial protection. Recognising such an excessively extended power to the national courts is explicitly dismissed by the CJEU. The CJEU is equipped with an exclusive authority to oversee the validity of EU law and maintain the unity of the Union's legal order, as well as to safeguard individual rights[41].

Furthermore, the mentioning of "conditions" does not refer to standing, since Art. 263 TFEU standing rules are not applicable to preliminary rulings. Nevertheless, the act in question must be targeted at an individual and not be of general application. This specific Rosneft's implication may not have significant practical implications. Hence, while the CFSP decisions (or specific provisions of them) that are subject to review are limited to restrictive measures against natural or legal persons, the procedures for conducting such review align with those used for the non-

[37] CJEU, 23.04.1986, Parti écologiste Les Verts v European Parliament, C-294/83, ECLI:EU:C:1986:166.
[38] CJEU, 25.07.2002, Unión de Pequeños Agricultores v Council ,C-50/00 P, ECLI:EU:C:2002:462.
[39] CJEU, 03.10.2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, ECLI:EU:C:2013:625.
[40] CJEU, 17.09.2020, Rosneft and Others v Council, C 732/18 P, EU:C:2020:727,para. 69.
[41] See i*bid.*

CFSP cases.

1.1.2. Overstretching the scope of rationae personae in defending the rule of law

From the above considerations it has become clear, that the judicial review of smart sanctions is possible under certain conditions, despite the limited CJEU's power in the CFSP. Nevertheless, is the judicial scrutiny of these sanctions possible, even when a third country asks for their review? In other words, can a third country be an applicant within the meaning of Article 263 (4) TFEU? This was, indeed, the question which arose in the Venezuela v. Council case[42]. This part of analysis examines the factual and legal context of the Venezuela v. Council case. An evaluation of the judgment and of future consequences will follow.

As regards the factual background of the case, in 2017 the Council of the European Union adopted, on the basis of Art. 29 TEU, the Decision 2017/2074 concerning restrictive measures due to the situation in the Bolivarian Republic of Venezuela, which was characterised by the continuing deterioration of human rights, rule of law and democracy. The content of that Decision was later included into the Council Regulation (EU) 2017/2063, adopted on the basis of Art. 215 TFEU in order to effectively implement the measures falling within the ambit of EU law. Articles 2, 3, 6 and 7 of the Regulation 2017/2063 provided, basically, a ban on the sale, supply, transfer or export of equipment which might be used for internal repression and services related to such equipment and to military equipment to any natural or legal person, entity or body in, or for use in, Venezuela.

In 2018, Venezuela brought an action for the annulment of Regulation 2017/2063, insofar as the provisions of that act concerned it. Within this framework, the question with which the General Court had to deal was, whether Venezuela, which is a third country, has locus standi to bring an action for annulment of the Council Regulation implementing those measures. Namely, the General Court had to give solution to two matters: to determine if Venezuela is a legal person for Article 263 TFEU and, in case of giving a positive answer, if Venezuela is directly affected by those restrictive measures. The Council's arguments about the inadmissibility of Venezuela's action were based on: First, Venezuela's alleged lack of legitimate interest, second, the fact that the provisions of Regulation 2017/2063 did not directly concern Venezuela, and third, the claim that Venezuela was not a "natural or legal person" within the meaning of Art. 263 (4) TFEU[43].

In September 2019, the General Court dismissed this action as inadmissible on the ground that Venezuela's legal position was not directly affected by the contested provisions within the meaning of the fourth paragraph of Art. 263 TFEU. According to the GC, the challenged provisions impose obligations only on natural and legal persons who have their registered office or their commercial activities within the Union, and not directly on Venezuela. The GC's reasoning for dismissing the action, primarily focused on the condition of "direct concern" mentioned in Article 263 (4) TFEU rather than the applicant's quality[44]. To have a standing right and challenge restrictive measures under Art. 275 (2) TFEU, applicants must possess specific qualities as "legal" or "natural" persons within the context of Article 263 (4) TFEU. Venezuela

[42] GC, 20.09.2019, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2019:649.
[43] *Ibid.*, para. 23.
[44] Poli, S., 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, p. 1048.

brought an appeal against this judgment in 2019, before the CJEU, challenging the part of the judgment that dismissed the action as inadmissible insofar as it was based on Articles 2, 3, 6 and 7 of Regulation 2017/2063. Judging on appeal, the Court of Justice, in June 2021, set aside the decision of the General Court, holding that Venezuela did have legal standing to bring proceedings against Articles 2, 3, 6 and 7 of Regulation 2017/2063, and referred the case back to the GC to rule on the merits[45]. But how was the CJEU led to this unpredictable conclusion?

The CJEU's line of reasoning did not begin with examining whether Venezuela is directly affected by the measures, but whether it is a "legal person" within the meaning of Art. 263 (4) TFEU. The Court stated that the term "legal person" provided for in Art. 263 TFEU is an autonomous concept of EU law and thus, it must be interpreted exclusively on the basis of the wording and the context of the provisions of the Treaties[46]. Thus, the Court highlighted, following a textual approach, that the concept at stake must not be interpreted narrowly[47], mentioning that not only private legal persons, but also public entities have legal standing to bring an action for annulment under this provision[48]. In this context, the Court reaffirmed its previous case law on the issue, noting that various types of entities, including local or regional entities[49], public entities[50], or even organisations with no legal personality that have been subjected to restrictive measures may bring proceedings under Art. 263 (4) TFEU[51].

Moreover, the CJEU pointed out that since the EU legislature determines that an entity can be subjected to restrictive measures, it follows from the principles of consistency and justice, that the same entity should also be regarded as having the capability to challenge those measures. Concerning the contextual and teleological interpretation of the term, the Court emphasised that the right to effective judicial protection is an integral component of the rule of law. Consequently, the rule of law stands as one of the foundational values of the Union and a guiding principle of its external action (Art. 21 TEU), including the CFSP (Art. 23 TEU)[52].

The CJEU also reaffirmed that the effective judicial review aiming to secure compliance with the EU law provisions is intimately tied to the rule of law and the right to effective judicial protection, and that in view of those principles, it must be acknowledged that a third State, as a "legal person governed by public international law", should have legal standing as a "legal person" within the meaning of Article 263 TFEU to bring an action for the annulment of an EU act, where the other conditions defined in that provision are met[53]. Moreover, it mentioned that the relations between the Union and third States are governed by international law, the subjects of which, according to the relevant rules, do not automatically have a right to appeal before the courts of other States. Instead, they have the right not to be subject to the jurisdiction of another State or that of an international court, unless they consented to it. The Court stressed out that EU obligations to secure respect for the value of the rule of law cannot in any way be made subject

[45] CJEU, 22.06.2021, Venezuela v. Council, 872/19 P, EU:C:2021:507.
[46] *Ibid.*, para. 42.
[47] *Ibid.*, para. 44.
[48] *Ibid.*, para. 43.
[49] e.g., CJEU, 22.11.2001, Nederlandse Antillen v. Council, C-452/98, ECLI:EU:C:2001:623.
[50] e.g., CJEU, 18.06.2015, Deutsche Bahn and Others v. Commission, C-583/13 P, ECLI:EU:C:2015:404.
[51] CJEU,22.06.2021, Venezuela v. Council, 872/19 P, EU:C:2021:507, paras. 45-47.
[52] *Ibid.*, paras. 48-49.
[53] *Ibid.*, para. 50.

to a condition of reciprocity as far as it concerns its relations with third States[54]. Therefore, the Court ruled that Venezuela, recognised as a state with legal personality under international law, shall be considered a "legal person" within the meaning of Art. 263 TFEU.

Next, the Court evaluated the single ground of appeal regarding the Council's third plea, which contended that the General Court had misinterpreted the condition set forth in Art. 263 TFEU, requiring that the challenged act must "directly" concern the applicant. Contrary to the General Court's reasoning, the CJEU stressed out that, the prohibitions imposed by the challenged provisions of the Regulation lead to prevent Venezuela from obtaining numerous goods and services, and thus, they directly affect Venezuela's legal situation. Furthermore, the extension of the prohibitions to "any natural or legal person, entity or body in, or for use in, Venezuela" eventually includes the government, public bodies, companies and agencies in Venezuela. Thus, the Court ruled that the GC erred in law in concluding that the restrictive measures imposed did not directly impact Venezuela's legal situation. It upheld the sole ground of appeal presented by the appellant[55].

Lastly, the Court examined the Council's first plea regarding the lack of legal interest on the part of the applicant. The Council relied on the CJEU judgment in the Front Polisario case[56], where it was ruled that the applying entity did not have legal standing to request the annulment of the contested therein Decision. In response to this claim, the CJEU stated that the prohibitions outlined in the challenged provisions of Regulation 2017/2063 could harm Venezuela's interests, especially its economic ones. The annulment of these provisions could provide an advantage to the appellant. Therefore, the objection by the Council was dismissed. Additionally, concerning the reference to the Front Polisario case, the Court clarified that it was not applicable due to significant differences not only in the facts but also in the legal aspects between the two cases. It is of high significance to highlight that, as per the Court's evaluation, Regulation 2017/2063 is categorised as a "regulatory act which does not entail implementing measures" as defined by Article 263 (4) TFEU. Consequently, in this particular case, the applicant was not required to demonstrate that the disputed provisions were of an individual, other than a direct, concern to it[57]. Hence, the above considerations led the CJEU to the conclusion that a third State, at the case at hand Venezuela, does have legal standing to contest pursuant to Art. 263 (4) TFEU the restrictive measures imposed on it.

It is widely supported, that the Court, by recognising locus standi to Venezuela, overstretched the rationae personae of Art. 263 (4) TFEU in the name of the rule of law. Under this prism, this was not a bright moment for the CJEU[58]. More particularly, the parameter of the specific nature of the EU's competence and objectives in the sector of the external action has been always taken into account by the Court, whereas in the Venezuela case the CJEU has seemingly neglected these factors. It is believed, that in the Venezuela case the CJEU at first acted inconsistently, and by exclusively relying on the principle of the rule of law and the right to effective judicial

[54] CJEU,22.06.2021, Venezuela v. Council, 872/19 P, EU:C:2021:507, paras. 51-52.
[55] *Ibid.*, paras 69-74.
[56] CJEU, 21.12.2016, Council v. Front Polisario, C-104/16 P, ECLI:EU:C:2016:973.
[57] CJEU,22.06.2021, Venezuela v. Council, 872/19 P, EU:C:2021:507, paras. 81-92.
[58] Perakis, M., How Many Applicants Can Fit in Article 263 TFEU? Presentation and Criticism of the CJEU's Venezuela v. Council Judgment (Part B), (2022) International Law Blog, p. 6.

protection, it handled the case ignoring the particularities of the CFSP[59]. Nevertheless, it has to be mentioned, that even though the CJEU recognised legal standing to Venezuela, it dismissed the action as inadmissible by ruling on the merits, due to the below reasons.

In September 2021, the Grand Chamber of the General Court made a distinction between, restrictive measures of general application, the ambit of which is defined by reference to objective criteria, on the one hand, and restrictive measures targeting identified natural or legal persons[60], on the other. In this context, the Court stressed out that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the challenged regulation are in fact, pursuant to Art. 215 (1) TFEU, measures interrupting or reducing economic relations with a third country as regards certain goods, namely equipment which might be used for internal repression and communication equipment, which could be misused, and services. According to the Court, those measures are not addressed to identified natural or legal persons, but are applicable to situations defined under objective criteria, and to a category of persons viewed in a general and abstract way[61].

Regarding the mere reference to "Venezuela's government" in Art. 6 (2) and Art. 7 (1) (c) of the challenged regulation, the Court clarified that those provisions do not refer to the Bolivarian Republic of Venezuela, but, regarding Art. 6 (2) of that regulation, to "Venezuela's government, public bodies, corporations or agencies, or any person or entity acting on their behalf or at their direction", and concerning Art. 7 (1) (c) thereof, to "Venezuela's government, public bodies, corporations and agencies or any person or entity acting on their behalf or at their direction [or for their direct or indirect benefit]", in other words, to general and abstract categories of persons or entities. Hence, the Bolivarian Republic of Venezuela is not targeted by name by those provisions[62], and the restrictive measures provided for in Articles 2, 3, 6 and 7 of the challenged regulation are restrictive measures of general application.

In dealing with the arguments of Venezuela about the right to be heard, the Grand Chamber of the General Court argued that according to settled case-law, this right in an administrative procedure regarding a specific person, even when there are no rules governing the procedure at stake, cannot be transposed to the procedures provided for in Art. 29 TEU and Art. 215 TFEU, leading to the adoption of measures of general application[63]. It was also highlighted by the Court in paragraph 39, that there is no provision that requires the Council to inform any person potentially affected by a new criterion of general application, of the adoption of that criterion[64]. The Bolivarian Republic of Venezuela based its claims on Article 41 (2) (a) CFR. Nevertheless, the General Court clarified that this provision is applicable to "individual measures" adopted in respect of a person, and therefore, it cannot be based on it in relation to the adoption of measures of general application, as is the case at hand. The challenged regulation was an act of general

[59] Perakis, M., How Many Applicants Can Fit in Article 263 TFEU? Presentation and Criticism of the CJEU's Venezuela v. Council Judgment (Part B), (2022) International Law Blog, p. 5.
[60] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 30.
See also to that effect, judgment of 6 September 2018, Bank Mellat v Council, C-430/16 P, EU:C:2018:668, paragraphs 55 and 56).
[61] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 31.
[62] *Ibid.*, para. 32.
[63] See also GC, 13.09.2018, NK Rosneft and others v. Council, T-715/14, ECLI:EU:T:2018:544, paragraph 133.
[64] See also the judgment of GC, 17.02.2017, Islamic Republic of Iran Shipping Lines and Others v Council, T 14/14 and T 87/14, EU:T:2017:102, paragraph 98.

application which mirrors a choice made by the Union in the sector of international policy.

Moreover, the General Court proceeded to a teleological interpretation that relied on and highlighted the very essence of the CFSP, and stated the following: "The interruption or reduction of economic relations with a third country pursuant to Article 215 (1) TFEU forms part of the very definition of the Common Foreign and Security Policy (CFSP) as set out in the second subparagraph of Article 24 (1) TEU, inasmuch as such a reduction or interruption involves the adoption of measures in response to a particular international situation, at the discretion of the Union authorities, in order to influence such a situation. Hearing the third country concerned, prior to the adoption of a regulation implementing such an external policy choice, would be tantamount to requiring the Council to conduct discussions similar to international negotiations with that country, which would negate the desired effect of imposing economic measures with regard to that country, namely exerting pressure on that country in order to bring about a change in its behaviour[65]". The Court also pointed out that the fact that the Bolivarian Republic of Venezuela is directly concerned by Articles 2, 3, 6 and 7 of the challenged regulation is not sufficient in itself to confer on it the right to be heard[66]. Thus, the Court ruled that the applicant cannot rely on the right to be heard regarding the restrictive measures provided for in Articles 2, 3, 6 and 7 of the challenged regulation.

The second plea in law that Venezuela raised, related to the Council's failure to state reasons. The General Court noted that according to settled case-law[67], the extent of the obligation to state reasons, which is an essential procedural requirement[68], depends on the nature of the measure at stake. In particular, in the case of measures of general application, the statement of reasons may be restricted to indicating the general situation because of which the measure was adopted, on the one hand, and the general objectives of the measures, on the other[69]. The General Court has already held that these are measures of general application, and therefore, the following clarifications are relevant and prove that reasons had been properly stated.

In paragraph 51 and following of the judgment, the General Court found that the challenged regulation as well as the Decision 2017/2074, for the implementation of which the said regulation was adopted, already from their preamble sufficiently describe the general situation in Venezuela, consisted of the continuing deterioration of democracy, rule of law and human rights in this country. The Union has repeatedly expressed its concern about the situation, and political actors of the country were informed accordingly. In addition, the preamble of the regulation made clear the context for the adoption of the restrictive measures[70], and thus, Venezuela had sufficient knowledge and was able to understand the contested regulation[71]. Besides, as the

[65] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 42.
[66] *Ibid.*,para. 43, see also judgments of 14 October 1999, Atlanta v European Community, C-104/97 P, EU:C:1999:498, paragraphs 34 and 35, and of 11 September 2002, Alpharma v Council, T-70/99, EU:T:2002:210, paragraph 388.
[67] judgments CJEU, 19.11.1998, *Spain* v *Council*, C-284/94, EU:C:1998:548, para. 28; CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 120.
[68] Lester, M., EU judgment in Venezuela case on international law & sanctions, Sanctions;Law, Practice and Guidance, 15.09.2023, https://www.europeansanctions.com/2023/09/eu-judgment-in-venezuela-case-on-international-law-sanctions/ .
[69] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 49.
[70] *Ibid.*, para. 52.
[71] *Ibid.*, paras. 52-56.

General Court successfully observes in paragraph 57, Venezuela's understanding and knowledge about the reasons supporting the adoption of the restrictive measures under scrutiny is reaffirmed by the third plea in law, which alleges a material inaccuracy of the facts and a manifest error in assessing the political situation in the country, which will be examined on the merits in the next paragraph.

The General Court started the relevant analysis with reminding that the Council enjoys a wide discretion as regards the parameters leading to the adoption of economic and financial measures on the basis of Article 215 TFEU. Consequently, the CJEU cannot substitute the Council's assessment, and can only review the legality of the procedure, the statement of reasons, the accuracy of the facts and the absence of a manifest error of assessment, and the absence of misuse of power[72]. The Court pointed out that the Council's assessment about the situation in Venezuela was based on credible and reliable information[73]. Without disregarding the texts in force formally granting respect for human rights in this country, the information on which the Council relied, enabled it to evaluate that, on the date it adopted the challenged regulation, excessive use of force, human rights violations, violence, and threats to democracy in Venezuela were sufficiently established, as well as there were risks of such situations retaking place[74]. Under those conditions, the Council was able to reach the conclusion that there were threats to democracy, rule of law and human rights in Venezuela, without making a manifest error[75]. Thus, the Court rejected the relevant claim.

Regarding the fourth plea in law, it involved the allegedly unlawful countermeasures that had been imposed and the alleged infringement of international law. More specifically, Venezuela argued that: a) the contested regulation imposed unlawful countermeasures that infringed customary international law and the World Trade Organisation (WTO) Agreement; b) the embargo imposed was not proportionate and entailed interference in the internal affairs of the country. In an effort to prove the character of the measures as "countermeasures", Venezuela highlighted the absence of a prior authorisation by the United Nations Security Council, while this is necessary for the Council to impose measures other than countermeasures.

It is important to consider that under Art. 3 (5) TEU, the EU is obliged to promote and uphold strict compliance with international law, and this includes the observance of international law in its entirety, including customary international law, which is binding on the Union's institutions when they adopt an act[76]. Nevertheless, the General Court found that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the contested regulation do not constitute countermeasures within the meaning of Article 49 of the draft articles concerning the liability of states for internationally wrongful acts in the first place. They were adopted in response to the

[72] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 63. See also the judgment of GC, 25.01.2017, Almaz-Antey Air and Space Defence v Council, T 255/15, ECLI:EU:T:2017:25, paragraph 95.
[73] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para.80.
[74] Lester, M., EU judgment in Venezuela case on international law & sanctions, Sanctions;Law, Practice and Guidance, 15.09.2023, https://www.europeansanctions.com/2023/09/eu-judgment-in-venezuela-case-on-international-law-sanctions/ .
[75] GC, 13.09.2023, Venezuela v. Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 66.
[76] *Ibid.*, para. 87. See also judgment of CJEU, 21.12.2011, Air Transport Association of America and Others, C 366/10, EU:C:2011:864, paragraph 101; see also, to that effect, judgment of CJEU, 03.09.2008, Kadi and Al Barakaat International Foundation v Council and Commission, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291.

continuing deterioration of democracy, rule of law and human rights in Venezuela, and not to the infringement of a rule of international law by Venezuela through the temporary non-performance of the Union's international obligations[77]. The allegations of the imposition of unlawful countermeasures and of a breach of the principle of non-interference in the internal affairs of the Bolivarian Republic of Venezuela must be rejected[78].

Furthermore, the Court rejected the argument of the Bolivarian Republic of Venezuela, that the Council lacked the power to adopt the challenged regulation without the prior authorisation of the United Nations Security Council. More precisely, the Court emphasised that Art. 29 TEU and 215 TFEU confer on the Council the power to adopt acts containing restrictive measures that are independent and distinct from measures particularly recommended by the United Nations Security Council, and the powers given on the Union by these provisions are not limited to the implementation of measures decided by the United Nations Security Council[79]. This is, in fact, an expression of the autonomy of the EU legal order, which allows it to act independently in the international arena. The General Court further clarified that no general practice accepted as law was proven to require prior authorisation of the adoption of restrictive measures by the United Nations Security Council[80].

As regards the principle of proportionality, it is part of the general principles of the EU legal order and mandates, that the means implemented by an EU law provision should be effective in accomplishing the legitimate goals set out by that particular legislation. Moreover, these means must not exceed what is essential to achieve these objectives. The Court stressed out that, when it comes to reviewing whether actions comply with the principle of proportionality, the Court of Justice acknowledges that the EU legislature should have significant discretion in areas involving political, economic, and social decision-making, where complex assessments are required. According to the Court, a measure can only be considered illegal, if it is manifestly unsuitable for achieving the objective intended by the competent institution[81].

In this context, it is worth noting that there is a rational connection between the restrictive measures, such as prohibiting the sale of certain equipment and related services that could be used for internal repression, and the objective of preventing further violence, excessive use of force, and human rights violations. The restrictive measures outlined in Articles 2,3,6, and 7 of the challenged regulation primarily involve prohibiting the sale, supply, transfer, or export of equipment with potential use in internal repression, related services, and military equipment to any individual, entity, or body in Venezuela, or for use there. Furthermore, Articles 4,6, and 7 of the regulation allow competent authorities in EU Member States to grant specific authorisations, deviating from these restrictive measures when necessary[82]. As a result, these measures are not manifestly unsuitable for their purpose, nor do they exceed what is required to achieve the

[77] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 91.
[78] *Ibid.*, paras.91-94. , the argument which the Bolivarian Republic of Venezuela draws from the judgment of the ICJ, 25.09.1997, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia, Case 92.
[79] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 95.
[80] *Ibid.*, paras. 95-98.
[81] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 100. See also CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, paragraph 146.
[82] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, para. 102.

intended objective. Thus, the principle of proportionality has not been breached.

Next, the General Court in very simple formulations dismissed three additional arguments of Venezuela. In particular, it stated that it was not founded that the contested regulation was linked with a particular obligation assumed in the context of WTO [83] . Further, the CFSP links with the values of the Union, such as the promotion in the wider world of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the respect for human dignity, and the respect for the principles of the United Nations Charter and international law, as expressed in Art. 3 (5) TEU and Art. 21 TEU, led to the rejection of the argument that with the contested regulation the Council has exercised an unlawful extraterritorial jurisdiction[84].

Taking the above considerations into account, one could claim that awarding locus standi to a third country is not compatible with settled case law and disregards the particularities of the CFSP, as well as the grammatical interpretation of Article 263 (4) TFEU. In addition, the principle of reciprocity of public international law and the principle of equality of arms are at the risk of being breached, as there is no guarantee that the EU would be able to challenge similar national measures adopted by third States. Therefore, the EU will be weakened and at a disadvantage. Thus, denying a third country to bring smart sanctions before the Court, involves the compliance with the principle of reciprocity and the principle of equality of arms to the actors of international arena. However, a counterargument is that, by awarding locus standi to a third country, the EU legal order secures the principle of the rule of law, as the prevention of any unlawful restrictive measures and the protection of population will be guaranteed, through the judicial review initiated by a third country as an applicant. Rejecting the possibility of a third country to challenge restrictive measures imposed on it, could have collateral damage and devastating humanitarian implications, since even manifestly illegal measures could remain unreviewed, leading in this way to the misuse of powers of the Council. Besides, as Belgium, Germany and Netherlands and others have stated during the judicial procedure in the Venezuela case, rejecting a third country the locus standi would entail that such a country would not be able to protect its interests "even where it is certain that its rights have been infringed"[85].

Of course, allowing a third country to bring an action for annulment against restrictive measures before the CJEU is not in line with the previous case law, but it is something brand new for the legal world, and it includes some dangers. In any case, even upon recognition of the locus standi of a third country, the CJEU has the power to rule on the merits on the action and assess the admissibility of the applicant's reasons. Therefore, such a recognition does not in itself have the risk of neglecting the special character of the CFSP or weakening the EU's position in the world. On the contrary, the CJEU's power to rule on the merits may have a corrective power, and the overall risks are lower compared to the risk of an infringement of the rule of law and this of irreparable and undue damage.

[83] GC, 13.09.2023, Venezuela v Council, T-65/18 RENV, ECLI:EU:T:2023:529, paras. 105-108.
[84] *Ibid.*, para. 113.
[85] *Ibid.*, paras. 33-34.

1.2. The CJEU's jurisdiction to give preliminary rulings in the CFSP

1.2.1. The necessity of a full review of EU restrictive measures

After examining the power of the CJEU to review actions for annulment of targeted sanctions, in view of the principle of the complete system of legal remedies and procedures of the EU as well as the right to effective judicial protection, this question has arisen: Is the CJEU authorised to deliver preliminary rulings on the validity of CFSP acts imposing restrictive measures on individuals? With this matter dealt the Court in the Rosneft case.

Regarding the historical context of the Rosneft case, its roots lie back in 2014, when Russia annexed Crimea. In response, since March 2014, the EU has imposed sanctions against Russian companies. Additional measures were introduced in July 2014, as the crisis was escalating. These sanctions mainly include travel or import bans, asset freezes, and targeted measures against individuals linked to threats against Ukraine's territorial integrity. Of particular importance to the Rosneft case is the prohibition preventing EU natural or legal persons from entering into contractual relationships with specific Russian state-owned companies and banks.

Rosneft, the majority of which is owned by a company affiliated with the Russian Federation, is the leading petroleum company in Russia. It asked the High Court of Justice in England and Wales to review the legality of the acts imposing on it restrictive measures[86]. More precisely, Rosneft contested various provisions outlined in the Regulation 833/2014, which imposed requirements, such as prior authorisation for the sale of certain items, restrictions on supplying services related to oil exploration and production in Russia, and the obligation for Member States to establish penalty rules. Rosneft also challenged the provisions of the Decision 2014/512, which prohibited the provision of financial services to Russian entities, established a prior authorisation system for the sale, supply, transfer, or export of specific technologies related to oil exploration and production projects in Russia, and imposed a ban on providing associated services necessary for these projects. It's important to note that both the Decision and the Regulation included Rosneft in their annexes, subjecting the company to some of the above outlined restrictions.

Next, the UK Court submitted a request for a preliminary ruling because, before resolving the dispute, it needed clarification on whether certain provisions of the Decision and the Regulation were valid. It considered that it could not make this determination without referring some questions to the CJEU. The first question, which is the one that is relevant for the analysis here, was whether the Court of Justice had the authority to deliver a preliminary ruling on the validity of an act that was adopted based on CFSP provisions, such as the Decision 2014/512[87].

It is worth-mentioning that the Rosneft judgment marked a significant milestone as the first-ever request for a preliminary ruling under Art. 267 TFEU concerning the interpretation and validity of an act within the European Union's realm of political and security international relations, specifically in the context of the CFSP. Indeed, in 2017, the Grand Chamber of the CJEU, in a

[86] High Court of Justice of England and Wales, judgment of 9 February 2015, R (OJSC Rosneft Oil Company) v. Her Majesty's Treasury et al.

[87] The national court submitted three more preliminary questions. No further discussion about them will follow, as their content goes beyond the scope of the present analysis.

preliminary ruling confirmed the validity of the restrictive measures imposed by the Council on Russian entities, including the major oil company Rosneft.

The importance of the Rosneft case lies, inter alia, in how the Court addressed two critical procedural issues: its authority to issue preliminary rulings, as well as its jurisdiction to assess CFSP acts. More specifically, following a contextual interpretation, the Court stressed out that Articles 9, 24 and 40 TEU, 175 TFEU and Art. 47 CFR should be interpreted as granting the Court the jurisdiction to direct preliminary rulings according to Art. 267 TFEU, regarding the legality of an act adopted on the basis of CFSP provisions, like the Decision at issue.

The Court mentioned that the judicial review of the legality of EU acts, as provided in the Treaties, consists of two complementary procedures, this of Art. 263 and 277 TFEU, and this of Art. 267 TFEU. These procedures together lead to the establishment of "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts", which has been "entrusted to the Courts of the European Union"[88]. Since it is an essential part of this comprehensive system that the validity of an EU measure can be challenged before a national court and considering that a request for a preliminary ruling on such an issue serves a mechanism for assessing the legality of EU acts, "that essential characteristic of the system for judicial protection in the European Union extends to the review of the legality of CFSP decisions imposing restrictive measures on natural or legal persons"[89].

Adding an argument of textual character, the Court highlighted that the Treaties do not indicate that an action for annulment brought before the General Court pursuant to the combined provisions of Articles 256 and 263 TFEU, is the exclusive means for examining the legality of decisions imposing restrictive measures against natural or legal persons, in particular, to the exclusion of a reference for a preliminary ruling on validity[90]. While the United Kingdom, French, Estonian, Czech and Polish Governments, along with the Council, contended that, according to the first limb of the last sentence of the second subparagraph of Art. 24, 1st paragraph, TEU and Art. 275 (1) TFEU, the Court lacked jurisdiction to deliver a preliminary ruling on the validity of CFSP measures[91], the Court concluded contradictorily. To examine whether it has jurisdiction on CFSP measures, meaning on the two exceptions provided for in Articles 24 (1), second subparagraph, last sentence, second limb of the TEU and 275 (2) TFEU, the Court divided its reasoning into two questions: first, whether the Court could monitor compliance with Article 40 TEU through the preliminary ruling procedure, and second, whether it had jurisdiction to review sanctions through this procedure.

Regarding the first question, the Court correctly observed that the Treaties did not specify the procedure for ensuring compliance with Article 40 TEU. Therefore, the general rule of Article 19 TEU granting the Court jurisdiction to deliver preliminary rulings on the validity of EU institutions' acts is applicable[92]. However, concerning the case of judicial review of restrictive

[88] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 66.
[89] *Ibid.*, para 69.
[90] *Ibid.*, para. 70.
[91] *Ibid.*, para. 58.
[92] See Art. 19, para. 3, letter b), TEU; CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 62.

measures against natural and legal persons, the situation is more complicated. A literal interpretation of the second limb of the last sentence of the second subparagraph of Art. 24 (1) TEU and the second paragraph of Art. 275 TFEU might suggest that a direct action for annulment is the only way to review the legality of such measures. Nevertheless, the Court firmly rejects this interpretation of the "claw-back" provisions asserting that Article 24, 1st paragraph, second subparagraph, last sentence, second limb of the TEU, by referring to the second paragraph of Article 275 TFEU, pertains to the type of decision ("restrictive measures") whose legality can be reviewed, not the type of procedure (i.e., actions for annulment)[93].

As already explained earlier in this dissertation, according to Art. 24 (1), second subparagraph, last sentence, first limb of the TEU and Art. 275 (1) TFEU, the CJEU does not have the power to review acts adopted within the CFSP framework, deviating, thus, from the CJEU's general jurisdiction established by Art. 19 TEU, and conferred on it to ensure the observance of law in interpreting and applying the Treaties. Nonetheless, the second limb of the last sentence of the second subparagraph of Art. 24 (1) TEU and the second paragraph of Art. 275 TFEU contain an "exception to the exception", allowing the CJEU to oversee compliance with Art. 40 TEU and to review the legality of decisions imposing restrictive measures on natural or legal persons made by the Council and based on the CFSP provisions in the TEU. These "claw-back" provisions, combined with the full integration of the CFSP in the EU legal order, imply that the Lisbon Treaty has endowed the CJEU with significant powers in the CFSP sector.

But do these powers also contain the authority to deliver preliminary rulings on the validity of an act adopted on the basis of a CFSP provision, and at the case at hand, of the Decision 2014/512, regarding targeted sanctions related to Russia's actions destabilising the situation in Ukraine? This Decision, based on Art. 29 TEU, is implemented in the EU legal order through the Regulation 833/2014. The last one is adopted on the basis of Art. 215 TFEU and, as such, falls within the Court's jurisdiction.

In line with the Kadi judgment, the CJEU asserted the need for a comprehensive review of the legality of all acts stemming from the TFEU. The Estonian and Polish governments, as well as the Council, mentioned that it was not necessary for the Court to decide on its jurisdiction over CFSP matters, as it could simply interpret the Regulation adopted under the TFEU. However, the CJEU rejected this argument, since the potential invalidity of the Regulation 833/2014 would not affect the obligation of Member States to align their national policies with the EU's stance established under the Decision 2014/512. In essence, the unique rules and processes linked to the CFSP do not alter the fact that Member States are legally bound to adhere to CFSP decisions. Therefore, for the uniform interpretation and application of EU law in the context of the CFSP to be ensured, the issue of the possibility of these decisions to be subject to a preliminary ruling procedure is of high importance.

Furthermore, EU constitutional principles and values are also applicable in the CFSP. The Rosneft judgment affirms that the CFSP is an integral part of the EU legal order and thus, the EU's horizontal principles, like the respect for the rule of law and the right to effective judicial

[93] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 70.

protection, apply to this specific area of EU law[94]. This stems from the reading of Art. 2 TEU, which defines the EU's foundational values as part of the "common provisions of the EU Treaty", in combination with Articles 21 and 23 TEU[95]. In fact, Art. 21 TEU falls under the "general provisions on the Union's external action" and refers to the EU's values, whereas Art. 23 TEU belongs to "the specific provisions on the CFSP". However, Art. 23 TEU defines that the EU's action regarding the CFSP "shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions [on the Union's external action]". The EU Treaty provisions concerning the CFSP, including the part on the limits to the Court's jurisdiction, cannot be interpreted in isolation from the overall structure and logic of the Treaties[96]. This is why the Court also expressly mentions Art. 47 of the EU Charter of Fundamental Rights about the right to effective judicial protection, as a necessary component of the rule of law[97]. While the Charter cannot grant jurisdiction to the Court where it is excluded under the Treaties, Art. 47 of the Charter implies that such exclusion should be narrowly interpreted[98]. Besides, a narrow interpretation of the jurisdiction conferred on the Court by Art. 275 (2) TFEU would be at odds with the goals of Art. 19 (1) TEU, which assigns the CJEU the responsibility to ensure effective judicial protection[99].

In fact, by totally excluding the Court's jurisdiction from an area of EU law such as the CFSP, the system of judicial protection would be severely undermined[100]. While it's up to the national courts to decide whether to make a preliminary ruling request and what questions to refer, eliminating the opportunity for an applicant (or the national court) to make such a request, would contradict Article 47 of the Charter. This is the case, despite the fact that, Art. 275 (2) TFEU seems to indicate that the Court's jurisdiction is limited to reviewing restrictive measures through direct legal actions.

Thus, the CJEU has jurisdiction to give preliminary rulings on the validity of CFSP acts imposing restrictive measures to individuals, which is the core point of this part of the dissertation. Furthermore, the CJEU mentioned the Council's broad discretionary power on issues of Foreign and Security Policy. This also implies, that the Council can provide detailed descriptions of the individuals and entities subjected to the restrictive measures in a CFSP decision, without infringing on the implementation procedure under Art. 215 TFEU[101]. Namely, the level of detail of the CFSP decision does not have an impact on its classification as a "non-legislative act". According to the Court, "the exclusion of the right to adopt legislative acts in the area of the CFSP reflects the intention that this policy should be subject to specific rules and procedures"[102]. The distinction between "legislative" and "non-legislative" acts is purely a matter

[94] Derived from Arts 2, 21 and 23 TEU and the precedent of "H".
[95] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 72.
[96] Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/ Peter van Elsuwege 06 April 2017 , p.3.
[97] *Ibid.*, p.3.
[98] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 74.
[99] *Ibid.*, para. 75.
[100] See Rosneft[GC], cit., para. 75, and case law there cited.
[101] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, paras. 88-90.
[102] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 91.

of procedure[103]. The CJEU assures that the sanctions against Russian entities concerning the crisis in Ukraine can legitimately be adopted to protect essential EU security interests and to maintain international peace and security. The objective of preserving peace and security further justifies the negative implications for the subjects involved, such as Rosneft[104].

The consistency of the EU system of judicial protection requires that there is no difference in comparison to other areas of EU law. Measures of general application, such as the fundamental principle of partially interrupting the EU's economic and financial relations with Russia, are exempted from judicial review. Nonetheless, as far as the persons and entities targeted by the sanctions are defined, the EU system of judicial protection applies to full extent.

However, it is likely that the extension of the CJEU's jurisdiction over preliminary rulings in the CFSP (in the case at hand, over a restrictive measure) implies risks, both for the judicial protection of individuals, and the institutional balance and the separation of powers. More precisely, the CJEU's ruling in Rosneft established its jurisdiction over restrictive measures that specifically target individuals or entities identified by reference to particular criteria, not over measures of general application. More specifically, this judgment can be criticised on three points[105]. Firstly, the distinction made by the Court between these two types of measures seems rather arbitrary. Secondly, this distinction appears to blur the lines between the requirements for establishing the CJEU's jurisdiction and those for establishing the applicants' locus standi. This results in a strict interpretation of standing rules, which delimits applicants' power to challenging provisions that directly mention them. This also means that they are deprived of the possibility of challenging restrictive measures that affect them indirectly but are part of regulations with general applicability. Thirdly, this distinction fails to provide adequate assurance that the Court will not overstep the principle of the separation of powers in the future if it reviews political decisions. These considerations will be analysed in the next pages.

In the Rosneft case, the Court was tasked with evaluating the validity of a CFSP Decision and of a relevant Regulation. However, the Court's judgment did not delve deeply into the jurisdiction issue regarding the review of the Decision. Instead, it ascertained that it only has jurisdiction to review a CFSP act in two scenarios: when it involves targeted sanctions or when it is related to monitoring compliance with Article 40 TEU. The next logical step was to determine which provisions of the CFSP Decision constituted restrictive measures against natural or legal persons[106]. A landmark judgment for the identification of restrictive measures subject to review under Art. 275 TFEU was issued in the Kadi case. In this judgment, the CJEU introduced a distinction between measures of "general nature", the scope of which is determined by reference to objective criteria and not by reference to identified natural or legal persons, and "decisions providing for restrictive measures against natural or legal persons within the meaning of the

[103] Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/ Peter van Elsuwege 06 April 2017, p.4.
[104] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 150.
[105] Lonardo, L., Law and foreign policy before the Court: Some hidden perils of Rosneft, (2018), European Papers, Vol. 3, No. 2, p. 549.
[106] This dissertation does not discuss the Court's decision on compliance with Art. 40 TEU.

second paragraph of Article 275 TFEU"[107]. In a next step, the CJEU found it had jurisdiction only on the latter category.

In the Rosneft case, the Court found that the articles of the Decision, which established a system of prior authorisation and restrictions on entering certain contractual relationships with Russian companies, "prescribe measures the scope of which is determined by reference to objective criteria, in particular, categories of oil exploration and production projects. […] those measures do not target identified natural or legal persons but are applicable generally to all operators involved in the sale, supply, transfer or export of certain technologies that are subject to the prior authorisation requirement and to all the suppliers of associated services"[108]. Because these measures were of a general nature and not targeted at specific individuals or entities, the Court concluded that it lacked jurisdiction to review their validity[109]. Instead, the Court exercised its jurisdiction over the restrictive measures outlined in other parts of Decision 2014/512 that were under scrutiny, specifically those detailed in Art. 1, para. 2, let. b) to d), and Art. 7, para. 3, and Annex III. It emphasised that "it is evident that the individuals and entities subject to these measures are defined by referring to particular entities. These provisions prohibit, inter alia, engaging in various financial transactions involving the entities listed in Annex III to that decision, with one of those entities being Rosneft[110].

In addition, the Court noted that it is "settled case-law that restrictive measures resemble both measures of general application, in that they impose on a category of addressees determined in a general and abstract manner a prohibition on making available funds and economic resources to entities listed in their annexes, and also individual decisions affecting those entities[111]"[112]. The Court also mentioned that "as regards measures adopted on the basis of provisions relating to the CFSP, it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU, permits access to the Courts of the European Union[113]"[114].

Regarding the Regulation, the Council argued that the Court could not rule on it, because Rosneft was essentially attempting to contest a fundamental decision that falls under the CFSP. According to AG Wathelet since the Regulation was adopted under Art. 215 TFEU, "even if it merely repeats verbatim, or adds to, or further specifies measures laid down in a CFSP decision, as is the case here with Decision 2014/512 and Regulation No 833/2014" this signifies that both the Decision and the Regulation, are judicially reviewable, as they became "dependent on compliance with the TFEU"[115]. The Court, following the AG's opinion, acknowledged that the Regulation is a TFEU act, over which the Treaty confers jurisdiction on the CJEU.

Hence, examining the jurisdiction over CFSP decisions, the overall criticism that could be

[107] Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission [GC], para. 37.
[108] Rosneft [GC], cit., para. 98.
[109] *Ibid.*, para. 99.
[110] *Ibid.*, para. 100.
[111] *Ibid.*, para. 102.
[112] distinction in Kadi.
[113] Rosneft [GC], cit., para. 103.
[114] See CJEU, 23.04.2013, Gbagbo and Others v. Council, C-478/11, ECLI:EU:C:2013:258.
[115] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, para. 103.

exercised is: Firstly, the differentiation between measures that target specific individuals or entities and those that do not, for the purpose of jurisdiction, appears to be entirely arbitrary. This distinction lacks justification based on the fundamental Treaties, whether through a literal, systematic, or teleological interpretation[116]. Crucially, the Court itself seems to disregard this arbitrary distinction. In the Rosneft case, despite asserting that it lacks jurisdiction over measures of general application, it still proceeded to assess the compatibility of the Decision's objectives with Art. 21 TEU[117]. However, the purposes of the Decision "do not target identified natural or legal persons but are applicable generally to all operators" [118] and thus, based on the Court's own determination, should have been considered beyond the scope of review. Additionally, one could argue that these objectives represent a "political decision" made by EU institutions and should not have been subject to review in any circumstance.

Secondly, and building upon the previous point, this arbitrary distinction is problematic because, in conjunction with the overly formalistic interpretation of the fourth paragraph of Article 263 TFEU, it prevents applicants from challenging sanctions that significantly harm their interests[119] but are included in rules of general application. The Court in Rosneft seems to conflate the condition for reviewability with the criteria for establishing locus standi. The condition mentioned in Article 275 TFEU, which relates to measures targeting specific entities, is not effectively distinguished from the requirements for standing ("proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty"). It is exclusively for the purposes of locus standi and of the kind of action.

One could reasonably argue that Article 275 TFEU is intended solely to determine locus standi and the type of legal action that can be pursued. It might be contended that Article 275 TFEU rules out, for instance, the possibility of reviewing restrictive measures in cases arising from preliminary rulings. The condition that the act must target the applicant individually is not a determining factor for establishing jurisdiction; it primarily pertains to demonstrating the applicant's interest in the proceedings. This viewpoint aligns with the opinion of Advocate General Wathelet[120], who criticised the contrary decision of the General Court in the Sina Bank[121] and the Hemmati[122] cases. A particularly notable concern is that the Court chose to adopt a highly formalistic interpretation of the fourth paragraph of Article 263 TFEU, which could potentially undermine the effectiveness of judicial protection within the CFSP.

Thirdly, the distinction does nothing to prevent the possible violation of the principle of separation of powers if the Court reviews political decisions. The purpose of the exclusion of the Court's jurisdiction from CFSP acts in Art. 24 TEU was to safeguard this principle[123], not to deprive individual applicants of contesting restrictive measures. Partially motivated by this

[116] Lonardo, L., Law and foreign policy before the Court: Some hidden perils of Rosneft, (2018), European Papers, Vol. 3, No. 2, p. 554.
[117] Rosneft [GC], cit., para. 116.
[118] *Ibid.*, para. 98.
[119] CJEU, 25.07.2002, Unión de Pequeños Agricultores v Council ,C-50/00 P, Opinion of AG Jacobs, ECLI:EU:C:2002:197, para. 60.
[120] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, paras 88-89.
[121] GC, 04.06 2014, Sina Bank v. Council, T-67/12, ECLI:EU:T:2014:348.
[122] GC, 04.06.2014, Hemmati v. Council, T-68/12, ECLI:EU:T:2014:349.
[123] CJEU, 19.07.2016, H v. Council and the Commission, C-455/14 P, Opinion AG Wahl, ECLI:EU:C:2016:212.

concern, during the Rosneft case, the Commission proposed the implementation of a "political question doctrine" to establish clear boundaries for the Court's jurisdiction.

According to this doctrine, the Court should refrain from reviewing purely political decisions. While this concept would represent a significant departure for the EU legal system, as it lacks any explicit provision in the treaties, it is a well-established tool in other jurisdictions[124]. The United States, for instance, has debated and employed such a doctrine, particularly in the sensitive realm of foreign affairs, for many years. However, there are several objections raised against introducing a political question doctrine in the EU. Firstly, it is not explicitly mentioned in the EU treaties, leading to concerns about its compatibility with the existing legal framework. Secondly, its implementation could introduce additional uncertainty into EU law[125]. Lastly, reconciling the political question doctrine with the EU's commitment to upholding the rule of law in its actions implies significant challenges[126].

Consequently, the Court in Rosneft established its jurisdiction relying on an incorrect distinction. The differentiation between measures of general application and those targeting specific individuals is not a basis laid out in the fundamental Treaties for the Court's jurisdiction**.** If there is such a distinction in the TFEU, it is solely for establishing locus standi. Confusing the conditions for jurisdiction with those for locus standi, might undermine the effectiveness of fundamental rights and judicial protection for those attempting to challenge the sanctions.

Moreover, the distinction does not prevent the Court from adjudicating on purely political acts, which potentially contradicts the purpose of excluding its jurisdiction from the CFSP. It seems, however, that the Court has left a wide margin of discretion to the Council, since it accepted, in Rosneft, both the reasoning on the compatibility of the measures with the EU-Russia agreement, and on their compliance with the principle of proportionality. Based on the current state of case law, it appears that, the only limit to the Council's discretion would be that of extreme irrationality. Any measure that does not seem blatantly unreasonable would be considered acceptable.

However, by endorsing the Council's choices, the Court has essentially assumed that it can decide whether or not to approve what the Council does[127]. If the case law continues with this approach, there is a risk that the EU constitutional principle of separation of powers be breached and the legal distinctiveness of the CFSP not be respected. Currently, the Court, albeit admittedly, rules on political questions, since it has so far left broad discretion to the Council, but it has always affirmed the choices made by the Council. In the Rosneft case, the Court upheld EU foreign policy choices and supported the political direction, but any change in this reasoning could reveal the hidden consequences of the judgment in Rosneft.

Nevertheless, and in spite of the problematic aspects discussed above, the Court's decision to

[124] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, para. 52.
[125] Lonardo, L., Law and foreign policy before the Court: Some hidden perils of Rosneft, (2018) European Papers, Vol. 3, No. 2, p.555.
[126] *Ibid.*, p. 555.
[127] *Ibid.*, p. 561.

allow preliminary rulings on CFSP acts imposing restrictive measures on individuals, albeit based on fragile teleological arguments, may have significant positive implications for EU integration in this area. With its judgment in the Rosneft case, the Court has intentionally opened the door to preliminary rulings, providing a means for immediate judicial dialogue between national and EU Courts, potentially shaping the future of the CFSP. Lastly, in the Rosneft case, the CJEU established a significant precedent by acknowledging that natural or legal persons could rely on both the annulment actions and the preliminary rulings to challenge the validity of CFSP decisions.

1.2.2. Access to domestic courts; a viable alternative to safeguarding fundamental rights

It seems that the judgment in the Rosneft case adopts a notably integrationist perspective[128]. For example, the Court does not begin its analysis by considering the unique nature of the CFSP in the Union's constitutional framework, but it initiates it by mentioning the establishment of a comprehensive system of legal remedies for reviewing the legality of EU acts. While the "H" case justified this based on the exceptional nature of the exclusion, the Rosneft judgment introduces the right to effective judicial protection, provided for in Art. 47 CFR, as an additional argument, introducing a human rights perspective. It presents the expansion of procedural mechanisms for exercising its jurisdiction, as essential to safeguarding fundamental human rights. In this way, the judgment suggests a degree of normalisation of the CFSP by aligning its rules more closely with the legal principles that apply to other areas of EU law and EU external actions.

The integrationist logic of Rosneft judgment asserts that only the CJEU may review the validity of a CFSP decision imposing restrictive measures on natural and legal persons[129]. This is emphasised through references to the Foto-Frost doctrine and the core principle of judicial review it establishes, which prevents national courts from declaring EU measures invalid. In the Foto-Frost case the role of national courts was dismissed as conflicting with "the necessary coherence of the system of judicial protection", which necessitates that only the CJEU should have the power to declare EU acts invalid, and as not in line with the pivotal objective of the preliminary reference procedure, namely ensuring the uniform application of EU law by national courts[130].

It has to be highlighted, that the significant role of domestic courts in the enforcement of EU law is determined by Art. 19 (1) subparagraph 2 TEU, which imposes a duty on Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". Inserted with the Lisbon Treaty and in alignment with prior case law, this article does not offer an explicit definition of the term "in the fields covered by Union law". Consequently, its scope does not exclude automatically CFSP measures.

This view is also supported by AG Kokott in her Opinion 2/13, where she asserted that "in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (Art. 275 (2) TFEU) and partly by national courts and tribunals (second subparagraph of Art. 19 (1) TEU and Art. 274 TFEU)" [131]. In essence, national courts are an integral part of the EU judicial system and the remedies provided under national law are incorporated in the EU system of remedies. In the Court's jurisprudence, not only the link between national courts and the CJEU is implied by the frequently used phrase "a complete system of legal remedies and procedures"[132], but it was also mentioned in Opinion 1/09: By

[128] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 22.
[129] *Ibid.*, p. 24.
[130] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, para. 78, with reference to 3. CJEU, 22.10.1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, C-314/85, ECLI:EU:C:1987:452, para 17 and 24. CJEU, 06.10.2015, Schrems, C-362/14, EU:C:2015:650, paras 62 and 80.
[131] Opinion 2/13, ECLI:EU:C:2014:2475, para 103.
[132] See Opinion 1/09 re: European and Community Patents Courts ECLI:EU:C:2011:123 para 70.

referring to Art. 19 (1) TEU, the Court characterised domestic courts, along with the CJEU, "the guardians" of the EU legal order[133], and regarded their tasks as "indispensable to the preservation of the very nature of the law established by the Treaties"[134]. Instead of simply having the option to provide these remedies, national courts are obliged to do so based on the duty of sincere cooperation which is binding on all organs of the Member States according to Art. 4 (3) TEU[135]. In Opinion 1/09 the CJEU also mentioned that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of individuals' rights under that law"[136].

Moreover, it is worth exploring the role of domestic courts as an alternative pathway for judicial review. Access to domestic courts could serve as a viable alternative that the case law has overlooked and would provide options of judicial protection to applicants when the CJEU lacks jurisdiction under Articles 24 (1), 2nd subparagraph, last sentence, first limb of the TEU and 275 (1) TFEU. Despite the CJEU's broad interpretation of jurisdiction, there are still areas within the CFSP that may fall outside the scope of the CJEU, such as CFSP decisions that do not involve restrictive measures against natural or legal persons. The Court of Justice has not clarified the role of national courts because of its expansive approach, which does not leave much room for national courts in this field. Yet the role of national courts remains significant within the CFSP framework[137]. This becomes particularly clear given the crucial role of Member States in implementing CFSP measures. More specifically, Member States share the responsibility for carrying out restrictive measures and are obligated to align their policies with the EU's stance as outlined in CFSP decisions, according to Article 29, 2nd paragraph, of the TEU[138]. Access to judicial review of such decisions "is indispensable where those decisions prescribe the adoption of restrictive measures against natural or legal persons", and a reference for a preliminary ruling, "plays an essential part in ensuring effective judicial protection"[139].

Whereas Articles 24 (1), 2nd subparagraph, last sentence, first limb of the TEU and 275 (1) TFEU restrict the jurisdiction of the Court of Justice in the CFSP, such limitation is not introduced, neither is implied regarding the national courts' jurisdiction. In the absence of access to the CJEU in CFSP matters, jurisdiction remains with domestic courts. This stance also applies regarding the competence under Art. 4 (1) TEU which provides that "competences not conferred upon the Union in the Treaties remain with the Member States". There is no justification for applying a different principle to jurisdiction[140].

In concise terms, as articulated by the president of the CJEU, prof. dr. Koen Lenaerts and his co-authors, "the Union courts do not have inherent jurisdiction just because matters of Union law are involved in a particular case. Instead, there must be a specific legal basis set down in the Treaties which delineates the extent of the Union courts' authority to adjudicate a specific case or cause of action. Therefore, anything outside the scope of authority conferred upon the Union

[133] Opinion 1/09 re: European and Community Patents Courts ECLI:EU:C:2011:123, para 66.
[134] *Ibid.*, para 85.
[135] *Ibid.*, para 68. See also Case C-583/11 P Innuit ECLI:EU:C:2013:625, para. 91.
[136] Opinion 1/09 re: European and Community Patents Courts ECLI:EU:C:2011:123, para. 68.
[137] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 27.
[138] Art. 29 TEU.
[139] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, para. 71.
[140] See AG Kokott in her View in Opinion 2/13, ECLI:EU:C:2014:2475, para. 96.

courts by the Treaties falls within the residual competencies of national courts"[141]. This conclusion aligns with Art. 274 TFEU, which holds that "save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States".

Article 47 CFR also provides that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article". It is clear that its wording is broad and does not limit its application to the CJEU. When the CJEU lacks jurisdiction to adjudicate a CFSP-related dispute under Art. 24 (1), 2nd subparagraph, last sentence, first limb of the TEU and Art. 275 (1) TFEU, jurisdiction remains within the domain of domestic courts[142]. National courts still function as EU courts and apply EU law when handling cases involving EU measures or national measures falling within the domain of EU law. Furthermore, the Charter's provisions are addressed to the Member States "when they are implementing EU law" pursuant to Art. 51 (1) of it. This provision has been construed broadly by the Court in order to cover any action by a Member State "within the scope of EU law"[143].

According to Advocate General Kokott in Opinion 2/13, national courts could disapply a CFSP act in a specific dispute. Such approach would not contradict with the Foto-Frost doctrine, since "in the context of the CFSP, the Court of Justice cannot claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies. The settled case law of the Court, stemming from the judgment in Foto-Frost, cannot, in [her] view, be applied to the CFSP. Unlike in supranational areas of EU law, there is no general principle in the CFSP that only the Courts of the EU may review acts of the EU institutions as to their legality"[144].

However, Advocate General Wahl in his Opinion in Case 455/14 P "H" suggested a somewhat more limited approach, stating that a national court could temporarily halt the enforcement of a CFSP act and award damages[145]. In fact, it is settled case law that a national court has the authority to temporarily halt the implementation of a European Union measure under specific circumstances, including a reference to the Court of Justice on the validity of the challenged measure[146]. According to AG Wahl, since the Court has no power to hear a reference, "it would then be for the EU institution responsible for the act to draw the necessary inferences from the decision of the national court; by repealing or amending the act whose application vis-à-vis the applicant has been suspended. More precisely, the decision of the national court on the

[141] Lenaerts, K., Maselis, I., and Gutman, K., EU Procedural Law, (2014) Oxford University Press, p. 3. See also Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 30.
[142] This position has also been approved by a number of Advocates Generals: see AG Kokott in her View in Opinion 2/13 ECLI:EU:C:2014:2475, para 99, AG Wahl in Case C-455/14 H P ECLI: EU:C:2016:212, para. 99.
[143] Case C-617/10 Åkerberg Fransson ECLI:EU:C:2013:105 paras 21–22, subsequently endorsed in, amongst others, Case C-206/13 Siragusa ECLI:EU:C:2014:126.
[144] View in Opinion 2/13 ECLI:EU:C:2014:2475, para. 100.
[145] Opinion in Case C-455/14 H P ECLI:EU:C:2016:212, para. 103.
[146] CJEU, 21.02.1991, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn, C-143/88, ECLI:EU:C:1991:65, paras 23–33; CJEU, 09.11.1995, Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft, C-465/93, ECLI:EU:C:1995:369, paras. 32–51.

lawfulness of an EU act does not, conversely, have consequences erga omnes[147]". The Foto-Frost principle, asserting the Courts' exclusive authority to invalidate EU law, was established in a legal context where the Court had complete jurisdiction. However, this does not apply to the CFSP domain. Despite the narrow interpretation of the CFSP exclusion, there remains a set of CFSP measures outside the Court's jurisdiction. The Court explicitly recognised this in Opinion 2/13, stating that "as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice" [148].

Hence, the Foto-Frost principle should be modified to align with the limited jurisdiction of the Court of Justice in the sphere of the CFSP. This modification would involve separating the principle from the review of EU law in the CFSP area, due to the CFSP exclusion and the consequent inapplicability of the preliminary reference procedure[149]. Based on the examination of the role of domestic courts presented in this section, it becomes evident that domestic judges hold jurisdiction under EU law regarding issues related to the interpretation and the validity of CFSP measures.

Furthermore, the Court pointed out, that there might be a necessity for preliminary rulings on the legality of a decision that imposes restrictive measures, especially since the implementation of such measures partly falls under the responsibility of the Member States[150]. Besides, although it was not explicitly addressed in the Rosneft case, the absence of the Court's jurisdiction over preliminary rulings would raise concerns under the 3rd paragraph of Art. 267 TFEU, if a request were to arise in a situation "pending before a court or tribunal of a Member State for which there is no judicial remedy available under national law" [151]. In other words, the fundamental reason for the involvement of national courts, which was somewhat diminished in the Rosneft case, lies in the clear constitutional restriction on the CJEU regarding CFSP acts[152].

The broad interpretation of the "claw-back" provisions signifies that a comprehensive system of legal remedies for reviewing the legality of sanctions against individuals or entities exists. As derived from Art. 19 TEU, this system consists of two pillars: the CJEU, on the one hand, and the national courts or tribunals of EU Member States, on the other hand. To ensure consistent application of EU law within the EU's legal framework, national courts or tribunals lack the power to declare EU acts invalid but are obliged to refer the legality of contested decisions to the CJEU through a preliminary reference.

Although the argument presented above is grounded in the CFSP exclusion, the pivotal role of domestic courts in the EU legal framework and in safeguarding the overarching principles of EU law, including fundamental human rights, may raise concerns[153]. These concerns could

[147] CJEU, 19.07.2016, H v. Council and the Commission, C-455/14 P, Opinion AG Wahl, ECLI:EU:C:2016:212, para. 103.
[148] Opinion 2/13 (Accession to ECHR) EU:C:2014:2454, para. 252.
[149] CJEU, 12.07.2006, Ayadi v. Council, T-253/02, ECLI:EU:T:2006:200, paras 151–153.
[150] Rosneft [GC], cit., para. 71.
[151] CJEU, 06.10.1982,CILFIT v. Ministry of Health, C-283/81, ECLI:EU:C:1982:335.See also Tridimas, T., The European Court of Justice and the National Courts: Dialogue and Instability in the Shadow of a Centralised Constitutional Model, in Chalmers, D., Arnull, A., (eds), The Oxford Handbook of European Union Law, (2015) Oxford University Press, p. 403.
[152] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 24.
[153] *Ibid.*, p. 33.

encompass the "uncontrolled proliferation of conflicting interpretations" and the potential non-application of EU measures in various domestic legal contexts.

More specifically, according to the Court, asserting jurisdiction over preliminary rulings of measures falling within the CFSP prevents a potential deterioration of the fundamental rights protection that could occur if every national court had the authority to monitor CFSP decisions in the absence of a centralised mechanism[154]. Allowing national courts to have jurisdiction when the Court of Justice of the EU does not, could result in varying and potentially even conflicting interpretations of the same CFSP measure[155], whereas a uniform interpretation and application of EU law is necessary for the EU legal order to exist and smoothly function.

Nevertheless, a certain level of uncertainty is not foreign to the functioning of the EU legal framework. It is important to recognise that the very cornerstone of EU law, namely the principle of supremacy, is applied by national constitutional courts with certain differentiations. For instance, in Germany a general reservation regarding the protection of fundamental human rights is recognised. Moreover, the application of supremacy by domestic courts is more contingent on the ongoing acceptance of national legislatures than on the jurisprudence of the Court of Justice concerning the inherent characteristics of the EU[156].

Hence, the EU legal order is accustomed to dealing with uncertainties and with the constant risk that the delicate constitutional equilibrium between EU and national law might be disrupted because of practical challenges. Furthermore, the CFSP is not the only field, within which the drafters of the Treaties have accepted the possibility of inconsistent, or at least differentiated, interpretations of EU law by national courts[157].

Even if the EU were hesitant to recognise the role of national courts in the CFSP, these courts may be inclined to take on such a role independently. Indeed, the German "Solange" experience suggests that the idea of an area of EU activity not subject to judicial review would be intolerable by national courts, and more importantly, it would contravene the general principles of EU law pursuant to Article 6 (3) TEU. In any case, whilst the risk of inconsistency is the inevitable consequence of the system of judicial supervision in the field of the CFSP as set out in the Treaties, the sense of alarm that it appears to generate may be exaggerated. It does not follow, for instance, that domestic courts would be keen to interfere unduly with the exercise of the Union policy in the CFSP.

National courts are obliged to adhere to the duty of sincere cooperation as outlined in Art. 4 (3) TEU. While this duty necessitates that they engage in the judicial scrutiny of CFSP measures to guarantee adherence to fundamental human rights, it also implies that, in the process, national courts should consider the effectiveness of EU law. Seen from this perspective, invalidating CFSP measures would not become a readily exploitable tool. In simpler terms, the

[154] Lonardo, L., Law and foreign policy before the Court: Some hidden perils of Rosneft, (2018), European Papers, Vol. 3, No. 2, p. 556.
[155] CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, cit., para. 27. That is why the AG suggested that the Court can issue preliminary rulings in CFSP. Opinion of AG Whathelet, cit., paras 61-62.
[156] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 33.
[157] *Ibid.*, p. 34.

responsibilities of national judges in this domain may not be exercised without considering the broader limitations set by the EU legal framework when they function as EU courts[158].

It is high time that the Court of Justice recognised the vital role of domestic courts and designated them as a decisive factor for the judicial review in this field. By doing so, the CJEU would adhere to the wording of the Treaties and the intentions of their creators regarding the judicial oversight of CFSP measures. Furthermore, it would grant considerable importance to the Member States' central role in shaping the CFSP. Finally, it would demonstrate confidence in the maturity of the EU's legal framework and the effectiveness of its decentralised enforcement system.

[158] Koutrakos, P., Judicial review in the EU's Common Foreign and Security Policy, (2018) ICLQ Vol. 67, p. 35.

2. CJEU'S JURISDICTION OVER CLAIMS FOR DAMAGES IN THE CFSP AS A COMMITMENT TO THE RULE OF LAW

2.1. EU liability in the CFSP as an indispensable element of a complete system of legal remedies of the EU

2.1.1. Rule of law as a justification for an over-broadened interpretation?

As already discussed in this dissertation, according to the "carve-outs" of Art. 24 (1), second subparagraph, last sentence, first limb of the TEU and Art. 275 (1) TFEU, the CJEU's jurisdiction in the CFSP is limited. Since the entry into force of the Lisbon Treaty, the CJEU has been asked to interpret several times these provisions. In fact, the CJEU has interpreted its jurisdiction broadly, being based on the "claw-backs" provisions of Art. 24 (1), subparagraph 2, last sentence, second limb of the TEU and Art. 275 (2) TFEU, and relying on the rule of law, on the necessity of the uniform interpretation and application of EU law across all Member States, as well as on the principle of a complete system of legal remedies and procedures. In this framework, this question has arisen, namely whether the CJEU has jurisdiction to hear actions for damages brought by individuals for harm allegedly suffered due to CFSP acts providing for restrictive measures. The CJEU dealt with this issue in the Bank Refah Kargaran v. Council case[159].

Concerning the case's factual background, Bank Refah Kargaran, the appellant, was included, during the period from 26 July 2010 to 6 September 2013, in the list of entities involved in nuclear proliferation in Iran, as annexed to various CFSP decisions and EU Regulations, and thus, its financial funds were frozen during that period. Following an annulment judgment of the GC due to the Council's insufficient statement of reasons for the Bank's listing, its name was removed from the list. However, the Bank was relisted by the Council in November 2013, on the ground of a different statement of reasons. A second action for annulment against the relisting failed. The Bank was listed both in the relevant CSFP decisions relied on Art. 29 TEU decision, and the EU regulations adopted under Art. 215 TFEU, activating these CFSP decisions.

Regarding the first period of wrongful listings in both the CFSP decisions and the EU regulations, Bank Refah Kargaran brought in 2015 an action for damages. The GC drew the conclusion of the lack of jurisdiction to rule on actions for damages for harm allegedly suffered due to the adoption of decisions imposing restrictive measures on the basis of Art. 29 TEU. Conversely, the GC accepted jurisdiction over actions for damages for harm allegedly suffered due to restrictive measures adopted under Art. 215 TFEU. Nevertheless, the GC dismissed here the action, as it concluded, that a breach of the duty to state reasons does not constitute itself a ground for liability on the part of the Union, conclusion with which the Advocate General Hogan agreed[160].

On appeal, the CJEU confirmed the legal assessment of the GC, which had rejected the ground

[159] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, ECLI:EU:C:2020:793.
[160] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, Opinion of AG Hogan, EU:C:2020:793, paras. 35-71; See also Eckes, Christina: Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP), (2020) VerfBlog, p. 3.

that the Council's breach of the duty to state reasons could provoke itself EU liability. According to the CJEU, despite the possible affection of a bank's reputation due to its listing, the GC's argument was persuasive in stating that the Council's defective statement of reasons at the case at hand did not constitute a serious disregard for the boundaries of its discretion. Remarkable is, that the breach of procedural rights, such as the obligation to state reasons, has led many times, in the history of EU targeted sanctions, to the annulment of listings.

Moreover, the CJEU recognised the right of natural and legal persons and other non-State entities to bring an action for damages against the EU for harm caused by EU acts, which, in this case, were adopted in the context of the non-proliferation sanctions regime vis-à-vis Iran. The Grand Chamber of the CJEU based its judicial pronouncement, inter alia, on the right to effective judicial protection. Thus, the Court had the opportunity to consider its jurisdiction to hear an action for damages for harm allegedly suffered due to CFSP decisions imposing restrictive measures. It is noteworthy, that in the Jannatian case[161], the GC had rejected a claim seeking compensation for damage allegedly suffered as a result of the adoption of this type of act, having declared lack of jurisdiction of the CJEU. In Bank Refah Kargaran Case, the CJEU recognised the private actors' possibility to claim EU non-contractual liability and damages due to CFSP decisions imposing smart sanctions, a possibility that was uncertain before[162].

The GC had paved the way for the CJEU to recognise its jurisdiction regarding the CFSP decisions in Bank Refah Kargaran. More specifically, it has to be highlighted, that in the earlier case of Post Bank Iran v. Council[163] the GC had mentioned: "Even if the Court does not have jurisdiction to hear the applicant's claim for compensation, in so far as the applicant seeks compensation for the damage that allegedly suffered as a result of the restrictive measures taken against it in the Decision 2010/644 and the Decision 2011/783, it does have jurisdiction to hear that claim, in so far as the applicant seeks compensation for the damage that it allegedly suffered as a result of the implementation of those measures by Regulation No 961/2010, Implementing Regulation No 1245/2011 and Regulation No 267/2012 ("the disputed acts")".

Regarding the CJEU's line of reasoning, private applicants have the option to seek compensation for damages resulting from regulations under Art. 215 TFEU, since these regulations are based on legal provisions within the TFEU. If the implementation of the regulations is unlawful or causes any harm to the applicants' rights, the CJEU may award compensation for the damage suffered. Besides, given that the adoption of a CFSP decision is a pre-requirement for the enactment[164] of a relevant regulation based on Art. 215 TFEU[165], and that a relevant regulation would be very similar in content to a CFSP decision, applicants should also be able to bring an

[161] GC, 18.02.2016, Jannatian v. Council, T-328/14, ECLI:EU:T:2016:86.
[162] Butler, G., Non-contractual liability and actions for damages regarding restrictive measures through CFSP Decisions: Jurisdiction of the CJEU confirmed, (2020) EU Law Live, https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/, p. 3.
[163] GC, 13.12.2018, Post Bank Iran v. Council, T-559/15, EU:T:2018:948.
[164] Butler, G., Non-contractual liability and actions for damages regarding restrictive measures through CFSP Decisions: Jurisdiction of the CJEU confirmed, (2020) EU Law Live, https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/, p. 3.
[165] Since the non-CFSP regulations under Art. 215 TFEU serve to implement the CFSP Decisions, as is customary in the field of restrictive measures.

action for damages pursuant to Art. 340 (2) TFEU for harm allegedly resulting from CFSP decisions taken under Art. 29 TEU. Furthermore, it has to be considered that, there are cases in which restrictive measures are enacted through CFSP decisions only, such as in the case of travel bans. In such cases the addressees are not able to bring an action for non-contractual liability, and thus, the protection provided to them based on an action for damages against the EU by contesting regulations, is not full. In practice most applicants will challenge, in the context of an action for damages, the legality of both a CSFP decision and the regulation enacting it. Even when an action for damages is ambiguous, references to acts taken under Art. 215 TFEU can be interpreted as indicating that the applicant considers the restrictive measures taken against him as a whole.

In line with the Court's reasoning, an action for damages pursuant to Art. 340 (2) TFEU is an autonomous legal remedy also in the CFSP area. EU external action is subject to the respect of the rule of law. Thus, Art. 275 (2) TFEU shall be interpreted in view of the right to effective judicial protection and of the principle of the complete judicial remedy system as crucial aspects of the rule of law. The Court also adopted the Advocate General Hogan's opinion, that the Treaty's provisions on the Court's jurisdiction on the CFSP[166] should be interpreted in the light of the essential "coherence of the legal system", and "the effective judicial protection", which was for the first time evoked in Foto-Frost[167], and later in Rosneft[168].

The CJEU in the Bank Refah Kargaran case based its judgement on the right to effective judicial protection and the principle of coherence of the judicial system, highlighting them as main elements of the principle of the rule of law, which governs the EU legal order. However, could the CJEU have asserted its jurisdiction without relying on those two principles? Indeed, in the Rosneft case, the CJEU's line of reasoning was persuasive in relying on the right to effective judicial protection and the principle of coherence of the judicial system, in order to extend its jurisdiction over preliminary rulings on the validity of CFSP decisions imposing restrictive measures. In particular, in the Rosneft case, the Court upheld its jurisdiction to review the validity of CFSP acts through the preliminary ruling procedure, in spite of the limited scope of the "claw back" clause in Art. 275 (2) TFEU. More precisely, the Court concluded that a restrictive interpretation of this clause, which would limit the review of validity of CFSP acts to the proceedings brought under Art. 263 TFEU, would be inconsistent with the right to effective judicial protection. Following this reasoning, the Court claimed that the phrase "review of the legality" of Union acts is broad enough to encompass also preliminary ruling proceedings, brought under Art. 267 TFEU. This claim was based on the similar function performed by the preliminary ruling and the action for annulment, since they both are "a means for reviewing the legality of European Union acts".

Nevertheless, these principles are deemed to constitute shakier grounds as regards the affirmation of the Court's jurisdiction to hear actions for damages connected with CFSP decisions imposing restrictive measures. More specifically, the grammatical interpretation of Art. 275 (2) TFEU does not refer at all to actions for damages. This raises the question whether the Court went beyond the acceptable limits, in interpreting the right to effective judicial protection

[166] 24 par. 1 subparagraph 2 TEU and 275 par. 2 TFEU.
[167] CJEU, 22.10.1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, C-314/85, ECLI:EU:C:1987:452.
[168] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236.

and the principle of coherence of the judicial protection system in this particular case so broadly. The rationale applied to Rosneft does not seamlessly extend to the action for damages, which is not part of the review system of the legality of EU acts.

Moreover, the action for damages serves the distinct purpose of compensating individuals or entities harmed by an unlawful conduct of EU institutions or agents. According to the CJEU in the Bank Refah Kargaran case, the action for damages is "an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions for its use dictated by its specific purpose"[169]. Since the purpose of an action for damages is not to review the legality of an EU act, such a remedy cannot be regarded covered by the "claw-back" clause[170].

Furthermore, rejecting the acceptance of non-contractual liability arising from CFSP decisions would contradict the complementary nature of this remedy in relation to remedies that result in the annulment of an EU measure. Thereafter, the CJEU emphasised the role of an action for damages in the overall protection of individuals in the EU legal order[171]. It is actually an EU constitutional principle that damages due to wrongful action must be compensated (Brasserie du Pecheur)[172]. In this context, the necessity of a complete system of remedies also in the CFSP area requires relief not only based on actions for annulment, but also on other procedural means, such as these of Articles 340 and 267 TFEU[173]. Although an action for damages is conceptually distinct from the review of legality, according to the Court, it still constitutes an integral component of the EU system of legal remedies, as well as of the right to an effective remedy[174].

In the Bank Refah Kargaran case the Court referred also to Art. 19 (1) TEU establishing its general jurisdiction and defining its role in ensuring that EU law is observed in the interpretation and application of the Treaties. It also highlighted its jurisdiction over actions for damages allegedly arising from CFSP decisions imposing restrictive measures, according to Art. 268 TFEU and 256 (1) TFEU.

Besides, the Court argued that Art. 47 CFR guarantees to every individual whose rights protected by EU law have been violated, the right to an effective remedy, which is an aspect of the rule of law[175]. In the Rosneft case the Court had recognised, that the only limit in the extensive interpretation of the right provided for in Art. 47 CFR, is that it "cannot confer jurisdiction on the Court, where the Treaties exclude it". The CJEU also stated that for the judicial protection of persons or entities subjected to restrictive measures to be complete, the CJEU should be able to rule on an action for damages for harm allegedly caused by restrictive measures imposed by CFSP decisions[176].

[169] Bank Refah, [GC], cit., para. 33.
[170] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1363.
[171] GC, 06.09.2013, Bank Refah Kargaran v. Council, T-24/11, ECLI:EU:T:2013:403, paras. 34-36.
[172] CJEU, 05.03.1996, Brasserie du Pêcheur SA v Federal Republic of Germany, C-46/93, ECLI:EU:C:1996:79.
[173] CJEU, 23.04.1986, Parti écologiste Les Verts v European Parliament, C-294/83, ECLI:EU:C:1986:166.
[174] GC, 06.09.2013, Bank Refah Kargaran v. Council, T-24/11, ECLI:EU:T:2013:403, paras 33 and 34.
[175] *Ibid.*, paras 35-36.
[176] *Ibid.*, para. 43.

The Court regarded the "carve-outs"[177] of Articles 24, 1st paragraph, second subparagraph, last sentence, first limb of the TEU and 275 (1) TFEU as exceptions to the general jurisdiction of the CJEU[178], and it underlined that they are to be interpreted narrowly. Moreover, even though Art. 275 (2) TFEU does not provide for jurisdiction over claims for damages allegedly arising from CFSP decisions, the need for effective judicial protection of individuals commands that the CJEU's jurisdiction extends to actions for damages also in this field. It has to be noted that Art. 275 TFEU does not exclude the CJEU's competence to hear actions for damages on this sector. In the absence of an explicit prohibition, the judiciary could have established its jurisdiction by stating that regulations under Art. 215 TFEU do not have an autonomous existence from a CFSP decision. Actions for damages should be allowed both against non-CFSP regulations based on Art. 215 TFEU and CFSP decisions based on Art. 29 TEU. Therefore, the CJEU established its jurisdiction to award damages for non-contractual liability of the EU due to CFSP acts imposing restrictive measures, relying on Art. 268 TFEU[179].

In view of the above considerations, the right to effective judicial protection as a basis for the Court's jurisdiction's extension is not excessively broadly interpreted. However, regarding the principle of the coherence of the judicial protection system, the Court could indeed have recognised its jurisdiction over claims for damages pursuant to Art. 340 (2) TFEU without relying on this principle. Deviating from the literal and contextual interpretation of Art. 24 TEU and 275 TFEU could be justified by the argument that, between a regulation imposing sanctions and a CFSP decision there is a unique situation of interdependence. If an action for damages were available to private applicants in the case of damages due to the former act, then the same rule has to apply in case of harm due to a CFSP decision.

Furthermore, the extension of the CJEU's jurisdiction to action for damages due to CFSP decisions imposing restrictive measures was in line with the Opinion of Advocate General Hogan. He argued that the Court's jurisdiction over the action for damages was well-established[180], and that, if an action for damages were limited to regulations under Art. 215 (2) TFEU imposing restrictive measures, this would represent an "anomaly" that is impossible to justify in a system of remedies that has to be coherent and offer full protection to individuals who suffered damages due to restrictive measures, and would not only be at odds with fundamental principles relating to the protection of the rule of law, but would also impair the effectiveness, as well as the necessary coherence of the system of remedies provided for in the Treaties[181].

[177] See CJEU, 28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, Opinion of AG Wathelet, ECLI:EU:C:2016:381, paras 36-66.
[178] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, ECLI:EU:C:2020:793, cit. para. 32.
[179] *Ibid.*, para. 43.
[180] *Ibid.*, paras. 35-71.
[181] *Ibid.*, para. 67.

2.1.2. The need for consistency & the design of a unified system of restrictive measures

i. The interdependence element and the integration clause of Art. 215 TFEU

At first glance, the line of reasoning that the Court followed to establish its jurisdiction, as well as the basis on which the Court relied, appears to lack clarity. Nevertheless, on closer examination, there is the argument which pervades the overall logic of the Court and gives consistency, namely the necessity to ensure the proper functioning of Art. 215 TFEU[182]. More specifically, in the Court's words, Art. 215 TFEU establishes a "bridge" between the objectives of the EU Treaty in CFSP matters and the EU actions including economic measures falling within the scope of the TFEU. This assumption leads the Court to contend that this "bridge", by combining the two spheres of competencies, forms a regime on restrictive measures in which there is no rationale to differentiate, regarding judicial protection, sanctions based on non-CFSP regulations from those based on CFSP decisions[183]. As the Court stated, if the European judicature has jurisdiction to rule on an action for damages with regard to restrictive measures set out in regulations based on Art. 215 TFEU[184], the need of consistency of the judicial protection system "requires that, in order to avoid a lacuna in the judicial protection of the natural or legal persons concerned, the Court […] must also have jurisdiction to rule on the harm allegedly caused by restrictive measures provided for in CFSP Decisions"[185]. Drawing on this reasoning, the solution of extending the action for damages to CFSP decisions stems from the necessity to safeguard the consistency of the judicial protection system as regards the overall restrictive measures[186], independently of their nature as CFSP or non-CFSP. Since this need ultimately derives from the "bridge" structured by Art. 215 TFEU, which is the legal basis of a legal sub-system, it appears sensible to read Art. 215 TFEU as implicitly conferring jurisdiction on the Court.

The extension of the Court's jurisdiction stemming from Art. 215 TFEU may have crucial impact on the EU legal order, in both practical and theoretical way. If Art. 215 TFEU demands that the CJEU extends the availability of the action for damages to CFSP acts, this Article is not only a "bridge"[187] than links CFSP decisions to substantive policies. By broadening the scope of judicial protection to CFSP decisions imposing targeted sanctions, Art. 215 TFEU has the additional effect of integrating these decisions into the judicial framework of the TFEU and making them subject to its rules[188]. In this framework, Art. 215 TFEU cannot be considered merely as a legal mechanism that connects two separate acts, each with its own legal basis and adopted through its own procedure. Although the metaphor of the "bridge" is suggestive, it falls short in explaining the rationale behind making subject two differentiated, yet connected, acts to

[182] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1364.
[183] *Ibid.*, p. 1365.
[184] Bank Refah, [GC], cit., para. 37.
[185] *Ibid.*, para. 39.
[186] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1365.
[187] The characterisation "bridge" was initially used in Kadi I (Court of Justice, judgment of 3 September 2008, joined cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, para. 197)".
[188] *Ibid.*, p. 1366.

the same judicial remedies[189].

Rather than relying on this metaphor, the link between a CFSP decision and a non-CFSP regulation, along with making the former subject to the same legal remedies as the latter, appears to result in the creation of a coherent and unified system for restrictive measures under Art. 215 TFEU. By extending the CJEU's jurisdiction over action for damages due to CFSP decisions, the CJEU highlights the significance of the "coherence of the system of judicial protection"[190]. Since the necessity of consistency arises within a legal system, the CJEU's emphasis on the need for coherence in the legal protection of individuals affected by both non-CFSP regulations and CFSP decisions would lack substance, if the mechanism provided for in Art. 215 TFEU did not establish a unified system of sanctions. If this line of reasoning is correct, Bank Refah Kargaran implies that Art. 215 TFEU establishes an integrated, sui generis, framework-system, where CFSP decisions and non-CFSP regulations are interdependent of each other[191]. From this viewpoint, Article 215 TFEU cannot be considered as a mere "bridge" between the CFSP and other substantive competences, but as a kind of an "integration clause".

ii. The "lacuna" risk and the role of national courts

In fact, Advocate General Hogan was like more hesitant, as regards the desires of the Treaty framers to restrict the CJEU's jurisdiction as regards the CFSP[192]. He highlighted that "[f]rom one viewpoint, the Court's jurisdiction is, by virtue of the second paragraph of Art. 275 TFEU, confined simply to reviewing the legality of the restrictive measures imposed on natural or legal persons in the context of an action for annulment under the second paragraph of Art. 263 TFEU" [193], and he further stated that "[f]rom this standpoint, it has to be highlighted that this jurisdiction does not cover any claims for consequential or related damages. Besides, it is settled case-law that an action for damages is not, as such, part of the EU act's legality's review system".[194] Nevertheless, the AG proceeded to finalise that, relying on a comprehensive and unified interpretation of the Treaties[195], the Court did indeed have such jurisdiction to award damages. He also considered that maybe the Treaty framers aimed to exclude CJEU jurisdiction over CFSP acts, excluding the decisions providing for restrictive measures[196].

Contrary to the AG's hesitance, the CJEU depicted the previously mentioned line of reasoning as the sole workable choice. Indeed, the CJEU's positive answer about its jurisdiction over actions for damages due to CFSP decisions providing for restrictive measures is impressive since it adopted this stance without much hesitation. In the CJEU's own words, "the consistency of the system of judicial protection in EU law requires that […] in order to avoid a gap for natural or legal persons […] [the CJEU] is competent to rule on damages allegedly suffered due to

[189] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1366.
[190] Bank Refah, [GC], cit., para. 39.
[191] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1366.
[192] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, Opinion of AG Hogan, EU:C:2020:793, paras 58-59.
[193] *Ibid.*, para. 59.
[194] *Ibid.*, para. 59.
[195] *Ibid.*, para. 68.
[196] *Ibid.*, para. 66.

restrictive measures imposed by CFSP Decisions"[197].

It is clear, that the avoidance of a lacuna in the judicial protection of individuals was a decisive justifying ground for the CJEU's stance. Nevertheless, taking into consideration that the responsibility for ensuring the effective judicial protection of individuals is shared between the CJEU and the national courts[198], would a lacuna really exist? Only in this case could a gap really arise, in which neither the CJEU nor the national courts would not have had competence to award damages arising from CFSP acts imposing targeted sanctions.

In theory national courts could potentially determine the existence on non-contractual liability of the EU, and if deemed appropriate, enforce compensation from the EU[199]. This arrangement would differ from the centralised structure outside of the CFSP domain, where the CJEU holds exclusive jurisdiction under Art. 268 TFEU to award damages for non-contractual liability of the EU. Nevertheless, in the absence of CJEU jurisdiction, the sole responsibility for ensuring effective legal protection would rest with national courts. In cases involving the interpretation of Art. 340 TFEU, national courts could ask for a preliminary ruling from the CJEU. While undoubtedly a more complex system to operate, this approach would, assuming the rule of law is upheld across all Member States, equip individuals with a means to seek compensation for harm caused by the EU.

In this context, the CJEU firm stance in the Bank Refah Kargaran case, asserting its exclusive role within the complex EU framework to award compensation due to CFSP decisions imposing restrictive measures, gets noteworthy. This insistence appears to be driven by motives beyond the mere aim of guaranteeing effective legal protection[200]. Indeed, if the CJEU's primary concern were solely to ensure individuals' access to an effective remedy, it might not have been opposed to the decentralised system, as mentioned above. Under this decentralised approach, national courts would determine whether the EU incurs non-contractual liability, and if positive, whether this liability entails the award of damages.

However, the CJEU rejected this option and implied that only the CJEU can make such determinations. In the Rosneft case, the Court invoked the Foto-Frost judgment[201] and the need to protect the unity of the EU legal order, to argue that the CJEU should have jurisdiction to rule on requests for preliminary rulings on the validity of CFSP decisions imposing restrictive measures[202]. Instead, in Bank Refah Kargaran, the Court of Justice took a different approach and did not invoke the Foto-Frost judgment, but it relied on the necessity of ensuring effective judicial protection, safeguarding the right to an effective remedy, and upholding the rule of law. The Court claimed that it would be inconsistent for it to have jurisdiction to award damages for harm caused by non-CFSP regulations, while be deprived of such jurisdiction for harm caused by

[197] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, ECLI:EU:C:2020:793, para. 39.
[198] See Art. 19 (1) TEU.
[199] Verellen, Th., In the name of the rule of law? CJEU further extends jurisdiction in CFSP (Bank Refah Kargaran), (2021) European Papers Vol.6, p. 23.
[200] *Ibid.*, p. 23.
[201] CJEU, 22.10.1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, CJEU, 22.10.1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, C-314/85, ECLI:EU:C:1987:452.
[202] CJEU,28.03.2017, Rosneft Oil Company v Her Majesty's Treasury and Others,72/15, EU:C:2017:236, cit. paras 78-80.

CFSP decisions.

However, there are indications that in Bank Refah Kargaran as well, the CJEU is influenced, wholly or partially, by a Foto-Frost-inspired logic, according to which the Court is to guarantee not only the appropriate relief for the affected individuals, but also the unity of the EU legal order, and in this case: the uniform interpretation of Art. 340 TFEU[203], which would be more vulnerable in a decentralised system in comparison with a centralised, where individuals have direct access to the CJEU. A concern linked to the Foto-Frost precedent could clarify why the Court dismisses the notion that Member States might address the gap that could arise, if the CJEU's jurisdiction would not cover CFSP restrictive measures. A more comprehensive rationale would have enhanced legal certainty because it would have clarified why the lack of the CJEU's jurisdiction to award damages would equate to a gap in the judicial protection system[204]. Finally, it is possible that the long-standing perception of the CJEU's exclusive jurisdiction to award damages for EU non-contractual liability contributes to the intuitive notion that only the CJEU should have this power.

[203] Verellen, Th., In the name of the rule of law? CJEU further extends jurisdiction in CFSP (Bank Refah Kargaran), (2021) European Papers Vol.6, p. 23.
[204] *Ibid.*, p. 23.

2.2. The question of a differentiated liability of the EU in the CFSP

2.2.1. Conditions of EU liability and award of damages in the CFSP

To begin with, Article 340 (2) TFEU provides that the EU can incur non-contractual liability, ensuring both the effectiveness of the judicial protection of individuals and the completeness of the system of judicial remedies and procedures in the EU legal order. According to settled case law, the conditions under which EU non-contractual liability can arise, are (cumulatively): The unlawfulness of the EU Institutions' conduct, the actual damage suffered by the applicant, and the causal link between the unlawful conduct and the damage caused. In this framework, questions arise regarding the requirements of EU non-contractual liability in the CFSP, and more precisely, in the field of EU smart sanctions. Are there any variations in this domain of liability due to the special and distinctive character of the CFSP?

Moreover, the numerous actions that are brought before the CJEU in order to challenge the validity of EU acts adopting restrictive measures are usually accompanied by an action for compensation for both material and non-material damage allegedly suffered by the applicants due to the restrictive measures imposed on them. The traditional approach that the CJEU has followed on matters of EU non-contractual liability, adopts a strict attitude concerning the actions for compensation of both material and non-material damage in the CFSP, and has leaded to the rejection of almost all of these actions[205].

It is also worth mentioning that over the years, numerous GC's judgments have explicitly rejected the EU Courts' jurisdiction for non-contractual liability related to EU legal acts adopted within the CFSP, particularly concerning restrictive measures cases. The judgments on Trabelsi and Others[206], Dagher[207], Georgias and Others[208], and Jannatian[209] are examples of judgments where this approach was adopted. Little fertile ground for some change seems to have been created since the judgment in the Safa Nicu Sepahan case[210], where the CJEU for the first time referred to the award of non-material damage in favour of the applicant due to CFSP acts imposing restrictive measures.

Concerning the factual background of the Safa Nicu Sepahan case, Safa Nicu Sepahan, an Iranian limited company, brought a case before the GC regarding the restrictive measures adopted to put pressure on the Islamic Republic of Iran to terminate proliferation-sensitive nuclear activities and the development of nuclear weapon delivery systems. Its name was included in the list of entities involved in nuclear proliferation included in one of the annexes to a CFSP decision concerning EU restrictive measures against Iran[211]. In the Council's statement

[205] Messina, M., The European Union's non-contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?, (2018) Maastricht Journal of European and Comparative Law 25(5), p. 647.
[206] GC, 28.05.2013, Trabelsi and Other v. Council, T-187/11, ECLI:EU:T:2013:273.
[207] GC, 27.02.2012, Dagher v. Council, T-218/11, ECLI:EU:T:2012:82.
[208] GC, 18.09.2014, Georgias and Other v. Council and Commission, T-168/12, ECLI:EU:T:2014:781.
[209] GC, 18.02.2016, Jannatian v. Council, T-328/14, ECLI:EU:T:2016:86.
[210] C-45/15 P, 30.05.2017, *Safa Nicu Sepahan Co. v Council*, EU:C:2017:402.
[211] Decision 2011/299/CFSP amending Decision 2010/413/CFSP concerning restrictive measures against Iran, [2011] OJ L 136/65 (Decision 2010/413/CFSP).

of reasons of that CFSP decision and in its implementing acts[212], Safa Nicu was characterised as a communications firm supplying equipment for the Fordow facility built without being declared to the International Atomic Energy Agency.

Safa Nicu Sepahan asked the Council to amend those annexes many times, by claiming that the Council erred in including its name in these lists concerning Iran. However, the Council maintained the name of Safa Nicu Sepahan in the list, stating that the observations submitted by the company did not substantiate the lifting of the restrictive measures. Then, Safa Nicu Sepahan brought an action for annulment claiming an alleged error of the assessment by the Council. The GC relying on the Fulmen and Mahmoudian judgment of CJEU[213], preliminarily affirmed that the EU Courts, via their scrutiny of the lawfulness of EU acts, must ensure that the restrictive measures affecting natural and legal persons individually are adopted on a sufficiently solid factual basis. The GC stated that the EU Institutions and not the persons concerned are obliged to establish that the reasons used against the targeted persons are well founded. It also stated that it may request from the EU authorities to provide proof[214]. The Council, in responding to this request, claimed that the listing proposal presented by the Member State was the only available piece of information about the adoption and the maintenance of the targeted sanctions against the applicant[215]. Thus, according to the GC the Council failed to state reasons for the listing of the applicant, and to substantiate that Safa Nicu Sepahan was a communications firm providing equipment for the Fordow facility. The Court further stated that the obligation for the Council to provide such evidence or information was already apparent from well-established case law when the Council listed the applicant. Hence, the GC partially annulled the contested EU acts as far as the listing of the applicant's name was concerned.

Regarding the claim for compensation made by Safa Nicu Sepahan, it involved both material and non-material damage. In this framework, the GC recalled relevant case law about the certain conditions that must be cumulatively fulfilled in order the EU to incur non-contractual liability[216]. As referred above, these conditions are: The unlawfulness of the EU Institutions' conduct, the actual damage suffered by the applicant, and the causal link between the unlawful conduct and the damage caused. In addition, the GC stated that the sufficiently serious breach, which constituted the Council's unlawful conduct, consisted in the authority's failure to realise and fulfil its obligation to provide sufficient information or evidence about the reason of the restrictive measures' imposition. This obligation is dictated by the principle of ordinary care and diligence, as well as by the requirement to observe the fundamental rights of the persons and the entities concerned.

For the condition of unlawfulness of the EU Institution's conduct to be fulfilled, the unlawful conduct has to entail a sufficiently serious breach of a rule of law, which intends to confer rights on individuals. Thus, not all degrees of unlawful conduct trigger EU's liability. Examples of

[212] Following the amendment of Annex II to Decision 2010/413/CFSP, the name of Safa Nicu was also included in the list in Annex VIII to Regulation No. 961/2010/EU on restrictive measures against Iran and repealing Regulation (EC) No. 423/2007, [2010] OJ L 281/1, which was then followed by its Implementing Regulation No. 503/2011/EU implementing Regulation (EU) No. 961/2010 on restrictive measures against Iran, [2011] OJ L 136/26.
[213] CJEU, 28. 11.2013, Council v. Fulmen and Mahmoudian, C-280/12 P, EU:C:2013:775.
[214] CJEU, 30.05.2017, Safa Nicu Sepahan Co. v Council, C-45/15 P, EU:C:2017:402, para. 36.
[215] *Ibid.*, para. 37.
[216] *Ibid.*, para. 47.

such a sufficiently serious breach are: The infringement of the regulatory framework in adopting the restrictive measures, the violation of the substantive conditions underlying the adoption of the restrictive measures or a breach of the applicant's procedural or substantial rights[217].

It follows from settled case-law that the sufficiently serious breach test is satisfied where the institution concerned manifestly and gravely disregarded the limits set on its discretion. The degree of clarity and precision of the rule breached, and the room of discretion left to the European Union authorities are decisive criteria for the existence of the sufficiently serious breach[218]. In other words, for the establishment of a sufficiently serious breach of EU law, the EU judge must establish whether the EU Institution in question has a margin of discretion, taken into consideration the complexity of the situation to be regulated and the difficulties of interpretation and application, as well as must affirm the clarity and precision of the violated rule, and the intentionality and inexcusability of the error made[219].

According to the GC, the Council, in the case at hand, did not enjoy any discretion and it was obliged to substantiate the adopted restrictive measures. Additionally, the rule obliging so the Council did not provoke any difficulties concerning its interpretation or application. Thus, no finding of a manifest and grave disregard of the limits of the Council's discretion was necessary in order to be established a sufficiently serious breach of a rule of law, which intended to confer rights on individuals[220].

Regarding the non-material damage, the Court preliminarily observed[221] that when an entity is subject to restrictive measures because it has allegedly supported nuclear proliferation, its conduct relates to serious threat to international peace and security[222], thus, affecting importantly its reputation[223]. In the Safa Nicu Sepahan case, the reputation of the applicant had been highly affected, since the harm suffered by the applicant did not derive from the expression of a personal opinion, but from an official statement of the position of an EU institution, published in the EU Official Journal. Thus, the non-material damage in this case was the result of the unlawful adoption and maintenance of the restrictive measures, and it differentiated from any material damage that may had been provoked to its commercial relations.

As regards the amount of compensation, the Court, referring to its previous case law[224], noted that the annulment of the challenged acts could constitute a form of compensation for the immaterial harm suffered by the applicant. However, the GC stated that, in this case, the annulment of the restrictive measures was only able to limit the amount of damages awarded but

[217] Thanou St., Individual restrictive measures and actions for damages before the General Court of the European Union, (2020) ERA Forum 20, p. 607.
[218] CJEU, 30.05.2017, Safa Nicu Sepahan Co. V Council, C-45/15 P, EU :C :2017 :402, para. 30.
[219] Messina, M., The European Union's non-contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?, (2018) Maastricht Journal of European and Comparative Law 25(5), p. 641.
[220] GC, 25.11.2014, Safa Nicu Sepahan v. Council, T-384/11, ECLI:EU:T:2014:986, para. 62.
[221] *Ibid.*, para. 88.
[222] *Ibid.*, para. 89.
[223] Messina, M., The European Union's non-contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?, (2018) Maastricht Journal of European and Comparative Law 25(5), p. 636.
[224] CJEU, 28.05.2013, Abdulrahim v. Council and Commission, C-239/12 P, EU:C:2013:331, para. 72.

could not represent full compensation for the immaterial damage suffered. In fact, despite the applicant's objections, the effects of the restrictive measures lasted for almost three years and could not be lifted only by the designation of the contested acts as unlawful, since the imposition of restrictive measures against an entity tends to attract increased notice and incite a more intense response than their subsequent annulment[225]. More precisely, on the one hand, in the Abdulrahim case[226], the matter was whether the applicant had an interest in bringing an action for damages even though the challenged act was revoked. In the Safa Nicu Sepahan case, on the other hand, the application regarded, inter alia, claims for damages due to Council's not sufficiently provided information and evidence to substantiate the inclusion of the applicant's name in the list. So, in the Abdulrahim case, the mere annulment of the challenged act could constitute an adequate form of compensation for the non-material damage caused, whereas in the Safa Nicu Sepahan case, the mere annulment of the contested act did not represent sufficient compensation in view of the continued maintenance of the applicant's name in the lists for a sufficiently long period despite the applicant's complaints.

According to the Opinion of Advocate General Mengozzi, who was in line with the Court's findings, the Court should consider all the parameters of the situation, including the seriousness and the duration of the infringement, as well as the aggravating circumstances that govern the specific situation of the individual involved[227]. In this way, the Court could evaluate whether the annulment of an unlawful act could potentially result in the retroactive elimination of the immaterial damage suffered by the applicant.

In view of settled case law[228], any action for compensation, whether the damage suffered is material or non-material, must specify the nature of the damage with regard to the conduct at stake and must quantify the whole of that damage, even if only approximately[229]. The Court also stated that it was the applicant's obligation[230] to provide the evidence to establish the fact and the extent of actual and certain damage as well as the fact that such damage is a sufficiently direct implication of the alleged conduct.

In fact, in the Georgias et al. case[231], regarding the restrictive measures adopted by the EU against certain persons due to the serious violations of human rights committed by the Government of Zimbabwe, the General Court gave attention to the causal link pursuant to Art. 340 (2) TFEU, confirming that it is established, where there is a definite and direct causal link between the harm caused by the Institution and the damage suffered, the burden of proof of which is on the applicant. The alleged damage shall be a sufficiently direct implication of the EU Institution's conduct, that must be the decisive ground of the damage, while there is no requirement to rectify every detrimental implication, even if it is distant, resulting from an unlawful situation.

[225] GC, 25.11.2014, Safa Nicu Sepahan v. Council, T-384/11, ECLI:EU:T:2014:986, para. 87–88.
[226] CJEU, 28.05.2013, Abdulrahim v. Council and Commission, C-239/12 P, EU:C:2013:331.
[227] Opinion of Advocate General Mengozzi in Case C-45/15 P Safa Nicu Sepahan, para. 55.
[228] See CJEU, 30.05.2017, Safa Nicu Sepahan Co. v Council, C-45/15 P, EU:C:2017:402, para. 62.
[229] GC, 13.12.2018, Iran Insurance v. Council, T-558/15, EU:T:2018:945, para. 120 and GC, 13.12.2018, Post Bank Iran v. Council, T-559/15, EU:T:2018:948,para. 113.
[230] Thanou St., Individual restrictive measures and actions for damages before the General Court of the European Union, (2020) ERA Forum 20, p.612.
[231] GC, 18.09.2014, Georgias and Other v. Council and Commission, T-168/12, ECLI:EU:T:2014:781.

As regards, the power of the Council to impose smart sanctions, the last one can now be expected to ensure that the imposition of new sanctions is complied with fundamental rights as reflected in the requirements that can be identified of the relevant case law[232]. These requirements are related with: The designation criteria, the statement of reasons, and finally, the supporting evidence, with the two latter categories being the relevant ones in most cases.

Regarding the designation criteria, the decision of imposing restrictive measures on a specific subject must be relied on precise and distinct criteria which are provided for in the relevant legal act and must be suitable for the objective of this act. These criteria have to be so precise and clear, so that they can be foreseen with reasonable certainty. They also have to preserve their targeted nature, and thus, they should not be too broad. Concerning the statement of reasons, it has to accompany the decision that imposes the sanctions, and it has to include the concrete reasons of the listing of the subject concerned. The statement of reasons must include sufficient information, and to enable the targeted person to comprehend what is necessary to refute the statement[233]. If the Council includes several reasons for the listing, the decision will survive a challenge, if at least one of them fulfil the test. However, for policy reasons, the Council should avoid including many reasons for the sole purpose of surviving a challenge.

As regards the supporting evidence, the decision imposing restrictive measures must rely on evidence that indicate that the decision has been taken on a sufficiently solid factual basis[234]. There is no need for proving the Council's statements beyond reasonable doubt, but in the case of lack of any supporting evidence, a statement will not be accepted as a justifying ground for imposing restrictive measures[235]. The feature of sensitivity or confidentiality of the underlying information is not a reason for refusal to provide it to the Courts. According to the Court's ruling in the Kadi II case[236], any information regarded as confidential by the Council would have to be provided to the Court to be assessed, and the Court would determine whether the security concerns were of that importance so as to justify the violation of the person's rights by withholding some or all that information from him[237]. Indeed, under recently amended rules, the Court has a certain, strictly defined, discretion to accept to take into consideration information that will not be provided to the person contesting the sanction. However, the Court's case law has not so far referred to this new tool. It is apparent that the most workable solution is for the Council to find justifications that can be supported by information that are publicly available.

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[232] Pursiainen, A., Targeted EU Sanctions and Fundamental Rights, https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751, p. 17.

[233] *Ibid.*, p. 10.

[234] Case C-280/12, Council v Fulmen and Fereydoun Mahmoudian, ECLI:EU:C:2013:775, para 64.

[235] Pursiainen, A., Targeted EU Sanctions and Fundamental Rights, https://um.fi/documents/35732/48132/eu_targeted_sanctions_and_fundamental_rights/14ce3228-19c3-a1ca-e66f-192cad8be8de?t=1525645980751, p. 12.

[236] CJEU, 03.09.2008, Kadi and Al Barakaat International Foundation v Council and Commission, C 402/05 P and C 415/05 P, EU:C:2008:461.

[237] The same was confirmed, for third country sanctions, in CJEU, 28.11.2013, Council v. Manufacturing Support & Procurement Kala Naft, C-348/12 P, ECLI:EU:C:2013:776, para 65-74.

2.2.2. Towards the constitutionalisation of the CFSP?

In the post-Lisbon era, the Bank Refah Kargaran case marks a significant judgment regarding the extent of the Court's jurisdiction in the CFSP. This case concerned EU non-contractual liability due to CFSP decisions taken under Art. 29 TEU, providing for restrictive measures. However, the issue of a broader ambit of EU non-contractual liability and actions for damages for other matters in the CFSP which do not concern restrictive measures, such as actions carried out by the Union in the context of its engagement in Common Security and Defence Policy (CSDP) missions beyond the Union's borders remain open. Nonetheless, the CJEU's jurisdiction was indeed extended as regards actions for damages in the area of the CFSP[238]. Additionally, the Bank Refah Kargaran case might function as a blow to the Council's restrictive measures regime, affecting it regarding the addressees and the duration of the restrictive measures imposed[239]. It seems likely that the Council's approach to imposing restrictive measures will be more cautious hereinafter, and its persistence on listing entities for extended periods of time will require more certainty.

Apart from the above, the Bank Refah Kargaran case has assured that the EU's commitment to fundamental rights and the rule of law extends also to the CFSP[240], and as a consequence, the EU shall compensate for damages it causes in the framework of this Policy[241].What is also obvious from the judgment in the Bank Refah Kargaran case, is that the Les Verts[242] doctrine of a "complete system of legal remedies and procedures" is still alive in the EU external relations case law[243].

Somebody could claim that the Court acts selectively by interpreting the Lisbon Treaty that broadly[244]. Of course, after the Lisbon Treaty, the CFSP was "normalised" in various ways, including the merging of the European Community of pre-Lisbon era into an EU equipped with a single legal personality, as Art. 47 TEU provides. Besides, Art. 1 (3) TEU holds that the two Treaties shall have the same legal value and that the Union shall be founded on both of them. Additionally, pre-Lisbon case law, such as Gestoras[245] and Segi[246], on the lack of CJEU's jurisdiction to award damages in the then second pillar, is not anymore alive[247]. In the "lisbonised" constitutional framework, the CFSP is not a pillar, and pillarisation belongs to legal

[238] Butler, G., Non-contractual liability and actions for damages regarding restrictive measures through CFSP Decisions: Jurisdiction of the CJEU confirmed, (2020) EU Law Live, https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/, p. 3.
[239] *Ibid.*, p. 5.
[240] Eckes, Christina: Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP), (2020) VerfBlog, p. 2.
[241] *Ibid.*, p. 6.
[242] CJEU, 23.04.1986, Parti écologiste Les Verts v European Parliament, C-294/83, ECLI:EU:C:1986:166.
[243] Butler, G., Non-contractual liability and actions for damages regarding restrictive measures through CFSP Decisions: Jurisdiction of the CJEU confirmed, (2020) EU Law Live, https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/, p. 7.
[244] Verellen, Th., In the name of the rule of law? CJEU further extends jurisdiction in CFSP (Bank Refah Kargaran), (2021) European Papers Vol.6, p. 21.
[245] See CJEU, 27.02.2007, Gestoras Pro Amnistía and Others v Council, C-354/04 P, ECLI:EU:C:2007:115, para. 46.
[246] See in the same sense case C-355/04 P Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union ("Segi") [2007] para. 46.
[247] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, ECLI:EU:C:2020:793, cit. paras 45-48.

history. In the Bank Refah Kargaran judgment the CJEU added how the Lisbon Treaty has reformed the structure of the EU Treaties, and more precisely, that the CFSP has been integrated into the "general framework" of EU law[248].

Nevertheless, while the Court gives emphasis on the EU's new structure and the end of differentiation between the TFEU and the CFSP, the notion of the cohesive framework of the EU's external action seems currently unrealistic[249]. More specifically, there are some indications that the framers of the Lisbon Treaty wanted to isolate the CFSP and safeguard its distinctive nature, and at the same time exclude the CJEU from this policy area that is considered strongly tied to national sovereignty and political matters of high significance[250]. The content of Articles 24 TEU and 275 TFEU is clear on this point. AG Hogan was right[251] in arguing, that the action for damages is an independent action which does not constitute part of the review system of the legality of EU acts as established by the Treaties[252]. A CFSP decision imposing restrictive measures constitutes clearly an act adopted on the basis of a CFSP Treaty provision.

Moreover, despite the abolition of the pillars structure and the establishment of an integrated system of external action, the CFSP is still subject to institutional and regulatory mechanisms inspired by intergovernmental dynamics[253]. Furthermore, the present formulation of Art. 40 TEU appears to uphold the logic of the pre-Lisbon arrangement, which relies on the differentiation between the CFSP, that retains the exclusive competence to pursue political goals, and the EU policies outlined in the TFEU, each of which is to accomplish specific substantive objectives assigned to them[254]. This distinct framework is also apparent in the CJEU's limited jurisdiction in the CFSP.

However, the Court acknowledges that, in certain realms of interaction, CFSP and TFEU components can be harmonised within a legally unified structure, necessitating homogeneity and consistence[255]. Under these conditions, it is the necessity of coherence that requires the CFSP component to be subject, as far as feasible, to the same judicial remedies as those of the TFEU component. In this framework, the concept of unity in the interaction between the CFSP and other competences appears to resurface. The process of "incorporating CFSP provisions into the general framework of EU law"[256] would specifically be expressed within the domain of sanctions, where a cohesive structure bridging the CFSP and other external policies is established through Art. 215 TFEU".

Nonetheless, there is still uncertainty about the extent to which this approach can be stretched,

[248] *Ibid.*, para. 47.
[249] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1368.
[250] See Koutrakos, P., Primary law and policy in EU external relations: moving away from the big picture, (2008) European Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567658.
[251] Verellen, Th., In the name of the rule of law? CJEU further extends jurisdiction in CFSP (Bank Refah Kargaran), (2021) European Papers Vol.6, p.21.
[252] CJEU, 06.10.2020, Bank Refah Kargaran v. Council, C-134/19 P, Opinion of AG Hogan, EU:C:2020:793, cit. para. 59.
[253] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1359.
[254] *Ibid.*, p. 1360.
[255] *Ibid.*, p. 1368.
[256] Bank Refah, [GC], cit., para. 47.

because of the limitations provided for in Art. 275, para. 2, TFEU. In any event, in Bank Refah, the Court aims at the preservation of individuals' protection in the EU legal order[257]. The Court, without giving a clear answer, suggests that the development of a unified subsystem subject to consistent (homogeneous) judicial scrutiny is feasible, despite the continued existence of fragmentation in the EU's external action. This judicial scrutiny predominantly aligns with the framework of the TFEU rather than this of the CFSP, although the opposite scenario could be considered. Hence, the conclusion that the Court adopts an integrationist approach appears reasonable[258].

But why did it take it so long for the Court to give an answer to this sector of jurisdiction, since it had been already called to give an answer on such a matter? One possible explanation for the Court's delay is that lawyers representing private parties, non-privileged applicants, might lack sufficient specialisation in the complex area of the law of restrictive measures. Consequently, they might submit incomplete pleadings, failing to present well-justified arguments. This could result from a lack of expertise in the restrictive measures law, and the intricate constitutional aspects of the CJEU's jurisdiction. Contrarily, the Council's highly skilled lawyers, who frequently appear before the EU courts in this multi-dimensional area of EU law, prove a formidable challenge for the opposing parties. Therefore, it is crucial for subjects of restrictive measures to carefully select their legal counsel before the CJEU and ensure their specialisation in the EU external relations law. This will help them ensure that a full array of potential arguments and pleas can be effectively utilised.

[257] Eckes, Christina: Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP), (2020) VerfBlog, p. 6.
[258] Bertoloni, M., "Restrictive Measures" under Art. 215 TFEU: Towards a unitary legal regime? Brief reflections on the Bank Refah judgment, (2020) European Papers Vol. 5, p. 1368.

CONCLUSION

The above analysis shows that the CFSP requires a special treatment due to the distinctive features that characterise this sphere. Nevertheless, it is obvious that the possibility of judicial review of CFSP acts by the CJEU is a necessary element for fundamental principles and rights enshrined by the EU legal order to be secured, such as the rule of law, the right to effective judicial protection, the right to a complete system of legal remedies and procedures etc. Therefore, the judicial scrutiny of smart sanctions against individuals shall under certain conditions be conducted by the CJEU. The judicial scrutiny consists of both the direct way of the action for annulment according to Article 263 (4) TFEU and the indirect way of the preliminary reference pursuant to Article 267 TFEU.

Furthermore, in case of unlawfulness of the imposed smart sanctions, individuals shall have the possibility to establish EU non-contractual liability and to bring an action for damages, in order their judicial protection to be complete. It shall be accepted that these actions for damages relate to both material and immaterial damages. The importance of immaterial damages is increased when the material damages awarded are not sufficient.

The broadened ambit of the right to effective judicial protection, emerging from the CJEU's case law, is a welcome development in the CFSP, which is in accordance with the EU's founding values. Furthermore, the principle of a comprehensive system of legal remedies and procedures, as established in the Les Verts (C-294/83) case, remains valid and is still evident in current EU external relations case law[259]. The principle of coherence of judicial remedies utilised as a ground for the Court's jurisdiction to be established might have implications for future litigation. For example, this principle could be the basis of an action for non-contractual liability concerning CFSP decisions other than restrictive measures, despite the exclusion of the Court's jurisdiction over acts deemed to be of a "genuine CFSP nature". In a Union based on the rule of law, the decisions of EU institutions, including those enacted in the context of the Common Foreign and Security Policy, should be subject to judicial review[260]. Of course, such a wide possibility of review of CFSP acts, if it tends to be accepted, should be balanced against the distinctive nature of the CFSP.

The exceptional jurisdiction of the CJEU in the CFSP is based on the "claw-back" provisions of Article 24 (1), second subparagraph, last sentence, second limb of the TEU and Article 275 (2) TFEU, regarding the CJEU's jurisdiction to review the validity of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union. The exceptional jurisdiction has been broadly interpreted by the CJEU, in the name of the above-mentioned principles and rights.

With its recent case law, and more specifically, in the Venezuela case that was concluded in

[259] Butler, G., Non-contractual liability and actions for damages regarding restrictive measures through CFSP Decisions: Jurisdiction of the CJEU confirmed, (2020) EU Law Live, https://eulawlive.com/op-ed-non-contractual-liability-and-actions-for-damages-regarding-restrictive-measures-through-cfsp-decisions-jurisdiction-of-the-cjeu-confirmed-by-graham-butler/, p. 5.

[260] Poli, S., 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, p. 1067.

September of 2023, the CJEU has also for the first time recognised legal standing to third countries, to contest the validity of CFSP acts imposing restrictive measures. This conclusion was founded on the protection of the principle of the rule of law. This is an evolution compared to previous case law. On the other hand, this has given rise to the criticism, according to which the CJEU did not take into account the particularities of the CFSP. Nevertheless, in this way the CJEU has aimed at the maintenance of the rule of law and the effectiveness of judicial protection.

In addition, the necessary role of the preliminary ruling procedure in the sphere of the CFSP, in order the complete system of legal remedies and procedures to be secured, has been also recognised by the CJEU. Thus, the CJEU has broadened its exceptional jurisdiction on the basis of Article 24 (1), second subparagraph, last sentence, second limb of the TEU and Article 275 (2) TFEU. In this way, the CJEU aims at the maintenance of the principle of the uniform interpretation and application of EU law, which is an essential characteristic for the proper functioning of the EU legal order.

It is also clear that the general reluctance of the CJEU in awarding damages caused by EU institutions also extends to the CFSP area. Moreover, in view of all the above considerations, it is confirmed that the burden of proof for the applicants to demonstrate the damage they have suffered is very high also in the CFSP. This makes the award of damages caused by EU institutions to targets of restrictive measures difficult. Despite the fact that for the first time in the CFSP an action for non-material damages was successful, the CJEU judgment in the Safa Nicu Sepahan case was undoubtedly coherent with judgments in previous cases, that dealt with EU liability and the award of damages. This judgment in the Safa Nicu Sepahan case is in fact their natural evolution, but it is for sure not a revolution[261]. As regards the award of material damages, it seems that Safa Nicu Sepahan has not contributed therein.

The Court of Justice upheld the reasoning of the General Court, arguing that, in view of these circumstances, crossing off Safa Nicu Sepahan from the list with targeted individuals could only represent a partial reparation of the damage occured[262]. However, two years after the judgment in the Safa Nicu Sepahan case, in the Jannatian case, the GC assessed that the finding of unlawfulness of the restrictive measures adopted against the applicant was sufficient as full reparation for the damage suffered, and thus, there was no need to award the applicant damages[263]. Nevertheless, according to two recent judgments of the General Court[264], the parameters of the duration and the seriousness of the unlawful conduct are not sufficient enough to establish that the annulment of restrictive measures does not constitute sufficient compensation for the damage suffered. The applicant has also to submit evidence showing that the annulment of the challenged acts would be insufficient, as such, to compensate for the non-material damage allegedly suffered because of the injury to the applicant's reputation provoked

[261] Messina, M., The European Union's non-contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?, (2018) Maastricht Journal of European and Comparative Law 25(5), p. 646.
[262] CJEU, 30.05.2017, Safa Nicu Sepahan Co. v Council, C-45/15 P, EU:C:2017:402, para. 48
[263] GC, 18.02.2016, Jannatian v. Council, T-328/14, ECLI:EU:T:2016:86, para. 64.
[264] GC, 13.12.2018, Iran Insurance v. Council, T-558/15, EU:T:2018:945, para. 134; GC, 13.12.2018, Post Bank Iran v. Council, T-559/15, EU:T:2018:948, para. 121.

by the challenged acts[265].

Additionally, the CJEU does not make any distinction between cases regarding country sanctions, like these in the Safa Nicu Sepahan case, and those regarding counterterrorism sanctions, such as these in the Kadi and Abdulrahim cases. The CJEU applied the same lines of reasoning to both groups of restrictive measures, pursuant to Article 215 (1) and (2) TFEU[266]. The General Court has so far applied the general rules applicable in every other field of European Union law[267]. In the Safa Nicu Sepahan case, the Court of Justice limited itself to recalling the traditional requirements for establishing European Union responsibility, without making any distinctions concerning the field of restrictive measures, and without interpreting the requirement of the sufficiently serious breach more strictly[268] in the field of restrictive measures than in its general case law[269]. What one can hope for the future is that the Safa Nicu Sepahan case provokes further reflections on the traditional case law in this area.

Overall, a step forward has been taken, taking into account that it is the very first example of pecuniary compensation for non-material damage in that area of EU law. It is very likely that the Safa Nicu Sepahan case will influence how the CJEU approaches the actions for non-contractual liability of the EU in future similar cases. May in the future the amount of compensation awarded be higher, if the EU judge takes into consideration, as obliged, the continuous maintenance into force of the restrictive measures for several years.

Thus, it is clear that the conditions of EU non-contractual liability in the sector of restrictive measures is not regulated differently in comparison with other fields of EU law, since the specific nature of restrictive measures does not seem to affect the interpretation of the requirements in order the EU to incur liability in the CFSP. Nevertheless, the particularities of the CFSP have to be taken into account, including its political and sensitive nature, so that the sustainability and legitimacy of the tool of restrictive measures be ensured. Future case law is expected to give answers on aspects remained unclear.

Besides, paraphrasing the words of the High Representative of the European Union for Foreign Affairs and Security Policy, Josep Borrell, a European security framework requires the right balance between the distinctive nature of the CFSP and the protection of core European values. Therefore, to strike a balance is an inescapable necessity.

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[265] Regarding the Safa Nicu Sepahan case, the limited amount of compensation, deliberated by the General Court, seems consistent with that line of cases. In fact, the duration of the inclusion of the applicant's name in the black lists amounted overall to three years. Hence, the amount of EUR 50.000 deliberated by the General Court might seem proportionate to the circumstances of the case, as actually affirmed by the CJEU in the appeal judgment, when it held that the General Court gave adequate reasons for its decision, indicating the criteria applied in order to determine the amount of compensation.

[266] Messina, M., The European Union's non-contractual liability following country and counterterrorism sanctions: Is there anything to learn from the Safa Nicu Sepahan case?, (2018) Maastricht Journal of European and Comparative Law 25(5), p. 647.

[267] See GC, 13.12.2018, Iran Insurance v. Council, T-558/15, EU:T:2018:945, paras 153-155.

[268] Thanou St., Individual restrictive measures and actions for damages before the General Court of the European Union, (2020) ERA Forum 20, p. 610.

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